CORPUS JURIS

BEING

A COMPLETE AND SYSTEMATIC STATEMENT
OF
THE WHOLE BODY OF THE LAW

AS EMBODIED IN AND
DEVELOPED BY

ALL REPORTED DECISIONS

KF
154
C6
Vol. 54
n/c

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> The law is progressive and expansive, adapting itself to the new relations and interests which are constantly springing up in the progress of society. But this progress must be by analogy to what is already settled.
>
> GREENE, C. J., in *1 R. I. 356.*

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TO

CHARLES WALTER DUMONT, LL.D.

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the author of the plan of the Cyclopedia of Law and Procedure, the inspiration of the organization which brought that work to completion, and whose creative genius evolved the plan of Corpus Juris, these volumes are dedicated.

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Pent Roads
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Plate-Glass Insurance
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Possessory Warrant
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Principal and Agent [See Agency in C. J.]
Principal and Surety
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Prize Fighting
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Prosecuting and District Attorneys [See District and Prosecuting Attorneys in C. J.]
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Public Utilities
Quieting Title
Quo Warranto
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Rape
Real Actions
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Receiving Stolen Goods
Recognizances
Records
Recoupment, Set-Off, and Counterclaim [See Set-Off and Counterclaim in C. J.]
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Reformation of Instruments
Reformatories
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Registration of Land Titles
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Removal of Causes
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Schools and School Districts
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Theft Insurance [See Burglary and Theft Insurance in C. J.]
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Trover and Conversion
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Turnpikes and Toll Roads
Undertakings
United States
United States Commissioners
United States Marshals
United States Supreme Court Marshal
Unlawful Assembly
Use and Occupation
Usury
Vagrancy
Vendor and Purchaser
Venue
War
Warehousemen
Waste
Waters
Weapons
Weights and Measures
Wharves
Wills
Witnesses
Woods and Forests
Work and Labor
Workmen's Compensation Acts

TABLE OF ABBREVIATIONS

REPORTS AND TEXTBOOKS

A

A	Atlantic Reporter
Abb.	Abbott (U. S.)
Abb. Adm.	Abbott's Admiralty (U. S.)
Abb. Dec.	Abbott's Decisions (N. Y.)
AbbNCas	Abbott's New Cases (N. Y.)
AbbPr	Abbott's Practice (N. Y.)
AbbPrNS	Abbott's Practice New Series (N. Y.)
A'Beck. Res. Judgm.	A'Beckett's Reserved Judgments (Vict.)
[1906] A. C.	[1906] Appeal Cases (Can.)
[1891]A. C.	Law Reports [1891] Appeal Cases (Eng.)
Acton	Acton (Eng.)
Add.	Addison (Pa.)
Add. Eccl.	Addams' Ecclesiastical (Eng.)
A. & E.	Adolphus & Ellis (Eng.)
A&EEncL	American & English Encyclopædia of Law
A&EEncL&Pr	American & English Encyclopædia of Law & Practice
Aik.	Aikens (Vt.)
A. K. Marsh.	A. K. Marshall (Ky.)
Ala.	Alabama
Ala. A.	Alabama Appellate Court
Alaska	Alaska
AlbLJ	Albany Law Journal
Alc. & N.	Alcott & Napier (Eng.)
Alc. Reg. Cas.	Alcock's Registry Cases (Eng.)
Aleyn	Aleyn (Eng.)
Alison Pr.	Alison's Practice (Sc.)
Allen	Allen (Mass.)
Alta. L.	Alberta Law
A. L. R.	American Law Reports
AmBankr	American Bankruptcy (U. S.)
Ambl.	Ambler (Eng.)
AmCorpCas	American Corporation Cases
AmCr	American Criminal
AmD	American Decisions
Am&ECorpCas	American & English Corporation Cases
Am&ECorpCasNS	American & English Corporation Cases New Series
Am&EEqD	American & English Decisions in Equity
AmElectrCas	American Electrical Cases
Am&ERCas	American & English Railroad Cases
Am&ERCasNS	American & English Railroad Cases New Series
AmJIntL	American Journal of International Law
AmLJ	American Law Journal (Pa.)
AmLJNS	American Law Journal New Series (Pa.)
AmLRec	American Law Record (Oh.)
AmLReg	American Law Register
AmLRegNS	American Law Register New Series
AmLRev	American Law Review
AmLTBankr	American Law Times Bankruptcy Reports
AmNeglCas	American Negligence Cases
AmNeglR	American Negligence Reports
A. M. & O.	Armstrong, Macartney & Ogle (Ir.)
AmProb	American Probate
AmProbNS	American Probate New Series
AmPr	American Practice
AmR	American Reports
AmR&Corp	American Railroad & Corporation
AmRRep	American Railway Reports
AmSR	American State Reports
AmStRD	American Street Railway Decisions
And.	Anderson (Eng.)
Andr.	Andrews (Eng.)
AnnCas	American & English Annotated Cases
Anstr.	Anstruther (Eng.)
Anth. N. P.	Anthon's Nisi Prius (N. Y.)
App.	Appeal Cases (D. C.)
App. Cas.	Law Reports Appeal Cases (Eng.)
App. Div.	Appellate Division (N. Y.)
Ariz.	Arizona
Ark.	Arkansas
Ark. Just.	Arkley's Justiciary (Sc.)
Arn.	Arnold (Eng.)
Arn. & H.	Arnold & Hodges (Eng.)
Ashm.	Ashmead (Pa.)
Aspin.	Aspinwall's Maritime Cases (Eng.)
Atk.	Atkyn (Eng.)
Austr. C. L. R.	Commonwealth Law Reports, Australia
AustrJur	Australian Jurist
AustrLT	Australian Law Times

B

Bacon Abr.	Bacon's Abridgment (Eng.)
B. & Ad.	Barnewall & Adolphus (Eng.)
B. & Ald.	Barnewall & Alderson (Eng.)
Baldw.	Baldwin (U. S.)
Balf. Pr.	Balfour's Practice (Sc.)
Ball & B.	Ball & Beatty (Ir.)
Bann. & A.	Banning & Arden (U. S.)
Barb.	Barbour (N. Y.)
Barb. Ch.	Barbour's Chancery (N. Y.)
B. & Arn.	Barron & Arnold (Eng.)
Barn.	Barnardiston King's Bench (Eng.)
Barn. Ch.	Barnardiston Chancery (Eng.)
Barnes Notes	Barnes' Notes (Eng.)
Batty	Batty (Ir.)
B. & Aust.	Barron & Austin (Eng.)
Baxt.	Baxter (Tenn.)
B. & B.	Broderip & Bingham (Eng.)
B. C.	British Columbia
B. & C.	Barnewall & Cresswell (Eng.)
B. D. & O.	Blackham, Dundas & Osborne (Ir.)
Beatty	Beatty (Ir.)
Beav.	Beavan (Eng.)
Beaw. Lex. Mer.	Beawes Lex Mercatoria (Eng.)
Bee	Bee (U. S.)
Bell.	Bellewe (Eng.)
Bell App. Cas.	Bell's Appeal Cases (Sc.)
Bell C. C.	Bell's Crown Cases (Eng.)
Bell Comm.	Bell's Commentaries (Eng.)
Bell Sc. Cas.	Bell's Scotch Court of Session Cases
Ben.	Benedict (U. S.)
Benl.	Benloe (Eng.)
Benl. & D.	Benloe & Dallison (Eng).
B. & H. Cr. Cas.	Bennett & Heard Leading Criminal Cases (Eng.)
Bibb	Bibb (Ky.)
Bing.	Bingham (Eng.)
Bing. N. Cas.	Bingham's New Cases (Eng.)
Binn.	Binney (Pa.)
Biss.	Bissell (U. S.)
Black	Black (U. S.)
Blackf.	Blackford (Ind.)
Blair Co.	Blair County (Pa.)
Bland	Bland (Md.)
Blatchf.	Blatchford (U. S.)
Blatchf. & H.	Blatchford & Howland (U. S.)
Blatchf. Prize Cas.	Blatchford's Prize Cases (U. S.)
Bligh	Bligh (Eng.)
Bligh N. S.	Bligh New Series (Eng.)
B. Mon.	B. Monroe (Ky.)
Bond	Bond (U. S.)
B. & P.	Bosanquet & Puller (Eng.)
B. & P. N. R.	Bosanquet & Puller's New Reports (Eng.)
Bradf. Surr.	Bradford's Surrogate (N. Y.)
Brayt.	Brayton (Vt.)
BRC	British Ruling Cases
Brewst.	Brewster (Pa.)
Brightly	Brightly (Pa.)
Brightly El. Cas.	Brightly's Election Cases (Pa.)
Bro. Ch.	Brown's Chancery (Eng.)
Brock.	Brockenbrough (U. S.)
BrodixAm&EPatCas	Brodix's American & English Patent Cases
Bro. Just.	Broun's Justiciary (Sc.)
Brook Abr.	Brook's Abridgments (Eng.)
Brook N. Cas.	Brook's New Cases (Eng.)
Bro. P. C.	Brown's Parliament Cases (Eng.)
Brown Adm.	Brown's Admiralty (U. S.)
Browne	Browne (Pa.)
Brown. & L.	Browning & Lushington (Eng.)
Brownl. & G.	Brownlow & Goldesborough (Eng.)
Bruce	Bruce (Sc.)
Brunn. Coll. Cas.	Brunner's Collective Cases (U. S.)
B. & S.	Best & Smith (Eng.)
Buck	Buck (Eng.)
Buller N. P.	Buller's Nisi Prius (Eng.)
Bulstr.	Bulstrode (Eng.)
Bunb.	Bunbury (Eng.)
Burn.	Burnett (Wis.)
Burr.	Burrows (Eng.)
Burr. S. Cas.	Burrows' Settlement Cas. (Eng.)

Bush	Bush (Ky.)
BWCC	Butterworth's Workmen's Compensation Cases (Eng.)

C

Cab. & E.	Cababe & Ellis (Eng.)
Cai.	Caines (N. Y.)
Cai. Cas.	Caines' Cases (N. Y.)
Cal.	California
Cal. A.	California Appellate Court
Cald.	Caldecott (Eng.)
Call	Call (Va.)
Calthr.	Calthrop (Eng.)
Cal. Unrep. Cas.	California Unreported Cases
Cam. Cas.	Cameron's Cases (Can.)
Campb.	Campbell (Eng.)
Canal Zone	Canal Zone Supreme Court
CanAppCas	Canadian Appeal Cases
CanCrCas	Canadian Criminal Cases
Can. Exch.	Canadian Exchequer
CanLJ	Canada Law Journal
CanLJNS	Canada Law Journal New Series
CanLTOccNotes	Canadian Law Times Occasional Notes
CanRCas	Canadian Railway Cases
Can. S. C.	Canada Supreme Court
Car. H. & A.	Carrow, Hamerton & Allen (Eng.)
Carter	Carter (Eng.)
Carth.	Carthew (Eng.)
Cartwr. Cas.	Cartwright's Cases (Can.)
Cary	Cary (Eng.)
Cas. t. Hardw.	Cases temp. Hardwicke (Eng.)
Cas. t. Holt	Cases temp. Holt (Eng.)
Cas. t. King	Cases temp. King (Eng.)
Cas. t. Talb.	Cases temp. Talbot (Eng.)
C. B.	Common Bench (Manning, Granger & Scott) (Eng.)
C. B. N. S.	Common Bench New Series (Manning, Granger & Scott New Series) (Eng.)
CCA	Circuit Court of Appeals (U. S.)
CentrLJ	Central Law Journal
[1891] Ch.	Law Reports [1891] Chancery (Eng.)
Chandl.	Chandler (Wis.)
Chase	Chase (U. S.)
Ch. Cas.	Cases in Chancery (Eng.)
Ch. Chamb.	Chancery Chambers (U. C.)
Ch. D.	Law Reports Chancery Division (Eng.)
Chest. Co.	Chester County (Pa.)
Chit.	Chitty (Eng.)
Choyce Cas. Ch.	Choyce Cases in Chancery (Eng.)
Ch. Rep.	Chancery Reports (Eng.)
ChSent	Chancery Sentinel (N. Y.)
CincLBul	Weekly Law Bulletin (Oh.)
Cinc. Super.	Cincinnati Superior Court Reporter (Oh.)
CityHallRec	City Hall Recorder (N. Y.)
C. J. Ann.	Corpus Juris Annotations
C. & K.	Carrington & Kirwin (Eng.)
C. & L.	Connor & Lawson (Ir.)
Clarke	Clarke's Chancery (N. Y.)
Clarke & S. Dr. Cas.	Clarke & Scully's Drainage Cases (Ont.)
C. L. Chamb.	Chamber's Common Law (U. C.)
ClevLRec	Cleveland Law Record (Oh.)
ClevLRep	Cleveland Law Reporter (Oh.)
Cl. & F.	Clark & Finnelly (Eng.)
Cliff.	Clifford (U. S.)
C. L. R.	Common Law Reports (Eng.)
C. & M.	Carrington & Marshman (Eng.)
C. M. & R.	Crompton, Meeson & Roscoe (Eng.)
CodeRep	Code Reporter (N. Y.)
CodeRepNS	Code Reports New Series (N. Y.)
Coff. Prob.	Coffey's Probate (Cal.)
Coke	Coke (Eng.)
Col. Cas.	Coleman's Cases (N. Y.)
Col. & C. Cas.	Coleman & Caines' Cases (N. Y.)
Coldw.	Coldwell (Tenn.)
Coll.	Collyer (Eng.)
Colles	Colles' Cases in Parliament (Eng.)
Colo.	Colorado
Colo. A.	Colorado Appeals
Coltm.	Coltman (Eng.)
Comb.	Comberbach (Eng.)
ComL	Commercial Law (Can.)
Comptr. Treas. Dec.	Comtroller Treasury Decisions
Comyns	Comyns (Eng.)
Comyns Dig.	Comyns Digest (Eng.)
Conn.	Connecticut
Conn. Surr.	Connolly's Surrogate (N. Y.)
Cooke	Cooke (Eng.)
Cooke	Cooke (Tenn.)
Cooke & A.	Cooke & Alcock (Ir.)
Cook Vice-Adm.	Cook's Vice-Admiralty (L. C.)
Coop.	Cooper's Chancery (Eng.)
Coop. Pr. Cas.	Cooper's Practice Cases (Eng.)
Coop. t. Brough.	Cooper's Cases temp. Brougham (Eng.)
Coop. t. Cott.	Cooper's Cases temp. Cottenham (Eng.)
Corb. & D.	Corbett & Daniell's Election Cases (Eng.)
Cow.	Cowen (N. Y.)
Cowp.	Cowper (Eng.)
Cox C. C.	Cox's Criminal Cases (Eng.)
Cox Ch.	Cox's Chancery (Eng.)
C. & P.	Carrington & Payne (Eng.)
C. P. D.	Law Reports Common Pleas Division (Eng.)
Crabbe	Crabbe (U. S.)
Cranch	Cranch (U. S.)
Cranch C. C.	Cranch's Circuit Court (U. S.)
Cranch Pat. Dec.	Cranch's Patent Decisions (U. S.)
Cr. App.	Criminal Appeals (Eng.)
Crawf. & D.	Crawford & Dix (Ir.)
Crawf. & D. Abr. Cas.	Crawford & Dix's Abridged Cases (Ir.)
CrLMag	Criminal Law Magazine
C. Rob.	Christopher Robinson's Admiralty (Eng.)
Cro. Car.	Croke Charles (Eng.)
Cro. Eliz.	Croke Elizabeth (Eng.)
Cro. Jac.	Croke James (Eng.)
Cromp. & J.	Crompton & Jervis (Eng.)
Cromp. & M.	Crompton & Meeson (Eng.)
CroswPatCas	Croswell's Collection of Patent Cases (U. S.)
Cr. & Ph.	Craig & Phillips (Eng.)
Ct. Cl.	Court of Claims (U. S.)
Cunn.	Cunningham (Eng.)
Curt.	Curtis (U. S.)
Curt. Eccl.	Curtis Ecclesiastical (Eng.)
Cush.	Cushing (Mass.)
Cust. A.	United States Customs Appeals
Cyc	Cyclopedia of Law & Procedure
Cyc Ann.	Cyclopedia of Law & Procedure Annotations

D

Dak.	Dakota
Dal. C. P.	Dalison's Common Pleas (Eng.)
Dall.	Dallaman's Decisions (Tex.)
Dall.	Dallas (Pa.)
Dall.	Dallas (U. S.)
Dalr. Dec.	Dalrymple's Decisions (Sc.)
Daly	Daly (N. Y.)
Dan.	Daniell (Eng.)
Dana	Dana (Ky.)
Dane Abr.	Dane's Abridgment
Dans. & L.	Danson & Lloyd (Eng.)
D'Anv. Abr.	D'Anver's Abridgment (Eng.)
Dauph. Co.	Dauphin County (Pa.)
Dav. & M.	Davison & Merivale (Eng.)
Davys	Davys (Ir.)
Day	Day (Conn.)
D. B. & M.	Dunlop, Bell & Murray (Sc.)
D. C.	District of Columbia
D. Chipm.	D. Chipman (Vt.)
Deac.	Deacon (Eng.)
Deac. & C.	Deacon & Chitty (Eng.)
Deady	Deady (U. S.)
Dears. & B.	Dearsley & Bell (Eng.)
Dears. C. C.	Dearsley's Crown Cases (Eng.)
Deas & A.	Deas & Anderson (Eng.)
De Gex	De Gex (Eng.)
De G. F. & J.	De Gex, Fisher & Jones (Eng.)
De G. J. & S.	De Gex, Jones & Smith (Eng.)
De G & J.	De Gex & Jones (Eng.)
De G. M. & G.	De Gex, MacNaghten & Gordon (Eng.)
De G. & Sm.	De Gex & Smael (Eng.)
Del.	Delaware
Del. Ch.	Delaware Chancery
Del. Co.	Delaware County (Pa.)
Dem. Surr.	Demarest's Surrogate (N. Y.)
Den.	Denio (N. Y.)
Den. C. C.	Denison's Crown Cases (Eng.)
Dev. Ct. Cl.	Devereux's Court of Claims (U. S.)
Dick.	Dickens (Sc.)
Dill.	Dillon (U. S.)
Dirl. Dec.	Dirleton's Decisions (Sc.)
Disn.	Disney (Oh.)
D. & L.	Dowling & Lowndes (Eng.)
Dods.	Dodson's Admiralty (Eng.)
DomLR	Dominion Law Reports (Can.)
Donnelly	Donnelly (Eng.)
Dorion	Dorion (L. C.)
Dougl.	Douglas (Eng.)
Dougl.	Douglass (Mich.)
Dougl. El. Cas.	Douglas' Election Cases (Eng.)
Dow	Dow (Eng.)
Dow & Cl.	Dow & Clark (Eng.)
Dowl. P. C.	Dowling's Practice Cases (Eng.)
Dowl. P. C. N. S.	Dowling's Practice Cases New Series (Eng.)
D. & R.	Dowling & Ryland (Eng.)
Draper	Draper (U. C.)
Drew.	Drewry (Eng.)
Drinkw.	Drinkwater (Eng.)
D. & R. Mag. Cas.	Dowling & Ryland's Magistrate Cases (Eng.)
D. & R. N. P.	Dowling & Ryland's Nisi Prius (Eng.)
Dr. & Sm.	Drewry & Smale (Eng.)
Drury	Drury (Ir.)
Dr. & Wal.	Drury & Walsh (Ir.)
Dr. & War.	Drury & Warren (Ir.)
D. & Sw.	Deane & Swabey (Eng.)
Dudl.	Dudley (Ga.)
Dunlop	Dunlop (Sc.)
Durie	Durie (Sc.)
Duv.	Duvall (Ky.)
Dyer	Dyer (Eng.)

E

East	East (Eng.)
EastLR	Eastern Law Reporter (Can.)
East P. C.	East's Pleas of the Crown (Eng.)
East. T.	Eastern Term. (Eng.)
E. & B.	Ellis & Blackburn (Eng.)
E. B. & E.	Ellis, Blackburn & Ellis (Eng.)

ECL	English Common Law
Eden	Eden (Eng.)
Edgar	Edgar (Sc.)
Edm. Sel. Cas.	Edmond's Select Cases (N. Y.)
E. D. Smith	E. D. Smith (N. Y.)
Edw.	Edwards (Eng.)
Edw.	Edwards' Chancery (N. Y.)
Edw. Adm.	Edwards' Admiralty (Eng.)
E. & E.	Ellis & Ellis (Eng.)
EncPl&Pr	Encyclopædia of Pleading & Practice
EngCh	English Chancery
EngL&Eq	English Law & Equity
Eq. Cas. Abr.	Equity Cases Abridged (Eng.)
Eq. Rep.	Equity Reports (Eng.)
ERC	English Ruling Cases
Esp.	Espinasse's Nisi Prius (Eng.)
Euer	Euer (Eng.)
Exch.	Exchequer (Eng.)
Ex. D.	Law Reports Exchequer Division (Eng.)

F

Falc.	Falconer's Court of Sessions (Sc.)
Falc. & F.	Falconer & Fitzherbert (Eng.)
F. Cas. No.	Federal Cases (U. S.)
F. (Ct. Sess.)	Fraser's Court of Sessions Cases (Sc.)
F.(2d)	Federal Reporter Second Series
Fed.	Federal Reporter (U. S.)
Ferg. Cons.	Ferguson's Consistory (Eng.)
F. & F.	Foster & Finlason (Eng.)
Fish. Pat. Cas.	Fisher's Patent Cases (U. S.)
Fish. Pat. R.	Fisher's Patent Reports (U. S.)
Fish. Prize Cas.	Fisher's Prize Cases (U. S.)
Fitzg.	Fitzgibbon (Eng.)
Fitzh.	Fitzherbert's Abridgment (Eng.)
Fitzh. N. Br.	Fitzherbert's Natura Brevium (Eng.)
Fla.	Florida
Flipp.	Flippin (U. S.)
Fl. & K.	Flanagan & Kelly (Ir.)
Fonbl.	Fonblanque (Eng.)
Forbes	Forbes (Eng.)
Forr.	Forrest (Eng.)
Forrester	Forrester's Cases (Eng.)
Fortesc.	Fortescue (Eng.)
Fost.	Foster (Eng.)
Fount. Dec.	Fountainhall's Decisions (Sc.)
Fox & S.	Fox & Smith (Ir.)
Freem.	Freeman's Chancery (Eng.)
Freem.	Freeman's Chancery (Miss.)
Freem. K. B.	Freeman's King's Bench (Eng.)

G

Ga.	Georgia
Ga. A.	Georgia Appeals
Ga. Dec.	Georgia Decisions
Gale	Gale (Eng.)
Gall.	Gallison (U. S.)
G. & D.	Gale & Davidson (Eng.)
Gibb. Surr.	Gibbon's Surrogate (N. Y.)
Giffard	Giffard (Eng.)
Gilb.	Gilbert's (Eng.)
Gilb. Cas.	Gilbert's Cases (Eng.)
Gilb. C. P.	Gilbert's Common Pleas (Eng.)
Gilb. Exch.	Gilbert's Exchequer (Eng.)
Gill	Gill (Md.)
Gill & J.	Gill & Johnson (Md.)
Gilm.	Gilmer (Va.)
Gilm. & Falc.	Gilmour & Falconer (Sc.)
Gilp.	Gilpin (U. S.)
Glasc.	Glascock (Ir.)
Glyn & J.	Glyn & Jameson (Eng.)
Godb.	Godbolt (Eng.)
Gosf.	Gosford (Eng.)
Gouldsb.	Gouldsborough (Eng.)
Gow	Gow (Eng.)
Grant	Grant's Cases (Pa.)
Grant Ch.	Grant's Chancery (U. C.)
Grant Err. & App.	Grant's Error & Appeal (U. C.)
Gratt.	Grattan (Va.)
Gray	Gray (Mass.)
Green Cr.	Green's Criminal Law (Eng.)
Greene	Greene (Iowa)
Gwill. T. Cas.	Gwillim's Tithe Cases (Eng.)

H

Hadd.	Haddington (Eng.)
Hagg. Adm.	Haggard's Admiralty (Eng.)
Hagg. Cons.	Haggard's Consistory (Eng.)
Hagg. Eccl.	Haggard's Ecclesiastical (Eng.)
Hailes Dec.	Hailes' Decisions (Sc.)
Hale	Hale's Common Law (Eng.)
Hale P. C.	Hale's Pleas of the Crown (Eng.)
Hall & T.	Hall & Twells (Eng.)
Halsbury L. Eng.	Halsbury's Law of England
Handy	Handy (Oh.)
Hard.	Hardin (Ky.)
Hardres	Hardres (Eng.)
Hare	Hare (Eng.)
Harr.	Harrison's Chancery (Mich.)
Harr. & G.	Harris & Gill (Md.)
Harr. Ch.	Harrison's Chancery (Eng.)
Harr. & H.	Harrison & Hodgins (U. C.)
Harr. & J.	Harris & Johnson (Md.)
Harr. & M.	Harris & McHenry (Md.)
Harr. & R.	Harrison & Rutherford (Eng.)
Harr. & W.	Harrison & Wollaston (Eng.)
Hask.	Haskell (U. S.)
Havil.	Haviland (Pr. Edw. Isl.)
Hawaii	Hawaiian
Hawaii Fed.	Hawaiian Federal
Hawk. P. C.	Hawkins' Pleas of the Crown (Eng.)
Hayes	Hayes (Ir.)
Hayes & J.	Hayes & Jones (Ir.)
Hay & M.	Hay & Marriott (Eng.)
Hayw.	Haywood (Tenn.)
Hayw. & H.	Haywood & Hazelton (U. S.)
HazReg	Hazard's Register (Pa.)
H. Bl.	Henry Blackstone (Eng.)
H. & C.	Hurlstone & Coltman (Eng.)
Head	Head (Tenn.)
Heisk.	Heiskell (Tenn.)
Hem. & M.	Hemming & Miller (Eng.)
Hempst.	Hempstead (U. S.)
Hen. & M.	Henning & Munford (Va.)
Het.	Hetley (Eng.)
H. & H.	Horn & Hurlstone (Eng.)
Hill	Hill (N. Y.)
Hilt.	Hilton (N. Y.)
Hil. T.	Hilary Term (Eng.)
H. L. Cas.	House of Lords Cases (Eng.)
H. & N.	Hurlstone & Norman (Eng.)
Hob.	Hobart (Eng.)
HodgeEl	Hodgins' Election (U. C.)
Hodges	Hodges (Eng.)
Hoffm.	Hoffman's Chancery (N. Y.)
Hoffm. Land Cas.	Hoffman's Land Cases (U. S.)
Hog.	Hogan (Ir.)
Holmes	Holmes (U. S.)
Holt Eq.	Holt's Equity (Eng.)
Holt K. B.	Holt's King's Bench (Eng.)
Holt N. P.	Holt's Nisi Prius (Eng.)
Home	Home (Sc.)
Hope Dec.	Hope's Decisions (Sc.)
Hopk.	Hopkins' Chancery (N. Y.)
Hopk. Dec.	Hopkins' Decisions (Pa.)
Hopw. & C.	Hopwood & Coltman (Eng.)
Hopw. & P.	Hopwood & Philbrick (Eng.)
Houst. Cr.	Houston's Criminal Cases (Del.)
How.	Howard (U. S.)
How. A. Cas	Howard's Appeal Cases (N. Y.)
How. N. P.	Howell's Nisi Prius (Mich.)
HowPr	Howard's Practice (N. Y.)
HowPrNS	Howard's Practice New Series (N. Y.)
How. St. Tr.	Howell's State Trials (Eng.)
Hud. & B.	Hudson & Brooke (Ir.)
Hughes	Hughes (Ky.)
Hughes	Hughes (U. S.)
Hume	Hume's Decisions (Sc.)
Humphr.	Humphreys (Tenn.)
Hun	Hun (N. Y.)
Hurl. & W.	Hurlstone & Walmsley (Eng.)
Hutt.	Hutton (Eng.)

I

Ida.	Idaho
Ill.	Illinois
Ill. A.	Illinois Appellate Court
Ill. Cir.	Illinois Circuit Court
Ind.	Indiana
Ind. A.	Indiana Appellate Court
Ind. T.	Indian Territory
InsLJ	Insurance Law Journal
Int. Com. Commn.	Interstate Commerce Commission
Int. Com. Rep.	Interstate Commerce Reports
Int. Rev. Rec.	Internal Revenue Record
Iowa	Iowa
[1891] Ir.	Law Reports [1891] Irish
Ir. Ch.	Irish Chancery
Ir. C. L.	Irish Common Law
Ir. Eq.	Irish Equity
Ir. R. C. L.	Irish Reports Common Law
Ir. R. Eq.	Irish Reports Equity
Irv. Just.	Irvine's Justiciary Cases (Eng.)

J

Jac.	Jacob (Eng.)
Jac. & W.	Jacob & Walker (Eng.)
J. Bridgm.	John Bridgman (Eng.)
J. & C.	Jones & Carey (Ir.)
Jebb & B.	Jebb & Bourke (Ir.)
Jebb C. C.	Jebb's Crown Cases (Ir.)
Jebb & S.	Jebb & Symes (Ir.)
Jeff.	Jefferson (Va.)
Jenk.	Jenkins (Eng.)
J. J. Marsh.	J. J. Marshall (Ky.)
J. & L.	Jones & La Touche (Eng.)
Johns.	Johnson (Eng.)
Johns.	Johnson (N. Y.
Johns. Cas.	Johnson's Cases (N. Y.)
Johns. Ch.	Johnson's Chancery (N. Y.)
Johns. & H.	Johnson & Hemming (Eng.)
Jones Exch.	Jones Exchequer (Ir.)
JournJur	Journal of Jurisprudence (Pa.)
J. P.	Justice of Peace (Eng.)
Jur.	Jurist (Eng.)
Jur. N. S.	Jurist New Series (Eng.)
JustLR	Justices' Law Reporter (Pa.)

K

Kames Dec.	Kames Decisions (Sc.)
Kames Elucid.	Kames' Elucidation (Sc.)
Kames Rem. Dec.	Kames' Remarkable Decisions (Sc.)
Kames Sel. Dec.	Kames' Select Decisions (Sc.)
Kan.	Kansas
Kan. A.	Kansas Appeals
Kay	Kay (Eng.)
Kay & J.	Kay & Johnson (Eng.)
[1901] K. B.	Law Reports [1901] King's Bench (Eng.)
Keb.	Keble (Eng.)
Keen	Keen (Eng.)
Keilw.	Keilway (Eng.)
Kel. C. C.	Kelyng's Crown Cases (Eng.)
Keyes	Keyes (N. Y.)
K. & G.	Keane & Grant (Eng.)
Kilk.	Kilkerran's Decisions (Sc.)
Kirby	Kirby (Conn.)
Knapp	Knapp (Eng.)
Knapp & O.	Knapp & Ombler (Eng.)
Knox	Knox (N. S. Wales)
Knox & F.	Knox & Fitzhardinge (N. S. Wales)
Kulp	Kulp (Pa.)
Ky.	Kentucky
Ky. Dec.	Kentucky Decisions
KyL	Kentucky Law Reporter
Ky. Op.	Kentucky Opinions

L

La.	Louisiana
La. A.	Louisiana Court of Appeals
La. A. (Orleans)	Court of Appeal, Parish of Orleans
La. Ann.	Louisiana Annual
Lab.	Labatt's District Court (Cal.)
LackJur	Lackawanna Jurist (Pa.)
LackLegN	Lackawanna Legal News (Pa.)
Lack LegRec	Lackawanna Legal Record (Pa.)
Lalor	Lalor's Supplement to Hill & Denio (N. Y.)
LancBar	Lancaster Bar (Pa.)
LancLRev	Lancaster Law Review (Pa.)
Land Dec.	Land Decisions (U. S.)
Lane	Lane (Eng.)
Lans.	Lansing (N. Y.)
Latch	Latch (Eng.)
Law Rep. N. S.	Law Reports New Series (N. Y.)
L. C.	Lower Canada
L. & C.	Leigh & Cave (Eng.)
LCJur	Lower Canada Jurist
LCLJ	Lower Canada Law Journal
LCRepSQu	Lower Canada Reports Seignorial Questions
L. D.	Law Dictionary
Ld. Ken.	Lord Kenyon (Eng.)
Ld. Raym.	Lord Raymond (Eng.)
Lea	Lea (Tenn.)
Leach C. C.	Leach's Crown Cases (Eng.)
L. ed.	Lawyers' Edition United States Supreme Court
Lee Eccl.	Lee's Ecclesiastical (Eng.)
Lee t. Hardw.	Lee temp. Hardwicke (Eng.)
LegChron	Legal Chronicle (Pa.)
LegGaz	Legal Gazette (Pa.)
Leg&InsR	Legal & Insurance Reporter (Pa.)
LegInt	Legal Intelligencer (Pa.)
LegOp	Legal Opinions (Pa.)
LegRec	Legal Record (Pa.)
Lehigh CoLJ	Lehigh County Law Journal (Pa.)
Lehigh ValLR	Lehigh Valley Law Reporter (Pa.)
Leigh	Leigh (Va.)
Leon.	Leonard (Eng.)
Lev.	Levinz (Eng.)
Lew. C. C.	Lewin's Crown Cases (Eng.)
Ley	Ley (Eng.)
L. G.	Law Glossary
Liberian L.	Liberian Law
Litt.	Littell (Ky.)
Litt.	Littleton (Eng.)
Litt. Sel. Cas.	Littell's Select Cases (Ky.)
L. J. Adm.	Law Journal Admiralty New Series (Eng.)
L. J. Bankr.	Law Journal Bankruptcy New Series (Eng.)
L. J. Ch.	Law Journal Chancery New Series (Eng.)
L. J. Ch. O. S.	Law Journal Chancery Old Series (Eng.)
L. J. C. P.	Law Journal Common Pleas New Series (Eng.)
L. J. C. P. O. S.	Law Journal Common Pleas Old Series (Eng.)
L. J. Eccl.	Law Journal Ecclesiastical New Series (Eng.)
L. J. Exch.	Law Journal Exchequer New Series (Eng.)
L. J. Exch. O. S.	Law Journal Exchequer Old Series (Eng.)
L. J. K. B.	Law Journal King's Bench New Series (Eng.)
L. J. K. B. O. S.	Law Journal King's Bench Old Series (Eng.)
L. J. M. C.	Law Journal Magistrate Cases New Series (Eng.)
L. J. M. C. O. S.	Law Journal Magistrate Cases Old Series (Eng.)
L. J. P. C.	Law Journal Privy Council New Series (Eng.)
L. J. P. D. & Adm.	Law Journal Probate Divorce & Admiralty New Series (Eng.)
L. J. P. & M.	Law Journal Probate & Matrimonial New Series (Eng.)
L. J. Q. B.	Law Journal Queen's Bench New Series (Eng.)
Ll. & G. t. Pl.	Lloyd & Goold temp. Plunket (Ir.)
Ll. & G. t. S.	Lloyd & Goold temp. Sugden (Ir.)
Ll. & W.	Lloyd & Welsby (Eng.)
L. & M.	Lowndes & Maxwell (Eng.)
L. M. & P.	Lowndes, Maxwell & Pollack (Eng.)
Loc. Gov.	Local Government (Eng.)
Lofft	Lofft (Eng.)
Longf. & T.	Longfield & Townsend (Ir.)
Lowell	Lowell (U. S.)
L. R.	Law Reports (U. S.)
LRA	Lawyers' Reports Annotated
LRA1915A	Lawyers' Reports Annotated 1915 A
L. R. A. & E.	Law Reports Admiralty & Ecclesiastical (Eng.)
LRANS	Lawyers' Reports Annotated New Series
L. R. C. C.	Law Reports Crown Cases (Eng.)
L. R. Ch.	Law Reports Chancery Appeal Cases (Eng.)
L. R. C. P.	Law Reports Common Pleas Cases (Eng.)
L. R. Eq.	Law Reports Equity Cases (Eng.)
L. R. Exch.	Law Reports Exchequer Cases (Eng.)
L. R. H. L.	Law Reports House of Lords (English & Irish Appeal Cases)
L. R. H. L. Sc	Law Reports House of Lords (Scotch Appeal Cases)
L. R. Indian App.	Law Reports Indian Appeals (Eng.)
L. R. Ir.	Law Reports Irish
L. R. P. C.	Law Reports Privy Council (Eng.)
L. R. P. & D.	Law Reports Probate & Divorce (Eng.)
L. R. Q. B.	Law Reports Queen's Bench Cases (Eng.)
LT	Law Times (Pa.)
LTNS	Law Times New Series (Pa.)
L. T. Rep. N. S.	Law Times Reports New Series (Eng.)
Lush.	Lushington's Admiralty (Eng.)
Lutw.	Lutwyche (Eng.)
Lutw. Reg. Cas.	Lutwyche's Registration Cases (Eng.)
LuzLegObs	Luzerne Legal Observer (Pa.)
LuzLegReg	Luzerne Legal Register (Pa.)

M

MacA. Pat. Cas.	MacArthur's Patent Cases (D. C.)
MacFarl.	MacFarlane (Sc.)
Macl. & R.	Maclean & Robinson (Eng.)
Macn. & G.	Macnaghten & Gordon (Eng.)
Macph.	Macpherson (Sc.)
Macph. S. & L.	Macpherson, Shirreff & Lee (Sc.)
Macq.	Macqueen's Scotch Appeal Cases
Madd.	Maddock (Eng.)
Madd. Ch. Pr.	Maddock's Chancery Practice (Eng.)
Man.	Manitoba Law
ManLJ	Manitoba Law Journal
Mann. Unrep. Cas.	Manning's Unreported Cases (La.)
Manson	Manson (Eng.)
Man. t. Wood	Manitoba temp. Wood
March	March (Eng.)
Mar. Prov.	Maritime Province Reports (Can.)
Mars. Adm.	Marsden's Admiralty (Eng.)
Marsh	Marshall (Eng.)
Mart.	Martin Old Series (La.)
Mart. N. S.	Martin New Series (La.)
Mart. & Y	Martin & Yerger (Tenn.)
Mason	Mason (U. S.)
Mass.	Massachusetts
McAll.	McAllister (U. S.)
McC.	McCahon (Kan.)
McClell.	McClelland (Eng.)
McClell. & Y.	McClelland & Younge (Eng.)
McCrary	McCrary (U. S.)
McG.	McGloin (La.)
McLean	McLean (U. S.)
Md.	Maryland
Md. Ch.	Maryland Chancery
Me.	Maine
Meg.	Megone (Eng.)
Meigs	Meigs (Tenn.)
Menzies Cape of Good Hope	Menzies Cape of Good Hope
Meriv.	Merivale (Eng.)
Metc.	Metcalf (Mass.)
Metc.	Metcalfe (Ky.)
M. & G.	Manning & Granger (Eng.)
M. & H.	Murphy & Hurlstone (Eng.)
Mich.	Michigan
Mich. N. P.	Michigan Nisi Prius
Mich. T.	Michaelmas Term (Eng.)
Miles	Miles (Pa.)
Milw.	Milward (Ir.)
Minn.	Minnesota
Minor	Minor (Ala.)
Misc.	Miscellaneous (N. Y.)
Miss.	Mississippi
M. & M.	Moody & Malkin (Eng.)
Mo.	Missouri
Mo. A.	Missouri Appeals
Moak	Moak (Eng.)
Mo. A. R.	Missouri Appeals Reporter
Mod.	Modern (Eng.)
Molloy	Molloy (Ir.)
Mon.	Monaghan (Pa.)
Mont.	Montana
Mont.	Montagu (Eng.)
Mont. & A.	Montagu & Ayrton (Eng.)
Mont. & B.	Montagu & Bligh (Eng.)
Mont. & C.	Montagu & Chitty (Eng.)
Mont. D. & De G.	Montagu, Deacon & De Gex (Eng.)
Montg. Co.	Montgomery County Law Reporter (Pa.)
Mont. & M.	Montagu & McArthur (Eng.)
Montr. Cond. Rep.	Montreal Condensed Reports
Montr. Leg. N.	Montreal Legal News
Montr. Q. B.	Montreal Law Reports Queens' Bench
Montr. Super.	Montreal Law Reports Superior Court
Moody C. C.	Moody's Crown Cases (Eng.)
Moore C. P.	Moore's Common Pleas (Eng.)
Moore Indian App.	Moore's Indian Appeals (Eng.)

Moore K. B.	Moore's King's Bench (Eng.)
Moore P. C.	Moore's Privy Council Old Series (Eng.)
Moore P. C. N. S.	Moore's Privy Council New Series (Eng.)
Moore & S.	Moore & Scott (Eng.)
Morr.	Morris (Iowa)
Morr. Bankr. Cas.	Morrell's Bankruptcy Cases (Eng.)
Morr. St. Cas.	Morris' State Cases (Miss.)
Mosely	Mosely (Eng.)
M. & P.	Moore & Payne (Eng.)
M. & R.	Manning & Ryland (Eng.)
M. & Rob.	Moody & Robinson (Eng.)
M. & S.	Maule & Selwyn (Eng.)
Mun Corp Cas	Municipal Corporation Cases
Munf.	Munford (Va.)
Murr.	Murray (Sc.)
M. & W.	Meeson & Welsby (Eng.)
Myl. & C.	Mylne & Craig (Eng.)
Myl. & K.	Mylne & Keen (Eng.)
Myr. Prob.	Myrick's Probate (Cal.)

N

NatBankrReg	National Bankruptcy Register (U. S.)
N. B.	New Brunswick
N. Benl.	New Benloe (Eng.)
N. B. Eq.	New Brunswick Equity
N. C.	North Carolina
N. Chipm.	N. Chipman (Vt.)
N. D.	North Dakota
NE	Northeastern Reporter
Nebr.	Nebraska
Nebr. (Unoff.)	Nebraska Unofficial
Nels.	Nelson (Eng.)
Nev.	Nevada
Newb. Adm.	Newberry's Admiralty (U. S.)
Newfoundl.	Newfoundland
New Rep.	New Reports in all Courts (Eng.)
New Sess. Cas.	New Session Cases (Eng.)
New Zeal. L.	New Zealand Law
N. H.	New Hampshire
N. J. Eq.	New Jersey Equity
N. J. L.	New Jersey Law
N. J. L. J.	New Jersey Law Journal
N. J. Misc.	New Jersey Miscellaneous
N. M.	New Mexico
N. & M.	Nevile & Manning (Eng.)
N. & Macn.	Neville & Macnamara (Eng.)
Nolan	Nolan (Eng.)
North.	Northington (Eng.)
North. Co.	Northampton County Reporter (Pa.)
NorthumbCoLegN	Northumberland County Legal News (Pa.)
Notes of Cas.	Notes of Cases (Eng.)
Noy	Noy (Eng.)
N. & P.	Nevile & Perry (Eng.)
N. S.	Nova Scotia
N. S. Dec.	Nova Scotia Decisions
N. S. Wales	New South Wales
N. S. Wales L.	New South Wales Law
N. S. Wales L. R. Eq.	New South Wales Law Reports Equity
NW	Northwestern Reporter
N. Y.	New York
NYAnnCas	New York Annotated Cases
NYCityCt	New York City Court
NYCityCtSuppl	New York City Court Supplement
NYCivProc	New York Civil Procedure
N. Y. Cr.	New York Criminal
NYLegObs	New York Legal Observer
NYLRec	New York Law Record
NYMonthLBul	New York Monthly Law Bulletin
NYS	New York Supplement
NYSt	New York State Reporter
N. Y. Super.	New York Superior Court
NYWklyDig	New York Weekly Digest

O

O. Bridgm.	Orlando Bridgman (Eng.)
Oh.	Ohio
Oh. A.	Ohio Court of Appeals
Oh. Cir. Ct.	Ohio Circuit Court
Oh. Cir. Ct. N. S.	Ohio Circuit Court New Series
Oh. Cir. Dec.	Ohio Circuit Decisions
Oh. Dec. (Reprint)	Ohio Decisions (Reprint)
OhFDec	Ohio Federal Decisions
OhLJ	Ohio Law Journal
OhNP	Ohio Nisi Prius
Oh. Prob.	Ohio Probate
OhS&CP	Ohio Superior & Common Pleas Decisions
Oh. St.	Ohio State
Okl.	Oklahoma
Okl. Cr.	Oklahoma Criminal
Olcott	Olcott (U. S.)
O'M. & H.	O'Malley & Hardcastle (Ir.)
Ont.	Ontario
Ont. A.	Ontario Appeals
OntElCas	Ontario Election Cases
Ont. L.	Ontario Law
Ont. L. J.	Ontario Law Journal
Ont. L. J. N. S.	Ontario Law Journal New Series
Ont. Pr.	Ontario Practice
OntWN	Ontario Weekly Notes
OntWR	Ontario Weekly Reporter
Op. Atty.-Gen.	Opinions of Attorneys-General (U. S.)
Op. Sol. Dept. Labor	Opinions of the Solicitor for the Department of Labor dealing with Workmen's Compensation

Or.	Oregon
Overt.	Overton (Tenn.)
Owen	Owen (Eng.)

P

P	Pacific Reporter
[1891] P.	Law Reports [1891] Probate (Eng.)
Pa.	Pennsylvania State
Pa. Cas.	Pennsylvania Supreme Court Cases (Sadler)
Pa. Co.	Pennsylvania County Court
Pa. C. Pl.	Common Pleas (Pa.)
Pa. Dist.	Pennsylvania District
Pa. Dist. & Co.	Pennsylvania District and County
Paige	Paige's Chancery (N. Y.)
Paine	Paine (U. S.)
PaLJ	Pennsylvania Law Journal
PaLJR	Clark's Pennsylvania Law Journal Reports
Palm.	Palmer (Eng.)
Park.	Parker (Eng.)
Park. Cr.	Parker's Criminal (N. Y.)
Park. Ins.	Parker's Insurance (Eng.)
Pars. Eq. Cas.	Parsons' Equity Cases (Pa.)
Pa. Super.	Pennsylvania Superior Court
Paton App. Cas.	Paton's Appeal Cases (Sc.)
PatrickElCas	Patrick's Election Cases (Can.)
Patt. & H.	Patton & Heath (Va.)
P. D.	Law Reports Probate Division (Eng.)
P. & D.	Perry & Davison (Eng.)
Peake N. P.	Peake's Nisi Prius (Eng.)
Pearson	Pearson (Pa.)
Peck	Peck (Tenn.)
Pennyp.	Pennypacker (Pa.)
Penr. & W.	Penrose & Watts (Pa.)
Pet.	Peters (U. S.)
Pet. Adm.	Peters' Admiralty (U. S.)
Pet. C. C.	Peters' Circuit Court (U. S.)
Phil.	Phillips (Eng.)
Phila.	Philadelphia (Pa.)
Philippine	Philippine
Phillim.	Phillimore Ecclesiastical (Eng.)
Pick.	Pickering (Mass.)
Pig. & R.	Pigott & Rodwell (Eng.)
Pig. Rec.	Pigott's Recoveries (Eng.)
Pinn.	Pinney (Wis.)
Pittsb.	Pittsburgh (Pa.)
PittsbLegJ	Pittsburgh Legal Journal (Pa.)
PittsbLegJNS	Pittsburgh Legal Journal New Series (Pa.)
P. & K.	Perry & Knapp (Eng.)
Plowd.	Plowden (Eng.)
Pollexf.	Pollexfen (Eng.)
Poph.	Popham (Eng.)
Port.	Porter (Ala.)
Porto Rico	Porto Rico
Porto Rico Fed.	Porto Rico Federal
Pow. Surr.	Powers' Surrogate (N. Y.)
P. R. & D. El. Cas.	Power, Rodwell & Dew's Election Cases (Eng.)
Prec. Ch.	Precedents in Chancery (Eng.)
Pr. Edw. Isl.	Prince Edward Island
Price	Price (Eng.)
Price Pr. Cas.	Price's Practice Cases (Eng.)
Pr. Rep.	Practice Reports (Eng.)
P. Wms.	Peere-Williams (Eng.)

Q

Q. B.	Queen's Bench (Adolphus & Ellis New Series) (Eng.)
[1891] Q. B.	Law Reports [1891] Queen's Bench (Eng.)
Q. B. D.	Law Reports Queen's Bench Division (Eng.)
Queensl. J. P.	Queensland Justice of the Peace
Queensl. L.	Queensland Law
QueenslLJ	Queensland Law Journal
Que. L.	Quebec Law
Que. Pr.	Quebec Practice
Que. Q. B.	Quebec Official Reports Queen's Bench
Que. Rev. Jud.	Quebec Revised Judicial
Que. Super.	Quebec Official Reports Superior Court
Quincy	Quincy (Mass.)

R

Rand.	Randolph (Va.)
Rawle	Rawle (Pa.)
R. & Can. Cas.	Railway & Canal Cases (Eng.)
R. & Can. Tr. Cas.	Railway & Canal Traffic Cases (Eng.)
Redf. & B.	Redfield & Bigelow's Leading Cases (Eng.)
Redf. R. Cas.	Redfield's Railway Cases (Eng.)
Redf. Surr.	Redfield's Surrogate (N. Y.)
Reeve Eng. L.	Reeve's English Law
Reports	Reports (Eng.)
Reprint	English Reprint
Rep. t. Finch	Cases temp. Finch (Eng.)
Res. & Eq. Judgm.	Reserved & Equity Judgments (N. S. Wales)
RevCrit	Revue Critique (Can.)
RevdeJur	Revue de Jurisprudence (Can.)
RevdeLegis	Revue de Legislation (Can.)
RevLeg	Revue Legale (Can.)
RevLegNS	Revue Legale New Series (Can.)
Rev. Rep.	Revised Reports (Eng.)
R. I.	Rhode Island
Rich. C. P.	Richardson's Practice Common Pleas (Eng.)
Ridg. L. & S.	Ridgeway, Lapp & Schoale (Ir.)

Ridg. P. C.	Ridgeway's Parliament Cases (Ir.)
Ridg. t. Hardw.	Ridgeway temp. Hardwicke (Eng.)
R. & M.	Ryan & Moody (Eng.)
R. M. Charlt.	R. M. Charlton (Ga.)
Rob.	Robinson (La.)
Rob.	Robinson (Va.)
Robb. Pat. Cas.	Robb's Patent Cases (U. S.)
Robert. App. Cas.	Robertson's Appeal Cases (Sc.)
Rob. Eccl.	Robertson's Ecclesiastical (Eng.)
Robin. App. Cas.	Robinson's Appeal Cases (Sc.)
Rolle	Rolle (Eng.)
Rolle Abr.	Rolle's Abridgment (Eng.)
Rom. Cas.	Romilly's Notes of Cases (Eng.)
Root	Root (Conn.)
Rose	Rose (Eng.)
Ross Lead. Cas.	Ross' Leading Cases (Eng.)
R. & R.	Russell & Ryan Crown Cases (Eng.)
Russ.	Russell (Eng.)
Russ. & C. Eq. Cas.	Russell's & Chesley's Equity Cases (N. S.)
Russ. Eq. Cas.	Russell's Equity Cases (N. S.)
Russ. & M.	Russell & Mylne (Eng.)

S

S	Southern Reporter
Salk.	Salkeld (Eng.)
Sandf. Ch.	Sandford's Chancery (N. Y.)
Sask. L.	Saskatchewan Law
Saund.	Saunders (Eng.)
Saund. & C.	Saunders & Cole (Eng.)
Sau. & Sc.	Sausse & Scully (Ir.)
S. Austr. L.	South Australia Law
Sav.	Savile (Eng.)
Sawy.	Sawyer (U. S.)
Say.	Sayer (Eng.)
S. C.	South Carolina
[1907] S. C.	Court of Session Cases (Sc.)
S. C. Eq.	South Carolina Equity
Sch. & Lef.	Schoales & Lefroy (Ir.)
[1907] S. C. (J.)	Court of Justiciary Cases (Sc.)
Sc. Jur.	Scottish Jurist
S. C. L.	South Carolina Law
Sc. L. Rep.	Scottish Law Reporter
Scott	Scott (Eng.)
Scott N. R.	Scott's New Reports (Eng.)
Sc. Sess. Cas.	Scotch Court of Session Cases
SCt	Supreme Court Reporter (U. S.)
S. D.	South Dakota
SE	South Eastern Reporter
Sel. Cas. Ch.	Select Cases in Chancery (Eng.)
Seld.	Selden's Notes (N. Y.)
Selw.	Selwyn's Nisi Prius (Eng.)
Serg. & R.	Sergeant & Rawle (Pa.)
Sess. Cas.	Court of Session Cases (Eng.)
Shaw	Shaw (Sc.)
Shaw & D.	Shaw & Dunlop (Sc.)
Shaw Dec.	Shaw's Digest of Decisions (Sc.)
Shaw & M.	Shaw & MacLean (Sc.)
Sheld.	Sheldon (N. Y.)
Sheph. Sel. Cas.	Shepherd's Select Cases (Ala.)
Show.	Shower (Eng.)
Show. P. C.	Shower's Parliament Cases (Eng.)
Sid.	Siderfin (Eng.)
Silv. A.	Silvernail's Appeals (N. Y.)
Silv. Sup.	Silvernail's Supreme (N. Y.)
Sim.	Simons (Eng.)
Sim. N. S.	Simons New Series (Eng.)
Sim. & St.	Simons & Stuart (Eng.)
Skin.	Skinner (Eng.)
Smale & G.	Smale & Giffard (Eng.)
Smith	Smith (Ind.)
Smith	Smith (N. H.)
Smith & B.	Smith & Batty (Ir.)
Smith K. B.	Smith's King's Bench (Eng.)
Smith Lead. Cas.	Smith's Leading Cases (Eng.)
Smith Reg.	Smith's Registration (Eng.)
Sm. & M. Ch.	Smedes & Marshall Chancery (Miss.)
Smythe	Smythe (Ir.)
Sneed	Sneed (Tenn.)
Sol. J.	Solicitor's Journal (Eng.)
Spinks	Spinks Admiralty (Eng.)
Spottisw.	Spottiswoode (Sc.)
Spottisw. Eq.	Spottiswoode's Equity (Sc.)
Sprague	Sprague (U. S.)
Stair	Stair (Sc.)
Stark.	Starkie Nisi Prius (Eng.)
Stew.	Stewart (Ala.)
Stew.	Stewart's Reports (N. S.)
Stew. & P.	Stewart & Porter (Ala.)
Stockt. Vice-Adm.	Stockton's Vice-Admiralty (N. B.)
Story	Story (U. S.)
Str.	Strange (Eng.)
Stuart Vice-Adm.	Stuart's Vice-Admiralty (L. C.)
Stu. M. & P.	Stuart, Milne & Peddie (Sc.)
Style	Style (Eng.)
Sumn.	Sumner (U. S.)
Susq. Leg. Chron.	Susquehanna Legal Chronicle (Pa.)
SW	South Western Reporter
SW(2d)	South Western Reporter Second Series
Swab.	Swabey's Admiralty (Eng.)
Swab. & Tr.	Swabey & Tristram (Eng.)
Swan	Swan (Tenn.)
Swanst.	Swanston (Eng.)

T

Taml.	Tamlyn (Eng.)
Taney	Taney (U. S.)
Tapp.	Tappan (Oh.)
Taunt.	Taunton (Eng.)
Taylor	Taylor (U. C.)
T. B. Mon.	T. B. Monroe (Ky.)
Tenn.	Tennessee
Tenn. Cas.	Unreported Tennessee Cases
Tenn. Ch.	Tennessee Chancery
Tenn. Ch. A.	Tennessee Chancery Appeals
Tenn. Civ. A.	Tennessee Civil Appeals
Terr. L.	Territories Law (Northwest Territories)
Tex.	Texas
Tex. A.	Texas Court of Appeals
Tex. A. Civ. Cas.	White & Wilson's Civil Cases (Tex.)
Tex. Civ. A.	Texas Civil Appeals
Tex. Cr.	Texas Criminal
Tex. Suppl.	Texas Supplement
Tex. Unrep. Cas	Poesy's Unreported Cases (Tex.)
Thach. Cr.	Thacher's Criminal Cases (Mass.)
Thomps. & C.	Thompson & Cook (N. Y.)
Thomps. Cas.	Thompson's Cases (Tenn.)
Tinw.	Tinwald (Sc.)
T. Jones	Thomas Jones (Eng.)
T. L. R.	Times Law Reports (Eng.)
T. & M.	Temple & Mew (Eng.)
Toth.	Tothill (Eng.)
T. R.	Term Reports (Durnford & East) (Eng.)
Transcr. A.	Transcript Appeals (N. Y.)
T. Raym.	Thomas Raymond (Eng.)
Treas. Dec.	Treasury Decisions (U. S.)
Tr. & H. Pr.	Troubat & Haly's Practice (Pa.)
Trint. T.	Trinity Term (Eng.)
Truem. Eq. Cas.	Trueman's Equity Cases (N. B.)
Tuck. Sel. Cas.	Tucker's Select Cases (Newfoundland)
Tuck. Surr.	Tucker's Surrogate (N. Y.)
T. U. P. Charlt.	T. U. P. Charlton (Ga.)
Turn. & R.	Turner & Russell (Eng.)
Tyler	Tyler (Vt.)
Tyrw.	Tyrwhitt (Eng.)
Tyrw. & G.	Tyrwhitt & Granger (Eng.)

U

U. C.	Upper Canada
U. C. C. P.	Upper Canada Common Pleas
U. C. Q. B.	Upper Canada Queen's Bench
U. C. Q. B. O. S.	Upper Canada Queen's Bench Old Series
U. S.	United States
Utah	Utah

V

Va.	Virginia
Va. Cas.	Virginia Cases
Van Ness Prize Cas.	Van Ness Prize Cases (U. S.)
Vaugh.	Vaughan (Eng.)
Vaux	Vaux's Decisions (Pa.)
Vent.	Ventris (Eng.)
Vern.	Vernon's Cases (Eng.)
Vern. Ch.	Vernon's Chancery (Eng.)
Vern. & S.	Vernon & Scriven (Ir.)
Ves.	Vesey Senior (Eng.)
Ves. & B.	Vesey & Beames (Eng.)
Ves. Jr.	Vesey Junior (Eng.)
Ves. Jr. Suppl.	Vesey Junior Supplement (Eng.)
Ves. Suppl.	Vesey Senior Supplement (Eng.)
Vict.	Victorian
Vict. L.	Victorian Law
VictLT	Victorian Law Times
Vict. St. Tr.	Victorian State Trials
Vin. Abr.	Viner's Abridgment (Eng.)
Vt.	Vermont

W

Walk.	Walker (Pa.)
Walk.	Walker's Chancery (Mich.)
Wall.	Wallace (U. S.)
Wallis	Wallis (Ir.)
Wall. Jr.	Wallace Junior (U. S.)
Wall. Sr.	Wallace Senior (U. S.)
Ware	Ware (U. S.)
Wash.	Washington
Wash.	Washington (Va.)
Wash. C. C.	Washington Circuit Court (U. S.)
Wash. T.	Washington Territory
Watts	Watts (Pa.)
Watts & S.	Watts & Sergeant (Pa.)
W. Bl.	William Blackstone (Eng.)
WCC	Minton-Senhouse's Workmen's Compensation Cases (Eng.)
Web. Pat. Cas.	Webster's Patent Cases (Eng.)
Welsh	Welsh Registry Cases (Ir.)
Wend.	Wendell (N. Y.)
West	West (Eng.)
WestLJ	Western Law Journal (Oh.)
WestLMonth	Western Law Monthly (Oh.)
WestLR	Western Law Reporter (Can.)
WestLT	Western Law Times (Can.)
WestR	Western Reporter
West t. Hardw.	West temp. Hardwicke (Eng.)

WestWkly	Western Weekly (Can.)
[1917]WestWkly	[1917] Western Weekly (Can.)
Whart.	Wharton (Pa.)
Wheat.	Wheaton (U. S.)
Wheel. Cr.	Wheeler's Criminal (N. Y.)
White & T. Lead. Cas. Eq.	White & Tudor's Leading Cases in Equity (Eng.)
Whitm. Pat. Cas.	Whitman's Patent Cases (U. S.)
Wight.	Wightwicke (Eng.)
Wilcox	Wilcox (Pa.)
Willes	Willes (Eng.)
Wilm.	Wilmot's Notes (Eng.)
Wils.	Wilson (Ind.)
Wils. Ch.	Wilson's Chancery (Eng.)
Wils. C. P.	Wilson's Common Pleas (Eng.)
Wils. Exch.	Wilson's Exchequer (Eng.)
Wils. P. C.	Wilson's Privy Council (Eng.)
Wils. & S.	Wilson & Shaw (Sc.)
Winch	Winch (Eng.)
Wis.	Wisconsin
W. Jones	William Jones (Eng.)
W. Kel.	William Kelynge (Eng.)
WklyLGaz	Weekly Law Gazette (Oh.)
WklyNC	Weekly Notes of Cases (Pa.)
Wkly. Rep.	Weekly Reporter (Eng.)
W. N.	Weekly Notes (Eng.)
Wolf. & B.	Wolferstan & Bristow's Election Cases (Eng.)
Wolf. & D.	Wolferstan & Dew's Election Cases (Eng.)
Woll.	Wollaston (Eng.)
Woodb. & M.	Woodbury & Minot (U. S.)
Woods	Woods (U. S.)
Woodw.	Woodward's Decisions (Pa.)
Woolw.	Woolworth (U. S.)
Wright	Wright (Oh.)
W. Rob.	William Robinson's Admiralty (Eng.)
W. Va.	West Virginia
W. W. & D.	Willmore, Wollaston & Davidson (Eng.)
W. W. & H.	Willmore, Wollaston & Hodges (Eng.)
Wyo.	Wyoming
Wythe	Wythe's Chancery (Va.)
Wy. & W.	Wyatt & Webb (Vict.)
Wy. W. & A'Beck.	Wyatt, Webb & A'Beckett (Vict.)

Y

Y. B.	Year Book (Eng.)
Y. & C. Exch.	Younge & Collyer's Exchequer (Eng.)
Y. & Coll.	Younge & Collyer's Chancery (Eng.)
Yeates	Yeates (Pa.)
Yelv.	Yelverton (Eng.)
Yerg.	Yerger (Tenn.)
Y. & J.	Younge & Jervis (Eng.)
YorkLegRec	York Legal Record (Pa.)
Young Adm.	Young's Admiralty Decisions (N. S.)
Younge	Younge Exchequer (Eng.)

OTHER ABBREVIATIONS

aff	affirmed in, or affirming
aff reh	affirmed on rehearing, or affirming on rehearing
allowing app	allowing appeal
allowing reh	allowing rehearing
ante	before (in same volume)
app allowed	appeal allowed
app den	appeal denied
app dism	appeal dismissed
appr	approved in, or approving
cert	certified from, or certified to
certiorari den	certiorari denied
cit	cited in, or citing
crit	criticized in, or criticizing
den app	denying appeal
den certiorari	denying certiorari
den motion for leave to app	denying motion for leave to appeal
den motion to dism app	denying motion to dismiss appeal
den new trial	denying new trial
den rearg	denying reargument
den reh	denying rehearing
den writ of error	denying writ of error
den writ of error to review proceedings	denying writ of error to review proceedings
disappr	disapproved in, or disapproving
dism app	dismissing appeal
dism writ of error	dismissing writ of error
dis. op.	dissenting opinion
dist	distinguished in, or distinguishing
expl	explained in, or explaining
foll	followed in, or following
infra	below (in same article or treatise)
lim	limiting
mod	modified in, or modifying
motion for leave to app den	motion for leave to appeal denied
motion to dism app den	motion to dismiss appeal denied
new trial den	new trial denied
op withdrawn reh	opinion withdrawn on rehearing
overr	overruled in, or overruling
post	after (in same volume)
quot	quoted in, or quoting
rearg den	reargument denied
reh allowed	rehearing allowed
reh den	rehearing denied
retransf	retransferred to
rev	reversed in, or reversing
rev reh	reversed on rehearing, or reversing on rehearing
supra	above (in same article or treatise)
transf	transferred from, or transferred to
vacated and rearg ordered	vacated and reargument ordered
withdrawing op reh	withdrawing opinion on rehearing
writ of error den	writ of error denied
writ of error dism	writ of error dismissed
writ of error to review proceedings den	writ of error to review proceedings denied

CYC-CORPUS JURIS PARALLEL REFERENCE TABLE

The following tables show where every proposition in CYC (if still the law) is located in CORPUS JURIS. This table translates CYC citations into CORPUS JURIS citations. No matter where you get a CYC citation, whether in an opinion, a brief, an annotated statute, a textbook, or elsewhere, this table gives the corresponding CORPUS JURIS citation. The CYC Index and Concordance, by means of this table, becomes a Key to CORPUS JURIS, equally as well as to CYC. **This table makes Cyc Citations available in Corpus Juris.**

RELIGIOUS SOCIETIES

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CORPUS JURIS

VOLUME FIFTY-FOUR

RELIGIOUS SOCIETIES

By S. Boyd Darling

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- Corporations in general see **Corporations** 14 C. J. p 1.
- Customs of particular sects or societies as to marriage see **Marriage** § 86.
- Dedication of property for religious uses see **Dedication** § 23.
- Defacement of church property see **Malicious Mischief** § 7 note 83 [i].
- Disturbance of religious meeting see **Disturbance of Public Meetings** §§ 4–11.
- Exemption of property from:
  - Assessments for local improvements see **Municipal Corporations** § 2907.
  - Taxation see **Municipal Corporations** § 4346; **Taxation** [37 Cyc 940].
- Garages prohibited near church see **Livery Stable and Garage Keepers** § 5.
- Gifts to religious bodies see **Charities** §§ 24–33, 64; **Perpetuities** §§ 57, 78, 79, 86, 144, 145, 159; **Wills** [40 Cyc 1053, 1441, 1471].
- Imputations against:
  - Church member see **Libel and Slander** § 45.
  - Clergyman see **Libel and Slander** § 80.
- Joining religious sect opposed to marriage as ground for divorce see **Divorce** § 164.
- Judicial notice of:
  - Customs and usages of religious organizations see **Evidence** § 1858.
  - Religious matters generally see **Evidence** § 1983.
- Larceny from church see **Larceny** § 69.
- Perfecting mechanic's lien against church see **Mechanics' Liens** § 184 note 37 [b].
- Privileged communications in church or society proceedings see **Libel and Slander** §§ 259, 274.
- Ratification of minister's acts see **Agency** § 117 note 82 [d].
- Regulation as to use of religious dress by public school teachers see **Schools and School Districts** [35 Cyc 1077].
- Religious belief as affecting:
  - Competency of juror see **Juries** § 389.
  - Credibility of witness see **Witnesses** [40 Cyc 2613].
- Sale of liquor near church see **Intoxicating Liquors** § 229.
- Sunday law as applicable to:
  - Church lectures and entertainments see **Sunday** [37 Cyc 551].
  - Proceedings and transactions generally see **Sunday** [37 Cyc 557].
  - Soliciting church subscriptions see **Sunday** [37 Cyc 556].
- Treating disease by christian science or other spiritual means see **Physicians and Surgeons** § 21.
- Use of:
  - School building for religious purposes see **Landlord and Tenant** § 729 note 16 [a]; **Schools and School Districts** [35 Cyc 943].
  - Street by Salvation Army see **Municipal Corporations** § 3886.

For **later cases, developments** and **changes** in the law see **Annotations,** same title and section number.

I. NATURE AND ORGANIZATION

[§ 1] **A. Definitions and Distinctions**[1]**—1. Religious Society.** A religious society is an assembly met, or a body of persons who usually meet, in some stated place for the worship of God and religious instruction.[2] It is made up of individuals who have associated together for religious as opposed to secular purposes,[3] having no regard to the particular mode or manner of constituting or forming the society,[4] or to its being incorporated,[5] although the term as used in particular statutes may have reference to incorporated[6] or quasi-incorporated[7] religious societies. In the New England states, the term religious society has been used as synonymous with parish to refer to an incorporated society created and maintained for the support of public worship.[8]

[§ 2] **2. Church.**[9] The term "church," elsewhere defined,[10] is sometimes employed as of the same meaning as "religious society" and sometimes in a more restricted sense as meaning a body having to do only with matters relating to the religious doctrine and discipline of its members apart from any temporal matters such as the acquisition and ownership of property and the maintenance of facilities for worship.[11] So, a church and a religious society may or may not be distinct, separate bodies, depending upon the usages and law of the jurisdiction and the nature of the church polity of the particular church under consideration.[12]

[§ 3] **3. Religious Corporation.**[13] A religious corporation is a corporation whose purposes as defined by charter or statute are directly ancillary to divine worship or religious teaching,[14] although the scope and application of the term may be defined and restricted by the terms of the statute in which it is used.[15] A corporation established for purely academic purposes, for education in literature and in the arts and sciences, is in no sense a religious corporation,[16] even though engaged in educating youths for the ministry,[17] or placed under the management of a religious body.[18] Nor is a charitable society made into a religious corporation by being controlled by a church.[19] A statute defining a religious corporation as a corporation created for religious purposes,[20] has been held to apply to a corporation organized to provide churches for seamen,[21] although other corporations so closely allied to religion that they may be broadly classed as religious corporations have been held not to be within the class designated as such by a particular statute.[22]

[§ 4] **B. Organization in General.**[23] The organization of religious societies in this country may be affected, and generally is, by one of three different systems of church government, episcopacy or prelacy, presbyterianism, or congregationalism; the first of which systems may be described as a church ruled by one or by a special group by virtue of a claimed divine right; the second, as a church in which the powers of government are vested in the body of believers and are exercised through their chosen representatives, the local church being subordinated to the control of a supreme governing body; and the third, as a church where each local body is a self-governing independent democracy.[24] Typical of the independent group are the Congregational societies and churches in New England,[25] while the Presbyterian congregations associated with the early history of New York, New Jersey, and Pennsylvania are illustrative of the group in which the local congregation is controlled by superior representative bodies,[26] and the Roman Catholic and Episcopal Communions are the groups representing a church government by one or a group ruling under a claim of divine right.[27]

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[1] **Related definitions** see Catholic 11 C. J. p 33; Christian 11 C. J. p 760; Christianity 11 C. J. p 761; Christian Science 11 C. J. p 761; Denomination 18 C. J. p 486; Episcopacy 20 C. J. p 1298; Evangelical 21 C. J. p 1258; Free Baptists 27 C. J. p 895; Latitudinarians 36 C. J. p 957; Lutheran 38 C. J. p 327; Mohammedanism 40 C. J. p 1488; Parish 46 C. J. p 1371; Presbyterian 49 C. J. p 1333; Roman Catholic post; Trinitarians [38 Cyc 1994]; Unitarians [39 Cyc 688].

Property exempt from taxation see Taxation [37 Cyc 940].

[2] Robertson v. Bullions, 9 Barb. (N. Y.) 64, 95 [aff 11 N. Y. 243].

"A voluntary association of individuals or families, united for the purpose of having a common place of worship, and to provide a proper teacher to instruct them in religious doctrines and duties, and to administer the ordinances of baptism, &c." Hartford First Baptist Church v. Witherell, 3 Paige (N. Y.) 296, 301.

[3] Ohio, etc., R. Co. v. Delhi Tp., 11 Oh. 24, 28.

[a] **A library association** organized to form and maintain a library, even though it calls itself the "First Moral Religious Society of Columbia Township," is not a religious society of any particular sect or denomination, entitled to share in a fund created for "every denomination of religious societies." State v. Township 9, 7 Oh. St. 58.

[b] **A public school** is not a "sect or religious society" within the meaning of the constitutional prohibition against payment of any public monies to any "sect or religious society," merely because a teacher reads the Bible without comment and Lord's prayer is repeated and songs sung by the pupils. Church v. Bullock, 104 Tex. 1, 109 SW 115, 117, 16 LRA NS 860.

[4] State v. Delhi Tp., 11 Oh. 24, 28.

[5] State v. Stuth, 11 Wash. 423, 39 P 665.

[6] St. Monica's Church v. New York, 119 N. Y. 91, 23 NE 294, 7 LRA 592; Nesqually Catholic Bishop v. Gibbon, 1 Wash. 592, 21 P 315.

[7] Way v. Ramsey, 192 N. C. 549, 135 SE 454.

[8] See infra § 4.

"Parish" defined see Parish 46 C. J. p 1371.

[9] **Charitable gifts to "church"** see Charities § 24.

[10] See Church 11 C. J. p 762.

[11] Hartford First Baptist Church v. Witherell, 3 Paige (N. Y.) 296, 24 AmD 223.

[a] **"Society" or "congregation" distinguished.**—"A religious society, or congregation, as recognized by the third section of the statute providing for the incorporation of religious societies, is, with us, what is usually denominated a poll parish, in some of the neighboring states. It consists of a voluntary association of individuals or families, united for the purpose of having a common place of worship, and to provide a proper teacher to instruct them in religious doctrines and duties, and to administer the ordinances of baptism, &c." Hartford First Baptist Church v. Witherell, 3 Paige (N. Y.) 296, 301, 24 AmD 223.

[12] See infra § 4.

[13] **Corporations generally distinguished from associations** see Associations § 2.

Property exempt from taxation see Taxation [37 Cyc 940].

[14] In re St. Louis Christian Science Inst., 27 Mo. A. 633, 637.

[15] See cases infra this note.

[a] **Protestant Episcopal Church.**—The "religious society" of a particular Protestant Episcopal Church consists of the communicants of that denomination who statedly attend divine services in the church edifice, while the members of the "religious corporation" are the persons within the congregation of the church who are entitled to vote in corporate elections for church wardens and vestrymen, and under Religious Corporations Law, § 43, it is not necessary that members of the corporation and all its trustees be communicants of the Protestant Episcopal Church, or members of the religious society, and a member of the religious society is not necessarily a member of the corporation. Fiske v. Beaty, 206 App. Div. 349, 201 NYS 441 [mod 120 Misc. 1, 198 NYS 358, and aff 238 N. Y. 598, 144 NE 907].

[b] **Christian Science.**—An application by an Institute of Christian Science organized "to heal the sick and promote longevity" by the supposed efficacy of a religious tenet and charging fees to pupils and patients for its services has been held to be an attempt to incorporate a religious corporation and not within the exception of a constitutional provision declaring that no religious corporation can be established except to hold title to real estate to church edifices, parsonages, and cemeteries. In re St. Louis Christian Science Inst., 27 Mo. A. 633, 637.

[16] Wyatt v. Stillman Inst., 303 Mo. 94, 260 SW 73; State v. Westminster College, 175 Mo. 52, 56, 74 SW 990.

[17] Wyatt v. Stillman Inst., 303 Mo. 94, 260 SW 73.

[18] State v. Westminster College, 175 Mo. 52, 74 SW 990.

[19] Baltzell v. Baltimore Church Home, etc., 110 Md. 244, 73 A 151.

[20] See statutory provisions.

[21] Matter of Prall, 78 App. Div. 301, 304, 79 NYS 971.

[22] See cases infra this note.

[a] **Young Men's Christian Association** although distinctly religious in its purposes is held not to be entitled to exemption from tax as a religious corporation, under a statute conditioning such exemption upon the exclusive use of its plant for religious purposes. In re Watson, 171 N. Y. 256, 261, 63 NE 1109; Young Men's Christian Assoc. v. New York, 113 N. Y. 187, 21 NE 86; In re Fay, 37 Misc. 532, 534, 76 NYS 62.

[23] **Effect of incorporation** see infra § 22.

Congregationalism. The parish-and-church type of organization is characteristic of the Congregational religious communities in New England, the religious society or parish controlling in temporal and the church in ecclesiastical affairs.[28] A church of the Congregational faith and polity is almost uniformly connected with a society or parish, but the two bodies are distinct and separate, one from the other;[29] and so, wherever the church polity is congregational or independent, there generally is the dual type of organization,[30] although in some states there is a merger of the two jurisdictions, ecclesiastical and temporal, in a single body, the church society.[31]

Presbyterianism. The theory of two distinct bodies, society and church, independent of each other, founded upon the early New England parish and town organization and applied to the New England Congregational type of church government,[32] has no application to a church whose polity consists of self-government through chosen representatives, the local body being a subordinate member of some general church organization in which there are appellate tribunals with ultimate power of control.[33] The governing body in the Presbyterian congregations is the "church session"; the sessions in a district being represented in the district "presbytery"; chosen representatives from the congregations constituting the "synod" which embraces a number of presbyteries; and over all the General Assembly, a representative body composed of ministers and ruling elders selected by each of the presbyteries.[34]

Episcopacy or prelacy. A congregation profess-

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24. Ramsey v. Hicks, 174 Ind. 428, 91 NE 344, 92 NE 164, 30 LRANS 665; Thomas v. Lewis, 224 Ky. 307, 6 SW (2d) 255, 257. See also cases infra this section.

"Different Christian denominations have different forms of government. There are three forms of government which have gained prevalence in Christian communities, and which are still maintained. It may be that all classes of Christian churches may be brought under one or the other of these three forms of church government. One is the prelatical form in which the governing power resides in prelates or diocesan bishops and the higher clergy. To this form of government may be assigned the Roman, Greek, English, and most Oriental churches. Another is the Presbyterian form in which the governing power resides in assemblies, synods, prebyteries, and sessions. To this form of government may be assigned the Scottish Church, the Lutheran, the various Presbyterian Churches, and the Methodist. Another is the independent or congregational form in which the body is self-governing, each single and local church administering its own government by the voice of the majority of its members. To this form may be assigned the Baptists, Congregationalists, Christian, and other independent churches." Thomas v. Lewis, supra.

25. See cases infra notes 28–31.

26. See cases infra notes 32–34.

27. See cases infra note 35.

28. See cases infra this note.

[a] **Parish and town organization.**—(1) In the early history of the New England states every town was considered to be a parish as well as a town until a separate parish was formed within it (Jewett v. Thames Bank, 16 Conn. 511; Weld v. May, 9 Cush. (Mass.) 181; Brunswick First Parish v. Dunning, 7 Mass. 445), (2) and the duties of a parish were required of the town, which was obliged to maintain and support public religious worship, and perform all parish duties (Jewett v. Burroughs, 15 Mass. 464; Cochran v. Camden, 15 Mass. 296; Dillingham v. Snow, 5 Mass. 547), (3) and where one or more parishes were set off from a town, the remaining part constituted a distinct parish and was considered as the first parish (Richardson v. Brown, 6 Me. 355; Brunswick First Parish v. Dunning, supra; Minot v. Curtis, 7 Mass. 441). (4) Parishes had no powers except those given by statute, and these extended only to the settlement of ministers and building houses of public worship and to the charges arising from and necessarily connected with those objects. Dillingham v. Snow, supra; Bangs v. Snow, 1 Mass. 181. (5) To defray the expenses arising from the execution of these powers, they might raise money, by assessing it on the polls and estates of the inhabitants, and by collecting it, for which purpose the parish collector was invested with authority to compel payment (Dillingham v. Snow, supra), (6) but although a second parish was organized in a town which had managed its parochial affairs, without organizing itself as a parish, the town might still assess a tax for parochial purposes (Ashby v. Wellington, 8 Pick. (Mass.) 524). (7) It was competent for towns, before they became divided into parishes, to conduct their parochial business at meetings distinct from those of the towns (Jewett v. Burroughs, supra); (8) but generally towns thus situated transacted their parochial concerns at town meetings, making no difference in their forms when acting upon those subjects or upon matters of mere municipal or political concern (Richardson v. Brown, supra; Austin v. Thomas, 14 Mass. 333). (8) Several parishes were often incorporated within the limits of a town, and sometimes a single parish embraced parts of different towns, but when a parish was invested with all the municipal powers of a town, it did not thereupon ipso facto cease to be a parish; and the new corporation was distinct from the parish, and was not a successor to it. Dillingham v. Snow, supra.

29. Silsby v. Barlow, 16 Gray (Mass.) 329, 330.

30. Martin v. Washington County German Reformed Church of Peace, 149 Wis. 19, 134 NW 1125.

"A church is understood, among those whose polity is congregational or independent, to be a body of persons associated together for the purpose of maintaining Christian worship and ordinances. A religious society is a body of persons associated together for the purpose of maintaining religious worship only, omitting the sacraments. A church and society are often united in maintaining worship; and in such cases the society commonly owns the property and makes the pecuniary contract with the minister. But in many instances societies exist without a church, and churches without a society." Silsby v. Barlow, 16 Gray (Mass.) 329, 330.

[a] **A legacy to "the Baptist Society** in P. for support of their minister" cannot be paid to the Baptist Church in P, but it may be paid to the duly authorized agent of the pew-holders, some of whom were church members and others not. Silsby v. Barlow, 16 Gray (Mass.) 329.

31. See cases infra this note.

[a] **In Missouri,** notwithstanding the fact that under Baptist polity each church is independent and there is no common head, the church members employ the minister and are liable as partners, if the church is unincorporated, for his salary provided there is liability under the terms of the contract, the peculiar usages of the parish organization in the New England states not being followed. Riffe v. Proctor, 99 Mo. A. 601, 74 SW 409.

32. See cases supra note 28.

33. See Ramsey v. Hicks, 174 Ind. 428, 91 NE 344, 92 NE 164, 30 LRA NS 665.

34. Ramsey v. Hicks, 174 Ind. 428,

ing to be Roman Catholic or Episcopal must render submission to the government and discipline of which it is a part.[35]

[§ 5] **C. Compact, Constitution, and Rules**[36]**—1. In General.** A religious association owes its existence to the compact between the members composing it,[37] and when a written constitution is finally adopted or recognized and accepted,[38] it is the embodiment of the terms of the compact by which the association was formed and by which it is to be conducted,[39] defining or limiting the powers of the local body in relation to other church bodies or judicatories and the rights of the individual members therein.[40] A religious society which has adopted the presbyterial as distinguished from the congregational form of government, has subordinated itself to the control of the supreme governing body of the general church organization of which it is a part,[41] and a religious society formed as a body free of any church control retains its independent character until its articles of association have been changed and the society has adopted for itself a changed status.[42] To be binding upon the society and its members, its constitution must not be in conflict with law or contrary to public policy.[43] An attempt at formal adoption based upon a defective notice of the meeting called for that purpose is irregular,[44] and a constitution based thereon, in the absence of evidence of subsequent acquiescence, and recognition, is not binding.[45] A constitution acquiesced in and recognized by a religious society is valid and binding,[46] although never legally adopted.[47] The society may adopt rules or by-laws for the government of its affairs which will be binding unless they are unreasonable,[48] or in conflict with the provisions of its own constitution,[49] or the general laws.[50] Where the constitution and by-laws of a church do not clearly determine the rights of parties at issue, the interpretation by the church itself, as disclosed by its own acts, will be adopted as the interpretation controlling the issue.[51]

[§ 6] **2. Alterations in General.** The constitution of a religious society after it has been adopted or has been recognized as binding,[52] can be changed or amended only in the manner provided therein,[53] or by the rules and by-laws of the society.[54] So also the making of an amendment of the by-laws must follow the method sanctioned by the constitution or, in the absence of express constitutional provisions, by the usage of the society.[55] A power granted by a constitution of a church to amend or change the confession of faith, catechism, constitution and rules of discipline includes a power to adopt an entirely new constitution, rules of discipline or form of government.[56] Even where a constitution provides that no rule or ordinance shall at any time be passed to change or do away with the confession of faith, changes in the interest of clearness of expression, or fulness of statement, of the accepted doctrines of the church may be made,[57] nor does such prohibition interfere with changes in administration not affecting the articles of faith.[58]

[§ 7] **3. Power of Society or Church Judicatory To Amend.** Whether the power to make changes in the constitution of a society rests with the members thereof or with some judicatory superior to the local body, and if so, with which one, depends on the terms of the organic law of the society[59] the power to make changes having been held in some instances

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91 NE 344, 92 NE 164, 30 LRANS 665.

35. Smith v. Bonhoof, 2 Mich. 115.

36. **Associations generally** see Associations §§ 25, 26.

37. Clark v. Brown, (Civ. A.) 108 SW 421 [rev on other grounds 102 Tex. 323, 116 SW 360, 24 LRANS 670].

38. See cases infra notes 39, 40.

39. Washington Grove Assoc. v. Walker, 128 Md. 85, 96 A 1079; Boyles v. Roberts, 222 Mo. 613, 677, 121 SW 805; Clark v. Brown, (Civ. A.) 108 SW 421 [rev on other grounds 102 Tex. 323, 116 SW 360, 24 LRANS 670].

"The constitution is the contract of association in churches and all unincorporated societies. It is binding upon all portions of the church, as well as all judicatories thereof. It is the supreme law of the church and must be adhered to by every part thereof. To pass upon the meaning of such instrument is not dealing with ecclesiastical questions at all, but only determining the meaning of an organic agreement or contract. That these organizations cannot go beyond their constitutional powers is amply shown by the cases." Boyles v. Roberts, supra.

40. Bennett v. St. Paul's Evangelical Lutheran Church, 137 Md. 341, 112 A 619, 14 ALR 622; Furmanski v. Iwanowski, 265 Pa. 1, 108 A 27.

41. Borgman v. Bultema, 213 Mich. 684, 182 NW 91.

42. Cape v. Moore, 122 Okl. 229, 253 P 506; Wisconsin Universalist Convention v. Prairie de Sac Union Unitarian, etc., Soc., 152 Wis. 147, 139 NW 753.

43. Geiss v. Trinity Lutheran Church Cong., (Nebr.) 230 NW 658; Fiske v. Beaty, 120 Misc. 1, 198 NYS 358 [mod on other grounds 206 App. Div. 349, 201 NYS 441 (aff 238 N. Y. 598, 144 NE 907)]; In re St. Mary's Immaculate Conception Greek Catholic Church, 296 Pa. 307, 145 A 862; Ryan v. Dunzilla, 239 Pa. 486, 86 A 1089.

44. See infra § 35.

45. Ehrenfeldt's App., 101 Pa. 186.

46. Ill.—Kuns v. Robertson, 154 Ill. 394, 40 NE 343.

Mich.—Bear v. Heasley, 98 Mich. 279, 57 NW 270, 24 LRA 615.

Mo.—Russie v. Brazzell, 128 Mo. 93, 30 SW 526, 49 AmSR 542.

Or.—Philomath College v. Wyatt, 27 Or. 390, 31 P 206, 37 P 1022, 26 LRA 68.

Pa.—Schlichter v. Keiter, 156 Pa. 119, 27 A 45, 22 LRA 161.

47. Philomath College v. Wyatt, 27 Or. 390, 31 P 206, 37 P 1022, 26 LRA 68.

48. Greek Orthodox Community v. Malicourtis, 267 Mass. 472, 166 NE 863; Saltman v. Nesson, 201 Mass. 534, 88 NE 3; Zernosky v. Kluchinsky, 278 Pa. 99, 122 A 262.

49. Howard v. St. Thomas' African Episcopal Church, 52 Pa. Super. 116.

50. Wallace v. Wells, (Tex. Civ. A.) 228 SW 1111.

51. Grupe v. Rudisill, (N. J. Ch.) 144 A 874.

52. See supra § 5.

53. Ind.—Lamb v. Cain, 129 Ind. 486, 29 NE 13, 14 LRA 518.

Mass.—Greek Orthodox Community v. Malicourtis, 267 Mass. 472, 166 NE 863.

Mich.—Bear v. Heasley, 98 Mich. 279, 57 NW 270, 24 LRA 615.

Mo.—Russie v. Brazzell, 128 Mo. 93, 30 SW 526, 49 AmSR 542.

Nebr.—Rottmann v. Bartling, 22 Nebr. 375, 35 NW 126.

Compare Smith v. Nelson, 18 Vt. 511.

[a] **Notice.**—(1) When the constitution provides for notice of any proposed change in the constitution, a change effected without giving such notice is invalid and of no effect. Brundage v. Deardorf, 55 Fed. 839; Rottmann v. Bartling, 22 Nebr. 375, 35 NW 126. (2) But notice of the time of an election to vote on a revision of the constitution and confession of faith to be held "during the month of Nov., 1888," the date being fixed by the custom of the society, is sufficient. Philomath College v. Wyatt, 27 Or. 390, 31 P 206, 37 P 1022, 26 LRA 68.

54. Rottmann v. Bartling, 22 Nebr. 375, 35 NW 126.

55. Boston First African M. E. Soc. v. Worthy, 232 Mass. 331, 122 NE 289.

56. Presbyterian Church Permanent Committee of Missions, etc. v. Presbyterian Church Pacific Synod, 157 Cal. 105, 106 P 395.

57. Kuns v. Robertson, 154 Ill. 394, 40 NE 343; Russie v. Brazzell, 128 Mo. 93, 30 SW 526, 49 AmSR 542; Rike v. Floyd, 6 Oh. Cir. Ct. 80, 3 Oh. Cir. Dec. 359; Schlichter v. Keiter, 156 Pa. 119, 27 A 45, 22 LRA 161; Germantown Church of Epiphany, 18 Pa. Dist. 390.

58. Com. v. Stauffer, 289 Pa. 139, 137 A 179.

59. See cases infra this section.

to be in the highest church judicatory,[60] in other instances in a majority of the minor judicatories having immediate control of the local bodies,[61] and in still other instances in the local bodies.[62] Under the constitutional provision of a church that there shall be no alteration of the constitution by its highest church judicatory unless by the request of the society, the request need not originate with the members of the society, but a proposed change may be laid before the society by such judicatory; and, after the society has expressed its wish for such change, it may be made by such judicatory;[63] but where one of the proposed changes in the constitution is that such judicatory shall have power to initiate changes, the implication is that under the constitution the power does not exist, and the court has followed the practical construction denying the power to the judicatory under the constitution.[64]

[§ 8] **4. Limitations on Power.** In the absence of a provision in its constitution to the contrary,[65] there must be unanimous consent of all members of a society, to an amendment of the constitution changing the fundamental faith or doctrine, and resulting in a diversion of its property to other uses;[66] and in case of a schism members adhering to the original tenets of the church are the true church and entitled to the church property even though the seceding members are in a majority;[67] but by a majority vote the church may amend its constitution in respect of administration and temporal matters or mere forms of worship not affecting religious doctrine or discipline.[68] Where a society incorporates under a general law[69] giving it a right to manage its affairs under by-laws which are reasonable and in conformity to the law, a by-law establishing a form of ritual and assuming to put it out of the power of the corporation to change it except by unanimous vote of its members is unreasonable,[70] and a minority has no power under such by-law to prevent a change adopted by the majority.[71] A provision in a church constitution requiring two-thirds vote of the whole society for an alteration of the constitution has been construed to require only two-thirds of the members voting,[72] but in some jurisdictions such a clause has been held ambiguous justifying the court in following the practical construction adopted by the church requiring a two-thirds vote of the whole society including non-voting members.[73]

[§ 9] **D. Incorporation and Effect Thereof—1. Right To Incorporate—a. In General.** The right to incorporate is based upon the terms of the statute under which incorporation is sought,[74] conformity to which with respect to the body or persons seeking incorporation[75] and purposes of the proposed incorporation,[76] as well as conformity to the general laws of the state[77] are required. In some states the right to incorporate is conferred by statute specifically providing for the incorporating of religious societies.[78] In other states the right exists under the general corporation law, which by its terms includes religious societies among those entitled to incorporate,[79] or the support of public worship among the purposes enumerated for which incorporation is permitted.[80] The right to incorporate under a statute giving that right to proprietors of real estate lying in common has been held to be conferred upon holders in common of church property.[81] A statute providing for the incorporation and government of churches,[82] has been held to apply to separate congregations and not to the church at large.[83] Under a statute so providing,[84] an associate body worshiping in a separate meeting-house or chapel may become separately organized and incorporated, but only with the consent of the parent society.[85] It has been held that a schismatical body within a church may incorporate,[86] but it must be done openly with the announcement of the schismatical character of the body and not under the guise of being an offshoot of the original society.[87] Under an incorporating law whose terms were permissive, not mandatory, the right to incorporate was held to be restricted to the persons or body, which under church laws and usages are vested with the administration of its temporalities.[88] A statutory provision that no religious corporation shall be recognized as existing except by express statute "of this state" has reference only to associations having temporalities to administer within the state, and does not bar the recognition of associations incorporated in other states unless they undertake to exercise their corporate franchises within the state.[89]

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[60] **60.** Presbyterian Church Permanent Committee of Missions, etc. v. Presbyterian Church Pacific Synod, 157 Cal. 105, 106 P 395; Borgman v. Bultema, 213 Mich. 684, 182 NW 91.

[61] **61.** Clark v. Brown, (Civ. A.) 108 SW 421 [rev 102 Tex. 323, 116 SW 360, 24 LRANS 670].

[62] **62.** See cases infra note 63.

[63] **63.** U. S.—Brundage v. Deardorf, 55 Fed. 839.

Ill.—Kuns v. Robertson, 154 Ill. 394, 40 NE 343.

Mo.—Russie v. Brazzell, 128 Mo. 93, 30 SW 526, 49 AmSR 542 (holding that a provision in the original constitution of a religious society that there shall be no alteration of the constitution unless by request of two thirds of the whole society, which prescribed no method of obtaining consent or of proposing amendments, is substantially complied with by the preparation of an amended constitution by a commission pursuant to resolution of the general conference, and its submission to a vote of the members under methods adopted by the commission, and by a report of the vote, and its adoption by the general conference, and its proclamation by the presiding bishop as the constitution of the church).

Oh.—Rike v. Floyd, 6 Oh. Cir. Ct. 80, 3 Oh. Cir. Dec. 359.

Or.—Philomath College v. Wyatt, 27 Or. 390, 31 P 206, 37 P 1022, 26 LRA 68.

Pa.—Schlichter v. Keiter, 156 Pa. 119, 27 A 45, 22 LRA 161.

[64] **64.** Bear v. Heasley, 98 Mich. 279, 57 NW 270, 24 LRA 615.

[65] **65.** See supra § 6.

[66] **66.** Mattson v. Saastamoinen, 168 Minn. 178, 209 NW 648.

[67] **67.** Brendzij v. Hajdij, 35 Man. 453, [1926] 2 DomLR 626, [1926] 1 WestWkly 443.

[68] **68.** Mattson v. Saastamoinen, 168 Minn. 178, 209 NW 648.

[69] **69.** See infra § 11.

[70] **70.** Saltman v. Nesson, 201 Mass. 534, 88 NE 3.

[71] **71.** Saltman v. Nesson, 201 Mass. 534, 88 NE 3.

[72] **72.** Ill.—Kuns v. Robertson, 154 Ill. 394, 40 NE 343.

Ind.—Lamb v. Cain, 129 Ind. 486, 29 NE 13, 14 LRA 518.

Mo.—Russie v. Brazzell, 128 Mo. 93, 30 SW 526, 49 AmSR 542.

Oh.—Rike v. Floyd, 6 Oh. Cir. Ct. 80, 3 Oh. Cir. Dec. 359.

Or.—Philomath College v. Wyatt, 27 Or. 390, 31 P 206, 37 P 1022, 26 LRA 68.

Pa.—Schlichter v. Keiter, 156 Pa. 119, 27 A 45, 22 LRA 161.

[73] **73.** Bear v. Heasley, 98 Mich. 279, 57 NW 270, 24 LRA 615.

[74] **74.** See cases infra this section.

[75] **75.** See cases infra notes 81–89.

[76] **76.** See cases infra this note.

[a] **Christian Science church.**—The right to incorporate as a religious body has been denied to a Christian Science church on the ground that a declared purpose is the treatment of disease through trained healers receiving compensation for their services and by a healing system subversive of the statutes regulating the practice of medicine. In re First Church of Christ Scientist, 6 Pa. Dist. 745, 20 Pa. Co. 241.

[b] **A communistic religious unincorporated society,** organized to promote and carry on the Christian religion according to its tenets, submissive to civil authority, while it does not contravene good morals or public policy, cannot be held to be a religious corporation within the terms of the statute where the chief purpose of the organization is secular. State v. Hutterische Bruder Gemeinde, 46 S. D. 189, 191 NW 635.

[77] **77.** In re First Church of Christ Scientist, 6 Pa. Dist. 745, 20 Pa. Co. 241.

[78] **78.** Voorhees v. Amsterdam Presb. Church, 17 Barb. (N. Y.) 103.

[79] **79.** Tunstall v. Wormley, 54 Tex. 476.

[80] **80.** In re St. Luke's M. E. Church, 17 Phila. (Pa.) 261.

[81] **81.** Howard v. Hayward, 10 Metc. (Mass.) 408 (under Rev. St. c 43 later incorporated into Gen. L. c 179).

[82] **82.** See statutory provisions.

[83] **83.** Baxter v. McDonnell, 155 N. Y. 83, 49 NE 667, 40 LRA 670.

[84] **84.** See statutory provisions.

[85] **85.** Church of Redemption v.

[§ 10] **b. Constitutional Provisions.** Where constitutional provisions exist restricting the establishment of religious corporations, the right to incorporate is governed thereby.[90] A constitutional restriction of the right to incorporate as a religious corporation, prohibiting such incorporation except for a limited purpose,[91] operates to bar the incorporation of religious associations as religious corporations for other than the excepted purposes,[92] but it does not bar the incorporation under the statutes of associations which are not to be classed as religious corporations.[93] The constitutional restriction does not apply to religious associations which have completed their incorporation before the time when the restriction goes into effect, and which the constitution by its terms exempts from the operation of the restriction.[94]

[§ 11] **2. Proceedings[95]—a. In General.** The statutory requirements for the incorporation of a religious society[96] must be substantially followed.[97] Where the statute requires it,[98] there must be a public notice given at a stated meeting,[99] an election or appointment of the required number of trustees,[1] a certificate in proper form,[2] executed,[3] verified by affidavit,[4] and recorded by the trustees.[5] In the absence of substantial compliance, there is no corporation de jure,[6] nor will the mere declaration of the founder of the church in her deed to the trustees make it so.[7] But notwithstanding defects in the charter, it will be a corporation de jure if within the terms of a later curative statute according that status to going concerns which had previously been attempted to be formed under the laws of the state.[8]

[§ 12] **b. Application.** An application for incorporation should contain only the matters prescribed by law.[9] It should not contain a recital with reference to matters which are the subject of express statutory control,[10] and the inclusion of such matter in the application is ground for the court's refusal to approve.[11] In the absence of statutory requirement to the contrary,[12] it is not necessary in the incorporation of a religious society that all of the members should sign the petition.[13] But an

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Grace Church, 68 N. Y. 570 [mod 6 Hun 166].

[86] In re Charter Church of Mother of God Czenstochowa, 5 Lack LegN (Pa.) 128.

[87] In re Charter Church of Mother of God Czenstochowa, 5 LackLegN (Pa.) 128.

[88] See cases infra this note.

[a] **Trustees of a Roman Catholic church** are not entitled to incorporation, where by the law of the church the administration of the temporalities is vested in the parish priest. Smith v. Bonhoof, 2 Mich. 115.

[89] In re Ticknor, 13 Mich. 44.

[90] Stump v. Sturm, 254 Fed. 535, 166 CCA 93 [rev 239 Fed. 749]; Catholic Church v. Tobbein, 82 Mo. 418.

[a] **General Assembly of the Presbyterian Church.**—Incorporation of the trustees of the General Assembly of the Presbyterian Church in the United States does not violate a constitutional prohibition against the incorporation of any church, as the General Assembly is not a church. Guthrie v. Guthrie, (Va.) 10 SE 327; Presbyterian Church Gen. Assembly v. Guthrie, 86 Va. 125, 10 SE 318, 6 LRA 321.

[b] **The trustees of the presbyterian committee of publication** is not a church or a denomination within the constitutional provision denying a right to incorporate. Wilson v. Perry, 29 W. Va. 169, 1 SE 302.

[c] **The home missionary society** of a religious denomination is not a "church" or religious denomination," within the constitutional provision declaring that no charter of incorporation shall be granted to any church or religious denomination. Stump v. Sturm, 254 Fed. 535 [rev 239 Fed. 749].

[91] See constitutional provisions.

[92] See cases infra this note.

[a] **Christian Science church.**—A constitutional provision prohibiting incorporation of religious associations except to hold title to real estate for church edifices, parsonages, and cemeteries, forbids the incorporation of a Christian Science church, a distinctly religious association, for the declared purpose of healing physical and mental diseases by the efficacy of a religious tenet. In re St. Louis Christian Science Inst., 27 Mo. A. 633.

[93] See cases infra note 94.

[a] **Colonizing society.**—An association for the purpose of establishing colonies of persons of a particular religious belief is not a religious corporation and is not affected by the constitutional restriction. St. Louis Colonization Assoc. v. Hennessy, 11 Mo. A. 555.

[b] **Richmond Home for Ladies.**—A benevolent business corporation, with a capital stock, chartered for the purpose of maintaining an institution in which indigent women connected with designated religious denominations might be provided with a comfortable home is not a religious corporation within the constitutional prohibition. Jordan v. Richmond Home for Ladies, 106 Va. 710, 56 SE 730.

[c] **Helpers of Holy Souls in Purgatory** is not a religious corporation within the constitutional prohibition, and may be incorporated as a benevolent corporation. Helpers of Holy Souls Soc. v. Law, 267 Mo. 667, 186 SW 718.

[94] Keith, etc., Coal Co. v. Bingham, 97 Mo. 196, 10 SW 32.

[95] **Formation of corporations generally** see Corporations §§ 53–159.

[96] See statutory provisions.

[97] See cases infra this section.

[98] See statutory provisions.

[99] See infra § 13.

[1] Ferraria v. Vasconcelles, 23 Ill. 456; Gullett v. First Christian Church, 154 Miss. 516, 122 S 732.

[2] Hartsfield v. Tremont Temple Baptist Church, 163 Ga. 557, 136 SE 550; Ferraria v. Vasconcelles, 23 Ill. 456; Kulinski v. Dambrowski, 29 Wis. 109.

[3] Ferraria v. Vasconcelles, 23 Ill. 456.

[4] Ferraria v. Vasconcelles, supra.

[5] Hartsfield v. Tremont Temple Baptist Church, 163 Ga. 557, 136 SE 550; Ferraria v. Vasconcelles, 23 Ill. 456.

[6] Ill.—Ferraria v. Vasconcelles, 23 Ill. 456.

Mass.—Eustace v. Dickey, 240 Mass. 55, 132 NE 852.

Miss.—Gullett v. First Christian Church, 154 Miss. 516, 122 S 732; Paine's Chapel African M. E. Church v. Aberdeen Realty Co., 120 Miss. 12, 81 S. 650.

N. Y.—St. Jacob's Lutheran Church v. Bly, 73 N. Y. 323.

Tenn.—Hunter v. Swadley, 141 Tenn. 156, 207 SW 730.

Wis.—Kulinski v. Dambrowski, 29 Wis. 109.

[7] Eustace v. Dickey, 240 Mass. 55, 132 NE 852.

[8] Miller v. St. Marks Baptist Church, 158 La. 377, 104 S 121.

[9] In re Russian Orthodox Catholic Church, 28 Pa. Dist. 205.

[a] **Provision for change.**—The proposed charter should not provide for separation from general religious body with which it is to be connected, and for a division of the property on such dissolution where such provision is not authorized by statute. In re Zion Evangelical Church, 18 Pa. Co. 174.

[10] In re Russian Orthodox Catholic Church, 28 Pa. Dist. 205.

[11] In re Russian Orthodox Catholic Church, supra.

[12] See statutory provisions.

[13] North St. Louis Christian Church v. McGowan, 62 Mo. 279.

application which does not set forth the names and residences of the subscribers thereto is fatally defective.[14] The fact that some of the applicants had previously signed an application to consolidate with another church will not affect the regularity of the proceedings.[15]

[§ 13] **c. Notice.** Where the statute provides for the reading of the notice by a person named in the statute as authorized to do so, at the church or meeting house, and on particular days named,[16] there must be a substantial compliance with such requirements.[17] But unless required by statute,[18] the notice of the meeting for election of trustees need not be given by any particular person,[19] and it is a sufficient reading at a church meeting to show a reading immediately after the benediction, before any of the congregation had left.[20] A statute requiring notice for the incorporation of the members of a religious society,[21] does not require notice where the incorporators are not members of a religious organization, but desire to organize a corporation in connection with a church of their own peculiar tenets to be associated therewith.[22]

[§ 14] **d. Meeting for Election of Trustees.**[23] Where the statute requires that a meeting of which due notice is given,[24] shall be held at the church or meeting-house for the election of trustees,[25] it is of the substance of the proceedings that the meeting be held at the church meeting-house, or other place where the congregation statedly meet for divine worship[26] and where a part of the congregation worshiped at one place and part at another, a meeting at either place, provided notice of it was duly given at both places, is a compliance with the statute.[27] If it appears that due notice was given to all and that none were excluded, the proceedings are not invalidated by the fact that the meeting was not attended by one faction of the society;[28] or by the recital in the certificate that it was composed of the male members of the congregation, although the women were entitled to participate.[29]

[§ 15] **3. Certificate and Charter**[30]**—a. In General.** The certificate of incorporation must be executed in compliance with the statutes.[31] Where the statute so requires,[32] the certificate must be made immediately after the meeting held for the purpose of incorporation;[33] must be signed by the required number of persons,[34] must be under seal,[35] acknowledged or verified by affidavit,[36] and recorded.[37] If the statute designates the officer before whom the certificate of incorporation shall be acknowledged, an acknowledgment before an officer clearly within the designation is sufficient;[38] insufficient if before any other.[39] In the absence of statutory requirement, a seal is not necessary.[40]

[§ 16] **b. Contents.** Statutory requirements as to the contents of the certificate of incorporation and charter[41] must be substantially followed.[42] Where the statute so provides,[43] there must be a distinct statement of the name of the corporation,[44] the purpose for which it is formed,[45] the place where the corporate affairs are to be transacted,[46] the term for which it is to exist,[47] the number of its trustees,[48] the date of their election or appointment and the length of term for which they were elected or appointed,[49] and the facts showing a compliance with the statutory requirements for the meeting at which the trustees had been elected.[50] A charter of a proposed corporation for the support of public worship should clearly state the kind or form of worship purposed, and distinctly name the kind of church government to which it is to be subject,[51] but it is not necessary under a statute providing that the form of worship and kind of church government shall not be inconsistent with the constitution or laws of the United States or the state,[52] that the certificate should state such to be the fact, a finding of the court to that effect at the hearing upon the application being all that is necessary.[53] Depending on statutory requirements,[54] it may or may not be necessary that the charter contain provisions relating to the nature, control and disposition of its property.[55] But no provision is necessary in a charter, concerning any matter provided for by statute,[56] as, for example, the duties of officers and members;[57] nor should a charter contain anything which is properly the subject of regulation by a by-law.[58]

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[14] In re United Brethren Hebrew Cong., 11 YorkLegRec (Pa.) 89.

[15] Walker v. McPherson, 199 Ala. 486, 74 S 449.

[16] See statutory provisions.

[17] Kulinski v. Dambrowski, 29 Wis. 109.

[18] See cases infra note 22.

[19] West Koshkonong Cong. v. Ottesen, 80 Wis. 62, 49 NW 24.

[20] West Koshkonong Cong. v. Ottesen, supra.

[21] See statutory provisions.

[22] Franke v. Mann, 106 Wis. 118, 81 NW 1014, 48 LRA 856.

[23] **Meeting at which notice is given** see supra § 13.

Necessity of election or appointment of trustees see supra § 11.

[24] See supra § 13.

[25] See statutory provisions.

[26] Kulinski v. Dambrowski, 29 Wis. 109.

[27] St. Jacob's Lutheran Church v. Bly, 73 N. Y. 323; Spiritual, etc., Temple v. Vincent, 127 Wis. 93, 105 NW 1026.

[28] Spiritual, etc., Temple v. Vincent, 127 Wis. 93, 105 NW 1026; West Koshkonong Cong. v. Ottesen, 80 Wis. 62, 49 NW 24.

[29] See infra § 16.

[30] **Validity and collateral attack** see infra § 19.

[31] See cases infra this section.

[32] See statutory provisions.

[33] In re Cutchogue Cong. Church, etc., 131 N. Y. 1, 30 NE 43.

[34] In re Ruthenian Greek Catholic Church, 224 App. Div. 113, 229 NYS 520 [aff 249 N. Y. 607 mem, 164 NE 602 mem].

[35] Ferraria v. Vasconcelles, 23 Ill. 456.

[36] Ferraria v. Vasconcelles, 23 Ill. 456; Summit Reformed Dutch Church v. Harder, 12 NYS 297 [aff 126 N. Y. 646, 27 NE 853]; First Baptist Soc. v. Rapalee, 16 Wend. (N. Y.) 605.

[37] Ferraria v. Vasconcelles, 23 Ill. 456.

[38] See case infra this note.

[a] **Commissioner of deeds.**—Where a statute provides that a certificate of incorporation may be acknowledged before "any officer authorized to take acknowledgments or proofs of conveyances of real estate," a commissioner of deeds may properly take such acknowledgment. Greenwich Second M. E. Church v. Humphrey, 21 NYS 89 [aff 142 N. Y. 137, 36 NE 812].

[39] First Baptist Soc. v. Rapalee, 16 Wend. (N. Y.) 605.

[40] In re Cathedral Church of Christ, 30 Pa. Dist. 43.

[41] See statutory provisions.

[42] See cases infra this section.

[43] See statutory provisions.

[44] Ferraria v. Vasconcelles, 23 Ill. 456; Lynch v. Pfeiffer, 110 N. Y. 33, 17 NE 402; Matter of St. Luke's M. E. Church, 17 Phila. (Pa.) 261.

Name see infra § 20.

[45] Matter of St. Luke's M. E. Church, 17 Phila. (Pa.) 261.

[46] In re Christ's Evangelical Lutheran Church, 5 Pa. Co. 121; Matter of St. Luke's M. E. Church, 17 Phila. (Pa.) 261.

[47] Matter of St. Luke's M. E. Church, 17 Phila. (Pa.) 261.

[48] In re Christ's Evangelical Lutheran Church, 5 Pa. Co. 121; Matter of St. Luke's M. E. Church, 17 Phila. (Pa.) 261; In re Evangelical Lutheran Cong., 6 Phila. (Pa.) 64.

[49] Ferraria v. Vasconcelles, 23 Ill. 456; Matter of St. Luke's M. E. Church, 17 Phila. (Pa.) 261.

[50] Lynch v. Pfeiffer, 110 N. Y. 33, 17 NE 402.

[a] **Sex of members attending.**—Incorporation proceedings are not invalidated by a recital in the certificate that the meeting to organize was composed of the male members of the congregation, although the women were entitled to participate. Lynch v. Pfeiffer, 110 N. Y. 33, 17 NE 402.

[51] In re Charter, 1 Del. Co. (Pa.) 415.

[52] See statutory provisions.

[§ 17] **c. Acceptance by Society.** The acceptance of a charter by a religious society must be by an act of the society as a body,[59] at a meeting regularly held for the purpose.[60] Individual assent thereto by each member of the society, evidenced by his signature, is not the equivalent of acceptance by act of the society.[61]

[§ 18] **d. Change or Amendment of Charter.** A religious corporation may at any time surrender its charter and accept a new one with other and different provisions,[62] or it may obtain an amendment of its charter,[63] provided such amendment does not alter the original principles or violate the fundamental law of the corporation,[64] or the general law or public policy of the state.[65] A charter of a church will not be amended so as to alter its original principles even on the petition of a majority of the congregation where the minority object,[66] nor can such purpose of the entire membership to alter their faith be implied from equivocal acts.[67]

[§ 19] **4. Validity; Collateral Attack.** While a compliance with statutory requirements is necessary to incorporation,[68] inquiry into the validity of the charter of a religious society cannot be made in a collateral proceeding,[69] or at the instance of persons estopped to deny its corporate existence.[70] The right to incorporate cannot be attacked collaterally,[71] even though the attack is based on constitutional grounds.[72] Nor will incorporation be invalidated in a collateral proceeding on grounds of irregularity in the proceedings to incorporate,[73] as, for example, on the ground of the making of the certificate one month after the meeting, instead of "immediately" as the statute requires,[74] or by the recording officer's error[75] or failure to record,[76] or by an accidental loss of seals after they were affixed.[77]

[§ 20] **5. Name.** In the absence of any statutory restriction,[78] a religious society, when it incorporates, may adopt any name reasonably appropriate to the declared purposes of the corporation,[79] subject to the rule of law that it cannot use a name to the use of which some other body, incorporated or unincorporated, has an exclusive right,[80] and subject to the discretionary power of the court to refuse to allow the new corporation to adopt a name so similar to the name of an existing corporation as to lead to confusion.[81] But the court in the exercise of its discretion has allowed a new corporation to take the name of a defunct corporation, where such action has been approved by the church judicatory, and the title to property is not affected thereby,[82] or to take the name of an unincorporated association of which the applicants for incorporation were formerly a part, it appearing that the association had no right to the exclusive use of the name,[83] and a part of a religious order on incorporating has been allowed to adopt the name of the religious order, the independent existence of the order not being affected thereby.[84] A religious corporation does not acquire an exclusive right to its name if the words used are generic in character and in common use.[85] A religious corporation has the same power to change its name as it had at first to adopt it,[86] subject to existing statutory regulations,[87] the change of name not affecting the identity of the corporation so as to prevent its holding the corporate property previously acquired.[88] An order changing the name of a religious corporation may be revoked, although there is no statutory provision in express terms authorizing it.[89]

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[53] Application for Charter of St. Bartholomew's Protestant Episcopal Church, 260 Pa. 284, 103 A 826.

[54] See statutory provisions.

[55] See cases infra this note.

[a] **In Pennsylvania** (1) under Acts of 1907 and 1913, it is no longer necessary that the charter should contain a provision securing the control and disposition of the property of the corporation to the lay members. Application for Charter St. Bartholomew's Protestant Episcopal Church, 260 Pa. 284, 103 A 826; In re Matki Boskie Bolesne Polish Nat. Catholic Church, 26 Pa. Dist. 147. (2) The earlier Acts of 1855 and 1887 require the charter to contain such a provision. In re Alexander Presby. Church, 30 Pa. 154; In re St. Paul's Church, 30 Pa. 152; In re St. David's Church, 11 Pa. Dist. 549; In re German Mut. Evangelical Protestant St. John's Church, 5 Pa. Co. 124 note; In re Christ's Evangelical Lutheran Church, 5 Pa. Co. 121; Matter of St. Luke's M. E. Church, 17 Phila. 261; In re Church of Holy Communion, 14 Phila. 126; In re West Park Ave. M. E. Church, 12 Phila. 518; In re Reformed Episcopal Church of Covenant, 12 Phila. 516. (3) The charter should contain a provision limiting the value of the real and personal estate of the corporation (In re Christ's Church Charter, 8 Pa. Co. 28), (4) although not required under a statute which itself contains the provision (In re Charter, 1 LegRec 133); (5) a limit on yearly income other than from real estate (In re Mary Elizabeth Patterson Memorial Church, 17 Phila. 306; Matter of St. Luke's M. E. Church, 17 Phila. (Pa.) 261; In re West Park Ave. M. E. Church, 12 Phila. 518); (6) and a prohibition against the diversion of the funds of the original donors from their destination, and against the admission of members not of the religious sect of the incorporators (In re Charter, 1 LegRec 133).

[56] In re Charter, 1 LegRec (Pa.) 133; Matter of St. Luke's M. E. Church, 17 Phila. (Pa.) 261; In re United Brethren Hebrew Cong., 11 YorkLegRec (Pa.) 89.

[57] In re Christ's Evangelical Lutheran Church, 5 Pa. Co. 121.

[58] In re Christ's Evangelical Lutheran Church, 5 Pa. Co. 121.

[59] Shortz v. Unangst, 3 Watts & S. (Pa.) 45.

[60] Shortz v. Unangst, supra.

[61] Shortz v. Unangst, supra.

[62] Atty.-Gen. v. Society for Relief, etc., 31 S. C. Eq. 604.

[63] Sawer v. Gosser, 1 WklyNC (Pa.) 55; Atty.-Gen. v. Society for Relief, etc., supra.

[64] Com. v. Cornish, 13 Pa. 288; Matter of Walnut St. Presb. Church, 3 Brewst. (Pa.) 277; Matter of Hebron Evangelical Lutheran Church, 9 Phila. (Pa.) 609.

[65] See case infra this note.

[a] **Use of German language.**—Amendment to charter providing for services, etc., to be conducted exclusively in the German language, forever providing against future amendment and stipulating for forfeiture of property if ever English were used, is denied as against public policy. In re German Evangelical Lutheran Church, 6 Pa. Dist. 412, 20 Pa. Co. 472.

[66] Matter of Hebron Evangelical Lutheran Church, 9 Phila. (Pa.) 609.

[67] See cases infra this note.

[a] **Failure to protest.**—That plaintiff, a Universalist society, when permitted to hold its annual convention in the church of defendant, an independent religious society, dedicated it as a Universalist Church, without protest from any of defendant's members, does not show such members embraced the Universalist faith in a body, and devoted their church to the practice of such faith; but simply indifference to such religious ceremonies. Wisconsin Universalist Convention v. Prairie du Sac Union Unitarian, etc., Soc., 152 Wis. 147, 139 NW 753.

[68] See supra §§ 9-17.

[69] Dubs v. Egli, 167 Ill. 514, 47 NE 766; Klix v. Polish Roman Catholic St. Stanislaus Parish, 137 Mo. A. 347, 118 SW 1171.

[70] Congregation B'Nai Abraham v. Arky, (Mo.) 20 SW (2d) 899.

[71] Klix v. Polish Roman Catholic St. Stanislaus Parish, 137 Mo. A. 347, 118 SW 1171.

[72] Klix v. Polish Roman Catholic St. Stanislaus Parish, supra.

[73] See cases infra notes 74-77.

[74] In re Cutchogue Cong. Church, etc., 131 N. Y. 1, 30 NE 43.

Certificate and charter generally see supra § 15.

[75] St. Jacob's Lutheran Church v. Bly, 73 N. Y. 323; Matter of Arden, 4 NYS 177, 1 Conn. Surr. (N. Y.) 159.

[76] Mills v. Zion Chapel, 119 Md. 510, 87 A 257.

[77] St. Jacob's Lutheran Church v. Bly, 73 N. Y. 323.

[78] See statutory provisions.

[79] Spiritual, etc., Temple v. Vincent, 127 Wis. 93, 105 NW 1026.

[a] **Holding corporation** of the property of two unincorporated congregations, but not itself intending to function as a church, will not be granted a charter as a church or under a name in which the word church appears. In re St. John's Church, 10 Pa. Dist. & Co. 576.

[80] See cases infra this note.

[a] **A seceding body** from a religious society cannot by incorporating under the name of the parent body, acquire a right to the use of the name, although the parent body was not incorporated. Hooper v. Stone, 54 Cal. A. 668, 202 P 485.

[81] In re Harrisburg First Presb. Church, 2 Grant (Pa.) 240; In re St. Francis Polish Nat. Catholic Church, 31 Pa. Super. 87; In re St. Stanislaus Polish Nat. Reformed Church, 12 Pa. Dist. 532; In re Ruthenian Greek Catholic Church, 44

[§ 21] **6. Proof of Incorporation; Presumptions.** The certificate is proper evidence of the fact of incorporation;[90] but the record of the certificate is not, unless nonproduction of the certificate is accounted for.[91] A certificate regular in form and subsequent user of corporate rights thereunder is prima facie evidence of incorporation,[92] and failure to record the certificate of incorporation does not prevent the society from proving its corporate existence by evidence of acts of user.[93] Where the statute expressly so provides,[94] user for a specified term of years raises a presumption of legal incorporation in pursuance of the laws of the state,[95] provided the acts relied on to show user are acts pertaining particularly to corporate powers and not merely such acts as an unincorporated religious society might perform.[96] In the absence of evidence of user, no presumption of incorporation is raised by the loss of church records.[97]

[§ 22] **7. Effect of Incorporation; Reincorporation.**[98] Whether the incorporated body is the religious society itself or its trustees or officers depends upon the terms of the statute,[99] the officers or trustees constituting the corporation under some statutes,[1] subject to a trust where the society or congregation is made beneficiary thereunder,[2] but the society itself remaining unincorporated.[3] A statute vesting in the trustees of a church the exclusive power of management and control[4] does not constitute the trustees the corporation.[5] Under other statutes,[6] the body corporate is the society, the trustees or other officers having only a delegated authority therefrom.[7] Under other statutes,[8] the constituents of the corporation are the petitioners for incorporation, such persons as they shall associate with them and their successors,[9] only such members of the unincorporated society being members of the corporation as are within the terms of the statutory restriction.[10] Under the statutes of some states,[11]

Pa. Co. 438.

[82] In re Bloomfield First Presb. Church, 111 Pa. 156, 2 A 574.

[83] Clarion Hospital Assoc.'s Charter, 10 Pa. Dist. & Co. 189.

[84] Helpers of Holy Souls Soc. v. Law, 267 Mo. 667, 186 SW 718.

[85] See cases infra this note.

[a] **New Thought Church.**—A religious corporation, adopting the name "New Thought Church" and teaching a form of religion based on "new thought" and teaching it through churches, cannot acquire a monopoly of teaching that form of religion by means of churches, and it may not enjoin one from conducting services under a similar name. New Thought Church v. Chapin, 159 App. Div. 723, 144 NYS 1026.

[86] Gibson v. Armstrong, 7 B. Mon. (Ky.) 481; In re Bloomfield First Presby. Church, 111 Pa. 156, 2 A 574. And see Watkins v. Wilcox, 4 Hun (N. Y.) 220, 6 Thomps. & C. 539 [aff 66 N. Y. 654].

[87] See statutory provisions.

[88] Trinity Church v. Hall, 22 Conn. 125; Cahill v. Bigger, 8 B. Mon. (Ky.) 211; Gibson v. Armstrong, 7 B. Mon. (Ky.) 481; Meyer v. German Evangelical Lutheran Emmanuel Church, 37 Minn. 241, 33 NW 786.

[89] In re Abyssinian Baptist Church, 13 NYS 919.

[90] Jackson v. Leggett, 7 Wend. (N. Y.) 377.

[91] Jackson v. Leggett, supra.

[92] Summit Reformed Dutch Church v. Harder, 12 NYS 297 [aff 126 N. Y. 646, 27 NE 853].

[93] Washington Fifth Baptist Church v. Baltimore, etc., R. Co., 16 D. C. 269.

[94] See statutory provisions.

[95] See Ionia Cong. Church v. Webber, 54 Mich. 571, 20 NW 542; Newark M. E. Church v. Clark, 41 Mich. 730, 3 NW 207.

[96] Newark M. E. Church v. Clark, 41 Mich. 730, 3 NW 207.

[a] **Acts sufficient to establish de facto corporation.**—A church having elected officers, rented premises, and conducting services is a de facto corporation and becomes a de jure corporation upon recording an affidavit in compliance with Corporation Act §§ 35, 36 (Hurd Rev. St. [1911] c 32). Trapp v. St. John's Baptist Church, 174 Ill. A. 213.

[97] Alden v. St. Peter's Parish, 158 Ill. 631, 42 NE 392, 30 LRA 232.

[98] **Membership of unincorporated religious society** see infra § 24.

[99] See statutory provisions.

[1] Ind.—Gray v. Good, 44 Ind. A. 476, 89 NE 498.

Me.—Bailey v. Freeport M. E. Church, 71 Me. 472; Nason v. First Bangor Christian Church, 66 Me. 100; Anderson v. Brock, 3 Me. 243.

Md.—Phillips v. Insley, 113 Md. 341, 77 A 850, 140 AmSR 408; Stubbs v. St. John's Church, 96 Md. 267, 53 A 917; Tarter v. Gibbs, 24 Md. 323; African Methodist Bethel Church v. Carmack, 2 Md. Ch. 143.

Mass.—Enos v. St. John The Baptist Church, 187 Mass. 40, 72 NE 253 (holding it not necessary to determine whether members of the society were incorporated, the statute providing that no one but trustees should have any part or voice in the doings of the society); Weld v. May, 9 Cush. 181; Earle v. Wood, 8 Cush. 430.

N. H.—Bean v. South Danbury Christian Church, 61 N. H. 260.

N. J.—Page v. Asbury M. E. Church, 78 N. J. Eq. 114, 78 A 246; Fair v. Bloomingdale First M. E. Church, 57 N. J. Eq. 496, 42 A 166; Holmes v. Wesley M. E. Church, (Ch.) 41 A 102.

[2] Worrell v. Millstone First Presby. Church, 23 N. J. Eq. 96.

[3] See cases supra notes 1, 2.

[4] See statutory provisions.

Powers of trustees see infra §§ 52–57.

[5] People's Bank v. St. Anthony's Roman Catholic Church, 109 N. Y. 512, 17 NE 408.

[a] **Churchwardens** are not a corporation in the full sense of the word, but are annual officers merely. Fell v. Charity Lands, [1898] 2 Ch. 44.

[6] See statutory provisions.

[7] Madison Ave. Baptist Church v. Oliver St. Baptist Church, 46 N. Y. 131, 11 AbbPrNS 132 [rev 31 N. Y. Super. 109 (aff 2 AbbPrNS 254, 32 HowPr 335)]; Gram v. Prussia Emigrated Evangelical Lutheran German Soc., 36 N. Y. 161; Robertson v. Bullions, 11 N. Y. 243; Burke v. Trinity Church Rector, etc., 63 Misc. 43, 117 NYS 255 [aff 132 App. Div. 930 mem, 117 NYS 1130 mem]; New York Presbytery v. West Twenty-Third St. Westminster Presby. Church, 67 Misc. 317, 122 NYS 309 [rev 142 App. Div. 876, 127 NYS 851]; Watkins v. Wilcox, 4 Hun (N. Y.) 220, 6 Thomps. & C. 539 [aff 66 N. Y. 654]; Burrell v. Seneca Associate Reformed Church, 44 Barb. (N. Y.) 282; Madison Ave. Baptist Church v. Oliver St. Baptist Church, 31 N. Y. Super. 109; Miller v. Gable, 2 Den. (N. Y.) 492; Hartford First Baptist Church v. Witherell, 3 Paige (N. Y.) 296, 24 AmD 223; Fadness v. Braunborg, 73 Wis. 257, 41 NW 84.

[8] See statutory provisions.

[9] Klix v. Polish Roman Catholic St. Stanislaus Parish, 137 Mo. A. 347, 118 SW 1171.

[10] Klix v. Polish Roman Catholic St. Stanislaus Parish, supra.

[11] See statutory provisions.

the corporation which is formed is a civil corporation as distinguished from an ecclesiastical corporation, having the powers of other civil corporations under the general incorporation laws so far as they are applicable,[12] corporation and church being distinct bodies with separate jurisdictions, the corporation over temporal and the church over ecclesiastical affairs,[13] the corporation being free of denominational control by the church in some jurisdictions[14] while in others, by statute, the trustees of the corporation are compelled to administer the temporalities according to the discipline, rules, and usages of the denomination to which the church members belong;[15] and under other statutes it has been held that an incorporated religious society acquires the rights and powers of a corporation for certain limited purposes, without losing its sectarian and denominational characteristics.[16] A charter granted on petition of a congregation is an incorporation of the congregation and not of the denomination.[17] A reincorporation of a religious society is merely a continuance of the old corporation,[18] unless dissolution of the old is the purpose of the reincorporation.[19]

[§ 23] **E. De Facto Corporation and Estoppel.**[20] A religious society which has, in good faith, attempted to legally organize as a corporation, and has long claimed and exercised the rights and powers of a corporation, is a corporation de facto, although its incorporation is technically defective.[21] The circumstances may also establish an element of estoppel to deny incorporation against a person dealing with a religious corporation as such,[22] although estoppel is not necessary for application of the doctrine.[23] Before a corporation can have a de facto existence, it must have been possible for it to be a corporation de jure,[24] and to establish a de facto status, it must show a charter or law under which a corporation might lawfully be created, a colorable and bona fide attempt to organize a corporation thereunder, and the exercise of corporate functions by the organization so formed.[25] Proof of existence of a de facto corporation is not sufficient, if there is an absence of evidence of any attempt to incorporate,[26] or, even though there is evidence of user of corporate functions if there is no evidence of a charter or law under which a corporation could be created.[27] As with de facto corporations generally,[28] a de facto religious corporation has power to sue,[29] and may be sued,[30] and may acquire,[31] and convey[32] property.

II. MEMBERSHIP[33]

[§ 24] **A. What Constitutes.** Who are members of a religious society must as a general rule be determined by reference to the rules, constitution, or by-laws of the society,[34] and by reference to the statutes governing such bodies in the various states,[35] and religious societies, when not restricted by their charters or articles of association, may make by-laws not inconsistent with their charter or statutes,[36] declaring what shall constitute membership applicable to existing as well as to future members.[37] Membership in a parish under the terms of varying statutes[38] has been held to be based on residence[39] and liability to taxation,[40] subject to power of the legislature to change a membership to a parish in another town, although the town boundaries are not altered and the municipal duties and rights of the member are not changed;[41] or on consent of the parties as evidenced by application for membership and acceptance by the parish.[42] Excepting the instances of residence qualification for parish membership under the statutes referred to,[43] the essence of the relation of membership in a religious society is held to be the agreement of the parties,[44] including financial support in some form when the statute requires it;[45] and generally a profession of faith,[46] adherence to its doctrines[47] and a submission to its government.[48] One accepted as a member continues to be a member in good standing in the absence of evidence of his voluntary withdrawal or proper expulsion.[49]

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[12] Horst v. Traudt, 43 Colo. 445, 96 P 259; Calkins v. Cheney, 92 Ill. 463; Klix v. Polish Roman Catholic St. Stanislaus Parish, 137 Mo. A. 347, 118 SW 1171; Watkins v. Wilcox, 4 Hun 220, 6 Thomps. & C. 539 [aff 66 N. Y. 654].

[13] Dismukes v. State, 176 Ala. 616, 58 S 195; Gray v. Good, 44 Ind. A. 476, 89 NE 498; McNeilly v. Brookline First Presby. Church, 243 Mass. 331, 137 NE 691; Westminster Presb. Church v. New York Presbytery, 211 N. Y. 214, 105 NE 199.

[14] Calkins v. Cheney, 92 Ill. 463.

[15] Westminster Presb. Church v. New York Presbytery, 211 N. Y. 214, 105 NE 199; York First Reformed Presb. Church v. Bowden, 14 AbbN Cas (N. Y.) 356.

[a] **Early New York doctrine,** since changed by statute, was that a religious society, when incorporated, has no denominational character, and none can be ingrafted upon it. That portion of the members of the corporation organized into a separate body, called the church, may belong to a peculiar denomination, but the church, as such, cannot impress its distinctive character upon the corporation, so as to prevent a majority of the corporators from changing it. Petty v. Tooker, 21 N. Y. 267 [aff 29 Barb. 256]; Van Buren v. Gansevoort Reformed Church, 62 Barb. (N. Y.) 495; Robertson v. Bullions, 9 Barb. (N. Y.) 64 [aff 11 N. Y. 243]; Hartford First Baptist Church v. Witherell, 3 Paige (N. Y.) 296, 24 AmD 223.

[16] Hale v. Everett, 53 N. H. 9, 16 AmR 82 (holding that under the acts of 1819 and 1827, religious sects or denominations of christians were alone authorized to form religious societies, and the limited corporate powers that were conferred upon them did not in any way take away or change their character as sectarian or denominational societies).

[17] Atty.-Gen. v. Dutch Reformed Protestant Church, 36 N. Y. 452, 2 Transcr. A. 145 [aff 33 Barb. 303].

[18] Miller v. English, 21 N. J. L. 317.

[19] Miller v. English, supra.

[20] **De facto corporations generally** see Corporations §§ 215-233.

Estoppel to deny incorporation generally see Corporations §§ 234-280.

Proof of incorporation and presumptions see supra § 21.

[21] Baltimore, etc., R. Co. v. Fifth Baptist Church, 137 U. S. 568, 11 SCt 185, 34 L. ed. 784; Willard v. Rockville Centre M. E. Church, 66 Ill. 55; Lyon M. E. Union Church v. Pickett, 19 N. Y. 482 [aff 23 Barb. 436]; Stoker v. Schwab, 56 N. Y. Super. 122, 1 NYS 425; All Saints Church v. Lovett, 1 N. Y. Super. 213; Chittenden v. Chittenden, 1 AmLReg (N. Y.) 538; Franke v. Mann, 106 Wis. 118, 81 NW 1014, 48 LRA 856.

[a] **Incorporation under wrong statute.**—Where a religious society is incorporated under the wrong statute, and is not incorporated under the religious societies act, it becomes a de facto, if not a de jure, corporation, and persons dealing with it are barred from questioning the authority of such corporation. St. John the Baptist Greek Catholic Church v. Baron, (N. J. Ch.) 73 A 422.

[22] Lyon M. E. Union Church v. Pickett, 19 N. Y. 482 [aff 23 Barb. 436].

[23] See Corporations § 216.

[24] Evenson v. Ellingson, 67 Wis. 634, 31 NW 342.

[25] Mabel First Lutheran Church v. Cadwallader, 172 Minn. 471, 215 NW 845; Methodist Episcopal Union Church v. Pickett, 19 N. Y. 482; Van Buren v. Gansevoort Reformed Church, 62 Barb. (N. Y.) 495.

[26] Mabel First Lutheran Church v. Cadwallader, 172 Minn. 471, 215 NW 845.

[27] Methodist Episcopal Union Church v. Pickett, 19 N. Y. 482; Van Buren v. Gansevoort Reformed Church, 62 Barb. (N. Y.) 495.

[28] See Corporations § 217.

[29] Baltimore, etc., R. Co. v. Fifth Baptist Church, 137 U. S. 568, 11 SCt 185, 34 L. ed. 784; Willard v. Methodist Episcopal Church, 66 Ill. 55; Douglas Reformed Methodist Soc. v. Draper, 97 Mass. 349; Franke v. Mann, 106 Wis. 118, 81 NW 1014, 48 LRA 856.

[30] Congregational Church v. Webber, 54 Mich. 571, 20 NW 542.

[31] Chittenden v. Chittenden, 1 AmLReg (N. Y.) 538.

[32] Stoker v. Schwab, 56 N. Y. Super. 122, 1 NYS 425.

[33] **Membership of religious corporation** see supra § 22.

[34] East Norway Lake Norwegian Evangelical Lutheran Church v. Halvorson, 42 Minn. 503, 44 NW 663; American Primitive Soc. v. Pilling, 24 N. J. L. 653.

[35] See statutory provisions; and cases infra this section.

[36] See supra § 5.

[37] Taylor v. Edson, 4 Cush. (Mass.) 522.

[a] **Adding to membership qualification.**—Where a statute incorporating a parish directed elections to be made in the customary manner, and the ancient law, which fixed that manner, allowed all persons residing in the parish, or paying taxes therein, to vote at elections, a by-law of the parish that every person should pay fifty dollars in order to be entitled to the privileges

[§ 25] **B. Rights and Duties of Member; Discipline.** Every person entering into a religious society impliedly, if not expressly, covenants to conform to its rules and to submit to its authority and discipline,[50] and he has no right to insist upon the exercise of his rights as a member where such insistence amounts to an invasion and destruction of property rights of the society and of other members thereof;[51] but where the church and the church corporation are distinct bodies,[52] the discipline of a member of the church by the church will not affect his rights as a member of the church corporation in the management of the temporal affairs of the corporation,[53] nor, if it is wrongfully done, will it impose any liability upon the church corporation;[54] nor has a member of a church, even though representing the church in an official capacity, any power to bind the church corporation by his acts.[55] Where the trustees constitute the corporation,[56] members of the unincorporated society have no rights as corporate members and no standing in court as such.[57] Where the members of a congregation constitute the corporation[58] under a statute granting them limited powers,[59] members of the congregation have no power outside the powers enumerated.[60] A member of a church has not necessarily any implied authority as

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of membership is a violation of the charter, and a nullity. St. Luke's Church v. Mathews, 4 S. C. Eq. 578, 6 AmD 619.

[38] See statutory provisions.

[39] St. Luke's Church v. Mathews, 4 S. C. Eq. 578, 6 AmD 619.

[a] **Membership in parish based on residence.**—(1) Under the earlier statutes it was held that every resident of full age within the limit of a territorial parish, if otherwise qualified, was ipso facto a member of the parish unless regularly united as a member to some poll parish, and on ceasing to be a member of such poll parish he became forthwith a member of the territorial parish within which he resided, unless such secession was fraudulent (Lord v. Chamberlain, 2 Me. 67); (2) and persons who came to reside within the limits of a territorial parish, and did not belong to any other religious society, thereby became members of such parish without application for admission or acceptance (Osgood v. Bradley, 7 Me. 411); (3) and the sons of members of a parish, on coming of age and continuing to reside within the limits of the parish, became ipso facto members of the parish (Osgood v. Bradley, supra); (4) and on ceasing to be members of such parish became forthwith members of the territorial parish within which they resided, unless such secession was fraudulent (Lord v. Chamberlain, supra; Oakes v. Hill, 10 Pick. (Mass.) 333).

[b] **Division of a parish** by authorities of the Roman Catholic Church terminates membership and property rights of members of the new parish in the church and property of the old parish. In re St. Casimir's Polish Roman Catholic Church, 273 Pa. 494, 117 A 219.

[40] Oakes v. Hill, 10 Pick. (Mass.) 333.

[41] Colburn v. Ellis, 7 Mass. 89.

[42] See cases infra this note.

[a] **Membership in parish based on consent.**—(1) The inhabitants of a town are not necessarily and of course members of a parish included within its limits. Bradford v. Cary, 5 Me. 339 (holding that members of an incorporated universalists' society are not members of the parish, and cannot become so except upon application and acceptance by the parish which must be in the prescribed statutory mode); Dillingham v. Snow, 3 Mass. 276 (holding that Quakers, for instance, and others exempted in conformity to their religious scruples and opinions, although members of a town, are not members of a parish comprehended by the same boundaries). (2) The relation of a member to a parish is founded on contract, and no person becomes a member until his written application has been acted upon. Sudbury First Parish v. Stearns, 21 Pick. (Mass.) 148 (holding that no person can be made or become a member of any religious society without its consent, and that too evidenced by a written application; and on the other hand, no person can thrust himself into any such body against its will, the authority to prescribe the mode of admitting members necessarily implying the power of determining whether they shall be admitted or not, which power may be exercised by a direct vote of the parish). (3) Where a person is admitted to be a member of a parish by vote and attends subsequent meetings and votes as a member, he is a member, although he may not have filed a certificate in accordance with St. (1823) c 106 (Chase v. Merrimack Bank, 19 Pick. (Mass.) 564, 31 AmD 163), (4) and that statute does not repeal St. [1811] c 6, and does not require a certificate of membership to be filed by the member, but only by his authority or subsequent ratification (Fisher v. Whitman, 13 Pick. (Mass.) 350). (5) A membership certificate is a document of which the clerk of an ecclesiastical society can give an official copy, and such a copy is sufficiently formal if made by a clerk signing his name, with the addition of "clerk" only. Price v. Lyon, 14 Conn. 279.

[43] See cases supra note 39.

[44] Leavitt v. Truair, 13 Pick. (Mass.) 111.

[45] Com. v. Morrison, 13 Phila. (Pa.) 135.

[46] Day v. Bolton, 12 N. J. L. 206 [cit and appr Cammeyer v. United German Lutheran Church, 2 Sandf. Ch. (N. Y.) 186]; Cape v. Plymouth Cong. Church, 130 Wis. 174, 109 NW 928.

[47] Yanthis v. Kemp, 43 Ind. A. 203, 85 NE 976, 86 NE 451.

[48] See infra § 25.

[49] Munsel v. Boyd, 10 Oh. Cir. Ct. N. S. 121, 30 Oh. Cir. Ct. 182; Munsel v. Boyd, 10 Oh. Cir. Ct. N. S. 121, 30 Oh. Cir. Ct. 182; Cohen v. Hazen Ave. Synagogue Cong., 47 N. B. 400.

[50] Permanent Committee of Missions, etc. v. Pacific Synod Presb. Church, 157 Cal. 105, 106 P 395; Lucas v. Case, 9 Bush (Ky.) 297; Cape v. Moore, 122 Okl. 229, 253 P 506; Clark v. Brown, (Tex. Civ. A.) 108 SW 421 [rev on other grounds 102 Tex. 323, 116 SW 360, 24 LRANS 670].

Church tribunals and judicial or legislative supervision see infra §§ 189–196.

"Religious societies are regarded by the civil authority as other voluntary associations, the individual members and separate bodies of which will be held to be bound by the laws, usages, customs, and principles, which are accepted among them, upon the assumption that in becoming parts of such organisms they assented to be bound by those laws, usages, and customs, as so many stipulations of a contract between them." Louisville First Presb. Church v. Wilson, 14 Bush (Ky.) 252, 256.

[51] Blount v. Sixteenth St. Baptist Church, 206 Ala. 423, 90 S 602; Ashinsky v. Levenson, 256 Pa. 14, 100 A 491, LRA1917D 994.

[52] See supra § 22.

[53] Hartford First Baptist Church v. Witherell, 3 Paige (N. Y.) 296, 24 AmD 223.

[54] Hardin v. Baptist Church, 51 Mich. 137, 16 NW 311, 47 AmR 555.

[55] Allen v. North Des Moines M. E. Church, 127 Iowa 96, 102 NW 808, 109 AmSR 366, 69 LRA 255.

[56] See supra § 22.

[57] Shaeffer v. Klee, 100 Md. 264, 59 A 850.

[58] See supra § 22.

[59] See statutory provisions.

[60] See cases infra this note.

[a] **Visitorial powers.**—The male members of a congregation incorporated under an act which empow-

such to bind the church to payment of expenses of an inquiry undertaken by the member in its behalf,[61] nor will the knowledge of the member of the terms of an insurance policy taken out by the member on the church be imputed to other members of the church society ignorant of the transaction.[62]

[§ 26] **C. Liabilities of Member—1. For Debts of Society.** A member of an unincorporated religious society not organized for gain or profit is not individually liable for its debts,[63] unless he authorized the incurring of the obligation or subsequently ratified the same.[64] A fortiori, members of an unincorporated religious society instrumental in organizing a religious corporation are not liable as members of the society for debts incurred by the corporation with persons who dealt with the corporation as such.[65] The members of a voluntary unincorporated religious society who through their trustees and priest enter into contracts are individually liable thereon,[66] as are also members of a church upon a contract adding "trustees" to their names to indicate that the legal interest is in them.[67] A member of an incorporated religious society is not individually liable for its debts, unless made so by the provisions of the charter.[68] A fortiori, private property of members of a church cannot be taken to satisfy a debt of a church corporation.[69] But when necessary to prevent a failure of justice equity will follow property of the society into the hands of its members among whom it had been divided to the prejudice of the rights of plaintiff.[70]

[§ 27] **2. Taxes and Assessments.**[71] Under early statutes,[72] support of public worship was compulsory and members of parishes were liable for payment of taxes levied for that purpose.[73] Following the law governing liability of members of non-religious societies,[74] the members of a religious society are liable to assessments for support of the church[75] and the right to levy the assessments and the manner of enforcing them are governed by the charter, constitution, and by-laws of the association.[76] In the absence of any express power in the constitution authorizing assessments on members, there is an implied power to make assessments for the support of activities within the terms of the charter,[77] the amount to be determined by the membership of the society.[78]

[§ 28] **D. Withdrawal and Expulsion—1. Manner and Grounds.** The essence of the relation between a member and the society which he has joined being the agreement of the parties,[79] the relation can be terminated in like manner as other agreements,[80] by mutual action of the parties,[81] or where the statute so provides,[82] by the withdrawal of the member

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ers them to elect trustees to manage its property are invested with no visitorial or controlling power over the ministers or trustees or interest in the property of the corporation, or with any authority except in the case of selling or leasing, or in amending the articles when the consent of two thirds is required. Tartar v. Gibbs, 24 Md. 323.

[61] See cases infra this note.

[a] **Inquiry into conduct of pastor.**—Where a member of a church expended money and rendered services in procuring the suspension of the pastor of the church for immoral conduct, although the rules of the church gives any member power to prosecute charges against the pastor, no authority to act for the church can be inferred from the nature of the services rendered by the member. Parshley v. Third M. E. Church, 4 Misc. 302, 24 NYS 106 [aff 147 N. Y. 583, 42 NE 15, 30 LRA 574].

[62] Concordia F. Ins. Co. v. Waterford, 145 Ark. 420, 224 SW 953, 13 ALR 1387.

[63] Plattsmouth First Nat. Bank v. Rector, 59 Nebr. 77, 80 NW 269.

[a] **Early New England usage.**—(1) By the usage and practice in some of the New England states, inhabitants of a parish were liable for the debts of the parish (Fernald v. Lewis, 6 Me. 264; Chase v. Merrimack Bank, 19 Pick. (Mass.) 564, 31 AmD 163); (2) but the remedy for satisfaction of a judgment against a parish by levy on the property of its members could be pursued against those only who were members at the time of the rendition of judgment, or, at furthest, at the time of commencement of the action (Fernald v. Lewis, supra), (3) and it was held that execution could not be levied on the property of one who was a member at the time of the rendition of judgment and ceased to be a member before the levy (Chase v. Merrimack Bank, supra), (4) and the rule was held to be further limited to members of territorial parishes not incorporated poll parishes (Richards v. Butterfield, 6 Cush. (Mass.) 191).

[64] Clark v. O'Rourke, 111 Mich. 108, 69 NW 147, 66 AmSR 389; Mood v. Methodist Episcopal Church South, (Tex. Civ. A.) 289 SW 461 [aff (Commn. A.) 296 SW 506].

[65] Kemp v. New Mexico Annual Conference M. E. Church South, 25 N. M. 418, 184 P 484.

[66] Brown v. Weir, (Tex. Civ. A.) 293 SW 916; Sheehy v. Blake, 72 Wis. 411, 39 NW 479, 77 Wis. 394, 46 NW 537, 9 LRA 564.

[67] Chick v. Trevett, 20 Me. 462, 37 AmD 68.

[a] **Minister's salary.**—If members of a voluntary religious association agree to hire a minister, and maintain a place of public worship, all contracts with such minister or with each other are binding, and they cannot discharge themselves from the obligations of a contract to pay for the support of the preaching by changing their religious sentiments, but only be discharged by vote of the society, appearing of record. Woodstock First Cong. Soc. v. Swan, 2 Vt. 222.

[68] Jewett v. Thames Bank, 16 Conn. 511; Richardson v. Butterfield, 6 Cush. (Mass.) 191.

[69] Allen v. North Des Moines M. E. Church, 127 Iowa 96, 102 NW 808, 109 AmSR 366, 69 LRA 255.

[70] Bigelow v. Middletown Cong. Soc., 15 Vt. 370, 11 Vt. 283.

[71] **Ministers exempt** see infra § 90.

Taxes on pews see infra §§ 184, 185.

[72] See statutory provisions.

[73] Conn.—Lord v. Marvin, 1 Root 330; Hosford v. Lord, 1 Root 325.

Me.—Dall v. Kimball, 6 Me. 171.

Mass.—West Newbury First Parish v. Dow, 3 Allen 369; Ware v. Sherburne First Parish, 8 Cush. 267; Sherburne First Parish v. Fiske, 8 Cush. 264, 54 AmD 755; Dow v. Sudbury First Parish, 5 Metc. 73; Goodell Mfg. Co. v. Trask, 11 Pick. 514; Oakes v. Hill, 10 Pick. 333; Inglee v. Bosworth, 5 Pick. 498, 16 AmD 419; Holbrook v. Holbrook, 1 Pick. (Mass.) 248; Whittemore v. Smith, 17 Mass. 347; Amesbury Nail Factory Co. v. Weed, 17 Mass. 53; Coburn v. Richardson, 16 Mass. 213; Turner v. Burlington Parish, 16 Mass. 208; Adams v. Howe, 14 Mass. 340, 7 AmD 216; Sanger v. Roxbury Third Parish, 8 Mass. 265; Lovell v. Byfield Parish, 7 Mass. 230; Turner v. Brookfield Second Precinct, 7 Mass. 60; Kendall v. Kingston, 5 Mass. 524; Thaxter v. Jones, 4 Mass. 570; Montague v. Dedham First Parish, 4 Mass. 269; Washburn v. West Springfield Fourth Parish, 1 Mass. 32.

N. H.—Muzzy v. Wilkins, Smith 1.

Pa.—Ebaugh v. Hendel, 5 Watts 43, 30 AmD 291.

[74] See Beneficial Associations § 73.

[75] Mayberry v. Mead, 80 Me. 27, 12 A 635.

[76] Perrin v. Granger, 30 Vt. 595.

[77] Bradley v. Cincinnati Camp Meeting Assoc., 9 Oh. A. 321.

[78] Bradley v. Cincinnati Camp Meeting Assoc., supra.

[79] See supra § 24.

[80] Leavitt v. Truair, 13 Pick. (Mass.) 111; Cammeyer v. United German Lutheran Churches, 2 Sandf. Ch. (N. Y.) 186.

[81] See cases infra this note.

[a] **Withdrawal before acted upon.**—A withdrawal by an inferior ecclesiastical corporation which had been connected with and subject to the superior jurisdiction of the church, from all connection with such church, does not affect the property rights of the seceding body, so as to deprive any person of membership, until some action is taken in the matter by the superior church authorities. American Primitive Soc. v. Pilling, 24 N. J. L. 653.

[82] See statutory provisions.

without subsequent action thereon by the society.[83] Persons induced by fraud to become members may on that ground have their membership canceled in a court of equity.[84] Where neither the charter nor by-laws of a corporation prescribe any particular form in which the members may resign their rights of membership, and their resignation be accepted, such resignation and acceptance may be by parol[85] or implied from the acts of the parties,[86] as by refusing to accept and act under the established confession of faith and constitution of the church,[87] the member's constitutional right to freedom of conscience and worship giving him no right to membership in a church whose faith he repudiates;[88] or, even though he has not changed his faith,[89] by withdrawing from attendance and worship, discontinuing support and uniting to establish another society.[90] And so where a member of a parish joins with others in incorporating a new society, he ceases to be a member of the parish,[91] but absence from the society, explained on other grounds, is not voluntary withdrawal.[92] Nor does the fact that a member of one of two churches tentatively becomes a member of a new organization for the purpose of bringing about a union of the two churches operate as a voluntary withdrawal from membership in the original church.[93] A mere attempt to suspend membership, in the absence of authority in constitution or by-laws for the suspension, is ineffective and members making the attempt still retain their membership.[94] And a pretended and colorable secession with fraudulent intent to accomplish thereby a transfer of property to others is ineffectual and void.[95] A division in a church as distinguished from a division from a church, does not operate necessarily as a forfeiture of membership for the members of either faction.[96] Members of both factions retain their membership even though the minority exclude the majority from possession and enjoyment of the church property,[97] or there is a conditional separation into two bodies with the consent and approval of the majority, pending a contemplated division of the property,[98] or a faction voluntarily meets in another building than the church edifice,[99] or even forms a society of its own with its own minister and officers, where the separation is explained on grounds consistent with the desire of the members to retain their membership in the original congregation,[1] or where the separation is discontinued and the separating members return to the original society,[2] or even though there is a difference of opinion as to doctrine, the constitution providing no way for determining the differences.[3]

Evidence of voluntary withdrawal. Any evidence upon which the inference of a voluntary withdrawal of members from a religious society might be based is admissible,[4] what amounts to a voluntary withdrawal being a question of law for the court.[5] Voluntary withdrawal is sufficiently shown by a certificate of the clerk of the society that the name of the member has been taken off of the membership roll at his own request,[6] but the schedule of members, as copied from the records, is not conclusive,[7] nor is a letter of dismission conclusive evidence of withdrawal.[8]

Grounds of forfeiture; expulsion. Where religious societies, not restricted by their charters or articles of association, make by-laws declaring that failure to conform thereto shall operate as a forfeiture of membership, failure to abide by the by-laws will forfeit membership.[9] In whom the power to expel a member lies depends, in the case of unincorporated societies, upon the rules and usages of the society or of the denomination to which it belongs,[10] such power having been held to be in the local congregations,[11] or, in the case of schism, in the part thereof adhering to the organization and doctrines of the church,[12] or in the deacons of an unincorporated church to whom the governing power has been delegated by the church.[13] The power to expel members cannot be arbitrarily exercised by the governing board where property rights are involved,[14] but expulsion or acts tantamount thereto, by a proper board in a proper way, will not be enjoined by the court where no property rights are involved.[15] When a vote of excommunication from a church has been passed, and the offender thereby declared to be no longer a member, the sentence may nevertheless be promulgated, by being read in the presence of the congregation, by the pastor, and will not support the prosecution of an action for libel;[16] but excommunication whether with or without authority cannot affect the expelled person's civil rights.[17]

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[83] Fernald v. Lewis, 6 Me. 264.

[84] Hansel v. Purnell, 1 F. (2d) 266 [certiorari den 266 U. S. 617 mem, 45 SCt 98 mem, 69 L. ed. 470 mem].

[85] State v. Ancker, 31 S. C. L. 245.

[86] State v. Ancker, supra.

[a] **Withdrawal from parish.**—(1) In New England, under the earlier statutes, any person might separate from one religious society and join another, either of the same or of a different denomination, by filing with the clerk of the society left a certificate or written notice of the fact (Jones v. Cary, 6 Me. 448; Gage v. Currier, 4 Pick. (Mass.) 399); (2) but statutory provisions relating to the manner of withdrawal from parish membership were held not to prohibit a withdrawal in a manner other than prescribed therein (Leavitt v. Truair, 13 Pick. (Mass.) 111; Oakes v. Hill, 10 Pick. (Mass.) 333. But see Jones v. Cary, supra), (3) although the filing of a certificate prescribed by statute might be necessary in order to secure an exemption from taxation (Leavitt v. Truair, supra).

[87] Lamb v. Cain, 129 Ind. 486, 29 NE 13, 14 LRA 518; Lindstrom v. Tell, 131 Minn. 203, 154 NW 969.

[88] Smith v. Pedigo, 145 Ind. 361, 33 NE 777, 44 NE 363, 19 LRA 433, 32 LRA 838.

[89] Day v. Bolton, 12 N. J. L. 206 [cit and appr Cammeyer v. United German Lutheran Churches, 2 Sandf. Ch. (N. Y.) 186].

[90] Cammeyer v. United German Lutheran Churches, 2 Sandf. Ch. (N. Y.) 186.

[91] Sutton First Parish v. Cole, 8 Mass. 96.

[92] See cases infra this note.

[a] **Pastoral work elsewhere.**—Membership in a monastic brotherhood is not terminated by absence from the abbey while engaged in pastoral work. New Jersey Order of St. Benedict v. Steinhauser, 234 U. S. 640, 34 SCt 932, 58 L. ed. 1512, 52 LRANS 459, AnnCas1917A 463 [aff 179 Fed. 137, and rev 194 Fed. 289, 114 CCA 249].

[93] Schrag v. Schrag, 113 Kan. 613, 215 P 1010.

[94] Marks v. Congregation Daruch Amuno, 5 Daly (N. Y.) 8.

[95] Lord v. Chamberlain, 2 Me. 67.

[96] West Koshkonong Cong. v. Otteson, 80 Wis. 62, 49 NW 24.

[97] Deaderick v. Lampson, 11 Heisk. (Tenn.) 523.

[98] Wiswell v. Cincinnati First Cong. Church, 14 Oh. St. 31.

[99] Perry v. Tupper, 74 N. C. 722.

[1] See cases infra this note.

[a] **Instruction in different language.**—The formation of a society, distinct from the rest of the congregation, for the instruction of a portion of it in the doctrines of the same church, in another language, is not per se a separation from the original congregation, although such society has a minister and officers of its own; but it is a circumstance for the consideration of the jury. Weckerly v. Geyer, 11 Serg. & R. (Pa.) 35.

[2] Peterson v. Samuelson, 42 Nebr. 161, 60 NW 347.

[3] St. Cloud German Evangelical Soc. v. Henschell, 48 Minn. 494, 51 NW 477; East Norway Lake Norwegian Evangelical Lutheran Church v. Halvorson, 42 Minn. 503, 44 NW 663.

[4] Perry v. Tupper, 74 N. C. 722.

[5] Perry v. Tupper, supra.

[6] Oakes v. Hill, 10 Pick. (Mass.) 333.

[7] Fletcher First Universalist Soc. v. Leach, 35 Vt. 108.

[8] Louisville First Presby. Church v. Wilson, 14 Bush (Ky.) 252.

[9] Taylor v. Edson, 4 Cush. (Mass.) 522; Fairchild v. Tillotson, 195 NYS 39.

[10] See cases infra notes 11–13.

[11] Igleheart v. Rowe, 47 SW 575, 20 KyL 821.

[12] Everett v. Jennings, 137 Ga. 253, 73 SE 375.

[§ 29] **2. Rights of Member after Withdrawal or Expulsion.** The rights of a member after withdrawal[18] or expulsion from a religious society[19] are to be determined by reference to its constitution and charter.[20] As a general rule the rights of a member are dependent on the continuance of his membership, and when he ceases to be a member his rights and beneficial interest in the property of the association ceases,[21] and thus an excommunicated or expelled member has no such beneficial interest in the church property as will authorize him to sue in relation thereto,[22] unless the expulsion was in pursuance of a fraudulent scheme to gain control of the property.[23] The courts have no jurisdiction over ecclesiastical processes to compel a restitution of membership privileges to an expelled member independently of violation of his constitutional rights of property and contract,[24] but his civil rights remain unimpaired,[25] as, for example, his right to maintain an action to enjoin expulsion;[26] or to compel restoration to membership, if the threatened expulsion or the expulsion had been by methods violating the constitution and rules of the society,[27] or involved the member's property or contract rights;[28] or his right to sue for libel if the excommunication was wrongful and injured him;[29] or to maintain an action for the protection of the church property, if the expulsion was in pursuance of a fraudulent scheme to obtain control thereof.[30] He has no right to recover for loss occasioned by the expulsion per se, independently of its wrongful character, such loss being damnum absque injuria.[31] An expelled member cannot maintain a suit to compel restoration to a church membership on the ground that such restoration is necessary to enable him to enjoy the right of sepulture, acquired by him as a member, such action being held by the court to be premature.[32]

III. MEETINGS AND ELECTIONS

[§ 30] **A. In General.** A meeting of its members properly called and organized is a necessity to the validity of any action a religious society or congregation may take wherever the constitution of the society so prescribes,[33] or wherever the action of a congregation as such is in issue,[34] although the society records of a meeting irregularly called may have value as evidence.[35] A meeting of church members is not, however, a meeting of an incorporated society with which the church is affiliated, where the two bodies are distinct,[36] and where the corporation by the terms of its constitution consists of two bodies, a meeting of one body will not be regarded as a meeting of the corporation.[37]

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[13] Fulbright v. Higginbotham, 133 Mo. 668, 34 SW 875.

[14] Holcombe v. Leavitt, 124 NYS 980.

[a] **Expulsion to prevent change in by-laws.**—Where a portion of the members of an incorporated church desired a change in the by-laws, and a committee appointed by the congregation had prepared new by-laws to be voted on, notice of which is required by statute to be given at church service on two successive Sunday mornings by an officer of the church, the church committee and those having control of the organization of the church, being opposed to the change, had no authority to expel members and officers favorable to the change, in order to prevent notice and an election to determine whether the change should be effected. Holcombe v. Leavitt, 124 NYS 980.

[15] Minton v. Leavell, (Tex. Civ. A.) 297 SW 615.

[a] **The adoption of a resolution** requiring members to repledge their allegiance to the faith and teachings of the church, even though the result is to sever the fellowship of some members with the church, is properly within the power of the majority of the members of a church having the congregational form of church organization, and if passed at a meeting duly called and there are no property rights involved, cannot be made the ground for an injunction against the majority putting the resolution into effect. Minton v. Leavell, (Tex. Civ. A.) 297 SW 615.

[16] Farnsworth v. Storrs, 5 Cush. (Mass.) 412.

[17] See infra § 29.

[18] Christian Church v. Crystal, 78 Cal. A. 1, 247 P 605.

[19] Grosvenor v. Believers United Soc., 118 Mass. 78; German Reformed Church v. Com., 3 Pa. 282.

[20] See cases supra notes 18, 19.

[21] St. John's Church v. Hanns, 31 Pa. 9; Nance v. Busby, 91 Tenn. 303, 18 SW 874, 15 LRA 801.

[22] Burke v. Roper, 79 Ala. 138; Brunnenmeyer v. Buhre, 32 Ill. 183; Shannon v. Frost, 3 B. Mon. (Ky.) 253; Nance v. Busby, 91 Tenn. 303, 18 SW 874, 15 LRA 801.

[23] See cases infra note.

[24] Peo. v. German United Evangelical St. Stephen's Church, 53 N. Y. 103 [rev 6 Lans. 172 (rev 3 Lans. 434)].

[25] See cases infra notes 26–30.

[26] Slaughter v. New St. John Missionary Baptist Church, 8 La. A. 430.

[27] Taylor v. Jackson, 273 Fed. 345.

[28] Clapp v. Krug, 232 Ky. 303, 22 SW (2d) 1025.

[29] Fitzgerald v. Robinson, 112 Mass. 371.

[30] Hendryx v. People's United Church, 42 Wash. 336, 84 P 1123, 4 LRANS 1154.

[31] Kauffman v. Plank, 214 Ill. A. 290.

[a] **Expulsion resulting in breach of contract.**—In trespass against bishops of a church for expelling plaintiff from membership, where damages were sought because such expulsion caused plaintiff's father-in-law to break a contract he had with plaintiff, the injury was not one for which redress could be had in a civil court. Kauffman v. Plank, 214 Ill. A. 290.

[32] State v. Hebrew Cong., etc., 31 La. Ann. 205, 33 AmR 217.

[a] **"The relator has happily no present need of enforcing his claim to burial anywhere,** and non constat that before he does need it, he will have his ban of excommunication removed, and be restored to full fellowship in the congregation." State v. Hebrew Cong. Dispersed of Judah, 31 La. Ann. 205, 209, 33 AmR 217.

[33] German Evangelical Cong. v. Pressler, 14 La. Ann. 799; Grupe v. Rudisill, (N. J. Ch.) 144 A 874.

[34] McAuley's App., 77 Pa. 397, 419.

"The congregation, as such, has but one constitutional method by which it can express itself, and that is by congregational meetings regularly called." McAuley's App., supra.

[35] See case infra this note.

[a] **Rebutting presumption of title.**—Where a parish for eight years had been in possession of a bell placed in the belfry of the parish church, the records of a parish meeting, there being no evidence that it was regularly called, at which the parish took action permitting a committee of subscribers to place the bell in the belfry, was admissible to show title to the bell in the committee and not in the parish. West Springfield Fourth Parish v. Root, 18 Pick. (Mass.) 318.

[36] Pittsburg Baptist Cong. v. Scannel, 3 Grant (Pa.) 48.

[§ 31] **B. Organization and Conduct**[38]**—1. In General.** The mode of conducting meetings and elections must conform to the requirements of statute or charter,[39] and where a statute and by-law are inconsistent, the statute controls.[40] Where the statute or charter is silent, the conduct of meetings and elections will be governed by rules and by-laws made by the society,[41] and in the absence of by-law a long established usage will govern.[42] The conduct of meetings and elections will not be governed by by-laws, rules, or votes outside the power of the society to make.[43] Disorderly conduct by some members present at a meeting resulting in others leaving will not invalidate the action taken, where the conduct did not amount to duress.[44]

[§ 32] **2. Enrollment and Quorum.**[45] Constitutional and statutory requirements as to enrollment[46] and a quorum at meetings of a religious society must be complied with,[47] as, for example, that enrollment shall be made by a committee appointed at the meeting, and not by the person functioning as enrollment officer up to the time of the meeting,[48] that a majority[49] or two-thirds of the members shall be present.[50] A constitutional provision that the management of affairs shall be vested in the "whole congregation" is construed to mean merely that every member of the congregation shall have the right and opportunity to be present at a meeting, not that every member must be present and vote before any action can be taken.[51] In the absence of constitutional and statutory requirements and where the organization of the church is congregational,[52] or where in the case of a religious corporation the corporators are indefinite,[53] a quorum for the purposes of election and voting upon other questions which require the sanction of the members, consists of those who assemble at any meeting regularly called and warned, although such members may be a minority of the whole, in which case a majority of those who assemble may elect, unless there is a different rule established by statute or a valid by-law.[54] A statement in the minutes that a meeting was held is equivalent to a statement that a quorum was present, in the absence of any showing to the contrary.[55]

[§ 33] **3. Moderator or Chairman.** Express requirements in statute or in the form of church government as to the person who shall preside at meetings must be complied with,[56] as, for example, that he shall be the pastor[57] or elder or church-warden, or in their absence a member of the society,[58] or that he shall be a member of the parish or society in charge of its temporalities when the meeting is a meeting of that body;[59] and in the latter case the pastor or rector has no right by virtue of his office to preside.[60] Prior to the election of a moderator the meeting may be called to order and the vote for moderator declared by a private parishioner who assumes that authority to himself.[61]

[§ 34] **4. Election Inspector.** In religious corporations the election inspectors must finally determine upon the qualification of an elector when he offers his vote, and before he casts it; after they have received it they cannot throw it out on the ground that he was not qualified,[62] and the only duty that then remains for them to perform is to count the ballots and return the number of votes received and the names of those having the greatest number.[63]

[§ 35] **C. Notice, Time, and Place**[64]**—1. In General.** A meeting of a religious society, to be valid, must conform with the requirements of its articles of association, statute, charter or by-law in the notice given, and as to the time and place where the meeting is held,[65] although statutes are given a reasonable and liberal construction for the benefit of the churches.[66] In the absence of controlling statutory requirements, compliance with the constitution and by-laws of the society are sufficient,[67] and in absence of provision in statute, constitution, or by-laws, notice given in accordance with the immemorial usage of the society will be valid,[68] and a notice not in conformity thereto is invalid.[69] If a statute requires notice,[70] a meeting held without notice,[71] or with notice to a part but not all of the members[72] is void, although for a number of years meetings have been held without notice,[73] and the society has no power to dispense with such notice.[74] If a statute requires notice to be given by a particular person or committee,[75] the notice must be given by the designated person or committee,[76] as by the chairman and clerk of the vestry in calling a meeting of the proprietors of a Protestant Episcopal church,[77] or by the session.[78]

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[37] German Evangelical Cong. v. Pressler, 14 La. Ann. 799.

[38] **Number of votes required for valid action** see infra § 42.

[39] Dayton v. Carter, 206 Pa. 491, 56 A 30.

[40] St. Luke's Church v. Matthews, 4 S. C. Eq. 578, 6 AmD 619.

[41] Juker v. Com., 20 Pa. 484; Com. v. Woelper, 3 Serg. & R. (Pa.) 29, 8 AmD 628.

[42] Juker v. Com., 20 Pa. St. 484.

[43] Christ Church v. Pope, 8 Gray (Mass.) 140.

[a] **Vote at prior annual meeting.**—The vote of a religious society, assembled at its annual meeting for the election of officers, and having no power over the election of officers at the next succeeding annual meeting, that the officers shall be always chosen by ballot, does not invalidate an election of officers by hand vote at a subsequent annual meeting. Christ Church v. Pope, 8 Gray (Mass.) 140.

[44] Stryjewski v. Panfil, 269 Pa. 568, 112 A 764.

[45] **Number of votes required for valid action** see infra § 42.

[46] Dickson v. Wilson, (Tex. Civ. A.) 21 SW (2d) 1072.

[47] See cases infra this section.

[48] Dickson v. Wilson, (Tex. Civ. A.) 21 SW (2d) 1072.

[49] See cases infra this note.

[a] **Majority of vestry.**—Under a statute requiring a majority of the vestrymen to be present, the majority of that body must not only exist at the time when any act is to be done by them, but a majority of them must attend the assembly where the act is to be done. Moore v. St. Thomas Church, 4 AbbNCas (N. Y.) 51.

[50] Com. v. Woelper, 3 Serg. & R. (Pa.) 29, 8 AmD 628.

[51] Duessel v. Proch, 78 Conn. 343, 62 A 152, 3 LRANS 854.

[52] Barton v. Fitzpatrick, 187 Ala. 273, 65 S 390; Bogard v. Boone, 200 Ky. 572, 255 SW 112.

[53] Madison Ave. Baptist Church v. Oliver St. Baptist Church, 28 N. Y. Super. 649, 2 AbbPrNS 254 [rev on other grounds 46 N. Y. 131]; Craig v. Pittsburgh First Presb. Church, 88 Pa. 42, 32 AmR 417; Applequist v. Seattle Swedish Evangelical Lutheran Gethsemane Church, 154 Wash. 351, 282 P 224.

[54] See infra § 42.

[55] Com. v. Woelper, 3 Serg. & R. (Pa.) 29, 8 AmD 628.

[56] See cases infra this section.

[57] See case infra this note.

[a] **That pastor shall be moderator.**—Where the requirement of the form of government of the church expressly directs that the pastor shall always be the moderator of the session, a meeting of the session for the election of elders is invalid where the pastor was not present and no one was appointed by him to preside. Dayton v. Carter, 206 Pa. 491, 56 A 30.

[58] See case infra this note.

[a] **A clergyman or preacher** in a baptist church is not an elder, within the meaning of the statute providing that at elections of trustees two of the elders or churchwardens must preside, and if there be no such officers, then two of the members may preside. Peo. v. Peck, 11 Wend. (N. Y.) 604, 27 AmD 104.

[59] State v. Stewart, 11 Del. 359.

[60] State v. Stewart, supra.

[61] Jones v. Cary, 6 Me. 448.

[62] Hartt v. Harvey, 32 Barb. (N. Y.) 55, 10 AbbPr 321; Peo. v. White, 11 AbbPr (N. Y.) 168.

[63] See cases supra note 62.

[64] **Notice of meeting to authorize alienation** see infra § 133.

[65] San Francisco First African M. E. Zion Church v. Hillery, 51 Cal. 155; Kerr v. Hicks, 154 N. C. 265, 70 SE 468, 33 LRANS 529; Ehrenfeldt's App., 101 Pa. 186. See also cases infra this section.

[66] See case infra this note.

[a] **Annual election held on movable holiday.**—Where the trustees of a church were required by statute

Elections. To constitute a valid election notice must be given in conformity to the charter, constitution, and by-laws.[79] If rules provide for election on a certain day upon specified notice, an election on a different day without notice,[80] or without notice given at the time provided for[81] is void, unless it appears that the voters were fully apprised of the election and all attended and exercised their rights and the election was fairly conducted.[82] Where statute or by-laws provide that an election can be postponed only by action taken at the meeting for which the election was originally called,[83] a postponement by order of the trustees issued at a time prior to the holding of the meeting is void.[84] The election must be held at the usual,[85] or designated,[86] place of meeting, unless the usual place of meeting has been changed, in which case an election at the old place of meeting is invalid.[87] If the meeting-house where the meeting is usually held is locked, the meeting may be held at the door or at the nearest practicable place.[88] Where a church charter requires elections to be held at the annual meeting, but there is no by-law or custom proved fixing the time of the annual meeting, the validity of an election cannot be attacked on the ground that the time of meeting when the election was held did not conform to a custom followed by a faction of the church after the division.[89]

[§ 36] **2. Contents of Notice.** As a general rule the notice or warrant contains a warning of such matters as will come before the meeting,[90] and it must do so when a special meeting is being called for the transaction of unusual and important business,[91] or where the statute or charter or by-laws requires it.[92] The fact that notice of a meeting of a religious corporation contained also notice of a class meeting to be held at the same time and place will not invalidate the corporate meeting in the absence of evidence that any member's rights were affected thereby.[93] But a notice which by its terms deprives members of their rights under the statute to attend the meeting and vote is invalid.[94]

[§ 37] **3. Proof of Notice.** The legality of a parish meeting is sufficiently proved by showing that it was notified and warned in due form by those claiming to act as the legally qualified officers of the so-

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to be divided into three classes, and the seats of one class were to be vacated at the expiration of every year, and the statute provided that one third should be annually chosen, and that the time of the annual election should be at least six days before the vacancies should occur, and the annual election was held on a movable holiday, by which means in some years the election would not be at least six days before the happening of the vacancies, such election was valid. Peo. v. Runkle, 9 Johns. (N. Y.) 147.

[67] Uzzell v. McClelland, 65 Colo. 324, 176 P 304.

[68] Hubbard v. German Catholic Cong., 34 Iowa 31; Boston First African M. E. Soc. v. Worthy, 232 Mass. 331, 122 NE 289.

[a] **By ringing church bell.**—Notice of a meeting given by ringing the church bell is sufficient where that is shown to be the customary way of calling church meetings. Hubbard v. German Catholic Cong., 34 Iowa 31.

[69] Ebenezer Baptist Church v. Thompson, 45 R. I. 263, 121 A 530.

[70] See statutory provisions.

[71] Hicock v. Hoskins, 4 Day (Conn.) 62; Baum v. Wicklein, 2 Woodw. (Pa.) 242.

[72] Syrian Antiochean St. George Orthodox Church v. Ghize, 258 Mass. 74, 154 NE 839.

[73] Hicock v. Hoskins, 4 Day (Conn.) 62.

[74] Bethany Cong. Soc. v. Sperry, 10 Conn. 200.

[75] See statutory provisions.

[76] Bethany Cong. Soc. v. Sperry, 10 Conn. 200; Schilstra v. Van Den Heuvel, 82 N. J. Eq. 155, 90 A 1056 [mod on other grounds 82 N. J. Eq. 612, 90 A 1056]; Cameron v. St. Luke's Presb. Cong., 59 N. S. 272, [1927] 2 DomLR 760.

[a] **In Massachusetts** (1) under early statutes, a justice of the peace could call a meeting of a religious society on the application of five or more of the qualified voters where there were no assessors or committee qualified to call a meeting, or where they unreasonably refused to call such meeting, and these were conditions precedent to his authority (Sudbury First Parish v. Sterns, 21 Pick. 148); (2) but the meeting called by the justice on such application was held to be properly called and was a legal meeting, although it was not stated in the application or recited in the warrant, that there were no assessors or parish committee (Ladd v. Clements, 4 Cush. 476), (3) and the statute was held to apply to a parish that had once been legally organized, but which, for the want of officers or any other cause, was unable to assemble in the usual manner (Wood v. Cushing, 6 Metc. 448).

[77] Christ Church v. Pope, 8 Gray (Mass.) 140.

[78] Cameron v. St. Luke's Presb. Cong., 59 N. S. 272, [1927] 2 DomLR 760.

[79] Smith v. Erb, 4 Gill (Md.) 437.

[80] San Francisco M. E. Zion Church v. Hillery, 51 Cal. 155.

[81] Dahl v. Palache, 68 Cal. 248, 9 P 94.

[82] Peo. v. Peck, 11 Wend. (N. Y.) 604, 27 AmD 104.

[83] See statutory provisions and by-laws.

[84] First Church of Christ Scientist v. Rentzel, 242 Mich. 120, 218 NW 652.

[85] Clapp v. Krug, 232 Ky. 303, 22 SW (2d) 1025; Miller v. English, 21 N. J. L. 317.

[a] **At house of trustee.**—Meetings of church members at house of one of them, instead of church, which was regular meeting place, without notice to congregation, were not church meetings, and election of trustees thereat conferred no authority on them to act as such and control church property as against trustees and majority of members joining another assembly. Ennix v. Owens, 209 Ky. 19, 271 SW 1091.

[86] Kerr v. Hicks, 154 N. C. 265, 70 SE 468, 33 LRANS 529.

[87] Miller v. English, 21 N. J. L. 317.

[88] American Primitive Soc. v. Pilling, 24 N. J. L. 653.

[89] Firestone v. First Slavish Roman Catholic Greek Rite Church, 215 Pa. 8, 63 A 1038.

[90] Tuttle v. Carey, 7 Me. 426; Canadian Religious Assoc. v. Parmenter, 180 Mass. 415, 62 NE 740.

[91] Barton v. Fitzpatrick, 187 Ala. 273, 65 S 390; Fiske v. Beaty, 120 Misc. 1, 198 NYS 358 [mod on other grounds 206 App. Div. 349, 201 NYS 441 (aff 238 N. Y. 598, 144 NE 907)].

[92] Tuttle v. Cary, 7 Me. 426; Downs v. Bowdoin Square Baptist Soc., 149 Mass. 135, 21 NE 294.

[a] **Reason for meeting omitted.**—(1) Where the constitution of an incorporated religious society requires notice to be given, with the reason for calling the meeting, the removal of a pastor at a meeting called by a notice which omits to state that such was the reason for calling it was invalid. Weber v. Zimmerman, 22 Md. 156. (2) An amendment of the charter of a religious society cannot be made at a meeting without a notice that the amendment would be proposed at the meeting. In re African M. E. Union Church, 28 Pa. Super. 193.

[93] Peo. v. African Wesleyan M. E. Church, 156 App. Div. 386, 141 NYS 394.

[94] St. Joseph's Lithuanian Roman Catholic Church's Pet., 270 Pa. 73, 112 A 754.

ciety,[95] and the return of the proper officer on the back of the notice is the only proper way of showing it.[96] Where the records of the meeting do not disclose that the necessary steps were taken, there is a presumption of regularity if the meeting was an annual or stated meeting and was held at the usual place and regular time,[97] or if it appears that there was a general acquiescence on the part of the members of the society in the holding of the meeting,[98] but no such presumption attaches to a special meeting held at an irregular time and place and under the protest of some of the members.[99]

[§ 38] **D. Persons Entitled To Vote—1. In General.** As a general rule, unless the right to vote is otherwise restricted,[1] every member of a religious society of full age is entitled to vote[2] until he voluntarily withdraws or is expelled from the society,[3] the right to vote not extending to non-members,[4] or to minors,[5] although contributing to the expenses of the society.[6] A person whose name appears on earlier church rolls, but not on the latest, is not a member entitled to vote,[7] notwithstanding no reason appears for the omission.[8] On the other hand the fact that a person's name still appears on the roll does not give him a right to vote where it appears aliunde that he had been received into membership of another church upon letter from the minister of the first.[9] In the absence of statute, by-laws, or custom, whether a member listed on the appendix or reserve roll of a Presbyterian church is entitled to vote depends in each case on whether a withdrawal or expulsion from membership is shown.[10] But also as a general rule, the right to vote is defined in provisions by which the society is governed,[11] and in that case the right to vote is restricted to those within the terms of the governing provision,[12] as, for example, to those who have partaken of the Holy Communion in a particular church,[13] or who shall have belonged to "such church,"[14] or been members thereof for the period stated in the church constitution;[15] or who shall be contributing members and communicants;[16] or who shall have contributed to the necessary church expenses,[17] or subscribed annually, not occasionally;[18] or who shall have attended for "at least one year" or contributed,[19] stated attendance being interpreted to mean personal presence of the voter as distinguished from presence of wife or other member of the family,[20] and regular as distinguished from occasional attendance,[21] and contribution to mean something "substantial and vital,"[22] not a contribution merely for the purpose of entitling the subscriber to vote;[23] or who, for one full year prior to the meeting, "holds a single sitting, whether occupied or not, duly paid for;"[24] or in more inclusive terms, to all attendants, or communicants, or pew holders, or contributors;[25] or who, being members of a religious corporation, are connected with that particular incorporated society as distinguished from the denomination at large,[26] their right to vote under the terms of the incorporating statute not being affected by their secession from the religious faith or ecclesiastical organization of the larger body.[27] Nonresidents induced by members of a church to become members for the sole purpose of voting are not entitled to vote.[28] Under the terms of a statute giving the chairman of the meeting "the casting vote,"[29] it has been held that the chairman having already voted as a member in an election resulting in a tie, may then exercise his right under the statute to break the tie by voting as chairman.[30] Under a statute so providing,[31] the presiding officer is the final arbiter on the question of fact whether a person claiming a right to vote has been a regular attendant and contributor for the required period.[32] A restriction on membership contained in the church constitution cannot be altered by by-law.[33]

[§ 39] **2. Deprivation of Right.** A deprivation of a member's right to vote has been held to result

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95. Tuttle v. Cary, 7 Me. 426.

96. Tuttle v. Cary, supra.

97. See Canadian Religious Assoc. v. Parmenter, 180 Mass. 415, 62 NE 740.

98. See infra § 43.

99. Canadian Religious Assoc. v. Parmenter, 180 Mass. 415, 62 NE 740.

1. See articles of association, charter, by-laws, and statutory provisions.

2. Keith v. Howard, 24 Pick. (Mass.) 292.

[a] **"Each member."**—Where the right to vote "upon all matters, touching the interests of the corporation" is secured by the charter to "each member," a further provision giving to pew owners the privileges of membership does not restrict the right of voting to them, but it belongs to every one admitted into the society by a majority of the members of the corporation. Wiswell v. Cincinnati First Cong. Church, 14 Oh. St. 31.

3. See infra § 39.

4. Com. v. Cain, 5 Serg. & R. (Pa.) 510.

5. McIlvain v. Christ Church, 8 Phila. (Pa.) 507, 2 Woodw. 293.

6. See case infra this note.

[a] **Pew holder.**—A minor cannot vote, although he has paid for a sitting. McIlvain v. Christ Church, 8 Phila. (Pa.) 507, 2 Woodw. 293.

7. Re Dalhousie Mills Presb. Church, (Ont.) [1926] 4 DomLR 383; Re Burlington Presb. Church, (Ont.) [1926] 4 DomLR 380.

8. Re Burlington Presb. Church, supra.

9. Re Maple Valley Presb. Church, (Ont.) [1926] 4 DomLR 378.

10. Re Richmond Hill Presb. Church, (Ont.) [1926] 4 DomLR 365.

11. See articles of association, charter, by-laws, and statutory provisions.

12. See cases infra notes 13–28.

13. Groesbeeck v. Dunscomb, 41 HowPr (N. Y.) 302.

14. See case infra this note.

[a] **Electors of episcopal churches.**—The meaning of "belonged" in a statute providing that the electors of episcopal churches shall consist "of all who shall have belonged to such church," is a mixed question of law and fact which must in each case be left to the jury. Peo. v. Keese, 27 Hun (N. Y.) 483.

15. Howard v. African Episcopal Church, 52 Pa. Super. 116.

16. Weckerly v. Geyer, 11 Serg. & R. (Pa.) 35.

17. State v. Crowell, 9 N. J. L. 390.

[a] **Under early New England statutes,** being assessed in the last parish tax to the amount required by the statute, was the only evidence of a right to vote in a parish meeting. Osgood v. Bradley, 7 Me. 411; Sparrow v. Wood, 16 Mass. 457.

18. State v. Stewart, 11 Del. 359.

19. Peo. v. Tuthill, 31 N. Y. 550.

20. Peo. v. Tuthill, supra.

21. Peo. v. Tuthill, supra.

22. Peo. v. Tuthill, supra.

23. Juker v. Com., 20 Pa. 484.

24. McIlvain v. Christ Church, 8 Phila. (Pa.) 507, 2 Woodw. 293; Com. v. Morrison, 6 WklyNC (Pa.) 346.

25. Livingston v. Trenton Trinity Church, 45 N. J. L. 230.

26. Watkins v. Wilcox, 4 Hun 220, 6 Thomps. & C. 539 [aff 66 N. Y. 654].

27. Petty v. Tooker, 21 N. Y. 267 [aff 29 Barb. 256].

28. Caranica v. Belba, (R. I.) 131 A 840.

29. See statutory provisions.

30. Peo. v. Church of Atonement, 48 Barb. (N. Y.) 603.

31. See statutory provisions.

32. Fiske v. Beaty, 120 Misc. 1, 198 NYS 358 [mod on other grounds 206 App. Div. 349, 201 NYS 441 (aff 238 N. Y. 598, 144 NE 907)].

33. Howard v. St. Thomas' African Episcopal Church, 52 Pa. Super. 116.

For **later cases, developments** and **changes** in the law see **Annotations,** same title and section number.

from any act of the member or of the society terminating his membership,[34] as, for example, where the member voluntarily withdraws,[35] or as a member of a faction within the church, secedes,[36] or where the fellowship of an independent religious society has been withdrawn from that member,[37] or where, by proper procedure, he has been excommunicated or expelled;[38] but not from fraudulent enrollment and rulings by the presiding officer.[39] Whether transfer of a member's name from the communion roll to the appendix or reserve roll of a presbyterian church operates as a deprivation of his right to vote, is a question of fact to be determined by the circumstances of a particular case.[40] So, also, grounds for deprivation of the right to vote may be a matter of regulation by statute, charter, or by-laws.[41] And it has been held that a by-law depriving a member of his right to vote for failure to pay his pew rent for a stated period is not inconsistent with a law restricting the vote to members.[42] But where the canons of the church give the right to vote to all church attendants or contributors or pew holders, a vote of the church depriving an attendant of his pew and refusing to accept his contribution does not deprive him of his right to vote.[43] He still may attend church, and as such attendant is entitled to vote.[44] Where no civil rights of the member are involved, acts of the pastor relating to matters of discipline only will not be enjoined by the court on the ground that such acts will result in depriving members of their right to vote.[45]

[§ 40] **3. Reception of Illegal Votes.** An election will not be invalidated unless it appears that illegal votes were received,[46] and that they affected the result.[47]

[§ 41] **4. Rights of Member after Rejection of Vote.** Officers of a religious society who preside at its elections and are authorized to decide on the qualifications of voters are not liable for refusing a qualified vote through error of judgment, but in good faith.[48] But an action will lie against the presiding officer of a religious meeting for wilfully refusing to receive the vote of a qualified voter,[49] provided the refusal is malicious,[50] malicious meaning from improper motives and with knowledge that no grounds for rejection existed.[51] A voter cannot object if, when his vote was challenged, he yielded to the challenge and his vote was not in fact rejected.[52] On the other hand, a member's vote unchallenged will not be subject to attack by other members who by their conduct have estopped themselves from later objecting to its legality.[53]

[§ 42] **E. Number of Votes Required for Valid Action.** The rules of law relating to freedom of action by independent churches and congregations are different from those rules which apply to congregations which are affiliated with and are subordinate to higher judicatories.[54] Unless a statute or church constitution otherwise provides, a majority vote at a valid meeting of a society which has adopted the congregational form of organization is sufficient to pass any resolution which the society was competent to enact,[55] and, if a quorum is present,[56] a majority of those attending the meeting and voting can so act,[57] a provision of the church constitution that "all of the members" can so act being construed as giving any member a right to attend the meeting and vote, and not as conditioning valid action upon an affirmation both by a majority of the entire membership,[58] and not as giving members attending but not voting power to block action by members voting.[59] However, when a religious society becomes affiliated with other religious societies and they unite to construct and maintain for their mutual advantage higher judicatories with constitutions of their own to which the members of the society subject themselves, then no action opposed to its obligation to continue its affiliation can be legally taken except by unanimous consent of its members and subject to the consent of the judicatory if under its constitution it has that power. A vote in favor of such action by a majority of the members of such a society is ineffective,[60] but a unanimous vote of all the members subject to the veto power of the judicatory if it has it, will be effective.[61]

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[34] See cases infra notes 35–38.

[35] Grupe v. Rudisill, (N. J. Ch.) 144 A 874.

[36] Grupe v. Rudisill, supra.

[37] Gipson v. Morris, 31 Tex. Civ. A. 645, 73 SW 85.

[38] Shannon v. Frost, 3 B. Mon. (Ky.) 253.

[39] Dickson v. Wilson, (Tex. Civ. A.) 21 SW (2d) 1072.

[40] See supra § 38.

[41] See statutory provisions.

[42] Com. v. Cain, 5 Serg. & R. (Pa.) 510.

[43] Livingston v. Trenton Trinity Church, 45 N. J. L. 230.

[44] Livingston v. Trenton Trinity Church, supra.

[45] See case infra this note.

[a] **Payment of one dollar into church treasury before voting.**—To equitable petition against pastor of incorporated church to enjoin him from holding election for trustees thereof and from prescribing as a condition precedent that each member before casting his vote pay into church treasury $1, a demurrer was properly sustained notwithstanding disciplinary provision that every adult member in full communion might vote for three nominees, if present, and allegation that enforcement of requirement would disqualify many members from voting, and would result in an illegal and fraudulent election, and be violative of rules of church, and permit pastor to enforce his arbitrary will upon members for his own private and personal purposes. Gibson v. Singleton, 149 Ga. 502, 101 SE 178.

[46] See cases infra this note.

[a] **The presence of strangers** does not vitiate the proceedings unless they voted and their votes were necessary to carry the resolution. Madison Ave. Baptist Church v. Oliver St. Baptist Church, 2 AbbPr NS 254 [rev on other grounds 46 N. Y. 131].

[b] **The opinion of a witness** that certain voters were not legal voters furnishes no evidence of their disqualification in an action to determine the validity of the election of wardens and vestrymen of an episcopal church. Peo. v. Lacoste, 37 N. Y. 192.

[47] Christ Church v. Pope, 8 Gray (Mass.) 140; Peo. v. Tuthill, 31 N. Y. 550; Madison Ave. Baptist Church v. Oliver St. Baptist Church, 2 Abb PrNS 254, 32 HowPr 335 [aff 31 N. Y. Super. 109 (rev on other grounds 46 N. Y. 131)]; Com. v. Morrison, 6 WklyNC (Pa.) 346.

[48] See case infra this note.

[a] **Election inspector** of a congregation may exercise a sound discretion in deciding whether a person offering to vote has lost his membership and right to vote by a voluntary separation from the congregation, although he has not been proceeded against and disfranchised under church regulations applying to cases of delinquency and not to a voluntary separation. Weckerly v. Geyer, 11 Serg. & R. (Pa.) 35.

[49] See case infra this note.

[a] **After qualifications shown.**—Where one who had been a member of a voluntary religious society demanded permission to vote at a meeting of the first parish in the town where he resided, and produced to the presiding officer a certificate of the clerk of the voluntary society that he had ceased to be a member thereof, an action by him would lie against the presiding officer for refusing to receive his vote; he being otherwise a qualified voter. Oakes v. Hill, 10 Pick. (Mass.) 333.

[50] Weckerly v. Geyer, 11 Serg. & R. (Pa.) 35.

[51] Weckerly v. Geyer, supra.

[52] Jones v. Sacramento Ave. M. E. Church, 198 Ill. 626, 64 NE 1018.

[53] See case infra this note.

[a] **Estoppel to deny right to vote.**—Where the members of a parent church for several years permitted the members of certain chapels organized and conducted by the church to vote concerning questions relating to dispositions of current funds to which such members had contributed, and members of such chapels were permitted without challenge to vote on a resolution increasing the salaries of the pastors of such chapels, a member of the parent church was estopped to maintain a suit in equity to enjoin the carrying out of the resolution adopted by the vote of such members on the ground that they had no legal right to vote. Davie v. Heal, 86 App. Div. 517, 83 NYS 723 [aff 180 N. Y. 545 mem, 73 NE 1123 mem].

[54] See supra §§ 4–8.

[55] Ala.—Sentell v. Friendship Baptist Church No. 2, 214 Ala. 584, 108 S 517.

Ky.—Clapp v. Krug, 232 Ky. 303, 22 SW (2d) 1025; Bogard v. Boone, 200 Ky. 572, 255 SW 112.

La.—Patterson v. Baptist Church, 8 La. A. 109.

Md.—Bennett v. St. Paul's Evangelical Lutheran Church, 137 Md. 341, 112 A 619, 14 ALR 622.

Oh.—Cape v. Moore, 122 Okl. 229, 253 P 506.

Wis.—Evangelical Lutheran St. Paul's Cong. v. Jaeger, 177 Wis. 34, 187 NW 681; Evangelical Lutheran St. Paul's Cong. v. Hass, 177 Wis. 23, 187 NW 677.

[56] See supra § 32.

[§ 43] **F. Waiver of Right and Estoppel To Object.** The right to object to the validity of a meeting,[62] or to the presence of a quorum,[63] or to the right of members to vote,[64] or to an election,[65] may be lost by waiver or estoppel. Waiver of notice must be clearly shown[66] as by presence at a meeting and acquiescence in its proceedings,[67] but before one can be charged with acquiescence in or recognition of an illegal election and its consequences, it must appear that he had knowledge or means of knowledge at the time of such illegality.[68] While the general rule is that one who is present at a meeting and withdraws cannot ordinarily complain as to what took place after his departure,[69] the rule is not applied where it would work a fraud upon those who had withdrawn.[70] Waiver is not shown by acts which are performed under compulsion of court.[71]

IV. OFFICERS AND COMMITTEES

[§ 44] **A. Qualifications, Election, and Tenure—1. Eligibility.** The necessary qualifications for election to office in a religious society are sometimes determined by statute, charter, or custom,[72] and where such provisions are shown to exist, the eligibility of candidates is governed thereby[73] as where parish[74] or church[75] membership is required by statute or charter; or, by usage, prior nomination by the consistory and announcement at a church service;[76] or ordination, in the case of deacons of a baptist church.[77] Whether a minister eligible by charter for the presidency of the corporation is thereby made eligible as trustee, is a question which has been raised but not decided.[78] In the absence of controlling provisions in statute, charter, or custom, the mere fact of nonmembership in the society,[79] or nonresidence[80] does not disqualify a person for trusteeship of the church, and, a fortiori, in a church where letters of dismission do not ipso facto terminate membership, a member who has received his letter is still eligible as trustee.[81]

[§ 45] **2. Election or Appointment[82]—a. General Rules.** The rules of the church or denomination control in the appointment or election of a trustee or other officer of a religious society in the absence of controlling statutory requirement,[83] or where the statutes are so framed as to allow the churches to select their officers according to their own usages and laws,[84] a long continued usage or custom being equally binding in the absence of rule or by-law.[85] Statutory provisions relating to appointment or election of officers of incorporated societies,[86] are controlling when applicable.[87] Officers of churches following the congregational polity cannot be lawfully appointed or elected by a minority,[88] or by individual members not acting as a church or society,[89] nor does a charter procured by a minority have any effect to legalize an election held under it as against the majority.[90] Where the act of incorporation so provides,[91] an officer elected cannot exercise the duties of his office until he gives bond, approved by court.[92] Vacancies in office must be filled by new election, regardless of whether vacancy was caused by lapse of term, death, removal, or judgment of ouster.[93] Statutes providing for appointment of a trustee by the court in all cases of vacancies caused by death of a trustee, on application by the cestui que trust,[94] have been held to apply to trustees of church property, and to authorize appointment by the court on application of petitioners authorized by the congregation to represent it, alleging such facts and the death of the former trustee.[95] Where the statute so provides,[96] the number of trustees of a congregational society cannot be reduced except by vote taken at the annual meeting of the society.[97]

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[57] Bogard v. Boone, 200 Ky. 572, 255 SW 112; Stryjewski v. Panfil, 269 Pa. 568, 112 A 764.

[58] Stryjewski v. Panfil, supra.

[59] Stryjewski v. Panfil, supra.

[60] Schilstra v. Van Den Heuvel, 82 N. J. Eq. 155, 90 A 1056 [mod on other grounds 82 N. J. Eq. 612, 90 A 1056].

[61] Vargo v. Vajo, 76 N. J. Eq. 161, 73 A 644.

[62] Helbig v. Rosenberg, 86 Iowa 159, 53 NW 111; Tuttle v. Cary, 7 Me. 426.

[a] **Thirty years' acquiescence.**—Where a committee, claiming to be authorized by the inhabitants of a town, invited a person to become the minister of that town, which invitation he accepted, and continued to officiate in that office for more than thirty years, the town all the time paying the stipulated salary, the town had waived its right, if any ever existed, to set up objections to the legality of the meeting at which the invitation was authorized. Bucksport v. Spofford, 12 Me. 487.

[63] Applequist v. Swedish Evangelical Lutheran Gethsemane Church, 154 Wash. 351, 282 P 224.

[64] State v. Good Hope Second Baptist Church, 144 La. 413, 80 S 608.

[65] Com. v. McCutchen, 2 Pars. Eq. Cas. (Pa.) 205.

[66] Hicock v. Hoskins, 4 Day (Conn.) 62.

[67] Applequist v. Swedish Evangelical Lutheran Gethsemane Church, 154 Wash. 351, 282 P 224.

[68] Com. v. McCutchen, 2 Pars. Eq. Cas. (Pa.) 205.

[69] See Grupe v. Rudisill, 101 N. J. Eq. 145, 136 A 911.

[70] Grupe v. Rudisill, supra.

[71] See case infra this note.

[a] **By voting under order of court.**—Where members of a board of directors of a religious corporation are ordered by the court to hold an election of officers and contest the right of other alleged members to vote, the contesting members by voting themselves do not waive their challenges to votes cast by other alleged members. State v. Good Hope Second Baptist Church, 144 La. 413, 80 S 608.

[72] See statutory and charter provisions.

[73] See cases infra notes 74, 75.

[74] Reg. v. Cree, 67 L. T. Rep. N. S. 556.

[75] Ross v. Crockett, 14 La. Ann. 811; Laight St. Baptist Church v. Noe, 12 HowPr (N. Y.) 497.

[76] Miller v. Eschbach, 43 Md. 1.

[77] Covington First Baptist Church v. Jackson, 10 La. A. 170, 120 S 639.

[78] Kulinski v. Dambrowski, 29 Wis. 109.

[79] Bouldin v. Alexander, 15 Wall. (U. S.) 131, 21 L. ed. 69; Fort v. Paris First Baptist Church, (Tex. Civ. A.) 55 SW 402.

[80] Fort v. Paris First Baptist Church, supra.

[81] Louisville First Presby. Church v. Wilson, 14 Bush (Ky.) 252.

[82] **Associations generally** see Associations §§ 46, 47.

Corporations generally see Corporations §§ 1799–1826.

[83] First Soc. M. E. Church v. Clark, 41 Mich. 730, 3 NW 207; Simmons v. Allison, 118 N. C. 763, 24 SE 716; Long v. Harvey, 177 Pa. 473, 35 A 869, 34 LRA 169, 55 AmSR 733; Schumann v. Dally, (Tex. Civ. A.) 29 SW (2d) 422.

[a] **In England** admission of churchwardens cannot be prevented by ecclesiastical authority. Rex v. Sowter, [1901] 1 K. B. 66 [foll Rex v. Simpson, Str. 609, 93 Reprint 731].

[84] Shavers v. Thomas, 339 Ill. 622, 171 NE 625; Roanoke Presb. Church v. Horton, 50 Ind. 223; Pulis v. Iserman, 71 N. J. L. 408, 58 A 554; Day v. Bolton, 12 N. J. L. 206; Doremus v. Dutch Reformed Church English Neighborhood, 3 N. J. Eq. 332; Re Hamilton Lutheran Church, 34 Ont. L. 228, 8 OntWN 556.

[85] Miller v. Eschbach, 43 Md. 1; Newman v. Churchwardens, 1 Newfoundl. 310.

[a] **In England,** manner of electing churchwardens determined by varying customs in different parishes, as follows: (1) By poll on request of a member of the parish not satisfied with shew of hands, not exclud-

[§ 46] **b. Certificate of Election.** Under statutory requirements[98] the officers designated by the statute certify the result of the election,[99] and a certificate so issued entitles the person named therein to act.[1] But the statutory provision is merely directory,[2] and a making of the certificate at a time later than required will not prevent its use as evidence,[3] nor will a failure to furnish a certificate disqualify a person who is duly elected,[4] provided his right to the office is proven by other evidence.[5] The certificate is prima facie evidence of the election of the person named therein,[6] but only prima facie evidence,[7] and a statutory provision that the certificate of election shall entitle the party elected to the office,[8] is not construed as making the certificate conclusive evidence in case of a contest as to who the "party elected" was.[9] If the certificate discloses facts showing noncompliance with statutory requirements in the election of the trustees certified to by it as having been elected, the certificate defeats itself, and disproves rather than proves title to the office in those whom it names.[10]

[§ 47] **c. De Facto Officers.** To constitute one a de facto officer of a religious society he must be acting as such under color of having been rightfully elected or appointed,[11] and under these circumstances he will be recognized and treated as such by the courts,[12] during the term for which he is elected,[13] and one who has contracted with him is estopped to deny his authority to contract.[14] But where there is a de jure officer acting as such, there cannot be a de facto.[15] And a successor to the office, who has not yet qualified as a de jure officer, is not an officer de facto,[16] his predecessor being still in office.[17]

[§ 48] **3. Duration of Office and Termination of Authority.** Where his term of office is not limited in time, an officer of a religious society continues in office until he is duly removed,[18] or another is appointed to succeed him,[19] and unless they resign officers or committees elected or appointed for a stated term continue in office, not only until the expiration of their terms,[20] but until their successors are selected and qualified.[21] In societies having a congregational form of government, trustees, even where their tenure has been fixed, hold office subject to the discretionary power of the majority to terminate

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ed by custom that election be by shew of hands. Campbell v. Maund, 5 A. & E. 865, 31 ECL 859, 111 Reprint 1394. (2) By vestry. Gibbs v. Flight, 3 C. B. 581, 54 ECL 581, 136 Reprint 232. (3) By vestry because law of new parish carved out of old following that custom. Rex v. St. James, 5 A. & E. 391, 31 ECL 660, 111 Reprint 1213. (4) Presentation of two names by outgoing churchwarden to rector who would select one to be churchwarden for ensuing year. Bremner v. Hull, L. R. 1 C. P. 748. (5) Election of one churchwarden by parishioners and one by rector. In re Barlow, 30 L. J. Q. B. 271. (6) Custom to have no churchwardens not established, and mandamus to parishioners to elect one granted. Rex v. Wix, 2 B. & Ad. 197, 22 ECL 90, 109 Reprint 1117.

[86] See statutory provisions.

[87] State v. Getty, 69 Conn. 286, 37 A 687; Samuel Israelite Baptist Church v. Thomas, 2 La. A. (Orleans) 178; Kulinski v. Dambrowski, 29 Wis. 109; Green v. Reg., 1 App. Cas. 513.

[a] **The trustees of a Roman catholic church** are a self-perpetuating body, and the members of the church or congregation have no voice in their selection. People's Bank v. St. Anthony's Roman Catholic Church, 109 N. Y. 512, 17 NE 408.

[88] Schumann v. Dally, (Tex. Civ. A.) 29 SW (2d) 422; Fort v. Paris First Baptist Church, (Tex. Civ. A.) 55 SW 402.

[89] Scott v. Curle, 9 B. Mon. (Ky.) 17.

[90] Wallace v. Wells, (Tex. Civ. A.) 228 SW 1111.

[91] See statutory provisions.

[92] Nolde's App., (Pa.) 15 A 777.

[93] Peo. v. Fleming, 59 Hun 518, 13 NYS 715; Peo. v. Hart, 13 NYS 903 [aff 10 NYS 125, 11 NYS 669-675, 25 AbbNCas 230].

[94] See statutory provisions.

[95] In re St. George's Lithuanian Roman Catholic Church, 244 Pa. 410, 90 A 918.

[96] See statutory provisions.

[97] Wheaton v. Gates, 18 N. Y. 395.

[98] See statutory provisions.

[99] See cases infra this note.

[a] **Presiding officers.**—Peo. v. Peck, 11 Wend. (N. Y.) 604, 27 AmD 104.

[b] **Rector in protestant episcopal church.**—Peo. v. Lacoste, 37 N. Y. 192.

[1] First Soc. M. E. Church v. Clark, 41 Mich. 730, 3 NW 207; North Baptist Church v. Parker, 36 Barb. (N. Y.) 171.

[2] Peo. v. Peck, 11 Wend. (N. Y.) 604, 27 AmD 104.

[3] Peo. v. Peck, supra.

[4] Staten Island North Baptist Church v. Parker, 36 Barb. (N. Y.) 171.

[5] Staten Island North Baptist Church v. Parker, supra.

[6] Peo. v. Lacoste, 37 N. Y. 192.

[7] Hartt v. Harvey, 32 Barb. (N. Y.) 55, 10 AbbPr 321.

[8] See statutory provisions.

[9] Hartt v. Harvey, supra.

[10] Hartt v. Harvey, supra; Kulinski v. Dambrowski, 29 Wis. 109.

[11] First African M. E. Zion Church v. Hillery, 51 Cal. 155; East Norway Lake Norwegian Evangelical Lutheran Church v. Halvorson, 42 Minn. 503, 44 NW 663.

[12] Mich.—Cicotte v. Anciaux, 53 Mich. 227, 18 NW 793.

N. Y.—Bellport Parish v. Tooker, 29 Barb. 256 [aff 21 N. Y. 267]; Berrian v. New York Methodist Soc., 4 AbbPr 424; Jackson v. Nestles, 3 Johns. 115.

Oh.—Gallipolis First Presb. Soc. v. Smithers, 12 Oh. St. 248.

Pa.—Nolde's App., 15 A 777.

S. C.—St. Luke's Church v. Mathews, 4 S. C. Eq. 578, 6 AmD 619.

Wash.—Applequist v. Swedish Evangelical Lutheran Gethsemane Church, 154 Wash. 351, 282 P 224.

Eng.—Turner v. Baynes, 2 H. Bl. 559, 126 Reprint 702. See Ganvill v. Utting, 9 Jur. 1081.

[13] Smith v. Erb, 4 Gill (Md.) 437.

[14] Skinner v. Richardson, 76 Wis. 464, 45 NW 318.

[15] Bray v. Somer, 2 B. & S. 374, 110 ECL 574, 121 Reprint 1113.

[16] Bray v. Somer, supra.

[17] See infra § 48.

[18] Hendrickson v. Shotwell, 1 N. J. Eq. 577.

[19] Zion Church of Evangelical Assoc. of North America v. Light, 7 Pa. Super. 223.

[20] Bristor v. Burr, 12 NYSt 638.

[21] Bethany Cong. Soc. v. Sperry, 10 Conn. 200; Brenner v. Hull, L. R. 1 C. P. 748; Bray v. Somer, 2 B. & S. 374, 110 ECL 374, 121 Reprint 1113.

their holding at any time and to appoint successors,[22] and the subsequent ouster or removal of their successors does not entitle the old officers to hold over.[23] An unlimited term of office may become limited by reason of a subsequent order of a superior church body providing for a stated term.[24]

Termination of authority.[25] The authority of a trustee of a religious society is terminated by his ceasing to be a member wherever a statute stipulates that membership shall be a necessary qualification for a trustee,[26] or where a statute provides in express terms that whenever a trustee ceases to be a member of the church congregation or society, he ceases to be a trustee.[27] Under the statutes, a trustee of a church ceases to be such when he unites with a church of another denomination,[28] or becomes one of the organizers and incorporators of a new church.[29] But a letter of dismission does not of itself operate to terminate the authority of an officer,[30] unless accompanied by other acts inconsistent with the performance of his duties as such officer.[31] Nor does a refusal to serve or discharge the duties of an officer in the absence of circumstances showing an intent to abandon the office and the acceptance thereof by the society as a resignation terminate the authority of the officer.[32] The statute, however, does not apply where membership in the church ceases because the church itself has ceased to exist through the action of a superior governing body.[33] Where the authority to appoint a committee is limited to appointment from the members of a particular body, a committeeman ceases to be such when he has terminated his membership in that body.[34] Where membership in a society or residence in a parish is not a qualification for election or appointment as trustee or other officer,[35] withdrawal from membership[36] or removal of residence[37] while it may be ground for terminating the authority of an officer, does not of itself so operate.

[§ 49] **4. Removal and Proceedings To Remove—a. In General.** The right to remove an officer of a religious society depends upon the terms of the governing statute, charter, by-law, or custom, and of the original compact as exemplified by the form of church government which the society has adopted, or of a deed of trust constituting the organic law of the church where such deed exists.[38] In churches having the independent, congregational form of church government, the congregation has the right to remove at any time regardless of the term for which the officer has been elected or appointed.[39] In churches following the presbyterian polity, the right is vested in the superior church judicatory acting under the rules and discipline of that church.[40] In churches of the episcopal communion, the right to remove a rector[41] or clerk[42] is in the bishop.[43] The right to remove may be vested in a governing board of trustees or directors acting by majority vote, by by-law not inconsistent with church polity,[44] or under the terms of a deed of trust from the founder of the church.[45] Where the right to remove is claimed to be vested in a particular church official or board, the rules and discipline of the church upon which such claim is based must be alleged and established by proof,[46] and allegation and proof of a power of appointment does not establish a power of removal.[47]

[§ 50] **b. Grounds and Proceedings.** An officer cannot be removed on grounds other than those provided by the rules and discipline of the church.[48] In a congregation subject to the superior jurisdiction of the church to which it belongs, officers cannot be removed by a majority of the congregation in violation of church rules.[49] In churches of the congregational type, the congregation's power by a majority vote to remove[50] is discretionary[51] and may be exercised at any time[52] and upon any grounds not malicious, whimsical, or capricious.[53] Nor are issues of religious faith or doctrine involved, where the majority may act independently of other authority.[54] But a removal cannot be made in violation of the rules and discipline inherent in the congregational form of government,[55] or in violation of a rule adopted by the particular church.[56] Where power is granted to the governing board in a church by trust deed to declare a vacancy in any office "for such reasons as to them may seem expedient," full power exists in the governing board acting by majority vote to remove a member of a subsidiary board,[57] or even a member of the governing board itself,[58] and under the terms of the trust, their power is discretionary, not subject to court review,[59] except to determine whether the removal because of the grounds alleged or methods used was an exercise of discretion or a capricious and arbitrary act.[60] Where the power granted the governing board is to remove whenever it seems to them expedient, an officer may be removed without formal hearing[61] or even without any notice or hearing, provided only that the act of removal is an exercise of the board's judgment and not a malicious, whimsical, or capricious act.[62]

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[22] See infra § 49.

[23] Peo. v. Fleming, 59 Hun 518, 13 NYS 715.

[24] Currier v. Trinity Soc. M. E. Church, 109 Mass. 165.

[25] **Mandamus to restore officers of religious or ecclesiastical corporations wrongfully removed** see Mandamus § 517.

Proceedings to remove see infra § 50.

[26] Ross v. Crockett, 14 La. Ann. 811; Laight St. Baptist Church v. Noe, 12 HowPr (N. Y.) 497.

[27] York First Reformed Presb. Church v. Bowden, 10 AbbNCas (N. Y.) 1 [aff 14 AbbNCas 356].

[28] Ross v. Crockett, 14 La. Ann. 811.

[29] In re Court St. M. E. Soc., 51 Hun 104, 4 NYS 723; York First Reformed Presb. Church v. Bowden, 10 AbbNCas (N. Y.) 1 [aff 14 AbbNCas 356]; Laight St. Baptist Church v. Noe, 12 HowPr (N. Y.) 497.

[30] Louisville First Presb. Church v. Wilson, 14 Bush (Ky.) 252; Laight St. Baptist Church v. Noe, 12 How Pr (N. Y.) 497.

[31] Laight St. Baptist Church v. Noe, supra.

[32] Connitt v. New Prospect Reformed Protestant Dutch Church, 54 N. Y. 551 [aff 4 Lans. 339].

[33] Westminster Presb. Church v. New York Presbytery, 211 N. Y. 214, 105 NE 199.

[34] See case infra this note.

[a] **A committee of the vestry** ceases to be such upon its members ceasing to be vestrymen. Peo. v. Blackhurst, 60 Hun 63, 15 NYS 114.

[35] See supra § 44.

[36] Doremus v. Dutch Reformed Church English Neighborhood, 3 N. J. Eq. 332.

[37] See case infra this note.

[a] **A churchwarden,** by ceasing to reside in the parish, does not ipso facto lose his office. Ganvill v. Utting, 9 Jur. 1081.

[38] See cases infra this section.

[39] Barton v. Fitzpatrick, 187 Ala. 273, 65 S 390; North Carolina Christian Conference v. Allen, 156 N. C. 524, 72 SE 617.

[40] Borgman v. Bultema, 213 Mich. 684, 182 NW 91.

[41] Fiske v. Beaty, 206 App. Div. 349, 201 NYS 441 [mod 120 Misc. 1, 198 NYS 358, and aff 238 N. Y. 598, 144 NE 907].

[42] Earle v. Simms, 4 Newfoundl. 541 (parish clerk).

[43] See cases supra notes 41, 42.

[44] Scott v. Wilson, 252 Pa. 95, 97 A 101; McDowell v. Wilson, 252 Pa. 91, 97 A 100.

[45] Dittemore v. Dickey, 249 Mass. 95, 144 NE 57; Eustace v. Dickey, 240 Mass. 55, 132 NE 852.

[46] Nemolovsky v. Rykhloff, 187 App. Div. 290, 175 NYS 617.

[47] Nemolovsky v. Rykhloff, supra.

[48] See case infra this note.

[a] **Wrongful expulsion.**—Where the discipline of a church permits the minister to expel members only for offenses against religion and immoral conduct, an expulsion of trustees for refusal to manage the property according to the wishes of the bishop and minister is void. Com. v. Oliver, 2 Pars. Eq. Cas. (Pa.) 420.

[49] American Primitive Soc. v. Pilling, 24 N. J. L. 653.

[50] See supra § 49.

[51] Barton v. Fitzpatrick, 187 Ala. 273, 65 S 390; North Carolina Christian Conference v. Allen, 156 N. C. 524, 72 SE 617.

[52] See supra § 49.

[53] Barton v. Fitzpatrick, 187 Ala. 273, 65 S 390; North Carolina Christian Conference v. Allen, 156 N. C. 524, 72 SE 617.

[54] Fort v. Paris First Baptist

[§ 51] **B. Title to Office; Direct and Collateral Attack.**[63] Compliance with the requirements of statute or by-laws as to election or appointment of officers,[64] clothes the person so appointed or elected with title to the office,[65] while a failure or departure from the required procedure generally results in a failure of title.[66] Where an action to determine title to church property involves title to the office of trustee between conflicting claimants, the determination of the issue must be made by the court upon the evidence of facts concerning the elections already had and cannot be resolved by a new election held under supervision of the court.[67]

Direct attack.[68] In the absence of statutory provision to the contrary, the proper remedy to test title to an office in an incorporated religious society is by proceedings in quo warranto,[69] and the members of such corporation contesting the trustees' title will not be bound by submission of that question to an arbitrator and his award.[70] And a statute authorizing the attorney-general to proceed against one usurping a corporate office,[71] provides an exclusive legal remedy, and a court of equity has no jurisdiction of an action brought by a bishop to test the title of officers of a church corporation to their offices.[72] But title to an office in an unincorporated religious society cannot be tried by quo warranto,[73] and in England the title of a church warden to his office cannot be tested by that remedy on the ground that it is not an office of a public nature.[74] While quo warranto is the proper proceeding to test the title of an officer of a religious corporation,[75] the right of a trustee to control the church property or to use it for purposes of worship may be tested in an action in equity to restrain others usurping the office.[76] The burden of proof is upon the relators in quo warranto proceedings to establish that they have a better right to the office than the respondents.[77] A judgment of ouster against part of the trustees of a religious corporation does not invalidate the title to the office of the remaining trustees.[78]

Collateral attack.[79] The title of an officer of a church or religious society is not subject to attack in a collateral proceeding,[80] and a bill in equity will not lie to restrain his alleged illegal acts.[81] However, under a statute providing that no objection shall be allowed to any suit in chancery upon the ground that the subject of the suit is exclusively or properly cognizable in a court of law,[82] an officer's title to his office may be contested in an action in equity brought by the officer suing in his official capacity.[83]

Church, (Tex. Civ. A.) 55 SW 402.

[55] See cases infra this note.

[a] **Removal by minority** without notice to majority is illegal. Bouldin v. Alexander, 15 Wall. (U. S.) 131, 21 L. ed. 69; Fort v. Paris First Baptist Church, (Tex. Civ. A.) 55 SW 402.

[b] **Removal by outsiders.**—Officers of a congregational church cannot be removed by vote at a meeting outside the church composed of delegates and ministers of other congregations uniting with members of the church. Long v. Harvey, 177 Pa. 473, 35 A 869, 55 AmSR 733, 34 LRA 169.

[56] See cases infra this note.

[a] **Requiring prior presentation to deacons.**—Expulsion of Baptist Church clerk is illegal where preferment of charges was not submitted to board of deacons before presentation to the church, such presentation being required by rules of the church. Clapp v. Krug, 232 Ky. 303, 22 SW (2d) 1025.

[57] Eustace v. Dickey, 240 Mass. 55, 132 NE 852.

[58] Dittemore v. Dickey, 249 Mass. 95, 144 NE 57.

[59] Dittemore v. Dickey, 249 Mass. 95, 144 NE 57; Eustace v. Dickey, 240 Mass. 55, 132 NE 852.

[60] Dittemore v. Dickey, 249 Mass. 95, 144 NE 57; Eustace v. Dickey, 240 Mass. 55, 132 NE 852.

[61] Eustace v. Dickey, supra.

[62] Dittemore v. Dickey, 249 Mass. 95, 144 NE 57.

[63] **Minister's title to office** see infra §§ 84, 85.

[64] See supra § 45.

[65] Wall Street M. E. Church v. Johnson, 140 Ind. 445, 39 NE 251; Boston First African M. E. Soc. v. Worthy, 232 Mass. 331, 122 NE 289.

[66] Wall Street M. E. Church v. Johnson, 140 Ind. 445, 39 NE 251; In re Ruthenian Greek Catholic Church, 224 App. Div. 113, 229 NYS 520 [aff 249 N. Y. 607 mem, 164 NE 602 mem].

[67] Mazaika v. Krauczunas, 229 Pa. 47, 77 A 1102, 31 LRANS 686.

[68] **On title of officer of private corporation** see Corporations § 1817; Quo Warranto § 14.

Quo warranto generally see Quo Warranto 51 C. J. p 307.

[69] See Quo Warranto § 14 note 39 [a] (5).

[70] Wyatt v. Benson, 23 Barb. (N. Y.) 327.

[71] See statutory provisions.

[72] Fiske v. Beaty, 206 App. Div. 349, 201 NYS 441 [mod 198 NYS 358, and aff 238 N. Y. 598, 144 NE 907].

Bill in equity by bishop to remove rector who is not a corporate officer see infra § 85.

[73] Atty.-Gen. v. Geerlings, 55 Mich. 562, 22 NW 89.

[74] In re Barlow, 30 L. J. Q. B. 271; Rex v. Shepherd, 4 T. R. 381, 100 Reprint 1075.

[75] See Quo Warranto § 14 note 39 [a] (5).

[76] Munsel v. Boyd, 10 Oh. Cir. Ct. N. S. 121, 30 Oh. Cir. Ct. 182.

Action to determine right of minister to administer ceremonies and rites see infra § 84.

[77] Peo. v. Nappa, 80 Mich. 484, 45 NW 355; Peo. v. Lacoste, 37 N. Y. 192; Peo. v. Farrington, 22 How Pr (N. Y.) 294.

[78] Peo. v. Fleming, 59 Hun 518, 13 NYS 715.

[79] **On title of public officers generally** see Officers § 213.

[80] Ill.—Shavers v. Thomas, 339 Ill. 622, 171 NE 625; Lawson v. Kolbenson, 61 Ill. 405.

Mich.—Cicotte v. Anciaux, 53 Mich. 227, 18 NW 793.

Mo.—Poplar Bluff First M. E. Church v. Berryman, 303 Mo. 475, 261 SW 73.

N. Y.—Concord Soc. v. Stanton, 38 Hun 1; Reformed Dutch Church v. Brandow, 52 Barb. 228; Bellport Parish v. Tooker, 29 Barb. 256 [aff 21 N. Y. 267]; Berrian v. Methodist Soc., 4 AbbPr 424; Jackson v. Nestles, 3 Johns. 115.

Oh.—Gallipolis Tp. First Presb. Soc. v. Smithers, 12 Oh. St. 248.

Pa.—Zion Church of Evangelical Assoc. v. Light, 7 Pa. Super. 223.

[81] North Baptist Church v. Parker, 36 Barb. (N. Y.) 171; Hartt v. Harvey, 32 Barb. (N. Y.) 55, 10 AbbPr 321; Messinger v. Trinity Church, 8 Oh. Dec. (Reprint) 227, 6 CincLBul 390; Trinity Church v. Wardens, etc., 3 Oh. Dec. (Reprint) 524; Nolde v. Madlem, 4 LancLRev (Pa.) 347 [aff 15 A 777]; Fadness v. Braunborg, 73 Wis. 257, 41 NW 84.

[82] See statutory provisions.

[83] Tully v. Farrell, 23 Grant Ch. (Ont.) 49 (action for accounting brought by a churchwarden).

[§ 52] **C. Powers, Duties, and Liabilities**[84]**—1. In General.** Unless the officer of a religious society is trustee under a dry or naked trust,[85] in which case he is a mere passive depositary of the property of the society with no active duties to perform or powers over it,[86] his powers are not materially different from those exercised by the managing directors of private corporations.[87] As in the case of private corporations,[88] officers of religious societies have no franchise in their offices,[89] nor are the offices regarded as tenements or hereditaments,[90] unless, as in England, with reference to certain parish offices, the incumbents hold for life and to the offices are attached certain perquisites established by immemorial usage.[91] Generally, the officers and committees appointed or elected by the society are mere agents or legal instruments to execute the will of the members,[92] intrusted with the care and management of all the temporalities of the parish or society over which they exercise jurisdiction,[93] with powers coextensive with that of the corporation,[94] and with the territorial jurisdiction conferred upon them by the canons of the church made in conformity to the laws of the state.[95] Officers must confine their official acts within the limit of their powers,[96] and an officer of a society, as well as the society itself,[97] must comply with constitutional or statutory requirements in the performance of particular acts where such exist.[98] Officers must not interfere with other officers empowered to act in other matters,[99] but where the church increases the number of officers, the rights and powers of the former officers are not affected until the additional officers are chosen.[1] Officers of an unincorporated religious society have no power to bind the other members of the society,[2] unless by the nature of the church government the trustees are regarded as the authorized agents of the aggregate body of church members.[3] Whether or not the relation between officers and the society is one of trustee and cestui que trust depends upon the terms of the incorporating act.[4] Where the officers or trustees are themselves the corporation, and the society remains unincorporated,[5] the relation of the trustees to members of the society is that of trustee and cestui que trust.[6] But where the society is incorporated and the trustees are its officers and agents,[7] the relation is not that of trustee and cestui que trustent in the narrow, technical sense, but the fiduciary or trust relation, using the word in a broader sense, existing between incorporators and officers of any private corporation.[8] Under the statutes of some states, where the society, and not the trustees, is incorporated, the trustees are made the sole managers of the corporation in respect to its temporalities[9] but with obligations to faithfully perform the duties of the office imposed on all officers of private corporations;[10] and if they are themselves the corporation and the charter gives them that power, they have full control and management of the temporalities,[11] subject in such case to the obligation of trustees to the unincorporated society as their cestui que trust.[12] But a statute which vests in the trustees of a church the exclusive power of management and control does not constitute the trustees the corporation.[13] Whether ecclesiastical officers have powers over the temporalities of a church depends on the provisions of ecclesiastical law and of state statutes.[14] A court has no power by its order to validate the act of an officer beyond his power to perform,[15] nor can a society by ratification on the part of any number of its members acting individually legalize an officer's illegal act.[16]

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[84] **Authority, duties, and liabilities of officers of beneficial associations** see Beneficial Associations §§ 49, 50.

[85] See Trusts [39 Cyc 30].

[86] Mazaika v. Krauczunas, 229 Pa. 47, 77 A 1102, 31 LRANS 686.

[87] Clark v. Brown, (Tex. Civ. A.) 108 SW 421 [rev on other grounds 102 Tex. 323, 116 SW 360, 24 LRANS 670].

[88] See Corporations § 1841.

[89] See cases infra note 91.

[90] See cases infra note 91.

[91] [a] **Parish clerk.**—Nichols v. Davis, L. R. 4 C. P. 80; Stephenson v. Raine, 2 E. & B. 744, 75 ECL 744, 118 Reprint 946.

[92] Mass.—Canadian Religious Assoc. v. Parmenter, 180 Mass. 415, 62 NE 740.

N. J.—Worrell v. Millstone First Presb. Church, 23 N. J. Eq. 96; Morgan v. Rose, 22 N. J. Eq. 583.

Pa.—Miller v. Church, 4 Phila. 48.

W. Va.—Potts v. Longest, etc., Co., 86 W. Va. 157, 103 SE 279.

Wis.—Kulinski v. Dambrowski, 29 Wis. 109.

[93] U. S.—Mason v. Muncaster, 9 Wheat. 445, 6 L. ed. 131.

La.—St. Francis, etc., Roman Catholic Church v. Martin, 4 Rob. 62.

N. J.—Cuthbert v. McNeill, (Ch.) 142 A 819.

Oh.—New Concord First United Presb. Church v. Young, 21 OhNPNS 569.

Pa.—Matter of Walnut St. Presb. Church, 3 Brewst. 277, 7 Phila. 310.

Tex.—Clark v. Brown, (Civ. A.) 108 SW 421 [rev on other grounds 102 Tex. 323, 116 SW 360, 24 LRANS 670].

[a] **In England** churchwardens and parish clerks are, for all substantial purposes, temporal officers. Rex v. Sowter, [1901] 1 K. B. 66; Lawrence v. Edwards, [1891] 1 Ch. 144.

[94] People's Bank v. St. Anthony's Roman Catholic Church, 109 N. Y. 512, 17 NE 408.

[95] Mason v. Muncaster, 9 Wheat. (U. S.) 445, 6 L. ed. 131 [aff 16 F. Cas. No. 9,247, 2 Cranch C. C. 274].

[96] See cases infra this note.

[a] **Admission by president.**—In suit for appointment of receiver of incorporated religious society, admission of president in separate answer of necessity for appointment, without any authority from corporation, is not binding upon corporation. Miller v. St. Marks Baptist Church, 158 La. 377, 104 S 121.

[b] **Efforts to amend constitution.**—The efforts of trustees to secure an amendment to the constitution of the society in the mode provided by that constitution are not outside the powers of the trustees where the property of the society held by the trustees is not subject to a trust imposed upon it by the unamended constitution. Greek Orthodox Community v. Malicourtis, 267 Mass. 472, 166 NE 863.

[97] See infra § 60.

[98] Grupe v. Rudisill, (N. J. Ch.) 144 A 874.

[99] Tartar v. Gibbs, 24 Md. 323; Cammeyer v. United German Lutheran Churches, 2 Sandf. Ch. (N. Y.) 186; Matter of Walnut St. Presb. Church, 3 Brewst. (Pa.) 277, 7 Phila. 310.

[1] Christ Church v. Pope, 8 Gray (Mass.) 140.

[2] Teed v. Parsons, 202 Ill. 455, 66 NE 1044 [rev 100 Ill. A. 342].

[3] Bushong v. Taylor, 82 Mo. 660.

[a] **Implied power of trustees.**—The action of trustees of a religious society in giving their note for a debt incurred in rebuilding the meeting-house, being for a necessary legitimate object, is within the implied powers of the trustees, and the society is liable for money had and received, although no such authority was actually granted to the trustees. Erie First Baptist Church v. Caughey, 85 Pa. 271.

[4] See cases infra notes 5–8.

[5] See supra § 22.

[6] Morgan v. Rose, 22 N. J. Eq. 583.

[7] See supra § 22.

[8] Robertson v. Bullions, 11 N. Y. 243 [aff 9 Barb. 64].

Fiduciary relation between officers of private corporation and stockholders see Corporations § 1866.

[9] Little v. Bailey, 87 Ill. 239; Chicago Heights First Presb. Church v. McColly, 126 Ill. A. 333; People's Bank v. St. Anthony's Roman Catholic Church, 109 N. Y. 512, 7 NE 408; Landers v. Frank St. M. E. Church, 97 N. Y. 119 [rev 15 Hun 340]; Madison Ave. Bapt. Church v. Oliver St. Bapt. Church, 46 N. Y. 131, 11 AbbPrNS 132 [rev 31 N. Y. Super. 109 (aff 2 AbbPrNS 254, 32 HowPr 335)]; Constant v. St. Albans Church, 4 Daly (N. Y.) 305; Cammeyer v. United German Lutheran Churches, 2 Sandf. Ch. (N. Y.) 186.

[a] **In New York the statute** giving rights and powers to the trustees is general and applies to all denominations alike, although variations in the election of trustees are accorded to different denominations. Watkins v. Wilcox, 4 Hun 220, 6 Thomps. & C. 539 [aff 66 N. Y. 654].

[10] See cases supra note 8.

[11] See cases infra this note.

[a] **Subsidiary educational institution.**—A religious society which has founded an educational institution is divested of the power of management, by the incorporation of a board of trustees under a charter which confers on them the power to hold the property and to man-

[§ 53] **2. Use and Possession of Church Property.** By virtue of their office, trustees or other officers of a religious society are entitled to possession of all the church property,[17] including the church records and corporate seal,[18] which ceases upon termination of their authority;[19] and, except in the case of a dry or naked trust,[20] they have full control and management of the property,[21] subject to a trust in favor of the congregation[22] or members of the society where such trust exists,[23] or to the control of superior ecclesiastical officers or judicatories in churches of the presbyterial or episcopal form of government,[24] the acquiescence of the trustees in a particular use not being regarded in such cases as a breach of trust where the judicatory has failed to act on the matter.[25] Church officers holding a church property in trust for the members of the society must protect the property against an unlawful invasion of the rights of the majority by the minority,[26] but they have no power to close the church against the wishes of a minority who desire to continue to worship there in accordance with the terms of the trust,[27] even though the church is without a minister to direct the services;[28] but where under the terms of the original compact or agreement,[29] or under the canonical usages or regulations of the church, a religious corporation has absolute title to the church property not subject to a trust in favor of members of the congregation worshiping therein, the officers of the corporation acting for it may close the church against the protest of members of the congregation,[30] or prevent any other use of the church property by members of the congregation which the officers prohibit.[31] Where trustees hold the church property in trust for members of the society or congregation, the members may confirm and ratify unauthorized acts of the trustees.[32] While right to possession of the church edifice gives the trustees only a constructive possession, they are held prima facie to be in actual possession if they have the key.[33] An officer's right to possession of the church property at the end of his administration passes to his successor.[34]

Private proprietary chapels. The rule giving trustees the right to possession and control of church property,[35] has no application to a private unconsecrated chapel, title and control of which remains in the owner although dedicated by him to the performance of divine service according to the ritual of a particular denomination.[36]

[§ 54] **3. Removal of Persons from Church Building.**[37] Trustees having a right to possession and control of church property,[38] have a right to remove any person from the church building who has not a superior right,[39] and may use the force necessary to remove a person who is disturbing a meeting of the society in violation of its rules,[40] even though the interruption is not willful,[41] without rendering themselves liable to an action for assault and battery.[42] The right to remove is conditioned on the acts objected to constituting either a disturbance of a religious meeting within the legal meaning of that term,[43] or a violation of the regulations of the

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age the school in all of its affairs. Union Baptist Assoc. v. Huhn, 7 Tex. Civ. A. 249, 26 SW 755.

[b] **Churchwardens** of a Roman Catholic church are the sole temporal administrators and cannot be controlled by pope or bishop in administration of its temporal affairs, where under the statute the churchwardens are the corporation, and not the bishop or clergy. St. Francis, etc., Roman Catholic Church v. Martin, 4 Rob. (La.) 62.

12. See case supra note 6.

13. See supra § 22.

14. See infra § 87.

15. Wheaton v. Gates, 18 N. Y. 395.

[a] **Order approving sale of real estate.**—The powers of the trustees of a religious corporation cannot be enlarged or extended to a power to sell real estate and distribute proceeds among pewholders by a county court ordering the sale of the real estate of such corporation and the application of the proceeds. Wheaton v. Gates, 18 N. Y. 395.

16. Grupe v. Rudisill, 101 N. J. Eq. 145, 136 A 911.

17. Prattsville Reformed Dutch Church v. Brandow, 52 Barb. (N. Y.) 228; Forsyth St. German Reformed Church v. Busche, 5 Sandf. (N. Y.) 666; Peo. v. Runkle, 9 Johns. (N. Y.) 147; Vincent v. Eyton, [1897] P. 1; Jackson v. Adams, 2 Bing. N. Cas. 402, 29 ECL 591, 132 Reprint 158 (bell-ropes).

18. Mitchell v. Milholland, 106 Ill. 175; Sawyer v. Baldwin, 11 Pick. (Mass.) 492; Maclury v. Hart, 10 NYS 125, 11 NYS 669, 25 AbbNCas 230 [rev on other grounds 121 N. Y. 636 mem, 24 NE 1013 mem]; Moss v. Thorneley, 4 Wkly. Rep. 514.

19. Griffiths v. Fraser, 60 N. S. 71, [1928] 2 DomLR 540.

20. See supra § 52.

21. St. Louis Church v. Blanc, 8 Rob. (La.) 51; Com. v. Dougherty, 107 Mass. 243; Forsyth St. German Reformed Church v. Busche, 7 N. Y. Super. 666; Newman v. Churchwardens, 1 Newfoundl. 310.

22. See case infra note 26.

23. See supra § 52.

24. See infra § 66.

25. See case infra this note.

[a] **Acquiescence in the occupation of a manse** by a pastor who moved into it in pursuance of a resolution of the parish meeting employing him for a year with the privilege of occupying the manse does not constitute a breach of trust on the part of the trustees, although the session has failed to act on the matter. Everett v. Asbury Park First Presb. Church, 53 N. J. Eq. 500, 32 A 747.

26. St. Matthew's Church v. Schaffer, 25 Pa. Co. 113.

27. Canadian Religious Assoc. v. Parmenter, 180 Mass. 415, 62 NE 740; Morgan v. Rose, 22 N. J. Eq. 583.

28. St. George's Church v. Cougle, 12 N. B. 620.

29. Beck v. Dech, 231 Pa. 636, 80 A 1129.

30. See case infra this note.

[a] **The rector and vestry** of an episcopal church corporation receiving its charter from the British Crown in 1697, have the power to discontinue the work of one of its chapels, in disregard of the wishes of the congregation. Burke v. Rector, etc., of Trinity Church, 132 App. Div. 930, 117 NYS 1130 [aff 63 Misc. 43, 117 NYS 255].

31. Beck v. Dech, 231 Pa. 636, 80 A 1129.

32. Samples v. United Fuel Gas Co., 100 W. Va. 441, 130 SE 670.

33. Peo. v. Runkle, 8 Johns. (N. Y.) 464.

34. Page v. Crosby, 24 Pick. (Mass.) 211; Dougherty v. Evangelista, 7 Philippine 37.

35. See cases supra notes 17, 21.

36. Bosanquet v. Heath, 3 L. T. Rep. N. S. 290.

37. **Disturbance of public meetings as an offense** see Disturbance of Public Meetings 18 C. J. p 1387.

38. See supra § 53.

39. Hamblett v. Bennett, 6 Allen (Mass.) 140.

40. McLain v. Matlock, 7 Ind. 525, 65 AmD 746; Wall v. Lee, 34 N. Y. 141.

41. Wall v. Lee, supra.

42. Wall v. Lee, supra; Beckett v. Lawrence, 7 AbbPrNS (N. Y.) 403.

43. See Disturbance of Public Meetings §§ 17–21.

church governing their meetings for worship.[44] A person present at the meeting who is conducting himself peaceably and who claims that he is lawfully entitled to be present and has an apparent right, cannot be removed[45] even by the order of the presiding officer.[46]

[§ 55] **4. Care and Management of Funds.** An officer having charge of funds belonging to or contributed for the church, whether he be the treasurer of the church[47] or of one of the subsidiary organizations in the church[48] is liable to the church for diversion of the funds to purposes other than those designated by the contributors thereof,[49] or for refusal to account therefor;[50] and he cannot justify his refusal on the ground that they were contributed for a specific purpose connected with the church activities.[51] But an officer who has received money for the church may defend in an action of assumpsit for money had and received if, before the commencement of the action, he had paid over the money to the church officer in charge of church funds.[52] Contributors to a society fund are entitled to a return of property and money fraudulently secured from them, and may hold the officer guilty of the fraud personally liable therefor.[53] While the court has no authority to control the discretion of the officers of the church in the management of its funds, so long as the charter is not violated,[54] under the statutes of some states,[55] they may apply to the court for aid and direction in respect to investment of such funds.[56] A bequest of money made to a church without designating the particular officer to whom payment shall be made is payable to the one who ordinarily receives and keeps the funds of the church.[57]

[§ 56] **5. Contracts and Indebtedness—a. Power To Contract.** Trustees of a religious society are presumably authorized to contract debts and execute contracts where there are such trustees and no evidence of a custom to the contrary;[58] and where they are expressly given that power by statute, it cannot be cut down by evidence of a custom to the contrary with respect to certain kinds of contracts.[59] The power of officers of a religious corporation to contract in its behalf is limited to the power granted to such officers by the terms of its charter.[60] Where the trustees themselves constitute the corporation, they alone have power to represent it in making contracts.[61] Such power does not exist in unauthorized members of the vestry,[62] nor is the rector of a protestant episcopal church acting as president of the vestry, in the absence of evidence of what the usual functions of the president of vestries of protestant episcopal churches are,[63] nor is the president,[64] secretary,[65] or treasurer[66] of a religious corporation, unless specially authorized by the board having the power.[67] In Canada, church wardens, in their corporate capacity,[68] or representing an incorporated church,[69] may contract for the church, but church wardens of an unincorporated church may not.[70] Where the power to contract is in a board or committee, such board or committee may delegate the power to one of its members,[71] or to an officer,[72] and may prescribe the extent of the delegated power.[73] An oral delegation is sufficient,[74] but the burden of proving the delegation of authority is on the party asserting the validity of the contract.[75] Trustees having power to contract are not thereby given power to allow claims against the society which are barred by the statute of limitations.[76]

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[44] See case infra this note.

[a] **Insistence on occupying particular seat.**—The mere fact that a member of the congregation insists on sitting on a camp stool in the aisle when there is room for him in a pew does not justify his expulsion from the building by force, unless it further appears that a regulation of the church was being violated, that the violator had been requested to desist, but refused, and that persistence in such conduct was disturbing to others in the meeting. Reid v. Inglis, 12 U. C. C. P. 191.

[45] Walsh v. Montreal, 10 Que. Super. 49, 8 Que. Super. 123.

[46] Walsh v. Montreal, supra.

[47] Church of Redeemer v. Crawford, 43 N. Y. 476 [rev 28 N. Y. Super. 100].

[48] Franklindale First Baptist Church v. Pryor, 23 Hun (N. Y.) 271.

[49] Bethel Presb. Church v. Donnom, 1 S. C. Eq. 154.

[50] Church of Redeemer v. Crawford, 43 N. Y. 476 [rev 28 N. Y. Super. 100]; Franklindale First Baptist Church v. Pryor, 23 Hun (N. Y.) 271.

[51] Church of Redeemer v. Crawford, 43 N. Y. 476 [rev 28 N. Y. Super. 100]; Franklindale First Baptist Church v. Pryor, 23 Hun (N. Y.) 271.

[52] Horsfall v. Handley, 8 Taunt. 136, 4 ECL 78, 129 Reprint 334.

[53] Scott v. Thompson, 21 Iowa 599.

[54] Christ Church Parish Episcopal Church v. Barksdale, 20 S. C. Eq. 197.

[55] See statutory provisions.

[56] Methodist Episcopal Soc. v. Harriman, 54 N. H. 444.

[57] Johnson v. Mayne, 4 Iowa 180.

[58] St. Patrick's Roman Catholic Church v. Gavalon, 82 Ill. 170, 25 AmR 305.

[59] McCrary v. McFarland, 93 Ind. 466.

[60] See case infra this note.

[a] **Land brokerage contract.**—Though, under articles of incorporation of a church, vote of members did not authorize consummation of sale of its land in absence of written consent of majority of male members, it gave officers authority to contract with a broker to find a purchaser. Stablein v. Hutterische Gemeinde, 43 S. D. 54, 177 NW 810.

[61] Little v. Bailey, 87 Ill. 239.

[62] Beckwith v. McBride, 70 Ga. 642.

[63] Cann v. Church of Redeemer, 111 Mo. A. 164, 85 SW 994.

[a] **Restriction of rector's authority.**—A contract between the vestrymen of a church and architects which requires the latter to draw plans for a proposed church to the satisfaction of the vestrymen restricts any authority in the rector of the church to bind the church, by his agreement with the architects relative to the plans which the law might otherwise have implied from the rector's position as president of the rectory. Cann v. Church of Redeemer, 111 Mo. A. 164, 85 SW 994.

[64] People's Bank v. St. Anthony's Roman Catholic Church, 109 N. Y. 512, 17 NE 408.

[65] Thomasson v. Grace M. E. Church, 113 Cal. 558, 45 P 838; People's Bank v. St. Anthony's Roman Catholic Church, 109 N. Y. 512, 17 NE 408.

[66] Columbia Bank v. Gospel Tabernacle Church, 127 N. Y. 361, 28 NE 29; People's Bank v. St. Anthony's Roman Catholic Church, 109 N. Y. 512, 17 NE 408.

[67] See cases infra note 71.

[68] In re Kirby, 8 Ont. L. 385, 4 OntWR 142.

[69] Maynard v. Gamble, 13 U. C. C. P. (Ont.) 56, 467; Carry v. Wallace, 12 U. C. C. P. (Ont.) 372.

[70] Anderson v. Worters, 32 U. C. C. P. (Ont.) 659.

[71] New Ebenezer Assoc. v. Gress Lumber Co., 89 Ga. 125, 14 SE 892; St. Patrick's Roman Catholic Church v. Gavalon, 82 Ill. 170, 35 AmR 305; Cann v. Church of Holy Redeemer, 121 Mo. A. 201, 98 SW 781; People's Bank v. St. Anthony's Roman Catholic Church, 109 N. Y. 512, 17 NE 408.

[72] Bishop v. Burke, 216 Mass. 231, 103 NE 691.

[73] See case infra this note.

[a] **Discretionary power.**—Where the executive committee of the Massachusetts Universalist Convention gave to its treasurer discretion in the matter of selling premises conveyed by the convention to a parish on condition, the authority of the treasurer was not limited to a sale after entry for breach of condition. Bishop v. Burke, 216 Mass. 231, 103 NE 691.

[74] Cann v. Church of Holy Redeemer, 121 Mo. A. 201, 98 SW 781.

[75] New Ebenezer Assoc. v. Gress Lumber Co., 89 Ga. 125, 14 SE 892.

[§ 57] **b. Limitations on Exercise of Power.**[77] Trustees, committees, or other officers empowered to enter into contracts must keep within the scope of their authority in order to bind the society,[78] and their acts are binding only when they are the official acts of the board or committee,[79] performed at an authorized meeting held in pursuance to a call addressed to all of its members,[80] at which a quorum was present,[81] within the scope of the chartered purposes of the society,[82] and in conformity to its rules and discipline,[83] and the limitations and requirements of its constitution.[84] But a religious society will be bound by a contract so made,[85] or by the terms of an unauthorized contract if its duly authorized officers have ratified it.[86] But ratification by such officers, if express, must be official,[87] and, if inferred from conduct, must be shown to have been based upon their knowledge of the unauthorized act,[88] and such knowledge is not established by evidence of equivocal facts.[89]

[§ 58] **6. Individual Liability.**[90] An officer of a religious society may become individually liable with respect to transactions where in breach of his duty he has acted in his own interest and in opposition to the interest of the society,[91] or by his fraudulent dealings with members of the society he may assume towards them the liabilities of a constructive trustee.[92] Following the rule of agency as to the individual liability of an agent on contracts of the principal,[93] it is held that the individual liability of trustees or other officers of a religious society on contracts not sealed depends on the disclosed intention of the parties,[94] the officer being held individually liable where such was the intention of the parties when they entered into the contract,[95] and not individually liable where the contract was negotiated on the sole credit of the society.[96] And so trustees of an incorporated religious society are not personally liable on corporate contracts executed by them as trustees in the absence of evidence that the contract was entered into on the personal credit of the trustee.[97] Where a religious society is unincorporated, the society not being liable,[98] the members who assent to the contract or subsequently ratify it,[99] or the officer,[1] or the members of the com-

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76. In re Orthodox Cong. Church, 6 AbbNCas (N. Y.) 398.

77. **Conduct of officers as ground for liability of society on implied contract** see infra § 63.

78. See infra § 63.

79. Parucki v. Polish Nat. Catholic Church Holy Mother of Rosary, 177 NYS 206; Miller v. Milligan, 6 Oh. Dec. (Reprint) 1000, 9 AmLRec 419.

[a] **The act of a council** unauthorized to contract for the society at a council meeting is not the act of the board, even though a majority of the trustees were at the council meeting. Cammeyer v. United German Lutheran Church, 2 Sandf. Ch. (N. Y.) 186.

[b] **Majority of trustees acting as individuals** have no authority to bind the corporation, and it is only when acting as a board that they can perform or authorize acts binding on the corporation. Columbia Bank v. Gospel Tabernacle Church, 127 N. Y. 361, 28 NE 29; People's Bank v. St. Anthony's Roman Catholic Church, 109 N. Y. 512, 17 NE 408.

80. State v. Ancker, 31 S. C. L. 245; United Brethren Church v. Vandusen, 37 Wis. 54.

81. Rittenhouse's Est., 140 Pa. 172, 21 A 254.

82. Thompson v. West, 59 Nebr. 677, 82 NW 13, 49 LRA 337.

83. Morgan v. Jones, 9 Kulp (Pa.) 503.

84. See case infra this note.

[a] **Loan to church.**—Where constitution of church prohibits its trustees from borrowing money without permission of congregation at a special meeting being first obtained, a loan made to church without such permission cannot be recovered. Poterski v. Polish Nat. Catholic Church Holy Mother of Rosary, 177 NYS 208.

85. See infra § 63.

86. New Ebenezer Assoc. v. Gress Lumber Co., 89 Ga. 125, 14 SE 892; Donnelly v. St. John's Protestant Episcopal Church, 26 La. Ann. 738; Peckham v. Haverhill North Parish, 33 Mass. 274; Ronconi v. Cook, 107 W. Va. 684, 150 SE 4.

Ratification by society see infra § 63.

87. Parshley v. Brooklyn Third M. E. Church, 147 N. Y. 583, 42 NE 15, 30 LRA 574.

[a] **Services gratuitously performed.**—Where an attorney is employed by a minority of the board of trustees acting individually to prosecute a preacher before the church tribunal for immorality, evidence that the board subsequently agreed to pay another attorney for services gratuitously performed with the understanding between him and the board of trustees as individuals that the sum so paid to him was to be by him paid on the claim of the attorney who prosecuted the preacher does not constitute a ratification of the acts of the individual members of the board or a corporate assumption of their obligation. Parshley v. Brooklyn Third M. E. Church, 147 N. Y. 583, 42 NE 15, 30 LRA 574.

88. American Cong. Assoc. v. Abbot, 252 Mass. 535, 147 NE 895; Richardson v. Prospect Hill Missionary Baptist Church, (Tex. Civ. A.) 7 SW (2d) 179.

89. See case infra this note.

[a] **Unauthorized mortgage.**—A church, by using the proceeds of a loan, is not estopped to deny that authority had been given to its trustees to mortgage certain property for its repayment. Chapman v. Williams, 112 S. C. 402, 100 SE 360.

90. **Of officers of corporations generally** see Corporations § 1949.

Exemption of "spiritual persons" in England from personal liability see infra § 60.

91. United Brethren Church v. Vandusen, 37 Wis. 54.

92. Scott v. Thompson, 21 Iowa 599.

93. See Agency § 487.

94. See case infra note 95.

95. See case infra this note.

[a] **Member of building committee,** agreeing to pay for building materials as one of the committee without limiting the extent of his obligation, is individually liable therefor. Cruse v. Jones, 3 Lea (Tenn.) 66.

96. See cases infra this note.

[a] **Officers held not individually liable:** (1) Vestry pledging corporate funds to persons doing work for the church. Vincent v. Chapman, 10 Gill & J. (Md.) 279. (2) Trustee accepting loan for church purposes, to be refunded if not used for those purposes. Emonds v. Termehr, 60 Iowa 92, 14 NW 197. (3) Bishop engaging priest for the church. Rose v. Vertin, 46 Mich. 457, 9 NW 491, 41 AmR 174. (4) Elders and deacons engaging minister for church. Neill v. Spencer, 5 Ill. A. 461; Paddock v. Brown, 6 Hill (N. Y.) 530. (5) Trustees signing building contract for parsonage of church as trustees. McGhee v. Lose, 22 Pa. Co. 371. (6) Members of committee executing building contract for church "as committee." Hewitt v. Wheeler, 22 Conn. 557; Stanton v. Camp, 4 Barb. (N. Y.) 274; Johnson v. Welch, 42 W. Va. 18, 24 SE 585. (7) Vestrymen engaging attorney to defend them against indictment for not repairing road. Sprott v. Powell, 3 Bing. 478, 11 ECL 236, 130 Reprint 598. (8) Churchwarden to pay fees to registrar of archdeaconry court upon visitation of archdeacon. Veley v. Pertwee, L. R. 5 Q. B. 573. (9) Churchwardens for salary of incumbent. Daw v. Ackerill, 25 Ont. A. 37 [aff 28 Ont. 452]. (10) President negotiating sale of society's property through broker. Winokur v. Federman, 183 NYS 41.

97. Peo. v. Syracuse, 63 N. Y. 291 [rev 2 Hun 433, 5 Thomps. & C. 61]; Beaty v. Gregory, 24 Ont. A. 325 [aff 28 Ont. 60].

98. See infra § 62.

99. Fla.—Phillips v. Hall, 99 Fla. 1206, 128 S 635.

Ga.—Thurmond v. Cedar Spring Baptist Church, 110 Ga. 816, 36 SE 221.

Mo.—Phœnix Ins. Co. v. Burkett, 72 Mo. A. 1.

Oh.—Males v. Murray, 23 Oh. Cir. Ct. 396.

S. C.—Medlin v. Ebenezer Methodist Church, 132 S. C. 498, 129 SE 830.

Tex.—Summerhill v. Wilkes, 63 Tex. Civ. A. 456, 133 SW 492; Burton v. Grand Rapids School Furniture Co., 10 Tex. Civ. A. 270, 31 SW 91.

1. Phillips v. Hall, 99 Fla. 1206, 128 S 635.

mittee who execute it,[2] are individually liable but not officially liable,[3] their individual liability in certain cases being restricted to a particular fund on the sole credit of which the creditor is shown to have contracted.[4] But an officer of an unincorporated society who had no part in the making of the contract is not personally liable thereon.[5] Officers of an unincorporated society negotiating a contract on false representations that the society was incorporated, are personally liable.[6] Officers not individually liable on contracts executed in behalf of the society,[7] do not incur such liability because they thought they were liable and later so expressed themselves,[8] or because an earlier contract on which they were personally liable had been merged into the later contract which they had signed as trustees.[9] Nor can an officer be held personally liable for church indebtedness incurred by another officer in the absence of evidence of agency or ratification,[10] nor is agency in administration of the temporal affairs of the church established by proof that the latter was subject to ecclesiastical control of the former.[11] But trustees are individually liable on contracts which they had no authority to make[12] unless the party with whom the trustees dealt had full knowledge of the trustee's lack of authority and there was no express undertaking on the part of the trustee that he would be individually liable,[13] or on bonds executed by them in their individual capacity with their official designations superadded,[14] or on acceptance of a contractor's order signed by a trustee individually before the society's obligation to the contractor had matured,[15] or with respect to indebtedness which the statute obligates them as individuals to pay.[16] A trustee of a religious society is not individually liable for torts committed by his predecessor in office, in the absence of evidence that he was connected with or participated in the wrongful act.[17] While a trustee of an unincorporated religious society may be individually liable in tort under certain circumstances,[18] he cannot be held liable in his official capacity, the society itself not being liable.[19] It has been held that under statutory provisions churchwardens may be sued in their individual names with the addition of the name of their office on contracts entered into for the church by their predecessors in office, although there was no personal liability of the churchwardens involved.[20]

[§ 59] **D. Compensation and Reimbursement for Expenses.**[21] In the absence of contract, the right of an officer of a religious society to compensation for services rendered depends on the usage in like cases.[22] Where the rendering of services gratuitously is shown to be the established custom, compensation will not be allowed, in the absence of contract, to a trustee of a religious society,[23] or to the treasurer of a church.[24] Nor in such case will liability be imposed on the society by recognition by trustees individually of the officer's alleged moral right to such compensation.[25] On the other hand, the hiring by one trustee of a sexton to care for the church property, and the acceptance of his services without objection by the church, places upon the church corporation the obligation to pay for them.[26] An officer of a religious society is entitled to reimbursement for expenditures and disbursements made in the performance of official duty in good faith and with reasonable prudence,[27] but not to a lien on the church property to secure its repayment.[28] He is not allowed reimbursement for expenditures which are not properly chargeable against the society.[29]

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[2] Forsberg v. Zehm, 150 Va. 756, 143 SE 284, 61 ALR 232.

[3] Phillips v. Hall, 99 Fla. 1206, 128 S 635; Summerhill v. Wilkes, 63 Tex. Civ. A. 456, 133 SW 492.

[4] See case infra this note.

[a] **Minister's salary out of voluntary contributions.**—Although the members of a voluntary association contracting in its behalf become jointly liable, yet, where a preacher contracting with the members of an incorporated religious society for employment knows that the expenses of the church are raised by assessment on a voluntary contribution by the entire membership, the members are not liable in solido. Riffe v. Proctor, 99 Mo. A. 601, 74 SW 409.

[5] Mood v. Methodist Episcopal Church South, (Tex. Civ. A.) 289 SW 461 [aff (Commn. A.) 296 SW 506].

[6] See case infra this note.

[a] **A building contract** signed in the name of the church or a religious denomination as a corporation, by one subscribing himself "president of the board of trustees," such church or religious denomination not being in fact a corporation, will be treated as the contract of such trustees if labor is performed or material furnished thereunder by their authority and direction. Lunsford v. Wren, 64 W. Va. 458, 63 SE 308.

[7] See cases supra note 96.

[8] Vincent v. Chapman, 10 Gill & J. (Md.) 279.

[9] McGhee v. Lose, 22 Pa. Co. 371.

[10] Leahey v. Williams, 141 Mass. 345, 6 NE 78; Devoss v. Gray, 22 Oh. St. 159; Le Saint v. Fisler, 8 Oh. Dec. (Reprint) 216, 6 CincLBul 337; Freeport Bank v. Egan, 146 Pa. 106, 23 A 390.

[11] Leahey v. Williams, 141 Mass. 345, 6 NE 78.

[12] Klopp v. Moore, 6 Kan. 27; Dennison v. Austin, 15 Wis. 334; Northwaite v. Bennett, 2 Cromp. & M. 316, 149 Reprint 781; Furnival v. Coombs, 5 M. & G. 736, 44 ECL 384, 134 Reprint 756; Ruitz v. Roman Catholic Episcopal Corp., 30 U. C. Q. B. (Ont.) 269.

[13] Swearingen v. Bulger, 117 Ark. 557, 176 SW 328.

[14] Dayton v. Warne, 43 N. J. L. 659; Taft v. Brewster, 9 Johns. (N. Y.) 334, 6 AmD 280.

[a] **Liability on official bond.**—The treasurer of a religious society, together with his sureties, is liable on his official bond for defalcations. Father Matthew Young Men's Total Abstinence, etc., Soc. v. Fitzwilliam, 12 Mo. A. 445 [aff 84 Mo. 406].

[15] Building Supplies Corp. v. Jeffress, 140 Va. 592, 125 SE 704.

[16] See case infra this note.

[a] **Assessments for improvements.**—Hopkinson v. Puncher, 3 Exch. 95, 154 Reprint 771.

[17] Louisville v. O'Donaghue, 157 Ky. 243, 162 SW 1110.

[18] Winton Place M. E. Church v. Splain, 16 Oh. A. 331.

[19] Winton Place M. E. Church v. Splain, supra.

[20] See infra § 214.

[21] **Compensation of minister** see infra §§ 88, 89.

[22] See cases infra notes 23–26.

[23] Cicotte v. Catholic, etc., Church Corp., 60 Mich. 552, 27 NW 682.

[24] Barksdale v. Christ Church Parish Episcopal Church, 20 S. C. Eq. 197.

[25] Cicotte v. Catholic, etc., Church Corp., 60 Mich. 552, 27 NW 682.

[26] East St. Louis St. Patrick's Roman Catholic Church v. Abst, 76 Ill. 252.

[27] Bradbury v. Birchmore, 117 Mass. 569; Nicholson v. Masters, 4 Vin. Abr. 529 pl. 9.

[28] French v. Griswold College, 60 Iowa 482, 15 NW 273.

[29] French v. Dear, 5 Ves. Jr. 547, 31 Reprint 731.

V. POWERS AND LIABILITIES OF CHURCH OR SOCIETY

[§ 60] **A. In General.** As a general rule, a church or religious society, subject to constitutional or statutory restrictions,[30] or to charter limitations on its power to act if incorporated,[31] has power to manage all its temporal affairs through its proper officers,[32] and like other corporations[33] is liable for the acts of its officers done in its behalf within the scope of their authority,[34] but not for negligence[35] or trespass,[36] or fraud,[37] or other tort[38] of its trustees outside the scope of their authority, nor for negligence of an employee within the scope of his employment where due care was used by the society in his selection,[39] except in particular classes of negligent acts where a statute is construed not to exempt religious corporations from the general rule of liability for negligence applicable to all corporations.[40] In the absence of fraudulent conduct on the part of its officers, the acts of the society are not subject to rescission by members of the society.[41] A religious society, although unincorporated, has a right to keep the organization intact, and is not at the mercy of a minority who desire to break up the church.[42] But a religious corporation has, in the absence of permission in its charter, no power to engage in commercial enterprises,[43] although when it owns shares in a business corporation, it may vote such shares by proxy at an election for directors.[44] In England, by statute, this disability to engage in commercial pursuits is extended to "spiritual persons," exempting such as are partners in a banking firm or other enterprise for profit from any personal liability on the partnership account.[45]

[§ 61] **B. Church or Denominational Rules, Regulations, and Usages.** Religious organizations have the right to prescribe such rules and regulations for the conduct of their own affairs as they may think proper, if not inconsistent with the constitution and law of the land,[46] independent churches being subject, each to its own rules,[47] and associated churches, each to the rules of the associated body and to its own rules so far as they are consistent therewith,[48] and the associated body to its rules;[49] and, subject to the qualification referred to,[50] the courts will give effect to such rules and regulations.[51] Incorporation does not take away the power of the society to transact its secular business according to the methods and customs of the particular communion or denomination to which it belongs,[52] a church of the congregational type having power to act through a majority vote of its congregation after incorporation as well as before,[53] especially where the trustees acquiesce in such action.[54] Powers guaranteed to a religious society by a state constitution are not affected by denominational rules and practices inconsistent therewith, where its property is held free of any trust for the support of religious worship according to the discipline of a particular denomination.[55]

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[30] See case infra this note.

[a] **Power to take legacy.**—A religious corporation has no power to accept a legacy where the constitution restricts its power to the holding title to real estate for a church edifice, parsonage, and cemetery. Catholic Church v. Tobbein, 82 Mo. 418.

[31] Shavers v. Thomas, 339 Ill. 622, 171 NE 625; Bright v. Ruthenian Greek Catholic Cong., 246 Pa. 156, 92 A 131; Masse v. Our Lady of Consolation Church, 49 R. I. 224, 141 A 703; Stablein v. Hutterische Gemeinde, 43 S. D. 54, 177 NW 810.

[32] See supra §§ 52–59.

[33] See Corporations § 2209.

[34] Iowa.—Cattron v. Manchester First Universalist Soc., 46 Iowa 106.

Ky.—Gladstone Baptist Church v. Scott, 74 SW 1075, 25 KyL 237.

Mass.—Farris v. St. Paul's Baptist Church, 220 Mass. 356, 107 NE 955; Packard v. Quincy First Universalist Soc., 10 Metc. 427.

N. Y.—Columbia Bank v. Gospel Tabernacle Church, 127 N. Y. 361, 28 NE 29 [aff 57 N. Y. Super. 149, 6 NYS 537]; People's Bank v. St. Anthony's Roman Catholic Church, 109 N. Y. 512, 17 NE 408.

Tex.—Owens v. Caraway, (Civ. A.) 110 SW 474.

[35] Louisville v. O'Donaghue, 157 Ky. 243, 162 SW 1110.

[36] Chicago Heights First Presb. Church v. McColly, 126 Ill. A. 333.

[37] New London United Brethren Church v. Vandusen, 37 Wis. 54.

[38] Magnuson v. O'Dea, 75 Wash. 574, 135 P 640, 48 LRANS 327, Ann Cas1915B 1230.

[39] Haas v. Most Holy Redeemer Missionary Soc., 6 Misc. 281, 26 NYS 868.

[a] **Reason for rule.**—"The organization is a missionary one, and there is no allegation of any kind that it has any fund other than that for the maintenance and support of the charity. It has no capital stock, no financial return is made to its members, and, as far as appears, its officers serve without remuneration. Under such circumstances it is merely an instrument of law to accomplish a certain object. The donors of its fund have selected it as a trustee for this object, and the estate, property and revenue in its hands are impressed with the trust for that purpose, and it does not seem to me to be lawful to divert them to any other, and, consequently, none of these funds can be diverted to the payment of damages for a personal injury received by a stranger at the hands of an agent not shown to be unworthy or unfit for the purposes for which he was employed." Haas v. Most Holy Redeemer Missionary Soc., 6 Misc. 281, 282, 26 NYS 868.

Liability of charitable corporation or association for tort generally see Charities §§ 106, 107.

[40] Wilson v. Evangelical Lutheran Church of Reformation, (Wis.) 230 NW 708, 709.

"If the complaint in this case states a cause of action, it is because the defendant failed to maintain a public building so as to render the same safe. The principle upon which charitable corporations were held not to be liable for acts of their servants involved considerations of public policy. It is peculiarly within the province of the Legislature to determine questions of public policy. The chapter referred to makes no exceptions of religious or charitable corporations, and, there appears to us to be no reason why it does not apply to a place of worship maintained by a religious corporation." Wilson v. Evangelical Lutheran Church of Reformation, supra.

[41] Holmes v. Wesley M. E. Church, 58 N. J. Eq. 327, 42 A 582.

[42] Le Blanc v. Lemaire, 105 La. 539, 30 S 135.

[43] Huber v. United Protestant Evangelical German Cong., 16 Oh. St. 371 (such as a bank).

[44] State v. Rohlffs, (N. J. Sup.) 19 A 1099.

[45] Hall v. Franklin, 3 M. & W. 259, 150 Reprint 1141.

Individual liability of officers generally see supra § 58.

[46] See cases infra this note.

"For its own internal order, and for the mode in which it fulfils its functions, it is to be a law unto itself, or have its law within itself, provided it keep within the bounds of social order and morality. This is the same rule that the law applies to individuals in their contracts about legitimate business. Their contracts and their own interpretation of them, so far as they can be ascertained, and the customs of the trade in which they are engaged, are the elements out of which we derive the law of the case which they present for our decision." McGinnis v. Watson, 41 Pa. 9, 14.

[a] **Rules enforced:** (1) That males and females should sit apart. McLain v. Matlock, 7 Ind. 525, 65 AmD 746. (2) That elders shall appoint the pastor. Prickett v. Wells, 117 Mo. 502, 24 SW 52. (3) That trustees of an incorporated Presbyterian church shall not appoint a minister unless authorized by public vote of a congregation. Myers v. Perry First Presb. Church, 11 Okl. 544, 69 P 874. (4) That a synod of the presbyterian church may effect a union with another synod of the same church. McGinnis v. Watson, 41 Pa. 9. (5) That trustees' consent to removal of church property is essential. Alexander v. Bowers, (Tex. Civ. A.) 79 SW 342.

[47] Mitchell v. Mt. Olive Church of Christ, (Ala.) 128 S 781; Thomas v. Lewis, 224 Ky. 307, 6 SW (2d) 255; Gregory v. Grastie, 44 Pa. Co. 43; Woods v. Humber, (Tex. Civ. A.) 282 SW 834.

[48] Nagle v. Miller, 275 Pa. 157, 118 A 670; McGinnis v. Watson, 41 Pa. 9, 14; In re Charter, 1 Del. Co. (Pa.) 415.

"How far is the congregation bound by the act of its Synod? Religious societies are not free, if they may not choose their own form of organization. They may organize as independent churches, and then their law is found in their own separate institutions, customary or written. Or they may organize as associated churches, and then their law is to be found in their own rules, and in those of the associated organism. When persons join a church belonging to such a general organism, they assent to its laws, and are entitled to the implication that the affairs of the church are to be managed according to them." McGinnis v. Watson, supra.

[49] See case infra this note.

[a] **If a religious society be composed of several bodies or branches,** whether coördinate or subordinate, the rules of the society for the man-

[§ 62] **C. Contracts and Indebtedness—1. In General.** The general rules governing private business corporations in the making of contracts and incurring indebtedness[56] apply to religious societies and corporations.[57] The authority of a religious corporation to contract is measured by its charter or organic law,[58] its powers being conferred expressly[59] or by implication.[60] By charter or statute[61] its power to contract may be limited as to the nature and purpose of the contract which it may make,[62] or in the amount of indebtedness which its trustees may create without the vote or sanction of the society.[63] When incorporated, the construction of a church building and the making of contracts relating thereto,[64] and repairs and improvements of the church property[65] are within its corporate powers, and the corporation is subject to the liabilities resulting from the exercise of such powers.[66] Also, religious associations having under the statute a legal existence and entity for the restricted purpose of holding real estate, although not incorporated,[67] have an implied power to make contracts necessary in the improvement of such real estate.[68] Unincorporated religious societies being incapable of making a contract, are not liable on contracts made by its officers or members,[69] and its members or agents are individually liable as joint promisors or partners.[70] Where the society is a corporation aggregate,[71] and has a board of trustees to manage its affairs,[72] it can contract only through the aggregate body by vote, or through the board of trustees by vote, or through an agent authorized by vote of one body or the other,[73] or in the case of a corporation organized merely to hold title, by the religious or denominational body by whom and for whose purposes the corporation has been created and is governed and sustained.[74] When a church and society are an existing organized association, acting in a collective quasi-corporate character,[75] the society is bound by acts of the majority of its members.[76]

[§ 63] **2. Essentials and Limitations of Liability.**[77] Like other corporations,[78] religious corporations are generally bound by the acts of their agents, acting within the apparent scope of their authority,[79]

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agement of its internal affairs, and for the adjustment of the relations between its branches, constitute the rules by which they should be governed. Harrison v. Hoyle, 24 Oh. St. 254.

[50] See supra text and note 46.

[51] See cases supra notes 46–49.

[52] Second Baptist Church v. Beecham, (Mo. A.) 180 SW 1065; Grupe v. Rudisill, 101 N. J. Eq. 145, 136 A 911.

[53] Second Baptist Church v. Beecham, (Mo. A.) 180 SW 1065.

[54] Second Baptist Church v. Beecham, supra.

[55] See case infra this note.

[a] **Call of minister.**—The majority of a presbyterian society may call a minister of their own choosing in violation of the ecclesiastical polity of the presbyterian denomination placing that power in the presbytery, where the state constitution provides that "religious societies of this commonwealth . . . shall ever have the right to elect their pastors or religious teachers," and where the society holds its property free of any trust for the support of religious worship according to the doctrine and discipline of the presbyterian denomination. McNeilly v. Brookline First Presby. Church, 243 Mass. 331, 137 NE 691.

[56] See Corporations § 2506.

[57] See infra this section.

[58] Bailey v. Freeport M. E. Church, 71 Me. 472; Greene v. Malden First Parish, 10 Pick. (Mass.) 500.

[59] See cases supra note 58; and infra notes 62, 63.

[60] See cases infra this note.

[a] **Authority to borrow** (1) will be implied from authority to construct (Wilson v. Clinton Chapel African M. E. Church, 138 Tenn. 398, 198 SW 244; Leonard v. St. Patrick's Parish, 17 Alta. L. 262, 66 DomLR 304) (2) or maintain a church building (Mendelsohn v. Gordon, (Tex. Civ. A.) 156 SW 1152), (3) and from it arises an implied power to give the necessary evidence of indebtedness (Miller v. Childs, 120 Mich. 639, 79 NW 924).

[61] See statutory provisions.

[62] See cases infra this note.

[a] **Business contracts.**—(1) A church incorporated as such cannot engage in commerce or transportation and cannot enter into contracts to that end, but must derive its income not from the conduct of any worldly business but from such property as it may own and from voluntary contributions (Harrimon v. First Bryan Baptist Church, 63 Ga. 186, 36 AmR 117); (2) but when it engages in secular matters it is subject to the same rules and principles governing other corporations, and having made an ultra vires contract it cannot accept the benefit of it and escape the burdens (Moore v. First Ruthven Cir. M. E. Church, 117 Iowa 33, 90 NW 492 [holding that where a church contracted for the erection of an edifice, and thereafter accepted the same, it was not entitled to defend on the ground that the contract was ultra vires]).

[63] Wyncoop v. Bellevue Cong. Soc., 10 Iowa 185.

[64] Bright v. Ruthenian Greek Catholic Cong., 246 Pa. 156, 92 A 131.

[65] First Presb. Church v. McKallor, 35 App. Div. 98, 54 NYS 740; Wilson v. Clinton Chapel African M. E. Zion Church, 138 Tenn. 398, 198 SW 244.

[66] Roman Catholic Archbishop v. Industrial Acc. Commn., 194 Cal. 660, 230 P 1.

[67] See Corporations § 49.

[68] Wilson v. Clinton Chapel African M. E. Zion Church, 138 Tenn. 398, 198 SW 244.

[69] Thurmond v. Cedar Spring Baptist Church, 110 Ga. 816, 36 SE 221; Phœnix Ins. Co. v. Burkett, 72 Mo. A. 1.

[70] See supra § 58.

[71] See Corporations § 30.

[72] See supra §§ 52–59.

[73] Miller v. Milligan, 6 Oh. Dec. (Reprint) 1000, 9 AmLRec 419; Sun Prairie M. E. Church v. Sherman, 36 Wis. 404.

Necessity of trustees acting officially to bind corporation see supra § 57.

[74] McLaughlin v. Concordia College, 20 Mo. A. 42.

[75] See Corporations § 49.

[76] See case infra this note.

[a] **Compromise of a suit.**—Horton v. Chester Baptist Church, etc., 34 Vt. 309.

[77] **Necessity of official action by trustees** see supra § 57.

[78] See Corporations § 1841.

[79] Cal.—Thomasson v. Grace M. E. Church, 113 Cal. 558, 45 P 838.

Conn.—Consociated Presb. Soc. v. Staples, 23 Conn. 544.

Ga.—New Ebenezer Assoc. v. Gress Lumber Co., 89 Ga. 125, 14 SE 892.

Ill.—St. Patrick's Roman Catholic Church v. Gavalon, 82 Ill. 170, 25 AmR 305; Chicago Heights First Presby. Church v. McColly, 126 Ill. A. 333.

Iowa.—Moore v. First Ruthven Cir. M. E. Church, 117 Iowa 33, 90 NW 492.

Kan.—Klopp v. Moore, 6 Kan. 27.

La.—Ross v. Crockett, 14 La. Ann. 811.

Me.—Adams v. Hill, 16 Me. 215.

Mass.—Child v. Christian Soc., 144 Mass. 473, 11 NE 664; Kupfer v. Augusta South Parish, 12 Mass. 185.

Nebr.—Thompson v. West, 59 Nebr. 677, 82 NW 13, 49 LRA 337 [dist or by the acts of persons to whom the agents of the society have lawfully delegated their authority,[80] or which have been assented to,[81] or ratified by the corporation;[82] and where the society has sold its property and made a gift of the proceeds to a new incorporated society, the creditor may enforce his claim against the proceeds in the hands of the donee.[83] It will not be bound in the absence of evidence of a binding contract,[84] or by the acts of a volunteer,[85] or of its own officers acting outside the scope of their authority,[86] in the absence of evidence of ratification,[87] although, in such case, the burden is on the society to prove the unauthorized character of its officer's act.[88]

[§ 64] **3. Implied Contracts.**[89] A religious society will be held liable on a contract implied by law from the conduct of its authorized agents,[90] as where it uses and occupies a building for the church purposes,[91] or where it accepts the services of a broker,[92] or architect,[93] or accepts and uses materials in building the church;[94] but, on the other hand, the society or its trustees cannot be held liable for materials or supplies purchased,[95] or services contracted for by an unauthorized person on his individual credit merely because they were used or accepted with the trustees' and society's knowledge to improve the property of the church.[96]

VI. SUPERIOR, ASSOCIATED, OR REPRESENTATIVE BODIES AND OFFICERS

[§ 65] **A. Relation between Society and Church in General.** A religious society may be independent of any church. Its relations to a church or to a denomination are such as it chooses. It may choose none.[97] Having made a choice, it may later change it if it has not irrevocably surrendered its right to do so.[98] A society which has made its choice in favor of the congregational system, retains its independence of other religious bodies, and may govern itself by its own rules.[99] And where the society owns the land and meeting house and has retained its independence of any church, and neither church members nor pewholders are ipso facto members of the society, the society by vote of its own members may determine the form of worship and its own policy as to the minister to be called and its church affiliations, even against the wishes of a majority of church members or pewholders worshiping in the society's house but who are not members of the society.[1] Correlatively, the church or ecclesiastical body is a separate and distinct organization from the society and independent thereof,[2] and property given absolutely to the church it holds as its property free from the control of the society.[3] The independent relation between church and society or parish may, however, be so far affected by the uses and

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Scott v. Jackson First Free Methodist Church, 50 Mich. 528, 15 NW 891].

N. Y.—Landers v. Frank St. M. E. Church, 114 N. Y. 626, 21 NE 420; People's Bank v. St. Anthony's Roman Catholic Church, 109 N. Y. 512, 17 NE 408; Hart v. Congregation Shearith Israel, 49 N. Y. Super. 523; Constant v. St. Albans Church, 4 Daly 305.

N. C.—Way v. Ramsey, 192 N. C. 549, 135 SE 454.

Oh.—Purcell v. Kuehn, 8 Oh. Dec. (Reprint) 73, 5 CincLBul 442.

Okl.—Myers v. Perry First Presb. Church, 11 Okl. 544, 69 P 874.

Va.—Lackey v. Price, 142 Va. 789, 128 SE 268.

W. Va.—Potts v. Longest, etc., Co., 86 W. Va. 157, 103 SE 279.

Wis.—United Brethren Church v. Vandusen, 37 Wis. 54; Dennison v. Austin, 15 Wis. 334.

[a] **Building committee.**—A church authorizing a committee to plan for a church not to cost more than fifty thousand dollars, was held not liable to architects furnishing plans to committee for building to cost more than that amount. Swearingen v. Bulger, 117 Ark. 557, 176 SW 328.

80. See case infra this note.

[a] **Agent of vestry.**—If a vestry of a church, having a right to reject plans which are not satisfactory, delegate control of the matter to an agent, the corporation is bound by the agent's act. Cann v. Church of Holy Redeemer, 121 Mo. A. 201, 98 SW 781.

81. Condon v. St. Augustine's Church, 112 App. Div. 168, 98 NYS 253.

82. Conn.—City Bank, etc., Co. v. St. Michael Ruthinian Greek Catholic Church, 102 Conn. 609, 129 A 785.

Ga.—Smith v. Goode, etc., Nichols Furniture Co., 8 Ga. A. 90, 68 SE 620.

Ill.—Christian Church v. Cox, 78 Ill. A. 219.

Minn.—Norwegian Evangelical Lutheran Bethlehem Cong. v. U. S. Fidelity, etc., Co., 81 Minn. 32, 83 NW 487.

Pa.—Bright v. Ruthenian Greek Catholic Cong., 246 Pa. 156, 92 A 131.

[a] **Ratification not proved.**—Where the priest of a church advances funds before the church corporation is organized, and the church property on which the funds were expended is sold under a decree to satisfy the lien of the priest, a decree ought not to be rendered against the church corporation for the deficiency, the church after incorporation never having assumed liability for the debt. St. Patrick's Catholic Church v. Daly, 116 Ill. 76, 4 NE 241.

Ratification by trustees see supra § 57.

83. Hunter v. Swadley, 141 Tenn. 156, 207 SW 730.

84. Barney v. Grace Church, 163 App. Div. 387, 147 NYS 1073; Parucki v. Polish Nat. Catholic Church Holy Mother of Rosary, 114 Misc. 6, 186 NYS 702; Cointe v. St. John the Baptist Cong., 154 Wis. 405, 143 NW 180.

85. East Baltimore Lumber Co. v. K'Nessett Israel Aushe S'Phard Cong., 100 Md. 125, 59 A 180.

86. Moore v. First Ruthven Cir. M. E. Church, 117 Iowa 33, 90 NW 492.

87. Frey v. Dougherty, 286 Pa. 45, 132 A 717.

88. Moore v. First Ruthven Cir. M. E. Church, 117 Iowa 33, 90 NW 492.

[a] **Loss of record of authorization.**—The mutilation of the minute book of a church by removing therefrom the pages containing a resolution of the congregation authorizing the trustees to execute a note does not affect the validity of the resolution. Gladstone Baptist Church v. Scott, 74 SW 1075, 25 KyL 237.

89. **Recovery by minister in quantum meruit** see infra § 88.

90. See case infra this note.

[a] **Acceptance of unauthorized loan.**—A person who has loaned money to a priest to pay a note due by the church of the priest to a bank, and the money loaned has been so used, may recover from the church the amount of the loan, although the priest had no authority to borrow the money. Wojciechowski v. Johnkowski, 16 Pa. Super. 444.

91. Trapp v. St. John's Baptist Church, 174 Ill. A. 213; Hines v. Perkins, 230 Ky. 339, 19 SW (2d) 991.

92. Stablein v. Hutterische Gemeinde, 43 S. D. 54, 177 NW 810.

93. Crescent Hill Presb. Church v. McDonald, 144 Ky. 655, 139 SW 849.

94. Wilson v. Tabernacle Baptist Church, 28 Misc. 268, 59 NYS 148; Tull v. Kingston M. E. Church, 75 N. C. 424.

95. Montgomery v. Walton, 111 Ga. 840, 36 SE 202.

96. Cointe v. St. John the Baptist Cong., 154 Wis. 405, 143 NW 180.

97. Trinitarian Cong. Soc. v. Union Cong. Soc., 61 N. H. 384; Holt v. Downs, 58 N. H. 170.

98. Trinitarian Cong. Soc. v. Union Cong. Soc., supra.

99. Sentell v. Friendship Baptist Church No. 2, 214 Ala. 584, 108 S 517; North Carolina Christian Conference v. Allen, 156 N. C. 524, 72 SE 617; Redland First Baptist Church v. Ward, (Tex. Civ. A.) 290 SW 828.

1. Trinitarian Cong. Soc. v. Union Cong. Soc., 61 N. H. 384.

2. Holt v. Downs, 58 N. H. 170.

3. Holt v. Downs, supra.

trusts on which property is granted as to make the identity of the church in relation to the church property dependent on its continued connection with the parish,[4] in which case a minority of the original church remaining in the parish is the church under the terms of the grant as against the majority moving out of the parish.[5] A society, at the time it organizes, may choose to surrender its independent character and to become a part of a larger church or denominational organization;[6] that choice may be established in proof by parol evidence of circumstances, a written compact or constitution not being required.[7] Where a society has once attached itself to a particular denomination, in order to maintain its status as a church of that denomination it must preserve an ecclesiastical connection with and subordination to the superior bodies, as prescribed by the rules of the superior bodies.[8] Where the church is an integral part of the general organization, and has a direct, inherent, and organic interest in that body, it is forever a part of it, except where its rights are forfeited by a regular judicial decree,[9] or the connection is broken by mutual consent of society and the superior body,[10] a society even though it has voted in favor of secession still remaining a part of the larger body until the secession has been acted upon by the larger body in conformity to its own rules.[11] But where the connection between society and superior body is shown to be purely voluntary, and there is no provision to the contrary in the church rules, it may be severed by the society without the consent of the superior body,[12] especially where the superior organization is merely an advisory body to a confederation of local self-governing churches,[13] and in such case a severance of the connection is effected by notice of withdrawal.[14] Where the original compact between members of a religious society and the terms of the trust on which its property is held require that it shall always adhere to a particular creed or system of doctrine and church polity and that the society shall always be connected with an orthodox synod, the society is at all times free by majority vote to change its synodical connection to another orthodox synod,[15] but a majority has no right to change the faith and doctrine to which the society was committed by its original compact.[16] The freedom of incorporated religious societies to change their denominational connections has been affected by statutes in some jurisdictions,[17] a majority of the members of a corporation having power at any time to sever their connection with the superior body under an early New York statute providing that a religious society shall not be subject to denominational control,[18] but where the charter embodies the original purpose of the incorporators to become connected with a superior church organization, and such connection is made, it cannot later be dissolved by action of the majority.[19] Where a connection is once established between a society and a superior church organization, it is presumed, in the absence of proof to the contrary, to have no right to sever the connection, except by mutual consent.[20]

[§ 66] **B. Powers.** In a congregational religious system, it is generally held that an association or conference of churches has no supervision, control, or governmental authority of any kind over the individual congregations,[21] and the right of an individual congregation to govern itself in accordance with its own by-laws[22] and by majority vote of its own members[23] is not affected by its adherence to or rejection of the discipline adopted by a conference of the churches, and by majority vote, it may withdraw therefrom at any time, and such withdrawal will be effective even though not in conformity with the rules of the conference regulating withdrawal of churches.[24] But the reasoning of the Massachusetts cases in which the terms of grants of property to a congregational church have been held to impose restrictions upon its power to act independently by a majority vote of its members,[25] have been so far followed in some cases that a constitution of a congregational church vesting its government in the body of believers who compose it and declaring an "organic relation" of mutual counsel and coöperation to exist between church and an association and conference of churches has been held to limit the governing power, at least in the calling and ordaining of ministers, to a majority of those coöperating with the association.[26] In the presbyterial and episcopal systems, where the governmental control over the individual congregation exists and is more or less centralized in superior ecclesiastical bodies, the powers of the superior body are defined and limited by the terms of its constitution,[27] the source of such power being the ecclesiastical as distinguished from municipal law.[28] When authorized by its organic law, and subject to the limitations therein contained, the superior body has power to provide means for the amendment of its constitution and confession of faith,[29] and to either divide or to submit a plan for the division of the church into two parts,[30] to provide a plan for union with another church,[31] to elect trustees of a subsidiary institution according to the terms of an endowment or statute;[32] to recognize one of two rival factions;[33] to depose officers of local churches,[34] and to construe the confession of faith and to determine whether certain doctrines are in conflict with such confession.[35] Although a superior body may have power to amend the constitution and confession of faith,[36] and to effect a union of churches of different faiths under a common confession of faith,[37] it has no power to divert trust property pledged to the maintenance of the original confession of faith of either one of the churches, and to prevent such diversion the court will inquire into matters of doctrine and faith while it would have no power to do so if property rights were not involved.[38] When a superior body is acting within the scope of its authority, its orders and judgments are binding on subordinate bodies,[39] and a subordinate body may be expelled from the organization if it disobeys.[40] But the superior body has no power to control outside of its authority to act,[41] or after a severance of the connection between the individual church and superior body has been effected;[42] nor has an intermediate body power by its unauthorized acts to bind the supreme body.[43] However, proceedings had without authority by an intermediate church organization may be ratified and validated by the supreme body, provided the latter body does not violate the discipline of the church.[44] Under a statute,[45] an ecclesiastical governing body may dissolve a church as a spiritual body,[46] but it has no power to dissolve the corporation considered as a legal entity,[47] although it may still direct the denominational uses to which the corporation as trustee shall apply the property.[48] Under other statutes,[49] the superior body may take possession of the property of extinct churches,[50] but such a provision gives it no power to decree the dissolution of a church[51] and then take possession of its property, the statute having no application to a case where extinction was forced upon the church.[52] In cases where withdrawal of a society from the superior church body can only be made effectual by consent of the superior body,[53] the superior body may give or withhold its consent.[54]

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[4] Baker v. Fales, 16 Mass. 488.

[a] **The Massachusetts doctrine,** apparently contra to the rule laid down in the New Hampshire cases, is explained on the basis of a practical identity of church and parish in early Massachusetts history, and on the terms of early grants of property for the support of worship in particular places. See Opinions of Parker, C. J., in Baker v. Fales, 16 Mass. 488, and Doe, C. J., in Holt v. Downs, 58 N. H. 170.

[5] Baker v. Fales, 16 Mass. 488.

[6] Permanent Committee of Missions, etc. v. Pacific Synod Presb. Church, 157 Cal. 105, 106 P 395; American Primitive Soc. v. Pilling, 24 N. J. L. 653; Nagle v. Miller, 275 Pa. 157, 118 A 670.

[7] American Primitive Soc. v. Pilling, 24 N. J. L. 653.

[8] Louisville First Presb. Church v. Wilson, 14 Bush (Ky.) 252.

[9] Kerr's App., 89 Pa. 97; McAuley's App., 77 Pa. 397.

[10] American Primitive Soc. v. Pilling, 24 N. J. L. 653.

Consent of superior body to withdrawal see infra § 66.

[11] American Primitive Soc. v. Pilling, 24 N. J. L. 653.

[12] Lawson v. Kolbenson, 61 Ill. 405; Pulis v. Iserman, 71 N. J. L. 408, 58 A 554; Bartholomew v. Lutheran Cong., 35 Oh. St. 567; Heckman v. Mees, 16 Oh. 583; Skilton v. Webster, Brightly (Pa.) 203.

[13] Gudmundson v. Thingvalla Lutheran Church, 29 N. D. 291, 150 NW 750; Fadness v. Braunborg, 73 Wis. 257, 41 NW 84.

[14] Gudmundson v. Thingvalla Lutheran Church, 29 N. D. 291, 150 NW 750.

[15] Schradi v. Dornfield, 52 Minn. 465, 55 NW 49.

[16] Smith v. Pedigo, 145 Ind. 361, 33 NE 777, 44 NE 363, 19 LRA 433, 32 LRA 838; Mt. Zion Baptist Church v. Whitmore, 83 Iowa 138, 49 NW 81, 13 LRA 198.

[17] See statutory provisions.

[18] Petty v. Tooker, 21 N. Y. 267 [aff 29 Barb. 256]; Watkins v. Wilcox, 4 Hun (N. Y.) 220, 6 Thomps. & C. 539 [aff 66 N. Y. 654]; Burrell v. Seneca Associate Reformed Church, 44 Barb. (N. Y.) 282.

For statutory changes as to denominational control in New York see supra § 22.

[19] Sutter v. First Reformed Dutch Church, 42 Pa. 503, 3 Grant 336.

[20] Vasconcellos v. Ferraria, 27 Ill. 237.

[21] North Carolina Christian Conference v. Allen, 156 N. C. 524, 72 SE 617.

[22] Gregory v. Grastie, 44 Pa. Co. 43 (as to baptist denomination).

[23] Windley v. McCliney, 161 N. C. 318, 77 SE 226.

[24] Delhi First Evangelical Lutheran Cong. v. Mommsen, 174 Minn. 215, 219 NW 91; Rock Dell Norwegian Evangelical Lutheran Cong. v. Mommsen, 174 Minn. 207, 219 NW 88.

[25] See supra § 65.

[26] Dyer v. Los Angeles Super. Ct., 94 Cal. A. 260, 271 P 113 [cit with appr Baker v. Fales, 16 Mass. 488].

[§ 67] **C. Meetings—1. Conduct in General.** A meeting convened with a jurisdictional basis in the church statute is entitled to the presumption of regularity.[55] A meeting called at a time and place in accordance with the requirements of the church discipline is valid, and action taken at such meeting is valid as against action taken by another faction at a meeting called at a different time and place not in accordance with the church discipline.[56] Where the church discipline provides that the time and place of a particular meeting shall be determined by certain designated agencies, the appointing a time and place is an administrative function, and may be delegated by the bodies named in the church discipline to another subordinate body.[57] A presiding officer of a superior ecclesiastical body is not a necessary part of that body. A superior body, legally constituted, may function legally without him.[58] Nor does his presence as presiding officer confer authority to act upon a body illegally constituted.[59] A rule of a superior body providing for selection of its presiding officer at a particular point of time in the proceedings may be suspended by the superior body and the selection postponed to a later time.[60]

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[27] See cases infra this section.

[28] See case infra this note.

[a] **The legal rights of a bishop,** in regard to the temporalities of a church, are not prescribed by the municipal law, and must arise, if at all, from the relations created by ecclesiastical law, which must be shown in evidence. Leahey v. Williams, 141 Mass. 345, 6 NE 78.

[29] Brundage v. Deardorf, 92 Fed. 214, 34 CCA 304; Harris v. Cosby, 173 Ala. 81, 55 S 231.

[30] Smith v. Swormstedt, 16 How. (U. S.) 288, 14 L. ed. 942 [rev 22 F. Cas. No. 13,112, 5 McLean 369]; Humphreys v. Burnside, 4 Bush (Ky.) 215; Gibson v. Armstrong, 7 B. Mon. (Ky.) 481; Reeves v. Walker, 8 Baxt. (Tenn.) 277; Brooke v. Shacklett, 13 Gratt. (54 Va.) 301.

[31] Ala.—Harris v. Cosby, 173 Ala. 81, 55 S 231.

Cal.—Cumberland Presb. Church Permanent Committee, etc. v. Presbyterian Church Pacific Synod, 157 Cal. 105, 106 P 395.

Ky.—Wallace v. Hughes, 131 Ky. 445, 115 SW 684.

Mo.—Hayes v. Manning, 263 Mo. 1, 172 SW 897.

Tex.—Brown v. Clark, 102 Tex. 323, 116 SW 360, 24 LRANS 670 [rev (Civ. A.) 108 SW 421].

[32] Kinkead v. McKee, 9 Bush (Ky.) 535.

[33] Rodgers v. Burnett, 108 Tenn. 173, 65 SW 408.

[34] Borgman v. Bultema, 213 Mich. 684, 182 NW 91; Dayton v. Carter, 206 Pa. 491, 56 A 30.

[35] Borgman v. Bultema, 213 Mich. 684, 182 NW 91.

[36] See cases supra note 29.

[37] See cases supra note 31.

[38] See infra §§ 155–159.

[39] Wheelock v. Los Angeles First Presb. Church, 119 Cal. 477, 51 P 841; Immaculate Conception Parish v. Murphy, 89 Nebr. 524, 131 NW 946, 35 LRANS 926; Bonacum v. Harrington, 65 Nebr. 831, 91 NW 886.

[a] **Synod of presbyterian church** (1) in the exercise of its legislative power, may erect new presbyteries (Smith v. Nelson, 18 Vt. 511), (2) and dissolve an old presbytery and assign its churches to some other presbytery (Wheelock v. Los Angeles First Presb. Church, 119 Cal. 477, 51 P 841; McAuley's App., 77 Pa. 397), (3) but only after a proper trial (Kerr's App., 89 Pa. 97).

[b] **President of methodist conference** may, during the recess of the conference, employ and station a minister to fill a vacancy without the consent of the church. Robinson v. Cocheu, 18 App. Div. 325, 46 NYS 55.

[c] **English bishops** possess the power of visitation. Reg. v. Rochester, 17 Q. B. 1, 79 ECL 1, 117 Reprint 1181; Reg. v. Chester, 15 Q. B. 513, 69 ECL 513, 117 Reprint 553; Phillpotts v. Boyd, L. R. 6 P. C. 435; Harrison v. Dublin, 2 Bro. P. C. 199, 1 Reprint 885; Kildare v. Dublin, 2. Bro. P. C. 179, 1 Reprint 872.

[40] Clark v. Brown, (Tex. Civ. A.) 108 SW 421 [rev on other grounds 102 Tex. 323, 116 SW 360, 24 LRA NS 670].

[41] See case infra this note.

[a] **Churchwardens** of Roman catholic church in Louisiana have power to fix compensation of priest without interference of bishop or pope. St. Francis of Point Coupeé Roman Catholic Church v. Martin, 4 Rob. (La.) 62.

[42] Pulis v. Iserman, 71 N. J. L. 408, 58 A 554; Gudmundson v. Thingvalla Lutheran Church, 29 N. D. 291, 150 NW 750.

[43] Congregation of Resurrection v. Laibe, 152 Ill. A. 417.

[44] Krecker v. Shirey, 163 Pa. 534, 30 A 440, 29 LRA 476.

[45] See statutory provisions.

[46] New York Presbytery v. Westminster Presb. Church, 222 N. Y. 305, 118 NE 800; Westminster Presb. Church v. New York Presbytery, 211 N. Y. 214, 105 NE 199.

[47] New York Presbytery v. Westminster Presb. Church, 222 N. Y. 305, 118 NE 800; Westminster Presb. Church v. New York Presbytery, 211 N. Y. 214, 105 NE 199.

[48] New York Presbytery v. Westminster Presb. Church, 222 N. Y. 305, 118 NE 800.

[a] **In England,** as between a churchwarden and the ordinary, it is held that the title to property used in worship is in the churchwarden, but the right to control its use in the services of the church is in the ordinary. Ritchings v. Cordingley, L. R. 3 A. & E. 113.

[49] See statutory provisions.

[50] Westminster Presb. Church v. New York Presbytery, 211 N. Y. 214, 105 NE 199.

[51] Westminster Presb. Church v. New York Presbytery, 211 N. Y. 214, 105 NE 199.

[52] Westminster Presb. Church v. New York Presbytery, supra.

[53] See supra § 65.

[54] See case infra this note.

[a] **Resolution held not to constitute authorization of withdrawal.**—A resolution adopted by the general conference of a religious society that if any church or circuit had decided to withdraw from the connection, the conference bade them God-speed, and prayed that their newer association might bring them greater opportunities, does not constitute a consent, authorization, or approval of any withdrawal. Cape v. Plymouth Cong. Church, 130 Wis. 174, 109 NW 928.

[55] Kedrovsky v. Rojdesvensky,

[§ 68] **2. Delegates and Representatives.** The status of a lay representative to a synod is not a civil but an ecclesiastical one, and an alleged interference with a lay representative's right to hold his office cannot be made ground for injunction in the civil courts.[61] After a church body has been exscinded by a superior church body, its representatives have no right to participate in the proceedings of the latter organization,[62] and a congregation is not chargeable with the acts of its delegates to the superior bodies, when, under the rules of the denomination, it has no voice in their election.[63]

VII. MINISTERS

[§ 69] **A. Definitions—1. Minister.** A minister is one who, having been ordained to the ministry, undertakes to perform certain services for another. As distinguished from pastor, it implies performance of a casual service, a "ministration."[64] It includes a bishop whenever officiating as minister in the service of the Holy Communion,[65] a lecturer who performs the services of a minister in the place of the regularly appointed minister,[66] a deacon[67] or a priest[68] who has conferred on him, by a general ordination, the investment of ministerial functions, even though he is not by that act placed over a particular church.[69]

[§ 70] **2. Minister of Gospel.**[70] "Minister of the gospel" within the meaning of the marriage acts requiring one to be such before he can be licensed to marry,[71] is construed broadly to refer to ministers of any form of religion or faith,[72] but that although it is not necessary that he should be the pastor of any congregation in particular, it is required that he should be something more than a preacher merely. He must have the faculty, according to the constitution of his church, to celebrate matrimony, and, to some extent at least, the power to administer the christian sacraments, as acknowledged and held by his church.[73]

[§ 71] **3. Minister of Religion.**[74] A "minister of religion" within the meaning of the statute exempting such from military service,[75] has reference to one authorized to preach and regularly employed in the discharge of ministerial duties regardless of whether or not he is compensated therefor.[76]

[§ 72] **4. Ordained Minister.**[77] An "ordained minister" is one consecrated to the ministry by some act of admitting and setting apart,[78] but within the meaning of the marriage acts requiring one licensed

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214 App. Div. 483, 212 NYS 273 [aff 242 N. Y. 547, 152 NE 421].

[56] Schweiker v. Husser, 146 Ill. 399, 34 NE 1022 [aff 44 Ill. A. 566]; Auracher v. Yerger, 90 Iowa 558, 58 NW 893; State v. Esher, 6 Oh. Cir. Ct. 312, 3 Oh. Cir. Dec. 468; Krecker v. Shirey, 163 Pa. 534, 30 A 440, 29 LRA 476.

[57] See cases infra this note.

[a] **Requirements of church discipline.**—Where provisions in the church discipline fix a method of determining the time and place of the next general conference, placing the duty on the bishops in the first instance, then if they do not act, on the general conference, and if they do not act, on the oldest annual conference, a number of annual conferences constituting the general conference, the oldest annual conference has no right to fix the time and place, if the bishops and general conference have done so through another properly delegated body. Schweiker v. Husser, 146 Ill. 399, 34 NE 1022 [aff 44 Ill. A. 566]; Auracher v. Yerger, 90 Iowa 558, 58 NW 893; State v. Esher, 6 Oh. Cir. Ct. 312, 3 Oh. Cir. Dec. 468.

[58] See case infra this note.

[a] **Bishop of evangelical association.**—Krecker v. Shirey, 163 Pa. 534, 30 A 440, 29 LRA 476.

[59] Krecker v. Shirey, 163 Pa. 534, 30 A 440, 29 LRA 476.

[60] See case infra this note.

[a] **Clerk of Quaker annual meeting.**—Earle v. Wood, 8 Cush. (Mass.) 430.

[61] See case infra this note.

[a] **Right to partake of Lord's Supper.**—A lay representative to a synod, being obliged to show that he has partaken of the Lord's Supper at least three times in the year, in order to retain his office of lay representative, is not entitled to an injunction against the minister on the ground that his refusal to allow the plaintiff to partake of the Lord's Supper operated to deprive him of his office. Dunnet v. Forneri, 25 Grant Ch. (Ont.) 199.

[62] Com. v. Green, 4 Whart. (Pa.) 531.

[63] McAuley's App., 77 Pa. 397.

[64] Perry First Presb. Church v. Myers, 5 Okl. 809, 825, 50 P 70, 38 LRA 687.

[a] **Other definitions.**—"The person whose office it was spiritually to minister" to the parishioners, and held to include a curate who had the cure of the parish as principal during suspension of the vicar. Pinder v. Barr, 4 E. & B. 105, 115, 82 ECL 114, 119 Reprint 41, 28 EngL &Eq 235.

[65] Read v. Lincoln, 14 P. D. 148.

[66] Reg. v. Liverpool, 8 A. & E. 176, 35 ECL 540, 112 Reprint 804.

[67] Kibbe v. Antram, 4 Conn. 134, 140.

[68] Dupont v. Pelletier, 120 Me. 114, 119, 113 A 11.

[69] See cases supra notes 67, 68.

[70] **Authority of clergymen to solemnize marriage** see Marriage § 79.

[71] See statutory provisions.

[72] Haggin v. Haggin, 35 Nebr. 375, 379, 53 NW 209; Matter of Reinhart, 9 OhS&CP 441, 6 OhNP 438.

[73] State v. Bray, 35 N. C. 289, 291.

[74] **Exemptions from military duty** see Militia § 7.

[75] See statutory provisions.

[76] Ex p. Cain, 39 Ala. 440, 441.

[a] **In England** the statutory exemption to "regular ministers of religious denominations" is held not to apply (1) to persons so employed after the "appointed day" for their enlistment but before their call to active service (Stone v. Wood, [1917] 2 K. B. 885; Chauncey v. Peters, 87 L. J. K. B. 833), (2) to a lay reader (Simmonds v. Elliott, [1917] 2 K. B. 894), (3) or missionary of a seamen's friend society (Bratt v. Auty, 87 L. J. K. B. 305), (4) or to a grocer elected minister who performed the ministerial function but without ordination and without salary (Nock v. Malins, 87 L. J. K. B. 62), (5) or to a draper elected an elder without salary (Kipps v. Lane, 86 L. J. K. B. 735, 116 L. T. Rep. 95), (6) or to an evangelist licensed to preach, but not to administer the sacraments (Flint v. Courthope, 87 L. J. K. B. 504; Robins v. Wood, 87 L. J. K. B. 224).

[77] **Authority of clergymen to authorize marriages** see Marriage § 79.

[78] Matter of Reinhart, 9 OhS

to marry to be an ordained minister,[79] not confined to the christian ministry.[80]

[§ 73] **5. Pastor.** A pastor is a minister who has been "installed according to the usage of some christian denomination in charge of the specific church or body of churches."[81] A distinction exists as between pastor and priest, priest having reference to a position with spiritual power regardless of locality, while the pastor is a priest placed in charge of a certain parish.[82]

[§ 74] **6. Settled Minister.**[83] Under statutes exempting settled ministers from taxation,[84] a "settled minister" is one ordained in some particular society, incorporated or unincorporated, which shall be entitled to his services and obligated to him for his support,[85] even though his employment changes from one society to another in the same town,[86] and even though he is a deacon, merely, ordained and licensed to preach, but not authorized to administer the Lord's Supper,[87] and has no fixed salary but is supported by voluntary contributions.[88] The term "settled minister" does not include an ordained minister who merely resides in town but whom no religious society in the town is obligated to support.[89]

[§ 75] **7. Stated Minister.**[90] Statutes regulating the solemnization of marriages have variously named the person authorized by law to administer the ordinance of marriage.[91] Within the meaning of these statutes, a "stated and ordained minister of the gospel" is held to include a person ordained to the ministry generally, and later engaged to preach in the town where he is licensed to marry.[92] A travelling circuit preacher on a circuit of several towns is not a stated or settled minister within the meaning of the marriage acts.[93]

[§ 76] **8. Stated Supply.** A "stated supply" is a term used in the presbyterial forms to apply to a missionary employed by the presbytery and assigned to a particular mission church. He is distinguished from a pastor, "called" by the congregation subject to confirmation of the presbytery.[94]

[§ 77] **9. Teacher of Piety, Religion, and Morality.** A "teacher of piety, religion and morality" within the meaning of a Bill of Rights is a minister of the gospel.[95]

[§ 78] **B. Ordination, Call, Employment, or Settlement—1. In General.** The rules and usages of the church determine the legal method of electing or appointing its minister,[96] except where they conflict with the constitution or statutes of the state in which the church is located.[97] Where the denomination has no rule for the appointment of ministers or priests, and the society is incorporated, its board of trustees is the proper body to exercise the power of appointment.[98] In the absence of a positive ecclesiastical rule, the entire absence of any ceremony of induction does not affect the right of a rector or minister to his position.[99] Where under a trust deed the right to nominate a minister for settlement is vested in a particular person, a nomination purchased for a certain sum of money is void.[1]

[§ 79] **2. Ordination and Reordination.** Ordination is not the equivalent of election or appointment.[2] If the election is invalid, a subsequent ordination vests the incumbent with no title.[3] Nor is reordination necessary each time a minister, once ordained, is settled over a church,[4] or where he transfers his ministry from the protestant episcopal to the presbyterian church.[5]

[§ 80] **3. Rules and Usages of Particular Churches.**[6] **Congregational.** In a church maintaining an organization independent of other churches or of denominational connections, the majority of the members of the church and society, not the session or trustees, elect the pastor.[7] In the baptist churches of early New England maintaining the dual form of organization, church and society, it has been held that both church and society must concur in calling and settling a minister,[8] but that after a formal call by the church, concurrence of the society may be proved by records recognizing him as filling that office, coupled with proof that he actually performed

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&CP 441, 444, 6 OhNP 438.

[79] See statutory provisions.

[80] Matter of Reinhart, 9 OhS&CP 441.

[81] Perry First Presb. Church v. Myers, 5 Okl. 809, 825, 50 P 70, 38 LRA 687 [quot Century D.; Webster D.].

[82] See Pastor 47 C. J. p 1375.

[83] **Exemption of ministers from taxation generally** see Taxation [37 Cyc 911 note 59].

[84] See statutory provisions.

[85] Ruggles v. Kimball, 12 Mass. 337, 338.

[86] Gridley v. Clark, 2 Pick. (Mass.) 403, 410.

[87] Baldwin v. McClinch, 1 Me. 102, 108.

[88] Baldwin v. McClinch, 1 Me. 102.

[89] Ruggles v. Kimball, 12 Mass. 337, 339; Kidder v. French, Smith (N. H.) 155, 164.

"It is impossible to consider the plaintiff entitled to a privilege which is given as much for the benefit of those societies who incur the charge of a settled minister as for the benefit of the minister himself, as this exemption necessarily enters into the computation of the sum which may be fixed as a compensation to the minister." Ruggles v. Kimball, supra.

[90] **Authority of clergymen to solemnize marriage** see Marriage § 79.

[91] See statutory provisions.

[92] Com. v. Spooner, 1 Pick. (Mass.) 235, 236.

[93] Goshen v. Stonington, 4 Conn. 209, 219, 10 AmD 121.

[94] Myers v. Perry First Presb. Church, 11 Okl. 544, 69 P 874.

[95] Baker v. Fales, 16 Mass. 488, 509.

"The term teacher was made use of as nomen generalissimum, to embrace the clerical head of every denomination of Christians in the state. It was well known, that, in early times, certain titles used in the established church were offensive to our modest ancestors, as savoring of ecclesiastical distinction, and that the terms teach, teaching elder, teaching officer, &c., were commonly used, in lieu of other official designations known in the English church. By a colonial law of 1668, it is provided, that teaching officers of churches should be the ministers to all the inhabitants of the towns in which the churches over which they are placed shall be planted. If a teacher of piety, religion and morality, in the sense of the Declaration of Rights, does not mean ministers of the gospel, then the provision is senseless and nugatory; for there was not then, nor is there now, any such officer known in the parishes or churches." Baker v. Fales, supra.

[96] See infra § 80.

[97] See infra §§ 81-83.

[98] Papaliou v. Manusos, 113 Ill. A. 316.

[99] Youngs v. Ransom, 31 Barb. (N. Y.) 49.

[1] Combe v. Brazier, 2 S. C. Eq. 431.

[2] See cases infra note 3.

"Ordination" 46 C. J. p 1136.

[3] Perry v. Shipway, 4 De G. & J. 353, 61 EngCh 277, 45 Reprint 136.

[4] Leicester v. Fitchburg, 7 Allen (Mass.) 90 [foll Bellingham v. West Boylston, 4 Cush. (Mass.) 553].

[5] Ritchie v. Widdemer, 59 N: J. L. 290, 35 A 825.

[6] **As affected by state constitutions, statutes, and charters** see infra §§ 81-83.

[7] Independent Presb. Church v. Proctor, 66 Ill. 11.

[8] Leicester v. Fitchburg, 7 Allen (Mass.) 90.

the duties thereof.[9] Where the church property is held by trustees in trust for the congregation, the majority of the congregation have the power to appoint the minister,[10] but the power must be lawfully exercised at a meeting duly called, and an alleged appointment on any other basis is no appointment at all.[11]

Presbyterial. According to the usage and form of government of the presbyterian church, the selection of the pastor is primarily in the congregation, but must be approved by the presbytery and accepted by the minister.[12] But a "call" by the congregation in itself is merely tentative,[13] and the formal sanction of the presbytery and acceptance of the call by the minister are essential to the consummation of the pastoral relation.[14] It has even been held that after confirmation by the presbytery and acceptance of the call by the minister, there must still be installation by the presbytery,[15] and that in the absence of installation, the presbytery may reconsider its action, reject the candidate, and prevent his further officiating as minister.[16] A "stated supply" is not a pastor.[17] His selection is made by the presbytery without a "call" from the congregation, and he is subject at all times to its control.[18]

Episcopal. In a church which has entered into voluntary association with the evangelical association where the itineracy of the clergy and the absolute power of the bishops over the appointments of the preachers for the various churches is a distinctive feature of the discipline, the trustees and congregation of a local church have no power in regard to the selection of its pastor,[19] subject only to the limitation that the appointing bishop shall be the presiding bishop of a conference that shall be itself a legally constituted body.[20] This rule applies to appointment of preachers to local churches in the methodist episcopal church.[21] Under the canons of the episcopal church requiring a bishop to consult the churchwardens and lay representatives of the parish before appointment of a rector to a vacancy, an appointment without prior consultation is not a lawful appointment.[22] In England, a curate is first appointed by the rector to assist him.[23] His appointment is then certified by the rector to the bishop.[24] Then, but not until then, he is eligible for ordination by the bishop.[25]

[§ 81] **4. State Constitutions, Statutes, and Charters—a. In General.** The civil law of the state, in the form of constitution, statute or charter, controls if in conflict with a church law or canon,[26] unless by the terms of a trust deed an appointment thereunder is made subject to the church law.[27] So a state law incorporating all vestries of episcopal churches, and investing them with power of appointment and removal of ministers[28] prevails over a church canon placing that power in the bishop of the diocese.[29] And a right to appoint in conflict with church law cannot be grounded on an old state law which has been abrogated.[30] But where there is ambiguity in the state law, it will be construed to avoid a conflict with the church law,[31] especially where the obscure enactment is an amendment of a church charter which itself recognizes the church law as controlling.[32] Where the legislature has conferred on the church corporation unconditionally the power of disposing of the right of presentation,[33] any by-law passed by the corporation in the exercise of that power is valid,[34] and the terms of the by-law are a matter within the discretion of the corporation.[35] The power of a religious corporation to contract for the services of a minister depends on the terms of its charter.[36] In the absence of express power to contract, no implied power can be based upon the power granted by the incorporating act to tax pews for enumerated purposes of which the support of a minister is not one.[37]

[§ 82] **b. New York Rule.** Where, as in New York, the state statute provides that the officers of a religious corporation shall administer the temporalities according to the rules of the church or denomination to which the corporation belongs,[38] the church law is supreme by force of the statute itself,[39] and the trustees cannot lawfully maintain in office a minister who has been deposed by a superior body of the denomination, which has the power of removal under the church law,[40] or without the approval of the bishop or without prior notice to him of the proposal to elect him as required by the church canons,[41] nor refuse to receive a minister lawfully appointed by a bishop having that power under the church law.[42] The early law in New York, which this statute changed, gave to trustees who were invested by statute with the management of the temporal affairs of the corporation the power of determining who should occupy the pulpit.[43]

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[9] Leicester v. Fitchburg, 7 Allen (Mass.) 90.

[10] See case infra note 11.

[11] Perry v. Shipway, 4 De G. & J. 353, 61 EngCh 277, 45 Reprint 136.

[12] Perry First Presb. Church v. Myers, 5 Okl. 809, 50 P 70, 38 LRA 687.

[13] Perry First Presb. Church v. Myers, 5 Okl. 809, 50 P 70, 38 LRA 687.

[14] West v. St. Paul Presb. Church, 41 Minn. 94, 42 NW 922, 4 LRA 692; Perry First Presb. Church v. Myers, supra.

[15] Woodside's App., 4 Pennyp. (Pa.) 124.

[16] Woodside's App., supra.

[17] See supra § 76.

[18] Myers v. Perry First Presb. Church, 11 Okl. 544, 69 P 874.

[19] Fuchs v. Meisel, 102 Mich. 357, 60 NW 773, 32 LRA 92.

[20] Krecker v. Shirey, 163 Pa. 534, 30 A 440, 29 LRA 476.

[21] Whitecar v. Michenor, 37 N. J. Eq. 6; Peo. v. Steele, 2 Barb. (N. Y.) 397; Peo. v. Connelly, 3 NYSt 372; Henderson v. Hunter, 59 Pa. 335.

[22] Johnson v. Glen, 26 Grant Ch. (Ont.) 162.

[23] Arnold v. Bath, 5 Bing. 316, 15 ECL 600, 130 Reprint 1083.

[24] Martyn v. Hind, 2 Cowp. 437, 98 Reprint 1174.

[25] Martyn v. Hind, supra.

[26] Bartlett v. Hipkins, 76 Md. 5, 23 A 1089, 24 A 532.

[27] See case infra this note.

[a] **The archbishop of the Roman catholic church,** while amenable to the courts for the enforcement of any legal right, and accountable for the administration of trust property to one entitled to appointment to a chaplaincy under a trust deed, is not liable for refusal to appoint to one claiming a right to appointment under the terms of the trust deed where by the terms of the foundation, the identity, status and rights of the person claiming appointment are to be determined by the canon law existing at the time of the presentment, and the archbishop's decision against the claimant was based upon the canon law as it existed at that time, and there is no fraud alleged or proved. Gonzalez v. Roman Catholic Archbishop, 280 U. S. 1, 50 SCt 5, 74 L. ed. 1.

[28] See statutory provisions.

[29] Bartlett v. Hipkins, 76 Md. 5, 23 A 1089, 24 A 532.

[30] St. Louis Church v. Blanc, 8 Rob. (La.) 51.

[a] **Appointment of curate to a Roman catholic church.**—A right to appoint a curate to a Roman catholic church in Louisiana cannot be claimed for the churchwardens in opposition to the bishop's right of appointment under the rules of the church, on the basis of the jus patronatus of the Spanish law which gave owners of parochial churches the right to nominate a curate, as the Spanish law has been abrogated in Louisiana. St. Louis Church v. Blanc, 8 Rob. (La.) 51.

[31] Com. v. Cornish, 13 Pa. 288.

[32] Com. v. Cornish, supra.

[33] See charter and statutory provisions.

[34] Atty.-Gen. v. Lauder, 9 Grant Ch. (Ont.) 461.

[35] See case infra this note.

[a] **By-law of corporation** providing for appointment of rector by bishop is valid. Atty.-Gen. v. Lauder, 9 Grant Ch. (U. C.) 461.

[36] Downs v. Bowdoin Square Baptist Soc., 149 Mass. 135, 21 NE 294.

[37] Downs v. Bowdoin Square Baptist Soc., supra.

[38] See statutory provisions.

[§ 83] **c. Massachusetts Rule.** In New England it was the custom in early times for a church to first nominate a minister and then submit the nomination to the parish for approval.[44] But it is provided in the Massachusetts Declaration of Rights that the town, parishes, and other religious societies shall have the exclusive right of electing their public teachers,[45] and when this right is insisted upon, it supersedes the ancient usage and renders unnecessary the concurrence of the church in the choice of a minister.[46] Nor is the constitutional right of a religious society by a majority vote of its members to elect its pastor or religious teacher affected by its acceptance of gifts and donations free from express trust or condition,[47] and a simple declaration implied from the fact that it was a presbyterian church and called itself such, and that it had adopted by-laws stating that the polity of the presbyterian denomination as to selection of ministers would be followed, cannot be regarded as an abandonment of its constitutional powers.[48]

[§ 84] **C. Action To Determine or Enforce Right to Office[49]—1. By Minister.** The right of one claiming to use the church property in administering the ceremonies and rites in his priestly capacity may be tested in an action to restrain another alleged to be wrongfully depriving him of the minister's office.[50] But equity will interfere to protect a minister in the enjoyment of his office only when his contract and relations with the church are such as to confer on him a property right in the office,[51] such as exemption from taxation[52] and the right to perform certain civil acts.[53] His right to the salary and emoluments are not vested property rights, which the civil court will protect against the acts of an ecclesiastical body having authority under the rules and discipline of the church to so act.[54] Where the suit for an injunction is brought against an officer or body within the church to prevent a threatened removal, the suit can be maintained only on the narrow jurisdictional ground that the superior officer or body assuming to deprive him of his office has no power under the laws of the church to do so.[55] And the court's power to act is still further confined to cases where the minister has seasonably objected to the jurisdiction,[56] a failure to object to the power of the ecclesiastical officer or body to act before it proceeds to do so constituting a waiver of his right to object later on this ground.[57] Within the limitations stated,[58] an injunction will lie to prevent an unwarranted removal of a minister by a bishop,[59] or by trustees,[60] or to enjoin the trustees of a church from refusing to receive the regularly appointed minister and from denying him the use of the church edifice,[61] or to restrain the governing body from hindering a minister wrongfully removed, in the exercise of his office,[62] or, where a minister and his followers adhere to the faith and doctrine which the church corporation was formed to establish and maintain, to enjoin other members of the church who have rejected its teachings and ceremonials from interfering with plaintiffs in their use of the church property.[63] Nor is a minister wrongfully excluded from the church edifice under any necessity of applying to the ecclesiastical courts before resorting to the civil courts for relief.[64] Where the action is against trustees, the Church Corporation should be made a party.[65]

[§ 85] **2. Against Minister.** While an action by the attorney-general in the nature of quo warranto is the proper remedy against officers of a church corporation to test their right to their offices,[66] where a minister is not an officer of the corporation,[67] his right to his office may be contested by a bill in equity brought against him to enjoin his alleged usurpation of the office.[68] To justify a court of equity in interfering with the occupancy of a pulpit, a clear case should be made out;[69] but this having been done it has been held that an injunction will issue to prevent the election of a minister who has not been regularly licensed,[70] to prevent a person not duly selected as minister from officiating in the church,[71] and to enjoin a deposed minister,[72] or a minister whose contract of employment has expired from continuing to officiate in a particular church and to use the church property;[73] but not to eject a clergyman, once regularly settled, merely because the vestry desire to turn him out,[74] nor to enjoin a minister from preaching or interfering with governmental affairs of the church where the officer or body assuming to discharge him had no authority,[75] or had not complied with recognized church usages in doing so.[76]

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[39] See cases infra this section.

[40] Isham v. Fullager, 14 AbbN Cas (N. Y.) 363; Isham v. Dunkirk First Presb. Church, 63 HowPr (N. Y.) 465.

[41] Fiske v. Beaty, 206 App. Div. 349, 201 NYS 441 [mod 120 Misc. 1, 198 NYS 358, and aff 238 N. Y. 598, 144 NE 907].

[42] Peo. v. Connelly, 3 NYSt 372.

[43] Petty v. Tooker, 21 N. Y. 267 [aff 29 Barb. 256]; Robertson v. Bullions, 11 N. Y. 243 [aff 9 Barb. 64].

[44] Bisbee v. Evans, 4 Me. 374; Burr v. Sandwich First Parish, 9 Mass. 277.

[45] See constitutional provisions.

Public teacher defined see supra § 77.

[46] Baker v. Fales, 16 Mass. 488; Avery v. Tyringham, 3 Mass. 160, 3 AmD 105.

[47] McNeilly v. Brookline First Presb. Church, 243 Mass. 331, 137 NE 691.

[48] McNeilly v. Brookline First Presb. Church, 243 Mass. 331, 137 NE 691.

[49] **Title to office of church officers generally** see supra § 51.

[50] See cases infra this section.

[51] Schweiker v. Husser, 146 Ill. 399, 34 NE 1022; Travers v. Abbey, 104 Tenn. 665, 58 SW 247, 51 LRA 260; Porter v. Clarke, 2 Sim. 520, 2 EngCh 520, 57 Reprint 882.

[52] Walker v. Wainwright, 16 Barb. (N. Y.) 486.

[53] Walker v. Wainwright, supra.

[54] Chase v. Cheney, 58 Ill. 509, 11 AmR 95; Furmanski v. Iwanowski, 265 Pa. 1, 108 A 27.

[55] Walker v. Wainwright, 16 Barb. (N. Y.) 486; Furmanski v. Iwanowski, 265 Pa. 1, 108 A 27.

[56] Walker v. Wainwright, 16 Barb. (N. Y.) 486.

[57] Walker v. Wainwright, supra.

[58] See cases supra notes 51–57.

[59] O'Hara v. Stack, 90 Pa. 477 [aff 5 LegGaz 97].

[60] Lawyer v. Cipperly, 7 Paige (N. Y.) 281.

[61] Fuchs v. Meisel, 102 Mich. 357, 60 NW 773, 32 LRA 92; Whitecar v. Michenor, 37 N. J. Eq. 6; Peo. v. Connelly, 3 NYSt 372.

[62] Parucki v. Polish Nat. Catholic Church of Holy Mother of Rosary, 114 Misc. 6, 186 NYS 702; Daugars v. Rivaz, 28 Beav. 233, 54 Reprint 355.

[63] Lindstrom v. Tell, 131 Minn. 203, 154 NW 969.

[64] Ackley v. Irwin, 71 Misc. 239, 130 NYS 841.

[65] See infra § 214.

[66] See supra § 51.

[67] Fiske v. Beaty, 206 App. Div. 349, 201 NYS 441 [mod 120 Misc. 1, 198 NYS 358, and aff 238 N. Y. 598, 144 NE 907].

[68] Allen v. Roby, 109 Miss. 107, 67 S 899; Fiske v. Beaty, 206 App. Div. 349, 201 NYS 441 [mod 120 Misc. 1, 198 NYS 358, and aff 238 N. Y. 598, 144 NE 907]; Friendship Baptist Church v. Hill, 119 S. C. 145, 112 SE 826; Ebenezer Baptist Church v. Thompson, 45 R. I. 263, 121 A 530.

[69] Independent Presb. Church v. Proctor, 66 Ill. 11; Allen v. Roby, 109 Miss. 107, 67 S 899.

[§ 86] **D. Authority, Rights, and Privileges[77]—1. In General.** Ordinarily the minister is not an officer of the church having authority to bind it by his acts,[78] and, if granted a special authority, he has no power to bind the church by acts outside the authority granted.[79] Nor has a minister, requiring authority from the bishop in order to contract debts for the church and given authority by the bishop for that purpose, any authority thereby to bind the bishop,[80] or, in the absence of any element of estoppel,[81] to bind the church after the special authority has been exhausted.[82] But an incorporated church will be bound on the ground of estoppel if with knowledge of the minister's unauthorized acts the trustees accepted and used for church purposes the benefits resulting therefrom.[83] However, a minister's official acts, when not contrary to statute, and when called in question incidentally, are as valid as the official acts of other persons,[84] but he cannot set up the official character of his acts to justify a trespass.[85] A priest's tortious or criminal acts done outside the scope of his authority place no liability therefor on the bishop who appointed him even though chargeable with negligence in the appointment of one whom he knew to be unfit for the place,[86] especially where the bishop's negligence was not the proximate cause of the injury which followed.[87] A minister can delegate to another no more authority than he possesses.[88]

[§ 87] **2. Use of Church Property.**[89] A minister has the right to enter the church edifice for the purpose of conducting religious services,[90] regardless of whether the church is incorporated or holds title to the building,[91] and is entitled to the custody of the church keys.[92] He is also entitled to occupy the rectory or parsonage under the terms of his contract during the period of his incumbency.[93]

[§ 88] **3. Compensation and Reimbursements[94]—a. In General.** The right to the salary stipulated at the time a minister accepts the call and is installed is a valuable property right secured to him by contract,[95] subject to denominational rules and usages[96] and to statutes applicable thereto which are expressly or by implication a part of the contract,[97] the terms of which cannot be ignored or violated with impunity by the church or society employing him,[98] unless the minister secured the contract by representations as to his faith and standing which were not true.[99] The minister's right to recover in such cases is governed by the law of contracts,[1] a recovery being allowed only when the minister has performed all the duties which the church or society allowed him to perform,[2] or has at all times exhibited readiness and ability to perform,[3] or when the society by requesting his resignation has been held to have thereby waived its right to set up his acts and omissions as ground for forfeiture of his right to compensation;[4] and a recovery not being allowed against the trustees individually when the contract was made by them as agents in behalf of the church and solely upon its credit.[5] While it has been held that to support an action against an incorporated society to recover his salary, it is only necessary for the minister to show a call by the church and his acceptance, and acquiescence by the trustees,[6] the stipulated salary is not recoverable when it is shown that the minister entered into the contract with knowledge that the officers with whom he was contracting were not legally elected,[7] or where the officers exceeded the power conferred upon them by statute in making the contract.[8] Where the minister, at the time of entering into the contract, knows that his salary is to be paid from voluntary contributions, he cannot recover an amount in excess of the contributions actually received,[9] provided the society uses due diligence in procuring and collecting subscriptions.[10] And where he contracts for his services on the credit of the society and not of a particular fund, he impliedly agrees to look solely to the society for his compensation.[11] Independently of his contractual rights, however, a minister is entitled to participate in the distribution of a fund if he is within the class intended to be benefited thereby.[12] A provision of the church discipline that a claim for deficiency may be presented to the conference does not prevent the minister recovering whatever salary the congregation has contracted to pay him,[13] but where he has contracted with two societies, each undertaking to pay him a stated part of his salary, he can only recover from each the amount which it obligated itself to pay.[14]

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[70] Milligan v. Mitchell, 1 Myl. & K. 446, 7 EngCh 446, 39 Reprint 750.

[71] First Cong. Church v. Stewart, 43 Ill. 81; Woodside's App., 4 Pennyp. (Pa.) 124.

[72] Bonacum v. Harrington, 65 Nebr. 831, 91 NW 886; Pounder v. Ash, 44 Nebr. 672, 63 NW 48; Rhinelander v. Ballentine, 23 Pa. Dist. 1093, 1099 [cit Cyc]; Hopson v. Swansy, (Tex. Civ. A.) 1 SW (2d) 419.

[73] Christ's Church v. Collett, 208 App. Div. 695, 204 NYS 315 [aff 240 N. Y. 563, 148 NE 706].

[74] Youngs v. Ransom, 31 Barb. (N. Y.) 49.

[75] Kedrovsky v. Burdikoff, 109 Conn. 354, 146 A 613.

[76] Woods v. Humber, (Tex. Civ. A.) 282 SW 834.

[a] **Removal without consent of required two-thirds.**—Bill in equity to restrain the trustees from intruding on the office of the minister, at the instance of male members of the congregation, when the consent of two thirds of the members of the corporation is required by the act under which the church is incorporated, cannot be maintained. Tartar v. Gibbs, 24 Md. 323.

[77] **Authority of minister to solemnize marriages** see Marriage § 79.

[78] Allen v. North Des Moines M. E. Church, 127 Iowa 96, 102 NW 808, 109 AmSR 366, 69 LRA 255.

[79] See cases infra this note.

[a] **A pastor authorized to solicit subscriptions** for paying off the indebtedness of the church possesses no authority to accept a subscription. Sun Prairie M. E. Church v. Sherman, 36 Wis. 404.

[b] **A pastor acting as chairman of trustees.**—Where by-laws of church provided trustees should have general management and care of property of the church the pastor, although he was chairman of the board of trustees, had no right to make a contract on behalf of the corporation for repair of the church after a fire without the assent of at least a majority of the members of the board. C. A. Dodge Co. v. Western Ave. Tabernacle Baptist Church, 247 Mass. 330, 142 NE 64.

[80] Leahey v. Williams, 141 Mass. 345, 6 NE 78.

[81] See case infra note 83.

[82] Davidsville First Nat. Bank v. St. John's Church, 296 Pa. 467, 146 A 102.

[83] Martin v. St. Aloysius Church, 38 R. I. 339, 95 A 768.

[84] State v. Winkley, 14 N. H. 480.

[85] See case infra this note.

[a] **Removal of persons from room.**—A priest cannot forcibly remove a person from the room of a sick person, to whom he is about to administer an office of his religion. Cooper v. McKenna, 124 Mass. 284, 26 AmR 667.

[86] Carini v. Bishop of Springfield, 219 Mass. 117, 106 NE 589, LRA1915B 825.

[87] Carini v. Bishop of Springfield, supra.

[88] Leahey v. Williams, 141 Mass. 345, 6 NE 78.

[89] **Rights after dismissal** see infra § 96.

[90] Lynd v. Menzies, 33 N. J. L. 162; Griffin v. Dighton, 5 B. & S. 93, 117 ECL 93, 122 Reprint 767.

[91] Lynd v. Menzies, 33 N. J. L. 162. But see Lawyer v. Cipperly, 7 Paige (N. Y.) 281.

[92] Ritchings v. Cordingley, L. R. 3 A. & E. 113; Redhead v. Wait, 6 L. T. Rep. N. S. 580.

[93] Bristor v. Burr, 120 N. Y. 427, 24 NE 937, 8 LRA 710.

[94] **Compensation of officers and employees of society** see supra § 59.

Rights of minister after removal see infra § 95.

[95] Bird v. St. Mark's Church, 62 Iowa 567, 17 NW 747.

[96] St. Louis Church v. Blanc, 8 Rob. (La.) 51.

[97] See cases infra this note.

[a] **Churchwardens of Roman catholic church** are granted authority by statute to determine a curate's salary, although the appointment of the curate is exclusively within the power of the bishop. St. Louis Church v. Blanc, 8 Rob. (La.) 51.

[b] **Society of presbyterian church** is given authority by statute to fix the compensation of the minister, and such statute is not in conflict with the usage and discipline of the presbyterian church which is to the effect that the call of the congregation for the services of a regular pastor does not become obligatory until accepted by the minister and sanctioned by the presbytery. West v. St. Paul First Presb. Church, 41 Minn. 94, 42 NW 922, 4 LRA 692.

[c] **Majority of church members** (1) under New York statute, have exclusive right to fix salary of the minister, and no recovery may be had for a salary fixed in any other manner or by any other body (Landers v. Frank St. M. E. Church, 97 N. Y. 119, 114 N. Y. 626, 21 NE 420; Petty v. Tooker, 21 N. Y. 267 [aff 29 Barb. 256]) (2) but also it has been held that where the amount of compensation is not determined in the required manner, recovery may be had on the contract, as for services rendered, limited by the amount actually received by the church applicable to such payment, and Landers v. Frank St. M. E. Church, supra, is distinguished on ground of rules and discipline of methodist episcopal church and the baptist church in this case (Pendleton v.

[§ 89] **b. In Absence of Express Contract.**[15] On the basis of a contract implied in law,[16] a stated supply[17] or a minister acting temporarily may recover in quantum meruit a just compensation for services rendered to and accepted by the church,[18] unless the transaction was without the consent of a superior body required by denominational laws and customs,[19] or unless by such laws and customs liability for such services is placed on the superior body and not on the individual church or society.[20] It has been held that a minister of a mission church, relying entirely on voluntary contributions for his support and serving without a fixed salary, may retain out of moneys received by him reasonable compensation for his services,[21] and that where the law of the church does not require it, he is not accountable for the excess of pew rents and collections over the expenses of the church.[22] One cannot recover even on a quantum meruit for services alleged to have been rendered as pastor, on evidence negativing in positive terms the existence of such relationship.[23] Nor is he entitled to extra compensation in addition to his salary for particular services when his contract imposed on him the duty of devoting his time and service to the interests of the church,[24] especially when such services if not within the terms of the contract must be regarded as having been rendered gratuitously.[25] An alleged duty of the Roman catholic church to support its priests cannot be made the basis of an implied contract on the part of the bishop

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Waterloo Baptist Church, 49 Hun 596, 2 NYS 383), (3) and the statute has been held not to apply to churches of the protestant episcopal denomination (Youngs v. Ransom, 31 Barb. (N. Y.) 49; Humbert v. St. Stephens Protestant Episcopal Church, 1 Edw. (N. Y.) 308).

[98] See case infra note 99.

[a] **Reduction of salary.**—A society cannot reduce its minister's salary during the term of his contract of employment without his consent. Bird v. St. Mark's Church, 62 Iowa 567, 17 NW 747.

[99] Garoufalis v. Elenike Orthodox Cenotis Agia Trias, 119 Me. 452, 111 A 757.

[1] Way v. Ramsey, 192 N. C. 549, 135 SE 454.

[2] Sheldon v. Easton Cong. Parish, 24 Pick. (Mass.) 281; Thompson v. Rehoboth Catholic Cong. Soc., 5 Pick. (Mass.) 469; Martyn v. Hind, Cowp. 437, 98 Reprint 1174.

[3] Whitney v. Brooklyn First Ecclesiastical Soc., 5 Conn. 405; Albany Dutch Church v. Bradford, 8 Cow. (N. Y.) 457; Martyn v. Hind, Cowp. 437, 98 Reprint 1174.

[4] Whitney v. Brooklyn First Ecclesiastical Soc., 5 Conn. 405.

[5] Way v. Ramsey, 192 N. C. 549, 135 SE 454.

[6] Miller v. Allowaystown Baptist Church, etc., 16 N. J. L. 251.

[7] St. Luke's Church v. Mathews, 4 S. C. Eq. 578, 6 AmD 619.

[8] Peckham v. North Parish Ministerial Fund, 19 Pick. (Mass.) 559.

Statutory regulations as to fixing salary of minister see cases supra note 97.

[9] Riffe v. Proctor, 99 Mo. A. 601, 74 SW 409; Baldwin v. Opportunity First M. E. Church, 79 Wash. 578, 140 P 673, 52 LRANS 171; Daw v. Ackerill, 25 Ont. A. 37 [aff 28 Ont. 452].

[10] Myers v. Jamaica Baptist Soc., 38 Vt. 614.

[11] See case infra this note.

[a] **When a salary is stipulated for, equal to that of ministers in other parishes,** and no reference is made to the income from a devise for the support of a minister, it will be presumed that the minister intended to look to the society and not the fund for payment. Thompson v. Rehoboth Catholic Cong. Soc., 5 Pick. (Mass.) 469.

[12] See case infra this note.

[a] **Right to participate in fund.**—Where one of the rules governing the distribution of a fund for the benefit of clergymen is that no clergyman whose income exceeds a certain amount shall be entitled to participate, a clergyman whose income is less than the amount stated is not debarred from participation in the fund by reason of the fact that the salary paid to his curate, where added to his own salary, exceeds the amount specified. Nova Scotia Diocesan Synod v. Ritchie, 18 Can. S. C. 705 [aff 21 N. S. 309].

[13] Jones v. Mt. Zion Cong., 30 La. Ann. 711.

[14] Peckham v. North Parish, 16 Pick. (Mass.) 274.

[15] **Liability of society on implied contract generally** see supra § 64.

[16] See supra § 64.

[17] **Stated supply defined** see supra § 76.

[18] West v. St. Paul First Presb. Church, 41 Minn. 94, 42 NW 922, 4 LRA 692; Myers v. Perry First Presb. Church, 11 Okl. 544, 69 P 874.

[a] **An unlicensed curate** may recover for services rendered against the incumbent employing him for temporary services. Dakins v. Searman, 9 M. & W. 777, 152 Reprint 330.

[19] Tuigg v. Treacy, 104 Pa. 493.

[20] Landers v. Frank St. M. E. Church, 97 N. Y. 119, 114 N. Y. 626, 21 NE 420.

[21] Nicholson v. Daniel, 152 Pa. 461, 25 A 1022.

[22] St. Patrick's Catholic Church v. Daly, 116 Ill. 76, 4 NE 241.

[23] See case infra this note.

[a] **A pastor who has refused the written call** extended to him cannot recover for his services on a quantum meruit, although he has acted as pastor. Neill v. Spencer, 5 Ill. A. 461.

[24] Rogers v. Westfall, 95 W. Va. 78, 120 SE 191 (extra compensation for services rendered as chairman of building committee in the construction of a parsonage).

[25] Rogers v. Westfall, supra.

to support a priest who has not been assigned to a congregation or employed in any other ecclesiastical work, warranting a recovery in assumpsit against the bishop in the civil courts,[26] nor will an assignment of the priest to duty justify any right to recover on an alleged implied contract against the bishop in the absence of allegation and proof of the civil rights and powers of the Roman catholic church and its bishop to hold property and make contracts.[27] A minister is entitled to reimbursement for money advanced which the society has accepted and used for church purposes.[28]

[§ 90] 4. **Exemptions.**[29] Under the statutes of some states, ministers are exempt from taxation,[30] but not from patrol duty required by a city ordinance.[31]

In England, clergymen are exempt from arrest while in a chapel,[32] or while attending a visitation.[33] They are also exempt from the payment of toll on a turnpike road when attending to their parochial duties.[34] They are liable, however, in like manner as other persons, to be adjudged bankrupts.[35]

[§ 91] **E. Tenure and Termination of Relation—1. In General.** The pastoral relation between a minister and his church may be terminated by expiration of his term, by resignation, or by discharge.[36] A minister employed by a church for a definite term is no longer its minister after the term has expired, where the appointing body in the church at a meeting duly called has voted to discontinue his employment at the end of the term, and has so notified him.[37] A resignation on terms and conditions named by the minister becomes effective according to its terms when accepted and the conditions performed;[38] and when that has been done, the minister's rights to his office are thereby terminated notwithstanding a later attempt to repudiate his offer to resign,[39] but notwithstanding his leaving the church his pastorate continues until it is formally terminated by the trustees or the congregation.[40] Unless the rules and discipline of the church otherwise provide,[41] a church which has employed a pastor for a definite period has the power to discharge him before the expiration of that time, so as to deprive him of the right to occupy the pulpit,[42] and without first paying him his arrears of salary,[43] although it may be liable for his salary in case the dismissal was without cause.[44] Where the appointment is not for a definite term and neither statute nor charter prescribe its duration, he may be dismissed at any time[45] upon reasonable notice,[46] and payment in full of salary due him is not a condition precedent to the exercise of the power to remove,[47] although the church may ultimately be held liable therefor.[48] An election "permanently" to a rectorship, and a call and acceptance in those terms, is held to be an appointment for an indefinite term,[49] but a contract providing for a continuance in office "till otherwise provided of some ecclesiastical preferment,"[50] or, in the early history of New England a "settlement" of a minister over a parish,[51] are construed to give a tenure terminable only by death, or for cause, or upon the contingency named in the contract. A "settlement" may be modified by terms of the contract to provide for dismissal by following a prescribed procedure, but a dismissal in any other way is ineffectual and the incumbent continues as the "settled minister" of the parish.[52] A minister may be summarily dismissed where under the church government the congregation[53] or a bishop has that power,[54] the compact or charter for the support of public worship according to the faith, doctrine and usages of a particular church being construed as an express recognition of the parties of the right of the proper officials to appoint and remove its pastor in the manner prescribed by its laws;[55] but he cannot be so dismissed where the constitution, rules, and usages of the church enter into and form a part of the contract, and these do not provide for a summary dismissal.[56] Nor has the congregation an absolute power to dismiss where the rules and discipline of the church provide that the pastoral relation can be severed only upon application to the bishop.[57]

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[26] Tuigg v. Sheehan, 101 Pa. 363, 47 AmR 727.

[27] Baxter v. McDonnell, 155 N. Y. 83, 49 NE 667, 40 LRA 670.

[28] St. Patrick's Catholic Church v. Daly, 116 Ill. 76, 4 NE 241.

[29] **Exemption of ministers from jury duty** see Juries § 197 note 95.

[30] See Taxation [37 Cyc 911 note 59]. See also supra § 74.

[31] Elizabeth City Corp. v. Kenedy, 44 N. C. 89.

[32] Ex p. Dakin, 16 C. B. 77, 81 ECL 77, 139 Reprint 684.

[33] McGeath v. Geraghty, 15 Wkly. Rep. 127.

[34] Layard v. Ovey, L. R. 3 Q. B. 415; Temple v. Dickinson, 1 E. & E. 34, 102 ECL 34, 120 Reprint 820.

[35] Ex p. Maymot, 1 Atk. 196, 26 Reprint 127.

[36] See cases infra this section.

[37] Christ's Church v. Collett, 208 App. Div. 695, 204 NYS 315 [aff 240 N. Y. 563, 148 NE 706].

[38] Fiske v. Beaty, 120 Misc. 1, 198 NYS 358 [mod on other grounds 206 App. Div. 349, 201 NYS 441 (aff 238 N. Y. 598, 144 NE 907)].

[39] Fiske v. Beaty, supra.

[40] Grupe v. Rudisill, (N. J. Ch.) 144 A 874.

[41] See cases infra this note; and infra note 53.

[a] **Episcopal minister.**—Unless something to the contrary is distinctly expressed in the call or settlement, an episcopal minister cannot, according to the rules of the church, be dismissed without his consent, except by the bishop. Youngs v. Ransom, 31 Barb. (N. Y.) 49.

[42] Barton v. Fitzpatrick, 187 Ala. 273, 65 S 390; St. Paul English Lutheran Church v. Stein, 115 Nebr. 114, 211 NW 611; Conway v. Carpenter, 80 Hun 428, 30 NYS 315; Evangelical Lutheran St. Paul's Cong. v. Jaeger, 177 Wis. 34, 187 NW 681; Evangelical Lutheran St. Paul's Cong. v. Hass, 177 Wis. 23, 187 NW 677.

Mode of taking action see supra § 42.

[43] Barton v. Fitzpatrick, 187 Ala. 273, 65 S 390.

[44] See infra § 95.

[45] Stubbs v. St. John's Church, 96 Md. 267, 53 A 917.

[46] Stubbs v. St. John's Church, 96 Md. 267, 53 A 917.

[a] **Three weeks' notice.**—Where the pastor of a church knew June 8, 1922, that the board of deacons recommended that he resign, and there was nothing to show that that feeling against him had changed, in view of such circumstances, a three weeks' notice of the termination of his pastorate on November 9, 1922, was reasonable. Ebenezer Baptist Church v. Thompson, 45 R. I. 263, 121 A 530.

[47] Morris St. Baptist Church v. Dart, 67 S. C. 338, 45 SE 753, 100 AmSR 727.

[48] See infra § 95.

[49] Perry v. Wheeler, 12 Bush (Ky.) 541.

[50] Martyn v. Hind, Cowp. 437, 98 Reprint 1174.

[51] Whitney v. Brooklyn First Ecclesiastical Soc., 5 Conn. 405, 413; Burr v. Sandwich First Parish, 9 Mass. 277; Avery v. Tyringham, 3 Mass. 160, 3 AmD 105.

"The word settled, has, from the frequency of its application, and universal understanding, the precision of a technical term, and undoubtedly means, to place a person in a permanent seat, or to fix him in a stable course of life. But an office held at will is no settlement; it has neither permanency, nor stability." Whitney v. Brooklyn First Ecclesiastical Soc., supra.

[52] Sheldon v. Easton Cong. Parish, 24 Pick. (Mass.) 281; Packham v. Haverhill North Parish, 16 Pick. (Mass.) 274.

[53] Morris St. Baptist Church v. Dart, 67 S. C. 338, 45 SE 753, 100 AmSR 727.

[54] Furmanski v. Iwanowski, 265 Pa. 1, 108 A 27.

[55] Furmanski v. Iwanowski, 265 Pa. 1, 108 A 27.

Bond to resign. In England, if a person having power to appoint requires the prospective appointee to give him at the time of his appointment a bond in general terms to resign, the bond is unlawful,[58] and, although the point of unlawfulness of the giving of the bond was a controverted one before finally settled in the house of lords,[59] it had always been beyond dispute that if the patron made an ill-use of the bond, the court would award a perpetual injunction against it.[60]

[§ 92] **2. Church Officers and Bodies Having Authority To Remove.** The persons vested with the power of appointment possess the power of removal,[61] except where the power is conferred on others by the charter of the corporation;[62] and it has been held that a board of trustees has power to dismiss a priest by virtue of a by-law which placed in its hands the control and direction of the association and church.[63]

[§ 93] **3. Grounds for Removal.** A minister removable only for cause may be dismissed for neglect of duty,[64] for discontinuance of his membership in the synod[65] or of his adherence to the faith and doctrine of the church,[66] unless under the rules and discipline of the church the right to secede is an established principle and the minister in his change of faith is supported by a majority of his congregation,[67] and for immoral or criminal conduct.[68] But immoralities must be gross to justify dismissal[69] and the court will not consider charges of immorality where both parties to the contract are satisfied and neither desires to dissolve the relation.[70] Dismissal is not justified by false statements by the minister not constituting dishonesty or immoral conduct,[71] nor by improper words, actions or temper containing no element of an indictable offense,[72] nor by actions of the church alleged to be in contravention of the church faith and discipline in the absence of similar charges against the minister individually,[73] a charge that the minister was moderator of the meeting at which the action of the church was taken not being the equivalent of a charge of heterodoxy against him.[74]

[§ 94] **4. Removal Proceedings.** Where there is an ecclesiastical judiciary vested with power to consider alleged grounds of forfeiture of the pastoral office, and to make findings thereon, it is the proper forum for hearing and determining the matter,[75] and a parish or congregation which fails to appeal to a council or other ecclesiastical court having jurisdiction waives its right to a review of its pastor's alleged errors in the civil court.[76] If there is no judiciary of this nature, or if it should refuse to act, the court intimates that an inquiry might be made in a court of law.[77] And where the canon of the church so provides, the bishop's power to deprive a minister of his license is so far curtailed that he has no power to act on charges of immorality without a trial by the diocesan court.[78] Where the relation of a minister to his church is created by a contract between the minister and the church solely, and there is no express term in the contract subordinating the church to a superior body in the appointment and removal of its minister, the relation of the minister to the church cannot be dissolved against the will of the contracting parties by such a body,[79] nor will the court dissolve the pastoral relation at the instance of such a body,[80] but in such case when either party to the contract desires a dissolution of the pastoral relation and the parties are unable to agree, and the rules and discipline of the church provide for such a procedure, they may call to their assistance a mutual council, so called to indicate that on that point at least there is agreement;[81] or the aggrieved party may request the assistance of an ex parte council, if from failure to agree a mutual council becomes impossible,[82] but only after the other party has been given opportunity[83] and refused[84] to join in the request. An application to a minister to join with his society in calling a council to consider the expediency of removing him for misconduct should state substantially the charges against him,[85] and, where the council recommends a dissolution of the contract, the recommendation should specify which of the charges were proved.[86] Partiality on the part of members of the council, when proven, invalidates the findings, making them ineffectual as justification for removal.[87] In the case of a mutual council, the presumption favors the existence of impartiality.[88] But the proof of impartiality must be clear where the council is ex parte.[89] The decision of the church tribunal is binding on both parties where their contract so provides,[90] or where the rules of the denomination, authorizing the deposition of pastors by ecclesiastical tribunals, form part of the contract,[91] but in the absence of evidence of intention of the parties to clothe the council with power to make a binding award, the decision of the council is merely advisory and does not bind a party who rejects it,[92] the pastoral relation continuing to exist as before, both parties having the same duties to perform and the same obligations as if no council had been convoked,[93] its only effect being to operate as a justification of the party adopting it and conforming to it.[94] Where the parties by their contract have subjected themselves to the decisions of church judicatories under the rules and discipline of the church providing for appeal from the decision of a lower judicatory to a higher, the decision of the highest judicatory is binding on the parties, until the aggrieved party by new proceedings on other charges again raises the issue of dismissal.[95]

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[56] Connitt v. New Prospect Reformed Protestant Dutch Church, 54 N. Y. 551; Batterson v. Thompson, 8 Phila. (Pa.) 251.

[57] Ackley v. Irwin, 71 Misc. 239, 130 NYS 841; Ackley v. Irwin, 69 Misc. 56, 125 NYS 672.

[58] Bishop of London v. Ffytche, 1 East 487, 102 Reprint 188.

[59] See Bishop of London v. Ffytche, 1 East 487, 496, 102 Reprint 188.

[60] Durston v. Sandys, 1 Vern. Ch. 411, 23 Reprint 552.

[a] **Ill-use of bond to resign.**—Where the patron required the incumbent to give a bond to resign, and upon the incumbent demanding tythes of his patron, gave him notice to resign, which the incumbent did but which his bishop refused to accept, ordering the incumbent to continue to do duty in the parish, the patron was perpetually enjoined to sue on the bond. Durston v. Sandys, 1 Vern. Ch. 411, 23 Reprint 552.

[61] Stubbs v. St. John's Church, 96 Md. 267, 53 A 917.

[62] African M. E. Church v. Clark, 25 La. Ann. 282.

[63] Papaliou v. Manusos, 113 Ill. A. 316, 108 Ill. A. 272.

[64] Sheldon v. Easton Cong. Parish, 24 Pick. (Mass.) 281; Evangelical Lutheran St. Paul's Cong. v. Hass, 177 Wis. 23, 187 NW 681; Evangelical Lutheran St. Paul's Cong. v. Hass, 177 Wis. 23, 187 NW 677.

[65] Helbig v. Rosenberg, 86 Iowa 159, 53 NW 111.

[66] Sheldon v. Easton Cong. Parish, 24 Pick. (Mass.) 281; Burr v. Sandwich First Parish, 9 Mass. 277.

[67] Smith v. Nelson, 18 Vt. 511.

[68] Sheldon v. Easton Cong. Parish, 24 Pick. (Mass.) 281; Ash v. Methodist Church, 27 Ont. A. 602.

[a] **Construction of "immorality."**—The word "immorality" as used in a church canon which names the grounds for the annulment of a minister's license is to receive its natural and grammatical meaning. Halliwell v. Ontario Synod, 7 Ont. 67.

"Immorality" 31 C. J. p 252.

[69] Thompson v. Rehoboth Catholic Cong. Soc., 5 Pick. (Mass.) 469.

[70] Smith v. Nelson, 18 Vt. 511.

[71] Ex p. Little, 33 N. B. 210.

[72] Pounder v. Ashe, 36 Nebr. 564, 54 NW 847.

[73] South Farms Ecclesiastical Soc. v. Beckwith, Kirby (Conn.) 91.

[74] South Farms Ecclesiastical Soc. v. Beckwith, supra.

[75] Whitney v. Brooklyn First Ecclesiastical Soc., 5 Conn. 405.

[76] Whitney v. Brooklyn First Ecclesiastical Soc., supra.

[77] Whitney v. Brooklyn First Ecclesiastical Soc., supra.

[78] Halliwell v. Ontario Synod, 7 Ont. 67.

[79] Allen v. Roby, 109 Miss. 107, 67 S 899; Smith v. Nelson, 18 Vt. 511.

[80] Smith v. Nelson, supra.

[81] Burr v. Sandwich First Parish, 9 Mass. 277; Avery v. Tyringham, 3 Mass. 160, 3 AmD 105.

[82] Thompson v. Rehoboth Catholic Cong. Soc., 5 Pick. (Mass.) 469; Burr v. Sandwich First Parish, 9 Mass. 277; Avery v. Tyringham, 3 Mass. 160, 3 AmD 105.

[83] Thompson v. Rehoboth Catholic Cong. Soc., 7 Pick. (Mass.) 160.

[84] Thompson v. Rehoboth Catholic Cong. Soc., supra.

[§ 95] **F. Rights of Minister after Removal**[96]**—1. Compensation.** A minister dismissed without cause in breach of his contract for a definite period may recover his unpaid salary for the full period.[97] If his tenure was at the will of the body dismissing him, he may still recover arrears of salary up to the time of his dismissal.[98] A minister settled over his parish under a contract of settlement who is rightfully dismissed before the beginning of a new year of service cannot recover for the refusal of the society to permit him to act during that year,[99] nor can he compel the holding of the "annual donation party" for that year provided for in his contract of settlement.[1] On the other hand, a minister cannot be enjoined from receiving such contributions as persons choose to give him merely because he has been rightfully deposed from the ministry by some ecclesiastical judicatory,[2] and if his removal by the bishop has been against the rules and discipline of the church, his right to receive voluntary offerings to the church for the support of its minister is a property right which the court will protect by enjoining the unlawful removal.[3] Where a church notifies its minister that his services will be no longer required, but accepts such services which he continues to perform it must pay for such services at the contract rate.[4] Where the pastoral relation is suspended pending a final determination by a higher judicatory of questions as to the regularity of his removal, he is entitled to his compensation during the period of suspension if he holds himself in readiness to perform his ministerial duties,[5] but if he seeks and secures other employment during such period and never offers to resume the pastoral relation, he cannot recover compensation for this period.[6]

[§ 96] **2. Use of Church Property.**[7] A minister who has been dismissed is no longer entitled to use or occupy any property belonging to the church,[8] nor have the trustees of a Roman Catholic church authority to permit an excommunicated priest to officiate therein.[9] But a rector dismissed by the vestry without the authority from the superior ecclesiastical body which the discipline of the church required it to have, cannot be prevented from conducting religious services in the church and any attempt to do so may be restrained by injunction.[10] The refusal of a minister to leave the parsonage on his suspension from ministerial service and church privileges, subject to the action of the next annual conference, will not render him a trespasser so as to justify the trustees of the local church in evicting him therefrom by violence without the aid of legal process,[11] although a refusal of a minister to leave after he has been rightfully dismissed does subject him to liability for rent, even though during his incumbency he was entitled to occupancy rent-free.[12]

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[85] Thompson v. Rehoboth Catholic Cong. Soc., supra.

[86] Thompson v. Rehoboth Catholic Cong. Soc., supra.

[87] Thompson v. Rehoboth Catholic Cong. Soc., supra.

[88] Thompson v. Rehoboth Catholic Cong. Soc., supra.

[89] See case infra this note.

[a] **Partiality proved.**—Where some of the members of an ex parte council are shown to have served on a prior council called to hear the same charges and their decision to have been adverse to the minister, their membership in the later council invalidates its findings. Thompson v. Rehoboth Catholic Cong. Soc., 7 Pick. (Mass.) 160.

[90] Stearns v. Bedford First Parish, 21 Pick. (Mass.) 114.

[91] Connitt v. New Prospect Reformed Protestant Dutch Church, 54 N. Y. 551; Albany Dutch Church v. Bradford, 8 Cow. (N. Y.) 457; Ash v. Methodist Church, 27 Ont. A. 602.

[92] Hollis St. Meeting House v. Pierpont, 7 Metc. (Mass.) 495; Stearns v. Bedford First Parish, 21 Pick. (Mass.) 114; Burr v. Sandwich First Parish, 9 Mass. 277.

[93] See case infra this note.

[a] **Continued operation of bond.**—Where it appeared that an ecclesiastical council recommended a dissolution of the pastoral relation but that the parish did not accept the recommendation, the relation continued to exist as before, and a bond given by the minister and sureties, conditioned to supply the desk of the parish, remained in full force. Bacon v. Lane, 21 Pick. (Mass.) 130 note.

[94] See cases supra note 92.

[95] Dieffendorf v. Reformed Calvinist Church, 20 Johns. (N. Y.) 12.

[96] **Rights before dismissal** see supra §§ 88, 89.

[97] Conway v. Carpenter, 80 Hun 428, 30 NYS 315; Children of Israel Cong. v. Peres, 2 Coldw. (Tenn.) 620.

[98] Morris St. Baptist Church v. Dart, 67 S. C. 338, 45 SE 753, 100 AmSR 727.

[99] Arthur v. Norfield Parish Cong. Church Soc., 73 Conn. 718, 49 A 241.

[1] Arthur v. Norfield Parish Cong. Church Soc., supra.

[2] Calkins v. Cheney, 92 Ill. 463.

[3] O'Hara v. Stack, 90 Pa. 477.

[4] Mady v. Holy Trinity Roman Catholic Polish Church, 223 Mass. 23, 111 NE 413.

[5] Wallace v. Snodgrass, 34 Pa. Super. 551.

[6] Wallace v. Snodgrass, supra.

[7] **Rights before dismissal** see supra § 87.

[8] Hatchett v. Mt. Pleasant Baptist Church, 46 Ark. 291; Duessel v. Proch, 78 Conn. 343, 62 A 152, 3 LRANS 854; Chatard v. O'Donovan, 80 Ind. 20, 41 AmR 782; Bonacum v. Harrington, 65 Nebr. 831, 91 NW 886.

[9] Immaculate Conception Parish v. Murphy, 89 Nebr. 524, 131 NW 946, 35 LRANS 926.

[10] Ackley v. Irwin, 69 Misc. 56, 125 NYS 672, 71 Misc. 239, 130 NYS 841.

[11] Bristor v. Burr, 120 N. Y. 427, 24 NE 937; 8 LRA 710.

[12] Perry v. Wheeler, 12 Bush (Ky.) 541.

[§ 97] **G. Reinstatement.**[13] A minister who has actual notice of the time and place of his trial on charges affecting his right to continue in the ministry cannot compel his reinstatement on the ground of irregularities in the notice,[14] or on the ground of incidental irregularities of the trial.[15] A deposed minister is not estopped by his voluntary withdrawal from the church division of which his congregation was a member from having his dismissal declared unlawful;[16] but he is so estopped where he has already sued for his salary.[17]

VIII. PROPERTY AND FUNDS

[§ 98] **A. Acquisition and Forfeiture—1. By Unincorporated Society.** In the absence of any statute empowering it to do so,[18] mere voluntary religious associations, like unincorporated associations generally,[19] are incapable of taking and holding real[20] or personal property in their society name,[21] although a gift to an unincorporated religious society has been upheld as a gift to pious[22] or charitable uses.[23] A conveyance may be made for the use and benefit of an unincorporated religious society through the intervention of a trustee,[24] who may be a natural or artificial person,[25] notwithstanding the fact that the trustee has not filed his certificate of election as required by statute.[26] Such a gift cannot be upheld as being made to a corporation de facto in the absence of evidence that it was such in fact,[27] especially where there is evidence that no attempt at incorporation was made until later.[28] In some states, unincorporated religious societies have the status of quasi corporations under the statute, being granted limited powers to take and hold real estate in the name of the society.[29]

[§ 99] **2. By Incorporated Society.**[30] An incorporated religious society has capacity to take and hold property, both real and personal, in its own name for its own uses, whether de jure[31] or de facto,[32] and without regard to its faith or church connections or the absence of them,[33] provided only the rules of the corporation under which the property was acquired are not void as against public policy,[34]

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13. **Mandamus to compel reinstatement** see Mandamus § 517.

14. Dempsey v. Wesleyan Methodist Connection of America, 98 Mich. 444, 57 NW 267.

15. Dempsey v. Wesleyan Methodist Connection of America, supra.

16. Wallace v. United Presb. Church, 201 Pa. 292, 50 A 762.

17. Canadian Religious Assoc. v. Parmenter, 180 Mass. 415, 62 NE 740.

18. See cases infra note 29.

19. See Associations § 32.

20. U. S.—Goesele v. Bimeler, 10 F. Cas. No. 5,503, 5 McLean 223 [aff 14 How. 589, 14 L. ed. 554].

Ala.—Gewin v. Mt. Pilgrim Baptist Church, 166 Ala. 345, 51 S 947, 139 AmSR 41; Stewart v. White, 128 Ala. 202, 30 S 526, 55 LRA 211.

Conn.—Greene v. Dennis, 6 Conn. 293, 16 AmD 58.

Ill.—Heiligenstein v. Schlotterbeck, 300 Ill. 206, 133 NE 188.

La.—Hardesty's Succ., 22 La. Ann. 332.

Mass.—Packard v. Duxbury First Cong. Parish, 256 Mass. 550, 152 NE 921; In re New South Meeting-House, 13 Allen 497.

Mo.—Tucker v. Diocese of West Missouri, 264 SW 897.

N. Y.—Betts v. Betts, 4 AbbNCas 317.

Or.—Liggett v. Ladd, 17 Or. 89, 21 P 133.

Tex.—Tunstall v. Wormley, 54 Tex. 476.

[a] **In England.**—By the common law, the church of England in its aggregate description is not deemed a corporation, and cannot receive a donation eo nomine; but a grant to a church of a particular place is good, by that law, and vests the fee in the parson and his successors. Pawlet v. Clark, 9 Cranch (U. S.) 292, 3 L. ed. 735.

21. In re Collier, 97 Misc. 543, 163 NYS 402 [aff 179 App. Div. 950 mem, 165 NYS 1081 mem].

22. Su Lee v. Peck, 40 Nev. 20, 160 P 18.

23. In re Allen, 111 Misc. 93, 181 NYS 398 [aff 202 App. Div. 810 mem, 194 NYS 913 mem (mod on other grounds 236 N. Y. 503, 142 NE 260)].

24. U. S.—Goesele v. Bimeler, 10 F. Cas. No. 5,503, 5 McLean 223 [aff 14 How. 589, 14 L. ed. 554].

Cal.—Bomar v. Mt. Olive Missionary Baptist Church, 92 Cal. A. 618, 268 P 665.

Ill.—Illinois Classis of Reformed Church v. Holben, 286 Ill. 473, 122 NE 46.

Ind.—Mendenhall v. First New Church Soc., 177 Ind. 336, 98 NE 57.

Ky.—Board of Parent Ministry v. Bohon, 192 Ky. 285, 233 SW 721.

Nebr.—Geiss v. Trinity Lutheran Church Cong., 230 NW 658.

Or.—Liggett v. Ladd, 17 Or. 89, 21 P 133.

Tex.—Clark v. Brown, (Civ. A.) 108 SW 421 [rev on other grounds 102 Tex. 323, 116 SW 360, 26 LRA NS 670].

Wis.—Martin v. German Reformed Church of Peace, 149 Wis. 19, 134 NW 1125; Fadness v. Braunborg, 73 Wis. 257, 41 NW 84.

25. Illinois Classis of Reformed Church v. Holben, 286 Ill. 473, 122 NE 46; Church of Redemption v. Grace Church, 68 N. Y. 570; Liggett v, Ladd, 17 Or. 89, 21 P 133.

26. Mendenhall v. First New Church Society, 177 Ind. 336, 98 NE 57.

27. In re Collier, 97 Misc. 543, 163 NYS 402 [aff 179 App. Div. 950 mem, 165 NYS 1081 mem].

28. In re Collier, supra.

29. See cases infra this note.

[a] **In Massachusetts** under the statutes providing that unincorporated religious societies shall have like power as incorporated societies to manage, use, and employ, according to its terms and conditions, any gift or grant made to them, a voluntary religious society possesses, for the purpose of taking, holding, and transmitting property, all the qualifying attributes of a duly organized corporation. Small v. Cahoon, 207 Mass. 359, 93 NE 588; Sharon First Baptist Church v. Harper, 191 Mass. 196, 77 NE 778; Glendale Union Christian Soc. v. Brown, 109 Mass. 163; Hamblett v. Bennett, 6 Allen 140; Weld v. May, 9 Cush. 181; Plymouth Christian Soc. v. Macomber, 5 Metc. 155; Fisher v. Whitman, 13 Pick. 350; Sawyer v. Baldwin, 11 Pick. 492; Stebbins v. Jennings, 10 Pick. 172. See Congregational Unitarian Soc. v. Hale, 29 App. Div. 396, 51 NYS 704 (construing the Massachusetts statutes).

[b] **In Pennsylvania** (1) the statute confirms in unequivocal terms to every religious society incorporated or unincorporated, the absolute ownership of its property subject only to the condition that it shall not divert it from the uses and trusts to which it may have been lawfully dedicated. Krauczunas v. Hoban, 221 Pa. 213, 70 A 740; Brown v. Lutheran Church, 23 Pa. 495; Magill v. Brown, 16 F. Cas. No. 8,952, Brightly 346. (2) An unincorporated religious society may hold title to land by grant or presumption thereof. Veech v. Trinity Episcopal Church, 3 Pa. Dist. & Co. 395. (3) But an unincorporated camp meeting association is not a religious denomination or society within the statutes authorizing such societies to lease lands. O'Neill v. Patterson, 10 PittsbLegJNS 189.

[c] **In Tennessee** a statute authorizes unincorporated religious societies to acquire land for purposes of worship. This does not allow it to accept a devise of a parsonage, library, and other personal property for purposes other than public worship. Reeves v. Reeves, 5 Lea 644.

30. **Ministerial lands in New England** see infra § 131.

31. Peo. v. Braucher, 258 Ill. 604, 101 NE 944, 47 LRANS 1015; Love v. Metropolitan Church Assoc., 184 Ill. A. 102; Howard v. Hayward, 10 Metc. (Mass.) 408; Peo. v. Trinity Church, 22 N. Y. 44; Peo. v. Fulton, 11 N. Y. 94; Van De Bogert v. Poughkeepsie Reformed Dutch Church, 128 Misc. 603, 220 NYS 50 [aff 219 App. Div. 220, 220 NYS 58]; Potter v. Pike, 183 NYS 842; Cammeyer v. United German Lutheran Churches, 2 Sandf. Ch. (N. Y.) 186; Toronto Church Soc. v. Crandell, 8 Grant Ch. (Ont.) 34.

32. Mabel First Lutheran Church v. Cadwallader, 172 Minn. 471, 215 NW 845.

33. Hanna v. Malick, 223 Mich. 100, 193 NW 798.

34. See case infra this note.

[a] **Property rules of monastic brotherhood.**—The agreement in the

the power being conferred upon the incorporated body,[35] whether it be the religious society itself or its trustees or other officers.[36] A religious society, after it has become incorporated, may compel the specific performance of a contract to deliver land which had been made with the trustees of the society before it was incorporated.[37] But a devise to an unincorporated society which in order to allow time for incorporating, postpones the vesting to a time not measured by lives in being, is void.[38] Except insofar as it may be restricted by statute,[39] a religious corporation itself has power to hold property as a trustee, for any of the purposes for which the society was incorporated,[40] or in trust for another unincorporated religious society,[41] or for a charity.[42]

[§ 100] **3. By Church or Society Recognized or Organized under Spanish Laws and Treaties.** The recognition by treaty of the right of a church to hold property is another source from which a religious society may derive power to acquire and hold real estate,[43] as in the case of the Roman Catholic Church in Spanish possessions afterwards ceded to the United States, its right to hold property being recognized by the concordats between Spain and the papacy, and such rights being protected in the law by which these possessions were ceded to the United States.[44] The fact that such property was acquired from gifts, even of public funds, does not affect the absoluteness of its right.[45] Also the Cofradia organized to care for the church building,[46] and the Confraternities of the Virgin, organized to carry on with greater solemnity and pomp the adoration of the Virgin Mother of the Savior,[47] which are unincorporated associations of the Roman Catholic faith organized under the old Spanish laws, are held to have legal existence and the right to possess and administer property, each Cofradia or Confraternity being a juridical entity having title to the property which it possesses.

[§ 101] **4. Constitutional and Statutory Limitations and Restrictions[48]—a. On Purpose for Which Acquired or Held.** A religious corporation cannot acquire or hold property for any purpose other than that of promoting the object of its creation.[49] For example, it cannot buy to sell again on speculation.[50] But it can accept a gift for authorized corporate purposes on condition of payment of an annuity to the donor, even though it had no power under its charter to deal in annuities.[51] It may take property in trust for any one of its authorized purposes, a declaration of trust co-extensive with the uses for which the society can hold property not being essential.[52] Statutes in some states in express terms limit the purposes for which real property may be acquired or held by a religious corporation,[53] but words of limitation are to be given their natural meaning in determining the extent of power granted.[54] Where the statute contains no other restriction, a religious corporation may acquire or hold property for purposes designated by the statute in any quantity or value,[55] and where the legislature later removes the limitation, it may sell free of the restriction.[56] A constitution restricting the power of religious corporations to hold real estate to certain enumerated purposes,[57] inferentially prohibits their acquiring or holding of land for a purpose not named.[58] Where a constitution prohibits conveyances to religious societies without the sanction of

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constitution of a monastic brotherhood that gains of members shall belong to the order is not opposed to public policy, where the constitution expressly recognizes the privilege of withdrawal and the order is entitled to all the personalty left by a deceased member, including that derived from his literary labors. Order of St. Benedict v. Steinhauser, 234 U. S. 640, 34 SCt 932, 58 L. ed. 1512, 52 LRANS 459, AnnCas1917A 463 [rev 194 Fed. 289, 114 CCA 249 (aff 179 Fed. 137)].

[35] See cases infra this note.

[a] **Trustees.**—Van Houten v. Totowa First Reformed Dutch Church, 17 N. J. Eq. 126; Protestant Episcopal Church v. Church of Messiah, 115 S. C. 285, 105 SE 414.

[b] **Vestry and wardens.**—St. James Parish v. Bagley, 138 N. C. 384, 50 SE 841, 70 LRA 160.

[36] See supra § 22.

[37] Gewin v. Mt. Pilgrim Baptist Church, 166 Ala. 345, 51 S 947.

[38] Washburn v. Acome, 74 Misc. 301, 131 NYS 963 [aff 157 App. Div. 948 mem, 136 NYS 1150 mem].

[39] See infra §§ 101–104.

[40] Miller v. Lerch, 17 F. Cas. No. 9,579, 1 Wall. Jr. 210; Levy v. Levy, 33 N. Y. 97; Waterford First Presb. Church v. McKallor, 35 App. Div. 98, 54 NYS 740; Tucker v. St. Clement's Church, 5 N. Y. Super. 242 [aff 8 N. Y. 558 note].

[41] Church of Redemption v. Grace Church, 68 N. Y. 570 [aff 6 Hun 166].

[42] See Charities § 51.

[43] See cases infra note 44.

[44] Santos v. Holy Roman Catholic, etc., Church, 212 U. S. 463, 29 SCt 338, 53 L. ed. 599; Ponce v. Roman Catholic Apostolic Church, 210 U. S. 296, 28 SCt 737, 52 L. ed. 1068; Roman Catholic Apostolic Church v. Municipalities, 12 Philippine 639; Roman Catholic Apostolic Church v. Placer, 11 Philippine 315; Roman Catholic Apostolic Church v. Santos, 7 Philippine 66 [aff 212 U. S. 463, 29 SCt 338, 53 L. ed. 599]; Barlin v. Ramirez, 7 Philippine 41.

[45] Santos v. Holy Roman Catholic, etc., Church, 212 U. S. 463, 29 SCt 338, 53 L. ed. 599; Roman Catholic Apostolic Church v. Placer, 11 Philippine 315.

[46] Govt. v. Avila, 38 Philippine 383.

[47] Roman Catholic Bishop v. San Jose, 27 Philippine 571.

[48] **Devises or bequests** see infra § 107.

[49] Thompson v. West, 59 Nebr. 677, 82 NW 13, 49 LRA 337.

[50] See cases infra this note.

[a] **Land.**—Thompson v. West, 59 Nebr. 677, 82 NW 13, 49 LRA 337.

[b] **Slave.**—Quaker Soc. v. Dickenson, 12 N. C. 189.

[51] Barger v. French, 122 Kan. 607, 253 P 230.

[52] Williams v. Williams, 8 N. Y. 525.

[a] **For support of minister.**—A religious corporation has power to accept and administer a trust for the support and maintenance of the rector or minister of the church. Tucker v. St. Clement's Church, 8 N. Y. 558 [aff 5 N. Y. Super. 242]; Williams v. Williams, 8 N. Y. 525.

[53] See statutory provisions.

[54] See case infra this note.

[a] **For support of institutions of Roman Catholic Church.**—A charter giving ecclesiastical corporations power to hold property to maintain worship according to the doctrine of the Roman Catholic Church and for the support of institutions of that church applies to the Roman Catholic Church in general, and is not to be restricted to the local parish corporation (Acts & Resolves [1869] p 221 §§ 3, 4, amended by Acts & Resolves [1872] p 188). Masse v. Our Lady of Consolation Church, 49 R. I. 224, 141 A 703.

[55] Miller v. Chittenden, 2 Iowa 315.

[56] Gump v. Sibley, 79 Md. 165, 28 A 977.

[57] See constitutional provisions.

[58] See case infra this note.

[a] **For missionary training school.**—A domestic corporation incorporated, to establish and maintain a training school for missionaries and other Christian workers, under the auspices of a board of a religious denomination, etc., is a religious corporation within the constitution, providing that no religious corporation can be established except such as may be created under a general law, for the purpose only of holding title to such real estate as may be used for church edifices, parsonages, and cemeteries, and it cannot take title to land devised to it. Proctor v. Methodist Episcopal Church South, 225 Mo. 51, 123 SW 862.

the legislature except for certain purposes,[59] a conveyance, not sanctioned by the legislature and not showing it was for any of the purposes named in the exception, is void.[60]

[§ 102] **b. On Amount Acquired or Held.** Statutes limiting the amount of property which a religious society may hold[61] are constitutional.[62] A deed of land to a society which brings its holdings to a point in excess of the statutory limit is absolutely void or voidable at the instance of the state, depending on the interest of the parties in the land conveyed.[63] An amendment increasing the limit, enlarges to that extent the power of the corporation.[64] The statute by its terms may restrict the limitation to a particular class of religious societies,[65] in which case a religious society not within the terms of the statute is not affected by the limitation;[66] or a constitution may provide for the holding of title to land by religious corporations in excess of the constitutional limit by leave of the legislature,[67] in which case no restriction is placed on the legislature and in its discretion it may grant leave to a religious corporation to take land in any amount.[68] Such limitations and restrictions apply to a single religious society,[69] and a society's capacity to acquire and hold real estate is not affected by the fact that other societies in the same denomination are holding land far in excess of the amount allowed.[70] They apply to land acquired or held by a society for its own use,[71] not to land held by it in trust for charitable uses,[72] nor to land directed to be sold and the proceeds given to the society,[73] especially where the society is located in a state other than the state where the limitation is in force.[74] But they do apply as against the cestui que trust to lands held by a trustee in trust for a religious society which is subject to the statutory limitation,[75] nor will the fact that the trustee has by a sale converted the realty into personalty validate the trust, or render it enforceable in equity,[76] unless by the terms of the will the property is given in this way to the cestui que trust for charitable uses.[77] Where the statute in terms applies to equitable as well as legal estates in land,[78] it is held to invalidate the gift of an equitable estate for years in land exceeding the statutory limit, although an estate for years is for some purposes regarded as personal estate.[79] A charter provision limiting the real estate holdings of a religious corporation does not, however, operate to restrict its power to accept personal estate,[80] and in the absence of restriction, a corporation may, in such case, take for legitimate corporate uses personalty without limitation.[81] Under an act of Congress limiting the real estate holdings of religious or charitable corporations in the territories,[82] the title of land held by a religious corporation in excess of the statutory amount escheats to the United States,[83] and the fact that it holds land greatly in excess of the limited amount is ground for the appointment of a receiver.[84] Where a religious corporation, subject to the restriction, is holding land in excess of the statutory allowance, its violation of the law cannot be taken advantage of collaterally by private persons, but only in a direct proceeding by the state,[85] unless

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59. See constitutional provisions.

60. Mills v. Zion Chapel, 119 Md. 510, 87 A 257; Dickerson v. Kirk, 105 Md. 638, 66 A 494; State University v. Calvary M. E. Church South, 104 Md. 635, 65 A 398; Zion Church v. Hilken, 84 Md. 170, 35 A 9; Gump v. Sibley, 79 Md. 165, 28 A 977.

61. See statutory provisions.

62. See case infra this note.

[a] **Societies of Christians.**—A statute restricting the amount of real estate holdings of "all Churches or Societies of Christians" is not void as discriminatory. Compton v. Moore, 156 Ky. 544, 161 SW 540.

63. See cases infra note 85.

64. In re Dooper, 125 Misc. 909, 212 NYS 616.

65. See statutory provisions.

66. See cases infra this note.

[a] **A missionary board,** incorporated, is not limited in the amount of property it may acquire by a statute prohibiting congregations incorporated for "the purpose of religious worship" to receive land not exceeding ten acres. Gilmer v. Stone, 120 U. S. 586, 7 SCt 689, 30 L. ed. 734.

[b] **Y. M. C. A.** is not a religious corporation, incorporated for purposes of religious worship, and is not subject to the limiting statute. Hamsher v. Hamsher, 132 Ill. 273, 23 NE 1123, 8 LRA 556.

[c] **An unincorporated religious society** is not within the terms of a statute limiting real estate holdings for incorporated religious societies. Alden v. St. Peter's Parish, 158 Ill. 631, 42 NE 392, 30 LRA 232.

67. See statutory provisions.

68. See cases infra this note.

[a] **In Maryland** (1) Declaration of Rights (1776), art 34, which declared that every gift, sale, or devise of land to a religious body, without leave of the legislature, should be void, except a gift, sale, or devise of not more than two acres, to be used for a meeting-house or burial-ground, imposed no restriction on the power of the legislature in granting such leave, but authorized it to declare limitations or not, in its discretion, both as to the extent and quality of the estate to be purchased, and the purposes for which it should be used. Baltimore Catholic Cathedral Church v. Manning, 72 Md. 116, 19 A 599. (2) But the legislature has no power to declare that an association incapable of taking the bequest at the time the will took effect, because unincorporated, should, on subsequent incorporation, be capable of taking it. State v. Warren, 28 Md. 338. (3) And the sanction of the legislature contemplated and required must be expressly given to each particular devise or bequest in order to render it valid. Rogers v. St. Joseph Sisters of Charity, 97 Md. 550, 55 A 318; Methodist Episcopal Church Extension v. Smith, 56 Md. 362. (4) But this is not necessary when the title has been conveyed by deed; in such an instance a prior or subsequent general sanction without particularizing the grants is all that is needed. Rogers v. St. Joseph Sisters of Charity, 97 Md. 550, 55 A 318; Gump v. Sibley, 79 Md. 165, 28 A 977; Baltimore Catholic Cathedral Church v. Manning, 72 Md. 116, 19 A 599 (holding also that where the legislature has granted to a religious corporation authority to purchase land, without restricting it as to the quality of the estate to be acquired, but limiting the purpose for which it shall be used, a fee-simple estate may be acquired and held; but a subsequent legislature has power, with consent of the corporation, to change or abrogate altogether the restrictions as to the use of the land).

69. Morgan v. Leslie, Wright (Oh.) 144.

70. Morgan v. Leslie, supra.

71. Kinney v. Kinney, 86 Ky. 610, 6 SW 593, 9 KyL 753.

72. Kinney v. Kinney, supra.

73. West Virginia Pulp, etc., Co. v. Miller, 176 Fed. 284, 100 CCA 176 [certiorari den 220 U. S. 619 mem, 31 SCt 722 mem, 55 L. ed. 612 mem]; Compton v. Moore, 167 Ky. 657, 181 SW 360.

74. West Virginia Pulp, etc., Co. v. Miller, 176 Fed. 284, 100 CCA 176 [certiorari den 220 U. S. 619 mem, 31 SCt 722 mem, 55 L. ed. 612 mem].

75. Miller v. Ahrens, 163 Fed. 870.

76. Miller v. Ahrens, supra.

77. Chambers v. Higgins, 49 SW 436, 20 KyL 1425; Methodist Episcopal Church Extension v. Smith, 56 Md. 362.

78. See statutory provisions.

79. Street v. Cave Hill Inv. Co., 191 Ky. 422, 230 SW 536.

80. In re Dooper, 125 Misc. 909, 212 NYS 616.

81. In re Dooper, supra.

82. See Act Cong. July 1, 1862.

83. U. S. v. Church of Jesus Christ, etc., 5 Utah 361, 15 P 473 [aff 136 U. S. 1, 10 SCt 792, 34 L. ed. 481].

84. U. S. v. Church of Jesus Christ, etc., supra.

85. U. S.—Jones v. Habersham, 107 U. S. 174, 2 SCt 336, 27 L. ed. 401; Reorganized Church of Jesus Christ, etc. v. Church of Christ, 60 Fed. 937 [rev on other grounds 70 Fed. 179, 17 CCA 387]; Miller v. Lerch, 17 F. Cas. No. 9,579, 1 Wall. Jr. 210.

the party complaining is in a position to claim an interest in the property, if it is adjudged that the corporation may not hold it.[86] Nor in the absence of a statutory provision declaring a forfeiture to the state of property held by a religious corporation in excess of the statutory limit, can the state do more than force a sale by the society. It cannot take the land from the society.[87]

[§ 103] **c. On Time Allowed for Holding.** Where a statute permits a religious corporation to hold land for a fixed period of years after its acquisition,[88] time does not commence to run in the case of a devise of a remainder until the expiration of the life estate.[89]

[§ 104] **d. On Societies Which May Acquire or Hold.** A statute declaring that no conveyance, devise or lease of real estate for purposes of religious worship shall vest any right, title or interest in the grantee unless made to a corporation organized under a particularly designated statute,[90] is held to apply to all conveyances, devises or leases made after enactment of the restrictive act transferring property dedicated to purposes of religious worship either before or after such act,[91] but title to land conveyed to a corporation organized under the particularly designated statute vests in the trustees when that statute so provides.[92] A constitutional prohibition against incorporation of a certain class of religious societies[93] does not operate to prevent a religious corporation not within that class from holding property.[94]

[§ 105] **5. Mode of Acquisition—a. In General.** Religious societies legally competent to acquire and hold property[95] may, within limitations imposed by constitution and statute,[96] acquire property by adverse possession,[97] by devise or bequest,[98] by various forms of public aid subject to constitutional restrictions existing in some states,[99] by deeds, donations, and grants,[1] by agreements, express or implied, between societies by which the property rights of each are vested in an association or in a superior church judicatory,[2] by agreements under which the property of individual members of a religious society is surrendered to the society,[3] which agreements have been held not to be against public policy where they include a provision reserving to the member the privilege of voluntary withdrawal at any time.[4] A statute authorizing a parish to convert its ministerial lands with the consent of the minister of the parish for the time being does not operate to divest a town of its title to lands formerly used for church purposes and to vest title to such lands in the parish.[5]

[§ 106] **b. By Adverse Possession.** It is very generally held that a religious corporation may obtain a title to land by adverse possession,[6] and the corporate acts without vote or deed are sufficient proof of the adverse entry and occupation.[7] Although the religious corporation has already acquired real estate to the statutory limit and is legally incapable of acquiring more, it cannot, after holding additional land for the period necessary to establish title by adverse possession, be ousted by the real owner,[8] and

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Ill.—Hamsher v. Hamsher, 132 Ill. 273, 23 NE 1123, 8 LRA 556. But see St. Peter's Roman Catholic Cong. v. Germain, 104 Ill. 440 (contra by a divided court, the minority holding to the rule of the text).

Md.—Hanson v. Little Sisters of Poor, 79 Md. 434, 32 A 1052, 32 LRA 293.

Miss.—State v. Sisters of Mercy, 150 Miss. 559, 115 S 323.

N. Y.—Church of Redemption v. Grace Church, 68 N. Y. 570; Bogardus v. Trinity Church, 4 Sandf. Ch. 633.

[86] Church of Redemption v. Grace Church, 68 N. Y. 570.

[a] **The heir at law** has a right to object, when a corporation claims to take and hold by devise a larger quantity of property than the law authorizes. Compton v. Moore, 156 Ky. 544, 161 SW 540; De Camp v. Dobbins, 31 N. J. Eq. 671; Betts v. Betts, 4 AbbNCas (N. Y.) 317. See also Miller v. Lerch, 17 F. Cas. No. 9,579, 1 Wall. Jr. 210.

[87] State v. Sisters of Mercy, 150 Miss. 559, 115 S 323.

Forfeiture upon breach of condition or trust see infra § 121.

[88] See statutory provisions.

[89] Re Naylor, 5 Ont. L. 153, 1 OntWR 809.

[90] See statutory provisions.

[91] Wilmington Monthly Meeting v. Ninth St. R. Co., 10 Del. Ch. 290, 91 A 542 [aff 10 Del. Ch. 479, 92 A 1085].

[92] Willin v. Roe, 25 Del. 197, 78 A 773.

[93] See supra § 10.

[94] See case infra this note.

[a] **Incorporated missionary societies** may take and hold property notwithstanding a constitutional prohibition against granting a charter of incorporation to any church or religious denomination, especially where the society was incorporated in a foreign state, and the state laws permit foreign corporations to hold property situated in the state. Stump v. Sturm, 254 Fed. 535, 166 CCA 93 [rev 239 Fed. 749, and certiorari den 248 U. S. 578 mem, 39 SCt 19 mem, 63 L. ed. 430 mem].

[95] See supra §§ 98–100.

[96] See supra §§ 101–104.

[97] See infra § 106.

[98] See infra § 107.

[99] See infra §§ 108, 109.

[1] See infra §§ 111–113.

[2] Barkley v. Hayes, 208 Fed. 319 [aff sub nom. Duvall v. Kansas Synod Presb. Church, 222 Fed. 669, 138 CCA 217].

[3] Order of St. Benedict v. Steinhauser, 234 U. S. 640, 34 SCt 932, 58 L. ed. 1512, 52 LRANS 459, Ann Cas1917A 463 [rev 194 Fed. 289, 114 CCA 249 (aff 179 Fed. 137)]; Ruse v. Williams, 14 Ariz. 445, 130 P 887, 45 LRANS 923; Maas v. Sisters of Mercy, 135 Miss. 505, 99 S 468; Jones v. Registrar, 18 Porto Rico 124.

[4] Order of St. Benedict v. Steinhauser, 234 U. S. 640, 34 SCt 932, 58 L. ed. 1512, 52 LRANS 459, Ann Cas1917A 463 [rev 194 Fed. 289, 114 CCA 249 (aff 179 Fed. 137)].

[5] Packard v. Duxbury First Cong. Parish, 256 Mass. 550, 152 NE 921.

[6] U. S.—Harpending v. Reformed Protestant Dutch Church, 16 Pet. 455, 10 L. ed. 1029.

Conn.—Camp v. Camp, 5 Conn. 291, 13 AmD 60.

Ky.—Curd v. Wallace, 7 Dana 190, 32 AmD 85.

Md.—Baltimore L. Ins. Co. v. Woodberry Ave. M. E. Church, 148 Md. 603, 129 A 908; Rydzewski v. St. Peter's Church, 145 Md. 531, 125 A 717.

Mass.—Rehoboth Second Precinct v. Carpenter, 23 Pick. 131.

N. Y.—Peo. v. Trinity Church, 22 N. Y. 44.

[a] **In Pennsylvania** an unincorporated religious society may acquire title to land by adverse possession. Veech v. Trinity Episcopal Church, 3 Pa. Dist. & Co. 395.

[7] Rehoboth Second Precinct v. Rehoboth Catholic Cong. Church, etc., 23 Pick. (Mass.) 139 note; Rehoboth Second Precinct v. Carpenter, 23 Pick. (Mass.) 131; Milton v. Milton First Cong. Parish, 10 Pick. (Mass.) 447.

[8] Humbert v. Trinity Church, 24 Wend. (N. Y.) 587, 604.

"Nor can it be received as an objection, that the possession and claim of title are by the agents or tenants of a corporation incapable by law of taking lands. It is said that the law will not do an idle thing; that by its own operation, it will not cast a title upon one not competent to take as a purchaser, any more than it will carry land by descent to an alien. The answer was properly given at the bar, that the argument confounds the acquisition of title with the cutting off a remedy. The plaintiff is barred of his action because he has been shut out of possession by an adverse claimant for 20 years. . . . The remedy is therefore gone. Admit that the law will cast no title on the corporation, the answer [of the corporation], in the words of the statute, is equally fatal: 'You have been out of possession for more than twenty years, and are thus disqualified to maintain an action to recover your land against me or any other.'" Humbert v. Trinity Church, supra.

although a conveyance to a religious corporation is void because in contravention of the constitution, the entry into possession by the corporation after the conveyance, and continuance of such possession for the statutory period, perfects the title against all persons not under legal disabilities.[9] As a general rule an unincorporated religious society cannot acquire title by adverse possession,[10] except in jurisdictions where for limited purposes an unincorporated religious society is allowed to take and hold real estate in its own name.[11] But its officers can for its benefit;[12] and if a corporation is afterward organized, the prior possession may be tacked to its own, to establish its title under the statute of limitations.[13]

[§ 107] **c. By Devise or Bequest.**[14] A religious corporation may accept bequests for uses within the scope of its charter or the law under which it was incorporated,[15] to an amount not exceeding that limited by statute,[16] unless the statute expressly prohibits it,[17] but it cannot take land by devise, unless and only to the extent that it is expressly authorized to do so by its charter or by statute,[18] although there are some early cases to the contrary.[19] In some states enabling statutes exist, while in others religious corporations are expressly forbidden to take by devise.[20] Authority to take by devise is not granted by a statute authorizing a religious corporation to acquire property by "conveyance,"[21] or by "deed,"[22] although it has been held to be conferred by a statute authorizing a transfer of property to a religious corporation by "deed or conveyance;"[23] nor is a power to take by will conferred by a granted power to receive "subscriptions or contributions in money or otherwise."[24] Whether a religious corporation can take property by devise in a particular case will depend upon the terms of the statute granting the power and the nature of the use for which the property is devised,[25] and where the terms of the charter of the corporation or of the statute under which it was incorporated conflict with the terms of a later general law in this respect, the terms of the charter or earlier incorporating statute control.[26] Under a constitutional provision permitting devises for limited purposes to a "religious sect, order or denomination,"[27] a local congregation uncontrolled by any general ecclesiastical organization is capable of receiving a devise.[28] A distinction is made between the statutes of mortmain proper which are against the holding of land at all by corporations, and statutes prohibiting devises of land for charitable uses. A statute granting power to a religious corporation to take land by devise exempts the corporation from the operation of the statute of mortmain, giving it the power to take by devise that an individual would have. But a grant of power to take by devise is not, per se, a grant of power to accept a devise of land for charitable uses. The grant must be in specific terms to give it that effect.[29] Also where the grant of the power to take by devise is restricted to devises for particular purposes, the corporation has no power to take by devise for a purpose not enumerated,[30] and a corporation having authority to take by devise only for its own use cannot take under the statute for any other use,[31] although it has been held that where a religious corporation is prohibited from taking real estate by devise, the prohibition does not invalidate a testamentary trust for purposes personal to the testator, merely because the church was named as trustee in the will.[32] Especially where a taking by devise for the excluded purposes is expressly prohibited, the power to take by devise is strictly confined to the purposes included in the statute.[33] In jurisdictions where the English statute of charitable uses (43 Elizabeth) is not in force as a part of the common law,[34] the power of the religious corporation to accept devises of property or trust is restricted to purposes declared as lawful by the local statute,[35] and on the terms laid down by the local law,[36]

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[9] Dickerson v. Kirk, 105 Md. 638, 66 A 494; State University v. Calvary M. E. Church, 104 Md. 635, 65 A 398; Zion Church v. Hilken, 84 Md. 170, 35 A 9; Gump v. Sibley, 79 Md. 165, 28 A 977.

[10] Gallupville Reformed Church v. Schoolcraft, 65 N. Y. 134 [rev 5 Lans. 206].

[11] Sharon First Baptist Church v. Harper, 191 Mass. 196, 77 NE 778.

[12] Gallupville Reformed Church v. Schoolcraft, 65 N. Y. 134 [rev 5 Lans. 206]; Deepwater R. Co. v. Honaker, 66 W. Va. 136, 66 SE 104, 27 LRANS 388.

[13] Gallupville Reformed Church v. Schoolcraft, 65 N. Y. 134 [rev 5 Lans. 206].

[14] **Constitutional and statutory limitations and restrictions generally** see supra §§ 101-104.

Devises to charitable or religious uses see Wills [40 Cyc 1053].

[15] Williams v. Williams, 8 N. Y. 525; In re Atkinson, 197 NYS 831.

[16] Williams v. Williams, 8 N. Y. 525.

[17] See cases infra notes 38, 39.

[18] Greene v. Dennis, 6 Conn. 293, 16 AmD 58; Levy v. Levy, 33 N. Y. 97; Goddard v. Pomeroy, 36 Barb. (N. Y.) 546; King v. Rundle, 15 Barb. (N. Y.) 139; In re Allen, 202 App. Div. 810 mem, 194 NYS 913 mem [aff 111 Misc. 93, 181 NYS 398, and mod on other grounds 236 N. Y. 503, 142 NE 260]; Jackson v. Hammond, 2 Cai. Cas. (N. Y.) 337. See also cases infra this section.

[19] Brown v. Langdon, Smith (N. H.) 178.

[20] See statutory provisions.

[21] American Bible Soc. v. Pendleton, 7 W. Va. 79.

[22] State v. Bates, 2 Del. 18; Ferguson v. Hedges, 1 Del. 524; Phillips v. Phillips, 10 Del. Ch. 314, 91 A 452.

[23] Baker v. Clark, 7 U. C. Q. B. (Ont.) 44.

[24] Brown v. Thompkins, 49 Md. 423.

[25] See cases infra this section.

[26] See case infra this note.

[a] **N. Y. Laws (1813) c 60,** permit a religious corporation to take by devise, and a corporation formed under such act is not affected, with reference to such rights, by L. (1848) c 319 § 6, declaring invalid a devise to such a corporation not made and executed at least two months before the death of the testator, nor is a church incorporated under such act affected by the general corporation law, religious corporation law, or the membership corporation law, with reference to its right to take property by will. Matter of Foley, 27 Misc. 77, 58 NYS 201.

[27] See constitutional provisions.

[28] Boyce v. Christian, 69 Mo. 492.

[29] Smith v. Methodist Church, 16 Ont. 199.

[30] Smith v. Methodist Church, supra.

[31] Levy v. Levy, 33 N. Y. 97.

[32] St. Stephen's Episcopal Church v. Norris, 115 Va. 225, 78 SE 622.

[33] See case infra this note.

[a] **In Missouri** the constitution permits a devise of land, not exceeding one acre, to a religious society upon which to erect a church, but a bequest of money to such a society for the purpose of building a church or for the support of a minister is expressly prohibited. First Baptist Church v. Robberson, 71 Mo. 326.

[34] See Charities § 13.

[35] Gram v. Prussia Emigrated Evangelical Lutheran German Soc., 36 N. Y. 161, 3 Transcr. A. 339.

[36] See case infra this note.

[a] **Devise to maintain a particular faith.**—Under the early New York rule giving trustees of incorporated religious societies power to manage temporalities free from denominational control (see supra § 22), a devise to maintain a particular faith in perpetuity, being void, trustees are held to take a devise in trust for all members of the society, and not merely for church

Where the statute expressly provides that no religious corporation, body or society shall take under a will,[37] both devises and bequests to a religious society are void,[38] and whether the testamentary gift is a devise of real estate or a bequest of the proceeds of real estate is immaterial, both being by will and so prohibited by the law.[39] But where the prohibition extends to devises of real estate only,[40] bequests of personal estate are valid,[41] and inasmuch as a prohibition of devises to religious corporations does not invalidate a devise to such corporation in trust for purposes personal to the testator,[42] a religious corporation prohibited from taking a devise of real estate may take by will an estate including both real and personal estate, where the real estate can be applied under the terms of the will to other than church purposes, and the personal estate appropriated for the church.[43]

Foreign corporations. In the absence of statute in the state of testator's domicile forbidding bequests to foreign religious organizations, such foreign organization may take devises and legacies under the will of a resident of another state, whenever, by the laws under which they are incorporated, such corporations have authority to acquire property by will, unless such devises or legacies are repugnant to the laws of such other state.[44] But a religious society incorporated by another state can by comity have no better title to take property by devise than domestic corporations in that state.[45]

[§ 108] **d. By Public Aid—(1) Constitutional Prohibitions.** Under some state constitutions, states, counties and towns are prohibited from making any gift of money or land to any church, or for any sectarian purpose.[46] These provisions do not prohibit the granting of a permit by a county to a religious denomination to build a chapel on county land for use by the county poor in religious worship, where the title to the chapel remains in the county.[47] Nor are payments by government to religious schools to reimburse them for increased costs due to services rendered by such schools to soldiers and sailors in the World War gifts to religious societies within the meaning of the constitutional prohibition.[48] Nor is excusing pupils from attendance on public schools to attend religious instruction outside of school, a use of public property, credit or money in aid of religious denominations within the meaning of a constitutional prohibition of such use.[49] Nor is the reading of the Bible without comment in the public schools an expenditure of public money for "sectarian purpose" within the meaning of the constitutional prohibition.[50]

[§ 109] **(2) Share in Ministerial Fund.**[51] Constitutional or statutory provisions in some states secure to every denomination of religious societies, in each township, an equal participation, according to their number of adherents, of the profits arising from the land granted by congress for the support of religion.[52] This fund is for the support of religion in the township in which the land furnishing the fund is located,[53] and cannot be appropriated for any other purpose,[54] or for the support of religion in any other place.[55] A society must be organized for religious, not secular, purposes to be entitled to share in the distribution,[56] and it must qualify by proof to the selectmen or town trustees that it is a religious society of some denomination, that it is organized, has a name, a duly appointed agent, and has furnished a list of members.[57] The number of its members determines its proportionate share in the fund.[58] To be entitled to a place on the list, a member of the society must be a citizen of the township,[59] citizen being synonymous with resident,[60] and over fifteen years of age,[61] but the faith and doctrine of the society is immaterial,[62] provided it belongs to some sect or denomination.[63] The selectmen or town trustees determine whether or not the society claiming a share of the fund has qualified,[64] and, if so, the number of its members entitled to be counted,[65] the list furnished by the claimant not being conclusive on this issue,[66] but they cannot sit in judgment on the faith of its members,[67] except to determine that they are members of a society belonging to some sect or denomination.[68] Their function is a judicial one, and they cannot be held

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members. Gram v. Prussia Emigrated Evangelical Lutheran German Soc., 36 N. Y. 161.

[37] See statutory provisions.

[38] In re Wright, Myr. Prob. (Cal.) 213.

[39] State v. Bates, 2 Del. 18.

[40] See statutory provisions.

[41] St. Stephen's Episcopal Church v. Norris, 115 Va. 225, 78 SE 622.

[42] See cases supra note 32.

[43] St. Stephen's Episcopal Church v. Norris, 115 Va. 225, 78 SE 622.

[44] U. S.—Reorganized Church of Jesus Christ, etc., v. Church of Christ, 60 Fed. 937.

Mich.—In re Ticknor, 13 Mich. 44.

Minn.—In re Henrikson, 163 Minn. 176, 203 NW 778.

N. Y.—Bullock's Est., 11 NYSt 700, 6 Dem. Surr. 335.

Va.—Methodist Episcopal Church Missionary Soc. v. Calvert, 32 Gratt. (73 Va.) 357.

[45] Miller v. Ahrens, 150 Fed. 644; Levy v. Levy, 33 N. Y. 97.

[46] See constitutional provisions.

[47] Reichwald v. Chicago Catholic Bishop, 258 Ill. 44, 101 NE 266, AnnCas1914B 301.

[48] State v. Johnson, 170 Wis. 251, 176 NW 224.

[49] Peo. v. Graves, 127 Misc. 135, 215 NYS 632.

[50] Peo. v. Stanley, 81 Colo. 276, 255 P 610.

[51] **Ministerial lands in New England** see infra § 131.

[52] See constitutional and statutory provisions.

[53] State v. Delhi Tp. Section 29, 11 Oh. 24.

[54] State v. Delhi Tp. Section 29, supra.

[55] State v. Delhi Tp. Section 29, supra.

[56] State v. Ohio Co.'s Purchase, 7 Oh. St. 58.

[57] State v. Ohio Co.'s Purchase, supra; State v. Delhi Tp. Section 29, 11 Oh. 24; State v. Trustees Section 29, Wright (Oh.) 560.

[a] **The proof of the appointment of the agent** must be verified by something more than his own statement. State v. Delhi Tp. Section 29, 11 Oh. 24.

[58] State v. Delhi Tp. Section 29, supra.

[59] State v. Delhi Tp. Section 29, supra.

[60] State v. Delhi Tp. Section 29, supra.

[61] State v. Delhi Tp. Section 29, supra.

[62] State v. Trustees Section 29, Wright (Oh.) 560.

[63] State v. Ohio Co.'s Purchase, 7 Oh. St. 58.

[64] State v. Delhi Tp. Section 29, 11 Oh. 24.

[a] **Organization of society.**—Evidence that there were a number of Catholics in town, and that they had organized a society to share in the ministerial fund, but not for worship, is not sufficient to entitle them to share in the fund. State v. Delhi Tp. Section 29, 11 Oh. 24.

[65] State v. Delhi Tp. Section 29, supra.

[66] Fletcher First Universalist Soc. v. Leach, 35 Vt. 108.

[67] State v. Trustees Section 29, Wright (Oh.) 560.

[68] State v. Ohio Co.'s Purchase, 7 Oh. St. 58.

liable for error in admitting or excluding evidence on which to form their judgment, provided they act in good faith and with reasonable diligence.[69] Nor can a claim, erroneously rejected, be charged upon the fund of a subsequent year.[70] Where it appears that the trustees had requested proof of a society to substantiate its claim, but no sufficient proof has been brought forward, mandamus will not lie to compel action by the trustees on the claim.[71] The right of religious societies in a town to share in funds previously established for their benefit is not abridged or in any way affected by the repeal of a law authorizing towns to vote and grant money for the settlement, maintenance and support of the ministry.[72]

[§ 110] **6. Right, Title, or Interest Acquired—a. Necessity of Transfer.** A religious corporation does not acquire title to property merely by force of the statutory provision which gives it power to take and hold real estate which has been given, granted or devised to it. There must still be a deed or will evidencing an intent of the former owner to pass title to the corporation.[73] And so the incorporation of a second corporation to take over church property held by the original corporation does not work a succession to the property without transfer.[74] But a confirmation of the appointment of original trustees, who hold title, and providing a new mode of appointment for the future, does not require a transfer to the trustees as trustees under the order of confirmation.[75] Under a statute granting power to a religious corporation to establish missions and associate churches which in their turn may become incorporated with the consent of the parent church,[76] title to the property occupied by the incorporated mission does not pass to the mission by virtue of the parent's consent to the incorporation, in the absence of evidence of consent to the passing of title.[77] A fortiori, in the absence of evidence of consent of the parent church not only to the passing of title, but to the incorporation of the mission church, no title passes to the latter.[78] However title to personal property held in trust by the parent church for the mission church does pass to the latter upon its incorporation,[79] even though the incorporation was without the consent of the parent church.[80]

[§ 111] **b. Construction and Operation of Deeds, Donations, and Grants[81]—(1) In General.** An intention of the parties to a transaction, disclosed by their acts, that title shall pass is an essential to a voluntary transfer of property to[82] or from a religious society.[83] In whom the title vests upon transfer by deed, donation or grant, is governed by rules of the common law in the absence of constitutional or statutory provisions.[84] A grant to a town for use of the ministry vests the legal title in the town.[85]

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[69] Fletcher First Universalist Soc. v. Leach, 35 Vt. 108.

[70] State v. Warren County, 2 Oh. 108.

[71] State v. Delhi Tp. Section 29, 11 Oh. 24.

[72] Candia v. French, 8 N. H. 133.

[73] Alexander Presb. Church v. New York Presb. Church, 64 N. Y. 274 [aff 46 HowPr 312].

[74] Syrian Antiochean St. George Orthodox Church v. Ghize, 258 Mass. 74, 154 NE 839.

[75] Re Hamilton Lutheran Church, 34 Ont. L. 228, 8 OntWN 556.

[76] See statutory provisions.

[77] See case infra this note.

[a] **Leased property.**—Where a religious corporation occupies its church building under lease from the parent church corporation which owned it, it cannot claim that title in fee simple passed to it when it was incorporated with the consent of the parent church, in the absence of a deed, merely because of the statute giving it power to take title. Alexander Presb. Church v. New York Presb. Church, 64 N. Y. 274 [aff 46 HowPr 312].

[78] Church of Redemption v. Grace Church, 68 N. Y. 570 [mod 6 Hun 166].

[79] Church of Redemption v. Grace Church, supra.

[80] Church of Redemption v. Grace Church, supra.

[81] **Construction of trusts for religious societies** see infra § 116.

[82] See case infra this note.

[a] **Bell owned by subscribers** does not become property of the parish by the mere circumstance of its being placed in the belfry of the parish church with permission of the parish. Fourth Parish v. Root, 18 Pick. (Mass.) 318.

[83] See case infra this note.

[a] **Guild hall built by guild members** on church property with permission of vestry, communicating with church building, does not become property of the guild, an unincorporated association, by force of the vestry's permission. Read v. St. Ambrose Church, 137 Pa. 320, 20 A 1002, 11 LRA 727.

[84] See cases infra notes 85–88.

[85] Wilton Baptist Soc. v. Wilton, 2 N. H. 508; Union Baptist Soc. v. Candia, 2 N. H. 20; Cilley v. Cayford, Smith (N. H.) 150.

[a] **Deeds, donations, and grants to towns and parishes.**—(1) In Massachusetts and others of the New England states it was formerly held that lands granted to a town for the use of the ministry vested in the town in its parochial capacity. Richardson v. Brown, 6 Me. 355; New Market v. Smart, 45 N. H. 87. (2) And land given to a town for the use of the ministry might, with the leave of the legislature and consent of all parties interested, be appropriated to the support of several ministers settled over distinct portions of the inhabitants of the town (Lanesborough Cong. Soc. v. Curtis, 22 Pick. (Mass.) 320; Humphrey v. Whitney, 3 Pick. (Mass.) 158), (3) and upon the erection or incorporation of the first parish in the town, the lands vested in the parish, which succeeded to the parochial rights and duties before belonging to the town (Sedgwick v. Pierce, 2 Root (Conn.) 431; Wells v. Heath, 10 Gray (Mass.) 17; Medford First Parish v. Medford, 21 Pick. (Mass.) 199; Shrewsbury First Parish v. Smith, 14 Pick. (Mass.) 297; Milton v. Milton First Cong. Parish, 10 Pick. (Mass.) 447; New Market v. Smart, 45 N. H. 87). (4) Where lands were held by the town in its parochial capacity, the proceeds of the sale of such lands were also held by the town in like capacity; and upon the separate organization of a parish, the parish succeeded to all the parochial property of the town (Winthrop v. Winthrop, 1 Me. 208; Tobey v. Wareham Bank, 13 Metc. (Mass.) 440; Ludlow v. Sikes, 19 Pick. (Mass.) 317), (5) and a poll parish was held to be within the rule (Sutton First Parish v. Cole, 8 Mass. 96). (6) The first parish, which was the successor of a town in its parochial capacity, might maintain trespass against a stranger for plowing up land used for purposes incidental to the place of worship, such land having been appropriated for the purpose by the town. Shrewsbury First Parish v. Smith, 14 Pick. (Mass.) 297. (7) Real estate originally granted to a parish, upon the subsequent incorporation of the parish into a town, passed to and was held by the new corporation (Lakin v. Ames, 10 Cush. (Mass.) 198), (8) unless prior to such incorporation a new religious society was formed therein, recognized by statute as an independent organization and its members therefore exempted from taxation in the original parish (Essex v. Low, 5 Allen (Mass.) 595). (9) If the town was subsequently divided into parishes, such property reverted to the original parish unless in the meantime it had been exclusively appropriated to the use of the town in its municipal capacity, but property held by the town in its municipal capacity remained still that of the town after the separation of the parish (Lakin v. Ames, 10 Cush. (Mass.) 198), (10) and after a grant of land to a town for the use of the ministry, if the town was divided, and such land fell within the boundaries of the new town, the title to the land still remained in the old town (Union Baptist Soc. v. Candia, 2 N. H. 20). (11) Lands thus given and appropriated were held by the minister of the parish as an estate in fee simple in him and his successors (Bucksport v. Spofford, 12 Me. 487; Brown v. Porter, 10 Mass. 93; Brunswick First Parish v. Dunning, 7 Mass. 445; Weston v. Hunt, 2 Mass. 500), (12) the first appointed minister and his successors taking the same, upon a regular settlement and ordination (Bucksport v. Spofford, 12 Me. 487; Brown v. Porter, 10 Mass. 93; Williams v. North Hero, 46 Vt. 301; Dow v. Hinesburgh, 2 Aik. (Vt.) 18; Sheldon v. Goodsel, 1 Aik. (Vt.) 225. See also Bisbee v. Evans, 4 Me. 374; Williams v. North Hero, 46 Vt. 301), (13) as a sole corporation (Bucksport v. Spofford, 12 Me. 487; Emer-

If the grant is to the church and the church unincorporated, title is held at common law to vest in the minister as representing the church,[86] the minister being seized only in right of the church, with no power of alienation beyond the time of his ministry, and on his resignation, death or deprivation, the freehold being in abeyance until his successor is inducted into office;[87] nor has a minister, seized in right of the church, power to alienate without the authority duly granted to him by a majority of the members of the church.[88] Under the statutes,[89] title has been held to vest by transfer in the minister[90] or bishop of a church as corporation sole;[91] in an organized religious society, although not incorporated;[92] and in an incorporated religious body, de jure or de facto.[93]

[§ 112] **(2) Conveyance to Trustees of Religious Society.** A deed to the trustees of a religious society and their successors, for the use of the society, vests the legal title in the trustees,[94] and whether the trustees are a corporation or not is immaterial so long as they are a legal body capable of taking estates by grant.[95] But a deed to individuals described as trustees of a religious society, and their successors without stating that the grant is to the use of the society, vests an absolute title in the individuals named not subject to a trust for the society.[96] A deed granting the legal title to trustees named and the superintendence, custody and control to the trustees of the congregation which includes the trustees named in the deed and others, does not vest title in the trustees of the congregation or give them the right to sell the property.[97] Where the conveyance to trustees and their successors states that the grant is for the use of the society, and the society is incorporated, in some states the statute executes the trust and vests the legal title in the society,[98] and the title conveyed is a fee simple notwithstanding the omission of the word "heirs" in the habendum clause.[99] But a deed conveying real estate to certain named individuals, not as trustees of any incorporated religious society, nor to their successors in office, does not pass the title to parties who claim to be such successors.[1] Under some statutes where the legal corporation consists of the trustees and does not include the congregation,[2] the trustees hold the legal title to the church property in trust for the congregation,[3] and each member of the church becomes entitled to a beneficial interest in the property of the church so long as his or her connection or membership continues.[4] Under others, the congregation or society is the incorporated body,[5] and whatever property it acquires, whether it be real or personal, is vested in interest in the body corporate;[6] and while the officers have it under their control or dominion, whatever possession they have, is the possession of the artificial person whose agents they are.[7] But where a conveyance is made to trustees without naming them the title vests in the corporation named in the deed.[8] In the absence of a declared, or clearly implied, trust,[9] the trustees of an incorporated religious society do not hold the property for any church in general, nor for the benefit of any peculiar doctrines or tenets of faith and practice in religious matters, but solely for the society or congregation whose officers they are,[10] and the trustees of an unincorporated religious society which recognized the authority in spiritual affairs of the parent society from which it sprung but not in temporal affairs hold the property for the use exclusively of the members of the branch society.[11]

[§ 113] **(3) Conveyance and Donations to Minister or Bishop of Church.**[12] A deed to a minister of a parish and his successors,[13] or to a bishop and to his successors and assigns forever,[14] or to a bishop, his heirs and assigns forever in trust for the church,[15] vests a fee-simple title in such bishop, in trust for

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son v. Wiley, 10 Pick. (Mass.) 317; Brown v. Porter, 10 Mass. 93; Brunswick First Parish v. Dunning, 7 Mass. 445; Weston v. Hunt, 2 Mass. 500). (14) But he held the lands in the right of the parish or church, and on his resignation or death the fee was in abeyance until there was a successor, the parish or church, during the vacancy, having the custody, and being entitled to the profits of the parsonage. Boothbay First Parish v. Wylie, 43 Me. 387; Cheever v. Pearson, 16 Pick. (Mass.) 266; Brunswick First Parish v. Dunning, 7 Mass. 445; Brown v. Porter, 10 Mass. 93; Weston v. Hunt, 2 Mass. 500; Terrett v. Taylor, 9 Cranch (U. S.) 43, 3 L. ed. 650). (15) This tenure might be changed by alienation, which might be made effectual by the minister, with the assent of his town or parish. Bucksport v. Spofford, 12 Me. 487.

[86] Pawlet v. Clark, 9 Cranch (U. S.) 292, 3 L. ed. 735; Terrett v. Taylor, 9 Cranch (U. S.) 43, 3 L. ed. 650; New Market v. Smart, 45 N. H. 87.

[87] New Market v. Smart, supra.

[88] Apostolic Holiness Union v. Knudson, 21 Ida. 589, 123 P 473.

[89] See statutory provisions.

[90] See infra § 113.

[91] See infra § 113.

[92] See supra § 98.

[93] See supra § 99.

[94] Conn.—Judd v. Woodruff, 2 Root 298.

Del.—Wilmington Baptist Church v. Laird, 10 Del. Ch. 118, 85 A 1082.

Mo.—Lewis v. Brubaker, 322 Mo. 52, 14 SW (2d) 982.

S. C.—Meyer v. Christ Church, 154 S. C. 415, 151 SE 741.

W. Va.—Deepwater R. Co. v. Honaker, 66 W. Va. 136, 66 SE 104, 27 LRANS 388.

[95] Judd v. Woodruff, 2 Root (Conn.) 298; Crawford v. Nies, 224 Mass. 474, 113 NE 408; Lewis v. Brubaker, 322 Mo. 52, 14 SW (2d) 982.

[96] Cairns v. Hay, 21 N. J. L. 174.

[97] Hines v. Jones, 1 Ky. Op. 219.

[98] See infra § 116.

[99] Visitors M. E. Church v. Town, 47 N. J. Eq. 400, 20 A 488.

[1] Isaac v. Emory, 64 Md. 333, 1 A 713.

[2] See supra § 22.

[3] Brunnenmeyer v. Buhre, 32 Ill. 183; Page v. Ashbury M. E. Church, 78 N. J. Eq. 114, 78 A 246; Fair v. Bloomingdale First M. E. Church, 57 N. J. Eq. 496, 42 A 166 [aff 60 N. J. Eq. 485, 46 A 1099].

[4] Brunnenmeyer v. Buhre, 32 Ill. 183; Ferraria v. Vasconcellos, 31 Ill. 25; Shannon v. Frost, 3 B. Mon. (Ky.) 253.

[5] See supra § 22.

[6] Peo. v. Fulton, 11 N. Y. 94; Cooper v. Sandy Hill First Presb. Church, 32 Barb. (N. Y.) 222.

[7] Peo. v. Fulton, 11 N. Y. 94.

[a] **Consistory of Dutch reformed church.**—A bequest to the consistory of the Dutch reformed church is in effect a bequest to the church corporation itself. Prattsville Reformed Dutch Church v. Brandow, 52 Barb. (N. Y.) 228.

[8] Keith, etc., Coal Co. v. Bingham, 97 Mo. 196, 10 SW 32.

[9] See infra §§ 112, 113.

[10] Calkins v. Cheney, 92 Ill. 463; Harper v. Straws, 14 B. Mon. (Ky.) 48.

[11] Board of Parent Ministry v. Bohon, 192 Ky. 285, 233 SW 721.

[12] **Ministerial lands in New England** see infra § 131.

[13] Christ Church v. Savannah, 82 Ga. 656, 9 SE 537; Weston v. Hunt, 2 Mass. 500.

[14] Ala.—Antones v. Eslava, 9 Port. 527.

Conn.—Georgetown Methodist Soc. v. Bennett, 39 Conn. 293.

Fla.—Reid v. Barry, 93 Fla. 849, 112 S 846.

Tex.—Olcott v. Gabert, 86 Tex. 121, 23 SW 985 [aff (Civ. A.) 22 SW 286].

W. Va.—Hyman v. Swint, 94 W. Va. 627, 119 SE 866.

[15] Fitzpatrick v. Fitzgerald, 13 Gray (Mass.) 400.

For **later cases, developments** and **changes** in the law see **Annotations,** same title and section number.

the church, in the absence of any condition subsequent, either expressed or implied;[16] but the trust attaches to the office of bishop, and not to the person, and therefore passes to his successor.[17] In states which have adopted the legislative policy that church property shall not be otherwise taken and held, or enure, than subject to the control and disposition of the lay members of such church,[18] a Roman Catholic bishop is a mere dry trustee of property owned by a particular congregation with no power to control it or to direct its management in any way,[19] and a resolution of the congregation that the bishop shall hold all the property of the congregation in accordance with the laws, rules and usages of the Roman catholic church where it is shown that such rules invest the bishop with the absolute control of the church property is against public policy and of no effect whatever.[20] In these states donations of money for the care of property of a Roman catholic church belong to the congregation,[21] while donations to the bishop insofar as they are for strictly ecclesiastical purposes having nothing to do with the care of church property are valid and belong to the bishop.[22] But as between an association collecting a fund for building a church for a Roman catholic congregation and the bishop, it has been held that donations belong to the bishop in trust for the congregation.[23]

[§ 114] **7. Conditions.**[24] A gift or grant to a religious society may be conditional if the condition is not inconsistent with the gift or grant and its avowed object.[25] The condition may be a condition precedent,[26] in which case title does not vest in the donee or grantee until performance of the condition;[27] or it may be a condition subsequent,[28] in which case title vests at once in the society subject to be divested if the condition is not performed;[29] or it may be a continuing condition,[30] in which case, if the terms of the gift require it, the fund will be retained in trust and the income paid over to the society as long as the condition is complied with.[31] When it is doubtful whether the words of the deed were intended as a condition precedent or subsequent, the courts prefer to construe the conditions as subsequent, so as to give a present estate liable to be divested rather than to defer the vesting.[32] If the act or condition required do not necessarily precede the vesting of the estate, but may accompany or follow it, and if the act may as well be done after as before the vesting of the estate,[33] or if, from the nature of the act to be performed and the time required for its performance, it is evidently the intention of the parties that the estate shall vest and the grantee perform the act after taking possession, then the condition is subsequent.[34] Where land is conveyed by deed containing a condition subsequent requiring its use for church purposes for a limited period of time, a performance of the condition changes the grantee's title from a defeasible to an indefeasible title in fee simple,[35] giving the grantee power to reconvey free of obligation to continue its use for church purposes.[36]

[§ 115] **8. Trusts**[37]**—a. In General.** As in the case of trusts generally,[38] trusts in favor of a religious society are created either by acts of the parties or by operation of law.[39] If created by act of the parties, the grantor must go further than merely state the purpose of the alleged trust; he must establish it by appropriate words,[40] a conveyance for the general use of a religious society[41] or to the trustees of a church congregation not being, per se, a conveyance upon a special trust.[42] Nor can a trust for a church be established by parol evidence as to the use to which the property was put.[43] Where a trust for a religious society is once established, its terms cannot be altered except by the consent of all persons concerned in the original creation of the trust,[44] a subsequent incorporation of the trustees having no effect whatever upon terms on which the property is held.[45] The grantor may reserve the right to make changes affecting the administration of the trust,[46] but a power reserved in those terms does not give the grantor a power to revoke the trust.[47] If land is the subject-matter of a trust by act of the parties, a writing creating it is necessary,[48] but not necessary where created by operation of law.[49] The provision of the statute of frauds requiring declarations of trust to be in writing,[50] has been held not to apply to property held in trust by an incorporated for an unincorporated religious society where the statute regulating such trusts does not require written evidence of the fact that they are so held,[51] a trust being created by force of the statute in such cases.[52] Either by statute or writing, a trust must be created and a trustee duly authorized to hold the legal title in order to give effect to a gift or grant of land to an unincorporated religious society,[53] the nature and extent of the trust depending on the terms of the statute or instrument creating it.[54] Grantees of property for the use of an unincorporated religious society, in the absence of statutory regulation, are trustees only in the sense and to the extent that the trust deed makes them such. They have an estate in the premises of such a duration as is necessary to effect the purposes of the trust,[55] holding the legal title in trust for the true successors and representatives of the society or church as it existed at the time the original deed was made to them.[56] A gift of lands made to trustees to the use of a certain religious society, and such as may succeed them, forever, holding the same principles, is not merely to the society then existing; but if that ceases to exist, or to be of the same faith, the gift is then to any other society holding the same faith, which may succeed them,[57] subject to such other restrictions as the trust deed may place upon beneficiaries.[58] Under a statute so providing,[59] a grant of property to an incorporated religious society for the use of an unincorporated religious society transfers title to such property to the corporation defeasible only upon incorporation by the beneficiary with the consent of the trustee corporation.[60] Following the law relating to trusts generally,[61] a court of equity will enforce the terms of a trust for an unincorporated church on petition of an individual church-member bringing the action on behalf of himself and other members,[62] or of one of various congregations constituting the church petitioning on behalf of itself and the other congregation members.[63] But no action can be maintained against a bishop as trustee of church property,[64] or against a church corporation holding title to property upon an alleged trust for a separate religious society in the absence of evidence establishing the existence of the alleged trust.[65]

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[16] See cases supra notes 14, 15.

[17] Beckwith v. St. Philip's Parish, 69 Ga. 564; Moore v. Gross, 54 Iowa 248, 6 NW 290; Scott v. Thompson, 21 Iowa 599.

[18] See statutory provisions.

[19] Carrick Borough v. Canevin, 243 Pa. 283, 90 A 147; Carrick Borough v. Canevin, 55 Pa. Super. 233.

[20] Mazaika v. Krauczunas, 233 Pa. 138, 81 A 938.

[21] Ryan v. Dunzilla, 239 Pa. 486, 86 A 1089.

[22] Ryan v. Dunzilla, supra.

[23] Akscyn v. Nashua Second Nat. Bank, 78 N. H. 196, 98 A 519.

[24] **Conditions in deeds generally** see Deeds §§ 367-447.

Forfeiture for breach see infra § 121.

[25] See case infra this note.

[a] **Use of church building.**—A condition in a conveyance of property to trustees of a certain denomination for "church purposes" that the church building is to be open "to all evangelical orders of Christians" when not in use by said denomination is not repugnant to the grant. Tomlin v. Blunt, 31 Ill. A. 234.

[26] See case infra note 27.

[27] See case infra this note.

[a] **Reservation in town charter.**—Where the state in its charter to a town reserves a lot to be appropriated for use of a minister as soon as settled and to be at the disposal of the inhabitants of the town, but no minister is ever settled, the title to the lot remains in the state. Victory v. Wells, 39 Vt. 488.

[28] See cases infra note 29.

[29] Tappan's App., 52 Conn. 412; McGee Presbytery, etc. v. Unknown Heirs, (Mo.) 232 SW 460; Van Horne's Pet., 18 R. I. 389, 28 A 341.

[30] See case infra note 31.

[31] In re Robinson, [1892] 1 Ch. 95.

[32] Rooks Creek Evangelical Lutheran Church v. Pontiac First Lutheran Church, 290 Ill. 133, 124 NE 793, 7 ALR 1422.

[33] Rooks Creek Evangelical Lutheran Church v. Pontiac First Lutheran Church, supra.

[34] Rooks Creek Evangelical Lutheran Church v. Pontiac First Lutheran Church, supra.

[35] Hines v. Perkins, 230 Ky. 339, 19 SW (2d) 991.

[36] Hines v. Perkins, supra.

[37] **Effect of dissolution of society** see infra §§ 205-208.

[38] See Trusts [39 Cyc 24].

[39] See cases infra this section.

[40] See cases infra this note.

[a] **To trustees of Christian Science perpetually and irrevocably.**—Where a deed conveying property in trust to promote the interests of Christian Science declared that the conveyance was on the perpetual and irrevocable trust and confidence, therein set out, the trust, upon delivery by the donor of the deed and property and the acceptance thereof by the grantees and performance by them of the trust, was an executed trust, not subject to revocation or modification, in the absence of a reservation of an express power to that end. Eustace v. Dickey, 240 Mass. 55, 132 NE 852.

[b] **To church trustees for a parsonage.**—(1) A deed reciting that land was conveyed for the purpose of a parsonage, church, etc., merely expressed motive of grantor or intention of grantee, and not to create trust for such purpose. Stansbery v. First M. E. Church, 79 Or. 155, 154 P 887. (2) A recital in the deed to trustees of church property that it was purchased for a parsonage does not create a trust, forbidding the use of part of the lot for a church building. Sanders v. Meredith, 78 W. Va. 564, 89 SE 733.

[c] **To church trustees for a cemetery.**—Where the owners of land deeded it to trustees of a church for a public cemetery, to have and to hold to themselves, successors, heirs, and assigns forever, the deed vested in the church fee-simple title to the land, and the parenthetical expression in the grant that it was for a cemetery was merely limitation of the use to which the land was to be put, and not a limitation of the title, so that it could not be said that under no circumstance did the trustees or church have power to sell. Barker v. Hazel-Fain Oil Co., (Tex. Civ. A.) 219 SW 874.

[d] **To B, M, and P as trustees for F church.**—A grant without consideration "unto B., M., and P. as trustees for the F. Church," a voluntary unincorporated society, where the instrument contains no specific language indicating a trust, vests legal title in the trustees as the only depositary of title, and is a gift to the church, and not a trust. Brittenbaker v. Buck, 58 Cal. A. 738, 209 P 264.

[e] **To presbyterian incorporated society.**—The simple declaration, implied from the inclusion in the name

[§ 116] **b. Construction.**[66] The intention of the donors is the criterion by which to determine the purposes to which the property of a church has been ded-

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of a religious society of the word "Presbyterian" and from the adoption of by-laws by the corporation, that the polity of a particular denomination as to the selection of ministers will be followed, cannot be regarded as an abandonment of the society's constitutional power to choose its own pastor or convert free gifts into gifts upon an implied trust that such polity shall be observed. McNeilly v. Brookline First Presb. Church, 243 Mass. 331, 137 NE 691.

[f] **To bishop and successors and assigns** not showing intention to create trust and not naming or designating beneficiary, does not create express trust. Reid v. Barry, 93 Fla. 849, 112 S 846.

41. Pleasant Grove Cong. v. Riley, 248 Ill. 604, 94 NE 30; Munson v. Bringe, 146 Wis. 393, 131 NW 904, AnnCas1912C 325.

[a] **Joint purchase by trustees of two churches.**—One church or congregation or church corporation is not, by a mere joint purchase of real estate with others, made trustee for such others where there is no trust expressed in the conveyance or forming part of any agreement between the purchasers, and the deed is in the ordinary form, running to tenants in common and conveying to each an undivided interest in the land. Munson v. Bringe, 146 Wis. 393, 131 NW 904, AnnCas1912C 325.

42. Wilmington First Presb. Church v. Bailey, 11 Del. Ch. 116, 97 A 583; Glader v. Schwinge, 336 Ill. 551, 168 NE 658.

43. Reid v. Barry, 93 Fla. 849, 112 S 846.

44. Knox v. Holy Trinity Church, 21 Pa. Dist. 63.

45. Crawford v. Nies, 224 Mass. 474, 113 NE 408.

46. Eustace v. Dickey, 240 Mass. 55, 132 NE 852.

47. Eustace v. Dickey, supra.

48. Hennessey v. Walsh, 55 N. H. 515.

49. Fink v. Umscheid, 40 Kan. 271, 19 P 623, 2 LRA 146.

50. See Trusts [39 Cyc 44].

51. Church of Redemption v. Grace Church, 6 Hun 166 [mod 68 N. Y. 570]; Voorhees v. Amsterdam Presb. Church, 8 Barb. (N. Y.) 135.

52. Church of Redemption v. Grace Church, 6 Hun (N. Y.) 166 [mod 68 N. Y. 570].

53. Tucker v. Diocese of West Missouri, (Mo.) 264 SW 897.

54. See statutory provisions.

Construction and operation of instruments creating trusts for religious societies see infra § 116.

Trusts generally see Trusts [39 Cyc 208].

55. Conn.—Burrows v. Holt, 20 Conn. 459.

Me.—Craig v. Franklin County, 58 Me. 479.

Mass.—Warner v. Bowdoin Square Baptist Soc., 148 Mass. 400, 19 NE 403; Maverick Cong. Soc. v. Lovejoy, 6 Allen 183; Atty.-Gen. v. Federal St. Meeting-House, 3 Gray 1.

Minn.—Little v. Willford, 31 Minn. 173, 17 NW 282.

Mo.—Hayes v. Manning, 263 Mo. 1, 172 SW 897.

N. H.—Atty.-Gen. v. Dublin, 38 N. H. 459.

56. Britton v. Jackson, 31 Ariz. 97, 250 P 763.

57. Potter v. Thornton, 7 R. I. 252.

58. See case infra this note.

[a] **Colored members** of the methodist episcopal church south being the class of beneficiaries named, a trust in favor of those maintaining the faith cannot be enforced against seceders, where in the group maintaining the faith there are no colored members. Newman v. Proctor, 10 Bush (Ky.) 318.

59. See statutory provisions.

60. Church of Redemption v. Grace Church, 6 Hun (N. Y.) 166.

Effect of subsequent incorporation in general see infra § 117.

61. See Trusts [39 Cyc 510].

62. Newburgh Associate Reformed Church v. Princeton Theological Seminary, 4 N. J. Eq. 77; Liggett v. Ladd, 17 Or. 89, 21 P 133; Beaver v. Filson, 8 Pa. 327.

63. Newburgh Associate Reformed Church v. Princeton Theological Seminary, 4 N. J. Eq. 77; Carskadon v. Torreyson, 17 W. Va. 43.

64. Baxter v. McDonnell, 155 N. Y. 83, 49 NE 667, 40 LRA 670.

65. Rock River Conference v. Trinity M. E. Church, 192 Ill. A. 204.

66. **Construction:**
And operation of deeds, donations and grants to religious societies generally see supra §§ 111-113.
Of instrument creating charity see Charities § 17.

icated,[67] and in ascertaining the intention the language of the conveyance, if clear and unequivocal, is conclusive;[68] but if the language is indefinite, extrinsic evidence is admissible in ascertaining the intention,[69] such as the faith of the donor,[70] or that professed and taught by the donees,[71] or the circumstances under which the gift was made.[72]

[§ 117] **c. Effect of Subsequent Incorporation—(1) In General.** The English statute of uses merging the legal and equitable titles in the beneficiary and destroying the trust[73] does not apply to trusts for religious purposes;[74] and by the subsequent incorporation of the beneficiary the legal title is not divested from the trustees and vested in the corporation,[75] except in particular instances where a special act incorporating the society is construed to have that effect.[76] In some states the statutes of uses has been repealed and in lieu thereof general statutes have been enacted providing in substance that where property has been conveyed for the use of an unincorporated religious society, and such society is afterward incorporated, the legal title to such property shall become vested in the corporation,[77] the effect of such a statute being to vest in the corporation itself the title to all property conveyed to trustees for its use without the formality of a conveyance,[78] and its possession of a church building on the property will be presumed although control is not assumed by any formal act or resolution.[79] So also where land is granted to a town for the use of the minister, and his successors, and a church is afterwards incorporated, the church becomes the successor of the town in its parochial capacity, and title vests in the incorporated church by operation of law,[80] and where land is granted to trustees for an unincorporated church, the church when incorporated succeeds to the legal title.[81] Vesting of the title in the society after incorporation may be controlled by the terms of the trust itself, and where the trust deed requires a conveyance by the trustees to the incorporated society upon a contingency named, the title vests by force of the conveyance when made.[82] Where lands are granted for use of the ministry to a person or corporation not in esse, the right to the possession and custody of the lands remains in the grantor,[83] or in the minister until the grantee shall come into existence,[84] and the grantor cannot resume the grant nor alienate the lands without such consent as is necessary for the alienation of other church property.[85] A statute assigning lots of land belonging to the state to particular churches and authorizing the governor to execute deeds to each church as soon as it had built a church on its lot[86] does not postpone conveyance until the church is incorporated; when the church has been built, a deed may be made to trustees for the church until the church is incorporated.[87] So a contract of sale of land to a society, made with the trustees of the society before incorporation, may be enforced in equity after incorporation on the petition of the incorporated society.[88] Under the terms of an incorporating statute expressly giving them that authority,[89] it has been held that trustees of an incorporated religious society have the right to collect subscriptions made for the society at its formation but before its incorporation.[90]

[§ 118] **(2) Conveyance by Trustees.** Whether or not a conveyance by the trustees to the incorporated society is necessary to a vesting of title in the society is determined by the provisions of the statute, where one exists, and by the terms of the deed creating the trust. In some states title vests in the society when it becomes incorporated by force of the statute,[91] although under the facts as established in some of the cases the decision rests upon the theory of a presumed grant.[92] In these states, a bill in equity to compel the conveyance to the society is unnecessary to perfect the title,[93] although the court may properly make a decree compelling a conveyance for purposes of record.[94] The trust deed may itself provide for termination of the trust and conveyance of legal title to the society upon contingencies named, as, for example, when the society becomes incorporated,[95] or at any time when requested by the society to do so, which assumes a request made after the society or its officers are a body corporate with power to take and hold the title,[96] in which cases title vests in the incorporated society or officers by conveyance.[97] Where under the terms of the trust the vesting of title is by conveyance,[98] the trustee is required to convey notwithstanding a claim by him against the society.[99] Nor can he justify his refusal to convey by the fact that the conveyance had been made to trustees, of which he was one, without his knowledge,[1] or by proof that the contingency named in an agreement between other parties for the making of the conveyance had not yet happened.[2] However, on a bill to compel conveyance, debts incurred by the trustees in good faith and in the exercise of reasonable prudence should be allowed them.[3]

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[67] Atty.-Gen. v. Reformed Protestant Dutch Church, 33 Barb. 303 [aff 36 N. Y. 452]; Peo. v. Steele, 2 Barb. (N. Y.) 397; Miller v. Gable, 2 Den. (N. Y.) 492; Knox v. Holy Trinity Church, 21 Pa. Dist. 63; Lyster v. Ramage, 26 U. C. Q. B. (Ont.) 233; Lyster v. Kirkpatrick, 26 U. C. Q. B. (Ont.) 217.

[68] Atty.-Gen. v. Reformed Protestant Dutch Church, 36 N. Y. 452 [aff 33 Barb. 303]; Peo. v. Steele, 2 Barb. (N. Y.) 397; Miller v. Gable, 2 Den. (N. Y.) 492.

[a] **To particular church for support of minister.**—A devise of land to a particular incorporated church of a denomination named for the support of its minister, that church being the only one in the city at that time, is not a devise for the support of the ministers of all churches of that denomination in the city named when there are other churches organized. Atty.-Gen. v. Reformed Protestant Dutch Church, 36 N. Y. 452 [aff 33 Barb. 303].

[b] **In conformity to rules and discipline as from time to time adopted.**—A trust deed providing for a place of worship for a local society of the Methodist Episcopal Church, requiring trustees to conform to the rules and discipline of the church as "from time to time * * * agreed upon and adopted by the ministers and preachers * * * at their general conference, * * *" meant discipline existent when the question should arise, not at the date of the deed. Atty.-Gen. v. Armstrong, 231 Mass. 196, 120 NE 678.

[69] See cases infra notes 70-72.

[70] Robertson v. Bullions, 11 N. Y. 243; Kniskern v. Lutheran Churches, 1 Sandf. Ch. (N. Y.) 439.

[71] Miller v. Gable, 2 Den. (N. Y.) 492.

[72] Ayres v. Weed, 16 Conn. 291; Ebbinghaus v. Killian, 12 D. C. 247; Iowa City First Constitutional Presb. Church v. Iowa City Cong. Soc., 23 Iowa 567; Robertson v. Bullions, 11 N. Y. 243; Kniskern v. Lutheran Churches, 1 Sandf. Ch. (N. Y.) 439.

[a] **The corporate or denominational name** (1) in connection with the contemporaneous acts of the corporators may be resorted to, in order to limit and define the trust in respect to doctrines usually considered fundamental, such as those in dispute between trinitarians and unitarians (Hale v. Everett, 53 N. H. 9, 16 AmR 82; Peo. v. Steele, 2 Barb. (N. Y.) 397; Miller v. Gable, 2 Den. (N. Y.) 492), (2) but not as to lesser shades of doctrine (Atty.-Gen. v. Dublin, 38 N. H. 459; Miller v. Gable, supra).

[73] St. 27 Henry VIII.

[74] See Charities § 16.

[75] Beckwith v. St. Philip's Parish, 69 Ga. 564.

[76] Craig v. Franklin County, 58 Me. 479.

[77] See statutory provisions.

[78] Delaware Land, etc., Co. v. Wilmington First, etc., Presbyterian Church, (Del.) 147 A 165; Sand Creek Christian Church v. Church of Christ, 219 Ill. 503, 76 NE 703; Dubs v. Egli, 167 Ill. 514, 47 NE 766; Dearborn First Evangelical Lutheran Church v. Rechlin, 49 Mich. 515, 14 NW 502; Robertson v. Bullions, 11 N. Y. 243 [aff 9 Barb. 64]; Van Deuzen v. Ft. Edward Presb. Church, 4 Abb. Dec. (N. Y.) 465, 3 Keyes 550, 3 Transcr. A. 39; Voorhees v. Amsterdam Presb. Church, 8 Barb. (N. Y.) 135, 5 HowPr 58; Van De Bogert v. Reformed Dutch Church, 128 Misc. 603, 220 NYS 50 [aff 219 App. Div. 220, 220 NYS 58]; Summit Reformed Dutch Church v. Harder, 12 NYS 297; Schenectady Dutch Church v. Veeder, 4 Wend. (N. Y.) 494; Garden St. Reformed Protestant Dutch Church v. Mott, 7 Paige (N. Y.) 77, 32 AmD 613; Hartford First Baptist Church v. Witherell, 3 Paige (N. Y.) 296, 24 AmD 223; South Baptist Church v. Yates, Hoffm. (N. Y.) 142; Cammeyer v. United German Lutheran Churches, 2 Sandf. Ch. (N. Y.) 186.

[79] Sanchez v. Grace M. E. Church, 114 Cal. 295, 46 P 2.

[80] New Market v. Smart, 45 N. H. 87.

[81] Walker v. McPherson, 199 Ala. 486, 74 S 449.

[82] See infra § 117.

[83] Flye v. New Castle First Cong. Parish, 114 Me. 153, 95 A 783; Shapleigh v. Pilsbury, 1 Me. 271.

[84] Pawlet v. Clark, 9 Cranch (U. S.) 292, 3 L. ed. 735.

[85] Pawlet v. Clark, 9 Cranch (U. S.) 292, 3 L. ed. 735; Shapleigh v. Pilsbury, 1 Me. 271.

[86] See statutory provisions.

[87] State v. Lincoln First Catholic Church, 88 Nebr. 2, 128 NW 657.

[88] Gewin v. Mt. Pilgrim Baptist Church, 166 Ala. 345, 51 S 947, 139 AmSR 41.

[89] See statutory provisions.

[90] Westfield Reformed Protestant Dutch Church v. Brown, 4 Abb. Dec. (N. Y.) 31, 24 HowPr 76 [aff 29 Barb. 335, 17 HowPr 287].

[§ 119] **d. Appointment and Removal of Trustees—(1) In General.** If the consideration for conveyance of land to trustees for a church was paid by the church, a court of equity will, upon proper application, fill vacancies in the board of trustees by appointing such persons as the church may select;[4] but if paid by the trustees, the legal title is in them, and no appointment is necessary.[5] If the conveyance provides that vacancies shall be filled in a certain manner, such provision is the law of the trust, and must be complied with.[6] In some states the appointment, change, and removal of church trustees is provided for by statute,[7] and the court, in the exercise of its equity powers, will appoint trustees when it is necessary to do so to prevent the failure of the trust,[8] or where the decision of the court has created a vacancy in the board of trustees.[9] But the court will not commit the execution of the trust to persons claiming to be trustees, but whose election is shown to have been secured by improper and illegal means.[10] Trustees named by the grantor in his deed of land for the use of an unincorporated religious society are not removable at the will of the society without cause shown, in the absence of some provision in the trust deed giving it that power.[11] And it must appear that the property held by the trustees will be impaired or the interests and rights of the society will be imperiled if the trustees are not removed to justify their removal by the court.[12] A court order appointing a receiver for a religious corporation and directing that certain parties to the action convey to the receiver their title to the trust property is not an adjudication as to title. In such proceeding the question in whom legal title should ultimately vest is within the discretionary supervision of the court, its determination to rest upon considerations affecting the welfare of the trust.[13]

[§ 120] **(2) Under Statute.** A statute providing that trustees of land held in trust for a religious society may be appointed, changed and removed by the court on the "application of the proper authorities of the congregation,"[14] restricts the jurisdiction of the court to the appointment, change and removal of the trustees. A decree of the court confining itself to the acts authorized on application made in the way prescribed by statute is valid,[15] but to the extent that the decree directs the administration of the trust property by the trustees appointed, it is void;[16] nor does the fact that the court had a general jurisdiction over the administration of trust property validate a decree made under the statute.[17] Where the trusts specified in the trust deed are inoperative, persons appointed trustees by the court under authority of the statute to fill supposed vacancies obtain no right or title to the property conveyed by force of the statute.[18] A statute providing for appointment of new trustees by the society upon death or removal of the former trustees and the submission to court and the recording of the names of the new trustees,[19] has no application to an attempted appointment of new trustees by a minority of the congregation in opposition to the will of the majority.[20] Nor has a statute providing that where property dedicated for pious uses has no proper or legal custodian, the court may appoint trustees,[21] any application to land granted to grantees named and their heirs and assigns forever for pious uses and where there are heirs in existence in whom the legal title has vested.[22] Where trustees have been removed and new trustees appointed by the court acting under the statute, the newly appointed trustees may recover the trust property from the removed trustees in an action of ejectment,[23] and the defendants in that action cannot question the validity of the new appointment.[24] The removal of trustees and appointment of others in their place under the statute does not have the effect of divesting the church of its property,[25] even where disloyalty to the government in time of war is the ground for their removal.[26]

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[91] See supra § 117.

[92] See case infra this note.

[a] **Presumption as to conveyance.**—After lapse of time, trustees holding lands for a religious society which was subsequently incorporated for the purpose of holding the lands in question, which lands, by the charter, were also confirmed in the church, will be presumed to have conveyed to the incorporated church those lands, it having always enjoyed and possessed them. Garden St. Reformed Protestant Dutch Church v. Mott, 7 Paige (N. Y.) 77, 32 AmD 613.

[93] Dearborn First Evangelical Lutheran Church v. Rechlin, 49 Mich. 515, 14 NW 502.

[94] South Baptist Church v. Yates, Hoffm. (N. Y.) 142.

[95] Miller v. Chittenden, 2 Iowa 315; Centenary M. E. Church v. Parker, 43 N. J. Eq. 307, 12 A 142.

[96] Earle v. Wood, 8 Cush. (Mass.) 430.

[97] See cases supra notes 95, 96.

[98] See cases supra notes 95, 96.

[99] Trinity Cong. Church v. Thompson, 226 Pa. 582, 75 A 855; Beatty v. Henry, 10 Phila. (Pa.) 35; Fourth Universalist Parish v. Wensley, 5 WklyNC (Pa.) 273.

[1] Newmyer's App., 72 Pa. 121.

[2] Newmyer's App., supra.

[3] Bradbury v. Birchmore, 117 Mass. 569.

[4] Draper v. Minor, 36 Mo. 290.

[5] Draper v. Minor, supra.

[6] Savage v. Fortner, 2 Chest. Co. (Pa.) 271.

[7] See infra § 120.

[8] Glader v. Schwinge, 336 Ill. 551, 168 NE 658, 66 ALR 172.

[9] Nash v. Sutton, 117 N. C. 231, 23 SE 178; Jones v. Wadsworth, 11 Phila. (Pa.) 239.

[10] Smith v. Nelson, 18 Vt. 511.

[11] Bouldin v. Alexander, 15 Wall. (U. S.) 131, 21 L. ed. 69; Peabody v. Lynn Eastern Methodist Soc., 5 Allen (Mass.) 540.

[12] Determann v. Luehrsmann, 74 Iowa 275, 37 NW 330.

[13] Kedrovsky v. Russian Orthodox Greek Catholic Church, 249 N. Y. 75, 162 NE 588.

[14] See statutory provisions.

[15] Wade v. Hancock, 76 Va. 620.

[16] Wade v. Hancock, supra.

[17] Wade v. Hancock, supra.

[18] Carskadon v. Torreyson, 17 W. Va. 43.

[19] See statutory provisions.

[20] Shannon v. Frost, 3 B. Mon. (Ky.) 253.

[21] See statutory provisions.

[§ 121] 9. **Forfeiture upon Breach of Condition or Trust.**[27] Whether property once given or granted to a religious society reverts to the grantor or his heirs upon failure of the society to use it for the purposes for which it was given depends upon the intention of the parties as disclosed by the terms of the deed or grant.[28] Generally, breach of a condition subsequent works a forfeiture of the estate, and the grantor has a right to enter or to bring his action to recover the estate.[29] But where the deed, in the light of the circumstances surrounding its execution, is construed as disclosing no intention of the parties that a forfeiture should result, the facts that it contains conditions and that they have been broken[30] or that the property was granted for particular pious uses and that it was not so used,[31] will not have that effect, even though the grantees covenanted that they would reconvey to the grantor if the use for which the land was granted was discontinued.[32] A voluntary and unconditional contribution to a church society for the purpose of acquiring and improving property for the use and benefit of the society does not create an express or resulting trust in favor of the donor upon disuse of the property by the society,[33] especially in view of a rule of the denomination to which the church belonged that upon dissolution of a local organization its property would pass to the denomination, the donor being presumed to have made his gift with that rule in mind.[34] A conditional gift may later be changed by the donor into a gift without condition,[35] in which case a breach of the condition cannot be made the basis of a claim that the gift be returned to the donor.[36] A fortiori, such claim cannot be made by trustees of the donee, even though alleging that their claim was made in behalf of the donor.[37] The right to enter for condition broken is a right which can be exercised only by the grantor or his heirs, and if he alienates the right the condition is gone.[38] Where land is deeded in trust for the use of a church so long as used for that purpose, and no longer, it revests in the grantor upon a breach of the trust by operation of the terms of the trust,[39] and abandonment of the church,[40] or of the land for church purposes[41] is a breach of trust within the meaning of this rule. So also a lease to an individual for the benefit of a church society during the time such society might use and occupy the premises as a church and pay the rent creates an estate in fee determinable on the society ceasing to occupy the premises as a church,[42] and the grant of a privilege to build a church on the grantor's land and to have and hold the church so long as the grantees continue to use it as a church conveys an easement in the land terminable on the contingency named.[43] In some states it is held that a grant of land to a church society for the use and purpose of a church is a grant for that special purpose, and when that fails the land reverts to the donor or his heirs,[44] while elsewhere it has been held that a conveyance to trustees of land to be used for the sole purpose of building thereon a church with a provision for perpetuating the trust by authorizing the survivors to convey to new trustees,[45] or by directing that when it ceased to be used for church purposes by the particular church it should go to a denominational organization for denominational purposes,[46] is not a conveyance on condition which is breached by a sale of the land, but a conveyance in trust without any implied restriction against the sale. In the absence of a condition subsequent or a trust provision to that effect in a deed or grant to a religious society, it is held that a subsequent violation of the trust upon which the property is held will not revest either the legal or equitable title in the donors or grantors,[47] although a palpable breach of trust may form a proper ground for application to a court of equity, on the part of the parties interested, to compel a due execution of the trust.[48] A fortiori, where an alienation of land by church trustees with consent of the cestuis que trustent is shown to be in furtherance of the trust purpose,[49] or where land, granted for a particular purpose on condition that it be used for that purpose, is conveyed by trustees to another board of trustees for the express purpose of more effectually carrying out the grantor's design, there is no breach of trust upon which a forfeiture can be predicated.[50] Nor is a condition that if any seats in the church shall be rented or sold, the land shall revert to the grantor, breached by a sale of the church for payment of debts.[51] Nor can a transfer of title and possession be claimed on the ground of breach of trust by trustees in the absence of evidence of the alleged breach.[52]

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[22] Hamlin v. Property in Webster, 106 Me. 132, 76 A 163.

[23] Kreglo v. Fulk, 3 W. Va. 74.

[24] Kreglo v. Fulk, supra.

[25] Peo. v. Trinity Church, 22 N. Y. 44 [aff 30 Barb. 537].

[26] Peo. v. Trinity Church, supra.

[27] **Breach of condition by grantee in deed from religious society** see infra § 152.

Forfeiture for violation of constitutional limitation see supra § 102.

[28] See cases infra this section.

Construction of conditions in deeds generally see Deeds §§ 380-381.

[29] Stanley v. Glennville, 140 Ga. 306, 78 SE 1064; Scott v. Stipe, 12 Ind. 74.

[30] Neely v. Hoskins, 84 Me. 386, 24 A 882; Sohier v. Boston Trinity Church, 109 Mass. 1, 19; Mills v. Davison, 54 N. J. Eq. 659, 35 A 1072, 55 AmSR 594, 35 LRA 113.

"The words 'upon condition' are appropriate words for creating a condition, but they do not of necessity create such an estate. Stanley v. Colt, 5 Wall. (U. S.) 119, 18 L. ed. 502, and cases there cited. If it is such an estate, in this case, the forfeiture would be to the grantors or their heirs. But the grantors were merely a committee who had taken their title in trust for the society; and if it were to come back to their heirs by forfeiture, it must be held by them in trust for the society, and thus would merely be turned into a trust estate. Therefore nothing could be gained by a forfeiture, or by treating it as an estate on condition. Taking into consideration the title of the grantors, the purposes of the grant, and the fact that the expression is 'in trust nevertheless, and upon condition always,' the fair construction of the instrument is, that the parties intended the title to be in trust, and that the words 'upon condition' were not used in their technical sense." Sohier v. Trinity Church, supra.

[31] Wilmington First Presb. Church v. Bailey, 11 Del. Ch. 116, 97 A 583; Glader v. Schwinge, 336 Ill. 551, 168 NE 658, 66 ALR 172; Rydzewski v. St. Peter's Church, 145 Md. 531, 125 A 717.

[32] See case infra this note.

[a] **To priests for a school.**—A deed conveying land to a community of priests for maintenance of school vests title in the grantee without condition subsequent or conditional limitation, notwithstanding agreement for reconveyance, if at any time the Community should find it could not open and maintain the school; such provision being purely a covenant, not affecting the estate granted. Community of Priests of St. Basil v. Byrne, (Tex. Commn. A.) 255 SW 601 [rev (Civ. A.) 236 SW 1016].

[33] Heisler v. Methodist Protestant Church, 166 Iowa 333, 147 NW 750; Westminster Presb. Church v. New York Presbytery, 142 App. Div. 855, 127 NYS 836 [app dism 202 N. Y. 581 mem, 96 NE 1134 mem].

[34] Heisler v. Methodist Protestant Church, 166 Iowa 333, 147 NW 750; Westminster Presby. Church v. New York Presbytery, 142 App. Div. 855, 127 NYS 836 [app dism 202 N. Y. 581 mem, 96 NE 1134 mem].

[35] McGee Presbytery, etc. v. Unknown Heirs, (Mo.) 232 SW 460.

[36] McGee Presbytery, etc. v. Unknown Heirs, supra.

[37] McGee Presbytery, etc. v. Unknown Heirs, supra.

[38] Craig v. Franklin County, 58 Me. 479.

[39] Henderson v. Hunter, 59 Pa. 335.

[40] Summit Reformed Dutch Church v. Harder, 12 NYS 297; Howe v. Jericho School Dist. No. 3, 43 Vt. 282.

[41] See case infra this note.

[a] **For church on particular land.**—Where a deed conveyed to a religious society land in trust to erect a house thereon for public worship, and provided that, if the society should cease to support the exercise of religion in such house, or, in the event of its destruction, in another house to be erected on the same ground, then to hold in trust for inhabitants of towns of S and F for maintaining public worship "in said house, or on said ground in another house," erected on the same ground in event of the destruction of the first, and if there be no such inhabitants who may associate and occupy said house or ground in the manner stated, "then to revert back" to the original grantors, heirs and assigns, the public worship must be conducted on the particular land granted, and when the land ceases to be used for the purpose of the trust the land reverts. Bridgeport First Cong. Soc. v. Bridgeport, 99 Conn. 22, 121 A 77.

[42] Mendenhall v. First New Church Soc., 177 Ind. 336, 98 NE 57.

[43] Smith v. Collier, 210 Ala. 23 97 S 101.

[§ 122] **B. Control, Use, and Disposition[53]—1. Control and Use—a. Right To Control—(1) In Unincorporated Societies.** The determination of questions relating to the control and use of church property depends largely upon the form of church government which the members of the church have adopted and to which they adhere,[54] and upon constitutional and statutory provisions relative thereto.[55] In churches which have adopted the congregational form of government without revisory power in a superior church judicatory, the control of church property is in the hands of the majority of the members of the society or other body having charge of its temporalities,[56] and the independent control of the church property by its own members is not affected by its affiliation with other churches or church bodies having advisory powers.[57] In churches which have adopted the presbyterial form of church government, the control of the property of a particular church to the extent that temporalities only are concerned is in the hands of the trustees,[58] but in matters relating to the use and occupation of the church-house for purposes of worship, the trustees' control is itself subject to the control which the judicatories of the church, beginning with the session, exercise over the spiritual affairs of the congregation.[59] Especially is this so where some question of doctrine or faith is in issue.[60] In churches adhering to the episcopal polity, ordinarily the bishop controls both in temporal and spiritual affairs,[61] but in states where the statute requires that title to church property shall be in the congregation regardless of what the canons of the church direct, and that the property shall be subject to the control of the lay members of the congregation subject to any trust terms or conditions that may have been placed thereon,[62] it is held that trustees for the congregation control the use to be made of the church property, subject

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44. Newington Cong. Soc., etc. v. Newington, 53 N. H. 595; Gumbert's App., 110 Pa. 496, 1 A 437.

45. Wilmington Baptist Church v. Laird, 10 Del. Ch. 118, 85 A 1082.

46. Aiello v. Simeone, 14 Del. Ch. 265, 125 A 192.

47. Conn.—Bristol Baptist Church v. Connecticut Baptist Convention, 120 A 497.

Mo.—Goode v. McPherson, 51 Mo. 126.

N. Y.—Garden St. Reformed Protestant Dutch Church v. Mott, 7 Paige 77, 32 AmD 613.

Tex.—Gabert v. Olcott, (Civ. A.) 22 SW 286 [rev on other grounds 86 Tex. 121, 23 SW 985].

Wis.—Strong v. Doty, 32 Wis. 381.

[a] **A description of grantees** as being trustees of a church in connection with a particular presbytery or synod, or as having a specified person for a minister, does not amount to a condition that the church or society shall remain in connection with that particular church judicatory or a limitation of the estate conveyed to that effect. Robertson v. Bullions, 9 Barb. 64 [aff 11 N. Y. 243].

48. Strong v. Doty, 32 Wis. 381.

49. Nelson v. Monitor Cong. Church, 74 Or. 162, 145 P 37; Huegli v. Pauli, 26 Ont. L. 94, 3 OntWN 915, 21 OntWR 776.

50. Nelson v. Monitor Cong. Church, 74 Or. 162, 145 P 37.

[a] **For home for superannuated ministers.**—That Conference of Methodist Episcopal Church, after property had been deeded to it to be used as a home for superannuated ministers and their widows, organized a separate board of trustees for said home pursuant to Pub. Acts (1901) No. 89, as to organization of corporate board of trustees for any endowment fund, would not breach condition in deed that if property was not used for said purpose it should revert. Puffer v. Clark, 202 Mich. 169, 168 NW 471.

51. Woodworth v. Payne, 74 N. Y. 196, 30 AmR 298 [aff 5 Hun 551].

52. United Brethren in Christ Church v. Gardner, 204 Iowa 907, 215 NW 970.

[a] **Church built partly on land.**—Where land was deeded "for the purpose and the use of a Presbyterian meeting house and for no other purpose whatsoever," obliging the church trustees or their successors to reconvey to grantor when such use ceased, grantor's heirs could not recover the land, where a part of a meeting house used by such church was located thereon. Lyle v. Purdy, 183 Ky. 677, 210 SW 667.

53. As affected by division or schism of society see infra §§ 163–172.

54. See cases infra this section.

55. See cases infra notes 63–65.

56. U. S.—Watson v. Jones, 13 Wall. 679, 20 L. ed. 666.

D. C.—Drew v. Hogan, 26 App. 55.

Iowa.—Hubbard v. German Catholic Cong., 34 Iowa 31.

Ky.—Rose v. Briggs, 205 Ky. 619, 266 SW 236; Poynter v. Phelps, 111 SW 699, 33 KyL 887.

Nebr.—St. Paul English Lutheran Church v. Stein, 115 Nebr. 114, 211 NW 611; Kenesaw Free Baptist Church v. Lattimer, 103 Nebr. 755, 174 NW 296.

Oh.—Katz v. Goldman, 33 Oh. A. 150, 168 NE 763.

Pa.—Dunkle v. Dries, 1 Woodw. 114.

Tex.—Stogner v. Laird, (Civ. A.) 145 SW 644.

57. Rose v. Briggs, 205 Ky. 619, 266 SW 236.

58. Dayton v. Carter, 206 Pa. 491, 56 A 30.

59. Morgan v. Gabard, 176 Ala. 568, 58 S 902; Harris v. Cosby, 173 Ala. 81, 55 S 231; Dayton v. Carter, 206 Pa. 491, 56 A 30; Clark v. Brown, (Tex. Civ. A.) 108 SW 421 [rev 102 Tex. 323, 116 SW 360, 24 LRANS 670].

60. Clark v. Brown, (Tex. Civ. A.) 108 SW 421 [rev 102 Tex. 323, 116 SW 360, 24 LRANS 670].

61. See Novicky v. Krauczunas, 245 Pa. 86, 91 A 657.

62. See statutory provisions.

to episcopal decrees in spiritual matters so long as it is an integral part of the larger church organization,[63] but that during a period of suspension from such larger church organization while an episcopal interdict against it is in force the trustees are free from episcopal control,[64] being again brought into subjection when the interdict is removed.[65]

[§ 123] **(2) In Incorporated Societies.** The statutes for the incorporation of religious societies generally provide a form of corporate organization in conformity with the rules and discipline of the different denominations, so that the distinctive features of church polity of the congregational, presbyterial and episcopal groups are preserved therein.[66] Where a religious society is incorporated, a majority of the members of the corporation generally control,[67] but subject to the rules and discipline of the church.[68] Where the members of an incorporated society constitute the corporation,[69] a majority of such members control the property,[70] unless by the terms of the incorporating statute, control is placed specifically and exclusively in the trustees.[71] Where the trustees are themselves the corporation,[72] a majority of the trustees control,[73] but their power is subordinate to the customs and rules of the organization, the acts of a majority of the trustees having no binding effect upon a dissenting minority if not conformable thereto,[74] although it has been held under some state statutes that a religious society when incorporated has no denominational character, and that under such statutes a majority of the corporators, without regard to the religious tenets of the church, have the entire control over the property and revenue of the corporation.[75]

[§ 124] **b. Effect of Provisions in Deed or Will.** Where the legal title by the terms of a deed is held by trustees for the use of a religious society but not upon any particular trust the control of the property is determined by the rules and discipline of the church for whose use the property is held,[76] the control being with a majority of the church members,[77] or in the hands of a conference or associated body where the rules of the church so provide.[78] Where a deed conveying property to or for a church or a church organization creates special trusts and provides particularly for what purpose and in what manner the trust is to be administered, the terms of the trust deed constitute the organic law of the trust, and questions as to what persons or bodies have control of the property and as to the limitations on their power are to be determined by reference thereto.[79] So where land is granted to trustees in trust for such members of the congregation as shall adhere to a particular faith or church discipline, the control of the property is in the hands of the members adhering,[80] and trustees of unincorporated[81] and incorporated societies[82] are equally bound. But where real estate is conveyed to a society or congregation in its corporate capacity, and not in trust for the benefit of the religious denomination to which it belongs, it is not subject to the control of any ecclesiastical judicatory.[83] And where a will leaves property in trust for purposes named to a particular church but without regard to its connection with any particular church body, the control within the limits fixed by the will is in the hands of a majority of the members of the church named without regard to its denominational connections or to its adherence to a particular faith.[84]

[§ 125] **c. Use, Repairs, Removal, and Change of Location—(1) In General.** The society, or its trustees, has the right to regulate the use of the church edifice,[85] or of a building constructed for parish purposes generally on church property by an associated church guild with the permission of the vestry,[86] and, acting through duly authorized committees, may contract for such professional services as are properly a part of its devotional exercises.[87] It may even oust persons worshiping in the church building whenever, having power to do so, it decides to convert it to some other use than for the holding of divine services.[88] Its regulations must be in conformity with church rules and discipline,[89] and, in the case of property held under special trusts, with the requirements of the deed or will creating the trust.[90] Where its regulations are in conformity with the church rules and discipline, they will be enforced against one acting in defiance thereof.[91] It may make repairs, alterations, and improvements,[92] and whenever necessary or proper, take down the old edifice and rebuild on the same spot or elsewhere,[93] or it may change its location, and erect a new edifice elsewhere;[94] nor will equity interfere to restrain such removal where it is clearly established that a majority of the corporators are in favor of removal, even though there had been no legal expression of the will of the corporators at a corporate meeting regularly called,[95] unless some breach of trust is involved.[96] The power to remove is sometimes expressly conferred by statute,[97] although if the power is granted by special act and is contingent upon the destruction or serious injury "of the then existing church building," it is not a continuing power and is exhausted by its exercise.[98] Under a statute giving it authority to do so,[99] a religious society may build associate churches or chapels in the city where it is located whenever in its judgment it becomes necessary or expedient for the accommodation of its members to do so.[1] Where trustees act as agents of an incorporated society in regard to repairs, improvements and changes on the church property, they must carry out the reasonable and legal will and wishes of the corporation,[2] but the presumption is that they have done so in the absence of evidence to the contrary.[3] Where the question is one not of agency, but of title, as where the legal title to the church edifice is vested in another person or body than the congregation, the congregation have no right to tear it down for the purpose of repairing or rebuilding it, without the consent of such other person or body.[4]

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[63] Maceirinas v. Chesna, 299 Pa. 70, 149 A 94; In re St. Mary's Immaculate Conception Greek Catholic Church, 296 Pa. 307, 145 A 862; Novicky v. Krauczunas, 245 Pa. 86, 91 A 657.

[64] Novicky v. Krauczunas, 245 Pa. 86, 91 A 657.

[65] Novicky v. Krauczunas, supra.

[66] See statutory provisions.

[67] Grupe v. Rudisill, 101 N. J. Eq. 145, 136 A 911; Cooper v. Sandy Hill First Presb. Church, 32 Barb. (N. Y.) 222; In re Reformed Dutch Church, 16 Barb. (N. Y.) 237.

[68] Grupe v. Rudisill, 101 N. J. Eq. 145, 136 A 911.

[69] See supra § 22.

[70] Burrell v. Associate Reformed Church, 44 Barb. (N. Y.) 282; Madison Ave. Baptist Church v. Oliver St. Baptist Church, 1 AbbPrNS (N. Y.) 214; Langolf v. Seiberlitch, 2 Pars. Eq. Cas. (Pa.) 64.

[71] See case infra this note.

[a] **In Massachusetts,** under statute incorporating Roman catholic churches no persons but the trustees have any part or voice in the corporate doings. A vote duly passed by the trustees is a vote of the corporation. No other communicant or member of the congregation can take part in the corporate action. Enos v. St. John the Baptist Church, 187 Mass. 40, 72 NE 253 (holding that in view of the statutory provision it was not necessary to decide whether the trustees or the congregation constituted the corporation).

[72] See supra § 22.

[73] St. Andrew's Church v. Shaughnessy, 63 Nebr. 792, 89 NW 261.

[74] Ill.—Brunnenmeyer v. Buhre, 32 Ill. 183.

Ind.—Yanthis v. Kemp, (A.) 85 NE 976, 86 NE 451.

Mich.—Fuchs v. Meisel, 102 Mich. 357, 60 NW 773, 32 LRA 92.

N. J.—Page v. Ashbury M. E. Church, 78 N. J. Eq. 114, 78 A 246; Fair v. Bloomingdale First M. E. Church, 57 N. J. Eq. 496, 42 A 166.

N. Y.—Presbytery v. Westminster Presb. Church, 222 N. Y. 305, 118 NE 800.

Pa.—Langolf v. Seiberlitch, 2 Pars. Eq. Cas. 64.

Tex.—Clark v. Brown, (Civ. A.) 108 SW 421.

[75] See cases infra this note.

[a] **Early New York doctrine** (1) followed the rule of the text (Gram v. Prussia Emigrated Evangelical Lutheran German Soc., 36 N. Y. 161; Petty v. Tooker, 21 N. Y. 267; Robertson v. Bullions, 11 N. Y. 243 [aff 9 Barb. 64]), (2) but it was later changed by statute (see supra § 7).

[76] Sanders v. Meredith, 78 W. Va. 564, 89 SE 733.

[77] Hall v. Henry, 159 Ga. 80, 124 SE 883.

[78] Sanders v. Meredith, 78 W. Va. 564, 89 SE 733.

[79] Eustace v. Dickey, 240 Mass. 55, 132 NE 852.

[80] German Evangelical Lutheran Trinity Cong. v. Deutsche Evangelisch Lutherische, etc., 246 Ill. 328, 92 NE 868, 20 AnnCas 404; Fair v. Bloomingdale First M. E. Church, 57 N. J. Eq. 496, 42 A 166 [aff 60 N. J. Eq. 485, 46 A 1099].

[81] Fair v. Bloomingdale First M. E. Church, supra.

[82] German Evangelical Lutheran Trinity Cong. v. Deutsche Evangelisch Lutherische, etc., 246 Ill. 328, 92 NE 868, 20 AnnCas 404.

[83] Calkins v. Cheney, 92 Ill. 463; Harper v. Straws, 14 B. Mon. (Ky.) 48; Miller v. Gable, 2 Den. (N. Y.) 492.

[84] Smith v. Nelson, 18 Vt. 511.

[85] Cooper v. Sandy Hill First Presb. Church, 32 Barb. (N. Y.) 222; Katz v. Goldman, 33 Oh. A. 150, 168 NE 763.

[86] Read v. St. Ambrose Church, 6 Pa. Co. 76.

[87] See case infra this note.

[a] **Services of organist.**—Forsberg v. Zehm, 150 Va. 756, 143 SE 284, 61 ALR 232.

[§ 126] **(2) Joint Use by Several Societies or by Several Church Groups of United Society.** Where two or more societies jointly use and occupy the same church edifice, the rights of the individual societies to its use will be determined by the deed[5] or the agreement controlling its use.[6] Where the deed gives the first right to use for religious rites and ceremonies to one of the churches, its right to priority is limited to a use for religious ceremonies, the other churches being then entitled to use it for the same purpose before the church having the prior right can use it for doctrinal discourses.[7] The society holding the legal title to the church edifice under the deed is the proper custodian thereof,[8] and is entitled to reasonable notice of the time when the other churches desire to use the building,[9] and may determine the right to its use as between several applicants who have selected the same time for its use.[10] But where the use of the building and the time of use are specifically provided for in the constitution and by-laws of the corporation holding the legal title, the various churches are entitled to the use at the times provided for without application or notice to the corporation.[11] Where the agreement controlling the use of a church building by two churches restricts its use to divine services, the restriction has been construed to prohibit the holding of a Sunday school by either of the churches,[12] but a prayer-meeting is held to be a divine service within the meaning of such a contract.[13] Where two churches by agreement organize a united society and provide for the management of the joint property by the society, one of the churches on its own initiative and without the consent of the united society cannot offer the use of the church edifice which it occupies to a third church and enter into an agreement with such third church for its joint use.[14]

[§ 127] **d. Remedies for Improper Exclusion.** If members are improperly excluded from the use of the church property, they must apply to the courts for redress, or appeal to the congregation.[15] They cannot resort to acts of trespass to gain entrance to the church, and if they do so they are liable as trespassers,[16] or if their entry is forcible, they may be dispossessed by an order of court in an action for forcible entry and detainer restoring possession to those formerly in possession.[17] But a trustee of a religious society cannot be sued by his cotrustees as trespasser in relation to the property of the society.[18] A majority of the trustees cannot by any rule or resolution exclude one of their number and so divest him of his rights as to make his subsequent act of obtaining possession of the trust property a tort.[19]

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[88] Hines v. Jones, 1 Ky. Op. 219.

[89] Cape v. Moore, 122 Okl. 229, 253 P 506.

[90] Cape v. Moore, supra.

[a] **Use until withdrawal.**—Where a religious society was entitled under the trust deed to the use of certain property until it had withdrawn its services therefrom, and after it was supplanted by another society it made strenuous efforts to obtain possession of the property for the purpose of conducting its services, its failure during the meantime to maintain services in the church did not amount to a withdrawal of such services. Cape v. Plymouth Cong. Church, 130 Wis. 174, 109 NW 928.

[91] See case infra this note.

[a] **Deposed priest** of the Roman catholic church may be restrained from functioning as priest at the instance of the parish, incorporated. St. Vincent's Parish v. Murphy, 83 Nebr. 630, 120 NW 187, 35 LRANS 919.

[92] Cooper v. Sandy Hill First Presb. Church, 32 Barb. (N. Y.) 222; Wilson v. Clinton Chapel African M. E. Zion Church, 138 Tenn. 398, 198 SW 244.

Change of church edifice as affecting pewholder's rights see infra § 182.

[93] Voorhees v. Amsterdam Presb. Church, 8 Barb. (N. Y.) 135 [aff 17 Barb. 103].

[94] Cushman v. Good Shepherd Church, 162 Pa. 280, 29 A 872; Wagner v. Christ Episcopal Church, 30 S. C. Eq. 155.

[95] Kulinski v. Dambrowski, 29 Wis. 109.

[96] Cushman v. Church of Good Shepherd, 162 Pa. 280, 283, 29 A 872.

"If, as the demurrer admits, subscriptions were secured towards the erection of the house at Radnor for the purpose of building at that place a memorial to Bishops Bowman and Kemper, or for any other distinct purpose apart from the mere erection of a place of worship, and with the money so obtained the memorial was built, the question whether the corporation may raze it to the ground, transport the material taken from it to some other place and use it in the erection of a building for a wholly different purpose is not a question of church polity or of ecclesiastical power. It is a question of fair dealing between the church authorities and those who furnish them the money with which to build, over which a court of equity has jurisdiction." Cushman v. Church of Good Shepherd, supra.

[97] See statutory provisions.

[98] Chicago First M. E. Church v. Dixon, 178 Ill. 260, 52 NE 887.

[99] See statutory provisions.

[1] Church of Redemption v. Grace Church, 68 N. Y. 570 [mod 6 Hun 166].

[2] Cooper v. Sandy Hill First Presb. Church 32 Barb. (N. Y.) 222.

[3] Cooper v. Sandy Hill First Presb. Church, supra.

[4] Tigard v. Moffitt, 13 Nebr. 565, 14 NW 534; Heiss v. Vosburg, 59 Wis. 532, 18 NW 463.

[5] Sharp v. Benton, 64 SW 636, 23 KyL 876.

[6] Gass' App., 73 Pa. 39, 13 AmR 726; Keiffer v. Emrick, 2 LegOp (Pa.) 168.

[7] Sharp v. Benton, 64 SW 636, 23 KyL 876.

[8] Sharp v. Benton, supra.

[9] Sharp v. Benton, supra.

[10] Sharp v. Benton, supra.

[11] Peterson v. Christianson, 18 S. D. 470, 101 NW 40.

[12] Gass' App., 73 Pa. 39, 13 AmR 726.

[13] Keiffer v. Emrick, 2 LegOp (Pa.) 168.

[14] Cammeyer v. United German Lutheran Churches, 4 Edw. (N. Y.) 223.

[15] Fulbright v. Higginbotham, 133 Mo. 668, 34 SW 875.

[§ 128] **2. Alienation and Encumbrance**[20]**—a. In General.** A religious society, generally speaking, may sell and convey land which it owns subject to such restrictions and requirements as may be contained in its own constitution or by-laws,[21] or in statutes applicable thereto,[22] the statute prevailing over rules of the church wherever there is a conflict,[23] or in the provisions of trust deeds or of wills under which it holds the property.[24] Where it is manifest from the terms of trust deed or will or charter under which church lands are held that the trustees named therein and their successors should only hold the naked legal title for the benefit of the body of worshippers, the trustees have no interest in the land which they can convey away from the body of worshippers.[25] The property can be disposed of only by the body of worshippers or church as a church by complying with the provisions of the instrument creating the trust and as authorized by the laws and constitution of the church,[26] the proper method of ascertaining the will of the majority of the members of the church being that prescribed in its charter or by-laws with reference to the transaction of its secular business.[27] Nor has a part only of a church named in the deed as beneficiary power to transfer the title in the absence of evidence of authority to represent the entire church.[28]

In the Philippines, the Roman catholic church is the owner of the churches, atrios, convents and cemeteries where it is shown that they are built upon sacred ground withdrawn from the commerce of men.[29] Religious orders affiliated with the Roman catholic church have no power to dispose of such places or buildings located on haciendas owned by them.[30]

[§ 129] **b. Sale Generally—(1) By Members or Trustees of Unincorporated Society—(a) In General.** Property owned by an unincorporated society may be conveyed by its members acting individually,[31] or by trustees where the legal title is vested in them,[32] but not by officers of the congregation having no title.[33] The grantors, members or trustees, must observe the requirements contained in the organic law of the society governing conveyances by them,[34] and in statutes applicable thereto,[35] but they are not bound by statutory requirements applicable solely to religious corporations.[36] Statutes dealing with unincorporated religious societies and providing for their organization under the statute by election of trustees do not operate to deprive an unincorporated society which has not organized under the statute of its right to convey its property. Trustees of such a society named by the instrument creating the trust may convey the legal title when authorized by the members of the society, the trustees acting under the trust deed, not under the statute.[37]

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[16] Tilden v. Metcalf, 2 Day (Conn.) 259; Peo. v. Runkel, 9 Johns. (N. Y.) 147; Unangst v. Shortz, 5 Whart. (Pa.) 506; Com. v. Oliver, 2 Pars. Eq. Cas. (Pa.) 420.

[17] See case infra this note.

[a] **Picking lock as forcible entry.**—Where the minority of the members of a church who have left the building in the possession of the majority, on the next Sunday, force the locks, in order to hold services therein, such entry is forcible, although they are aided by the police and the plaintiff acting as agent for the majority may sue the trespassers in an action of forcible entry and detainer and secure an order of the court restoring him to the possession. Central Park Baptist Church v. Patterson, 9 Misc. 452, 30 NYS 248, 24 NYCiv Proc 79.

[18] Pultney M. E. Church v. Stewart, 27 Barb. (N. Y.) 553.

[19] Pultney M. E. Church v. Stewart, supra.

[20] **Sale as ground for forfeiture by religious society** see supra § 121.

[21] Ill.—Buhrnson v. Stoner, 275 Ill. 41, 113 NE 943.

Mass.—Sohier v. Trinity Church, 109 Mass. 1.

Nebr.—Geiss v. Trinity Lutheran Church Cong., 230 NW 658.

N. Y.—Feiner v. Reiss, 98 App. Div. 40, 90 NYS 568.

Pa.—Burton's App., 57 Pa. 213.

Tenn.—Bridges v. Wilson, 11 Heisk. 458.

[a] **Covenant conferring use on members.**—Where covenant of religious society provided that the property brought into the society by its members should become the property of the whole society as such, with a several right of use conferred on each member, as a member, so long as he remained a member, the society having dwindled to eleven members, and having lost much of its property, and permitted remaining property to deteriorate, had the right to convey its property in consideration of grantee's agreement to support the remaining members during the rest of their lifetime. Board of Parent Ministry v. Bohon, 192 Ky. 285, 233 SW 721.

[22] See case infra this note.

[a] **From society to church.**—Under a statute providing that "any religious society connected with a church" incorporated under the statute may convey its real estate to the church to hold on the same trusts as when held by the society, a society may convey to an incorporated church the property belonging to the society against the protest of a pewholder, the latter's rights not being extinguished by the sale. Massachusetts Baptist Missionary Soc. v. Bowdoin Square Baptist Soc., 212 Mass. 198, 98 NE 1045, AnnCas1913C 472.

Statutory leave of court see infra §§ 142–148.

[23] See infra § 139.

[24] Jones v. Sacramento Ave. M. E. Church, 198 Ill. 626, 64 NE 1018; In re New South Meeting-house, 13 Allen (Mass.) 497; Griffits v. Cope, 17 Pa. 96; Langolf v. Seiberlitch, 2 Pars. Eq. Cas. (Pa.) 64; Wiswell v. Cincinnati First Cong. Church, 14 Oh. St. 31.

[25] Levasseur v. Martin, 11 La. Ann. 684; Bridges v. Wilson, 11 Heisk. (Tenn.) 458; Williams v. Goddard, 8 Vt. 492.

[a] **Devise to Roman catholic church** is construed to be a gift to a particular church for which the Archbishop held as naked trustee, giving him no power to alienate without the consent of the church. Levasseur v. Martin, 11 La. Ann. 684.

[26] Bridges v. Wilson, 11 Heisk. (Tenn.) 458.

[27] Nelson v. Solomon, 112 Ga. 188, 37 SE 404; Boras v. Gdovin, 7 Pa. Dist. & Co. 789.

[28] Hill Est. Co. v. Whittlesey, 21 Wash. 142, 57 P 345.

[a] **Conveyance by vestrymen.**—Where the deed grants property to the bishop in trust for the wardens, vestry and congregation of a parish, the vestrymen acting alone have no power to convey the property where there is no evidence to show that they were authorized to do so by the wardens and congregation. Hill Est. Co. v. Whittlesey, 21 Wash. 142, 57 P 345.

[29] See supra § 100.

[30] Govt. v. Roman Catholic Archbishop, 35 Philippine 934.

[31] See cases infra note 32.

[32] Hubbard v. German Catholic Cong., 34 Iowa 31; Feiner v. Reiss, 98 App. Div. 40, 90 NYS 568 (title vested in trustees by articles of the covenant signed by the members, and by statute giving trustees of unincorporated religious societies power to take and hold property in perpetual succession for the society); Gold v. Cozart, 173 N. C. 612, 92 SE 600.

[33] See case infra this note.

[a] **By pastor and secretary.**—Apostolic Holiness Union v. Knudson, 21 Ida. 589, 123 P 473.

[34] Hubbard v. German Catholic Cong., 34 Iowa 31.

[35] Hubbard v. German Catholic Cong., supra.

[36] See case infra this note.

[a] **Sanction of court.**—The statutory requirement that a religious corporation, before selling its real estate, must first obtain the sanction of the Supreme Court, does not apply to sales by unincorporated religious societies. Feiner v. Reiss, 98 App. Div. 40, 90 NYS 568.

[§ 130] **(b) Consent of Members to Sale by Trustees.** The consent or approval of members or of certain boards or officers of the society is necessary to a conveyance by trustees whenever and to the extent required by the constitution of the society,[38] or by the trust deed under which the property is held by the society;[39] but a consent secured informally and orally is sufficient in the absence of requirements to the contrary,[40] especially where it is shown that the uniform and unvaried practice has been to manifest approval verbally in informal consultation.[41] A consent given at a meeting of the members duly called is sufficient,[42] and notice of a meeting given by ringing the church bell is sufficient where that is shown to be the customary way of calling church meetings.[43]

[§ 131] **(2) By Incorporated Society—(a) In General.** An incorporated religious society, acting under statutory or charter authority, may sell property which it owns, subject to statutory or charter restrictions,[44] and in conformity to and in furtherance of the trust under which the property may be held.[45] Property owned by a corporation free of trust may be conveyed by it free of any encumbrance,[46] and where the conveyance by trustees acting for the corporation in good faith is made for a valid consideration and in conformity to the vote of a majority of the corporate members, it is valid as against the protest of the minority.[47] The power of alienation is in the corporate body, whether it be parish,[48] society or congregation,[49] trustees,[50] rector, wardens, and vestrymen,[51] or the minister as corporation sole,[52] provided, however, in cases where statute, trust deed or church rules require it, that the consent of congregation,[53] church judicatory,[54] or the sanction of the court[55] be first obtained. Where a church corporation acts through authorized officers or trustees, the validity of a sale of church property by officers or trustees de facto cannot be collaterally attacked.[56] Restraints may be imposed by statute on the power of a religious corporation to alienate property,[57] as, for example, that it cannot alienate unless upon a valuable consideration inuring to the corporation as such,[58] or only after it has applied to the court for permission to sell and the court has sanctioned the transaction.[59] Restraint upon alienation by a religious corporation imposed by charter may later be removed by the legislative will, whether expressed in a special or general act.[60]

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[37] **37.** Moreland Union Sunday School v. Moreland Christian Church, 171 Ky. 534, 188 SW 626.

[38] **38.** Post Falls Apostolic Holiness Union v. Knudson, 21 Ida. 589, 123 P 473; Hubbard v. German Catholic Cong., 34 Iowa 31; Feiner v. Reiss, 98 App. Div. 40, 90 NYS 568.

[39] **39.** McCallister v. Ross, 155 Mo. 87, 55 SW 1027.

[40] **40.** Feiner v. Reiss, 98 App. Div. 40, 47, 90 NYS 568.

[41] **41.** Feiner v. Reiss, supra.

"We fail, therefore, to find any force in the objection that it was essential for the vendor to produce a formal resolution or written evidence of the approbation of the ministry and elders, and for the sufficient reason that the defendant concedes that such never was the custom of the society and that its uniform and unvaried practice on the purchase, sale or transfer of real property has been to manifest approval verbally in informal consultation had between the trustees, ministry and elders. . . . Inasmuch as the necessity for the approbation of the ministry and elders is found, not in any statute, but solely in the voluntary agreement of the community itself, the community has a right to interpret its own requirements and its interpretation long and invariably followed is decisive of the question of whether the approbation of the ministry and elders was properly obtained in the case at bar." Feiner v. Reiss, supra.

[42] **42.** Hubbard v. German Catholic Cong., 34 Iowa 31.

[43] **43.** See supra § 35.

[44] **44.** Ill.—McClane v. Dixon, 281 Ill. 288, 118 NE 38.

Me.—Whitmore v. Holy Cross Church, 121 Me. 391, 117 A 469.

Mass.—Sohier v. Trinity Church, 109 Mass. 1.

Mich.—Walrath v. Campbell, 28 Mich. 111.

Mo.—Keith, etc., Coal Co. v. Bingham, 97 Mo. 196, 10 SW 32.

N. J.—Van Houten v. Totowa First Reformed Dutch Church, 17 N. J. Eq. 126; Magie v. Newark German Evangelical Dutch Church, 13 N. J. Eq. 77 [aff 15 N. J. Eq. 500].

N. Y.—In re Buffalo First Presb. Soc., 106 N. Y. 251, 12 NE 626; Gallupville Reformed Church v. Schoolcraft, 65 N. Y. 134; Madison Ave. Baptist Church v. Oliver St. Baptist Church, 31 N. Y. Super. 109; Madison Ave. Baptist Church v. Oliver St. Baptist Church, 26 N. Y. Super. 570, 1 AbbPrNS 214, 30 HowPr 455; Reformed Protestant Dutch Church v. Mott, 7 Paige 77, 32 AmD 613.

Pa.—Phillips v. Westminster Church, 225 Pa. 62, 73 A 1062; Burton's App., 57 Pa. 213; Langolf v. Seiberlitch, 2 Pars. Eq. Cas. 64.

Eng.—Trelawny v. Winchester, 1 Burr. 219, 97 Reprint 281, 1 Ld. Ken. 256, 96 Reprint 985.

"It is first claimed that the property cannot be sold, and a good title to it cannot be given, by reason of a trust imposed upon it. The deed to the corporation is absolute and without condition or reservation. It created no trust beyond that general duty which the law puts upon a corporation of using its property for the purposes contemplated in its creation. That sort of trust is not one which fastens upon the land and inheres in the title, going with it where it passes or restraining alienation, but founded solely upon the corporate character of the grantee, and so justifying the control which the statute gives to the courts. The title of the church is an absolute fee which it can transmit to a vendee with the judicial consent and approval. When that occurs the proceeds take the place of the land and become the corporate property which the court, by a suitable direction, devotes to the proper uses and purposes which the corporation was framed to subserve, and to accomplish which its property was bestowed. It is in no respect diverted from the religious corporation, or even from its denominational uses, and so far as there is an element of trust a sale is consistent with and not destructive of it." Matter of First Presb. Soc., 106 N. Y. 251, 253, 12 NE 626.

[45] **45.** Sohier v. Trinity Church, 109 Mass. 1.

[46] **46.** Uzzell v. McClelland, 65 Colo. 324, 176 P 304.

[47] **47.** Uzzell v. McClelland, supra.

[48] **48.** Mason v. Muncaster, 9 Wheat. (U. S.) 445, 6 L. ed. 131 [aff 16 F. Cas. No. 9,247, 2 Cranch C. C. 274].

[49] **49.** Jones v. Sacramento Ave. M. E. Church, 198 Ill. 626, 64 NE 1018; Sterling Zion Church v. Mensch, 178 Ill. 225, 52 NE 858.

[50] **50.** Shavers v. Thomas, 339 Ill. 622, 171 NE 625; Grupe v. Rudisill, 101 N. J. Eq. 145, 136 A 911; Van Houten v. Totowa First Reformed Dutch Church, 17 N. J. Eq. 126; New Concord First United Presb. Church v. Young, 21 OhNPNS 569.

What constitutes corporate body see supra § 22.

[51] **51.** Lane v. Calvary Church, 59 N. J. Eq. 409, 45 A 702; Cushman v. Church of Good Shepherd, 14 Pa. Co. 26.

[52] **52.** See cases infra this note.

[a] **Ministerial lands in New England.**—(1) Title to ministerial lands in New England is vested in the minister as corporation sole and in his successors, and the minister alone can convey. Flye v. Newcastle First Cong. Parish, 114 Me. 158, 95 A 783; Brown v. Nye, 12 Mass. 285; Brown v. Porter, 10 Mass. 93. (2) If there is no settled minister, the title is held in abeyance until there is, the town in its parochial capacity or the parish managing it, but having no right to convey. Lemington v. Stevens, 48 Vt. 38. (3) Nor does the incorporation of the parish give it the right to convey. It succeeds merely to the rights of the unincorporated parish. Flye v. Newcastle First Cong. Parish, supra. (4) But where a parish holds land in fee and not on special trust for ministers of parish in succession, it may convey a good title to the land free of trust. Emerson v. Wiley, 10 Pick. (Mass.) 317.

[53] **53.** See infra § 132.

[54] **54.** See infra § 140.

[55] **55.** See infra §§ 141, 142.

[56] **56.** Poplar Bluff First M. E. Church v. Berryman, 303 Mo. 475, 261 SW 73.

[57] **57.** See cases infra notes 58, 59.

[58] **58.** Madison Ave. Bapt. Church v. Oliver St. Bapt. Church, 46 N. Y. 131, 11 AbbPrNS 132 [rev 31 N. Y. Super. 109 (aff 2 AbbPrNS 254, 32 HowPr 335)].

[59] **59.** See infra §§ 142–148.

[§ 132] **(b) Authorization Generally.** Authorization at a meeting duly called[61] and at which a quorum was present,[62] is necessary to the validity of a sale by a religious corporation.[63] Where the members of the society constitute the incorporated body,[64] consent of the corporation is necessary to a sale of the church property by the trustees,[65] and trustees acting without the consent of the corporation have no title to convey, and their deed executed under such circumstances is void,[66] even though a special act of the legislature purports to give them authority to do so.[67] A fortiori, an instrument purporting to be the deed of an incorporated church, executed by the pastor and a minority of the trustees, without the authority of the church body, has no validity regardless of recitals of authorization made therein.[68] Also where the statute requires it,[69] the consent of the congregation must first be obtained by the trustees even where the trustees are themselves the corporation,[70] but in such case it has been held that a statute requiring consent of the congregation to a sale by the trustees does not require their consent to a mortgage by the trustees.[71]

[§ 133] **(c) Notice of Meeting To Authorize Alienation.**[72] The notice of meeting to authorize alienation of property belonging to an incorporated religious society must follow the requirements of statute or charter or by-laws,[73] or in the absence of provisions in charter or by-laws, as the officers of the corporation in their warrant for the meeting shall direct.[74] Special notice is not required where authority for the sale is voted at a regular annual meeting,[75] or at an adjourned session of such annual meeting.[76] Where due notice is given, the meeting fairly conducted, the objection that the vote was illegal for want of a proper register is of no force.[77]

[§ 134] **c. Sale for Payment of Debts—(1) Voluntary Sale.** A religious society may dispose of its property to pay its debts when necessary for that purpose;[78] and unless restrained by charter or statute, it may assign its property in trust for the payment of its debts.[79]

[§ 135] **(2) Involuntary Sale.** If a religious society or its trustees refuses to sell its property to pay its debts, a court of equity, in the absence of a statutory prohibition, will enforce the sale in a proceeding in rem,[80] or will declare an equitable lien and enter judgment directing a sale of the property as in mortgage foreclosure,[81] or, upon petition stating the facts, will grant an injunction to prevent any disposition of the church property before the result of an action at law shall be reached.[82] Unless exempted by statute, a church edifice is subject to a mechanic's lien,[83] and to seizure and sale under execution.[84] Nor will informalities in the execution defeat the purchaser's title where they have been waived by the church corporation.[85] Where, after the sale of the property of a church under a decree of court for the payment of its debts, a surplus remains, that surplus is held as the whole fund or property was held, and no other or different condition can be attached to it.[86]

[§ 136] **d. Mortgage or Other Lien—(1) In General.** In some states there are restrictions by statute or charter on the power of religious societies to give a mortgage,[87] a society having no power whatever where its charter expressly prohibits it to give a mortgage or to suffer a lien to be placed on its church or grounds,[88] or, where the statute so provides,[89] having such power only upon application to the court in each case for permission to exercise it,[90] the court in that event having jurisdiction to make a decree free of the limitations placed upon the mortgaging power of the society by the church canons.[91] Where legislative policy permits the giving of mortgages by religious societies, it must be done in conformity with regulations contained in statute, charter or by-laws, and in pursuance of authority granted by the society to its officers or trustees.[92] A statute giving religious societies power to mortgage but further providing that nothing in the statute shall affect a resulting trust in favor of grantor contained in any deed conveying the lands in trust,[93] in no way restricts the power of a society to mortgage lands not subject to a resulting trust expressed in the deed to the society but conveyed for a substantial monetary consideration to the society and where a resulting trust, if any arose by operation of law, would be in favor of the society.[94] Where the society has accepted benefits from a mortgage which it has not authorized, it is either estopped to question the authority of its trustees and officers to make the conveyance,[95] or it must restore the consideration paid as a condition precedent to a decree of court canceling the mortgage.[96] And where authority to make the mortgage is granted by the society, a member participating is estopped to deny the validity of the proceedings.[97]

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[60] McClane v. Dixon, 281 Ill. 288, 118 NE 38; Burton's App., 57 Pa. 213, 218.

"The restraint upon alienation imposed by the charter in the church council or corporation was made for the protection of the interests of the church body. The disability inheres solely in the legal entity called the corporation, and not in the nature of the estate or the character of the church body. It is therefore, capable of removal by the legislative will, whether expressed in a special or general act. An authority to sell for the benefit of the congregation conferred by law, would impair no contract and violate no law." Burton's App., supra.

[61] See infra § 133.

[62] Moore v. St. Thomas, 4 AbbN Cas (N. Y.) 51.

[63] See cases supra notes 61, 62.

[64] See supra § 22.

[65] La.—Tabernacle Baptist Church v. Green, 124 La. 171, 50 S 1.

Me.—Hamlin v. Property in Webster, 106 Me. 132, 76 A 163.

Mass.—Austin v. Thomas, 14 Mass. 333; Weston v. Hunt, 2 Mass. 500.

Oh.—South Kenton Union Sunday School Assoc. v. Espy, 17 Oh. Cir. Ct. 524, 9 Oh. Cir. Dec. 695.

S. C.—Calvary Baptist Church v. Dart, 68 S. C. 221, 47 SE 66.

[66] White Bear First M. E. Church v. White Bear Beach Church, 126 Minn. 282, 148 NW 271; South Kenton Union Sunday School Assoc. v. Espy, 17 Oh. Cir. Ct. 524, 9 Oh. Cir. Dec. 695.

[67] South Kenton Union Sunday School Assoc. v. Espy, 17 Oh. Cir. Ct. 524, 9 Oh. Cir. Dec. 695.

[68] Pallilla v. Galilee Baptist Church, 215 Ala. 667, 112 S 134.

[69] See statutory provisions.

[70] Irving v. McLachlan, 5 Grant Ch. (Ont.) 625.

[71] Scott v. Jackson First Free Methodist Church, 50 Mich. 528, 15 NW 891.

Necessity of sanction of court to mortgage see infra § 142.

[72] **Notice of meetings generally** see supra §§ 35–37.

[73] Jones v. Sacramento Ave. M. E. Church, 198 Ill. 626, 64 NE 1018; Wiggin v. Lowell First Freewill Baptist Church, 8 Metc. (Mass.) 301; Madison Ave. Baptist Church v. Oliver St. Baptist Church, 31 N. Y. Super. 109.

[74] See cases supra note 73.

[75] Wiswell v. Cincinnati First Cong. Church, 14 Oh. St. 31.

[76] Wiswell v. Cincinnati First Cong. Church, supra.

[77] In re Buffalo First Presb. Soc., 106 N. Y. 251, 12 NE 626.

[78] Eggleston v. Doolittle, 33 Conn. 396.

[79] De Ruyter v. St. Peter's Church, 3 N. Y. 238 [aff 3 Barb. Ch. 119].

[80] Bushong v. Taylor, 82 Mo. 660; Linn v. Carson, 32 Gratt. (73 Va.) 170.

[81] Perry v. Protestant Episcopal Church Bd. of Missions, 102 N. Y. 99, 6 NE 116.

[82] Lyons v. Planters' Loan, etc., Bank, 86 Ga. 485, 12 SE 882, 12 LRA 155.

[83] Harrisburg Lumber Co. v. Washburn, 29 Or. 150, 44 P 390.

[84] Harrisburg Lumber Co. v. Washburn, supra.

[85] St. Bartholomew's Church v. Wood, 80 Pa. 219.

[86] Harper v. Straws, 14 B. Mon. (Ky.) 48.

[87] See statutory provisions.

[88] Morrison v. Ann Carmichael Memorial Presb. Church, 273 Pa. 162, 116 A 801 (holding that, although an adjoining landowner might cut into a party wall to construct a building on his own property, building a party wall would not violate a provision in the charter of a religious corporation, prohibiting it from giving a mortgage or lien on its church or grounds).

[89] See statutory provisions.

[90] See infra §§ 142–148.

[91] See infra § 147.

[§ 137] **(2) By Members or Trustees of Unincorporated Society.** Under a statute conferring power to mortgage upon trustees of an unincorporated religious society where a debt is contracted for building or repairing a church or other church building, or for the purchase of land for church purposes,[98] trustees named in a deed of land to an unincorporated society who are later duly elected by the society have the power to mortgage under the statute.[99] But they must have authority from the society to make the mortgage.[1] Trustees of an unincorporated religious society have no power to mortgage the church property in the absence of authority from the society to do so in the form either of a vote granting the authority in express terms, deed, or church rules and discipline.[2] Such authority must be express and special.[3] It cannot be implied from authority to the trustees to proceed with the building of the church and to do whatever was necessary in the premises.[4]

[§ 138] **(3) By Incorporated Society.** A church corporation, having power to take and hold real estate,[5] may mortgage it as security for repayment of money borrowed for legitimate corporate purposes,[6] but its trustees have no power to initiate proceedings to mortgage the corporate property in the absence of authority by vote, deed or church rules and discipline to do so.[7] Where the corporation has a congregational form of government the consent of a majority of the members of the congregation to the giving of the mortgage must first be obtained, where its charter or the governing statute so provides,[8] but a mortgage of church property in the usual form of a corporate mortgage, signed by the president and attested by the secretary of the corporation, is presumably executed with the authority of the corporation.[9]

[§ 139] **e. Validity[10]—(1) In General.** A sale of property of a religious society to be valid must conform to the requirements of law to which it is subject, the statute law of the state,[11] the rules and discipline of its own church constitution,[12] even where they add to the statutory requirements, provided, however, there is no inconsistency or statutory prohibition involved,[13] and the limitations and restrictions in a trust deed or will under which the property may be held.[14] It must meet the common law requirements of a valid contract of sale of land.[15] If there has been a failure of consideration, the society making the conveyance may rescind and procure its cancellation.[16] In the case of trust property, a lease[17] or sale[18] in furtherance of the trust, if it conforms to law in other respects, is valid. For example, a religious society having power to remove its meeting-house from one location to another,[19] may sell and convey the real property on which the church building stands free of the trust on which it holds it in order that with the proceeds it may purchase new land and erect a new building, holding the newly acquired property on the same trusts as the old.[20]

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[92] See infra §§ 137, 138.

[93] See statutory provisions.

[94] Re St. John's Church, 60 Ont. L. 491, [1927] 3 DomLR 535.

[95] See infra § 150.

[96] Gallilee Baptist Church v. Pallilla, 219 Ala. 683, 123 S 210.

[97] Applequist v. Swedish Evangelical Lutheran Gethsemane Church, 154 Wash. 351, 282 P 224.

[98] See statutory provisions.

[99] Re Hamilton Lutheran Church, 34 Ont. L. 228, 8 OntWN 556.

[1] See cases infra note 2.

[2] Hyde Park Supply Co. v. Peck-Williamson Heating, etc., Co., 176 Ky. 513, 195 SW 1115, 176 Ky. 656, 197 SW 391; Patterson v. Baptist Church, 8 La. A. 109.

[3] Patterson v. Baptist Church, 8 La. A. 109.

[4] Hyde Park Supply Co. v. Peck-Williamson Heating, etc., Co., 176 Ky. 513; 195 SW 1115, 176 Ky. 656, 197 SW 391.

[5] See supra § 99.

[6] See case infra this note.

[a] **For purchase of church site.**—Love v. Metropolitan Church Assoc., 184 Ill. A. 102.

[7] Gallilee Baptist Church v. Pallilla, 219 Ala. 683, 123 S 210 (negotiations conducted by parson assuming to act for church); In re Beth Israel, 187 NYS 36.

[8] In re Beth Israel, 187 NYS 36.

[9] Page v. Asbury M. E. Church, 78 N. J. Eq. 114, 78 A 246.

[10] **Cross references:**
Deed of incorporated church:
  Authorization see supra § 132.
  Execution by officer de facto see supra § 131.
Mortgage see supra §§ 136-138.

[11] See infra §§ 142-148.

[12] Geiss v. Trinity Lutheran Church Cong., (Nebr.) 230 NW 658; Grupe v. Rudisill, 101 N. J. Eq. 145, 136 A 911.

[13] Grupe v. Rudisill, 101 N. J. Eq. 145, 136 A 911.

[14] See infra § 152.

[15] See Vendor and Purchaser [39 Cyc 1183].

[16] See case infra this note.

[a] **Failure to consolidate.**—On failure of dominant object to unite two churches into one, consideration for conveyance of church property failed, and grantor may rescind it and procure its cancellation. Evangelische Lutherische St. Thomas Gemeinde v. German Evangelical Lutherische St. Matthews Church, 191 Wis. 340, 210 NW 942, 50 ALR 113.

[17] Hollywood v. Brockton First Parish, 192 Mass. 269, 78 NE 124; Hayes v. Franklin, 141 N. C. 599, 54 SE 432; Catholic Inst. v. Gibbons, 7 Oh. Dec. (Reprint) 516, 3 CincLBul 581; Dunkle v. Dries, 1 Woodw. (Pa.) 114.

[18] Starr v. Starr Methodist Protestant Church, 112 Md. 171, 76 A 595; Burton's App., 57 Pa. 213, 218; In re Todd Tp. Evangelical Lutheran Church, 35 Pa. Co. 348.

"There is no good reason why a perpetual restraint should be placed upon the alienation of the estate of religious societies. That which is suited to the present, by a change of times becomes unfit for the future. The unpretending church or modest parsonage, or primitive schoolhouse of a village or borough town becomes unsuited to the growth, situation and progress of taste and culture of a large city. The ground itself often becomes the most valuable possession, and by a sale may add greatly to the welfare of the body, enabling it to erect finer edifices, better adapted to the change of times and circumstances. Conversion is not destruction, and can be made for the benefit of the trust. No solid objection lies to the change of church property so long as its true purpose is preserved. . . . A sale is frequently the best mode of executing the trust." Burton's App., supra.

[19] See supra § 125.

[20] Starr v. Starr Methodist Prot-

[§ 140] **(2) Consent of Superior Church Judicatory or Conference.** The consent of a superior church judicatory to the conveyance by a religious society, although required by the canons of the church, is not necessary where the statute authorizing the conveyance grants the power to convey without any such restriction,[21] but is necessary where the statute follows the church law in this respect.[22] An association or conference of churches has itself no power of alienation of land devised to an individual church of the conference.[23] But where land is held by a church subject to church rules and discipline and a sale is made which is within the terms of a church rule requiring the consent of the conference, a failure to secure the consent of the conference invalidates the sale.[24] The church rule must in terms apply to the particular transaction to give it that effect.[25] A church rule requiring consent of the conference to a sale or mortgage of property held by trustees for an individual church does not apply to a sale of property which had been conveyed directly to an individual church corporation without the intervention of trustees. Property so held may be sold by the church corporation without the consent of the conference.[26] Whether such consent is necessary under the New York statute requiring trustees to hold and administer church property according to the rules and usages of the denomination to which the church members of the corporation belong, has been raised but not decided, it appearing in the particular case that the judicatory consented to the sale on conditions which were performed.[27]

[§ 141] **(3) Sanction of Court or Legislature—(a) In General.** Independently of statute, a court of equity has inherent power to order a sale of property held in trust for a religious society where such action is necessary to the execution of the purposes of the trust and for the protection of the estate and the rights of the beneficiaries.[28] And this power of the equity court to direct a conveyance of a trust estate in furtherance of the trust may be exercised by the legislature in a special statute authorizing the trustees of a particular church to convey the lands held in trust.[29]

[§ 142] **(b) Statutory Leave of Court—aa. Necessity.**[30] Under the laws of some states,[31] a religious corporation is not authorized to sell or mortgage any of its real estate without leave of court,[32] although it has been held under early statutes requiring court sanction for a conveyance by a religious corporation,[33] that a valid mortgage could be given without such sanction,[34] and under statutes permissive in terms rather than mandatory it is held that a failure to obtain an order of court does not defeat the grantee's title to the land conveyed.[35]

[§ 143] **bb. Purpose and Scope of Statute.** It is not the purpose of the statute to give the court power to control or manage the property of a religious corporation,[36] but merely power to prevent the misapplication of its funds.[37] The statute applies only to religious corporations,[38] only to domestic corporations,[39] only to real property,[40] only to a sale as distinguished from an assignment[41] or from an agreement accompanying the sale,[42] only to a sale by the

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estant Church, 112 Md. 171, 76 A 595; Sohier v. Trinity Church, 109 Mass. 1; Phillips v. Westminster Church, 225 Pa. 62, 73 A 1062; Cushman v. Church of Good Shepherd, 14 Pa. Co. 26; Huegli v. Pauli, 26 Ont. L. 94, 3 Ont WN 915, 21 OntWR 776.

21. Sohier v. Trinity Church, 109 Mass. 1; In re Louther Memorial M. E. Church, 22 Pa. Dist. 858, 40 Pa. Co. 611.

22. Jacob v. Ursuline Nuns, 2 Mart. (La.) 268; Lane v. Calvary Church, 59 N. J. Eq. 409, 45 A 702.

23. Boxwell v. Affleck, 79 Va. 402.

24. Smallwood v. Robinson, 204 Ky. 836, 265 SW 441.

25. See cases infra note 26.

26. Poplar Bluff First M. E. Church v. Berryman, 303 Mo. 475, 261 SW 73.

27. In re Buffalo First Presb. Soc., 106 N. Y. 251, 12 NE 626.

28. Bristol Baptist Church v. Connecticut Baptist Convention, 98 Conn. 677, 120 A 497; Crawford v. Nies, 224 Mass. 474, 113 NE 408.

Trusts generally see Trusts [39 Cyc 352].

29. Wilmington Baptist Church v. Laird, 10 Del. Ch. 118, 85 A 1082.

30. **Necessity of consent of congregation to mortgage** see supra § 132.

31. See statutory provisions.

32. Giffen v. Christ's Church, 48 Cal. A. 151, 191 P 718; Francestown Trinitarian Cong. Soc. v. Francestown Union Cong. Soc., 61 N. H. 384; Madison Ave. Baptist Church v. Oliver St. Baptist Church, 26 N. Y. Super. 570, 1 AbbPrNS 214, 30 HowPr 455; Matter of Church of Messiah, 12 NYS 489, 25 AbbNCas 354; Reformed Protestant Dutch Church v. Mott, 7 Paige (N. Y.) 77, 32 AmD 613; In re St. Mary's Immaculate Conception Greek Catholic Church, 296 Pa. 307, 145 A 862; In re St. Joseph's Lithuanian Roman Catholic Church, 273 Pa. 486, 117 A 216; Cushman v. Church of Good Shepherd, 6 Pa. Dist. 607, 7 Del. Co. 1295.

"It is probably true that the restraining statute of Elizabeth became a part of the common law of this State, and that, prior to our general law upon the subject, no religious corporation could convey its real estate without an act of the legislature. (Madison Ave. Baptist Church v. Oliver St. Baptist Church, 46 N. Y. 131, 11 AbbPrNS 132). But since our statute authorizing the sale of the real estate of religious corporations upon the order of the chancellor, it cannot be said to be against public policy for such corporations to sell their real estate, for such sales are expressly permitted. Such sales are simply against public policy, unless authorized by the proper tribunal, in the same way that the sale of the lands of infants is against public policy, unless authorized by some court." Gallupville Reformed Church v. Schoolcraft, 65 N. Y. 135, 147.

33. See statutory provisions.

34. Manning v. Moscow Presb. Soc., 27 Barb. (N. Y.) 52; Albany South Baptist Soc. v. Clapp, 18 Barb. (N. Y.) 35; Matter of Canaan Second Baptist Soc., 20 HowPr (N. Y.) 324.

35. Sullivan v. Columbiana County Agricultural Soc., 23 OhNPNS 49.

36. Wheaton v. Gates, 18 N. Y. 395.

37. Albany South Baptist Soc. v. Clapp, 18 Barb. (N. Y.) 35; Madison Ave. Baptist Church v. Oliver St. Baptist Church, 26 N. Y. Super. 570, 1 AbbPrNS 214, 30 HowPr 455; Beth Elohim Cong. v. Central Presb. Church, 10 AbbPrNS (N. Y.) 484.

38. Feiner v. Reiss, 98 App. Div. 40, 90 NYS 568.

39. Muck v. Hitchcock, 212 N. Y. 283, 106 NE 75, AnnCas1915D 566.

[a] **Land in state owned by foreign religious corporation.**—The provision of the general corporation law that any foreign corporation may take by devise any real property situated within this state, and may hold the same for a period not exceeding five years from the time when the right to the possession thereof vests in such devisee, and may convey it by deed or otherwise in the same manner as a domestic corporation, does not require a foreign religious corporation to obtain permission from the court to sell its real property as required of domestic corporations by the above provision of the Religious Corporations Law. Muck v. Hitchcock, 212 N. Y. 283, 106 NE 75, AnnCas1915D 566.

40. See case infra this note.

[a] **Church on rollers.**—Sale of a church edifice on rollers ready to be moved off the church lot may be made by trustees of a religious corporation without securing sanction of court. Beach v. Allen, 7 Hun (N. Y.) 441.

41. See case infra this note.

[a] **Assignment for benefit of creditors.**—An assignment for benefit of creditors is not a sale within the meaning of the statute requiring concurrence of the court, inasmuch as the religious corporation making the assignment retains an interest in the property. De Ruyter v. St. Peter's Church, 3 N. Y. 238 (where, however, sanction of the court was sought and granted and its action approved on the assumption that the statute applied).

42. See case infra this note.

[a] **Separate agreement for re-**

corporation of its own property as distinguished from a conveyance by a corporation trustee to the beneficiary,[43] or by trustees of an unincorporated church to the church after it has been incorporated,[44] and only to a sale which the corporation has a legal right to make.[45] Where however the statutory consent of the congregation to a sale by the trustees of the corporation has not been obtained,[46] the sanction of the court has been held to cure the defect where the statute in express terms gives it that effect,[47] although in the absence of any such provision, the court has no jurisdiction to direct a sale which has not the consent of the congregation when the statute requires it.[48] The statute does not prohibit a religious corporation from making, without such consent, an executory contract of sale preliminary to conveyance; and it is sufficient if the consent be obtained after the contract, and before the time of conveying the property.[49]

[§ 144] **cc. Application—(aa) Who May Make.** In the absence of any restrictions upon their power in respect to such an application, or of any requirement that there should be a vote of the congregation to sanction their action, the vestry or trustees of a church may apply to the court to be allowed to sell or mortgage its real estate.[50] But a court has no jurisdiction to sanction the sale upon the application of a pewholder as pewholder,[51] or upon application of trustees where the consent of the lay members required by statute has not been obtained,[52] or of a faction of a church where neither the church corporation or its trustees have been made parties thereto.[53]

[§ 145] **(bb) Contents.** The application should state the reasons for the sale,[54] compliance with the statutory requirements as to authorization by the congregation,[55] when the property was acquired by the society if there is a contention that it was acquired before the statute requiring leave of court was enacted,[56] and the proposed application of the moneys arising therefrom.[57]

[§ 146] **dd. Objections to Order and Right To Intervene.** For sufficient reasons the court may withhold its assent and so prevent the sale or the proposed disposition of the proceeds,[58] but it has no power to order a sale or an application of the proceeds against the will of the petitioners.[59] It is not a sufficient reason for withholding assent that a sale of the church edifice will deprive a pewholder of his pew,[60] or that the proceeds of the sale are to be used for the payment of the corporation's debts,[61] the proceeds taking the place of the land,[62] or that the proceedings for the sale are to procure the use of the property for purposes which will be detrimental to the interests of an adjoining owner, in the absence of violation of a vested right.[63] But a sale or lease by a religious society will not be sanctioned if it violates vested rights of a third party,[64] not unless such rights are fully protected in the order directing the sale.[65] Nor can an adjoining owner, in the absence of violation of some vested right, intervene to oppose

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verter on breach of condition that premises conveyed by parent church to branch church should always be used for religious purposes, not itself a part of the deed but provided for in the agreement of sale, is not itself a sale requiring sanction of court separate and distinct from the sanction already given by the court to the sale, and the contention of the branch church that the agreement was void because of failure of court to sanction it, leaving it free to lease a part of the premises for business purposes was declared by the court to be unsound. Flatbush Second Reformed Protestant Dutch Church v. Flatbush Reformed Protestant Dutch Church, 220 App. Div. 244, 221 NYS 396 [aff 127 Misc. 498, 216 NYS 616].

43. Edelstein v. Hays, 50 Misc. 130, 100 NYS 403.

[a] **Trustee for purchaser.**—A religious corporation, to which are devised, under the residuary clause of a will, lands which the testatrix had, before her death, contracted to sell and convey, takes the legal title to such lands under the will merely as a trustee for the vendee, to whom it is bound to convey upon the vendee's performance of the contract; and leave of the court is not required to authorize a conveyance by the corporation to the vendee. Edelstein v. Hays, 50 Misc. 130, 100 NYS 403.

44. People's Sav. Bank, etc., Co. v. South Side Baptist Church, 220 Ky. 113, 294 SW 804; Nelson v. Monitor Cong. Church, 74 Or. 162, 145 P 37.

45. See cases infra this note.

[a] **Unauthorized sale.**—Under a statute prohibiting sales of real estate by a religious corporation except upon a consideration inuring to the corporation as such, the sanction of the court gives no validity to a sale upon a consideration inuring to the benefit only of individual members of the corporation. Madison Ave. Baptist Church v. Oliver St. Baptist Church, 73 N. Y. 82; Madison Ave. Baptist Church v. Oliver St. Baptist Church, 46 N. Y. 131; Wheaton v. Gates, 18 N. Y. 395.

[b] **Void sale.**—A sale by a religious corporation of an estate in reversion under a will is void under the champerty act when the land, subject of the conveyance, was at the time in adverse possession of another claiming title thereto, and being void, the sanction of the court under the statute will not validate it. Christie v. Gage, 71 N. Y. 189.

46. See supra § 132.

47. Re Wansley, 21 Ont. 34.

48. In re Louther Memorial M. E. Church, 22 Pa. Dist. 858, 40 Pa. Co. 611.

49. Bowen v. Irish Presb. Cong., 19 N. Y. Super. 245; Beth Elohim Cong. v. Central Presb. Church, 10 AbbPrNS (N. Y.) 484.

[a] **The better practice** is to negotiate and agree upon the terms of the sale first, and then lay the agreement before the court for its sanction. Madison Ave. Baptist Church v. Oliver St. Baptist Church, 26 N. Y. Super. 570, 1 AbbPrNS 214, 30 HowPr 455; Bowen v. Irish Presb. Church, 19 N. Y. Super. 245.

50. Madison Ave. Baptist Church v. Oliver St. Baptist Church, 46 N. Y. 131 [aff 31 N. Y. Super. 109, and dist Wyatt v. Benson, 23 Barb. 327]; Matter of St. Ann's Church, 23 How Pr (N. Y.) 285; Matter of Canaan Second Baptist Soc., 20 HowPr (N. Y.) 324.

51. Trinitarian Cong. Soc. v. Union Cong. Soc., 61 N. H. 384.

52. See supra § 143.

53. Cage v. Cansler, 119 Okl. 36, 248 P 612.

54. Madison Ave. Baptist Church v. Oliver St. Baptist Church, 26 N. Y. Super. 570, 1 AbbPrNS 214, 30 HowPr 455.

55. St. Joseph's Church's Pet., 29 Pa. Dist. 1084.

56. St. Joseph's Church's Pet., supra.

57. Madison Ave. Baptist Church v. Oliver St. Baptist Church, 26 N. Y. Super. 570, 1 AbbPrNS 214, 30 HowPr 455.

58. In re Saugerties Reformed Dutch Church, 16 Barb. (N. Y.) 237.

59. In re Saugerties Reformed Dutch Church, supra.

60. In re Saugerties Reformed Dutch Church, supra.

61. De Ruyter v. St. Peter's Church, 3 N. Y. 238.

62. In re Buffalo First Presb. Soc., 106 N. Y. 251, 12 NE 626.

63. In re Ash, 82 W. Va. 516, 96 SE 797.

64. Samples v. United Fuel Gas Co., 100 W. Va. 441, 130 SE 670.

65. See case infra this note.

[a] **Oil and gas leases.**—A religious society, through its trustees, executed a gas lease on property not used for church purposes without securing sanction of court. For many years it received money under the terms of the lease as delay rentals. During the term of that lease, the society received a more advantageous offer for an oil lease on the same property from another party. The society applied for sanction of court to the oil lease, repudiating the gas lease on ground that it had never been sanctioned by court. The court ordered a confirmation of the gas lease or a refund of the delay rentals received thereunder. Samples v. United Fuel Gas Co., 100 W. Va. 441, 130 SE 670.

For **later cases, developments** and **changes** in the law see **Annotations,** same title and section number.

the sale,[66] even though his title and the title to the church property are derived from a common source.[67] But where there are conflicting claims to the right of possession and control of church property, proceedings on application for its sale will be stayed until the claims are definitely determined.[68] Under statutes in some states,[69] the proceeding is ex parte and no provision is made for letting in anybody to defend,[70] and a claimant not being allowed to intervene, his rights will not be affected by any order or decree that may be made.[71]

[§ 147] **ee. Order of Court.** The granting of the order directing the sale or mortgage is discretionary with the court.[72] If the reasons stated are within the law and the application of proceeds proper, the court sanctions the agreement for the sale and directs a conveyance in pursuance of its terms,[73] or it authorizes the making of a mortgage free of the limitations placed upon the mortgaging power of the society by the church canons.[74] The order, if made, is permissive, not mandatory.[75] It usually directs the application of the proceeds,[76] but its failure to do so is no objection to its validity.[77] However, an order directing an application which the trustees are not legally authorized to make is void,[78] and will not legalize a distribution in accordance with its terms.[79]

[§ 148] **ff. Review.** The sanctioning order being discretionary with the court,[80] it will not be reviewed by the appellate court,[81] if based on facts before the court at the time the decision is made.[82] A decision based on facts not before the court is void,[83] even though the existence of facts which would have justified the decision is afterwards established by proof.[84]

[§ 149] **(4) Publication of Notice of Sale.** Statutory requirements for publication of the notice of sale of church property must be complied with,[85] and it has been held that publication in a daily paper for the required number of weeks before the sale is not a sufficient compliance with a statute requiring publication in a weekly paper,[86] even though in the particular instance publication in the daily paper is admittedly more effective advertising than publication in a weekly paper.[87]

[§ 150] **(5) Repudiation and Ratification.**[88] A religious corporation may repudiate an unauthorized conveyance,[89] even though the purchaser has paid the consideration and has been put in possession,[90] but must return to a purchaser in possession all he has paid upon faith of the supposed title.[91] On the other hand a religious society that has power to direct its trustees to sell or mortgage property has power to ratify irregular action taken by the trustees,[92] as where they acted without the direction or the assent of the society,[93] or where the meeting to authorize the trustees was called without proper notice.[94] Ratification in order to validate the sale must be by the church body which under the rules and discipline of the church has the power to convey.[95] Ratification need not be by a direct proceeding with an express intent to ratify, but may be effected indirectly, and by acts of recognition or acquiescence, or acts inconsistent with repudiation or disapproval,[96] as where the society accepts and retains the benefits of the unauthorized transaction,[97] or, in the case of a mortgage, pays the interest thereon.[98] Also a member of a congregation will be estopped to deny the regularity of the meeting called to authorize a deed by his own participation therein without objection,[99] and a parent church whose minister with its authority has confirmed the execution of a deed by trustees of a branch church cannot later deny its validity.[1] Ratification relates back to the date of execution of the deed if no rights have intervened which would be prejudiced thereby.[2]

[§ 151] **f. Construction and Operation of Conveyance[3]—(1) In General.** Both land and buildings are conveyed by a deed from a religious society referring to the subject of the conveyance as the entire property of the society, even though reference is made in another part of the conveyance to the building only.[4] Where a religious corporation conveys property to another by deed under which the grantee covenants that he will pay certain taxes and not convey to another except with the consent of the corporation, a reconveyance by the grantee with the grantor's consent by deed containing the same covenants is binding upon the second grantee, making him liable for the taxes of his predecessor in title still unpaid.[5] A conveyance of land by an incorporated association of churches to trustees appointed by the association for the establishment of a school does not operate to make the individual churches which are members of the association tenants-in-common of the school property so as to entitle a member church to petition for a partition of the school property.[6]

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[66] In re Ash, 82 W. Va. 516, 96 SE 797.

[67] In re Ash, supra.

[68] In re Westminster Presb. Church, 168 App. Div. 823, 154 NYS 361; In re Westminster Presb. Church, 137 App. Div. 301, 121 NYS 1039.

[69] See statutory provisions.

[70] In re St. Michael's Church, 76 N. J. Eq. 524, 74 A 491.

[71] In re St. Michael's Church, 76 N. J. Eq. 524, 74 A 491.

[72] Giffen v. Christ's Church, 48 Cal. A. 151, 191 P 718; In re Buffalo First Presb. Soc., 106 N. Y. 251, 12 NE 626.

[73] Madison Ave. Baptist Church v. Oliver St. Baptist Church, 26 N. Y. Super. 570, 1 AbbPrNS 214, 30 HowPr 455.

[74] In re St. Mary's Immaculate Conception Greek Catholic Church, 296 Pa. 307, 145 A 862; In re St. Joseph's Lithuanian Roman Catholic Church, 273 Pa. 486, 117 A 216.

[75] Giffen v. Christ's Church, 48 Cal. A. 151, 191 P 718; Bowen v. Irish Presb. Church, 19 N. Y. Super. 245.

[76] Matter of Church of Messiah, 12 NYS 489, 25 AbbNCas 354.

[77] Madison Ave. Church v. Oliver St. Baptist Church, 26 N. Y. Super. 570, 1 AbbPrNS 214, 30 HowPr 455; Matter of Brick Presb. Church, 3 Edw. (N. Y.) 155.

[78] See case infra this note.

[a] **Distribution among pewholders.**—An order directing distribution of the proceeds of the sale of a church property among pewholders is void inasmuch as it disregards the interests of the society as an organization and its right to continue its existence for the purposes of its creation. Wheaton v. Gates, 18 N. Y. 395.

[79] Wheaton v. Gates, 18 N. Y. 395.

[80] See supra § 147.

[81] In re Buffalo First Presb. Soc., 106 N. Y. 251, 12 NE 626.

[82] See cases infra notes 83, 84.

[83] Madison Ave. Baptist Church v. Oliver St. Baptist Church, 73 N. Y. 82 [mod 41 N. Y. Super. 369].

[84] Madison Ave. Baptist Church v. Oliver St. Baptist Church, supra.

[85] Re East Presb. Church, 16 Ont. 30.

[86] Re East Presb. Church, supra.

[87] Re East Presb. Church, supra.

[88] **Rescission** see supra § 139.

[89] Macon, etc., R. Co. v. Riggs, 87 Ga. 158, 13 SE 312; Madison Ave. Baptist Church v. Oliver St. Baptist Church, 73 N. Y. 82.

[90] Madison Ave. Baptist Church v. Oliver St. Baptist Church, supra.

[91] Madison Ave. Baptist Church v. Oliver St. Baptist Church, supra.

[92] Scott v. Jackson First Free Methodist Church, 50 Mich. 528, 15 NW 891; East Norway Lake Church v. Froislie, 37 Minn. 447, 35 NW 260.

[93] Scott v. Jackson First Free Methodist Church, 50 Mich. 528, 15 NW 891.

[94] East Norway Lake Church v. Froislie, 37 Minn. 447, 35 NW 260.

[95] Grupe v. Rudisill, 101 N. J. Eq. 145, 136 A 911.

[96] Scott v. Jackson First Free Methodist Church, 50 Mich. 528, 15 NW 891; McCallister v. Ross, 155 Mo. 87, 55 SW 1027; Lafayette St. Church Soc. v. Norton, 202 N. Y. 379, 95 NE 819, 39 LRANS 906.

[97] Love v. Metropolitan Church Assoc., 184 Ill. A. 102; Page v. Asbury M. E. Church, 78 N. J. Eq. 114, 78 A 246; Roundtree v. Blount, 129 N. C. 25, 39 SE 631; French v. Barre, 58 Vt. 567, 5 A 568.

[98] Page v. Asbury M. E. Church, 78 N. J. Eq. 114, 78 A 246.

[99] Applequist v. Swedish Evangelical Lutheran Gethsemane Church, 154 Wash. 351, 282 P 224.

[1] Board of Parent Ministry v. Bohon, 192 Ky. 285, 233 SW 721.

[2] Scott v. Jackson First Free Methodist Church, 50 Mich. 528, 15 NW 891.

[3] **Conveyances to religious society** see supra §§ 98–121.

[§ 152] **(2) Breach of Condition Subsequent and Remedies Therefor.** A condition in a deed from a religious society as grantor that the grantee will use the property for religious instruction is broken upon abandonment of religious for secular instruction,[7] and a condition requiring instruction in the denominational faith of the grantor is broken by an abandonment of denominational for instruction in a form of general evangelical christianity.[8] A covenant by grantee in deed from a church to continue a school is not broken by sale of the land and removal of the school to other property,[9] so that the consent of the original grantor to a sale of the land by the grantee is not a waiver of its right to enforce the grantee's liability for the subsequent breach of his covenant.[10] Title on breach of condition contained in a deed from the trustees of a religious society as grantors reverts to the trustees of that society or their successors and not to the trustees of another affiliated society.[11] When a religious society conveys property to another on condition that its present use will be continued by the grantee and that if such use shall at any time be discontinued, the property shall revert to the grantor or a payment of a fixed sum in lieu thereof shall be made by the grantee at his option, the grantee upon breach of condition and refusal to return the property or pay the money, becomes liable to the grantor in an action to recover the money,[12] which liability accrues within the meaning of the statute of limitations not when the grantee committed the breach of condition, but when he disavowed any intention to return the property and denied the alternative obligation to pay the money.[13]

[§ 153] **3. Diversion[14]—a. In General.** Property or funds held by a religious society, or its officers, in trust for certain specified purposes cannot be diverted to any other use,[15] as from religious to secular uses;[16] from denominational control to control by others outside of the denomination;[17] from one branch to another branch of the same denomination, the two branches holding different doctrines;[18] from a free church to a church under denominational control;[19] from a particular church, entitled under the terms of the trust deed to the entire property, to a group of churches of which the original beneficiary is one, all sharing in the fund;[20] from a managing board of a particular church, constituted as provided for by the church law and as referred to in the deed of trust, to a board enlarged by methods in violation of the church constitution;[21] from a permanent fund for the support of the ministry at a particular place established by irrevocable gifts of subscribers to a fund of fluctuating amount diminished by the return to subscribers of amounts contributed by them.[22] But where the terms of the trust place the control of the church property in the majority of the congregation without denominational restrictions, there is no diversion involved in the majority going from one denomination to another and carrying the church property with them.[23] Conversion of trust property is not diversion, necessarily,[24] and trustees of church property, even though held on special trusts, may sell it free of trust when such sale is in furtherance of the purposes of the trust, and with the proceeds buy other property and hold it subject to the trust, provided there is nothing in the deed of trust prohibiting such conversion.[25]

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[4] Stanley v. Glennville, 140 Ga. 306, 78 SE 1064.

[5] Silver Lake Assembly v. Hard, 132 App. Div. 475, 116 NYS 1061.

[6] Spring Green Church v. Thornton, 158 N. C. 119, 73 SE 810.

[7] Lowrey v. Hawaii, 215 U. S. 554, 30 SCt 209, 54 L. ed. 325; Lowrey v. Hawaii, 206 U. S. 206, 27 SCt 622, 51 L. ed. 1026.

[8] Lowrey v. Hawaii, 215 U. S. 554, 30 SCt 209, 54 L. ed. 325; Lowrey v. Hawaii, 206 U. S. 206, 27 SCt 622, 51 L. ed. 1026.

[9] St. Basil Community of Priests v. Byrne, (Tex. Civ. A.) 236 SW 1016.

[10] St. Basil Community of Priests v. Byrne, supra.

[11] Stanley v. Glennville, 140 Ga. 306, 78 SE 1064.

[12] Lowrey v. Hawaii, 206 U. S. 206, 27 SCt 622, 51 L. ed. 1026.

Breach of condition by religious society see supra § 121.

[13] Lowrey v. Hawaii, 215 U. S. 554, 30 SCt 209, 54 L. ed. 325.

[14] **Diversion of property as ground for equitable relief** see infra §§ 161, 162.

[15] Ga.—Mack v. Kime, 129 Ga. 1, 58 SE 184.

Ill.—Brunnenmeyer v. Buhre, 32 Ill. 183.

La.—In re Immanuel Presb. Church, 112 La. 348, 36 S 408.

Md.—Baltimore Second Universalist Soc. v. Dugan, 65 Md. 460, 5 A 415.

N. J.—Holmes v. Wesley M. E. Church, 58 N. J. Eq. 327, 42 A 582.

N. Y.—Field v. Field, 9 Wend. 394.

Oh.—Mannix v. Purcell, 46 Oh. St. 102, 19 NE 572, 2 LRA 753, 15 Am SR 562.

Tex.—Clark v. Brown, (Civ. A.) 108 SW 421 [rev on other grounds 102 Tex. 323, 116 SW 360, 24 LRA NS 670].

Wis.—Cape v. Plymouth Cong. Church, 130 Wis. 174, 109 NW 928; Franke v. Mann, 106 Wis. 118, 81 NW 1014, 48 LRA 856.

[16] Chicago First M. E. Church v. Dixon, 178 Ill. 260, 52 NE 887 [rev 77 Ill. A. 166]; Scott v. Stipe, 12 Ind. 74.

[17] Baptist City Mission Soc. v. People's Tabernacle Cong. Church, 64 Colo. 574, 174 P 1118.

[a] **For Lutheran school.**—No portion of land, conveyed in trust for the erection of a church and academy, for the benefit of a Lutheran congregation, could be transferred to others than Lutherans for an academy. Busby v. Mitchell, 23 S. C. 472.

[18] Park v. Chaplin, 96 Iowa 55, 64 NW 674, 59 AmSR 353, 31 LRA 141; Kinkead v. McKee, 9 Bush (Ky.) 535.

[19] Stokes v. Dale, 14 NYSt 901.

[20] Orford Union Cong. Soc. v. West Cong. Soc., 55 N. H. 463; Hendrickson v. Shotwell, 1 N. J. Eq. 577; Ex p. Shoup, 9 Oh. Dec. (Reprint) 648, 16 CincLBul 71.

[21] Watson v. Avery, 2 Bush (Ky.) 332.

[22] Langdon v. Plymouth Cong. Soc., 12 Conn. 113.

[23] Gram v. Prussia Emigrated Evangelical Lutheran German Soc., 36 N. Y. 161, 3 Transcr. A. 339.

[24] See Trusts [39 Cyc 346].

[§ 154] **b. Statutes Authorizing Change in Use.** A diversion of trust property cannot be legalized by statute.[26] But the constitutionality of a statute authorizing certain persons named as individuals, who are trustees of a religious corporation but not so described in the statute, to make a use of the corporate property not hitherto authorized, cannot be raised in an action to which the corporation, but not the trustees individually, are made parties.[27] A statute amending the charter or enlarging the powers of a religious corporation, or authorizing a change of use, is not a diversion of property given in trust for the use of the corporation,[28] or on terms so flexible as to be coterminous with its powers.[29] Nor is a statute authorizing a change in the use of the property a diversion where the trust is itself the creature of statute,[30] or of a deed or will subjecting it to legislative control.[31] Nor are surplus funds of a religious corporation diverted by the statutory authorization of their use for purposes other than those provided for in the original charter, where the original purposes of the trust fund have been realized and no diversion of funds from those purposes is involved.[32]

[§ 155] **c. Change of Doctrine and Discipline—(1) By Majority of Trustees or Church Members—(a) In General.** The scope of the restrictions upon the power of the constituted authorities or of the majority of the church members to change their faith and take the church property with them is determined by the terms of the church constitution or of the trust under which the property is held.[33] Where no breach of agreement or trust is involved in a division of church membership, both majority and minority adhering to the faith, a division of the property on equitable principles is generally made.[34]

[§ 156] **(b) In Violation of Compact or Trust.** Where a church has adopted adherence to a particular faith or a form of church government requiring adherence as the basis of its organic law, or where its property is held on trusts or conditions requiring such adherence, the constituted authorities, or the majority of a church, who change its doctrines and discipline by abandoning the adopted faith, either becoming independent or uniting with another denomination, cannot take with them the trust property of the church, and the right to use such property remains in those who adhere to the original doctrine and discipline, no matter how small in number they may be.[35] A fortiori, where the majority adhere to the old faith, a seceding minority cannot lawfully take possession of the property and exclude the majority,[36] unless they can prove that in fact they are the adherents and that the majority are the secessionists.[37] Where the church constitution or the trust under which its property is held requires merely adherence to a particular faith but not subjection to any particular synod or judicatory, the majority of a church which has the congregational type of government may change its synod connections without forfeiture of property rights, provided only they adhere to the faith.[38] They may even differ from the minority as to the interpretation of certain provisions in the articles of faith and follow their own interpretation in the use of the property without forfeiting their rights in it so long as they do not depart from the characteristic doctrines and practices of the adopted faith of the church.[39] And judicatories of the same faith may unite and take their property into the consolidated body, where their constitutions permit it,[40] but they cannot go beyond their constitutional powers.[41] Where neither constitutional nor trust restrictions impose upon the society any obligation to maintain a particular faith or form of worship,[42] or particular denominational connections,[43] or where the church is independent and the connection between church and synod is merely voluntary,[44] the majority of the trustees or church members may change its faith or its church connections and take the church property with them,[45] but in such case as between two factions of a church membership, one continuing the organization and its activities and the other withdrawing and disbanding, the former is entitled to the property, regardless of its numbers, and the faction which has withdrawn and disbanded, cannot by later reorganizing and claiming to be the majority of the original group take over the property.[46] Even where a church has established and maintained its synodical connections under a trust or constitutional obligation and does not claim independence, the majority may determine to which one of two conflicting judicatories it will adhere without forfeiture of its property.[47]

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[25] Kilpatrick v. Graves, 51 Miss. 432; In re Buffalo First Presb. Soc., 106 N. Y. 251, 12 NE 626; Burton's App., 57 Pa. 213; Griffitts v. Cope, 17 Pa. 96; Cushman v. Church of Good Shepherd, 14 Pa. Co. 26; Hardy v. Wiley, 87 Va. 125, 12 SE 233.

[26] Baker v. Ducker, 79 Cal. 365, 21 P 764.

Constitutionality of statute impairing vested rights see Constitutional Law § 486.

[27] Davis v. Syracuse First Cong. Soc., 65 N. Y. 278.

[28] Atty.-Gen. v. Society for Relief of Elderly, etc., Ministers, etc., 31 S. C. Eq. 604.

[29] Cincinnati M. E. Church v. Gamble, 26 Oh. Cir. Ct. 295.

[a] **Trust for specific and general purposes of church.**—A statute empowering church trustees to sell real estate which had been conveyed to them in trust for burial purposes "and for any other purposes for the benefit of said church," and apply the proceeds for the use of one of its colleges, is not a diversion but a use well within the terms of the original trust. Methodist Episcopal Church v. Gamble, 26 Oh. Cir. Ct. 295.

[30] Atty.-Gen. v. Society for Relief of Elderly, etc., Ministers, etc., 31 S. C. Eq. 604.

[31] Atty.-Gen. v. Society for Relief of Elderly, etc., Ministers, etc., supra.

[32] Atty.-Gen. v. Society for Relief of Elderly, etc., Ministers, etc., supra.

[33] See infra §§ 156–159.

[34] See infra § 169.

[35] See cases infra this note.

[a] **Held diversion by majority** where property is held by: (1) Baptist church which had adopted articles of faith and rules of decorum as its constitution and the law of its existence. Smith v. Pedigo, 145 Ind. 361, 33 NE 777, 44 NE 363, 19 LRA 433, 32 LRA 838. (2) Baptist church which had dedicated its property to be used as a place of worship in accordance with the teachings, doctrines and faith of the baptist denomination. Mt. Helm Baptist Church v. Jones, 79 Miss. 488, 30 S 714. (3) Christian church of McGregor, adhering to fundamental principles, usages and customs of the Disciples of Christ in Texas. Peace v. McGregor First Christian Church, 20 Tex. Civ. A. 85, 48 SW 534. (4) Church of God, adhering to religious principles and government of the Eldership of the Church of God in North America. Winebrenner v. Colder, 43 Pa. 244. (5) Local Church of God in Christ subject to national Church of God in Christ. Britton v. Jackson, 31 Ariz. 97, 250 P 763. (6) Elders of Zion's church, for the only use as a church and controlled by the evangelical lutheran church of the Holston synod. Rodgers v. Burnett, 108 Tenn. 173, 65 SW 408. (7) German evangelical reformed church, associated to worship according to faith and discipline of German evangelical reformed church of United States and subject to control of the synod of that church. Schnorr's App., 67 Pa. 138, 5 AmR 415. (8) German reformed church, consecrated for religious service in accordance to the order, discipline and faith of the German reformed church of the United States. Roshi's App., 69 Pa. 462, 8 AmR 275. (9) Methodist protestant church in trust for the sole and exclusive benefit of the religious congregation of regular, orthodox methodist protestants at Heathsville. Finley v. Brent, 87 Va. 103, 12 SE 228, 11 LRA 214. (10) Presbyterian church which adhered to the presbyterian faith and had placed itself in subordination to the presbytery, synod and general assembly of that denomination. Iowa City First Constitutional Presb. Church v. Congregational Soc., 23 Iowa 567; Louisville First Presb. Church v. Wilson, 14 Bush (Ky.) 252. (11) Presbyterian church in connection with the free church of Scotland. Atty.-Gen. v. Christie, 13 Grant Ch. (Ont.) 495. (12) Primitive methodist society in trust for denominational purposes. Cape v. Plymouth Cong. Church, 130 Wis. 174, 109 NW 928. (13) Protestant dissenters "for the worship and service of God." Atty.-Gen. v. Pearson, 3 Meriv. 353, 36 Reprint 135. (14) Protestant episcopal church for worship according to the order of the protestant episcopal church in the United States. Merriweather v. Petit, 10 Ky. Op. 113. (15) Reformed church, in accordance with the confessions of faith known as the Heidelberg catechism. Baker v. Ducker, 79 Cal. 365, 21 P 764. (16) Roman catholic church which had placed itself under the authority of the archbishop and had submitted itself to his authority in all ecclesiastical matters. Dochkus v. Lithuanian Ben. Soc., 206 Pa. 25, 55 A 779. (17) Third reformed Dutch church of Philadelphia, adhering to and maintaining the faith and discipline of the reformed Dutch church of North America. Jones v. Wadsworth, 11 Phila. (Pa.) 227. (18) Trinity evangelical church subject to discipline, usage and ministerial appointments of evangelical association of North America. Garrett v. Nace, 5 Pa. Super. 475. (19) Trustees of associate congregation of Pleasant Divide, subordinate to the associate presbytery and synod. McBride v. Porter, 17 Iowa 203. (20) Trustees of methodist episcopal church, South, for the use of the colored members of that church. Godfrey v. Walker, 42 Ga. 562. (21) Trustees of a methodist episcopal church with power to B to nominate a minister, provided, however, that such minister should preach the doctrines of Mr. Wesley. Combe v. Brazier, 2 S. C. Eq. 431. (22) United Greek catholic church adhering to the Roman catholic faith and acknowledging the supremacy of the pope, but conducting services in the Slavonic instead of the Latin language. Greek Catholic Church v. Orthodox Greek Church, 195 Pa. 425, 46 A 72.

[36] Bates v. Houston, 66 Ga. 198; McAuley's App., 77 Pa. 397.

[37] McAuley's App., supra.

[§ 157] **(c) In Violation of Charter or Statute.** Where land is held by an incorporated parish for the support of public worship without regard to any particular faith,[48] or by an incorporated society free of denominational control,[49] a change of faith and appropriation of the church property for worship under the new tenets by the majority of the congregation or corporation is not a diversion in the absence of special trust requirements holding the property to the old faith.[50] But where under the statute, the incorporated society holds its property subject to denominational control of the church with which it is connected,[51] or for the support of a particular faith but independent of synodical control,[52] a majority of the corporate members cannot divert the property to other uses opposed to the denomination or the faith which the corporation was created to support.[53]

[§ 158] **(2) Under Authority of Superior Judicatory.** A church which by trust obligation or by its constitution is subject to the ecclesiastical authority of a superior judicatory may accept such changes of faith and discipline as are made or authorized by the judicatory and continue to hold their property thereafter subject to the new faith and discipline,[54] provided the superior judicatory itself had authority to make the change.[55] The unlawful change of the constitution and confession of faith by the superior judicatory does not authorize a new use of its property by the individual church. In such case those who adhere to the original constitution and confession of faith are entitled to the use of the property.[56] This question does not arise with reference to the property of a church which has adopted an independent form of church government and where the association or council or conference or convention of churches in the denomination functions merely in an advisory capacity.[57]

[§ 159] **(3) Materiality.** To constitute a diversion of church property, a change in the doctrine which the church is obligated by trust or its constitution to maintain must materially affect some fundamental belief in the confession of faith.[58] Such a

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38. Windley v. McCliney, 161 N. C. 318, 77 SE 226; Trexler v. Mennig, 2 WklyNC 677.

39. Mitchell v. Mt. Olive Church of Christ, (Ala.) 128 S 781.

40. Mack v. Kime, 129 Ga. 1, 58 SE 184.

41. Clark v. Brown, (Tex. Civ. A.) 108 SW 421 [rev on other grounds 102 Tex. 323, 116 SW 360, 24 LRANS 670].

42. U. S.—Brundage v. Deardorf, 92 Fed. 214, 34 CCA 304.

Ky.—Harper v. Straws, 14 B. Mon. 48.

Mich.—Wilson v. Livingstone, 99 Mich. 594, 58 NW 646.

N. Y.—Watkins v. Wilcox, 66 N. Y. 654 [aff 4 Hun 220, 6 Thomps. & C. 539]; Miller v. Gable, 2 Den. 492.

N. C.—Organ Meeting House v. Seaford, 16 N. C. 453.

43. Ill.—Lawson v. Kolbenson, 61 Ill. 405.

Ky.—Gartin v. Penick, 5 Bush 110; Harper v. Straws, 14 B. Mon. 48.

Minn.—Schradi v. Dornfeld, 52 Minn. 465, 55 NW 49.

N. Y.—Burrel v. Seneca Associate Reformed Church, 44 Barb. 282.

Pa.—Pine Hill Lutheran Cong. v. St. Michael's Evangelical Church, 48 Pa. 20; Suter v. Spangler, 4 Phila. 331.

44. Miller v. Gable, 2 Den. (N. Y.) 492; Heckman v. Mees, 16 Oh. 583.

45. See cases supra notes 42–44.

46. Harper v. Straws, 14 B. Mon. (Ky.) 48.

47. English Presb. Cong. v. Johnston, 1 Watts & S. (Pa.) 9.

48. Atty.-Gen. v. Federal St. Meeting-House, 3 Gray (Mass.) 1.

49. Ruhbush v. Buss, 184 Wis. 439, 198 NW 608.

[a] **Under early New York statute** (1) land was held by trustees for the incorporated society free of denominational control. Gram v. Prussia Emigrated Evangelical Lutheran German Soc., 36 N. Y. 161; Petty v. Tooker, 21 N. Y. 267; Robertson v. Bullions, 11 N. Y. 243; Burrel v. Seneca Associate Reformed Church, 44 Barb. 282; Kniskern v. Lutheran Churches, 1 Sandf. Ch. 439. (2) This rule was later changed by statute. See cases infra note 51.

50. See cases supra notes 48, 49.

51. Westminster Presb. Church v. New York Presbytery, 142 App. Div. 855, 127 NYS 836 [app dism 202 N. Y. 581 mem, 96 NE 1134 mem]; Isham v. Dunkirk First Presb. Church, 63 HowPr (N. Y.) 465.

52. Delhi First Evangelical Lutheran Cong. v. Mommsen, 174 Minn. 215, 219 NW 91; Rock Dell Norwegian Evangelical Lutheran Cong. v. Mommsen, 174 Minn. 207, 219 NW 88; Lindstrom v. Tell, 131 Minn. 203, 154 NW 969; Application of Lloyd's Memorial Cong. Church, 178 NYS 104.

53. See cases supra notes 51, 52.

54. U. S.—Brundage v. Deardorf, 92 Fed. 214, 34 CCA 304.

Ark.—Sanders v. Baggerly, 96 Ark. 117, 131 SW 49.

Cal.—Horsman v. Allen, 129 Cal. 131, 61 P 796.

Ind.—Ramsey v. Hicks, 174 Ind. 428, 91 NE 344, 92 NE 164, 30 LRANS 665.

Ky.—Wallace v. Hughes, 131 Ky. 445, 115 SW 684; Gibson v. Armstrong, 7 B. Mon. 481.

Mo.—Hayes v. Manning, 263 Mo. 1, 172 SW 897.

Oh.—Griggs v. Middaugh, 10 Oh. Dec. (Reprint) 643, 22 CincLBul 367.

Pa.—Nagle v. Miller, 275 Pa. 157, 118 A 670; McGinnis v. Watson, 41 Pa. 9 [foll Ramsey's App., 88 Pa. 60].

Tenn.—Rodgers v. Burnett, 108 Tenn. 173, 65 SW 408.

Tex.—Clark v. Brown, (Civ. A.) 108 SW 421 [rev 102 Tex. 323, 116 SW 360, 24 LRANS 670].

55. See cases infra note 56.

56. Bear v. Heasley, 98 Mich. 279, 57 NW 270, 24 LRA 615 [foll Lemp v. Raven, 113 Mich. 375, 71 NW 627].

57. Jarrell v. Sproles, 20 Tex. Civ. A. 387, 49 SW 904.

58. See cases infra this section.

change will not be inferred necessarily from the dismissal of one minister and the employment of another,[59] or by permitting a low-church episcopalian rector, degraded from the ministry by the high-church bishop, to continue in his office where it was shown that the property was held under no special trust, and that contributions had been made with the understanding that the church, which was low-church, should be independent of the control of the high-church bishop.[60] A diversion of property is not necessarily to be inferred from a mere change in the name of the church,[61] especially where it appears that the name used in the deed creating the trust was a misnomer,[62] or by mere alterations in expression or fuller and clearer statements of doctrine in the confession of faith,[63] or by incorporating into the confession of faith of a church the doctrines previously contained in its discipline to which all members must have subscribed before they became members,[64] or from a mere difference of opinion between factions as to the manner in which confessions of sins should be made where it appeared that both factions admitted that confession of sins is necessary as a condition precedent to the reception of the sacrament of the Lord's Supper,[65] or by the teaching of "absolute predestination" or of "limited predestination" in a primitive baptist church, where it appeared that those learned in the doctrine of the church disagreed as to whether God predestined all things which happen or only those things which come to pass with reference to the salvation of souls.[66]

[§ 160] **d. Right To Claim Diversion as Ground of Forfeiture.** Even though a congregation has forfeited its rights to trust property by a change of ecclesiastical connection, that fact cannot be taken advantage of by former members of the congregation who have abandoned their claim to the property, withdrawn and built a new church for themselves.[67] Nor can a lessee of a religious society set up a change of doctrine as a defense in an action by the society against him to recover the rent.[68] Nor in the case of a remainder in fee devised to the rector and wardens of a certain church and their successors and which had vested in them, can a stranger in possession take advantage of the fact that the church had changed its discipline and form of worship, when the church after the death of the life tenant brings an action to oust him.[69]

[§ 161] **e. Protection and Enforcement of Trust—(1) In General.** A court of equity will aid the lawfully elected trustees of a religious society in the administration of their trust by compelling a conveyance to them of the legal title to the property,[70] and by protecting them from threatened interference with the use of the church property,[71] where the threatened interference would constitute a serious or irreparable injury.[72] Conversely equity may be resorted to for the purpose of compelling the trustees, or other officers holding property or funds of the society in trust, to use and apply such property and funds to the purpose for which the trust was created and of restraining them from applying the property to other purposes,[73] unless the action is barred by some statute of limitations.[74] Nor does a statute which authorizes the members of churches to remove refractory trustees[75] oust the jurisdiction of a court of equity.[76] But to justify the court's interposition, it is necessary to show the creation of a valid trust,[77] the existence of the terms of the trust as alleged,[78] and a real and substantial departure from the purposes thereof,[79] which, in the case of long-continued acquiescence in the present application of trust funds, must be established by proof sufficient to rebut the presumption of legality raised thereby.[80] Where discretion is vested in trustees as to the distribution of a trust fund, or the income thereof, the court will not interfere so long as it is honestly exercised.[81]

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[59] Fadness v. Braunborg, 73 Wis. 257, 41 NW 84.

[60] Calkins v. Cheney, 92 Ill. 463.

[61] Church of Christ v. Hammond Christian Church, 193 Ill. 144, 61 NE 1119.

[62] Church of Christ v. Hammond Christian Church, supra.

[63] Itter v. Howe, 23 Ont. A. 256; Dorland v. Jones, 12 Ont. A. 543.

[a] **"The fall of Adam."**—There is no change in doctrine amounting to a diversion of property involved in changing the confession of faith so that it reads in place of "the fall of Adam" as follows, "that man is fallen from original righteousness, and, apart from the grace of our Lord Jesus Christ, is not only destitute of holiness, but is inclined to evil and only evil and that continually." Itter v. Howe, 23 Ont. A. 256, 261.

[64] Philomath College v. Wyatt, 27 Or. 390, 31 P 206, 37 P 1022, 26 LRA 68.

[65] Schradi v. Dornfeld, 52 Minn. 465, 55 NW 49.

[66] Bennett v. Morgan, 112 Ky. 512, 66 SW 287, 23 KyL 1824.

[67] Pine Hill Lutheran Cong. v. St. Michael's Evangelical Church, 48 Pa. 20.

[68] Swedish Evangelical Lutheran Church v. Shivers, 16 N. J. Eq. 453.

[69] King's Chapel v. Pelham, 9 Mass. 501.

[70] See case infra this note.

[a] **To overseers of a monthly meeting.**—A court of equity has jurisdiction to compel a conveyance to overseers of a quaker's monthly meeting of real and personal property held by persons who are not such overseers, but who hold it in trust for such monthly meeting. Earle v. Wood, 8 Cush. (Mass.) 430.

[71] Ky.—Curd v. Wallace, 7 Dana 190, 32 AmD 85.

La.—Lafayette German Evangelical Cong. v. Pressler, 17 La. Ann. 127.

N. Y.—Reis v. Rohde, 34 Hun 161.

Wis.—Lutheran Evangelical Church v. Gristgau, 34 Wis. 328; New Elm German Evangelical Cong. v. Hoessli, 13 Wis. 348.

Can.—Dorland v. Jones, 12 Ont. A. 543 [rev 7 Ont. 17].

[72] See cases infra this note.

[a] **A trespass upon a burying ground** for the purpose of making burials, and which constitutes no serious or irreparable injury, is not ground for the interposition of a court of equity. Miller v. English, 6 N. J. Eq. 304.

[b] **Removal of memorial windows.**—Equity will not enjoin the destruction of a church by the vestrymen because of interference with memorial windows, where it is shown that it is their intention to remove certain memorial windows, and place them in a new church to be built at another place. Cushman v. Church of Good Shepherd, 188 Pa. 438, 41 A 616.

[73] Ill.—Nelson v. Benson, 69 Ill. 27; Brunnenmeyer v. Buhre, 32 Ill. 183; Tomlin v. Blunt, 31 Ill. A. 234.

Ind.—Perry v. McEwen, 22 Ind. 440; Scott v. Stipe, 12 Ind. 74.

Mass.—Weld v. May, 9 Cush. 181; Fisher v. Ellis, 3 Pick. 322.

Nebr.—Avery v. Baker, 27 Nebr. 388, 43 NW 174, 20 AmSR 672.

N. H.—Hale v. Everett, 53 N. H. 9, 16 AmR 82.

N. J.—Holmes v. Wesley M. E. Church, 58 N. J. Eq. 327, 42 A 582; Whitecar v. Michenor, 37 N. J. Eq. 6.

N. Y.—Robertson v. Bullions, 9 Barb. 64 [aff 11 N. Y. 243]; Voorhees v. Amsterdam Presb. Church, 8 Barb. 135, 5 HowPr 58 [aff 17 Barb. 103]; People v. Connelly, 3 NYSt 372; Isham v. Fullager, 14 AbbNCas 363; Isham v. Dunkirk First Presb. Church, 63 HowPr 465; Miller v. Gable, 2 Den. 492 [aff 10 Paige 627]; Hartford First Baptist Church v. Witherell, 3 Paige 296, 24 AmD 223; Kniskern v. Lutheran Churches, 1 Sandf. Ch. 439; Bowden v. McLeod, 1 Edw. 588.

Pa.—Skilton v. Webster, Brightly 203; Christ Church v. Holy Communion Church, 14 Phila. 61.

S. C.—Wilson v. John's Island Presb. Church, 19 S. C. Eq. 192.

Eng.—Shore v. Wilson, 9 Cl. & F. 355, 8 Reprint 450.

Ont.—Brewster v. Hendershot, 27 Ont. A. 232; Sanson v. Mitchell, 6 Grant Ch. 582.

[74] See case infra this note.

[a] **Limitations.**—Where there is no statute of limitations applicable to such action, the open and adverse use of church property for a form of worship other than that for which it is held in trust for twenty years or more bars a suit in equity to enforce the trust. Atty.-Gen. v. Federal St. Meeting House, 3 Gray (Mass.) 1.

[75] See statutory provisions.

[76] Brunnenmeyer v. Buhre, 32 Ill. 183.

[77] Follett v. Badeau, 26 Hun (N. Y.) 253.

[78] See case infra this note.

[§ 162] **(2) Determination of Rights of Contesting Church Factions.** Where a dispute between church factions involves only title to office, quo warranto and not an action in equity is the proper remedy,[82] but where the proper use of church property is involved, equity will take jurisdiction and protect the party entitled to possession, regardless of whether it constitutes a majority or minority.[83] As in the case of an alleged diversion by trustees,[84] a substantial departure from the purposes of the trust must be shown before equity will interfere.[85] On proof that proper grounds therefor exist, an equity court will restrain the violation of a charter of the society by a majority of the corporation,[86] enjoin the unauthorized interference with the church property by a faction which refuses to abide by proper adjudications of the duly authorized church tribunals,[87] restrain one of two congregations jointly using a church edifice from introducing a sabbath school into the church without the consent of the other congregation,[88] or decree a division of the property of an independent church organization which is split by irreconcilable differences,[89] but a court of equity will not partition property owned by two religious societies as tenants-in-common, a petition at law for a partition being the proper remedy.[90] Where a religious society holds land in fee, subject to no use except its general purposes, the majority may control the use of it at their pleasure, and no supposed error of doctrine will authorize the interference of a court of equity.[91] In such case, the court will do no more than award the possession of the property to the legal board of trustees in whom the title is vested.[92]

[§ 163] **4. Division, Schism, and Secession—a. Definitions.** In a broad sense, division of a religious society means its separation into parts. But the fact always is that either the parts, separating from each other, remain in the society, or one part withdraws, separating itself from the society as effectually as if it had been expelled. When members of the two factions retain their membership in the society, there is said to be either a division or schism. Schism is a separation into parts occasioned by diversity of opinion; division, used in its stricter sense, imports no more than a separation without any change of faith or ulterior relations. Where a part withdraws from the society entirely, reducing its membership ipso facto, the act is called secession.[93]

[§ 164] **b. Effect in General.** Speaking generally and without regard to particular issues of doctrine and of possible breach of trust or condition involved,[94] the separation or secession of part of the members from a church does not destroy the identity of the church nor lessen the rights of those adhering to the organization,[95] even though the minis-

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[a] **Necessity of synodical connection** is not established by proof of a trust to maintain merely a spiritual connection. Suter v. Spangler, 4 Phila. (Pa.) 331.

79. Miller v. Gable, 2 Den. (N. Y.) 492; Ehrenfeldt's App., 101 Pa. 186; Fadness v. Braunborg, 73 Wis. 257, 41 NW 84; Itter v. Howe, 23 Ont. A. 256.

[a] **Building church on parsonage land.**—It is not a breach of trust to build a church on part of a lot of land purchased by the society for a parsonage. Sanders v. Meredith, 78 W. Va. 564, 89 SE 733.

[b] **Removing church to other land** is not a breach of trust on which the land was conveyed to the society where the only restriction was that the grantee should not sell the land without the consent of the grantor and where the society was retaining the land for the parsonage. King v. Lee, 282 Ill. 530, 118 NE 724.

[c] **Temporarily uniting with other denomination.**—A society that leases its church building, temporarily uniting in worship with congregations of other denominations under name "Community Church" has not lost identity and forfeited right to use property as matter of law. Christian Church v. Crystal, 78 Cal. A. 1, 247 P 605.

[d] **Change of name.**—Where deed merely granted land for erection of Episcopal Church, contract between grantor and trustees as individuals, not delivered simultaneously with deed, whereby church was given fixed name, does not prevent change of name on erection of new church building in lieu of that first erected. Meyer v. Christ Church, 154 S. C. 415, 151 SE 741.

[e] **Use of church lot as burial ground** is not a diversion where lot was granted originally for either purpose. In re Todd Tp. Evangelical Lutheran Church, 35 Pa. Co. 348.

80. See cases infra this note.

[a] **A long-continued acquiescence** in the application of a trust fund to the support of certain religious doctrines will not be interfered with unless the donor plainly expressed an intention that the fund should be applied to the support of different doctrines. Hale v. Everett, 53 N. H. 9, 16 AmR 82; Atty.-Gen. v. Dublin, 38 N. H. 459.

81. Hawes Place Cong. Soc. v. Hawes Fund, 5 Cush. (Mass.) 454; Pulpress v. African M. E. Church, 48 Pa. 204.

82. Harris v. Pounds, 64 Ga. 121.

83. Ga.—Bates v. Houston, 66 Ga. 198.

Iowa.—Mt. Zion Baptist Church v. Whitmore, 83 Iowa 138, 49 NW 81, 13 LRA 198.

Kan.—Hackney v. Vawter, 39 Kan. 615, 18 P 699.

Ky.—Hadden v. Chorn, 8 B. Mon. 70.

Miss.—Mt. Helm Baptist Church v. Jones, 79 Miss. 488, 30 S 714.

Mo.—Fulbright v. Higginbotham, 133 Mo. 668, 34 SW 875.

Oh.—Bakos v. Takach, 14 Oh. A. 370.

Pa.—Henry v. Dietrich, 84 Pa. 286; Kisor's App., 62 Pa. 428.

Tenn.—Nance v. Busby, 91 Tenn. 303, 18 SW 874, 15 LRA 801; Deaderick v. Lampson, 11 Heisk. 523.

Ont.—Atty.-Gen. v. Christie, 13 Grant Ch. 495.

84. See supra § 161.

85. Greek Catholic Church of Transfiguration of Christ v. Hunau, 74 Colo. 262, 220 P 981; Kuns v. Robertson, 154 Ill. 394, 40 NE 343; Lawson v. Kolbenson, 61 Ill. 405; Happy v. Morton, 33 Ill. 398.

[a] **Lease of church to another denomination.**—The leasing with reasonable restrictions of a German reformed church building by a vote of the church to another protestant denomination is not an inconsistent appropriation of the property, restrainable by a bill in equity by a minority. Dunkle v. Dries, 1 Woodw. (Pa.) 114.

86. Bakos v. Takach, 32 Oh. A. 569; Sarver's Appeal, 81* Pa. St. 183; Sawer v. Gosser, 1 WklyNC (Pa.) 55; Anderson v. Gislason, 30 Man. 536, 53 DomLR 491, [1920] 3 WestWkly 301.

87. Rike v. Floyd, 6 Oh. Cir. Ct. 80, 3 Oh. Cir. Dec. 359 [aff 33 CincL Bul 351].

88. Gass' App., 73 Pa. 39, 13 AmR 726.

89. Immanuel's Gemeinde v. Keil, 8 Kan. A. 405, 54 P 800.

90. Swoyer v. Schaeffer, 2 Pa. Dist. 749, 13 Pa. Co. 346.

91. Keyser v. Stansifer, 6 Oh. 363; Martin v. German Reformed Church of Peace, 149 Wis. 19, 134 NW 1125.

92. Fort v. Paris First Baptist Church, (Tex. Civ. A.) 55 SW 402.

93. U. S.—Smith v. Swormstedt, 16 How. 288, 14 L. ed. 942 [rev 22 F. Cas. No. 13,112].

Ill.—Nelson v. Benson, 69 Ill. 27.

Ky.—McKinney v. Griggs, 5 Bush 401, 96 AmD 360; Poynter v. Phelps, 33 KyL 887, 111 SW 699.

Minn.—Lindstrom v. Tell, 131 Minn. 203, 154 NW 969.

Tenn.—Bonham v. Harris, 125 Tenn. 452, 145 SW 169.

94. See infra § 165.

95. Ky.—Hadden v. Chorn, 8 B. Mon. 70.

Mass.—Page v. Crosby, 24 Pick.

ter[96] and trustees[97] are among the seceders; but members seceding from a church thereby forfeit all rights to the church property,[98] even though they keep the name of the old society,[99] or even though they incorporate and take its name.[1] However, forcible exclusion is not secession, and members forcibly excluded from the church building and meeting in some other place do not thereby relinquish their rights in the church property,[2] especially where the excluded faction constitute the majority of the church members and still maintain the church organization.[3] A seceding trustee, where he still retains title and right of possession, is trustee for the adherents and must administer the property in their interest.[4] Ministerial land in New England, vested in the minister for the use of the parish or society,[5] remains for what is left of the original parish after its division into separate parishes, and is not in any manner transferred or distributed by the separation,[6] and where, after the division into several parishes, there is a division in the church of the original parish, those remaining with that church are entitled to the property as against those who move away.[7]

[§ 165] **c. Identity with Original Society—(1) In General.** Where the issue of identity with the original organization is based on grounds other than adherence to and secession from a particular form of doctrine,[8] those who establish such identity by proof are entitled to the property,[9] an estoppel, however, operating against those who stand by without protest while others appropriate a part of the lot and build a church thereon,[10] and neither of the opposing divisions of the original society who later organize themselves into two new and opposing corporations being entitled to the property where there is a failure of proof of identity on the part of both.[11] In cases where identity is determined by adherence to a particular doctrine,[12] a minority claiming to be the original church is not estopped from pressing its claim by participating in worship with the majority where it was led to believe that participation would be without prejudice to its claim.[13]

[§ 166] **(2) After Incorporation.**[14] The faction first incorporating, provided all members of the church are notified and have opportunity to participate, takes title to the church property,[15] even though it is the minority faction,[16] except that, in the absence of evidence establishing a breach of trust or condition, and under a statute providing that incorporation by a majority of a society only, operates as a transfer of the rights and interests of individual members to the corporation,[17] an incorporation by a minority faction against the wishes of the majority creates merely a new society and has no effect upon individual rights and interests in the old one.[18]

[§ 167] **(3) As Affected by Obligation To Adhere to Particular Doctrine.** Where the church holds its property or is entitled to its use as a denominational church, the courts, when called upon, will award the property, and all rights pertaining thereto, to those who continue to adhere to the doctrine, tenets, and rules of the church as they existed before the division;[19] even though they constitute only the mi-

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211; Sawyer v. Baldwin, 11 Pick. 492; Stebbins v. Jennings, 10 Pick. 172.

N. J.—Hendrickson v. Shotwell, 1 N. J. Eq. 577.

Pa.—Landis' App., 102 Pa. 467.

Tenn.—Deaderick v. Lampson, 11 Heisk. 523.

[96] Page v. Crosby, 24 Pick. (Mass.) 211.

[97] Brewster v. Hendershot, 27 Ont. A. 232.

[98] Cal.—Christian Church v. Crystal, 78 Cal. A. 1, 247 P 605.

Kan.—Slinker v. Sumner County Bldg., etc., Assoc., 96 Kan. 672, 153 P 537; Venable v. Ebenezer Baptist Church, 25 Kan. 177.

Ky.—Brown v. Monore, 80 Ky. 443; Lewis v. Watson, 4 Bush 228; Harper v. Straws, 14 B. Mon. 48; Shannon v. Frost, 3 B. Mon. 253.

Mo.—McRoberts v. Moudy, 19 Mo. A. 26.

Nebr.—Rottmann v. Bartling, 22 Nebr. 375, 35 NW 126.

N. H.—Hale v. Everett, 53 N. H. 9, 16 AmR 82; Atty.-Gen. v. Dublin, 38 N. H. 459.

N. J.—Newburgh Associate Reformed Church v. Princeton Theological Seminary, 4 N. J. Eq. 77.

N. Y.—Isham v. Dunkirk First Presb. Church, 63 HowPr 465.

Oh.—Wiswell v. Cincinnati First Cong. Church, 14 Oh. St. 31; Cincinnati M. E. Church v. Wood, 5 Oh. 283; Cincinnati M. C. v. Wood, Wright 12; Ex p. Shoup, 9 Oh. Dec. (Reprint) 648, 16 CincLBul 71.

Pa.—Skilton v. Webster, 1 Brightly 203; Gordan v. Williams, 3 LegGaz 113.

S. C.—Bethel Presb. Church v. Donnom, 1 S. C. Eq. 154.

Tenn.—Rodgers v. Burnett, 108 Tenn. 173, 65 SW 408.

Tex.—Redland First Baptist Church v. Ward, (Civ. A.) 290 SW 828; Clark v. Brown, (Civ. A.) 108 SW 421 [rev on other grounds 102 Tex. 323, 116 SW 360, 24 LRANS 670].

[99] Venable v. Coffman, 2 W. Va. 310.

[1] Hooper v. Stone, 54 Cal. A. 668, 202 P 485.

[2] Bouldin v. Alexander, 15 Wall. (U. S.) 131, 21 L. ed. 69.

[3] Bouldin v. Alexander, supra.

[4] Brewster v. Hendershot, 27 Ont. A. 232.

[5] See supra § 131.

[6] Brown v. Porter, 10 Mass. 93.

[7] Baker v. Fales, 16 Mass. 488.

[8] See infra § 167.

[9] St. Louis African Baptist Church v. St. Louis Transfer Co., 98 Mo. 412, 11 SW 990; Fernstler v. Seibert, 114 Pa. 196, 6 A 165; Reeves v. Walker, 8 Baxt. (Tenn.) 277.

[10] St. Paul's Reformed Church v. Hower, 191 Pa. 306, 43 A 221.

[11] Cox v. Walker, 26 Me. 504.

[12] See infra § 167.

[13] Bonham v. Harris, 125 Tenn. 452, 145 SW 169.

[14] **Name of corporation as related to issue of adherence** see infra § 167.

[15] Russian Orthodox All Saints Church v. Darin, 222 Mich. 35, 192 NW 697; Holm v. Holm, 81 Wis. 374, 51 NW 579 [foll West Koshkonong Cong. v. Ottesen, 80 Wis. 62, 49 NW 24].

[16] St. Jacob's Lutheran Church v. Bly, 73 N. Y. 323.

[17] See statutory provisions.

[18] Happy v. Morton, 33 Ill. 398; Henry v. Deitrich, 84 Pa. 286 [rev 7 LancBar 185].

[19] U. S.—Reorganized Church of Jesus Christ, etc. v. Church of Christ 60 Fed. 937 [rev on other grounds 70 Fed. 179, 17 CCA 387].

Ida.—Post Falls Apostolic Holiness Union v. Knudson, 21 Ida. 589, 123 P 473.

Ill.—Sand Creek Christian Church v. Church of Christ, 219 Ill. 503, 76 NE 703.

Ind.—Smith v. Pedigo, 145 Ind. 361, 33 NE 777, 44 NE 363, 19 LRA 433, 32 LRA 838.

Iowa.—McBride v. Porter, 17 Iowa 203.

Ky.—Louisville First Presb. Church v. Wilson, 14 Bush 252; Harper v. Straws, 14 B. Mon. 39; Gibson v. Armstrong, 7 B. Mon. 481.

Md.—Brown v. Scott, 138 Md. 237, 120 A 759; Brown v. Scott, 138 Md. 237, 113 A 727.

Mich.—Hanna v. Malick, 223 Mich. 100, 193 NW 798; Borgman v. Bultema, 213 Mich. 684, 182 NW 91.

Minn.—First Evangelical Lutheran Cong. v. Mommsen, 174 Minn. 215, 219 NW 91; Rock Dell Norwegian Evangelical Lutheran Cong. v. Mommsen, 174 Minn. 207, 219 NW 88.

Mo.—Boyles v. Roberts, 222 Mo. 613, 121 SW 805; North St. Louis Christian Church v. McGowan, 62 Mo. 279; Klix v. Polish Roman Catholic St. Stanislaus Parish, 137 Mo. A. 347, 118 SW 1171.

N. H.—Holt v. Downs, 58 N. H. 170.

N. J.—Grupe v. Rudisill, 101 N. J. Eq. 145, 136 A 911; Paramus True Reformed Dutch Church v. Iserman, 64 N. J. L. 506, 45 A 771.

Pa.—Nagle v. Miller, 275 Pa. 157, 118 A 670; Chrapko v. Kobasa, 271 Pa. 447, 114 A 254.

Tenn.—Rudolph v. Foust, 147 Tenn. 369, 247 SW 987.

Sask.—First German Evangelical

nority,[20] and even though later they incorporate under a name differing from the original form and the secessionists also incorporate and take over the original name;[21] or in the case of a church subject to the control of denominational judicatories, to those recognized as being the church or congregation by the highest judicatory,[22] acting within its authority,[23] recognition by the highest judicatory prevailing over a contrary recognition by a committee of the judicatory acting without authority.[24] A fortiori, where there is attached to the property an express trust, that certain doctrines shall be taught or a particular form of worship observed, those who adhere to the purpose of the trust are entitled to the property, even though they constitute a minority and the church is independent in government,[25] although it has been held that where the division is made on what constitutes proper denominational doctrine, the majority in an independent church has power to make the controlling declaration and to vote themselves to be the adherents and entitled under the trust,[26] even though a conference or association of churches within the denomination, having no disciplinary power, advises them that they are not.[27] Where the church is independent and self-governing, and where the trust under which the property is held does not require the observance of any particular form of worship or the teaching of any particular doctrine, the control of the property belongs to the majority, regardless of any change of religious views or teachings.[28] Also an independent congregation can act with reference to its property independent of control of the church judicatories, to which it had been subject where, having the right to do so, it had withdrawn from its synodical connections.[29]

[§ 168] **d. Powers, Rights and Duties of Trustees and Members after Separation—(1) After Division or Schism—(a) In General.** A division or schism within a church, not amounting to secession of a faction, does not operate to deprive either faction of its rights in the church property,[30] and either faction may organize without prejudice to those rights;[31] it must organize before it can maintain an action to enjoin the other faction from alleged interference with the church property,[32] and if it is found to be the faction that is adhering to the faith, it is the church and has the right to control the church property by majority vote of its members, if it has the congregational type of church government.[33] Where, however, a church organization has been divided into two churches by a judicatory having power to make the division, the members of the new church have no property rights in the old.[34] One faction cannot exclude the other on ground of departure from doctrinal beliefs imposed on the church where the difference of opinion between them has nothing to do with doctrinal beliefs,[35] or is based on refined doctrinal distinctions which are not vital or substantial.[36] After a church has divided into factions, one faction may make a binding contract with the other for the purchase of the latter's interest in the church property,[37] and it is not necessary to the validity of such contract that it should be affirmed by a majority of the church members where open conferences were held which all members were allowed to attend and there was no concealment;[38] but at any time before the negotiations for the contract of sale are completed, the church may stop the negotiations and declare against the division and sale by majority vote of its members, where it has a congregational form of church government.[39]

[§ 169] **(b) Partition of Property and of Use of Church—aa. In General.** In general the factions of a church are not entitled to a partition and division of the property, where it is lawfully applied to the

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Luth. Zion's Cong. v. Reiker, 14 Sask. L. 156.

[20] Stallings v. Finney, 287 Ill. 145, 122 NE 369; McKinney v. Griggs, 5 Bush (Ky.) 401, 96 AmD 360; Chrapko v. Kobasa, 271 Pa. 447, 114 A 254.

[21] Sand Creek Christian Church v. Church of Christ, 219 Ill. 503, 76 NE 703.

[22] U. S.—Watson v. Jones, 13 Wall. 679, 20 L. ed. 666.

Ind.—White Lick Quarterly Meeting of Friends v. White Lick Quarterly Meeting of Friends, 89 Ind. 136.

N. J.—Day v. Bolton, 12 N. J. L. 206; Karoly v. Hungarian Reformed Church, 83 N. J. Eq. 514, 91 A 808 [aff 84 N. J. Eq. 203, 93 A 1085]; Schilstra v. Van Den Heuvel, 82 N. J. Eq. 155, 612, 90 A 1056.

N. Y.—New York Presbytery v. Westminster Presb. Church, 67 Misc. 317, 122 NYS 309 [rev 142 App. Div. 876, 127 NYS 851].

Or.—Philomath College v. Wyatt, 27 Or. 390, 31 P 206, 37 P 1022, 26 LRA 68.

Pa.—Bose v. Christ, 193 Pa. 13, 44 A 240; Krecker v. Shirey, 163 Pa. 534, 30 A 440, 29 LRA 476; Roshi's App., 69 Pa. 462, 8 AmR 275 [foll App v. Lutheran Cong., 6 Pa. 201]; Winebrenner v. Colder, 43 Pa. 244; McGinnis v. Watson, 41 Pa. 9; Trustees v. Sturgeon, 9 Pa. 321; Jones v. Wadsworth, 11 Phila. 239.

S. C.—Wilson v. John's Island Presb. Church, 19 S. C. Eq. 192.

Tenn.—Rodgers v. Burnett, 108 Tenn. 173, 65 SW 408.

Tex.—Brown v. Clark, 102 Tex. 323, 116 SW 360, 24 LRANS 670.

Va.—Hoskinson v. Pusey, 32 Gratt. (73 Va.) 428.

Sask.—Stein v. Hauser, 6 Sask. L. 383.

[23] Lamb v. Cain, 129 Ind. 486, 29 NE 13, 14 LRA 518; Reichert v. Saremba, 115 Nebr. 404, 213 NW 584; Clark v. Brown, (Civ. A.) 108 SW 421 [rev on other grounds 102 Tex. 323, 116 SW 360, 24 LRANS 670].

[24] Rodgers v. Burnett, 108 Tenn. 173, 65 SW 408.

[25] Nance v. Busby, 91 Tenn. 303, 18 SW 874, 15 LRA 801.

[26] Monk v. Little, 122 Ark. 7, 182 SW 511; Turpin v. Bagby, 138 Mo. 7, 39 SW 455.

[27] Monk v. Little, 122 Ark. 7, 182 SW 511; Turpin v. Bagley, 138 Mo. 7, 39 SW 455.

[28] U. S.—Watson v. Jones, 13 Wall. 679, 20 L. ed. 666.

Ala.—Tucker v. Denson, 202 Ala. 308, 80 S 373.

Cal.—Christian Church v. Crystal, 78 Cal. A. 1, 247 P 605.

Iowa.—Dressen v. Brameier, 56 Iowa 756, 9 NW 193.

Ky.—Poynter v. Phelps, 111 SW 699, 33 KyL 887.

Okl.—Cape v. Moore, 122 Okl. 229, 253 P 506.

Pa.—In re Aitken, 158 Pa. 541, 27 A 1102.

Tex.—Paris First Baptist Church v. Fort, 93 Tex. 215, 54 SW 892, 49 LRA 617 [aff in part (Civ. A.) 55 SW 402]; Jarrell v. Sproles, 20 Tex. Civ. A. 387, 49 SW 904.

Va.—Cheshire v. Giles, 144 Va. 253, 132 SE 479.

[29] Gudmundson v. Thingvalla Lutheran Church, 29 N. D. 291, 150 NW 750.

[30] Lost River Norwegian Evangelical Lutheran Cong. v. Thoen, 149 Minn. 379, 183 NW 954.

[31] Bonham v. Harris, 125 Tenn. 452, 145 SW 169.

[32] Stogner v. Laird, (Tex. Civ. A.) 145 SW 644.

[33] Tucker v. Paulk, 148 Ga. 228, 96 SE 339; Lutheran Trefoldighed Cong. v. St. Paul's English Evangelical Lutheran Cong., 159 Wis. 56, 150 NW 190.

[34] In re St. Casimir's Polish Roman Catholic Church, 273 Pa. 494, 117 A 219.

[35] Russian Orthodox All Saints Church v. Darin, 222 Mich. 35, 192 NW 697.

[36] Woodrum v. Burton, 88 W. Va. 322, 107 SE 102.

[37] Bottom v. Tinsley, (Tex. Civ. A.) 134 SW 833.

[38] Bottom v. Tinsley, supra.

[39] Bottom v. Tinsley, supra.

purpose of the trust and none of the members are prevented from participation in its use and enjoyment;[40] and where the church maintains merely voluntary synodical connections, a minority faction is not entitled to a division of the church property against the will of the majority who have changed such connections where both factions still adhere to the constitution of the church,[41] although there is authority favoring the power of a court of equity to make division where the differences between the factions are shown to be irreconcilable.[42] Where the church is subject to the ecclesiastical control of a superior judicatory, it may be divided into two churches on petition of either faction,[43] and where such division is made by a judicatory having authority, a court of equity will then divide the funds and property between them on equitable principles;[44] and it has been held that even where the church is not subject to the ecclesiastical control of a superior judicatory,[45] or where the synodical connections are merely voluntary,[46] a court of equity will divide the property on petition of a faction where the differences between the factions are shown to be irreconcilable and both factions have adhered to the church constitution.[47] The fact that the church is incorporated does not present any obstacle.[48] Where property is owned by several churches in common free from trust obligations and the union of churches is voluntary, a church may withdraw from the union and sue for its share in a partition of the property, where under the statute the rights of all the churches could be protected in the judgment.[49]

[§ 170] **bb. By Agreement.** Where a division of the property is made by the factions under agreement and no breach of trust is involved, the court will not disturb the arrangement,[50] especially where the factions have acquiesced in the arrangement over a long period of time;[51] but a resolution of a church corporation dividing property of the corporation and setting off to a part of its church membership worshipping at another place cannot operate where there was no grantee, or no individual named as grantee and no corporation to take,[52] and a resolution of a society having a church corporation in its charge which afterwards separated dividing its property between them will not authorize a division of a legacy which had been left to the original church corporation.[53] A division of property in case of schism agreed to by all the members when the congregation was organized will not entitle a faction to a division under the agreement in the absence of evidence that a schism existed.[54]

[§ 171] **cc. Under Statute.** While it may be that a religious corporation may be able under special legislative authority to divide its property between congregations worshipping at different places in church buildings belonging to the corporation under circumstances where without such authority it could not do so,[55] the legislature has no power by special act to divide a religious society and against its protest to give a part of the funds and property of the old society to the new society created thereby.[56] In some states, statutes, held not to apply in case of secession of a faction,[57] expressly provide that in case of division or schism, the trustees shall permit each of the factions to have the use of the house of worship proportionately to the number belonging to each faction.[58] Where each of two factions in an independent, self-governing congregation claims to be the majority, there is a division within the meaning of the statute, and either faction is entitled to have the use of the church apportioned,[59] and the church records copied at the expense of both factions, each faction receiving a copy.[60] Upon proof that the separation is a division or schism and not an expulsion of one faction by the other on proper grounds, the faction alleged to have been expelled is entitled to a use of the church-house under the terms of the statute;[61] and where the statute excepts from its operation and benefits a faction excommunicated by the other on charges of immorality brought in good faith and established by proof,[62] a charge of immorality against a single member of a faction will not justify the exclusion of the faction from the benefits of the statute.[63] Under the decisions, however, the statute has been very much restricted in its application. It applies only to trustees who have the legal title and the control of the church property,[64] and only for the period of time during which a decision is pending as to which faction is the church and entitled to the full control of its property.[65] In churches having a congregational type of government, a vote of the majority decides this question, and from that time on the majority faction is entitled to the use of the church exclusively,[66] except in cases where the issue between the factions does not affect the status of the minority faction as a part of the church organization.[67]

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[40] German Evangelical Lutheran Trinity Cong. v. Deutsche, etc., Gemeinde, 246 Ill. 328, 92 NE 868, 20 AnnCas 404; Schradi v. Dornfeld, 52 Minn. 465, 55 NW 49.

[41] Dressen v. Brameier, 56 Iowa 756, 9 NW 193.

[42] See cases infra notes 45–47.

[43] Wheelock v. Los Angeles First Presb. Church, 119 Cal. 477, 51 P 841.

[44] Smith v. Swormstedt, 16 How. (U. S.) 288, 14 L. ed. 942 [rev 22 F. Cas. No. 13,112, 5 McLean 369]; Bascom v. Lane, 2 F. Cas. No. 1,089, Brunn. Coll. Cas. 348; Wheelock v. Los Angeles First Presb. Church, 119 Cal. 477, 51 P 841; Weddell v. Collier, 26 PittsbLegJNS (Pa.) 309.

[45] Immanuel's Gemeinde v. Keil, 61 Kan. 65, 58 P 973; Hale v. Everett, 53 N. H. 9, 16 AmR 82; Huffhines v. Sheriff, 65 Okl. 90, 162 P 491.

[46] Niccolls v. Rugg, 47 Ill. 47, 95 AmD 462; Ferraria v. Vasconcellos, 31 Ill. 25; Lost River Norwegian Evangelical Lutheran Cong. v. Thoen, 149 Minn. 379, 183 NW 954.

[47] See cases supra notes 45, 46.

[48] Wheelock v. Los Angeles First Presb. Church, 119 Cal. 477, 51 P 841; Immanuel's Gemeinde v. Keil, 61 Kan. 65, 58 P 973.

[49] Munson v. Bringe, 146 Wis. 393, 131 NW 904, AnnCas1912C 325.

[50] Wicks v. Nedrow, 28 Nebr. 386, 44 NW 457.

[51] Wicks v. Nedrow, supra.

[52] Gallupville Reformed Church v. Schoolcraft, 65 N. Y. 134.

[53] Methodist Episcopal Church v. Asbury Sunday School Soc., 109 Md. 670, 72 A 199.

[54] Nelson v. Benson, 69 Ill. 27.

[a] **Dufficulty over elections.**—A difficulty growing out of an illegal election of trustees and their exclusion of the majority from the use of the church is not such a schism as will entitle the faction to a division of the property under the terms of an agreement, entered into at the time of the purchase of the property, that there should be a fair division of the property in case of a schism. Nelson v. Benson, 69 Ill. 27.

[55] Gallupville Reformed Church v. Schoolcraft, 65 N. Y. 134; Madison Ave. Baptist Church v. Oliver St. Baptist Church, 46 N. Y. 131.

[56] Portland Second Ecclesiastical Soc. v. Portland First Ecclesiastical Soc., 23 Conn. 255.

[57] See infra § 172.

[58] See statutory provisions.

[59] Poynter v. Phelps, 129 Ky. 381, 111 SW 699, 33 KyL 887, 24 LRANS 729.

[60] Poynter v. Phelps, supra.

[61] Ransom v. Rogers, 12 Ky. Op. 739.

[62] See statutory provisions.

[63] Cox v. Prewitt, 197 Ky. 176, 247 SW 976.

[64] Thomas v. Lewis, 224 Ky. 807, 6 SW (2d) 255.

[65] Thomas v. Lewis, supra.

[66] Thomas v. Lewis, supra.

[67] Ennix v. Owens, 209 Ky. 19, 271 SW 1091.

The statute has been still further restricted to cases where the original trustees having died, new trustees are appointed under other provisions of the statute.[68] In other states, the statute providing for apportionment of the use of a church building,[69] applies only where the church building is occupied by two societies of different denominations and only when the petitioning society owns at least five pews therein.[70]

[§ 172] **(2) After Secession.** While seceding members may have forfeited all right to the church property,[71] they are entitled to reimbursement for necessary repairs to the church made by them in good faith while in possession.[72] It has been held that they are not liable for rent for the period of occupation while the issue of whether they or the opposing faction were entitled to possession was being litigated.[73] Payment by them of the debts of the church from which they withdrew does not give secessionists an interest in the property entitling them to a partition.[74] Where there has been a secession, those seceding are not entitled to the benefit of the statute providing for the use of the church property by both parties where there has been a division or schism.[75] Even where they form a new society and enter into an arrangement for the use of the church building by the new society, such contract rights as they may have lapse with its dissolution.[76]

[§ 173] **C. Actions To Determine Rights to Property—1. Remedies and Defenses.** Following the rules applicable to the jurisdiction of courts of equity,[77] an action may be brought in equity to secure the enforcement of a trust for religious purposes and to prevent a departure from the designated faith or doctrine in contravention thereof;[78] or to restrain a threatened interference with worship or church management in accordance with the designated faith and doctrine,[79] unless the property is held free of any trust, express or implied;[80] or to secure an adjudication as to the rights of contending parties to the use of the church property;[81] or to make a division between them in case of schism;[82] or to secure the specific performance of a contract of sale of land to the society,[83] or a reconveyance of church property to trustees of an unincorporated society by a corporation secretly and fraudulently organized to take over the property;[84] or, under statutory authority, to declare a church extinct and to decree the disposition of its property.[85] Also an action in equity is the proper remedy against an unincorporated religious society whose property is held in common and whose members are numerous and constantly changing.[86] An action at law may be brought for the recovery of the possession of the property.[87] Ejectment is a proper method by which to determine the right to possession of church property as between parties claiming to be trustees of the church,[88] or persons claiming under them.[89] Under a statute providing for the disposition of the property of extinct churches,[90] ejectment by a general conference to recover the property of an extinct church cannot be maintained until the question whether or not it is extinct has been adjudicated.[91] So also where the petition combines a cause of action in ejectment and a cause of action to impose a trust on property for the use of the petitioners, an adjudication of their title under the alleged trust is a condition precedent to the maintenance of the action in ejectment.[92]

Defenses. Delay in bringing a petition for equitable relief, amounting to laches, is a defense to the action.[93] The fact that the only trespass is a past act and that no continuance of the trespass is threatened is a defense to an action for an injunction against interference with church services.[94] Noncompliance of a decision of a church judicatory with the by-law of the church is a defense to an action for relief based on such decision.[95] Illegality of the relief sought or the purpose of the petitioners to circumvent the law or a court decree enforcing it thereby is a defense.[96] Rescission of a contract for the sale of church property by one faction to another before any deed had been signed in pursuance thereof is a defense to an action brought for its specific performance.[97] It is not a defense to an action brought by a Roman catholic bishop against a suspended priest to recover possession of the church property that the bishop did not own the land on which the church was built.[98]

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[68] Shannon v. Frost, 3 B. Mon. (Ky.) 253.

[69] See statutory provisions.

[70] Leeds First Baptist Soc. v. Grant, 59 Me. 245.

[71] See supra § 164.

[72] Hadden v. Chorn, 8 B. Mon. (Ky.) 70.

[73] Rudolph v. Foust, 147 Tenn. 369, 247 SW 987.

[74] Stallings v. Finney, 287 Ill. 145, 122 NE 369.

[75] McKinney v. Griggs, 5 Bush (Ky.) 401, 96 AmD 360.

Definitions see supra § 163.

[76] Berryman v. Reese, 11 B. Mon. (Ky.) 287.

[77] See Equity §§ 7–149.

[78] Ala.—Mitchell v. Mt. Olive Church of Christ, 128 S 781; Manning v. Yeager, 203 Ala. 185, 82 S 435.

Del.—Tebo v. Hazel, (Ch.) 74 A 841.

Ind.—Lamb v. Cain, 129 Ind. 486, 29 NE 13, 14 LRA 518.

Nebr.—Immaculate Conception Parish v. Murphy, 89 Nebr. 524, 131 NW 946, 35 LRANS 926.

N. Y.—Hartford First Baptist Church v. Witherell, 3 Paige 296, 24 AmD 223.

Pa.—Kicinko v. Petruska, 259 Pa. 1, 102 A 286; Skilton v. Webster, Brightly 203.

[79] Cal.—Church of Christ v. Harper, 83 Cal. 41, 256 P 476.

Ga.—McCluskey v. Rakestraw, 167 Ga. 199, 144 SE 761.

Mich.—Komarynski v. Popovich, 232 Mich. 88, 205 NW 184.

N. Y.—Kedrovsky v. Rojdesvensky, 214 App. Div. 483, 212 NYS 273 [aff 242 N. Y. 547, 152 NE 421].

Pa.—Maceirinas v. Chesna, 299 Pa. 70, 149 A 94.

S. C.—Middleton v. Ellison, 95 S. C. 158, 78 SE 739.

Wash.—Eternal Truth Spiritualist Church v. Stuber, 105 Wash. 154, 177 P 686.

[80] Illinois Classis of Reformed Church v. Holben, 286 Ill. 473, 122 NE 46.

[81] Ala.—Manning v. Yeager, 201 Ala. 599, 79 S 19; Barton v. Fitzpatrick, 187 Ala. 273, 65 S 390; Morgan v. Gabard, 176 Ala. 568, 58 S 902.

Ark.—Morris v. Griffin, 146 Ark. 439, 225 SW 634.

Ga.—Shackleford v. Rutledge, 160 Ga. 688, 128 SE 794.

Ill.—German Evangelical Lutheran Trinity Cong. v. Deutsche, etc., Gemeinde, 246 Ill. 328, 92 NE 868, 20 AnnCas 404.

Md.—Brown v. Scott, 138 Md. 237, 113 A 727.

Mich.—Komarynsky v. Popovich, 218 Mich. 481, 188 NW 386.

Philippine.—Roman Catholic Apostolic Church v. Langaran, 11 Philippine 460.

W. Va.—Woodrum v. Burton, 88 W. Va. 322, 107 SE 102.

Wis.—Lutheran Trefoldighed Cong. v. St. Paul's English Evangelical Lutheran Cong., 159 Wis. 56, 150 NW 190.

[82] Lost River Norwegian Evangelical Lutheran Cong. v. Thoen, 149 Minn. 379, 183 NW 954.

[83] Gewin v. Mt. Pilgrim Baptist Church, 166 Ala. 345, 51 S 947, 139 AmSR 41.

[84] Bomar v. Mt. Olive Missionary Baptist Church, 92 Cal. A. 618, 268 P 665.

[85] General Six Principle Baptist Conference v. Bennett, (R. I.) 83 A. 758.

[86] Pleasant Hill Shakers' Soc. v. Watson, 68 Fed. 730, 15 CCA 632.

[87] Smith v. Pedigo, 145 Ind. 361, 33 NE 777, 44 NE 363, 19 LRA 433, 32 LRA 838.

[88] Yanthis v. Kemp, 43 Ind. A. 203, 85 NE 976, 86 NE 451.

[89] Humphreys v. Hunter, 20 U. C. C. P. (Ont.) 456.

[90] See cases supra note 85.

[91] Pittsburg Annual Conference, etc. v. Cyphert, 268 Pa. 322, 112 A 89.

[92] Burtzlaff v. Huge, 122 Oh. St. 172, 171 NE 30.

[93] Greek Catholic Church v. Roizdestvensky, 67 Colo. 217, 184 P 295; Vargo v. Vajo, 76 N. J. Eq. 161, 73 A 644.

[94] Church of Christ v. Harper, 83 Cal. A. 41, 256 P 476; Pido v. First Slavish Roman Catholic Greek Rite Church, 298 Pa. 231, 148 A 100.

[§ 174] **2. Jurisdiction.** It is well settled that, while civil courts will not interfere in purely ecclesiastical matters,[99] they will take jurisdiction of and determine controverted claims to the title, use or possession of church property,[1] subject to any statutory restrictions which may exist on the jurisdiction of particular courts;[2] but the mere fact that property rights are involved will not give the court jurisdiction where the real question at issue is one of religious doctrine.[3] Where the rights to church property are dependent upon the rules and discipline of the church or denomination, together with the decisions of the church tribunals, the civil courts will give effect to such rules and decisions,[4] when not inconsistent with the constitution and laws of the state,[5] and will inquire only as to what are the rules and decisions of the church and its tribunals, and what parties or factions adhere to them, without questioning their wisdom or propriety.[6] Under a statute giving the court authority to declare societies that have been or shall be affiliated with a particular denominational conference extinct and to decree the disposition of their property,[7] the court has no authority to declare extinct a society which was extinct before the conference itself had come into existence.[8]

[§ 175] **3. Persons Entitled To Sue, and Parties.** Actions involving the title or control of church property are properly brought in the name of the church, if incorporated,[9] or having the status of a quasi corporation,[10] and must be brought in its name and not in the names of the trustees when the church and not the trustees is the incorporated body.[11] So also in a suit to determine property rights between two incorporated church organizations, action should be brought against the corporation and not its members.[12] Trustees, duly authorized to represent the corporation,[13] are the persons prima facie entitled to institute the litigation,[14] and the action is properly brought in their names when the title of the property,[15] or of a moiety thereof,[16] is vested in them in trust.[17] The dissent of one of two trustees does not invalidate an action brought in the name of both where the dissenting trustee has been indemnified for the costs.[18] In general no right to sue in behalf of the church or society is vested in officers of the church other than the trustees,[19] as, for example, in the minister,[20] or the session of the presbyterian church,[21] or in a bishop of the Roman catholic church,[22] or in the members,[23] in the absence of a demand made upon the officers authorized to act to do so, or of a showing that such demand would be unavailing.[24] But where the trustees of the corporation refuse to bring suit,[25] or where the trustees or other officers are charged with a diversion of the trust property,[26] any member of the corporation for himself and in behalf of others may join as plaintiffs in an action brought in the name of the corporation. A separate and independent body within the church which has unlimited control of particular funds has been held to have capacity of suing and being sued with reference thereto,[27] and where under the church constitution a superior church judicatory is given control over the church property, the judicatory is entitled to maintain an action with reference thereto,[28] and the officers of a general church organization, as representative of the general membership, may maintain a suit in equity to determine property rights,[29] or where the issue raised in the suit is between trustees and particular officers, such officers are properly made parties.[30] Trustees are necessary parties to an action brought to test the constitutionality of a statute under which they claim authority to dispose of a fund belonging to the corporation for other than corporate purposes.[31] When the society is unincorporated, suit may be brought by the trustees,[32] or by one or more members of the society in behalf of all,[33] or by pewholders having and retaining an interest in the church property,[34] without including officers or members of the governing body.[35] But the rule allowing members of an unincorporated society to bring action for themselves and in behalf of other members of the society,[36] has been held under a statute to apply only to actions in equity, and not to be applicable to an action of trover.[37] A suit to prevent a diversion of trust funds may be brought by contributors to such

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[95] Reichert v. Saremba, 115 Nebr. 404, 213 NW 584.

[96] Novickas v. Krauczunas, 240 Pa. 248, 87 A 686.

[97] Bottom v. Tinsley, (Tex. Civ. A.) 134 SW 833.

[98] Morris v. Griffin, 146 Ark. 439, 225 SW 634.

[99] Nebr.—Reichert v. Saremba, 115 Nebr. 404, 213 NW 584; Kenesaw Free Baptist Church v. Lattimer, 103 Nebr. 755, 174 NW 296.

N. D.—Bendewald v. Ley, 39 N. D. 272, 168 NW 693.

S. C.—Middleton v. Ellison, 95 S. C. 158, 78 SE 739.

Tex.—Mendelsohn v. Gordon, (Civ. A.) 156 SW 1149.

W. Va.—Sandèrs v. Meredith, 78 W. Va. 564, 89 SE 733.

And see infra § 190.

[1] U. S.—Gonzalez v. Roman Catholic Archbishop, 280 U. S. 1, 50 SCt 5, 74 L. ed. 1.

Ala.—Barton v. Fitzpatrick, 187 Ala. 273, 65 S 390.

Ark.—Morris v. Griffin, 146 Ark. 439, 225 SW 634; Monk v. Little, 122 Ark. 7, 182 SW 511.

Cal.—Dyer v. Los Angeles Super. Ct., 94 Cal. A. 260, 271 P 113; Bomar v. Mt. Olive Missionary Baptist Church, 92 Cal. A. 618, 268 P 665.

Ill.—Pleasant Grove Cong. v. Riley, 248 Ill. 604, 94 NE 30; Fancy Prairie Cong. v. King, 245 Ill. 120, 91 NE 776; Lincoln First Presb. Church v. First Cumberland Presb. Church, 245 Ill. 74, 91 NE 761, 19 AnnCas 275; Ferraria v. Vasconcellos, 31 Ill. 25.

Ind.—Ramsey v. Hicks, 174 Ind. 428, 91 NE 344, 92 NE 164, 30 LRANS 665 [rev 44 Ind. A. 490, 87 NE 1091, 89 NE 597].

Ky.—Thomas v. Lewis, 224 Ky. 307, 6 SW(2d) 255; Wallace v. Hughes, 131 Ky. 445, 115 SW 684; Gartin v. Penick, 5 Bush 110; Ransom v. Rogers, 12 Ky. Op. 739.

La.—German Evangelical Cong. v. Pressler, 17 La. Ann. 127.

Miss.—Mt. Helm Baptist Church v. Jones, 79 Miss. 488, 30 S 714.

Mo.—Boyles v. Roberts, 222 Mo. 613, 121 SW 805; Prickett v. Wells, 117 Mo. 502, 24 SW 52.

Nebr.—Geiss v. Trinity Lutheran Church Cong., (Nebr.) 230 NW 658.

N. J.—Everett v. Sussex First Baptist Church, 6 N. J. Misc. 640, 142 A 428.

N. Y.—Robertson v. Bullions, 9 Barb. 64 [aff 11 N. Y. 243]; New York Presbytery v. Westminster Presb. Church, 67 Misc. 317, 122 NYS 309 [rev 142 App. Div. 876, 127 NYS 851].

N. D.—Bendewald v. Ley, 39 N. D. 272, 168 NW 693.

Okl.—Cape v. Moore, 122 Okl. 229, 253 P 506.

Pa.—Schlichter v. Keiter, 156 Pa. 119, 27 A 45, 22 LRA 161; McIlvain v. Christ Church, 8 Phila. 507, 2 Woodw. 293.

Tex.—Mendelsohn v. Gordon, (Civ. A.) 156 SW 1149.

Wis.—Marien v. Evangelical Creed Cong., 140 Wis. 31, 121 NW 604.

Ont.—Itter v. Howe, 23 Ont. A. 256.

[2] Roman Catholic Apostolic Church Cebu, 11 Philippine 405.

[3] Moseman v. Heitchousen, 50 Nebr. 420, 69 NW 957.

[4] U. S.—Watson v. Jones, 13 Wall. 679, 20 L. ed. 666.

Ala.—Barton v. Fitzpatrick, 187 Ala. 273, 65 S 390.

Conn.—Trinity M. E. Church v. Harris, 73 Conn. 216, 47 A 116, 50 LRA 636.

Ga.—Mack v. Kime, 129 Ga. 1, 58 SE 184.

Ill.—Pleasant Grove Cong. v. Riley, 248 Ill. 604, 94 NE 30; German Evangelical Lutheran Trinity Cong. v. Deutsche, etc., Gemeinde, 246 Ill. 328, 92 NE 868, 20 AnnCas 404; Kuns v. Robertson, 154 Ill. 394, 40 NE 394.

Ind.—Ramsey v. Hicks, 44 Ind. A. 490, 87 NE 1091, 89 NE 597 [rev on other grounds 174 Ind. 428, 91 NE 344, 92 NE 164, 30 LRANS 665]; Smith v. Pedigo, 145 Ind. 361, 33 NE 777, 44 NE 363, 19 LRA 433, 32 LRA 838; Lamb v. Cain, 129 Ind. 486, 29 NE 13, 14 LRA 518; Gaff v. Greer, 88 Ind. 122, 45 AmR 449.

Kan.—Hackney v. Vawter, 39 Kan. 615, 18 P 699.

Ky.—Bogard v. Boone, 200 Ky. 572, 255 SW 112; Wallace v. Hughes, 131 Ky. 445, 115 SW 684.

Mo.—Boyles v. Roberts, 222 Mo. 613, 121 SW 805.

Nebr.—Pounder v. Ashe, 44 Nebr. 672, 63 NW 48; Rottmann v. Bartling, 22 Nebr. 375, 35 NW 126.

N. Y.—New York Presbytery v. Westminster Presb. Church, 67 Misc. 317, 122 NYS 309 [rev 142 App. Div. 876, 127 NYS 851].

Oh.—Harrison v. Hoyle, 24 Oh. St. 254; Katz v. Goldman, 33 Oh. A. 150, 168 NE 763; Rike v. Floyd, 6 Oh. Cir. Ct. 80, 3 Oh. Cir. Dec. 359; Griggs v. Middaugh, 10 Oh. Dec. (Reprint) 643, 22 CincLBul 367.

[5] German Evangelical Lutheran Trinity Cong. v. Deutsche, etc., Gemeinde, 246 Ill. 328, 92 NE 868, 20 AnnCas 404; Prickett v. Wells, 117 Mo. 502, 24 SW 52.

[6] U. S.—Watson v. Jones, 13 Wall. 679, 20 L. ed. 666.

Ind.—Smith v. Pedigo, 145 Ind. 361, 33 NE 777, 44 NE 363, 19 LRA 433, 32 LRA 838.

Ky.—Gartin v. Penick, 5 Bush 110.

Minn.—East Norway Lake Norwegian Evangelical Lutheran Church v. Halvorson, 42 Minn. 503, 44 NW 663 (a well considered case).

Mo.—Boyles v. Roberts, 222 Mo. 613, 121 SW 805.

Nebr.—Pounder v. Ashe, 36 Nebr. 564, 54 NW 847.

N. J.—German Evangelical Lutheran Church v. Maschop, 10 N. J. Eq. 57; Rainier v. Howell, 9 N. J. Eq. 121; Hendrickson v. Shotwell, 1 N. J. Eq. 577.

[7] See statutory provisions.

[8] General Six Principle Baptist Conference v. Bennett, (R. I.) 83 A 758.

[9] McConnell v. Gardner, Morr. (Iowa) 272; Westminster Presb. Church v. New York Presbytery, 211 N. Y. 214, 105 NE 199; Van Deuzen v. Presbyterian Cong., 4 Abb. Dec. (N. Y.) 465, 3 Keyes 550, 3 Transcr. A. 39; German Evangelical Cong. v. Hoessli, 13 Wis. 348.

[a] **One trustee** may sue in the name of the corporation to restrain his co-trustees from diverting the revenues of the church to unauthorized uses. York First Reformed Presb. Church v. Bowden, 14 AbbN Cas (N. Y.) 356.

[b] **Insertion of corporate name by amendment.**—Trustees suing in their individual names may amend at the trial by striking out their names and substituting the name of the corporation. Ainleyville Cong. v. Grewer, 23 U. C. C. P. (Ont.) 533.

[10] White v. Miller, 71 N. Y. 118, 27 AmR 13; Jones v. Torrellas, 28 Porto Rico 42; Marrero v. Skerret,

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17 Porto Rico 540; Franklin Church v. Maguire, 23 Grant Ch. (Ont.) 102; Toronto Berkeley St. Cong. v. Stevens, 37 U. C. Q. B. (Ont.) 9; Ainleyville Cong. v. Grewer, 23 U. C. C. P. (Ont.) 533; Humphreys v. Hunter, 20 U. C. C. P. (Ont.) 456.

11. Peo. v. Fulton, 11 N. Y. 94.

12. Bendewald v. Ley, 39 N. D. 272, 168 NW 693.

13. See cases infra this note.

[a] **An irregularly appointed trustee may not sue.**—Scott v. Curle, 9 B. Mon. (Ky.) 17.

[b] **Trustees de facto** of an unincorporated religious society cannot, on the ground that they truly represent the religious faith of those who took the deed of the land and erected the meeting-house thereon, maintain an action to recover possession of the property against persons who are in actual possession, claiming that they represent a corporation that owns the same. Bundy v. Birdsall, 29 Barb. (N. Y.) 31.

[c] **When title to office is disputed** (1) and both plaintiffs and defendants claim to be the legal trustees, and defendants are in possession of the church property, plaintiffs cannot maintain their action to recover the possession and control of the property, until their title to the office is first determined by quo warranto or other proper proceedings (Staten Island North Baptist Church v. Parker, 36 Barb. (N. Y.) 171), (2) although there is authority to the contrary (Gaff v. Greer, 88 Ind. 122, 45 AmR 449).

14. Bates v. Houston, 66 Ga. 198; Attica First M. E. Church v. Filkins, 3 Thomps. & C. (N. Y.) 279; Dunkle v. Dries, 1 Woodw. (Pa.) 114.

15. U. S.—Penny v. Central Coal, etc., Co., 138 Fed. 769, 71 CCA 135.

Del.—Willin v. Roe, 25 Del. 197, 78 A 773.

Ky.—Cahill v. Bigger, 8 B. Mon. 211; Curd v. Wallace, 7 Dana 190, 32 AmD 85.

Pa.—Unangst v. Shortz, 5 Whart. 506.

Ont.—Doe v. Bain, 3 U. C. Q. B. 198.

16. Curd v. Wallace, 7 Dana (Ky.) 190, 32 AmD 85.

17. See cases supra notes 13–16.

18. Unangst v. Shortz, 5 Whart. (Pa.) 506.

19. See cases infra notes 20–24.

20. Clark v. Quincy Evangelical Soc., 12 Gray (Mass.) 17.

21. McConnell v. Gardner, Morr. (Iowa) 272; Everett v. Asbury Park First Presb. Church, 53 N. J. Eq. 500, 32 A 747; Westminster Presb. Church v. Findley, 44 Misc. 173, 89 NYS 801.

22. Eis v. Croze, 149 Mich. 62, 112 NW 943; Blair v. Odin, 3 Tex. 288.

23. Eustace v. Dickey, 240 Mass. 55, 132 NE 852.

24. German Evangelical Emmaus Church v. Free Evangelical Emmaus Church, 87 Colo. 237, 287 P 89.

25. Bendewald v. Ley, 39 N. D. 272, 168 NW 693.

26. Cal.—Baker v. Ducker, 79 Cal. 365, 21 P 764.

N. Y.—Isham v. Fullager, 14 Abb NCas 363.

N. C.—Nash v. Sutton, 117 N. C. 231, 23 SE 178.

Oh.—Wiswell v. Cincinnati First Cong. Church, 14 Oh. St. 31.

Ont.—Boulton v. Toronto Church Soc., 15 Grant Ch. 450.

27. See case infra this note.

[a] **The consistory of the reformed Dutch church** has been held to constitute a separate and independent body in reference to charitable funds, having unlimited control thereof, and to have the capacity of suing and being sued. Prattsville Reformed Dutch Church v. Brandow, 52 Barb. (N. Y.) 228.

28. New York Presbytery v. Westminster Presb. Church, 142 App. Div. 876, 127 NYS 851 [rev 67 Misc. 317, 122 NYS 309].

29. Barkley v. Hayes, 208 Fed. 319 [aff 222 Fed. 669, 138 CCA 217].

30. See cases infra this note.

[a] **The minister may be joined** as a party plaintiff when the subject-matter of the suit is the refusal of the trustees to pay him his salary from a fund held in trust for his support. Raynham First Cong. Soc. v. Raynham Cong. Ministers Fund, 23 Pick. (Mass.) 148.

[b] **Commissioners appointed by a division of the methodist episcopal church** (1) may maintain a bill in equity, for a division of property against the trustees of the common property (Bascom v. Lane, 2 F. Cas. No. 1,089, Brunn. Coll. Cas. 348), (2) or against the book concern belonging to the general church at the time of the separation (Smith v. Swormstedt, 16 How. 288, 14 L. ed. 942 [rev 22 F. Cas. No. 13,112, 5 McLean 369]).

31. Davis v. Syracuse First Cong. Soc., 65 N. Y. 278.

32. Potts v. Longest, etc., Co., 86 W. Va. 157, 103 SE 279.

33. U. S.—Beatty v. Kurtz, 2 Pet. 566, 7 L. ed. 521; Penny v. Central Coal, etc., Co., 138 Fed. 769, 71 CCA 135 (acting trustee).

Iowa.—McConnell v. Gardner, Morr. 272.

Kan.—Fink v. Umscheid, 40 Kan. 271, 19 P 623, 2 LRA 146.

N. J.—Newburgh Associate Reformed Church v. Princeton Theological Seminary, 4 N. J. Eq. 77.

Oh.—Mannix v. Purcell, 46 Oh. St. 102, 19 NE 572, 15 AmSR 562, 2 LRA 753.

34. Small v. Cahoon, 207 Mass. 359, 93 NE 588.

35. Sharp v. Bonham, 213 Fed. 660.

36. See cases supra note 33.

37. McLendon v. Simmons, 40 Ga. A. 27, 148 SE 626.

funds,[38] suing in behalf of themselves and other contributors to such funds,[39] it not being necessary that all should be joined as parties to the suit.[40] But where the action is based on a contract, it must be brought either by persons who are subscribers thereto or by the successors or legal representatives of the society for whose benefit the contract was made.[41] A nonmember of the church or society cannot maintain an action to regulate the use of the church property,[42] even though he was one of the original grantors,[43] or was formerly a member of the society.[44] The town or selectmen are not necessary or proper parties to actions involving rights to church property after the parochial affairs of the town have been taken over by an organized parish.[45]

[§ 176] **4. Pleading.** A complaint or petition which sets up facts showing the right of plaintiff to sue and to maintain or recover the possession and control of the property in question, together with facts showing the wrongful possession or diversion of defendants, is sufficient.[46] A petition for relief brought by members of an independent church having a congregational type of government which does not show that plaintiffs and those for whom they act constitute a majority of the membership is insufficient.[47] A petition by one religious corporation against another in an action brought to determine property rights based on forms of faith is not sufficient where it contains no allegations as to church polity.[48] A petition is insufficient to state a cause of action against a particular defendant where it fails to show any interest of his in the property,[49] or any interest of the petitioner,[50] or any invasion of his property rights.[51] Where the title to the property is admitted to be in third persons, a petition praying that plaintiffs be put in possession and that defendants be restrained from interfering therewith is one for an injunction, and not in ejectment.[52] Under a statute so providing,[53] defendants cannot set up in their answers that plaintiff trustees are holding the church property in violation of their trust until they have tried out the issue of title in an independent action.[54]

[§ 177] **5. Evidence. Presumptions and burden of proof.** There is a presumption that congregations conduct themselves in an orderly manner and according to the rules and usages of deliberative bodies.[55] The burden of proving a better right to the property in question is on defendants where plaintiffs are members or trustees adhering to the established organization,[56] but it is on plaintiffs where defendants have been adjudged the duly elected trustees.[57] The burden of proving secession,[58] or diversion of trust property,[59] or lack of authority to mortgage church property,[60] or existence of condition upon which claim of reverter of church property to grantor is based,[61] is on the party alleging it.[62]

Admissibility. It is error to exclude evidence which bears directly on the issues of the case and is otherwise unobjectionable;[63] but irrelevant and immaterial evidence, such as the adherence of members to certain doctrines when that question is not in issue, should be excluded.[64] Records of an ex

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38. Ludlam v. Higbee, 11 N. J. Eq. 342.

[a] **A minority of the society** who are not pewholders and who have paid no part of the purchase-money cannot maintain a bill in equity to restrain the society from reconveying a trust estate to the former trustees, discharged of the trust. Clark v. Quincy Evangelical Soc., 12 Gray (Mass.) 17.

39. Avery v. Baker, 27 Nebr. 388, 43 NW 174, 20 AmSR 672.

40. Avery v. Baker, supra.

41. Manning v. Gloucester Fifth Parish, 6 Pick. (Mass.) 6.

42. Strong v. Doty, 32 Wis. 381.

43. Strong v. Doty, supra.

44. Shannon v. Frost, 3 B. Mon. (Ky.) 253; Smith v. Bowers, 57 App. Div. 252, 68 NYS 169 [aff 171 N. Y. 669 mem, 64 NE 1125 mem]; Nance v. Busby, 91 Tenn. 303, 18 SW 874, 15 LRA 801.

[a] **Expelled members.**—Members of a church in which the majority rules, expelled by a vote legally taken, have no standing to enjoin the church from tearing down a church edifice on the ground that they had a right to possession as members of the church. Foreman v. Fryerson, 135 La. 221, 65 S 131.

45. Raynham First Cong. Soc. v. Raynham Cong. Ministers Fund, 23 Pick. (Mass.) 148; Colchester v. Hill, Brayt. (Vt.) 65.

46. Ala.—Manning v. Yeager, 201 Ala. 599, 79 S 19; Morgan v. Gabard, 176 Ala. 568, 58 S 902.

Cal.—Baker v. Ducker, 79 Cal. 365, 21 P 764.

Ga.—McCluskey v. Rakestraw, 167 Ga. 199, 144 SE 761.

Ind.—Yanthis v. Kemp, 43 Ind. A. 203, 85 NE 976, 86 NE 451.

Tex.—Bottom v. Tinsley, (Civ. A.) 134 SW 833.

Va.—Cheshire v. Giles, 144 Va. 253, 132 SE 479.

[a] **Conflict of doctrine sufficiently alleged.**—A complaint which alleges that plaintiffs accepted one doctrinal standard and defendants another is sufficiently definite, although it does not show the difference between the two confessions of faith. Baker v. Ducker, 79 Cal. 365, 21 P 764.

[b] **Contrary to doctrine must be alleged.**—A demurrer lies to a petition which does not allege that the acts complained of were done without authority or contrary to the doctrine of the church. Messinger v. Trinity Church, 8 Oh. Dec. (Reprint) 227, 6 CincLBul 397.

[c] **Expulsion sufficiently alleged.**—An allegation in a bill to restrain the use of certain property, against certain expelled members of a religious society, that they were expelled after full and mature deliberation by the church, is sufficient, as it shows the expulsion to have been made by the church, and it will be presumed that everything necessary and proper was done. Berryman v. Reese, 11 B. Mon. (Ky.) 287.

47. Hall v. Hall, 177 Ky. 430, 197 SW 799.

48. Bendewald v. Ley, 39 N. D. 272, 168 NW 693.

49. New York Presbytery v. Westminster Presbyterian Church, 182 NYS 703 [aff 192 App. Div. 163, 182 NYS 705].

50. Bertoniere v. Savoure, 163 La. 1073, 113 S 459.

51. Minton v. Leavell, (Tex. Civ. A.) 297 SW 615.

52. Simmons v. Allison, 118 N. C. 763, 24 SE 716.

53. See statutory provisions.

54. Bredell v. Alexander, 8 Mo. A. 110.

55. Gibson v. Morris, 36 Tex. Civ. A. 593, 83 SW 226.

56. Igleheart v. Rowe, 47 SW 575, 20 KyL 821; Clark v. Brown, (Tex. Civ. A.) 108 SW 421 [rev 102 Tex. 323, 116 SW 360, 24 LRANS 670].

57. African Baptist Church v. White, 69 SW 757, 24 KyL 646.

58. McAuley's App., 77 Pa. 397.

59. Chesire v. Giles, 144 Va. 253, 132 SE 479.

60. Applequist v. Swedish Evangelical Lutheran Gethsemane Church, 154 Wash. 351, 282 P 224.

61. Brookfield v. Beamon, 170 Ark. 996, 282 SW 364.

62. See cases supra notes 58–61.

63. See cases infra this note.

[a] **Constitution and by-laws.**—A document identified by members of an incorporated religious society as the constitution and by-laws used by the society is admissible in a suit to determine rights to property claimed by contending factions, although no vote of the society, adopting it as such, is shown. Baker v. Ducker, 79 Cal. 365, 21 P 764.

[b] **Vote of congregation** having congregational type of government on a matter in issue is admissible. Dochkus v. Lithuanian Ben. Soc., 206 Pa. 25, 55 A 779.

[c] **Withdrawal from membership,** evidence tending to disprove, is admissible. Perry v. Tupper, 74 N. C. 722.

64. Baker v. Ducker, 79 Cal. 365, 21 P 764; Field v. Field, 9 Wend. (N. Y.) 394.

[a] **List of minority faction.**—On an issue as to how the members voted at a church meeting which

parte proceeding by a church judicatory having no jurisdiction are not admissible.[65]

Weight and sufficiency. On a question of change or departure from faith, detached sentences from the sermon of the minister should not be given too much weight,[66] and the opinion of an elder should not be allowed to overweigh the decision of several ecclesiastical tribunals.[67] A finding of title in plaintiff is justified by evidence showing the acquisition of title by adverse possession.[68] A decree in favor of a minority faction of an independent church is not justified in the absence of evidence that the majority faction had renounced the faith.[69] The use of ribald, coarse and scurrilous language by a pastor with reference to a mission board and college supported by the church is not in itself sufficient to show a diversion of property.[70] A valid appointment of a church officer is not shown by an appointment which fails to conform to the church discipline.[71]

[§ 178] **6. Questions of Law and Fact.** What constitutes secession is a question of law for the court.[72] Whether in a particular case there has been a secession,[73] or which faction were the adherents and which faction the secessionists,[74] is a mixed question of law and fact. Where no departure from church doctrines is claimed and the only issue is which faction had a majority of the church members, the question is one of fact.[75] It is for the court to determine whether a certain meeting of the church was a legal one.[76] It is for the jury to determine whether plaintiffs are the duly elected trustees so as to be entitled to sue, when that question is raised by answer and not by demurrer.[77]

[§ 179] **7. Argument and Instructions to Jury.** In his argument to the jury, counsel may read extracts from the writings of a person learned in theology which are merely argumentative, but not extracts from opinions of scientific witnesses which would be inadmissible as evidence.[78] The failure of the court to name all plaintiffs and defendants in his charge to the jury does not constitute prejudicial error.[79] The refusal of the court to submit issues of fact to the jury is not error where the only issue in the case is on an ecclesiastical question on which there had been an adjudication by an ecclesiastical tribunal and an opportunity for review by another church tribunal exists.[80]

[§ 180] **8. Judgment, Relief, and Costs.**[81] Where relief is sought under a particular statute, the parties are limited to the statutory relief,[82] and to the restrictions and conditions imposed by statute on the granting of it.[83] On the other hand they can receive no aid from the statute if they do not base their claim upon it.[84] Subject to the qualifications already noted,[85] the court will, in general, grant such relief to either or both parties, as the circumstances of the case requires,[86] as, for example, restoration of possession of church property to those entitled and their protection from further interference,[87] or an accounting by a church pastor of funds of the church held by him,[88] subject to his right to apply the same on mortgage notes of the church which he holds.[89] The court will not make a decree as to disposition of property in violation of the trust to which the property is subject,[90] nor will it make an order against trustees based on breach of trust in the absence of evidence of such breach,[91] but it will order the church property sold and proceeds divided among the church members where it appears that the church is about equally divided by irreconcilable differences,[92] and it will make an order restraining officers of an independent church from making a sale where the evidence shows that the sale had not been consented to by a majority of the congregation.[93] It is proper for the court to order that rival factions shall alternate in the use and possession of the church, pending the decision of the question of their rights by the church tribunals where neither faction is in possession to the exclusion of the other.[94] A decree authorizing a faction to occupy the church for a part of the time for purposes of worship is not a grant of power to

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fixed the status of the parties, it is proper to permit a witness to state how many persons were present at the meeting, but not to give a list of the members comprising the minority faction. Gibson v. Morris, 36 Tex. Civ. A. 593, 83 SW 226.

[65] Gudmundson v. Thingvalla Lutheran Church, 29 N. D. 291, 150 NW 750.

[66] Happy v. Morton, 33 Ill. 398.

[67] Smith v. Pedigo, 145 Ind. 361, 33 NE 777, 44 NE 363, 19 LRA 433, 32 LRA 838.

[68] Penny v. Central Coal, etc., Co., 138 Fed. 769, 71 CCA 135.

[69] Chesire v. Giles, 144 Va. 253, 132 SE 479.

[70] Manning v. Yeager, 203 Ala. 185, 82 S 435.

[71] Kedrovsky v. Rojdesvensky, 214 App. Div. 483, 212 NYS 273 [aff 242 N. Y. 547, 152 NE 421].

[72] Perry v. Tupper, 74 N. C. 722.

[73] Stamford First Baptist Church v. Rouse, 21 Conn. 160; Hale v. Everett, 53 N. H. 9, 16 AmR 82; Wiswell v. Cincinnati First Cong. Church, 14 Oh. St. 31.

[74] Jackson v. Jones, 130 Kan. 488, 287 P 603.

[75] Gibson v. Morris, 28 Tex. Civ. A. 555, 67 SW 433.

[76] Gibson v. Morris, supra.

[77] Gallipolis Tp. First Presb. Soc. v. Smithers, 12 Oh. St. 248.

[78] Jones v. Little Blue River Regular Baptist Church, Smith (Ind.) 47.

[79] Gibson v. Morris, 36 Tex. Civ. A. 593, 83 SW 226.

[80] Cussen v. Lynch, (Tex. Civ. A.) 245 SW 932.

[81] **Appointment and removal of trustees** see supra §§ 119-120.

[82] Curd v. Wallace, 7 Dana (Ky.) 190, 32 AmD 85.

[83] See case infra this note.

[a] **Consent of lay members** is a condition precedent to jurisdiction of court to order sale of church property on petition of trustees. In re Louther Memorial M. E. Church, 22 Pa. Dist. 858, 40 Pa. Co. 611.

[84] Hadden v. Chorn, 8 B. Mon. (Ky.) 70.

[85] See cases supra notes 82-84.

[86] See cases infra notes 87-89.

[87] Bartholomew v. Lutheran Cong., 35 Oh. St. 567; St. Michael's Ukranian Greek Catholic Church v. Bohachewsky, 48 R. I. 234, 136 A 878.

[88] Bouldin v. Alexander, 103 U. S. 330, 26 L. ed. 308.

[89] Bouldin v. Alexander, supra.

[90] See case infra this note.

[a] **Contributions to pay pastor.**—The court will not decree the delivery of contributions, voluntarily made for the specific purpose of paying the salary of one pastor, to another pastor, even though the latter is regularly appointed. Bliem v. Schultz, 170 Pa. 563, 33 A 337.

[91] See case infra this note.

[a] **Failure to sell.**—The court will not order local trustees to convey church property direct to the general church organization which has beneficial title thereto on the ground that they had failed to comply with the resolution of the church organization to sell the property where it appears that there had been no market for a sale and that the trustees were administering the property in the interest of the church organization. United Brethren in Christ Church v. Gardner, 204 Iowa 907, 215 NW 970.

[92] Immanuels Gemeinde v. Keil, 61 Kan. 65, 58 P 973 [mod 8 Kan. A. 405, 54 P 800].

[93] Covington First Baptist Church v. Jackson, 10 La. A. 170, 120 S 639.

[94] Bowden v. McLeod, 1 Edw. (N. Y.) 588.

place its own elected pastor and officers in authority over the entire church membership.[95] In the absence of agreement between them dividing the use of the church building and one faction being in possession to the exclusion of the other, the court cannot compel it to divide its possession with the other, pending an adjudication by the civil court of the right to possession.[96] But the court will not allow to a faction which has obtained a decree establishing its right to the possession of the church property compensation to be paid by the unsuccessful faction for use and occupation pending the trial where no member of the church of either faction was excluded from worshipping at the church.[97] A judgment against the trustees will not bind the real estate, or the proceeds of a sale thereof, where the statutes from which they derive their authority confer no power upon them to alien or encumber the real estate of their own volition.[98] An order directing delivery of church property to members of a congregation means a delivery to them as representatives of the church.[99] An order requiring the delivery of deeds to church property into the physical possession of the receiver and the execution of such other deeds as might thereafter be required is not an adjudication of title to such property.[1] Where the relief involves the adjustment of accounts between two religious corporations, it will be brought, in point of time, down to the close of the litigation.[2]

Costs. It has been held that a parish for whose benefit a suit is defended ought to defray the expenses of the suit,[3] and that a trustee who has wrongfully refused to execute his trust is properly charged with the costs of the proceeding brought to compel him to do so.[4]

IX. PEWS

[§ 181] **A. Estate, Interest, and Rights of Pewholder—1. General Rules.** A pew[5] is not absolute but qualified and conditional property,[6] upon which a grant in perpetuity operates merely as a conveyance of the right to sit therein.[7] In some states it is regarded as realty,[8] but notes for rent thereof are personalty;[9] in others, as personalty.[10] It is in the nature of a mere usufruct,[11] or incorporeal immovable.[12] The pewholder has no title to the soil on which the edifice stands, nor to the edifice itself,[13] but merely an easement therein,[14] the edifice being the property of the society,[15] of which the seisin and possession are in the trustees.[16] Nor does the pewholder own the space above the pew;[17] he has merely a right to use the pew, subject to and limited by the rights and powers of the corporation or trustees and all the conditions and limitations incident to such property, and subject to the superior title included in the ownership of the house.[18] His right is limited to an exclusive occupancy of a cer-

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[95] Roundtree v. Fletcher, 109 Miss. 830, 69 S 689.

[96] Newhart v. Sampsel, 2 Pa. Dist. 647, 13 Pa. Co. 161.

[97] Bouldin v. Alexander, 103 U. S. 330, 26 L. ed. 308.

[98] Globe Furniture Co. v. Jerusalem Baptist Church, 103 Va. 559, 49 SE 657.

[99] Greek Orthodox Church v. Alexander, 199 Ind. 528, 151 NE 1, 156 NE 545.

[1] Kedrovsky v. Russian Orthodox Greek Catholic Church, 249 N. Y. 75, 162 NE 588.

[2] Madison Ave. Baptist Church v. Oliver St. Baptist Church, 73 N. Y. 82 [mod 41 N. Y. Super. 369].

[3] Dillingham v. Snow, 5 Mass. 547.

[4] Newmyer's App., 72 Pa. 121.

[5] See case infra this note.

[a] **Definition and derivation.**—The word "pew" is derived from "puye" signifying an inclosed seat in a church. Brumfitt v. Roberts, L. R. 5 C. P. 224. See also Pews 48 C. J. p 1053.

[6] Sohier v. Trinity Church, 109 Mass. 1; Kimball v. Rowley Second Cong. Parish, 24 Pick. (Mass.) 347; Daniel v. Wood, 1 Pick. (Mass.) 102, 11 AmD 151; Gay v. Baker, 17 Mass. 435, 9 AmD 159; Hartford First Baptist Church v. Witherell, 3 Paige (N. Y.) 296, 24 AmD 223.

[7] Hartford First Baptist Church v. Witherell, 3 Paige (N. Y.) 296, 24 AmD 223.

[a] **Pew tenancy is as accurate a description as pew ownership.**—Jones v. Towne, 58 N. H. 462, 42 AmR 602.

[8] La.—Gamble's Succ., 23 La. Ann. 9.

Me.—Severance v. Whittier, 24 Me. 120.

N. J.—Newark Third Presb. Cong. v. Andruss, 21 N. J. L. 325.

N. Y.—St. Paul's Church v. Ford, 34 Barb. 16; Voorhees v. Amsterdam Presb. Church, 17 Barb. 103; Vielie v. Osgood, 8 Barb. 130; Ithaca First Baptist Church v. Bigelow, 16 Wend. 28.

Vt.—O'Hear v. De Groesbriand, 33 Vt. 593, 80 AmD 653; Barnard v. Whipple, 29 Vt. 401, 70 AmD 422; Hodges v. Green, 28 Vt. 358; Kellogg v. Dickinson, 18 Vt. 266.

[9] Gamble's Succ., 23 La. Ann. 9.

[10] Antrim First Presb. Soc. v. Bass, 68 N. H. 333, 44 A 485; Church v. Wells, 24 Pa. 249.

[a] **In Massachusetts** (1) pews were formerly real estate except in the city of Boston, under statute. Atty.-Gen. v. Federal St. Meeting-House, 3 Gray 1; Jackson v. Rounseville, 5 Metc. 127; Gay v. Baker, 17 Mass. 435, 9 AmD 159. (2) But now they are by statute personalty throughout the state. Massachusetts Baptist Missionary Soc. v. Bowdoin Square Baptist Soc., 212 Mass. 198, 98 NE 1045, AnnCas1913C 472; Locke v. Belmont Cong. Soc., 157 Mass. 589, 32 NE 949.

[11] Gamble's Succ., 23 La. Ann. 9; Sohier v. Trinity Church, 109 Mass. 1; Freligh v. Platt, 5 Cow. (N. Y.) 494; White v. Methodist Episcopal Church, 3 Lans. (N. Y.) 477.

[12] Gamble's Succ., 23 La. Ann. 9.

[a] **In England** the interest of a pewholder in his pew is held to be of merely an incorporeal nature, or in the nature of an easement or right or privilege in the lands of another, and a pewholder is not the owner of that part of the church covered by the pew. Brumfitt v. Roberts, L. R. 5 C. P. 224; Hinde v. Charlton, L. R. 2 C. P. 104; Mainwaring v. Giles, 5 B. & Ald. 356, 7 ECL 198, 106 Reprint 1221; Gully v. Exeter, 4 Bing. 290, 13 ECL 508, 130 Reprint 779.

[13] In re New South Meeting-House, 13 Allen (Mass.) 497; Gay v. Baker, 17 Mass. 435, 9 AmD 159; Atty.-Gen. v. Federal St. Meeting-House, 3 Gray (Mass.) 1; Newark Third Presb. Cong. v. Andruss, 21 N. J. L. 325; Woodworth v. Payne, 74 N. Y. 196, 30 AmR 298; Wheaton v. Gates, 18 N. Y. 395; Witthaus v. St. Thomas' Church, 161 App. Div. 208, 146 NYS 279; In re Saugerties Reformed Dutch Church, 16 Barb. (N. Y.) 237; Voorhees v. Amsterdam Presb. Church, 8 Barb. (N. Y.) 135, 5 HowPr 58 [aff 17 Barb. 103]; Abernethy v. Puritans' Church Soc., 3 Daly (N. Y.) 1; Heeney v. St. Peter's Church, 2 Edw. (N. Y.) 608; In re Brick Presb. Church, 3 Edw. (N. Y.) 155; Kincaid's App., 66 Pa. 411, 5 AmR 377; Church v. Wells, 24 Pa. 249.

[a] **Tenancy in common.**—Pew owners are not tenants in common of land on which the edifice stands. Craig v. Franklin County, 58 Me. 479.

[b] **License to builder to sell pews.**—Builders of a church paid by permitting them to sell the pews at auction, with the right to retain such as should be unsold, to be sold or locked up at their election, took no title to the church edifice or the premises, but merely the right to sell for such price and on such terms as they might see fit, and their right did not extend to pews which the corporation might put in at its own expense, by way of repair or reconstruction, many years afterward. White v. Syracuse M. E. Church First Soc., 3 Lans. (N. Y.) 477.

[14] Hartland Union Meeting-House v. Rowell, 66 Me. 400; Curry v. Erie First Presb. Cong., 2 Pittsb. (Pa.) 40.

[15] See supra §§ 98–113.

[16] See supra § 53.

[17] Gay v. Baker, 17 Mass. 435, 9 AmD 159.

[18] Me.—Leeds First Baptist Soc. v. Grant, 59 Me. 245.

Mass.—Massachusetts Baptist Missionary Soc. v. Bowdoin Square Baptist Soc., 212 Mass. 198, 98 NE 1045, AnnCas1913C 472; Kimball v. Rowley Second Cong. Parish, 24 Pick. 347; Gay v. Baker, 17 Mass. 435, 9 AmD 159.

N. H.—Colby v. Northfield, etc.,

tain part of the meeting-house for the purpose of attending upon public worship, during the time that the church is open for church purposes,[19] amounting in the case of a free church, where there is no renting of pews, merely to a license to occupy a seat therein.[20] The pewholder's right to occupancy is subject to the right of the society to have the meeting-house in such a place as will best accommodate the whole.[21] This right to occupy may be held by a corporation.[22] The pewholder cannot remove the pew,[23] nor convert it to other use, and can do nothing which may interfere with or impair the use of the building for the purpose for which it is used.[24] He cannot change it,[25] or decorate it to his fancy,[26] or cut it down and carry it away.[27] The right is limited also as to time, for if the house is burnt or destroyed by time the right is gone;[28] but the right extends so long as the pew remains or to the limit of the term of purchase,[29] and the pew owner cannot be despoiled of his property, and in some respects his rights are superior to those of the church, and they must exercise their general ownership in subordination to them, and be restricted to the general purposes for which the church was created.[30] Withdrawal of the hand of fellowship has no effect on the pewholder's right to attend divine service or to a seat in the edifice.[31] The pewholder's right to his pew is not affected by a sale of the building to another church of the same denomination although the church membership and right to vote in the old society which the ownership of his pew gave him may not have been carried over into the new society.[32]

[§ 182] **2. Alteration, Removal, or Destruction of Pew or Church Edifice, and Compensation for Pew.** The church society may pull down and rebuild the meeting-house, make repairs, alterations, and improvements, and determine when it shall give place to a new one,[33] or may remodel the pew and alter the internal structure of the building, or enlarge or remove it, or sell or abandon the edifice and rebuild elsewhere;[34] and when these changes are necessary,[35] or when the meeting-house has become so old, decayed, or ruinous as to be unfit for use, and when in fact the pew has ceased to be of any use or value as a pew, and the pew is removed, the title is gone,[36] and its owner is not entitled to compensation.[37] Nor can a pewholder recover for a

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Cong. Soc., 63 N. H. 63; Jones v. Towne, 58 N. H. 462, 42 AmR 602.

N. Y.—Cooper v. Sandy Hill First Presb. Church, 32 Barb. 222; Voorhees v. Amsterdam Presb. Church, 17 Barb. 103 [aff 8 Barb. 135, 5 HowPr 58]; Erwin v. Hurd, 13 AbbNCas 91; Bronson v. St. Peter's Church, 7 NY LegObs 361; Shaw v. Beveridge, 3 Hill 26, 38 AmD 616.

Vt.—Perrin v. Granger, 33 Vt. 101; Kellogg v. Dickinson, 18 Vt. 266.

[19] La.—Gamble's Succ., 23 La. Ann. 9.

Mass.—Sohier v. Trinity Church, 109 Mass. 1; In re New South Meeting-House, 13 Allen 497; Atty.-Gen. v. Federal St. Meeting-House, 3 Gray 1; Kimball v. Rowley Second Cong. Parish, 24 Pick. 347; Wentworth v. Canton First Parish, 3 Pick. 344; Daniel v. Wood, 1 Pick. 102, 11 AmD 151; Gay v. Baker, 17 Mass. 435, 9 AmD 159.

N. H.—Huntington v. Ramsden, 77 N. H. 376, 92 A 336, AnnCas1915C 949.

N. J.—Newark Third Presb. Church v. Andruss, 21 N. J. L. 325.

N. Y.—Wheaton v. Gates, 18 N. Y. 395; White v. Syracuse M. E. Church First Soc., 3 Lans. 477; Cooper v. Sandy Hill First Presb. Church, 32 Barb. 222; In re Reformed Dutch Church, 16 Barb. 237; Voorhees v. Amsterdam Presb. Church, 8 Barb. 135, 5 HowPr 58 [aff 17 Barb. 103]; Abernethy v. Puritans' Church Soc., 3 Daly 1; Erwin v. Hurd, 13 AbbNCas 91; Shaw v. Beveridge, 3 Hill 26, 38 AmD 616; Freligh v. Platt, 5 Cow. 494; Hartford First Baptist Church v. Witherell, 3 Paige 296, 24 AmD 223.

Pa.—Zernosky v. Kluchinsky, 278 Pa. 99, 122 A 262; Kincaid's App., 66 Pa. 411, 5 AmR 377; Curry v. Erie First Presb. Cong., 2 Pittsb. 40.

Vt.—Howe v. Stevens, 47 Vt. 262; O'Hear v. De Goesbriand, 33 Vt. 593, 80 AmD 653; Perrin v. Granger, 33 Vt. 101; Kellogg v. Dickinson, 18 Vt. 266.

Eng.—Brumfitt v. Roberts, L. R. 5 C. P. 224; Mainwaring v. Giles, 5 B. & Ald. 356, 7 ECL 198, 106 Reprint 1221; Gully v. Exeter, 4 Bing. 290, 13 ECL 508, 130 Reprint 779.

Ont.—Ridout v. Harris, 17 U. C. C. P. 88.

[a] **Mode of use.**—Where a meeting-house is conveyed to trustees for the use of a certain church and society, for a place of public religious worship for such church and society, and for no other use, intent, or purpose whatsoever, and in the deeds of the pews in such house, which are given to an individual, the provisions of the conveyance of the house are referred to, and recognized, the pew owner has a right to the sole use of his pews on all occasions when the house is occupied, although it be opened for purposes different from those mentioned in the conveyance thereof, and he has a right to exclude all others from his pews on such occasions, by fastening the pew doors, or otherwise, in such manner as not to interrupt or annoy those who may occupy other pews; and any person who enters such pews, knowing the facts, is a trespasser, and liable to an action by the owner; and so, if the owner of such pews cover them in an offensive manner for the purpose of excluding others, and any person, in removing the offensive covering, do any unnecessary injury to the pew or its fixtures, he is liable to the owner in an action of trespass. Jackson v. Rounseville, 5 Metc. (Mass.) 127.

[20] Sheldon v. Vail, 28 Hun (N. Y.) 354.

[21] Antrim First Presb. Soc. v. Bass, 68 N. H. 333, 44 A 485; Johnson v. Towne, 58 N. H. 462, 42 AmR 602; Fisher v. Glover, 4 N. H. 180; Van Houten v. Totowa First Reformed Dutch Church, 17 N. J. Eq. 126.

[22] Reg. v. Warwick, 8 Q. B. 926, 55 ECL 926, 115 Reprint 1123.

[23] Jones v. Towne, 58 N. H. 462, 42 AmR 602.

[24] Daniel v. Wood, 1 Pick. (Mass.) 102, 11 AmD 151; Freligh v. Platt, 5 Cow. (N. Y.) 494; Curry v. Erie First Presb. Church, 2 Pittsb. (Pa.) 40; Kellogg v. Dickinson, 18 Vt. 266.

[25] Church v. Wells, 24 Pa. 249.

[26] Church v. Wells, supra.

[27] Church v. Wells, supra.

[28] Witthaus v. St. Thomas' Church, 161 App. Div. 208, 146 NYS 279; Voorhees v. Amsterdam First Presb. Church, 8 Barb. (N. Y.) 135, 5 HowPr 58 [aff 17 Barb. 103]; Abernethy v. Puritans Church Soc., 3 Daly (N. Y.) 1; Freligh v. Platt, 5 Cow. (N. Y.) 494.

[29] White v. Syracuse M. E. Church First Soc., 3 Lans. (N. Y.) 477.

[30] Kimball v. Rowley Second Cong. Parish, 24 Pick. (Mass.) 347.

[31] Sheldon v. Vail, 28 Hun (N. Y.) 354; Morgan v. Curtis, 3 M. & R. 389.

[32] Massachusetts Baptist Missionary Soc. v. Bowdoin Square Baptist Soc., 212 Mass. 198, 98 NE 1045, AnnCas1913C 472.

[33] Sohier v. Trinity Church, 109 Mass. 1; Kimball v. Rowley Second Cong. Parish, 24 Pick. (Mass.) 347; Wentworth v. Canton First Parish, 3 Pick. (Mass.) 344; Daniel v. Wood, 1 Pick. (Mass.) 102, 11 AmD 151; Jones v. Towne, 58 N. H. 462, 42 AmR 602; White v. Syracuse M. E. Church First Soc., 3 Lans. (N. Y.) 477; Voorhees v. Amsterdam Presb. Church, 8 Barb. (N. Y.) 135, 5 HowPr 58 [aff 17 Barb. 103]; Erwin v. Hurd, 13 Abb NCas (N. Y.) 91; Church v. Wells, 24 Pa. 249.

[34] Sohier v. Trinity Church, 109 Mass. 1; Fassett v. Boylston First Parish, 19 Pick. (Mass.) 361.

[a] **Change of pews into slips.**—The corporation may change pews into slips without the assent of each pew owner. Cooper v. Sandy Hill First Presb. Church, 32 Barb. (N. Y.) 222.

[35] White v. Syracuse M. E. Church First Soc., 3 Lans. (N. Y.) 477; Voorhees v. Amsterdam Presb. Church, 8 Barb. (N. Y.) 135, 5 HowPr 58 [aff 17 Barb. 103].

[36] Gorton v. Hadsell, 9 Cush. (Mass.) 508 (holding that unless a meeting-house at the time it was torn down by a vote of the proprietors is not only unfit for public worship, but so old and ruinous as to render its entire demolition necessary, a pewholder is entitled to indemnity for the destruction of his pew); Kimball v. Rowley Second Cong. Parish, 24 Pick. (Mass.) 347.

[37] Fassett v. Boylston First Parish, 19 Pick. (Mass.) 361; Howard v. North Bridgewater First Parish, 7 Pick. (Mass.) 138; Gay v. Baker, 17 Mass. 435, 9 AmD 159; Cooper v. Sandy Hill First Presb. Church, 32 Barb. (N. Y.) 222; Howe v. Stevens, 47 Vt.

temporary interruption for necessary repairs.[38] Nor can he recover possession of a pew formerly occupied but which has been removed during alterations.[39] A pewholder is entitled to compensation for destruction of his pew if it is maliciously done by the society or by a majority of its members,[40] or if it is done, not from necessity,[41] but for a merely useful or convenient purpose.[42] Under circumstances justifying removal without compensation,[43] the materials may be worked into a new house or may be sold and the proceeds put into the treasury to aid in rebuilding, and the individual pewholders cannot claim a share in the materials or proceeds.[44] But it has been held that where a religious edifice is sold, and a new one erected with the proceeds, it is the duty of the trustees to tender to a pewholder a pew in the new edifice corresponding in location to that which he owned in the old building, on the payment of such a sum as, in equity, he ought to pay, if the cost of the new structure exceeds the proceeds of the sale of the old property, together with the sums in the treasury of the society, and if they fail to allot him a pew he is entitled to damages for his loss;[45] and where, with the assent of a religious society owning a meeting-house, repairs and alterations changing the location of the pews are made by the pewholders, an equitable assignment of the new pews among the pewholders by a committee of the pewholders, acting with their implied assent and in pursuance of a vote of the society, is valid.[46] The action of church trustees in making repairs interfering with or destroying pews is presumed to accord with the wishes of a majority of the society.[47]

[§ 183] **B. Renting, Assignment, and Conveyance.** Religious societies may make such reasonable by-laws and regulations respecting the renting,[48] sale and purchase of pews as they think their interests as a religious society may require,[49] so as to exclude persons holding obnoxious opinions, and thus prevent a change in the society by an influx of persons of a different faith,[50] and the doctrine that conditions against alienation in a conveyance in fee simple are void has never been held applicable to

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262; Kellogg v. Dickinson, 18 Vt. 266.

[a] **Elimination of pew in rebuilding.**—Where a church edifice having become so dilapidated as to be dangerous for the society to worship in, the corporation owning it substantially rebuilt it, except the walls, remodeling the inside so that the pulpit occupied the place of plaintiff's pew, plaintiff was not entitled to compensation for his pew. Voorhees v. Amsterdam Presb. Church, 17 Barb. (N. Y.) 103 [aff 8 Barb. 135, 5 HowPr 58].

[38] Van Houten v. Totowa First Reformed Dutch Church, 17 N. J. Eq. 126.

[39] Voorhees v. Amsterdam Presb. Church, 8 Barb. (N. Y.) 135, 5 HowPr 58 [aff 17 Barb. 103].

[40] Wentworth v. Canton First Parish, 3 Pick. (Mass.) 344; Voorhees v. Amsterdam Presb. Church, 8 Barb. (N. Y.) 135, 5 HowPr 58 [aff 17 Barb. 103].

[41] See cases supra note 36.

[42] Aylward v. O'Brien, 160 Mass. 118, 35 NE 313, 22 LRA 206; Kimball v. Rowley Second Cong. Parish, 24 Pick. (Mass.) 347; Fassett v. Boylston First Parish, 19 Pick. (Mass.) 361; Howard v. North Bridgewater First Parish, 7 Pick. (Mass.) 138; Daniel v. Wood, 1 Pick. (Mass.) 102, 11 AmD 151; Gay v. Baker, 17 Mass. 435, 9 AmD 159; Voorhees v. Amsterdam Presb. Church, 17 Barb. (N. Y.) 103 [aff 8 Barb. 135, 5 HowPr 58]; Kellogg v. Dickinson, 18 Vt. 266.

[43] See cases supra notes 35, 36.

[44] Wentworth v. Canton First Parish, 3 Pick. (Mass.) 344; Kellogg v. Dickinson, 18 Vt. 266.

[45] Samuels v. Congregation Kol Israel Anshi Poland, 52 App. Div. 287, 65 NYS 192; Mayer v. Temple Beth El, 23 NYS 1013.

[46] Colby v. Northfield, etc., Cong. Soc., 63 N. H. 63.

[47] Cooper v. Sandy Hill First Presb. Church, 32 Barb. (N. Y.) 222.

[48] Zernosky v. Kluchinsky, 278 Pa. 99, 122 A 262.

[49] French v. Old South Soc., 106 Mass. 479; Atty.-Gen. v. Federal St. Meeting-House, 3 Gray (Mass.) 1.

[50] French v. Old South Soc., 106 Mass. 479; Atty.-Gen. v. Federal St. Meeting-House, 3 Gray (Mass.) 1, 47; Petty v. Tooker, 21 N. Y. 267 [aff 29 Barb. 256].

"It is competent for such a society to make such reasonable by-laws and regulations, respecting the sale and purchase of pews, as they think their interests as a religious society may require. And it is usual for such societies to make such regulations in regard to the sale of their pews, and express them in the deeds they issue, as to prevent an indiscriminate sale of pews, and thus retain some right to elect and determine whom they will associate with, or rather who may associate with them. Otherwise, if it were free to anybody to purchase pews without restraint, a number of people of another denomination, finding pews low, might purchase them and become a majority, and thus turn the proper congregation out of their own house." Atty-Gen. v. Federal St. Meeting-House, supra.

[a] **A conveyance to a non-member** is void where a by-law of the society prohibits sales of pews to nonmembers. Price v. Lyon, 14 Conn. 279.

[b] **In England.**—(1) The assignment and tenure of pews was discussed at length in Livingston v. Trenton Trinity Church, 45 N. J. L. 230. (2) As is there shown, before the Reformation, no separate seats were allowed in churches, the body of the church being common to all parishioners; but after the Reformation a practice arose to assign particular seats to individuals, and this assignment of seats was made by the bishop or ordinary, by a grant called a faculty which was a mere license, and was personal to the licensee; and all disputes concerning it were determined in the spiritual courts. Newark Third Presb. Cong. v. Andruss, 21 N. J. L. 325; 1 Burn Eccl. L. p 358. (3) The disposal of seats in the nave of the church appertained to common right to the bishop of the diocese, "so that he may place and displace whomsoever he pleaseth" (Boothly v. Baily, Hob. 69, 80 Reprint 218; 1 Burn Eccl. L. p 359; Comyns Dig. tit Eglise 3), (4) and the ordering of it was a matter merely spiritual (Corven's Case, 12 Coke 105, 77 Reprint 1380; Hool Church D. tit Pews). (5) The discretionary power of ordering the seats in the church which, by the common law, was vested in the ordinary, by custom was exercised by the churchwardens, who were the representatives of the ordinary in that respect, and whose assignment of seats was presumed to have been made with the approbation and consent of the ordinary. 2 Bacon Abr. p 242; 1 Burn Eccl. p 359; Wood Inst. pp 88, 90. (6) Consequently it has become the settled law of the English courts that churchwardens have a discretionary power to appropriate the pews in the church, subject only to the control of the ordinary. Reynolds v. Monkton, 2 M. & R. 384; Re St. Columb Cathedral Church, 8 L. T. Rep. N. S. 861. (7) In England the right to a pew can be acquired only by a faculty, which is personal to the grantee, and cannot of itself be given a transmissible or heritable quality (Stocks v. Booth, 1 T. R. 428, 99 Reprint 1177; Clifford v. Wicks, 1 B. & Ald. 498, 106 Reprint 83), (8) or by prescription, which will not arise from a possession, however long, unless it be annexed to a house, and it also be shown that the pew was repaired by the claimant and those under whom he claims for the prescriptive period (Boothly v. Baily, Hob. 69, 80 Reprint 218; Stocks v. Booth, 1 T. R. 428, 99 Reprint 1177), (9) or by a grant which, creating an incorporeal interest in lands, must be in writing and under seal; or by a letting for a limited period by the proper authorities of the church (Livingston v. Trenton Trinity Church, 45 N. J. L. 230), (10) and in an action for disturbance in the enjoyment of the right, plaintiff must prove a prescriptive right or a faculty and must claim it in the declaration as appurtenant to a messuage in the parish (Brumfitt v. Roberts, L. R. 5 C. P. 232; Mainwaring v. Giles, 5 B. & Ald. 356, 7 ECL 198, 106 Reprint 1221; Stocks v. Booth, 1 T. R. 428, 99 Reprint 1177) (11) for the grant of a pew to any person without regard to a messuage or inhabitancy within the parish is void by the general law (Mainwaring v. Giles, 5 B. & Ald. 356, 7 ECL 198, 106 Reprint 1221; Stocks v. Booth, 1 T. R. 428, 99 Reprint 1177; Brumfitt v. Roberts, L. R. 5 C. P. 232), (12) and it is only a legal right of possession acquired by some one of these methods that can be made the foundation of legal proceedings for its protection in a court of law; otherwise, the disturbance of the possession is a matter of ecclesiastical cognizance only (Mainwaring v. Giles, 5 B. & Ald. 356, 7 ECL 198, 106 Reprint 1221; Stocks v. Booth, 1 T. R. 428, 99 Reprint 1177). (13) The English ecclesiastical law governing pew rights forms the basis of the law regulating the affairs of the episcopal church in this country, and is in force except so far as it has been modified and changed by statute and by the usages and canons of the church. Livingston v. Trenton Trinity Church, 45 N. J. L. 230; Lynd v. Menzies, 33 N. J. L. 162.

conveyance of pews.[51] Where a pew is considered real estate,[52] an instrument conveying it must have the solemnities required by law for the transfer of real estate by deed,[53] and a contract for the sale of a pew stipulating for "a good and sufficient deed" is not performed by the offer of a perpetual lease, reserving rent,[54] even though under the constitution of the church conveyances of pews were restricted to that form.[55] The levy of an execution upon a pew as real estate will transfer a title which at law will prevail over a prior assignment of a certificate of the ownership of it of which the execution creditor was ignorant.[56] Where the charter of a church declared that the purchasers of pews in fee simple shall hold them forever, free from any liability for debts, and that they shall never be susceptible of any species of mortgage, the pews are a distinct property, and when owned by an individual are not liable to be seized for his debts.[57]

[§ 184] **C. Taxes, Rents, and Forfeitures—1. In General.** Where no mode of taxation is prescribed by the act of incorporation, a religious society may adopt any mode which is not prohibited by law, and may, with the assent of all the proprietors, tax the pews in the meeting-house and regulate the proceedings therefor by its by-laws,[58] and may let or sell the pews in the meeting-house on condition that the lessee or grantee should pay a certain sum yearly or such taxes as may be lawfully assessed thereon,[59] and that he should forfeit his right in the pew on failure to pay.[60] Or it may sell pews free of rent, in which case the pewholder is under no obligation to pay an assessment,[61] unless a binding promise to pay is proved.[62] But where the constitution of the society regulates the matter in order to justify the sale of a pew for non-payment of an assessment laid by the society owning the church, it is requisite that the assessment and forfeiture or sale be in conformity with the provisions of the constitution and by-laws of the society,[63] a forfeiture for nonpayment not resulting in the absence of express provision in the constitution therefor.[64] The obligation of the pewholder to pay is not affected by his institution of proceedings for the purchase of his pew by the society under the statute where later such proceedings were abandoned and the pewholder retained his rights to his pew.[65] Executors of a pewholder are not bound to pay pew rent accruing after his death.[66]

[§ 185] **2. Limitation of Power To Tax.** The purposes for which an assessment on pews may legally be made may be restricted by the terms of a statute or deed.[67] A statute which gives power to incorporated religious societies to tax pewholders for specifically enumerated purposes inferentially denies that power for purposes not enumerated,[68] and a later statute which widens the power to include the purposes not enumerated under the earlier statute but restricting its application to meeting-houses thereafter erected has no application to a meeting-house in existence at the time of the enactment,[69] and a still later statute extending the application of the second statute to churches in existence at the time of its enactment has no application to a church not complying with the conditions stipulated therein.[70] A tax assessed upon a pew by a religious corporation in part for purposes not specifically named in a deed of the pew, which alone gives the power to make such assessment, and which strictly defines and limits such power, is invalid in toto;[71] but where under the deed, granted when the society was unincorporated, the power to tax is unlimited, the pewholder cannot object if a charter power later granted in restricted terms is subsequently enlarged by statute, where the legislative power to alter, amend or repeal the charter had been reserved.[72]

[§ 186] **D. Actions To Enforce Pewholder's Rights and Liabilities—1. In General.** A pewholder has an exclusive right to an undisturbed occupancy of his pew,[73] and he can maintain trespass, ejectment or a writ of entry, or an action on the case against any one who improperly disturbs him in the legitimate exercise of his legal right to use the pew during divine service,[74] even against the society or person in whom the title to the land and building is vested,[75] and although others may have so far obtained possession of a meeting-house as to oust the society, yet a pewholder may maintain trespass for the first invasion of his individual right to his pew after such ouster;[76] but trespass will not lie for a destruction of a pew by pulling down the meeting-house, in order to rebuild it by order of the parish;[77] and a pewholder cannot maintain trespass for the mere breaking and entry of the meeting-house in which his pew is situate; but he may for the destruction of his pew, although he sue for the entry with it, the destruction of the pew being the gist of the action;[78] and a collector who makes a sale of a pew under an unauthorized assessment for repairs is jointly liable in an action of case with the purchaser under the sale who alone actually disturbs the owner, both being principals.[79] In an action of assumpsit by the society to recover the price of a pew from a purchaser at an auction sale, it is not necessary that the society should offer evidence of its right and title to the pew.[80]

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[51] French v. Old South Soc., 106 Mass. 479 (holding also that a condition prescribed by a by-law in the deeds of pews by an incorporated religious society, which owns its meeting-house in fee simple, and is composed exclusively of the successive pewholders, that the grantee shall forfeit the pew if he leave the meeting-house without first offering it to the society for a certain price, is not invalid as being repugnant to the grant).

[52] See supra § 181.

[53] See case infra this note.

[a] **Unacknowledged bill of sale** is not sufficient to convey an interest in a pew. Price v. Lyon, 14 Conn. 279.

[54] Foote v. West, 1 Den. (N. Y.) 544.

[55] Foote v. West, supra.

[56] Barnard v. Whipple, 29 Vt. 401, 70 AmD 422.

[57] New Orleans City Bank v. McIntyre, 8 Rob. (La.) 467.

[58] Mussey v. Bulfinch St. Soc., 1 Cush. (Mass.) 148; Abernethy v. Puritans' Church Soc., 3 Daly (N. Y.) 1; Churchwardens v. Rendell, 1 Newfoundl. 264.

[59] Mussey v. Bulfinch St. Soc., 1 Cush. (Mass.) 148 (holding also that on the forfeiture of a pew for the non-payment of the taxes due thereon for a year, according to the condition in the deeds, the corporation may deduct and retain from the proceeds all the taxes then due, as well those which had been due less, as those which had been due more, than a year).

[60] Abernethy v. Puritans Church Soc., 3 Daly (N. Y.) 1.

[61] Hebron First Presb. Cong. v. Quackenbush, 10 Johns. (N. Y.) 217.

[62] Hebron First Presb. Cong. v. Quackenbush, supra.

[63] Perrin v. Granger, 33 Vt. 101, 30 Vt. 595.

[64] Perrin v. Granger, 30 Vt. 595.

[65] Curtis v. Quincy First Cong. Soc., 108 Mass. 147.

[66] Church v. Wells, 24 Pa. 249. See Christ Church v. Simons, 31 S. C. L. 368 (question raised but not decided).

[67] See cases infra this section.

[68] Downs v. Bowdoin Square Baptist Soc., 149 Mass. 135, 21 NE 294.

[69] Downs v. Bowdoin Square Baptist Soc., supra.

[70] Downs v. Bowdoin Square Baptist Soc., supra.

[71] Fall River First M. E. Soc. v. Brayton, 9 Allen (Mass.) 248.

[72] See case infra this note.

[a] **Assent of majority to tax.**—A pewholder in a church whose deed from the society before it was incorporated expressly subjected his pew to all rates and taxes imposed thereon by the trustees for expenses and repairs cannot object to the repeal, without his assent, of a clause in the charter subsequently obtained, which requires the assent of a majority of the pewholders to the imposition by the trustees of any pew tax, where the general assembly have expressly reserved to themselves the power in the charter to alter, amend, or repeal it at pleasure. Bailey v. Power St. M. E. Church, 6 R. I. 491.

[73] See supra § 181.

[74] Murray v. Cargill, 32 Me. 517; Gay v. Baker, 17 Mass. 435, 9 AmD 159; Shaw v. Beveridge, 3 Hill (N. Y.) 26, 38 AmD 616; Hartford First Baptist Church v. Witherell, 3 Paige (N. Y.) 296, 24 AmD 223; Perrin v. Granger, 33 Vt. 101; Kellogg v. Dickinson, 18 Vt. 266.

[a] **Destruction of pews.**—Where subscribers for the erection of a Roman catholic church contracted for the purchase of a site, but no grantee was named, and after the edifice was erected, and the pews allotted, the land was conveyed to the bishop of the diocese, he holds the legal title as

Injunction. Equity may restrain a school district from converting a meeting-house into a schoolhouse,[81] and it will enjoin an illegal sale of a pew under an attachment where it appears that the pewholder's religious feelings would be outraged and that he could have no adequate remedy at law.[82] But it will not enjoin the pulling down, rebuilding, or alteration of a church building where necessary, there being an adequate remedy at law.[83] It will not enjoin the trustees from removing and changing the pews of the church where a statute expressly gives them power to regulate and order the renting of pews,[84] nor will it enjoin the trustees selling the pew for failure of the holder to pay his assessment.[85]

Certiorari. The control of church officials over the pews of a church being discretionary, certiorari will not lie to review their action in relation thereto, in the absence of any contract between the church and pewholder for the occupation of his pew.[86]

[§ 187] **2. Defenses.** In an action by a pewholder to recover for the unnecessary destruction of his pew, tender by the society of its value,[87] or acceptance by the pewholder of a new pew at a higher price is a defense.[88] But in an action by the pewholder against a stranger for trespass, it is no defense that the church had failed to keep the house in repair and that the pewholder's right was of no value.[89] In an action on a note given in consideration of a sale of pews to defendant followed by possession, it is no defense that the vendor refused to convey,[90] or that the society had been ousted from the meeting-house by the holder of a paramount title where the ouster occurred some time after the pewholder had gone into occupation of his pew.[91] In an action by a pewholder to recover his pew, title by levy of execution on the pew is no defense where the execution is not recorded on the parish books as required by statute.[92] In an action to enforce liability of a pewholder for assessment made upon his pew, it is no defense that the society had changed its name where it appeared that the pewholder had accepted a deed of the pew conditioned on his paying the annual assessment.[93] In an action to enforce a forfeiture for breach of condition on which a pew was held, waiver by the society of its right to declare a forfeiture is not established by its taxing the pewholder for a period of years after the breach, the breach being continuous.[94]

[§ 188] **3. Persons Entitled To Sue.** Government officers entitled to the occupancy of pews owned by the Crown may bring an action against the churchwardens for wrongful interference with their rights.[95] One who occupies a loose seat or bench in a place assigned it by the trustees does not have the seizin or possession of a pewholder entitling him to maintain trespass for breaking and entering his close.[96] A tenant in common with others of a meeting-house may maintain trespass for injuring one of the pews against one having no title or right either in the pew or in the house.[97]

X. CHURCH TRIBUNALS AND JUDICIAL OR LEGISLATIVE SUPERVISION

[§ 189] **A. General Principles—1. Ecclesiastical Jurisdiction of Church Tribunals.** When a person becomes a member of a church, he thereby submits to the ecclesiastical jurisdiction in ecclesiastical matters and he has no legal right to invoke the supervisory power of a civil court so long as none of his civil rights are involved.[98] Nor is a civil right involved in excommunication or excision of a member

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trustee for the subscribers, who may maintain trespass for the destruction of their pews by him. O'Hear v. De Goesbriand, 33 Vt. 593, 80 AmD 653.

[75] Howe v. Stevens, 47 Vt. 262; O'Hear v. De Goesbriand, 33 Vt. 593, 80 AmD 653.

[76] Howe v. Stevens, 47 Vt. 262.

[77] Daniel v. Wood, 1 Pick. (Mass.) 102, 11 AmD 151.

[78] Howe v. Stevens, 47 Vt. 262.

[79] Perrin v. Granger, 33 Vt. 101.

[80] Stoddert v. Port Tobacco Parish, 2 Gill & J. (Md.) 227.

[81] Howe v. Jericho School Dist. No. 3, 43 Vt. 282.

[82] Deutsch v. Stone, 11 Oh. Dec. (Reprint) 436, 27 CincLBul 20.

[83] Van Horn v. Talmage, 8 N. J. Eq. 108; In re Brick Presb. Church, 3 Edw. (N. Y.) 155; Heeney v. St. Peter's Church, 2 Edw. (N. Y.) 608.

[84] Solomon v. Congregation B'nai Jeshurun, 49 HowPr (N. Y.) 263.

[85] Abernethy v. Puritans Church Soc., 3 Daly (N. Y.) 1.

[86] Livingston v. Trenton Trinity Church, 45 N. J. L. 230.

[87] Kimball v. Rowley Second Cong. Parish, 24 Pick. (Mass.) 347.

[88] Curry v. Erie First Presb. Cong., 2 Pittsb. (Pa.) 40.

[89] Howe v. Stevens, 47 Vt. 262.

[90] Freligh v. Platt, 5 Cow. (N. Y.) 494 (holding that the remedy was a suit for specific performance).

[91] Severance v. Whittier, 24 Me. 120 (holding that there must be a total failure of consideration; if anything passed by the conveyance a note given for the consideration is recoverable, and if there be a partial failure of consideration the grantee is remitted to his covenants, if there be any, for his remedy).

[92] Sargent v. Peirce, 2 Metc. (Mass.) 80.

[93] Mussey v. Bulfinch St. Soc., 1 Cush. (Mass.) 148.

[94] Crocker v. Old South Soc., 106 Mass. 489.

[95] Fitzherbert v. Williams, 1 Newfoundl. 115.

[96] Niebuhr v. Piersdorff, 24 Wis. 316.

[97] Murray v. Cargill, 32 Me. 517.

[98] Ill.—Ferraria v. Vasconcellos, 31 Ill. 25.

Ind.—Hadley White Lick Quarterly Meeting of Friends v. Mendenhall White Lick Quarterly Meeting of Friends, 89 Ind. 136 [quot and foll O'Donovan v. Chatard, 97 Ind. 421, 49 AmR 462]; Gaff v. Greer, 88 Ind. 122, 45 AmR 449.

Ky.—Gibson v. Armstrong, 7 B. Mon. 481; Shannon v. Frost, 3 B. Mon. 253.

Mass.—Farnsworth v. Storrs, 5 Cush. 412; Remington v. Congdon, 2 Pick. 310, 13 AmD 431.

Miss.—Dees v. Moss Point Baptist Church, 17 S 1.

Mo.—State v. Farris, 45 Mo. 183.

N. Y.—Robertson v. Bullions, 9 Barb. 64 [aff 11 N. Y. 243]; McGuire v. St. Patrick's Cathedral, 3 NYS if done in accordance with the church discipline.[99] Ecclesiastical questions[1] belong to the ecclesiastical tribunals,[2] and their decisions thereon are binding, conclusive, and not reviewable by the civil courts,[3]

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781 [aff 54 Hun 207, 7 NYS 345].

Oh.—New Concord First United Presb. Church v. Young, 21 OhNPNS 569.

Pa.—Heidelberg German Reformed Church v. Com., 3 Pa. 282.

[99] See infra § 192.

[1] See case infra this note.

[a] **"Ecclesiastical matter" defined.**—An ecclesiastical matter is one that concerns doctrine, creed, or form of worship of the church, or the adoption and enforcement within a religious association of needful laws and regulations for the government of membership, and the power of excluding from such associations those deemed unworthy of membership by the legally constituted authorities of the church; and all of such matters are within the province of church courts and their decisions will be respected by civil tribunals. Clark v. Brown, (Tex. Civ. A.) 108 SW 421 [rev on other grounds 102 Tex. 323, 116 SW 360, 24 LRANS 670].

[2] U. S.—Brown v. Protestant Episcopal Church, 8 F. (2d) 149; Hansel v. Purnell, 1 F. (2d) 266 [certiorari den 266 U. S. 617 mem, 45 SCt 98 mem, 69 L. ed. 470 mem].

Ala.—Mitchell v. Mt. Olive Church of Christ, 128 S 781; Gewin v. Mt. Pilgrim Baptist Church, 166 Ala. 345, 51 S 947, 139 AmSR 41; Houston v. Howze, 162 Ala. 500, 50 S 266.

Ark.—Sanders v. Baggerly, 96 Ark. 117, 131 SW 49.

Cal.—Church of Christ v. Harper, 83 Cal. A. 41, 256 P 476.

D. C.—U. S. v. First Colored Baptist Church, 56 App. 324, 13 F. (2d) 296; Lemmon v. Kirkland, 44 App. 512.

Ga.—McCluskey v. Rakestraw, 164 Ga. 30, 137 SE 394; Hall v. Henry, 159 Ga. 80, 124 SE 883; Gibson v. Singleton, 149 Ga. 502, 101 SE 178; Tucker v. Paulk, 148 Ga. 228, 96 SE 339; Mack v. Kime, 129 Ga. 1, 58 SE 184, 24 LRANS 675.

Ill.—Stallings v. Finney, 287 Ill. 145, 122 NE 369; Fancy Prairie Cong. v. King, 245 Ill. 120, 91 NE 776; Lincoln First Presb. Church v. First Cumberland Presb. Church, 245 Ill. 74, 91 NE 761, 19 AnnCas 275; Fussell v. Hail, 233 Ill. 73, 84 NE 42 [aff 134 Ill. A. 620]; Kuns v. Robertson, 154 Ill. 394, 40 NE 343; Chase v. Cheney, 58 Ill. 509, 11 AmR 95; Kauffman v. Plank, 214 Ill. A. 306; Lewis v. Voliva, 154 Ill. A. 48.

Ind.—Ramsey v. Hicks, 174 Ind. 428, 91 NE 344, 92 NE 164, 30 LRANS 665 [rev 44 Ind. A. 490, 87 NE 1091, 89 NE 597].

Kan.—King v. Smith, 106 Kan. 624, 189 P 147.

Ky.—Chiles v. Seventh-Day Adventist Conference Assoc., 201 Ky. 373, 256 SW 1103; Hall v. Hall, 177 Ky. 430, 197 SW 799.

La.—State v. Hebrew Cong., etc., 31 La. Ann. 205, 33 AmR 217.

Md.—Jackson v. Hopkins, 113 Md. 557, 78 A 4; Tartar v. Gibbs, 24 Md. 323.

Mass.—Tymchuk v. St. Nicholas Russian Ben. Soc., 169 NE 424; Greek Orthodox Community v. Malicourtis, 267 Mass. 472, 166 NE 863; Moustakis v. Hellenic Orthodox Soc., 261 Mass. 462, 159 NE 453; Dittemore v. Dickey, 249 Mass. 95, 144 NE 57; Krauthoff v. Atty.-Gen., 240 Mass. 88, 132 NE 865; Carter v. Papineau, 222 Mass. 464, 111 NE 358, LRA1916D 371, AnnCas1918C 620; Crawford v. Nies, 220 Mass. 61, 107 NE 382.

Mich.—Holwerda v. Hoeksema, 232 Mich. 648, 206 NW 564; Komarynski v. Popovich, 232 Mich. 88, 205 NW 184.

Miss.—Edwards v. DeVance, 138 Miss. 580, 103 S 194; Allen v. Roby, 109 Miss. 107, 67 S 899.

Mo.—Hynes v. Lillis, 183 Mo. A. 190, 170 SW 396.

N. H.—Hale v. Everett, 53 N. H. 9, 16 AmR 82.

N. J.—Livingston v. Trenton Trinity Church, 45 N. J. L. 230; Day v. Bolton, 12 N. J. L. 206.

N. Y.—Baxter v. McDonnell, 155 N. Y. 83, 49 NE 667, 40 LRA 670; Connitt v. New Prospect Reformed Protestant Dutch Church, 54 N. Y. 551 [aff 4 Lans. 339]; Christ's Church v. Collett, 208 App. Div. 695, 204 NYS 315 [aff 240 N. Y. 563, 148 NE 706]; Westminster Presb. Church v. New York Presbytery, 142 App. Div. 855, 127 NYS 836 [app dism 202 N. Y. 581 mem, 96 NE 1134 mem]; Baxter v. McDonnell, 18 App. Div. 235, 45 NYS 765; Burke v. Rector, etc., of Trinity Church, 63 Misc. 43, 117 NYS 255 [aff 132 App. Div. 930 mem, 117 NYS 1130 mem]; Fairchild v. Tillotson, 195 NYS 39; Hartford First Baptist Church v. Witherell, 3 Paige 296, 24 AmD 223.

N. D.—Bendewald v. Ley, 39 N. D. 272, 168 NW 693.

Oh.—Katz v. Goldman, 33 Oh. A. 150, 168 NE 763.

Okl.—Cage v. Cansler, 119 Okl. 36, 248 P 612.

Pa.—Pido v. First Slavish Roman Catholic Greek Rite Church, 298 Pa. 231, 148 A 100.

Tex.—Kelley v. Curry, (Civ. A.) 15 SW (2d) 109; Hopson v. Swansy, (Civ. A.) 1 SW (2d) 419; Minton v. Leavell, (Civ. A.) 297 SW 615; Clark v. Brown, (Civ. A.) 108 SW 421 [rev Brown v. Clark, 102 Tex. 323, 116 SW 360, 24 LRANS 670].

W. Va.—Woodrum v. Burton, 88 W. Va. 322, 107 SE 102.

Alta.—Wetmon v. Baynes, 23 Alta. L. 446, [1928] 1 DomLR 848, [1928] 1 WestWkly 519.

[a] **General assembly of Cumberland presbyterian church** under the constitution of that organization has authority to determine whether the teaching, doctrines, and form of government of another organization are in accord with it, and, if found so, to unite it with such organization upon such terms and under such name as the judgment of the general assembly shall dictate. Mack v. Kime, 129 Ga. 1, 58 SE 184.

[b] **Devotional singing.**—The question whether or not devotional singing, forming a part of the public worship of a particular religious society, should be accompanied with instrumental music, must be determined by those who administer the discipline of the church to which they belong. Tartar v. Gibbs, 24 Md. 323.

[3] U. S.—Gonzalez v. Roman Catholic Archbishop, 280 U. S. 1, 50 SCt 5, 74 L. ed. 131; Watson v. Jones, 13 Wall. 679, 20 L. ed. 666; Sherard v. Walton, 206 Fed. 562.

Ala.—Manning v. Yeager, 203 Ala. 185, 82 S 435; Harris v. Cosby, 173 Ala. 81, 55 S 231.

Cal.—Permanent Committee of Missions, etc. v. Pacific Synod Presb. Church, 157 Cal. 105, 106 P 395.

Conn.—Arthur v. Norfield Parish Cong. Church Soc., 73 Conn. 718, 49 A 241.

Ga.—Swafford v. Keaton, 29 Ga. A. 13, 113 SE 67; Swafford v. Keaton, 23 Ga. A. 238, 98 SE 122.

Ill.—Fancy Prairie Cong. v. King, 245 Ill. 120, 91 NE 776; Lincoln First Presb. Church v. First Cumberland Presb. Church, 245 Ill. 74, 91 NE 761, 19 AnnCas 275; Fussell v. Hail, 233 Ill. 73, 84 NE 42 [aff 134 Ill. A. 620]; Kuns v. Robertson, 154 Ill. 394, 40 NE 343; Schweiker v. Husser, 146 Ill. 399, 34 NE 1022 [aff 44 Ill. A. 566].

Ind.—O'Donovan v. Chatard, 97 Ind. 421, 49 AmR 462.

Iowa.—Bethany Cong. Church v. Morse, 151 Iowa 521, 132 NW 14; Bird v. St. Mark's Church, 62 Iowa 567, 17 NW 747.

Ky.—Wallace v. Hughes, 131 Ky. 445, 115 SW 684; Perry v. Wheeler, 12 Bush 541; Shannon v. Frost, 3 B. Mon. 253.

Mich.—Holwerda v. Hoeksema, 232 Mich. 648, 206 NW 564; Borgman v. Bultema, 213 Mich. 684, 182 NW 91.

Minn.—East Norway Lake Norwegian Evangelical Lutheran Church v. Halvorson, 42 Minn. 503, 44 NW 663.

Miss.—Windham v. Ulmer, 102 Miss. 491, 59 S 810.

Mo.—Hayes v. Manning, 263 Mo. 1, 172 SW 897; State v. Farris, 45 Mo. 183; Klix v. Polish Roman Catholic St. Stanislaus Parish, 137 Mo. A. 347, 118 SW 1171.

Nebr.—Immaculate Conception Parish v. Murphy, 89 Nebr. 524, 131 NW 946, 35 LRANS 926; St. Vincent's Parish v. Murphy, 83 Nebr. 630, 120 NW 187, 35 LRANS 919; Bonacum v. Harrington, 65 Nebr. 831, 91 NW 886; Wehmer v. Fokenga, 57 Nebr. 510, 78 NW 28; Pounder v. Ashe, 44 Nebr. 672, 63 NW 48.

N. J.—Schilstra v. Van Den Heuvel, 82 N. J. Eq. 155, 612, 90 A 1056; Everett v. Sussex First Baptist Church, 6 N. J. Misc. 640, 142 A 428.

N. Y.—Baxter v. McDonnell, 155 N. Y. 83, 49 NE 667, 40 LRA 670; Connitt v. New Prospect Reformed Protestant Dutch Church, 54 N. Y. 551 [aff 4 Lans. 339]; In re Westminster Presb. Church, 137 App. Div. 301, 121 NYS 1039; Robertson v. Bullions, 9 Barb. 64 [aff 11 N. Y. 243]; Fiske v. Beaty, 120 Misc. 1, 198 NYS 358 [mod on other grounds 206 App. Div. 349, 201 NYS 441 (aff 238 N. Y. 598, 144 NE 907)]; New York Presbytery v. Westminster Presb. Church, 67 Misc. 317, 122 NYS 309 [rev 142 App. Div. 876, 127 NYS 851].

Okl.—Wagoner First Presb. Church v. Cumberland Presb. Church, 34 Okl. 503, 126 P 197.

Pa.—Furmanski v. Iwanowski, 265 Pa. 1, 108 A 27; Irvine v. Elliott, 206 Pa. 152, 55 A 859; Krecker v. Shirey, 163 Pa. 534, 30 A 440, 29 LRA 476; Skilton v. Webster, Brightly 203; Gordon v. Williams, 3 LegGaz 113.

Tex.—Davis v. Sauls, (Civ. A.) 298 SW 441; Clark v. Brown, (Civ. A.) 108 SW 421 [rev 102 Tex. 323, 116 SW 360, 24 LRANS 670].

"The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and having the same effect in proceedings before a civil court as the judgment of any civil court of competent jurisdiction,[4] regardless of whether the governing authority is placed in one person or in a synod or conference,[5] or whether the mode of procedure is in accord with the ordinary course of investigations or trials.[6] There is some authority to the contrary.[7] It has been held, however, that constitutional questions affecting the organization and authority of the tribunal, and whether its decision violates the constitution of the church, may be reviewed by the civil courts.[8]

[§ 190] **2. Jurisdiction and Power of Civil Courts.** While ecclesiastical tribunals have exclusive jurisdiction of ecclesiastical matters,[9] civil rights are within the exclusive jurisdiction of the courts.[10] But civil courts have no jurisdiction over the church or its members, as such, or over its officers or tribunals, except where temporal rights are involved;[11] nor in court proceedings can they inquire or decide

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officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for." Watson v. Jones, 13 Wall. (U. S.) 679, 728, 20 L. ed. 666.

[a] **Union between religious bodies.**—Where, according to the book of discipline of the methodist episcopal church, as construed by its bishops and its ecclesiastical authorities, the bishop who presides at the annual conference has the power to consolidate two or more churches into one church, and the trustees of the church thereby become in the law of the church the successors of the trustees of the churches whose existences were terminated, and such construction is the common understanding and practice of the church, and has never been called in question, it is binding on the courts. Trinity M. E. Church v. Harris, 73 Conn. 216, 47 A 116, 50 LRA 636; Clark v. Brown, (Civ. A.) 108 SW 421 [rev on other grounds 102 Tex. 323, 116 SW 360, 24 LRANS 670].

[b] **Division of church into two.**—The division of a local presbyterian church into two organizations by the act of a presbytery, according to the recognized ecclesiastical law of the presbyterian church, is binding upon the local church, and upon the civil courts whenever material to pending litigation. Wheelock v. Los Angeles First Presb. Church, 119 Cal. 477, 51 P 841.

[c] **Secession.**—Where a presbytery decides that members of a presbyterian church have seceded, the decision binds the civil courts and the seceders, although a majority lose their rights to the church property. Gaff v. Greer, 88 Ind. 122 [foll Trinity M. E. Church v. Harris, 73 Conn. 216, 47 A 116, 50 LRA 636].

[4] See infra § 190.

[5] Bonacum v. Harrington, 65 Nebr. 831, 91 NW 886.

[6] See infra § 196.

[7] Smith v. Nelson, 18 Vt. 511, 549 (referred to in Connitt v. New Prospect Reformed Protestant Dutch Church, 54 N. Y. 551, as being "in conflict with the general course of judicial decisions everywhere in this country").

"In this State the case is wholly different [from England]. We have no religious establishment, no ecclesiastical law, or courts, established by any authority. All their laws are wanting in this essential requisite, to give them any authority, that they are not 'prescribed by the supreme power in a State.' And though they may form constitutions, enact canons, laws, or ordinances, establish courts, or make any decisions, decrees of judgments, yet they can have only a voluntary obedience, cannot affect any civil rights, immunities, or contracts, or alter or dissolve any relations, or obligations, arising from contracts. When their proceedings are to be examined by ordinary tribunals of justice, their power is a phantom, and they can receive no other consideration, than the regulations of any other voluntary associations, formed for trifling, or grave and important, purposes. Obedience to the requisitions of any ecclesiastical societies may be required, under the penalty of spiritual censures; but this is the only penalty incurred by disobedience; and whether one submits to, or defies, the proceedings of any ecclesiastical court, or any censures passed by them, depends on his conviction of the regularity, or irregularity, of their proceedings. In short, they can only affect the conscience of the individual; how far they affect this, he must be the judge." Smith v. Nelson, supra.

[8] See infra § 190.

[9] See supra § 189.

[10] Cal.—Dyer v. Los Angeles Super. Court, 94 Cal. A. 260, 271 P 113; Hooper v. Stone, 54 Cal. A. 668, 202 P 485.

Ill.—Marie M. E. Church v. Trinity M. E. Church, 253 Ill. 21, 97 NE 262; Chase v. Cheney, 58 Ill. 509, 11 AmR 95.

Ind.—Yanthis v. Kemp, 43 Ind. A. 203, 85 NE 976, 86 NE 451.

Iowa.—Bird v. St. Mark's Church, 62 Iowa 567, 17 NW 747.

Ky.—Thomas v. Lewis, 224 Ky. 307, 6 SW (2d) 255; Watson v. Avery, 2 Bush 332; Shannon v. Frost, 2 B. Mon. 253.

Mass.—Sheldon v. Easton Cong. Parish, 24 Pick. 281; Avery v. Tyringham, 3 Mass. 160, 3 AmD 105.

Minn.—Spenningsby v. Norwegian Evangelical Lutheran Trinity Cong., 152 Minn. 164, 188 NW 217.

Mo.—Watson v. Garvin, 54 Mo. 353.

N. J.—Lynd v. Menzies, 33 N. J. L. 162.

N. Y.—Baxter v. McDonnell, 18 App. Div. 235, 45 NYS 765; Westminster Presb. Church v. Findley, 44 Misc. 173, 89 NYS 801; Holcombe v. Leavitt, 124 NYS 980; Miller v. Gable, 2 Den. 492.

Oh.—Ginerich v. Swartzentruber, 22 OhNPNS 1; First Presb. Soc. v. Markley, 10 OhNPNS 529.

Okl.—Cage v. Cansler, 130 Okl. 70, 265 P 112.

Pa.—In re St. Mary's Immaculate Conception Greek Catholic Church, 296 Pa. 307, 145 A 862; Ashinsky v. Levenson, 256 Pa. 14, 100 A 491, LRA 1917D 994; O'Hara v. Stack, 90 Pa. 477; Gordon v. Williams, 3 LegGaz 113; Batterson v. Thompson, 8 Phila. 251.

R. I.—Caranica v. Belba, 131 A 840.

[11] Ill.—Fussell v. Hail, 233 Ill. 73, 84 NE 42 [aff 134 Ill. A. 620]; Kuns v. Robertson, 154 Ill. 394, 40 NE 343; Chase v. Cheney, 58 Ill. 509, 11 AmR 95.

Ind.—Hadley White Lick Quarterly Meeting of Friends v. Mendenhall White Lick Quarterly Meeting of Friends, 89 Ind. 136 [quot and foll O'Donovan v. Chatard, 97 Ind. 421, 49 AmR 462]; Grimes v. Harmon, 35 Ind. 198, 254, 9 AmR 690 [quot and foll O'Donovan v. Chatard, supra]; Yanthis v. Kemp, 43 Ind. A. 203, 85 NE 976, 86 NE 451.

N. J.—Jennings v. Scarborough, 56 N. J. L. 401, 28 A 559; Livingston v. Trenton Trinity Church, 45 N. J. L. 230.

N. Y.—Baxter v. McDonnell, 18 App. Div. 235, 45 NYS 765; Westminster Presb. Church v. Findley, 44 Misc. 173, 89 NYS 801; Hartford First Baptist Church v. Witherell, 3 Paige 296, 24 AmD 223.

Oh.—Messinger v. Trinity Church, 8 Oh. Dec. (Reprint) 227, 6 CincLBul 397.

S. C.—Morris St. Baptist Church v. Dart, 67 S. C. 338, 45 SE 753, 100 AmSR 727.

[a] **Sufficiency of presentment to ecclesiastical court** in respect of the specifications of time, place, and circumstances will not be inquired into by a secular court, but must be determined by the spiritual court before which the cause is to be tried. Chase v. Cheney, 58 Ill. 509, 11 AmR 95.

[b] **Courts will not compel individual to attend worship** in any place, nor remain connected with any church, nor to receive any one as his pastor. Feizel v. Wyandotte City M. E. Church First German Soc., 9 Kan. 592.

[c] **Courts of equity** (1) will not supplement the rules of a church by supplying a remedy for the regulation of purely church affairs (Powers v. Budy, 45 Nebr. 208, 63 NW 476), (2) and will not review the decisions or proceedings of ecclesiastical judicatures in matters properly within their province under the laws and regulations of the church (Travers v. Abbey, 104 Tenn. 665, 58 SW 247, 51 LRA 260 [holding also that there is no waiver of the jurisdiction of a religious society to adjudicate its own matters by answering and setting up a defense in a court of equity, since the jurisdiction is of the subject matter, and objection may be raised at any time]) (3) and, where no property rights are involved, will not interfere to quell religious disturbances (Papailiou v. Manusos, 108 Ill. A. 272), (4) and thus a bill to enjoin proceedings of an ecclesiastical body which fails to show that property rights will be affected thereby is demurrable (Fussell v. Hail, 233 Ill. 73, 84 NE 42 [aff 134 Ill. A. 620]). (5) But it has been held that a court of equity may interfere in an ecclesiastical controversy so far as to ascertain if the governing body has acted within the scope of its authority. Batterson v. Thompson, 8 Phila. (Pa.) 251.

[d] **Questions of procedure; certiorari.**—Irregularity under the canons of the church in the organization of the diocesan court and refusal of such court to entertain a challenge by a clergyman on trial before it to one of the members of the court, and

what religious doctrines are true or what are false except where property rights or the administration of a trust are involved.[12] Where a civil right or the right of property depends upon some ecclesiastical matter, such as doctrine, discipline, or church government, the civil court, where the question may arise, will take the ecclesiastical decisions, out of which the civil right has arisen, as it finds them, accepting those decisions as matters adjudicated by another jurisdiction;[13] and until an ecclesiastical tribunal having final jurisdiction to decide the question has determined it, the civil court will not assume to do so.[14] It has been held, however, that constitutional questions affecting the organization and authority of the church tribunal,[15] and whether its decision violates the constitution of the church, may be reviewed by the civil courts[16] unless the precise question has itself been adjudicated by the supreme tribunal of the church having jurisdiction thereof.[17] If, however, the authority of the church tribunal is doubtful, the court will be slow to inter-

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supposed insufficiency of the evidence upon which accused could be convicted under the provisions of a certain canon, are questions of procedure where they involve construction of the canons of the church, and depend upon the judgment of the ecclesiastical court over which the civil court can exercise no power of revision, or control. There is no power or jurisdiction in the civil courts of common-law jurisdiction to review and correct by certiorari supposed errors in the proceedings and judgments by a diocesan court in matters of ecclesiastical cognizance, such as charges of crime or immorality, against a clergyman of the church and because by deposition from his office a clergyman of the church, as the result of a sentence by a diocesan court, is deprived of the right or power to exercise the power or functions of a minister of the church and of the right to earn his salary as such minister, a property right is not thereby involved which will give the civil courts jurisdiction to review by certiorari the action of such diocesan court, there being no vested property right in a clergyman to exercise the functions of his office to the end that he may earn and have a salary. Satterlee v. U. S., 20 App. (D. C.) 393.

12. Ill.—Sand Creek Christian Church v. Church of Christ, 219 Ill. 503, 76 NE 703; Kuns v. Robertson, 154 Ill. 394, 40 NE 343.

Ind.—Hadley White Lick Quarterly Meeting of Friends v. Mendenhall White Lick Quarterly Meeting of Friends, 89 Ind. 136.

Minn.—East Norway Lake Norwegian Evangelical Lutheran Church v. Halvorson, 42 Minn. 503, 44 NW 663.

Nebr.—Wehmer v. Fokenga, 57 Nebr. 510, 78 NW 28.

N. H.—Hale v. Everett, 53 N. H. 9, 16 AmR 82.

"The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." Watson v. Jones, 13 Wall. (U. S.) 679, 728, 20 L. ed. 666.

[a] **General court of Virginia had jurisdiction,** as an ecclesiastical tribunal, to punish or depose a regularly ordained minister of the church of England. Godwin v. Lunan, Jeff. (Va.) 96.

[b] **Liability in civil court no bar to ecclesiastical proceeding.**—The liability of a clergyman to indictment and conviction in the civil courts for offenses charged in an ecclesiastical proceeding against him in a diocesan court forms no part of the proceeding in the latter court. Satterlee v. U. S., 20 App. (D. C.) 393 (holding that the general convention of the church has the power to make and enforce the canon providing that every minister of the church shall be liable to presentment and trial for certain offenses including that of crime or immorality, there being nothing in the provisions of the canon violative of, or in conflict with, personal civil rights of those liable to be tried therein).

13. U. S.—Watson v. Jones, 13 Wall. 679, 20 L. ed. 666; Barkley v. Hayes, 208 Fed. 319 [aff Duvall v. Kansas Synod Presb. Church, 222 Fed. 669, 138 CCA 217].

Ala.—Dismukes v. State, 176 Ala. 616, 58 S 195; Harris v. Cosby, 173 Ala. 81, 55 S 231.

Ga.—Mack v. Kime, 129 Ga. 1, 58 SE 184.

Ill.—Fancy Prairie Cong., etc. v. King, 245 Ill. 120, 91 NE 776; Lincoln First Presb. Church v. First Cumberland Presb. Church, 245 Ill. 74, 91 NE 761, 19 AnnCas 275.

Ind.—Hadley White Lick Quarterly Meeting of Friends v. Mendenhall White Lick Quarterly Meeting of Friends, 89 Ind. 136 [quot and foll O'Donovan v. Chatard, 97 Ind. 421, 49 AmR 462].

Ky.—Clapp v. Krug, 232 Ky. 303, 22 SW (2d) 1025; Ransom v. Rogers, 12 Ky. Op. 739.

Minn.—East Norway Lake Church v. Halvorson, 42 Minn. 503, 44 NW 663.

Miss.—Mt. Helm Baptist Church v. Jones, 79 Miss. 488, 30 S 714.

N. J.—Livingston v. Trenton Trinity Church, 45 N. J. L. 230.

N. Y.—Connitt v. New Prospect Reformed Protestant Dutch Church, 54 N. Y. 551; Baxter v. McDonnell, 18 App. Div. 235, 45 NYS 765.

Oh.—Harrison v. Hoyle, 24 Oh. St. 254; Sampsell v. Escher, 11 Oh. Dec. (Reprint) 351, 26 CincLBul 156.

S. C.—Harmon v. Preher, 17 S. C. Eq. 87.

Tex.—Schumann v. Dally, (Civ. A.) 29 SW (2d) 422; Redland First Baptist Church v. Ward, (Civ. A.) 290 SW 828.

[a] **Adverse decision of ecclesiastical court.**—When a plaintiff brings an action founded upon a custom or law of the church to which he belongs, it is a good defense thereto that he has already submitted his claim to an ecclesiastical court, which has passed upon it adversely. Baxter v. McDonnell, 155 N. Y. 83, 49 NE 667, 40 LRA 670.

14. Fussell v. Hail, 233 Ill. 73, 84 NE 42 [aff 134 Ill. A. 620].

[a] **Employment of pastor.**—In the absence of a showing that an ecclesiastical tribunal having final jurisdiction to decide a question as to church doctrine has determined it in favor of complainant, or that such an ecclesiastical tribunal exists having jurisdiction to decide the question, the court will not determine whether the tenets of faith and practice of one synod of the Lutheran church differ in essential particulars from the tenets of another synod, and that a majority of a religious congregation, or the trustees thereof, will not, at the suit of a minority, be enjoined from employing a pastor professing the same organic creed professed by the congregation, on the ground that such minister teaches doctrines and practices a certain church polity not taught and practiced by the minority, nor by the original founders of the congregation. Wehmer v. Fokenga, 57 Nebr. 510, 78 NW 28.

15. Mason v. Lee, 96 Miss. 186, 50 S 625.

16. U. S.—Brundage v. Deardorf, 55 Fed. 839.

D. C.—Taylor v. Jackson, 50 App. 381, 273 Fed. 345.

Ill.—Fancy Prairie Cong., etc. v. King, 245 Ill. 120, 91 NE 776; Lincoln First Presb. Church v. First Cumberland Presb. Church, 245 Ill. 74, 91 NE 761, 19 AnnCas 275.

Mo.—Boyles v. Roberts, 222 Mo. 613, 121 SW 805.

N. J.—Day v. Bolton, 12 N. J. L. 206.

Okl.—Wagoner First Presb. Church v. Cumberland Presb. Church, 34 Okl. 503, 126 P 197.

Pa.—Scott v. Wilson, 252 Pa. 95, 97 A 101; McDowell v. Wilson, 252 Pa. 91, 97 A 100.

Vt.—Smith v. Nelson, 18 Vt. 511.

[a] **Original jurisdiction of session.**—The higher courts of the presbyterian church have not original jurisdiction of matters pertaining to the immediate government of a congregation, such government being primarily intrusted to "the session." Watson v. Avery, 2 Bush (Ky.) 332.

[b] **Removal of Roman catholic priest.**—By the laws and customs of the Roman catholic church in the United States, a priest is liable to be removed from the charge of a congregation at the pleasure of his bishop, without trial. O'Donovan v. Chatard, 97 Ind. 421, 49 AmR 462. But see Stack v. O'Hara, 98 Pa. 213 (holding, however, that he cannot be suspended from his priestly functions and ministerial duties without specific accusation and trial).

[c] **Sequestration of temporalities.**—No church judiciary can sequester the temporalities of the church, society, or corporation, because of the deposition of the minister, nor, where the society has been incorporated, supply the pulpit temporarily, or otherwise, against the will of the trustees. Robertson v. Bullions, 9 Barb. 64 [aff 11 N. Y. 243].

[d] **Delegation by synod of its judicial power.**—The synod of a church has no power to appoint a commission to receive the submission of a presbytery, which has been on trial before the synod, and to restore or dissolve the presbytery, as the commissioners may think proper. This is a delegation of judicial power not warranted by any known rules of discipline in the "Associate Church." Smith v. Nelson, 18 Vt. 511.

17. Brundage v. Deardorf, 92 Fed. 214, 34 CCA 304; Permanent Committee of Missions, etc. v. Pacific Synod Presby. Church, 157 Cal. 105, 106 P 395; Bentle v. Ulay, 175 Ind. 494, 94 NE 759; Ramsey v. Hicks, 174 Ind. 428, 91 NE 344, 92 NE 164, 30 LRANS 665 [rev 44 Ind. A. 490, 87 NE 1091, 89 NE 597]; Clark v. Brown, (Tex. Civ. A.) 108 SW 421 [rev 102 Tex. 323, 116 SW 360, 24 LRANS 670].

fere.[18] Where the church tribunal has only advisory powers, its decisions on matters referred to it, while not conclusive on the courts,[19] are entitled to great weight.[20]

[§ 191] 3. **Legislative Supervision.** Subject to constitutional guaranties as to religious liberty[21] regulatory legislation affecting the temporalities of the church may be sustained.[22]

[§ 192] **B. Admission, Expulsion, and Rights of Member.**[23] Civil courts have no jurisdiction to review the action of competent church authority in expelling a member,[24] an appeal lying to the higher tribunal of the church wherever available.[25] Nor will the civil courts review the judgments of the general assembly of a church, cutting off synods of the church,[26] or the action of a synod rejecting a minister's application for membership,[27] or the action of a religious society in admitting or rejecting members,[28] or the action of the ecclesiastical authorities determining whether a person died in the faith of the Roman catholic church entitling him to interment in the cemetery of the church.[29] Even in equity the judgments of religious associations, bearing upon their own members, are not examinable, except where they affect civil rights,[30] and equity has no jurisdiction to compel a faction of a religious body to cease worshiping in its church because of an abandonment of the faith, laws, usages, and customs of the church.[31] It is held, however, that civil courts may inquire whether the expulsion was the act of the church or of persons who were not the church, and who consequently had no right to excommunicate anyone,[32] and that the ecclesiastical tribunal of a denomination will be enjoined from expelling a member of a local congregation for alleged spiritual offenses, when it appears that such tribunal has not been organized in conformity with the organic law of the church;[33] and where a member of a religious society is expelled, and he deems himself aggrieved in his rights of property thereby, the courts will examine the judgment of expulsion to see if it has been regularly made on due notice and a hearing, and if not will disregard it and give proper relief.[34]

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[18] Gibson v. Armstrong, 7 B. Mon. (Ky.) 481.

[19] Monk v. Little, 122 Ark. 7, 182 SW 511; Monongahela City Baptist Church v. Shawger, 36 Pa. Co. 514; Woodrum v. Burton, 88 W. Va. 322, 107 SE 102; Evangelical Lutheran St. Paul's Cong. v. Hass, 177 Wis. 23, 187 NW 677; Evangelical Lutheran St. Paul's Cong. v. Jaeger, 177 Wis. 34, 187 NW 681.

[20] Smith v. Pedigo, 145 Ind. 361, 33 NE 777, 44 NE 363, 19 LRA 433, 32 LRA 838.

[21] See Constitutional Law §§ 450–457.

[22] Grupe v. Rudisill, 101 N. J. Eq. 145, 136 A 911.

[a] **Declaring church extinct.**—The conditions imposed by statute, under which a governing presbytery may declare a church extinct and take charge of its property, is the law of the state, and cannot be superseded by church discipline. New York Presbytery v. Westminster Presb. Church, 67 Misc. 317, 122 NYS 309 [rev 142 App. Div. 876, 127 NYS 851].

[b] **Borrowing money.**—A conflicting canon law yields to the law of the land, and, in a proceeding under statute, to borrow money for necessary church repairs, a resolution of the church that "except for ordinary outlays" no sum beyond three hundred dollars could be spent unless with the bishop's assent in writing could not be set up as a defense, as raising money by mortgage was within the purview of the act and "repairs" might be ordinary outlays. In re St. Joseph's Lithuanian Roman Catholic Church, 273 Pa. 486, 117 A 216.

[23] **Mandamus to restore to membership** see Mandamus § 517.

[24] U. S.—Bouldin v. Alexander, 15 Wall. 131, 21 L. ed. 69.

Iowa.—Helbig v. Rosenberg, 86 Iowa 159, 53 NW 111.

Ky.—Shannon v. Frost, 3 B. Mon. 253.

Mass.—Canadian Religious Assoc. v. Parmenter, 180 Mass. 415, 62 NE 740; Grosvenor v. United Soc. of Believers, 118 Mass. 78; Farnsworth v. Storrs, 5 Cush. 412.

Miss.—Dees v. Moss Point Baptist Church, 17 S 1.

Nebr.—Bonacum v. Murphy, 71 Nebr. 463, 98 NW 1030, 104 NW 180.

N. Y.—Peo. v. German United Evangelical St. Stephen's Church, 53 N. Y. 103 [rev 6 Lans. 172 (rev 3 Lans. 434)].

[a] **By congregation of congregational church.**—When persons have voluntarily associated themselves into a society of christians, recognizing no ecclesiastical tribunal with authority to revise its final determination, such a church is what is denominated congregational, and has the exclusive right to deal with its defaulting members, and the courts cannot supervise or control that jurisdiction. Lucas v. Case, 9 Bush (Ky.) 297.

[b] **On insufficient evidence.**—The action of a religious society, empowered to expel any member acting against its interest, in expelling members for such reason upon a proper hearing, is final, and is not reviewable by a court on the ground that the evidence on which the expulsion was based was insufficient; and hence exceptions to a master's report that a society's expulsion of members was ineffectual on the ground of insufficient evidence will be sustained. Canadian Religious Assoc. v. Parmenter, 180 Mass. 415, 62 NE 740.

[c] **For subversive opinions and doctrines.**—The ministers and elders of the society of believers, commonly called "shakers," have the power to expel members of the society, and where they expel a member for entertaining opinions and promulgating doctrines within the society at variance with the established belief and subversive of the organization, the courts have no power or jurisdiction in an action of tort for such expulsion to determine whether or not the opinions and doctrines of such expelled member were in fact inconsistent with the society's established belief. Grosvenor v. United Soc. of Believers, 118 Mass. 78.

[25] See case infra this note.

[a] **Appeal from consistory.**—If a consistory expel a member without the consent of the congregation, his remedy is by appeal to a higher tribunal of the church, not to the civil courts. German Reformed Church v. Com., 3 Pa. 282.

[26] Com. v. Green, 4 Whart. (Pa.) 531.

[27] Helbig v. Rosenberg, 86 Iowa 159, 53 NW 111.

[28] Richardson v. Francestown Union Cong. Soc., 58 N. H. 187.

[29] McGuire v. St. Patrick's Cathedral, 3 NYS 781 [aff 54 Hun 207, 7 NYS 345].

[30] Harmon v. Dreher, 17 S. C. Eq. 87.

[a] **Membership qualifications.**—A court of equity has no power to disfranchise a member of a religious society by declaring that he does not possess the necessary qualifications. Robertson v. Bullions, 9 Barb. 64 [aff 11 N. Y. 243].

[b] **Excommunication.** — Where the relation between an independent baptist church and its members is not contractual, and no property or civil rights depend on membership, a court of equity, having jurisdiction in ecclesiastical matters only as an incident to the ascertainment of civil rights, cannot determine whether the excommunication of members of such church was conducted in accordance with the usages and laws of the church. Nance v. Busby, 91 Tenn. 303, 18 SW 874, 15 LRA 801.

[31] Smith v. Charles, (Miss.) 24 S 968.

[32] Bouldin v. Alexander, 15 Wall. (U. S.) 131, 21 L. ed. 69.

[a] **Schism.**—The members of a church having divided into two factions on account of a difference in religious belief and faith, each claiming that its faith is that on which the church was founded, the action of the majority faction, in deciding in its own favor and expelling the members of the other faction, is not conclusive, but such majority faction having in fact departed from the faith, its action was not that of the church, but was nugatory. Smith v. Pedigo, 145 Ind. 361, 33 NE 777, 44 NE 363, 19 LRA 433, 32 LRA 838.

[33] Hatfield v. De Long, 156 Ind. 207, 59 NE 483.

[34] Watson v. Garvin, 54 Mo. 353 [disappr Watson v. Jones, 13 Wall. (U. S.) 679, 20 L. ed. 666 (a case involving the same dispute)].

[a] **Closing church.**—Where the trustees and certain members of a religious society closed the society's church, held in trust for its members, against the wishes of other members desirous of continuing worship there in accordance with the constitutional object of the society, and expelled those members without a proper motion and hearing, the court, on the petition of the society, will restrain such trustees and members from closing the church against religious services held by members in accordance with the society's object. Canadian Religious Assoc. v. Parmenter, 180 Mass. 415, 62 NE 740.

But in the absence of objections to the jurisdiction of the ecclesiastical tribunal, its judgment will not be reviewed by the civil courts.[35]

[§ 193] **C. Deposition, Discharge, or Removal of Minister.** The deposition or removal of a minister,[36] and the grounds therefor,[37] are purely ecclesiastical matters, and the civil courts will not review the decision of competent ecclesiastical tribunals in regard thereto,[38] even where the powers of the tribunal are merely advisory where it appears that its advice was followed by the ecclesiastical body competent to act.[39] Even a court of equity will not consider the question involved until all ecclesiastical remedies have been exhausted.[40] Nor will the civil courts take original jurisdiction of such matters where there are ecclesiastical tribunals competent to deal with them.[41] But the civil court will review the questions as to whether the ecclesiastical tribunal had jurisdiction to try the minister,[42] and whether he was tried in the way prescribed by the constitution of the church.[43] The court will issue a writ of prohibition against a church tribunal acting in excess of its jurisdiction,[44] and will enjoin the removal of a minister who has had no opportunity for hearing and trial where, under the law of the land, if not under the laws of the church, he is entitled to such trial and hearing.[45] While generally the civil courts will not review the act of an ecclesiastical tribunal deposing or removing a minister,[46] they may adjudicate questions relating to the effect of the deposition or removal upon civil rights,[47] except where the existence of the alleged civil rights are conditioned on the continued existence of the pastoral relation and it appears that such relation has been terminated by the decision of a competent ecclesiastical tribunal.[48]

[§ 194] **D. Amendment of Church Constitution.** The decision of the general conference of a religious society upon a proposed revision, amendment, or change of constitution or faith is binding upon civil courts,[49] unless its decision is attacked on grounds of jurisdiction[50] or violation of a trust.[51] On appeal from a decree of a court having jurisdiction amending the charter of a church, where no breach of trust is involved, the only question reviewable is the regularity of the proceedings as shown by the record brought up by certiorari.[52] But the action of the general conference of the church in adopting the report of the committee that the amended constitution as submitted to vote had become the organic law of the church has been held to be merely legislative, and not an adjudication binding upon civil courts.[53]

[§ 195] **E. Election and Removal of Officers.** The question who are the officers of a religious society is to be determined according to the discipline of that society,[54] and civil courts will not review the decision of a competent ecclesiastical body upon a question involving the election of officers.[55] Nor does a statute to prevent fraudulent elections by incorporated companies confer upon the civil courts power to determine the validity of an election of the trustees of an incorporated religious society,[56] nor does it warrant action by the court in advance of an election being held solely on an assumption, unsupported by evidence, that it will be conducted illegally or improperly.[57] A court cannot assume powers of removal delegated to an ecclesiastical board by a deed of trust,[58] but it has jurisdiction to review removal proceedings of the board to determine whether they conform to the trust requirements.[59]

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[35] Sampsell v. Escher, 11 Oh. Dec. (Reprint) 351, 26 CincLBul 156.

[36] Watson v. Garvin, 54 Mo. 353; Robertson v. Bullions, 9 Barb. 64 [aff 11 N. Y. 243]; Brown v. Richmond, 25 Pa. Dist. 342; Ash v. Methodist Church, 27 Ont. A. 602.

[a] **Action by presbytery.**—The civil courts have no jurisdiction to decide whether a presbytery of the presbyterian church acted unwisely or unjustly in deposing a minister. Isham v. Fullager, 14 AbbNCas (N. Y.) 363.

[b] **Order of bishop.**—The vestry of an episcopal church cannot be relieved by the civil courts from an order of the bishop, made in accordance with the rules and canons of the church, forbidding a clergyman to officiate as rector of such church. St. James' Church v. Huntington, 82 Hun 125, 31 NYS 91.

[c] **Investigation by mutual council.**—Where a mutual council was authorized by congregational usage to investigate the conduct of a minister prior to and during his pastorate to determine his fitness for the ministry, and whether he had conducted the church affairs according to approved congregational usage, his exception to its taking action against him was properly overruled. Arthur v. Norfield Parish Cong. Church Soc., 73 Conn. 718, 49 A 241.

[37] See case infra this note.

[a] **What acts or omissions create forfeiture** of the office of pastor is not within the province of a court of law to determine, it being exclusively within the cognizance of an ecclesiastical tribunal. Whitney v. Brooklyn First Ecclesiastical Soc., 5 Conn. 405.

[38] See cases supra notes 36, 37.

[39] Arthur v. Norfield Parish Cong. Church Soc., 73 Conn. 718, 49 A 241.

[40] Buettner v. Frazer, 100 Mich. 179, 58 NW 834.

[41] See case infra this note.

[a] **Charge of heresy.**—Where the minority of a church claim that the pastor does not teach the faith of the church, they must appeal to the supervising tribunals of the church, and their decision the state courts will take as final, and, if necessary and proper, enforce. Wehmer v. Fokenga, 57 Nebr. 510, 78 NW 28.

[42] Jennings v. Scarborough, 56 N. J. L. 401, 28 A 559; Ex p. Little, 33 N. B. 210.

[a] **Where ousted priest a member of tribunal.**—The provision of a church constitution that the members should not appeal to the public court in case of misunderstanding, but such cases should be tried by the parish peace court composed of six parishioners and the priest, does not prevent recourse to bill in equity to oust the priest from possession of the church after his proper discharge by the congregation, since, even if that was such a misunderstanding as contemplated by the provision, the peace court could not properly function without a priest, and the ousted priest could not sit at judgment in his own case. Stryjewski v. Panfil, 269 Pa. 568, 112 A 764.

[43] Evangelical Lutheran St. Paul's Cong. v. Jaeger, 177 Wis. 34, 187 NW 681; Evangelical Lutheran St. Paul's Cong. v. Hass, 177 Wis. 23, 187 NW 677.

[44] Ex p. Currie, 26 N. B. 403.

[45] O'Hara v. Stack, 90 Pa. 477.

[46] See cases supra note 36.

[47] Robertson v. Bullions, 9 Barb. 64 [aff 11 N. Y. 243].

[48] Connitt v. New Prospect Reformed Protestant Dutch Church, 54 N. Y. 551 [aff 4 Lans. 339].

[49] Lamb v. Cain, 129 Ind. 486, 29 NE 13, 14 LRA 518; Russie v. Brazzell, 128 Mo. 93, 30 SW 526, 49 AmSR 542.

[50] See case infra this note.

[a] **In absence of proof of jurisdiction.**—The resolution of a general conference that constitutional prohibitions of any change in the existing confession of faith or in the constitution, unless by request of two thirds of the society, are impracticable; and their consequent proceedings, in disregard thereof, to effect material changes, do not, by confirmation of such conference, conclude a civil court as to the ownership of the society's realty, the conference's jurisdiction not being affirmatively and conclusively shown. Bear v. Heasley, 98 Mich. 279, 57 NW 270, 24 LRA 615.

[51] Mattson v. Saastamoinen, 168 Minn. 178, 209 NW 648.

[52] In re African M. E. Union Church, 28 Pa. Super. 193.

[53] Philomath College v. Wyatt, 27 Or. 390, 31 P 206, 37 P 1022, 26 LRA 68.

[54] Earle v. Wood, 8 Cush. (Mass.) 430.

[55] Day v. Bolton, 12 N. J. L. 206.

[a] **Overseers of monthly meeting.**—The decision of a yearly meeting of quakers, formed according to their discipline, is conclusive on the question as to who were the rightful overseers of the monthly meeting even in a suit in equity, brought prior to the yearly meeting by one set of overseers of the monthly meeting against another set to obtain a conveyance of the property belonging to the monthly meeting. Earle v. Wood, 8 Cush. (Mass.) 430.

[56] In re Bethany Baptist Church, 60 N. J. L. 88, 36 A 701.

[§ 196] **F. Procedure.** The conduct of a trial before an ecclesiastical tribunal depends upon the articles and by-laws of the society or congregation,[60] as does also the question whether a member on trial is entitled to counsel,[61] although, in the absence of any provision in the by-laws on the matter, a member is not entitled to counsel as a matter of law where no charges are made and no issue is to be tried.[62] In the absence of provisions in articles or by-laws, a member or officer cannot be deprived of his rights and privileges without a hearing or trial upon adequate notice,[63] and the courts are unwilling to construe charters, by-laws, or rules as depriving members of membership without a hearing,[64] but a member waives his right to a hearing or trial by refusing to submit to it.[65] Church tribunals are not required to conform to all the rules applicable to courts of public justice and are not governed by strict rules of legal evidence,[66] and evidence may be referred to a committee for its findings,[67] and one hearing is not a bar to another hearing upon the same charge,[68] and while the constitution of the church may provide that no one who participated in the trial by which a member was expelled shall sit in the appellate tribunal,[69] and while the fact that a part of the members of an ex parte council were members of a previous council which had decided adversely to the minister on the same issues will vitiate their findings in the second council,[70] the fact that the church meeting which voted to accept the decision of a mutual council as to the disqualifications of their minister, and to dismiss him, was composed almost entirely of the aggrieved members of the church, at whose request the mutual council had been called to investigate his conduct, did not disqualify them.[71]

XI. CONSOLIDATION

[§ 197] **A. In General.** Religious societies have an inherent right to consolidate subject only to such restrictions as may be imposed by their own constitution, rules, and discipline,[72] by the trusts, express or implied, under which they hold their property,[73] or by statutes[74] or charter.[75] Consolidation is the result of agreement entered into between the societies themselves that follow the congregational type of church government,[76] or between judicatories having power to act in the case of societies which have adopted the presbyterial or episcopal polity,[77]

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57. In re Washington Ave. Baptist Church, 215 App. Div. 529, 214 NYS 259.

58. Eustace v. Dickey, 240 Mass. 55, 132 NE 852.

59. Eustace v. Dickey, supra.

60. Gibbs v. Gilead Ecclesiastical Soc., 38 Conn. 153; Jennings v. Scarborough, 56 N. J. L. 401, 28 A 559.

61. Gibbs v. Gilead Ecclesiastical Soc., 38 Conn. 153.

62. Gibbs v. Gilead Ecclesiastical Soc., supra.

63. Mass.—Canadian Religious Assoc. v. Parmenter, 180 Mass. 415, 62 NE 740.

Mich.—First Church of Christ Scientist v. Rentzel, 242 Mich. 120, 218 NW 652.

Minn.—Delhi First Evangelical Lutheran Cong. v. Mommsen, 174 Minn. 215, 219 NW 91; Rock Dell Norwegian Evangelical Lutheran Cong. v. Mommsen, 174 Minn. 207, 219 NW 88.

Nebr.—Jones v. State, 28 Nebr. 495, 44 NW 658, 7 LRA 325.

N. J.—Jennings v. Scarborough, 56 N. J. L. 401, 28 A 559.

Pa.—McAuley's App., 77 Pa. 397.

[a] **Notice to accused presbytery.**—Where a complaint is preferred to the synod, against a presbytery, it is irregular for the synod to attempt to pass upon the matter, or give any opinion in the case, without giving the presbytery notice to appear before it; and if it does thus proceed, its authority to sit in the case, after this, might, with the strictest propriety and according to the rules of justice, be declined. Smith v. Nelson, 18 Vt. 511.

[b] **Absence of notice to expelled faction.**—The action of one faction of a congregation in declaring without notice, hearing, or evidence the members of the other faction withdrawn or suspended, will, in a civil action involving property rights, be considered as of no effect. West Koshkonong Cong. v. Ottesen, 80 Wis. 62, 49 NW 24.

64. See case infra this note.

[a] **For failure to attend or contribute.**—Where a by-law of a religious society provided that any member ceasing to worship or failing to contribute for a year should be dropped, a member could be dropped only by a vote of the society after a hearing. Gray v. Christian Soc., 137 Mass. 329, 50 AmR 310.

65. See case infra this note.

[a] **Bishop's waiver of examination by elders.**—Where the discipline of a church provided that if a bishop be accused of immoral conduct three of the elders are to meet and examine the bishop, the obligation of the elders to go to his home to meet him is dispensed with where the bishop informed the elders that he would not submit to their examination. Sampsell v. Escher, 11 Oh. Dec. (Reprint) 351, 26 CincLBul 156.

66. See case infra this note.

[a] **Refusal to allow cross-examination.**—There was no impropriety in the refusal of a mutual council called to investigate the conduct of a minister to allow any cross-examination of witnesses, the rule being applied alike to those of each party and the trial having been fairly conducted according to the usages of the denomination. Arthur v. Norfield Parish Cong. Church Soc., 73 Conn. 718, 49 A 241.

[b] **Hearsay evidence** admitted with caution and reserve and in accordance with the usages of the denomination is not such a departure from the fundamental principles which should govern such hearing as to vitiate the decision unanimously reached, dismissing a minister. Arthur v. Norfield Parish Cong. Church Soc., 73 Conn. 718, 49 A 241.

[c] **Statutes of limitations** do not ordinarily apply. Arthur v. Norfield Parish Cong. Church Soc., 73 Conn. 718, 49 A 241.

67. Arthur v. Norfield Parish Cong. Church Soc., supra.

68. Arthur v. Norfield Parish Cong. Church Soc., supra.

[a] **Preliminary hearing** is not a bar to another hearing nor to a trial. Sampsell v. Escher, 11 Oh. Dec. (Reprint) 351, 26 CincLBul 156.

69. Hatfield v. De Long, 31 Ind. A. 210, 67 NE 551.

70. Thompson v. Rehoboth Catholic Cong. Soc., 7 Pick. (Mass.) 160.

71. Arthur v. Norfield Parish Cong. Church Soc., 73 Conn. 718, 49 A 241.

72. U. S.—Barkley v. Hayes, 208 Fed. 319 [aff 222 Fed. 669, 138 CCA 217].

Ark.—Sanders v. Baggerly, 96 Ark. 117, 131 SW 49.

Ill.—Fussell v. Hail, 134 Ill. A. 620 [aff 233 Ill. 73, 84 NE 42].

Ind.—Ramsey v. Hicks, 174 Ind. 428, 91 NE 344, 92 NE 164, 30 LRANS 665.

Pa.—Com. v. Stauffer, 289 Pa. 139, 137 A 179.

"Why is it not possible to promote the prosperity and enlargement of the church by uniting with another body that teaches a doctrine or faith identical with its own? If these two churches, in their confessions of faith and their religious teachings, are the same, then these interests may be promoted by uniting all those who preach, teach and believe in and care for those interests, the same as can be done by individuals joining their interests in co-partnerships or corporations." Fussell v. Hail, 134 Ill. A. 620, 631.

73. See infra § 203.

74. See infra §§ 200, 201.

75. See infra § 202.

76. Bennett v. St. Paul's Evangelical Lutheran Church, 137 Md. 341, 112 A 619, 14 ALR 622.

77. Permanent Committee of Missions, etc. v. Pacific Synod Presb.

and rights thereunder are determined by its terms[78] subject to the restrictions already referred to.[79]

[§ 198] **B. As Affected by Church Constitution, Rules, and Discipline—1. In General.** Consolidation of churches, to be effective, must conform to the requirements of their constitutions, by-laws, and discipline,[80] the churches being represented therein by the bodies having authority under their constitutions to act.[81]

[§ 199] **2. Powers of Church Judicatory.** Where the consolidating churches have the presbyterial form of church government, and the power to amend the constitution and confession of faith rests in the supreme judicatory, a consolidation effected by the judicatory in conformity to the constitution and confession of faith as amended by it,[82] and in the absence of fraud,[83] is valid,[84] nor in such case is ratification by the church members necessary,[85] unless a statute requires it;[86] and where the supreme judicatory has been held to have jurisdiction to declare the validity of the union between branches of the church, its declaration to that effect, being an ecclesiastical question,[87] is binding on the civil courts;[88] but the validity of the union has been denied wherever courts have taken the view that amendment of the constitution and confession of faith was beyond the power of the judicatory.[89] Where the statute requires that an agreement to consolidate shall have the approval of a church judicatory,[90] the court will not assume jurisdiction to enjoin the consolidation proceedings on grounds cognizable by the church judicatory.[91]

[§ 200] **C. As Affected by Statutes and Charters—1. In General.** While unincorporated religious societies have an inherent right to consolidate,[92] subject to restrictions,[93] religious corporations cannot consolidate without legislative authority to be found either in charter or statute,[94] and without conforming thereto.[95] Where the statutes of the state relating to corporations are construed as permitting the consolidation only of corporations of a similar nature, a church corporation organized under a religious corporations law cannot consolidate with a benevolent, charitable, or missionary society organized under the Membership Corporations Law.[96] The incorporation of a consolidated church composed of members of the separate churches named in the articles of association under a statute authorizing the incorporation of churches is not void on the ground that the statute provided only for the incorporation of single churches taken separately.[97] A consolidated church corporation, formed by the merger of

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Church, 157 Cal. 105, 106 P 395; Lincoln First Presb. Church v. First Cumberland Presb. Church, 245 Ill. 74, 91 NE 761, 19 AnnCas 275; Hayes v. Manning, 263 Mo. 1, 172 SW 897.

[78] See infra § 204.

[79] See supra notes 73–75.

[80] U. S.—Barkley v. Hayes, 208 Fed. 319 [aff 222 Fed. 669, 138 CCA 217].

Ill.—Lincoln First Presb. Church v. First Cumberland Presb. Church, 245 Ill. 74, 91 NE 761, 19 AnnCas 275.

Minn.—Spenningsby v. Norwegian Evangelical Lutheran Cong., 152 Minn. 164, 188 NW 217.

Okl.—Wagoner First Presb. Church v. Cumberland Presb. Church, 34 Okl. 503, 126 P 197.

Pa.—Com. v. Stauffer, 289 Pa. 139, 137 A 179.

[81] U. S.—Helm v. Zarecor, 213 Fed. 648.

Ark.—Sanders v. Baggerly, 96 Ark. 117, 131 SW 49.

Cal.—Permanent Committee of Missions, etc. v. Pacific Synod Presb. Church, 157 Cal. 105, 106 P 395.

Ky.—Wallace v. Hughes, 131 Ky. 445, 115 SW 684.

Mo.—Hayes v. Manning, 263 Mo. 1, 172 SW 897.

Tex.—Clark v. Brown, 102 Tex. 323, 116 SW 360, 24 LRANS 670 [rev (Civ. A.) 108 SW 42].

[82] Ark.—Sanders v. Baggerly, 96 Ark. 117, 131 SW 49.

Cal.—Permanent Committee of Missions, etc., of the Pacific Synod, etc. v. Pacific Synod Presb. Church, 157 Cal. 105, 106 P 395.

Ill.—Lincoln First Presb. Church v. First Cumberland Presb. Church, 245 Ill. 74, 91 NE 761, 19 AnnCas 275; Fussell v. Hail, 134 Ill. A. 620 [aff 233 Ill. 73, 84 NE 42].

Ind.—Ramsey v. Hicks, 174 Ind. 428, 91 NE 344, 92 NE 164, 30 LRA NS 665.

Ky.—Wallace v. Hughes, 131 Ky. 445, 115 SW 684.

Mo.—Hayes v. Manning, 263 Mo. 1, 172 SW 897.

Tex.—Clark v. Brown, 102 Tex. 323, 116 SW 360, 24 LRANS 670 [rev (Civ. A.) 108 SW 42].

[83] Horton v. Smith, (Tex. Civ. A.) 145 SW 1088.

[84] See cases supra notes 82, 83.

[85] Wallace v. Hughes, 131 Ky. 445, 115 SW 684; Hayes v. Manning, 263 Mo. 1, 172 SW 897; Com. v. Stauffer, 289 Pa. 139, 137 A 179; Clark v. Brown, 102 Tex. 323, 116 SW 360, 24 LRANS 670 [rev (Civ. A.) 108 SW 42].

[86] First Presb. Soc. v. Markley, 10 OhNPNS 529.

[87] See supra § 194.

[88] U. S.—Helm v. Zarecor, 213 Fed. 648; Barkley v. Hayes, 208 Fed. 319 [aff 222 Fed. 669, 138 CCA 217].

Ark.—Sanders v. Baggerly, 96 Ark. 117, 131 SW 49.

Ill.—Lincoln First Presb. Church v. First Cumberland Presb. Church, 245 Ill. 74, 91 NE 761, 19 AnnCas 275; Fussell v. Hail, 134 Ill. A. 620 [aff 233 Ill. 73, 84 NE 42].

Ind.—Ramsey v. Hicks, 174 Ind. 428, 91 NE 344, 92 NE 164, 30 LRA NS 665.

Ky.—Wallace v. Hughes, 131 Ky. 445, 115 SW 684.

Miss.—Carothers v. Moseley, 99 Miss. 671, 55 S 881.

Mo.—Hayes v. Manning, 263 Mo. 1, 172 SW 897 [overr Boyles v. Roberts, 222 Mo. 613, 121 SW 805].

Okl.—Wagoner First Presb. Church v. Cumberland Presb. Church, 34 Okl. 503, 126 P 197.

Pa.—Com. v. Stauffer, 289 Pa. 139, 137 A 179.

Tex.—Clark v. Brown, 102 Tex. 323, 116 SW 360, 24 LRANS 670 [rev (Civ. A.) 108 SW 42].

[89] Newburgh Associate Reformed Church v. Princeton Theological Seminary, 4 N. J. Eq. 77.

[90] See statutory provisions.

[91] See case infra this note.

[a] **On ground that agreement was unlawful.**—Under a statute which provides that two religious corporations may consolidate by making an agreement so to do, but in the case of episcopal churches their agreement must be approved by the bishop and the standing committee of the diocese, and then by the supreme court, which may demand that all parties appear before it, the statute having provided a tribunal to pass on the agreement, an injunction will not lie to restrain proceedings by it on the ground that the agreement was made unlawfully. MacLaury v. Hart, 121 N. Y. 636, 24 NE 1013 [rev 10 NYS 125, 11 NYS 669–675, 25 Abb NCas 230].

[92] See supra § 197.

[93] See infra § 201.

[94] Chevra Bnai Israel v. Chevra Bikur Cholim, 24 Misc. 189, 52 NYS 712; Evangelische Lutherische, etc. v. Congregation of German Evangelical Lutherische, etc., 191 Wis. 340, 210 NW 942, 50 ALR 113.

[95] See cases infra this note.

[a] **Oral consolidation.**—(1) Where two religious corporations made an oral consolidation, without any attempt to observe the statutory provision relating to consolidation of such corporations, the consolidation was ineffective to transfer any of plaintiff's property to the new society, and was ultra vires and void. Erste Sokolower Cong. Anshe Yosher v. First United Royatiner Sokolower Verein, 32 Misc. 269, 66 NYS 356; Chevra Medrash Auschei Makaver v. Makower Chevra Aucchei Poland, 66 NYS 355. (2) Either party to such an attempted consolidation may sue to set aside the consolidation as ultra vires. Chevra Medrash Auschei Makaver v. Makower Chevra Aucchei Poland, supra.

[96] Chevra Bnai Israel v. Chevra Bikur Cholim, 24 Misc. 189, 52 NYS 712.

[97] Neale v. St. Paul's Church, 8 Gill (Md.) 116, 118.

"Here it is objected that two societies united for the purposes contemplated. Does not the very act of union constitute them one? Not two separate church corporations, is subject to the statute in force at the time of the consolidation obligating it to administer its temporalities according to denominational rules and discipline,[98] and not to statutes in force when the separate churches were incorporated giving each the right to administer its temporalities irrespective of denominational considerations.[99]

[§ 201] **2. Sanction of Court.** Where the statute requires the consent of the court to the consolidation,[1] the court has discretionary power to permit or prohibit consolidation regardless of the consolidation agreement of the churches involved,[2] and where the consent of the court is not secured, the consolidation is void,[3] and the agreement of the churches to consolidate may be set aside at the instance of a single dissenting church member.[4] Where the purpose of the consolidation is to evade certain obligations and restrictions of church polity and faith, the court is justified in withholding its consent.[5] Even where the consent has been obtained, the consolidation will be declared void where shown to be the result of illegal conspiracy to deprive one of the churches of its property.[6]

[§ 202] **3. Validity of Consolidation of Church Corporations.**[7] A consolidation of church corporations of the same faith into one chartered body in conformity with the rules and discipline of the church and the requirements of the statute, and within the chartered powers of the churches affected, is valid,[8] even though it involves the surrender of the name and organization of one of the merged churches[9] and the transfer of trust property, if there is nothing in the terms of the trust to prohibit such a union.[10] But consolidation of church corporations is void in the absence of charter or statutory authority to consolidate,[11] nor without authority can consolidation be effected by the transfer of the property by one corporation to the other.[12] But such authority may be granted by amendment of the charter of one of the corporations enlarging its powers so that it may take over the property of the other.[13] A consolidation of two congregations, one incorporated and one unincorporated, does not of itself effect an incorporated consolidated church, not even de facto, where no attempt to incorporate the consolidated body has been made.[14] The incorporation of the congregations of two churches as one church, each to retain its individual character with respect to its property, and the enforcement of the payment of moneys due to it, the selection of pastors, and other administrative matters, is not allowed, the preservation of the autonomy of each church in the respects desired being inconsistent with the legal requisites of a corporation.[15]

[§ 203] **D. As Affected by Trust Provisions.** The right to consolidate is not affected by the fact that the churches hold property granted to them specifically by name for their use, where it is shown that

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that they have united in doctrine; that they expressly reserve. But united certainly in name and designation, 'a church;' as one corporation with respect to the property owned and possessed by them, and the mutual enjoyment and dedication of it in common for religious purposes." Neale v. St. Paul's Church, supra.

[98] Westminster Presb. Church v. New York Presbytery, 211 N. Y. 214, 105 NE 199.

[99] Westminster Presb. Church v. New York Presbytery, supra.

[1] See statutory provisions.

[2] Methodist Episcopal Soc. v. Perry, 51 Hun 104, 4 NYS 723.

[3] Methodist Episcopal Soc. v. Perry, supra; Chevra Bnai Israel v. Chevra Kikur Cholim, 24 Misc. 189, 52 NYS 712.

[4] Davis v. Congregation Beth Tephila Israel, 40 App. Div. 424, 57 NYS 1015.

[5] Methodist Episcopal Soc. v. Perry, 51 Hun 104, 109, 4 NYS 723.

"In this state, the purposes for which corporations can be organized are specified in the statutes, and we know of no statute authorizing the formation of a religious corporation for the sole purpose of consolidating it with another for the ultimate end of acquiring the property of the other and applying it to the maintenance of a church with a different polity and with a somewhat different faith. Nor were the consolidation statutes designed to authorize the consolidation of an existing religious corporation with one organized solely for the purpose of consolidation, but they were designed to enable existing religious corporations, organized in good faith for the advancement of religious interests, and for a time carried on for such purpose, to consolidate, when it becomes apparent that such interests can be better advanced by the union of the corporations." Methodist Episcopal Soc. v. Perry, supra.

[6] Stokes v. Phelps Mission, 47 Hun (N. Y.) 570.

[a] **Fraud as defense in action to enforce consolidation agreement.**—In an action by a church corporation to compel another church corporation to affix its corporate seal to an agreement for the consolidation of the two corporations, it appearing that the committee of defendant's vestry appointed in the consolidation proceedings had been declared fraudulently elected, and had been ousted from their offices as vestrymen, the members of defendant's vestry who remained in office, although not a sufficient number to constitute a quorum, had authority to retain counsel to represent defendant, and an appearance by the counsel retained by such committee before their ouster would be set aside as unauthorized. Holy Trinity Church v. St. Stephen's Church, 15 NYS 117.

[7] **Power of corporations generally to consolidate** see Corporations §§ 3632-3639.

[8] U. S.—Barkley v. Hayes, 208 Fed. 319 [aff Duvall v. Kansas Synod, etc., Presb. Church, 222 Fed. 669, 138 CCA 217]; Sharp v. Bonham, 213 Fed. 660; Helm v. Zarecor, 213 Fed. 648.

Ark.—Sanders v. Baggerly, 96 Ark. 117, 131 SW 49.

Cal.—Permanent Committee of Missions, etc. v. Pacific Synod Presb. Church, 157 Cal. 105, 106 P 395.

Ill.—Fancy Prairie Cong., etc. v. King, 245 Ill. 120, 91 NE 776; Lincoln First Presb. Church v. First Cumberland Presb. Church, 245 Ill. 74, 91 NE 761, 19 AnnCas 275.

Ind.—Ramsey v. Hicks, 174 Ind. 428, 91 NE 344, 92 NE 164, 30 LRA NS 665.

Ky.—Wallace v. Hughes, 131 Ky. 445, 115 SW 684.

Md.—Bennett v. St. Paul's Evangelical Lutheran Church, 137 Md. 341, 112 A 619, 14 ALR 622.

Minn.—Spenningsby v. Norwegian Evangelical Lutheran Trinity Cong., 152 Minn. 164, 188 NW 217.

Mo.—Hayes v. Manning, 263 Mo. 1, 172 SW 897.

N. Y.—MacLaury v. Hart, 121 N. Y. 636, 24 NE 1013 [rev on other grounds 10 NYS 125, 11 NYS 669-675, 25 AbbNCas 230]; Madison Ave. Baptist Church v. Oliver St. Baptist Church, 26 N. Y. Super. 570, 1 AbbPrNS 214, 30 HowPr 455.

Oh.—New Concord First United Presb. Church v. Young, 21 OhNPNS 569.

Okl.—Wagoner First Presb. Church v. Cumberland Presb. Church, 34 Okl. 503, 126 P 197.

Pa.—Com. v. Stauffer, 289 Pa. 139, 137 A 179.

Tex.—Clark v. Brown, 102 Tex. 323, 116 SW 360, 24 LRANS 670 [rev (Civ. A.) 108 SW 421].

[9] Barkley v. Hayes, 208 Fed. 319 [aff 222 Fed. 669, 138 CCA 217]; Permanent Committee of Missions, etc. v. Pacific Synod Presb. Church, 157 Cal. 105, 106 P 395; Ramsey v. Hicks, 174 Ind. 428, 91 NE 344, 92 NE 164, 30 LRANS 665 [rev 44 Ind. A. 490, 87 NE 1091, 89 NE 597]; Madison Ave. Baptist Church v. Oliver St. Baptist Church, 26 N. Y. Super. 570, 1 AbbPrNS 214, 30 How Pr 455.

[10] Fussell v. Hail, 134 Ill. A. 620 [aff 233 Ill. 73, 84 NE 42].

[11] See supra § 200.

[12] Evangelische Lutherische St. Thomas Gemeinde v. German Evangelical Lutherische St. Matthews Church, 191 Wis. 340, 210 NW 942, 50 ALR 113.

[13] Wheaton v. Cutler, 84 Vt. 476, 79 A 1091.

[14] Mabel First Lutheran Church v. Cadwallader, 172 Minn. 471, 215 NW 845.

[15] In re German Lutheran, etc., Church, 9 Pa. Co. 12; Evenson v. Ellingson, 72 Wis. 242, 39 NW 330, 67 Wis. 634, 31 NW 342.

consolidation serves and does not violate the purposes of trust provisions under which it is held.[16] The fact that the name is lost in consolidation does not prove a breach of trust in the absence of a trust requirement that the name should be retained.[17]

[§ 204] **E. Effect of Consolidation.** The effect of consolidation on the rights of the parties depends on the nature of the consolidation agreement and the proceedings thereunder.[18] A consolidation under an agreement providing merely for joint meetings of the congregations under a single pastor does not of itself effect a transfer of title of the property belonging to the separate societies,[19] but where the agreement provides for a transfer of all the property rights of the separate churches to the consolidated church, title to property passes by the consolidation.[20] Upon a consolidation of separate church corporations into one church corporation, the separate corporations cease to exist where the statute so provides.[21] Where a consolidation has been effected, there is no right of the merged congregation to secede and take back its property where no such right is reserved in the consolidation agreement nor provided for in the rules and discipline of the consolidated church,[22] but where the agreement provides for the building of a new church edifice for the consolidated congregations and that each should retain title to its old building, a dissolution of the consolidated organization into its component parts before the building of the new edifice does not operate to give to each congregation a share in one of the old buildings in which the consolidated congregation had worshipped.[23]

XII. DISSOLUTION AND REORGANIZATION

[§ 205] **A. Dissolution—1. In General.** While a religious society, having discharged all its liabilities, may by its own act cause its own dissolution,[24] as, for example, by the withdrawal of every individual member from it,[25] or by a vote, at a meeting called on notice, declaring the society dissolved,[26] or by abandonment and nonuser,[27] a dissolution cannot be caused by the withdrawal of some, leaving others to carry on its corporate activities,[28] or by failure to elect officers,[29] or by loss of its meeting house,[30] or by withdrawal from a superior church body,[31] or by an ineffective attempt to consolidate with another society.[32] A church which is a member of a church organization in which a superior church judicatory has the constitutional power to dissolve member churches may be dissolved by such judicatory,[33] subject, however, to any statutory restrictions which may exist.[34] Where an unincorporated religious society consists of annual meetings of delegates from its constituent members, the organization is dissolved on adjournment of such meeting into its individual elements until reassembled pursuant to common agreement.[35]

[§ 206] **2. By Legislature or Court.** An incorporated religious society may have its charter annulled and its existence as a civil body terminated by act of the legislature where the right to amend, alter, or repeal is reserved,[36] but not otherwise.[37] It may, however, be dissolved by the court in proceedings instituted by the state for forfeiture of its charter where grounds for forfeiture exist,[38] and the state cannot be barred by laches in such proceedings.[39]

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[16] Permanent Committee of Missions, etc. v. Pacific Synod Presb. Church, 157 Cal. 105, 106 P 395.

[17] Permanent Committee of Missions, etc. v. Pacific Synod Presb. Church, supra.

[18] See cases infra this section.

[19] Glader v. Schwinge, 336 Ill. 551, 168 NE 658.

[20] Sharp v. Bonham, 213 Fed. 660; Barkley v. Hayes, 208 Fed. 319 [aff 222 Fed. 669, 138 CCA 217].

[21] Ward v. Worthington, 28 Oh. A. 325, 162 NE 714.

[22] Sutter v. First Reformed Dutch Church, 42 Pa. 503.

[23] Bald Knob First Baptist Church v. Central Baptist Church, 176 Ark. 371, 3 SW (2d) 45.

[24] Oakes v. Hill, 14 Pick. (Mass.) 442.

[25] Oakes v. Hill, supra.

[26] See case infra this note.

[a] **Ceasing to be visible church within terms of trust deed.**—Where a testator devised real estate in trust to apply the income to the maintenance of a pastor or elder in a church of a certain faith and practice in the town where the testator resided, so long as the members of that church or their successors should maintain the visibility of the church of such faith and order, and afterward the only two members of the church, at a meeting called by public notice, voted and resolved that they would no longer endeavor to maintain the appearance of a visible church, and declared the church dissolved and extinct, the church was thereby dissolved, and ceased to be a visible church, and the trustee held the estate as a resulting trust for the testator's heirs at law. Easterbrooks v. Tillinghast, 5 Gray (Mass.) 17.

[27] Miller v. Riddle, 227 Ill. 53, 81 NE 48.

[28] Oakes v. Hill, 14 Pick. (Mass.) 442.

[29] Tobey v. Wareham Bank, 13 Metc. (Mass.) 440.

[a] **Omission of parish for one year to elect parish officers** does not necessarily operate as a dissolution of the parish; and, if it did, the parish property would not therefore vest in the town, although the town held the property, in its parochial capacity, before the parish was separately organized. Tobey v. Wareham Bank, 13 Metc. (Mass.) 440.

[30] In re Mt. Calvary Methodist Protestant Church, 272 Pa. 453, 116 A 319.

[31] American Primitive Soc. v. Pilling, 24 N. J. L. 653.

[32] Chevra Bnai Israel Aushe Yanove und Motal v. Chevra Bikur Cholim Aushe Rodof Sholem, 24 Misc. 189, 52 NYS 712.

[33] Westminster Presb. Church v. New York Presbytery, 142 App. Div. 855, 127 NYS 836 [app dism 202 N. Y. 581 mem, 96 NE 1134 mem].

[34] New York Presbytery v. Westminster Presb. Church, 222 N. Y. 305, 118 NE 800; Westminster Presb. Church v. New York Presbytery, 211 N. Y. 214, 105 NE 199.

[a] **Churches in New York excepted.**—While under Religious Corp. L. § 15, an incorporated presbytery has control over the several churches of its denomination within its jurisdiction, it cannot dissolve a church within the county of New York; § 18, excepting from the provisions for dissolution of religious corporations those located in the county of New York. Westminster Presb. Church v. New York Presbytery, 211 N. Y. 214, 105 NE 199.

[35] Kerr v. Hicks, 154 N. C. 265, 70 SE 468, 33 LRANS 529.

[36] See case infra this note.

[a] **Acts of congress annulling charter granted by territory.**—Congress having plenary and supreme legislative power over the territories of the United States and their inhabitants, an act of congress abrogating the charter of a church granted by the legislature of Utah, and dissolving the corporation, was a valid exercise of such power, and the corporation ceased to have any existence as a civil body. Church of Jesus Christ, etc. v. U. S., 136 U. S. 1, 10 SCt 792, 34 L. ed. 481 [aff 5 Utah 361, 15 P 473 (which held also that Act Congr. July 1, 1862 § 2, annulling certain portions of the charter, did not, by excepting a portion of the act, make such excepted portions, in effect, a law of the United States)].

[37] In re Opinion of Justices, 237 Mass. 619, 131 NE 29.

[38] State v. Hutterische Bruder Gemeinde, 46 S. D. 189, 191 NW 635.

[39] State v. Hutterische Bruder Gemeinde, supra.

In some states statutes provide for the dissolution of religious societies by the court,[40] and a statutory authorization to the court to do so on application of a majority of the trustees does not necessitate action by the board of trustees at a meeting duly called for the purpose.[41] But the court acting under such statute has no power to dissolve a religious society incorporated under an earlier statute containing no such provision.[42] Even where the power of the court to dissolve exists, it will not be exercised against the protest of a minority on the alleged ground that the society is in an unprosperous condition and that it is inexpedient to continue to occupy the present church edifice as a place of public worship.[43]

Appointment of receiver. Regardless of whether or not a court may take the property of a religious corporation out of the hands of its trustees and place it in the hands of receivers as an incidental proceeding in a suit by the state for the forfeiture of the corporation's charter,[44] it cannot do so in ex parte proceedings on a petition unsworn to, brought by parties having no interest in the property, and on the production before the court of no evidence in support thereof.[45] Nor can it do so on a petition alleging as unlawful certain acts which by its terms are shown to have been approved by trustees and members of the church.[46] Nor can a minority force a dissolution and liquidation by receivership proceedings on the ground that they are tenants in common and as such entitled to a sale and division of the property.[47] Jurisdiction of the court to appoint a receiver of a religious corporation is not conferred by the statute giving it power to sanction sales of its real estate.[48]

[§ 207] **3. Disposition of property.** On dissolution of a church, trust funds belonging to it should be disposed of in the way best calculated to carry out the intentions of the founders of the trust.[49] And funds will not revert to the contributors or their heirs where given to the society upon a consideration which the contributors received from the society at the time and continued to enjoy up to the time of the dissolution.[50] Where a church is organized in subordination to an incorporated general conference, whose charter provides that property of a church member which should become extinct should vest in the conference, the conference is entitled to the proceeds of the property of any extinct church member.[51] And where, under the church discipline, a superior judicatory is entitled to the proceeds of the property of extinct churches, it may direct the disposition of such property.[52] But under statutes restricting the power of the church judicatory to the dissolution of the church as an ecclesiastical body, the trustees of the church corporation continue to hold title to the church property after the dissolution of the ecclesiastical body although the superior judicatory under the terms of the statute may compel them to administer it for denominational purposes.[53] Where a consolidation agreement provides for a retention by each of the consolidating churches of its own property until the happening of a contingency which never happened, a dissolution of the consolidated church has no effect upon the title to the properties which remains with respect to each church as it was before the consolidation.[54]

[§ 208] **B. Reorganization.** Formal dissolution of the old church corporation is not a necessary condition precedent to reincorporation. A practical dissolution by neglect to elect trustees is sufficient.[55] The identity of a religious corporation is not changed merely by reincorporation, but the question is one of intention.[56] Where a new corporation entirely independent of the old is formed, it has no right to declare the first extinct and to appropriate the property of the old.[57] Where reorganization is carried out in good faith for the purpose of forming a new corporation, property subsequently acquired by the new corporation is not liable for the debts of the old corporation,[58] even though the property formerly belonging to the old corporation may be so liable.[59] A court may, in its discretion, appoint a master to reconcile litigating factions and to effect under court auspices a reorganization of the divided church.[60]

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[40] See statutory provisions.

[41] Matter of Brooklyn Third M. E. Church, 67 Hun 86, 21 NYS 1105 [aff 142 N. Y. 638, 37 NE 567].

[42] In re New South Meeting-House, 13 Allen (Mass.) 497.

[43] In re New South Meeting-House, supra.

[44] State v. Immanuel Presb. Church, 52 La. Ann. 1311, 27 S 806.

[45] State v. Immanuel Presb. Church, supra.

[46] Schooley v. Dimmick, 56 App. (D. C.) 350, 13 F. (2d) 956.

[47] Miller v. St. Marks Baptist Church, 158 La. 377, 104 S 121.

[48] Wheaton v. Gates, 18 N. Y. 395.

[49] Matter of Union Village Orthodox Cong. Church, 6 AbbNCas (N. Y.) 398; Jones v. Renshaw, 130 Pa. 327, 18 A 651.

[a] **In furtherance of founders' doctrines.**—Where members of a reformed church withdrew therefrom in protest against its failure to conform to certain doctrines and founded a congregational church which they endowed, the surplus from the funds upon dissolution of the congregational church should be paid to the congregational union rather than to the reformed church. Matter of Union Village Orthodox Cong. Church, 6 AbbNCas (N. Y.) 398.

[50] Easum v. Bohon, 180 Ky. 451, 202 SW 901, LRA1918D 1144.

[51] Scranton First Methodist Protestant Church's App., 16 Wkly NC (Pa.) 245.

[52] Madison Tp. v. Rader, (Iowa) 231 NW 329.

[53] Westminster Presb. Church v. New York Presbytery, 211 N. Y. 214, 105 NE 199.

[54] Bald Knob First Baptist Church v. Central Baptist Church, 176 Ark. 371, 3 SW (2d) 45.

[55] Irving M. E. Church First Soc. v. Brownell, 5 Hun (N. Y.) 464.

[56] Irving M. E. Church First Soc. v. Brownell, supra.

[57] Ludlow v. Rector, etc., of St. John's Church, 144 App. Div. 207, 130 NYS 679 [rearg den 145 App. Div. 940 mem, 130 NYS 1118 mem].

[58] Allen v. North Des Moines M. E. Church, 127 Iowa 96, 102 NW 808, 109 AmSR 366, 69 LRA 255.

[59] Allen v. North Des Moines M. E. Church, supra.

[60] Grupe v. Rudisill, 101 N. J. Eq. 145, 136 A 911.

XIII. ACTIONS[61]

[§ 209] **A. By Society or Members—1. By Members or Officers of Unincorporated Society.** A voluntary religious association which has never been incorporated has no legal existence and cannot sue,[62] except in states where by statute suits in the name of an unincorporated association are allowed,[63] but an action brought in the name of the society by its trustees, named, will be regarded as a suit by the trustees in behalf of the society and as such may be maintained.[64] A part of the persons belonging to a voluntary religious society, and having a common interest, may sue in behalf of themselves and others having the like interest, as part of the same society for purposes, common to all, and beneficial to all,[65] or they may be authorized to do so by resolution of a church judicatory having power to grant such authorization,[66] or the officers and agents of the society may bring an action in behalf of themselves and other members,[67] or they may sue in their own names when authorized by the society to do so,[68] even though they are not members of the congregation,[69] or an officer of the association may sue in his own name to enforce an obligation, the legal title to which is vested in him for the benefit of the association;[70] but officers without authority or title cannot sue in their own names.[71]

[§ 210] **2. By Quasi Corporation.** In states where unincorporated religious societies are given by statute limited corporate powers,[72] a religious society having a quasi-corporate existence may sue in its own name on a contract made with it in its associate capacity.[73] In such case, an information by the attorney-general on relation of the trustees of the society is not the proper remedy.[74]

[§ 211] **3. By Incorporated Society.** It has been held that in order to give an organization for public worship legal rights, such as to sue, and to impose upon it legal obligations as a corporate body, there must be either a special law declaring its existence, or an incorporation under the provisions of the general law relating to religious societies,[75] and in the absence of any statute authorizing actions in favor of a religious corporation, the president of such corporation cannot maintain an action therefor in his own name, and designating himself as president in his pleadings is a mere description of the person.[76] An exception to this rule exists in the case of the Roman catholic church in the Philippines which is a juridical entity and may maintain an action in the courts of the Philippine Islands although not registered as a corporation.[77] But where the charter or incorporating statute and the power thereunder to bring suit are shown, the right of the corporation to bring suit to enforce payment of its claim is established,[78] and such right is not affected by the fact that its officers are de facto, not having been legally elected,[79] or that there is a vacancy in an office,[80] or that it has not caused certificates of incorporation to be filed in the office of the secretary of state,[81] or that it has lost its corporate existence by nonuser or failure to keep up its church organization,[82] or that it is holding real estate in excess of the amount allowed by law,[83] or that it has altered its doctrines, worship, or discipline,[84] or that it has an equitable, but not a legal, title to the property which it seeks to recover,[85] or that the action was not authorized by the trustees, the governing body of the corporation.[86] Generally it is held that a suit by a religious corporation must be brought in its corporate name,[87] and not in the names of its members,[88] but trustees of a religious corporation have been held to be proper parties plaintiff to bring suit to compel the enforcement of provisions in a will in favor of the corporation.[89] Where under the statute the trustees of a religious society are the corporate body with power to sue and be sued,[90] an action may be brought by them to enforce a building bond running to the building committee of the church as obligee,[91] and an action may be brought in their names on an obligation entered into between their predecessors as trustees for the society and third persons,[92] and without joining their predecessors as parties plaintiff,[93] and a presumption of their lawful incorporation exists in the absence of evidence to the contrary.[94] Under some statutes it has been held that an incorporated religious society must sue in the name of its trustees,[95] but trustees who have withdrawn from the church and abandoned their rights in the property may not institute an action in the name of the corporation,[96] and persons subsequently elected as trustees but who were not trustees at the time action was brought may not institute the action.[97]

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[61] **Associations generally** see Associations §§ 102-133.

Corporations generally see Corporations §§ 2862-3023.

[62] Osceola Presb. Church v. Harken, 177 Iowa 195, 158 NW 692.

[63] Mitchell v. Church of Christ, 219 Ala. 322, 122 S 341.

[64] Osceola Presb. Church v. Harken, 177 Iowa 195, 158 NW 692; Potts v. Longest, etc., Co., 86 W. Va. 157, 103 SE 279.

[65] U. S.—Beatty v. Kurtz, 2 Pet. 566, 7 L. ed. 521; Schell v. Leander Clark College, 2 F. (2d) 17.

Conn.—Bailey v. Lewis, 3 Day 450.

Ky.—Berryman v. Reese, 11 B. Mon. 287.

N. H.—Akscyn v. Nashua Second Nat. Bank, 78 N. H. 196, 98 A 519.

Pa.—In re Maguire, 13 Phila. 244.

Va.—Perkins v. Seigfried, 97 Va. 444, 34 SE 64.

Associations generally see Associations § 105.

[66] Tilden v. Metcalf, 2 Day (Conn.) 259.

Associations generally see Associations § 103.

[67] Callsen v. Hope, 75 Fed. 758; Young v. Knox, 165 Ark. 129, 263 SW 52; White v. Rice, 112 Mich. 403, 70 NW 1024; Wilson v. Fromm, 26 OhNP NS 75.

[a] **Trustees of religious association** may, for and in behalf of all the members, sue to establish a will making it a devise. Lilly v. Tobbein, (Mo.) 13 SW 1060.

[68] Tilson v. Graham, 208 Ala. 312, 94 S 295; Bennett v. Morgan, 112 Ky. 512, 66 SW 287, 23 KyL 1824; Humphrey v. Burnside, 4 Bush (Ky.) 215; Shannon v. Frost, 3 B. Mon. (Ky.) 253.

[a] **Committee appointed to collect debts** has implied power to sue therefor. Arts v. Guthrie, 75 Iowa 674, 37 NW 395.

[b] **Pastor** suing in their behalf must allege and prove sufficient authority from the members to that end. St. Patrick's Church v. Consumers' Ice Co., 44 La. Ann. 1021, 11 S 682.

[69] Humphrey v. Burnside, 4 Bush (Ky.) 215.

[70] McDonald v. Gray, 11 Iowa 508, 79 AmD 509; Walker v. Fawcett, 29 N. C. 44.

Associations generally see Associations § 104.

[71] Bundy v. Birdsall, 29 Barb. (N. Y.) 31.

[72] See supra §§ 60, 62.

[73] Phipps v. Jones, 20 Pa. 260, 263, 59 AmD 708; Perkins v. Seigfried, 97 Va. 444, 34 SE 64.

"There ought to be no doubt about the right of unincorporated religious societies to sue on a contract made with them in their associate capacity and for the legitimate purposes of their association, even though there be no persons named or described in the contract as trustees or committee-men on behalf of the society. Such associations have always, and especially since the Act of 1731, been recognized as having an associate and quasi corporate existence in law, with power to hold land and build appropriate houses, and of course with power to acquire rights by contract, and to vindicate them. And if the English common law forms are insufficient for such cases, we admit the infusion into our law of the plain equity principle that allows a committee of voluntary societies to sue and be sued as representatives of the whole." Phipps v. Jones, supra.

[a] **Trover or replevin** may be maintained in the name of a parish for the recovery of the parish records. Sudbury First Parish v. Stearns, 21 Pick. (Mass.) 148.

[74] Atty.-Gen. v. Clark, 167 Mass. 201, 45 NE 183.

[a] **To recover church donations.**—Information will not lie by the attorney-general, on relation of trustees of an incorporated religious society, to recover funds donated for erection or repair of the church building, since such society is a definite body, capable, under Pub. St. c 39 § 9, of maintaining suit itself for the right to hold and use gifts in the manner intended by the donors. Atty.-Gen. v. Clark, 167 Mass. 201, 45 NE 183.

[75] New York Mut. L. Ins. Co. v. Inman Park Presb. Church, 111 Ga. 677, 36 SE 880; Van Buren v. Gansevoort Reformed Church, 62 Barb. (N. Y.) 495; Tunstall v. Wormley, 54 Tex. 476.

[76] Lowenthall v. Wiseman, 56 Barb. (N. Y.) 490.

[77] Harty v. Sandin, 11 Philippine 450.

[78] In re Conger, 113 Misc. 129, 184 NYS 74.

[79] West Koshkonong Cong. v. Ottesen, 80 Wis. 62, 49 NW 24.

[80] See case infra this note.

[a] **Curate.**—A vacancy in the office of curate of the church corporation does not impair the corporation's right to sue, the curate, being an ex officio member of the board of wardens, having but one vote, like any other member of the board. St. Louis Church v. Blanc, 8 Rob. (La.) 51.

[81] Mora v. Murphy, 83 Cal. 12, 23 P 63; Probst v. Domestic Missions, 3 N. M. 237, 5 P 702 [rev on other grounds 129 U. S. 182, 9 SCt 263, 32 L. ed. 642].

[82] In re Cutchogue Cong. Church,

For **later cases, developments** and **changes** in the law see **Annotations,** same title and section number.

[§ 212] **B. Against Society or Members—1. Against Members or Officers of Unincorporated Society.** Following the general rule in actions against unincorporated associations generally,[98] an unincorporated religious society cannot be sued as such.[99] If unincorporated, the individual members may be sued collectively, or, if too numerous to admit of all being brought before the court, one or more may be sued, and may defend for the whole,[1] and one holding the legal title should be made a party.[2] A suit may be brought against the trustees only[3] and execution levied against the trust property.[4] A religious community may be sued in the name of its trustees.[5]

[§ 213] **2. Against Quasi Corporation.** A religious society, endowed by statute with legal existence and vested with certain powers, although not incorporated, may be sued on the few obligations it is empowered to incur,[6] but a suit against an unincorporated religious society by name, being a nullity,[7] cannot be changed by amendment into a suit against a quasi-incorporated body.[8]

[§ 214] **3. Against Incorporated Society.** A church if incorporated must be sued by its corporate name.[9] Suit should not be brought against the members individually,[10] or against the trustees,[11] unless the trustees constitute the incorporated body,[12] although in the latter case it has been held that the trustees should be sued as a corporation and not as trustees.[13] Where, however, the statute so provides,[14] action may be brought against the churchwardens of an incorporated church, designated as such.[15] In an action against trustees to enjoin their ejecting a clergyman, the church corporation should be made a party.[16]

[§ 215] **C. Between Societies and Their Members.** The rule forbidding actions between partners on partnership demands[17] does not apply to voluntary associations and their officers and members.[18] A trustee may sue other trustees of the same society to restrain their unlawful acts,[19] as, for example, a consolidation with another society in violation of the terms of the trust under which the property is held,[20] and it is not necessary that he should make an annual conference of which the church is a member a party to the suit.[21] So also one member of a governing board is accountable to the other members for funds collected for a church purpose.[22] Members of an unincorporated association, by delegating to its board of education, a corporation, power to supervise and conduct the administration of its

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etc., 131 N. Y. 1, 30 NE 43; Matter of Arden, 1 Conn. Surr. 159, 4 NYS 177.

[83] Wheeling First English Evangelical Lutheran Church v. Arkle, 49 W. Va. 92, 38 SE 486.

[84] King's Chapel v. Pelham, 9 Mass. 501.

[85] Van Deuzen v. Presb. Cong., 4 Abb. Dec. (N. Y.) 465, 3 Keyes 550, 3 Transcr. A. 39.

[86] Second Baptist Church v. Beecham, (Mo. A.) 180 SW 1065.

[87] Jones v. Watson, 63 Ga. 679; Holwerda v. Hoeksema, 232 Mich. 648, 206 NW 564; Barnes v. Perine, 9 Barb. 202 [aff 12 N. Y. 18]; In re Conger, 113 Misc. 129, 184 NYS 74.

[88] Holwerda v. Hoeksema 232 Mich. 648, 206 NW 564.

[89] Cabe v. Vanhook, 127 N. C. 424, 37 SE 464.

[90] See supra § 22.

[91] Franklin M. E. Church v. Equitable Surety Co., 269 Pa. 411, 112 A 551.

[92] Skinner v. Richardson, 76 Wis. 464, 45 NW 318.

[93] Skinner v. Richardson, supra.

[94] Skinner v. Richardson, supra.

[95] Ada St. M. E. Church v. Garnsey, 66 Ill. 132; Drumheller v. Pierceton First Universalist Church, 45 Ind. 275; New Concord First United Presb. Church v. Young, 21 OhNPNS 569.

[96] Saints of Spokane v. Bailey, 153 Wash. 294, 279 P 750.

[97] Samuel Israelite Baptist Church v. Thomas, 2 La. A. (Orleans) 178.

[98] See Associations § 118.

[99] Phillips v. Hall, 99 Fla. 1206, 128 S 635; Thurmond v. Cedar Spring Baptist Church, 110 Ga. 816, 36 SE 221; Green v. Young Zion Baptist Church, 27 Ga. A. 572, 109 SE 517; Burton v. Grand Rapids School Furniture Co., 10 Tex. Civ. A. 270, 31 SW 91.

[1] Keller v. Tracy, 11 Iowa 530.

[2] Keller v. Tracy, supra.

[3] Holmes v. Bankston, 149 Ga. 668, 101 SE 792; Moore v. Stemmons, 94 Mo. A. 475, 68 SW 224.

[a] **Bishop of Roman catholic church.**—The bishop of a church in whom is the legal title, having possession and control of the property of the church which is being laid out for use as a cemetery, is the proper defendant to a suit to restrain the use of the land for such purpose as a nuisance. Jung v. Neraz, 71 Tex. 396, 9 SW 344.

[4] Kelsey v. Jackson, 123 Ga. 113, 50 SE 951; Moore v. Stemmons, 94 Mo. A. 475, 68 SW 224.

[5] Davis v. Bradford, 58 N. H. 476.

[6] Hunter v. Swadley, 141 Tenn. 156, 207 SW 730; Wilson v. Clinton Chapel African M. E. Zion Church, 138 Tenn. 398, 198 SW 244.

[7] See supra § 212.

[8] Langford v. Mt. Zion Baptist Church, 22 Ga. A. 696, 97 SE 102.

[9] Keller v. Tracy, 11 Iowa 530: Tartar v. Gibbs, 24 Md. 323; Groesbeeck v. Dunscomb, 41 HowPr (N. Y.) 302.

[10] Groesbeeck v. Dunscomb, supra.

[11] Tartar v. Gibbs, 24 Md. 323.

[12] Wallace v. United Presb. Church Gen. Assembly, 194 Pa. 178, 45 A 84.

[13] Staats v. McCuskey, 98 W. Va. 26, 126 SE 337.

[14] See statutory provisions.

[15] Maynard v. Gamble, 13 U. C. C. P. (Ont.) 56, 467.

[16] Lawyer v. Cipperly, 7 Paige (N. Y.) 281.

[17] See Partnership § 250.

[18] See Associations § 134.

[19] Brown v. Scott, 138 Md. 237, 113 A 727; Stokes v. Phelps Mission, 47 Hun (N. Y.) 570; Munsel v. Boyd, 10 Oh. Cir. Ct. N. S. 121, 30 Oh. Cir. Ct. 182.

[20] Stokes v. Phelps Mission, 47 Hun (N. Y.) 570.

[21] Brown v. Scott, 138 Md. 237, 113 A 727.

[22] McGuire v. Evans, 19 OntWN 174.

schools and colleges, do not thereby deprive themselves of the right and power to sue its colleges and their trustees to prevent violations of trust and for accountings of property wrongfully disposed of.[23] And so a member may sue trustees of an incorporated religious society to enjoin their wrongful interference with his membership rights,[24] to which suit the corporation is a proper but not a necessary party where the trustees' acts are alleged to be unauthorized.[25] But a member is not entitled to a personal judgment against other members and to a lien on church property on a note signed by such other members and partly paid by the church in the absence of evidence as to the nature of the transaction and in what proportion the members were to contribute toward the payment if it was a church obligation.[26] A church corporation which has adopted the congregational form of church government cannot sue to enjoin some of its members interfering in the church government and in its use of the church property, in the absence of authority granted to it by the congregation for the institution of the suit.[27] Nor can a church corporation sue some of its former members to recover the value of property which belonged to the members of the church and which had been illegally converted to other uses by defendants prior to the incorporation of the church.[28] Conflicting claims by church societies to the same property are cognizable in the civil courts.[29] Nor is the right of a society to prosecute its claim barred by lapse of time not exceeding the statutory limitation, and not amounting to laches prejudicing the rights of defendant.[30] But where there is a schism and a faction withdraws, abandoning its claim to the church property, its successors after a long period of time and after the death of all the secessionists cannot revive the claim to the church property.[31] An action to prevent the use of church property in violation of the terms of a trust should be brought against the church in control of the property,[32] and not against the rector preaching doctrine in violation of the trust terms who has no individual right to the property.[33] In an action by trustees of a church to have a trust on parsonage property in favor of preachers of the church declared void, the attorney-general, as representing future preachers and future congregations, should be made a party.[34] In an action to determine the rights to offices in a religious society between conflicting claimants, all claimants should be made parties thereto.[35]

[§ 216] **D. Process and Appearance.**[36] A statute authorizing service of process on an unincorporated business association by leaving a copy of the summons at its usual place of business has no application to unincorporated religious associations permitting service thereon by leaving a copy of summons at the church.[37] In such case service must be made upon the parties who are the debtors in the case.[38] Upon whom process against religious corporations may be served depends upon the statutes under which they are organized.[39] Under some statutes service must be made on the president personally, or at the office of the corporation, if it holds such in permanence, by delivery to some of its agents,[40] but where the service is at the office, it must appear either in the petition or in the sheriff's return that the person served was an agent of the corporation authorized to receive service.[41] Under other statutes, service must be made on the trustees of the corporation or on the officers appointed by them.[42] Service on the last-appointed treasurer and vestryman of an incorporated church with a dormant parish is sufficient to give the court jurisdiction even though the church defaults.[43] The statement in a summons as to the capacity in which plaintiff sues may be amended to conform to the fact.[44]

[§ 217] **E. Pleading.**[45] The facts entitling plaintiff to relief in an action by or against a religious society must be set forth in the petition,[46] as for example, authorization to sue, in an action brought by trustees of an incorporated[47] or unincorporated religious society,[48] authorization by defendants of the work done, in an action to recover for work and material upon a church building,[49] absolute conveyance to church authorities free of trust, in an action to remove alleged implied trusts as clouds upon the title,[50] conformity by the minority and nonconformity by the majority to the rules and discipline of the church, in an action by a minority of church trustees to enjoin interference by the majority,[51] bad faith or conspiracy to injure, in an action by a church member seeking relief from disciplinary proceedings against him,[52] right under church rules to a new trial on charges against a member after decision by conference on appeal, in an action to recover damages for refusal to grant it,[53] a threat to oust the officers of a church from its management, in an action for an injunction,[54] the civil rights and powers of a church with reference to certain rules and regulations upon which plaintiff bases his right to recover, in an action by a pastor to recover his salary from the bishop of a Roman catholic church,[55] removal by the proper ecclesiastical authority, in an action to restrain a rector acting as such for failure to comply with church tenets.[56] In an action against a bishop as trustee for a religious congregation on a contract alleged to have been made by an officer of the congregation, an affidavit of defense stating that the congregation was incorporated and that the officer had no authority from the corporation to make the alleged contract is sufficient to prevent summary judgment.[57] An application for a writ of garnishment signed by a single church trustee is sufficient, the trustee's authority to represent the church being presumed whether the church was incorporated or unincorporated.[58] Incorporation of a religious society is not sufficiently alleged by a recital in the pleading that defendants were members of a religious society.[59] Trustees of a church, incorporated or unincorporated, in declaring on their title need not set forth how the trust was created or how their title accrued, it being sufficient to aver the fact of their property and the injury.[60] The officer of a religious congregation on whom process was served as alleged agent for the purpose of process of a religious society organized as a legal entity under the statute may plead nul tiel corporation in his own name or in the name of the society.[61]

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[23] Schell v. Leander Clark College, 2 F. (2d) 17.

[24] Masbruch v. Von Oehsen, 163 Wis. 208, 157 NW 775.

[25] Masbruch v. Von Oehsen, supra.

[26] Meyer v. Lipski, 10 OhS&CP 95, 7 OhNP 366.

[27] Blount v. Sixteenth St. Baptist Church, 206 Ala. 423, 90 S 602.

[28] Mountain Top Missionary Baptist Church v. McLarty, 133 Ga. 548, 66 SE 243.

[29] Geiss v. Trinity Lutheran Church Cong., (Nebr.) 230 NW 658.

[30] Geiss v. Trinity Lutheran Church Cong., supra.

[31] Predestinarian Baptist Church v. United Baptist Church, 139 Ky. 110, 129 SW 546.

[32] Nemolovsky v. Rykhloff, 187 App. Div. 290, 175 NYS 617.

[33] Nemolovsky v. Rykhloff, supra.

[34] Bernardsville M. E. Church v. Seney, 85 N. J. Eq. 271, 96 A 388.

[35] Kerr v. Hicks, 154 N. C. 265, 70 SE 468, 33 LRANS 529.

[36] **Appearance in actions against corporations generally** see Corporations §§ 2921–2923.

Service of process in actions against:
Associations generally see Associations §§ 124, 125.
Corporations generally see Corporations §§ 2903–2916.

[37] Hicks v. Methodist Episcopal Church, 4 Oh. Dec. (Reprint) 85, 1 ClevLRep 14.

[38] Hicks v. Methodist Episcopal Church, supra.

[39] See statutory provisions.

[40] New Orleans v. Christ Church, 3 La. Ann. 453.

[41] New Orleans v. Christ Church, supra.

[42] Berrian v. New York Methodist Soc., 4 AbbPr (N. Y.) 424.

[a] **On warden.**—In mandamus to restore petitioner to his rights as member of a church corporation, the accounting warden of the church, appointed by de facto officers thereof, may appear and file a return to the alternative writ. Woodward v. Church, 14 WklyNC (Pa.) 240.

[43] Protestant Episcopal Church v. Church of Messiah, 115 S. C. 285, 105 SE 414.

[44] See cases infra this note.

[a] **Amendment of writ.**—(1) In trespass quare clausum, plaintiffs were permitted to amend their writ, which charged defendant for an injury to their own property, by setting forth that they sued as deacons and overseers of a society of shakers. Anderson v. Brock, 3 Me. 243. (2) Similarly, where an action of trespass de bonis asportatis was brought in the name of the elder and deacons of a church, and it appeared that the deacons alone constituted the corporation with respect to such property, in whose name the action should have been brought, the writ might be amended by striking out the words "elder and." Lowell First Freewill Baptist Church v. Bancroft, 4 Cush. (Mass.) 281.

[45] **In actions by or against:**
Associations generally see Associations §§ 112–116, 127.
Corporations generally see Corporations §§ 2924–2977.

[46] See cases infra notes 47–56.

[47] Evangelical Lutheran St. Matthew's Cong. v. Bethards, 202 Ill. A. 87.

[48] Tucker v. West Missouri Diocese, (Mo.) 264 SW 897.

[49] Frey v. Dougherty, 286 Pa. 45, 132 A 717.

[§ 218] **F. Issues and Proof.**[62] If the declaration against a church as a corporation is not traversed by a denial of the incorporation, proof of a de jure incorporation is not required of plaintiff if a de facto incorporation is shown.[63] Evidence that defendant church is not a corporation is not admissible in the absence of a specification of defense taking issue with the allegation in the writ that it was.[64] Evidence that defendants were trustees of a religious society and so entitled to possession of its property is not admissible under a general denial in an action by the society and its trustees against certain individuals named as trespassers.[65]

[§ 219] **G. Evidence**[66]**—1. Presumptions and Burden of Proof.** A presumption of incorporation exists where a church is sued as an entity and answers to the merits without raising that issue.[67] A presumption favors the regularity of proceedings brought in the name of all the trustees of a church,[68] and the signing of the necessary applications and affidavits by one is presumed to have been authorized by all.[69] A presumption favors the authority of church trustees to incur indebtedness for the repair and improvement of the church property in the absence of church regulations to the contrary.[70] There is no presumption arising from the fact that notes, purporting to be corporate notes, were signed by the president, secretary, and treasurer in their official character, that they were authorized or based on a legal consideration.[71] No presumption as to powers of church judicatories arises from the mere name of the church,[72] nor will the power to remove a rector be presumed from the power of appointment and transfer.[73] The burden is on the plaintiff to prove that the acts of the church official upon which he bases his right to recover were either authorized[74] or ratified by the church.[75]

[§ 220] **2. Admissibility.**[76] The general rules as to the admissibility of evidence on grounds of its competency[77] and relevancy[78] are applicable in actions by or against religious societies.[79] Canons and customs of church are not admissible to contradict the terms of a deed.[80] An offer by a church to pay plaintiff for his pews, unaccepted and later withdrawn, is not admissible as evidence of plaintiff's ownership.[81] Evidence of a church usage that a pewholder is not entitled to compensation for pews lost on sale of the church is admissible in an action of a pewholder to recover, even though the witness can testify to only one or two instances in support of the custom.[82] Evidence that church members knew the facts upon the basis of which an estoppel against them is claimed is admissible on that issue.[83] That property was paid for by contributions of members of an unincorporated religious society is admissible as tending to show that such society was the equitable owner of the property and entitled to its use as against an incorporated society holding the legal title.[84] Connection with other so-called religious associations proved to have followed immoral practices is admissible to prove familiarity with, and knowledge of, such practices on the part of the founder of an association which plaintiff alleges he was fraudulently induced to join and as bearing upon the issue of fraud.[85]

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[50] Reid v. Barry, 93 Fla. 849, 112 S 846.

[51] Brown v. Scott, 138 Md. 237, 113 A 727.

[52] Taylor v. Neal, 260 Mass. 427, 157 NE 646.

[53] Linderholm v. Kansas Conference, etc., 97 Kan. 212, 155 P 24.

[54] Schumann v. Dally, (Tex. Civ. A.) 29 SW (2d) 422.

[55] Baxter v. McDonnell, 155 N. Y. 83, 49 NE 667, 40 LRA 670.

[56] Nemolovsky v. Rykhloff, 187 App. Div. 290, 175 NYS 617.

[57] McGlynn v. Hoban, 42 Pa. Super. 478.

[58] Queen Ins. Co. v. Keller, (Tex. Civ. A.) 186 SW 359.

[59] Riffe v. Proctor, 99 Mo. A. 601, 74 SW 409.

[60] Shipton v. Norrid, 1 Colo. 404.

[61] Gullett v. First Christian Church, 154 Miss. 516, 122 S 732.

[62] **In actions by or against:** Associations generally see Associations § 127.
Corporations generally see Corporations § 2978.

[63] Whitmore v. Plymouth Fourth Cong. Soc., 2 Gray (Mass.) 306.

[64] Townsend v. Lowell First Freewill Baptist Church, 6 Cush. (Mass.) 279.

[65] Holmes v. Hall, 168 La. 1133, 123 S 807.

[66] **In actions by and against corporations generally** see Corporations §§ 2979, 2980.

[67] Zeigler v. Perry, 37 Ga. A. 647, 141 SE 426.

[68] Queen Ins. Co. v. Keller, (Tex. Civ. A.) 186 SW 359.

[69] Queen Ins. Co. v. Keller, (Tex. Civ. A.) 186 SW 359.

[70] Wilson v. Clinton Chapel African M. E. Zion Church, 138 Tenn. 398, 198 SW 244.

[71] People's Bank v. St. Anthony's Roman Catholic Church, 109 N. Y. 512, 17 NE 408.

[72] Nemolovsky v. Rykhloff, 187 App. Div. 290, 175 NYS 617.

[73] Nemolovsky v. Rykhloff, supra.

[74] Columbia Bank v. Gospel Tabernacle Church, 127 N. Y. 361, 28 NE 29.

[75] Davidsville First Nat. Bank v. St. John's Church, 296 Pa. 467, 146 A 102.

[a] **Unauthorized loan.**—A bank loaning money to a minister, who has no authority from his church to borrow, on a note purporting to be the joint note of church and minister, has the burden of proving ratification by the church's receipt of the money in an action against the church on the note. Davidsville First Nat. Bank v. St. John's Church, 296 Pa. 467, 146 A 102.

[76] **In actions by or against corporations generally** see, Corporations § 2981.

[77] See Evidence §§ 157-162.

[78] See Evidence §§ 89-156.

[79] See cases infra this section.

[80] Reid v. Barry, 93 Fla. 849, 112 S 846.

[81] Witthaus v. St. Thomas' Church, 161 App. Div. 208, 146 NYS 279.

[§ 221] **3. Weight and Sufficiency.** The general rules as to the weight and sufficiency of evidence[86] are applicable in actions by or against religious societies.[87] Hearsay evidence, if received without objection and is uncontradicted, is sufficient to support a finding of the existence of the fact testified to therein.[88] Church membership is sufficiently proved by admission contained in the pleading.[89] That a building contract was the contract of a religious corporation executed by its duly authorized agent is sufficiently proved by an admission to that effect contained in the original answer of the corporation even though the authority was denied in a later amended answer.[90] The authority of a rector to bind the church in the employment of an architect is not sufficiently established by proof that he was president of the vestry in the absence of evidence of church regulations giving the president that power.[91] Authority of a rector to waive provisions of a building contract is not proved by evidence of his authority to make the contract.[92] Authority by a board of church trustees to its president to sign a note is not sufficiently proved by evidence merely of conversation between the trustees as to the need of money in the absence of evidence of any vote or resolution.[93] Evidence that a note was signed by the president, secretary, and treasurer of a religious corporation is not sufficient to charge the corporation with liability thereon in the absence of evidence that the note was made with the authority of the trustees.[94] Proof that the conveyance of church property was executed by de facto trustees of the church held out by the church as having authority to convey is sufficient to establish the conveyance as the act of the church.[95] Execution of a contract by a religious corporation is not proved by signature of an individual followed by initials indicating his membership in another religious order.[96] Clear and convincing proof of fraud on the part of church trustees in securing a consolidation of churches and a conveyance of its property by the merged church is not established by the testimony of an equal number of witnesses on both sides of that issue.[97]

[§ 222] **H. Dismissal and Nonsuit.**[98] Following general rules,[99] it has been held that, where there is no evidence in the case in support of plaintiff's claim, a nonsuit should be ordered.[1] A suit brought by trustees of a church will not be dismissed at the instance of individual trustees acting in their private interests against the wishes of members and the other trustees.[2]

[§ 223] **I. Trial—1. Questions of Law and Fact.** General rules governing questions of law and fact[3] are applicable in actions by or against religious societies.[4] While it is a question of law for the court to determine whether there is any evidence in support of the material issues of the case which will warrant its submission to the jury,[5] the weight and sufficiency of the evidence are for the jury, and if there is evidence in the case which fairly tends to support plaintiff's right to recover, it is error to direct a verdict for defendant.[6] And so, in actions involving a conflict of evidence on the issue, it has been held to be a question of fact for the jury whether a religious society was a corporation at a particular time,[7] whether the book of discipline of the church had in effect been adopted in lieu of by-laws,[8] whether a particular officer of a religious corporation had authority to make a contract,[9] whether an unauthorized contract had been ratified,[10] whether a rector was authorized to bind the church by his acceptance of the architect's plans,[11] whether a sale of building materials by a contractor acting for a church which had abandoned its building contract was authorized by the church.[12]

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[82] Huntington v. Ramsden, 77 N. H. 376, 92 A 336, AnnCas1915C 949.

[83] Stablein v. Hutterische Gemeinde, 43 S. D. 54, 177 NW 810.

[84] Chomkowitz v. Russian Greek Orthodox Nat. Assoc., 219 App. Div. 592, 220 NYS 260.

[85] Hansel v. Purnell, 1 F. (2d) 266 [certiorari den 266 U. S. 617 mem, 45 SCt 98 mem, 69 **L. ed.** 470].

[86] See Evidence §§ 1730–1806.

[87] See cases infra this section.

[88] See case infra this note.

[a] **In broker's action for commission** for procuring purchaser for lands of a church, uncontradicted evidence of plaintiff that a church trustee had told him that the trustees had voted to sell the land is sufficient to support a finding that members of the church had voted to sell the land. Stablein v. Hutterische Gemeinde, 43 S. D. 54, 177 NW 810.

[89] Sheehy v. Blake, 77 Wis. 394, 46 NW 537, 9 LRA 564.

[90] Kelly v. St. Michael's Roman Catholic Church, 148 App. Div. 767, 133 NYS 328.

[91] Cann v. Church of Redeemer, 111 Mo. A. 164, 85 SW 994.

[92] Kelly v. St. Michael's Roman Catholic Church, 148 App. Div. 767, 133 NYS 328.

[93] Parucki v. Polish Nat. Catholic Church of Holy Mother of Rosary, 177 NYS 206.

[94] Parucki v. Polish Nat. Catholic Church of Holy Mother of Rosary, 114 Misc. 6, 186 NYS 702.

[95] Poplar Bluff First M. E. Church v. Berryman, 303 Mo. 475, 261 SW 73.

[96] Winefield v. Congregation of Resurrection, 189 Ill. A. 594.

[97] Chiles v. Seventh-Day Adventist Conference Assoc., 201 Ky. 373, 256 SW 1103.

[98] **In actions by or against corporations** see Corporations § 2983.

[99] See Trial [38 Cyc 1551 et seq].

[1] See case infra this note.

[a] **Of authorized contract.**—In an action by a bidder with the joint committee of affiliated churches for contract to erect a church building, evidence as to any authorized contract by the committee to close with the lowest bidder is insufficient to take the case to the jury. Rissmiller v. Evangelical Lutheran Cong., 268 Pa. 41, 110 A 740.

[2] Berry v. Stillwater Second Baptist Church, 37 Okl. 117, 130 P 585.

[3] See Trial [38 Cyc 1511].

[4] See cases infra this section.

[5] See Trial [38 Cyc 1514].

[6] Moore v. First Ruthven Cir. M. E. Church, 117 Iowa 33, 90 NW 492.

[a] **Ratification by church.**—Direction of a verdict for the church in an action to recover for the erection of a building on the ground that trustees exceeded their authority is error where there is some evidence of ratification by the church of the acts of its trustees. Moore v. First Ruthven Cir. M. E. Church, 117 Iowa 33, 90 NW 492.

[7] Packard v. Duxbury First Cong. Parish, 256 Mass. 550, 152 NE 921.

[8] Smith v. Bethel African M. E. Church, 89 N. J. L. 397, 99 A 102.

[9] Malerba v. Friars Minor of Order of St. Francis, 180 App. Div. 441, 167 NYS 1000; Stablein v. Hutterische Gemeinde, 43 S. D. 54, 177 NW 810; Richardson v. Prospect Hill Missionary Baptist Church, (Tex. Civ. A.) 7 SW (2d) 179.

[10] C. A. Dodge Co. v. Western Ave. Tabernacle Baptist Church, 247 Mass. 330, 142 NE 64.

[§ 224] 2. **Instructions.** Following the rules as to instructions generally,[13] it has been held in actions in which a religious society was a party that instructions must present the issues raised by the evidence,[14] and that requests for instructions not conforming to the evidence are properly refused.[15]

[§ 225] 3. **Findings.** Findings must be responsive to the issues made by the pleadings.[16] A finding of court that the proceedings on appeal from one ecclesiastical court to another were so irregular as to be null and void is responsive to averments in the pleading where the complaint alleged that the action of the appellate tribunal was without authority and the answer averred that it was in accordance with the procedure of the church courts.[17]

[§ 226] **J. Judgment and Execution.**[18] In an action against a religious corporation and its president jointly, a personal judgment against the president cannot be had in the absence of evidence showing personal liability.[19] A judgment enjoining certain members of a church from taking possession and control of church property and assuming management thereof, but permitting them to attend services and participate in the church meetings, is sufficiently definite to preserve defendants' rights as members.[20] Judgment against trustees of a religious community, rendered in an action on contracts made in behalf of the community, may be satisfied out of property belonging to the community.[21] Sale of land under execution on judgment against an unincorporated church society, as if it were incorporated, does not convey a good title.[22] Execution against a church cannot be satisfied out of a bank deposit in the name of the minister made up of general contributions given by church members to him but for no specific purpose.[23]

[§ 227] **K. Costs.**[24] Costs adjudged against a pastor in a dismissal suit cannot be set off against salary due him where the amount due is not involved in the dismissal action and where the dismissal was not conditioned on payment of arrears.[25] Where charges of misconduct are proved in an action to expel a member from a church corporation but the expulsion is denied on ground of errors in the procedure, he is not entitled to his costs although the action against him has failed.[26]

[§ 228] **L. Receivers.**[27] When an action involving title to an archbishopric is never brought to trial because of the appointment of a receiver to take over the church property, and later on motion the receivership is vacated, an order cannot be made that the church property be delivered over to one of the competitors for the office, such an order amounting to a decision on the merits of the controversy without trial.[28]

***RELIGIOUS TEACHER.**[1]

RELIGIOUS USES.[2]

RELIGIOUS WORSHIP.[3]

RELINQUISH.[4] To forsake, or abandon; quit; leave with reluctance; desist from; renounce a claim to.[5]

In an agreement to "relinquish an annuity" the term is sufficiently satisfied by the promisor abandoning, and not demanding it.[6]

As a word of conveyance "relinquish" does not import a conveyance of the fee, but rather the use of the land.[7]

Phrases: "Relinquish any obligation to the state or any political subdivision thereof,"[8] "relinquishing

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[11] Cann v. Church of Holy Redeemer, 121 Mo. A. 201, 98 SW 781.

[12] Lackey v. Price, 142 Va. 789, 128 SE 268.

[13] See Trial [38 Cyc 1594 et seq].

[14] See case infra this note.

[a] **Authority to apply funds.**—An instruction that defendant would be liable for church funds received by him from a church barbecue unless the church "at a regular, adjourned or called meeting" authorized him to apply on church notes which he held is not too restrictive in view of the evidence of the defendant that the authority was given at such meeting, and there was no evidence in the case of its being given at any other time. Second Baptist Church v. Beecham, (Mo. A.) 180 SW 1065.

[15] See case infra this note.

[a] **In action by priest to recover for services.**—Where plaintiff's evidence that he was an ordained priest was not contradicted, the court properly refused to instruct that, in order to recover for his services, plaintiff must show that his services sued for were those of a christian priest. Mady v. Holy Trinity Roman Catholic Polish Church, 223 Mass. 23, 111 NE 413.

[16] See Trial [38 Cyc 1925].

[17] Wallace v. United Presb. Church Gen. Assembly, 201 Pa. 292, 50 A 762.

[18] **Executions generally** see Executions 23 C. J. p 281.

In actions by or against:
Associations see Associations §§ 130–133.
Corporations see Corporations §§ 2988–3005.

Judgments generally see Judgments 33 C. J. p 1042.

[19] Kaplan v. Adash Israel Cong., 125 NYS 305.

[20] Schumann v. Dally, (Tex. Civ. A.) 29 SW (2d) 422.

[21] Davis v. Bradford, 58 N. H. 476.

[22] Paine's Chapel African M. E. Church v. Aberdeen Realty Co., 120 Miss. 12, 81 S 650.

[23] People's Bank v. St. Anthony's Roman Catholic Church, 38 Hun (N. Y.) 330.

[24] **Generally** see Costs 15 C. J. p 1.

In actions by or against corporations generally see Corporations § 3007.

[25] Morris St. Baptist Church v. Dart, 67 S. C. 338, 45 SE 753, 100 AmSR 727.

[26] Cohen v. Hazen Ave. Synagogue Cong., 47 N. B. 400.

[27] **Generally** see Receivers 52 C. J. p 1.

In actions by or against corporations generally see Corporations § 3023.

[28] Kedrovsky v. Archbishop, etc., Greek Catholic Church, 218 App. Div. 121, 217 NYS 873.

[1] See Religious § 8.

[2] See Charities §§ 24–33.

[3] See Religious § 9.

[4] See also Relinquishment post.

[5] Wisconsin-Texas Oil Co. v. Clutter, (Tex. Civ. A.) 258 SW 265, 268.

[a] **"Abandon" as synonymous.**—Wisconsin-Texas Oil Co. v. Clutter, (Tex. Civ. A.) 258 SW 265. "Abandon" 1 C. J. p 2.

"Desist" 18 C. J. p 973.

"Quit" 51 C. J. p 299.

"Renounce" post.

[6] Home v. Booth, 3 Man. & G. 709, 742, 42 ECL 371, 133 Reprint 1325.

[7] Mitchell v. Bourbon County, 76 SW 16, 17, 25 KyL 512.

[8] State v. Snyder, 29 Wyo. 199, 212 P 771, 775. See Harkin v. Niobrara County, 30 Wyo. 455, 222 P 35.

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. . . the indebtedness, liabilities or obligation."[9]

RELINQUISHMENT.[10] A forsaking, abandoning, renouncing, or giving over a right.[11]

RELOAN.[12] The act of loaning money a second time, or oftener.[13]

RELOCATE.[14] To locate again;[15] locate that which was formerly located.[16]

RELOCATION.[17] A second location.[18]

RELUCTANT. Disinclined to yield to some demand or requirement; unwilling;[19] striving against; opposed in desire; unwilling; disinclined; or disinclined to yield.[20]

RELY. To depend on someone or something as worthy of confidence; to repose confidence; to trust; used with "on" or "upon;"[21] to trust or to depend upon.[22]

REM.[23]

REMAIN.[24] [§ 1] **A. In General.** To continue;[25] to continue unchanged;[26] to stay; to be left; to be left after another or others are gone;[27] to stay behind after others have withdrawn; to continue unchanged in place; to abide; to stay; to endure; to last.[28]

Term implies the absence of motion;[29] something that exists or continues after some other time or event.[30]

In a statute requiring deed of trust of chattels to be recorded in the county where the goods remain, the term has been construed to mean "is."[31]

To enter and remain in a place. To enter therein, and, after having done so, to stay there for some indefinite length of time longer than is required for an immediate exit.[32]

Other phrases: "Remain in the employment,"[33] "remain in the possession of owner till paid for,"[34] "remain invested in the capital account of the business,"[35] "remain inviolate,"[36] "remain strictly and continuously within the house,"[37] "remain unmarried,"[38] "remain unsold,"[39] "remain with,"[40] "right to remain in,"[41] "shall remain bound as now,"[42] "shall remain valid and secure under the laws of the proposed state,"[43] "so long as he shall remain as a resident on said lands,"[44] "that may remain at her death,"[45] and "unoccupied and so remain;"[46] also, "remains a member;"[47] also, "remains due,"[48] "remains unexpended,"[49] "remains unpaid,"[50] "remains unredeemed,"[51] "whatever remains,"[52] and "what remains;"[53] also, "remained therein."[54]

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[9] State v. Snyder, 29 Wyo. 199, 212 P 771, 777. See Harkin v. Niobrara County, 30 Wyo. 455, 222 P 35.

[10] See also Relinquish ante.

Relinquishment of:
Claim to public land see Public Lands §§ 137–140, 596.
Curtesy see Curtesy § 48 et seq.
Dower right see Dower § 180.
Easement see Easements § 149 et seq.
Funds or securities as discharging surety:
  In general see Principal and Surety §§ 259–269.
  Affecting right of cosurety to contribution see Principal and Surety § 490.
Mining claim see Mines and Minerals § 291 et seq.
Possession as effecting loss of attorney's lien see Attorney and Client § 384.
Right to child's earnings see Parent and Child §§ 88–90.
Rights under deed see Deeds §§ 470–480.
Trade-mark see Trade-Marks, Trade-Names, and Unfair Competition [38 Cyc 881].

[11] Black L. D.

[12] **"Loan"** 38 C. J. p 125.

[13] Spurgeon v. Smitha, 114 Ind. 453, 455, 17 NE 105.

[14] See Relocation post.

"Locate" 38 C. J. p 131.

[15] Raines v. Terrell County, 169 Ga. 725, 151 SE 509; Marks v. State Highway Dept., 167 Ga. 792, 146 SE 838; Bennett v. Wellesley, 189 Mass. 308, 75 NE 717, 721 (dis. op).

Applied to way see Highways § 225.

"Locate anew" as synonymous see Locate 38 C. J. p 132 text and note 75.

[16] Thompson v. Burk, 2 Alaska 249.

[17] **Relocation of:**
Boundaries §§ 13, 19, 46.
Bridges § 16.
Canal see Eminent Domain § 120.
County seat see Counties § 66 et seq.
Easements §§ 215, 216.
Ferries 25 C. J. p 1051 text and note 21 [a].
Highway see Highways § 225; Railroads § 344.
Mining claim see Mines and Minerals §§ 191, 293, 301, 304, 305 et seq.
Railroad:
  Generally see Eminent Domain § 120; Railroads § 153 et seq.
  Highway grade see Railroads § 344.
  On abolition of grade crossing see Railroads § 379.
Street Railroads [36 Cyc 1387].

[18] Webster New Int. D.

"Location" 38 C. J. p 132.

[19] Standard D. [quot Georgia Cent. R. Co. v. Harden, 113 Ga. 453, 456, 38 SE 949].

[20] Webster D. [quot Georgia Cent. R. Co. v. Harden, supra].

[21] Spencer v. Hersam, 31 Mont. 120, 77 P 418 [cit Century D.; Standard D.].

"Believe" synonymous see Believe 7 C. J. p 1037 text and note 35.

"Relying" as precatory word see Wills [40 Cyc 1740 text and note 26].

[22] Caciatore v. Transit Constr. Co., 147 App. Div. 676, 132 NYS 572 [cit Century D.].

[23] **Proceeding in rem** see Actions § 171.

[24] **In condition of liquor dealer's bond** see Intoxicating Liquors § 155 text and note 65 [f].

Limitation over of what remains after life estate see Wills [40 Cyc 1587, 1629].

[25] State v. Fowler, 66 Conn. 294, 300, 32 A 162, 33 A 1005; Beard v. Smith, 6 T. B. Mon. (Ky.) 430, 489; Re Perrie, 21 Ont. L. 100, 16 OntWR 90.

"Continue" 13 C. J. p 202.

[26] Harris v. Wright, 118 N. C. 422, 426, 24 SE 751.

[27] State v. Fowler, 66 Conn. 294, 300, 32 A 162, 33 A 1005.

[28] Webster New Int. D. [quot Tinkle v. Sweeney, 97 Tex. 190, 192, 77 SW 609]. See Harris v. Wright, 118 N. C. 122, 24 SE 751.

[29] Norcross v. B. L. Roberts Co., 239 Mass. 596, 132 NE 399.

[30] Baldwin v. Ely, 66 Wis. 171, 198, 28 NW 392.

[31] Mitchell v. Smith, 34 S. C. L. 236, 244.

[32] Haynes v. Haberzettle, (Tex. Civ. A.) 152 SW 717, 721.

[33] Clinton Min. Co. v. Bradford, 192 Ala. 576, 69 S 4.

[34] Harris v. Whitehead, 25 Man. 105, 19 DomLR 722, 30 WestLR 32, 7 WestWkly 660.

[35] Moore v. Brown, 55 N. S. 460, 69 DomLR 14 [app dism [1924] 2 DomLR 545].

[36] Isom v. Mississippi Cent. R. Co., 36 Miss. 300, 308; Gribble v. Wilson, 101 Tenn. 612, 614, 49 SW 736. See also Juries § 13 et seq.

[37] Interstate Business Men's Acc. Assoc. v. Sanderson, 144 Ark. 271, 222 SW 51.

[38] Re Perrie, 21 Ont. L. 100, 105, 16 OntWR 90.

[39] Faxon v. Faxon, 174 Mass. 509, 55 NE 316, 317; Manning v. Craig, 4 N. J. Eq. 436, 437, 41 AmD 739.

[40] Harris v. Wright, 118 N. C. 422, 24 SE 751.

[41] Farquharson v. Farquharson, (Pr. Edw. Isl.) 11 EastLR 201.

[42] Com. v. Boston, etc., Mill Corp., 8 Allen (Mass.) 296 (by obligations of agreement).

[43] Beard v. Smith, 6 T. B. Mon. (Ky.) 430, 489.

[44] Webster D. [quot Wilkinson v. Wilson, 26 Ont. 213, 215, 216].

[45] Downey v. Borden, 36 N. J. L. 460, 468.

[46] See Fire Insurance 26 C. J. p 208 text and note 96 [a].

[47] Peo. v. Thornton, 63 Cal. A. 724, 219 P 1020.

[48] Hendelman v. Kahan, 50 Wash. 247, 97 P 109, 110.

[49] Annin v. Vandoren, 14 N. J. Eq. 135, 143.

[50] National Surety Co. v. Price, 162 Ky. 632, 172 SW 1072.

[51] Lombard v. White, 76 Wis. 445, 447, 45 NW 420; Baldwin v. Ely, 66 Wis. 171, 198, 28 NW 392.

[52] Green v. Hewitt, 97 Ill. 113, 37 AmR 102; Loud v. Poland, 126 Me. 45, 136 A 119.

[§ 2] **B. Remaining** involves the idea of continuance in the same state or position.[55]

Phrases: "Dues remaining in the treasury of said society,"[56] "estate remaining,"[57] "remaining assets,"[58] "remaining at my wife's death,"[59] "remaining brothers and sisters,"[60] "remaining children,"[61] "remaining collector,"[62] "remaining due,"[63] "remaining in any car,"[64] "remaining interest,"[65] "remaining living heirs,"[66] "remaining members,"[67] "remaining on the land,"[68] "remaining property,"[69] "remaining son,"[70] "remaining sons,"[71] "remaining unpaid,"[72] "remaining untried,"[73] "the property remaining."[74]

REMAINDER.[75] A portion of a thing remaining or left at the separation and removal of a part; remnant; residue;[76] that which remains; something left as after subtraction;[77] whatever may be left;[78] what may remain;[79] also, the survivor.[80] As used in statute relating to interest of stockholders or members in securities of corporations, limited partnerships, or joint stock associations, the part remaining after all other prior lawful obligations are satisfied.[81]

Phrases: "Remainder of my estate,"[82] "remainder of the aforesaid children."[83]

REMAINDERMAN. One who holds or is entitled to a remainder.[84]

REMAND.[85] After a preliminary or partial hearing before a court or magistrate, to send a prisoner back to the custody, to be kept until the hearing is resumed or the trial comes on;[86] to remit or send back a cause to the court from which it was removed, appealed, or transferred into another court, in order that some further action may be taken upon it in the original form.[87]

Remanded. Held for trial.[88]

REMANENT PRO DEFECTU EMPTORUM. In practice, the return made by the sheriff to a writ of execution when he has not been able to sell the property seized, that the same remains unsold for want of buyers.[89]

REMANETS. The causes of which the trial is deferred from one term to another, or from one sitting to another.[90]

REMANIT. A manufacture of silk;[91] a substance made from silk rags, some of which may contain an admixture of cotton and wool; the rags being placed in a large drum which is charged with various acids, the purposes being to destroy the cotton and wool by the process known as carbonization.[92]

REMARK. The mention of that which is worthy of notice or attention.[93]

REMARRIAGE.[94]

REMATE JUDGMENT. In Spanish law, a main order or judgment of a very peculiar nature.[95]

REMEDIAL.[96] Affording a remedy; intended as a remedy, or for the removal or abatement of an evil.[97]

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[53] State v. Smith, 52 Conn. 557, 564; Coulson v. Alpaugh, 163 Ill. 298, 303, 45 NE 216; Foote v. Sanders, 72 Mo. 616, 621; Jackson's Est., 179 Pa. 77, 83, 36 A 156.

[54] Matter of Simpson, 167 N. Y. 403, 60 NE 747.

[55] Henderson v. Henderson, 131 Md. 308, 101 A 691 [cit Century D.; Webster New Int. D.].

[56] Lake v. Minnesota Masonic Relief Assoc., 61 Minn. 99, 63 NW 261, 52 AmSR 538.

[57] Chase v. Cartwright, 53 Ark. 358, 365, 14 SW 90, 22 AmSR 207.

[58] Houston First Nat. Bank v. J. I. Campbell Co., (Tex. Civ. A.) 133 SW 311 [rev on other grounds 104 Tex. 457, 140 SW 430].

[59] Robertson v. Hardy, (Va.) 23 SE 766, 767.

[60] Lingo v. Smith, 174 Iowa 461, 156 NW 402.

[61] Turner v. Withers, 23 Md. 18, 41; Smith v. Myers, 212 Pa. 51, 61 A 573; Re Garner, 3 OntWR 584, 585.

[62] State v. Fowler, 66 Conn. 294, 300, 32 A 162, 33 A 1005.

[63] See Due 19 C. J. p 822 text and note 33.

[64] Brown v. State, 110 Ga. 771, 36 SE 68.

[65] Sizemore v. Willis, 130 Ga. 666, 61 SE 536, 537; Eaton v. Trowbridge, 38 Mich. 454, 460.

[66] In re Harrington, 142 Wis. 447, 460, 125 NW 986.

[67] In re Wells Tp. School Dist., 297 Pa. 242, 146 A 601.

[68] Langmaid v. Mickle, 16 Ont. 111, 114.

[69] Russell v. Werntz, 88 Md. 210, 214, 44 A 219.

[70] Henderson v. Henderson, 131 Md. 308, 101 A 691.

[71] Re Totten, 8 OntWR 543, 547.

[72] See Due 19 C. J. p 820 text and note 52.

"Owing" as synonymous see Owe 46 C. J. p 1163 text and note 15 [c].

[73] Preston v. Englert, 5 Binn. (Pa.) 390.

[74] McGuire v. Gallagher, 99 Me. 334, 59 A 445.

[75] **As an estate** see Curtesy § 425; Deeds §§ 285–291; Estates §§ 130–178; Trusts [39 Cyc 231]; Wills [40 Cyc 1640 et seq].

[76] Webster New Int. D. [quot Weller v. Dinwiddie, 198 Ky. 360, 248 SW 874, 875].

[77] New Standard D. [quot Weller v. Dinwiddie, supra].

[78] Weller v. Dinwiddie, supra [quot Cyc]; Baumgras v. Baumgras, 5 Misc. 8, 12, 13, 24 NYS 767; In re Herborn, 189 App. Div. 319, 178 NYS 582.

[79] Weller v. Dinwiddie, 198 Ky. 360, 248 SW 874, 875.

[80] Weller v. Dinwiddie, supra [quot Cyc]; Nelson v. Combs, 18 N. J. L. 27, 35 (so used in a clause of a will which recited that if one of two persons should die, or either of them, the remainder to enjoy the other's property).

[81] Provident Life, etc., Co. v. McCaughn, 245 Pa. 370, 91 A 672.

[82] Pearce v. Pearce, 199 Ala. 491, 74 S 952; Wingard v. Harrison, 337 Ill. 387, 169 NE 232.

[83] Presley v. Davis, 28 S. C. Eq. 105, 108, 62 AmD 396.

[84] Webster New Int. D. See also Deeds §§ 285–291; Estates §§ 130–178; Wills [40 Cyc 1640 et seq].

[85] **"Mandate"** 38 C. J. p 956.

[86] Black L. D. See also Criminal Law § 599 et seq.

"Commitment" 12 C. J. p 149.

[87] Black L. D. See also Admiralty § 322; Appeal and Error §§ 1944, 2037, 3113, 3255 et seq; Certiorari § 383; Courts § 629; Criminal Law §§ 327, 3758, 3759, 3762 et seq; Justices of the Peace § 672; Removal of Causes post; Trial [38 Cyc 1278 text and note 67]; Venue [40 Cyc 178].

"Dismiss" distinguished see Dismiss 18 C. J. p 1141 text and note 76 [a].

[88] Ex p. Chalfant, 81 W. Va. 93, 93 SE 1032.

[89] Black L. D. See also Executions § 556 et seq.

[90] Black L. D. [cit 1 Archbold Pr. 375]. See also trial [38 Cyc 1238].

[91] Frank v. U. S., 143 Fed. 702, 703.

[92] Frank v. U. S., supra.

[a] **Carbonized silk thus obtained** is bound together with metal threads and made in the form of ropes about one and one-quarter inches thick, or into mats, as may be desired. Frank v. U. S., 143 Fed. 702, 703.

[93] Webster D. [quot U. S. v. Dorr, 2 Philippine 269, 286].

[94] **Remarriage:**

Of divorced person see Adultery § 19; Divorce §§ 411, 420, 438, 455, 456; Marriage § 45 et seq.

Of widow of soldier as affecting right to pension see Pensions § 10.

Validity of, as affected by subsisting marriage see Marriage § 45 et seq.

[95] In re Henderson, 37 Ch. D. 244, 253 [rev 35 Ch. D. 704].

[a] **Nature of this judgment.**—A person in whose favor documents of a certain class have been executed can commence what is termed "executive proceedings," in which defendant can plead only defenses not disputing the original right of action, and plaintiff may obtain a "remate judgment," which is an order for an execution to issue. This judgment does not preclude either party from taking what is termed "plenary proceedings" or "ordinary proceedings" as to the same subject-matter, in which latter proceedings all defenses are open and neither party can set up the "remate judgment" as res judicata, although plaintiff may on giving security enforce the "remate judgment" notwithstanding ordinary or plenary proceedings have been taken. In re Henderson, 37 Ch. D. 244, 253.

[96] See also Remedy post.

Remedial:

Action see Actions § 21.

Phrases: "Remedial order,"[98] and "remedial provision."[99]

REMEDIUM EXTRAORDINARIUM. An extraordinary remedy; one out of the usual order of legal remedies, and not resorted to except in cases of great necessity, and where ordinary remedies cannot be resorted to.[1]

REMEDY.[2] Something used for the cure or relief of bodily disease or ailment;[3] that which cures a disease;[4] that which is used in any way for the cure or relief of bodily disease;[5] that which relieves or cures a disease;[6] more specifically, a medicine;[7] also, remedial treatment.[8]

Remedy at law. A remedy on the law side of the court.[9]

Remedy over.[10] A person who is primarily liable or responsible, but who, in turn, can demand indemnification from another, who is responsible to him, is said to have a "remedy over."[11]

REMEMBRANCE. A term sometimes used in wills.[12]

Remembrancer. In English law, an officer of the exchequer, whose duty it is to put in remembrance the lord treasurer and the justices of that court of such things as are to be called and dealt in for the benefit of the crown.[13]

Remembrancer of the city of London is parliamentary solicitor to the corporation, and is bound to attend all courts of aldermen and common council when required.[14]

REM IN BONIS NOSTRIS HABERE INTELLIGIMUR, QUOTIES AD RECUPERANDAM EAM ACTIONEM HABEAMUS.[15]

REMIND. Refresh the memory.[16]

REMISE. To discharge;[17] quitclaim;[18] release;[19] surrender by deed.[20]

Phrases: "Remise, release and forever quitclaim,"[21] "remise, release and quitclaim."[22]

REMISIT CURIAM. He adjourned the court.[23]

REMISSIO INJURIÆ. Forgiveness of the offence; condonation.[24]

REMISSION.[25] A release of a debt.[26] The word implies forgiveness, and means a voluntary relinquishment of a claim or a part thereof by one capable of asserting it, and does not refer to the extinguishment of a debt by agreement of the parties, or by

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Cases see Courts 15 C. J. p 1076 text and note 94 [a].
Law see Law § 27.
Proceeding for contempt see Contempt 13 C. J. p 58 text and note 93.
Right see Actions 1 C. J. p 945 text and note 31.
Statute see Statutes [36 Cyc 1173].

[97] Webster New Int. D.

"Punitive" distinguished see Punitive 51 C. J. p 92.

[98] In re Merchants' Stock, etc., Co., 223 U. S. 639, 32 SCt 339, 346, 56 L. ed. 584.

[a] **"Punitive order" distinguished.**—In re Merchants' Stock, etc., Co., 223 U. S. 639, 32 SCt 339, 340, 56 L. ed. 584.

[99] Brooklyn First Constr. Co. v. Rapid Transit Subway Constr. Co., 211 App. Div. 184, 206 NYS 822; MacDonald v. Wills, 199 App. Div. 203, 191 NYS 566; Columbus Trust Co. v. Upper Hudson Electric, etc., Co., 190 NYS 737.

[1] Trayner Leg. Max. See Habeas Corpus 29 C. J. p 1; Injunctions 32 C. J. p 1; Mandamus 38 C. J. p 526; Ne Exeat 45 C. J. p 588; Prohibition 50 C. J. p 651; Quo Warranto 51 C. J. p 307; Receivers 53 C. J. p 1.

[a] **"Cannot be converted into an ordinary or common remedy** which may thoughtlessly by its indiscreet application produce real loss and damage to parties." Egozcue v. Lundt, 8 Porto Rico 366, 369.

[2] **Defined** see Actions § 37.

"Election of Remedies" 20 C. J. p 1.

Particular remedies see specific titles in this work.

[3] Beile v. Travelers' Protective Assoc., 155 Mo. A. 629, 135 SW 497.

As synonymous with "cure" see Druggists 19 C. J. p 786 text and note 4.

"Cure" 17 C. J. p 404.

"Disease" 18 C. J. p 1139.

"Preparations and remedies" within meaning of Narcotic Law see Poisons 49 C. J. p 1060 text and note 49.

[4] Webster New Int. D. [quot U. S. v. Natura Co., 250 Fed. 925, 926].

[5] Standard D. [quot U. S. v. Natura Co., supra].

[6] Webster New Int. D. [quot U. S. v. Natura Co., supra].

[7] Standard D. [quot U. S. v. Natura Co., supra].

"Medicine" 40 C. J. p 626.

[8] Standard D. [quot U. S. v. Natura Co., supra].

"Remedial" ante.

[9] Risty v. Chicago, etc., R. Co., 297 Fed. 710, 717.

Adequate remedy at law see Equity § 14 et seq.

[10] **Remedy over:**
Against person primarily liable in general see Indemnity § 75.
Of insurer against person causing loss see Accident Insurance § 364; Fire Insurance § 618; Insurance § 714; Life Insurance § 363; Marine Insurance § 484.
Of surety against principal see Principal and Surety § 399.

Right of contribution among debtors jointly liable:
In general see Contribution § 12 et seq.
Officers and stockholders of corporation see Corporations §§ 1786, 2072.
Promoters see Corporations § 328.
Sureties see Principal and Surety § 531.

Substitution of third person paying debt to rights of creditor against debtor see Subrogation [37 Cyc 361].

[11] Black L. D. [cit 2 Black Jud. § 575] ("For example, a city being compelled to pay for injuries caused by a defect in the highway, has a 'remedy over' against the person whose act or negligence caused the defect, and such person is said to be 'liable over' to the city").

[12] Bubb v. Yelverton, L. R. 13 Eq. 131, 132, 20 Wkly. Rep. 164. See Read v. Devaynes, 3 Bro. Ch. 95, 29 Reprint 429; Burgess v. Burgess, 1 Coll. 367, 28 EngCh 367, 63 Reprint 458.

[13] Black L. D. [cit Jacob L. D.].

[14] Black L. D. [cit Pull. L. & Cust. Lond. 122].

City attorney generally see Municipal Corporations § 1607.

[15] A maxim meaning "We are considered to have an interest in our own effects, so often as we are entitled to an action to recover them." Tayler L. Gloss.

[16] Putnam v. U. S., 162 U. S. 687, 700, 16 SCt 923, 40 L. ed. 1118. See also Witnesses [40 Cyc 2447].

[17] Sherman v. Sherman, 23 S. D. 486, 122 NW 439, 443.

"Discharge" 18 C. J. p 1048.

[18] Bannard v. Duncan. 79 Nebr. 189, 112 NW 353, 355, 126 AmSR 661; Sherman v. Sherman, 23 S. D. 486, 122 NW 439, 443.

"Quitclaim" 51 C. J. p 299.

[19] Bannard v. Duncan, 79 Nebr. 189, 112 NW 353, 355, 126 AmSR 661; Sherman v. Sherman, 23 S. D. 486, 122 NW 439, 443.

"Release" ante.

[20] Bannard v. Duncan, 79 Nebr. 189, 112 NW 353, 355, 126 AmSR 661.

[21] Mosier v. Momsen, 13 Okl. 41, 74 P 905.

[22] Pearson v. Mulholland, 17 Ont. 502 [overr Acre v. Livingstone, 26 U. C. Q. B. 282].

[23] Tayler L. Gloss.

"Adjournment" 1 C. J. p 1235.

[24] Trayner Leg. Max.

"Condonation" see Divorce § 192 et seq.

[25] See also Remit post; Remittitur post.

Remission of:
Costs see Costs § 868; Ejectment § 356.
Damages see Appeal and Error § 3139; New Trial § 151.
Fine see Fines, Forfeitures, and Penalties § 42.
Forfeiture see Fines, Forfeitures, and Penalties § 71.
Part of demand to confer jurisdiction see Courts § 73; Justices of the Peace § 92.
Penalty see Fines, Forfeitures, and Penalties §§ 156, 157.

[26] Bouvier L. D. [quot Rowlands v. State Loan Bd., 24 Ariz. 116, 120, 207 P 359]; Hall v. Allen Mfg. Co., 133 La. 1079, 63 S 591. See also Remise ante.

judgment of the court.[27]

At common law, remission is the act by which a forfeiture or penalty is forgiven.[28]

Phrases: "Penalty-remission,"[29] and "remission or conventional discharge."[30]

REMISSIUS IMPERANTI MELIUS PARETUR.[31]

REMISSNESS. A term, as used in a contract by a telegraph company exempting it from liability for any delay, error, or remissness, implies a sending or delivering of the message, but in a tardy, negligent, or careless manner.[32]

REMIT.[33] A term that has been variously defined as meaning to abate;[34] to absolve;[35] to annul;[36] to countermand the exaction of;[37] to defer or put off;[38] to discharge from;[39] to forgive;[40] to pardon;[41] to postpone;[42] to refrain from exacting[43] or enforcing;[44] to relax;[45] to release;[46] to release from punishment or penalty;[47] to relinquish;[48] to remove.[49] In another sense the term may be employed as meaning to restore;[50] to return;[51] to send back;[52] to transmit, forward, or send,[53] especially to a distance,[54] as money in payment of a demand, account, draft, etc.[55]

Remitted. A word, as applicable to a crime, which has been said to mean pardoned.[56] Also, the word may be employed as convertible with "extinguished" or "released."[57]

Phrases: "Received and remitted,"[58] "received . . . for remittance,"[59] and "remitted to his former rights."[60]

REMITMENT. Money sent by one person to another, either in specie, bill of exchange, check, or otherwise.[61]

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27. Kilgore Lumber Co. v. Thomas, 95 Ark. 43, 48, 128 SW 62, 64.

28. Black L. D.

[a] **"Pardon" distinguished.**—(1) "Remission is relieving the person from a punishment or the unexecuted portion of a punishment, but not pardoning the offense as such, or removing the disabilities or penal consequences attaching thereto or to the conviction. The pardoning of 'punishment,' authority for which is vested in certain commanders by the one hundred and twelfth article of war, is remission." Dig. Op. Judge Adv. Gen. p 839 XVI A. (2) A pardon is an act of mercy; a remission is an act of justice. U. S. v. Morris, 26 F. Cas. No. 15,816, 1 Paine 209, 237. See also Remit post. "Pardon" see Pardons § 1.

"Amnesty" see Pardons § 2.

"Commutation" see Pardons § 4.

"Reprieve" see Pardons § 4.

29. U. S. v. Findlay, 4 Hawaii Fed. 166, 184.

30. Hall v. Allen Mfg. Co., 133 La. 1079, 63 S 591.

31. A maxim meaning "One commanding not too strictly is better obeyed." Peloubet Leg. Max. [cit 3 Inst. 233].

32. Baldwin v. U. S. Tel. Co., 54 Barb. (N. Y.) 505, 515, 6 AbbPrNS 405 [rev on other grounds 45 N. Y. 744, 6 AmR 165].

33. See also Remission ante; Remittance post; Remittitur post.

34. Webster New Int. D. [quot Rowlands v. State Loan Bd., 24 Ariz. 116, 207 P 359, 360].

"Abate" 1 C. J. p 13.

35. Webster New Int. D. [quot Rowlands v. State Loan Bd., 24 Ariz. 116, 207 P 359, 360].

36. Bouvier L. D. [quot Rowlands v. State Loan Bd., supra].

"Annul" 3 C. J. p 222.

37. New Standard D. [quot Rowlands v. State Loan Bd., 24 Ariz. 116, 207 P 359, 360].

"Countermand" 15 C. J. p 377.

38. New Standard D. [quot Rowlands v. State Loan Bd., 24 Ariz. 116, 207 P 359, 360].

39. New Standard D. [quot Rowlands v. State Loan Bd., supra].

40. Rowlands v. State Loan Bd., supra [quot Cyc]; Cook v. Middlesex County, 26 N. J. L. 326, 328.

41. Webster New Int. D. [quot Rowlands v. State Loan Bd., 24 Ariz. 116, 207 P 359, 360]. See also Pardons 46 C. J. p 1179.

[a] **"Pardon" distinguished.**—"To remit a fine after conviction was not strictly the exercise of the pardoning power; it operated only on the punishment—the unforgiven crime remained. . . . It was what its language imports—namely, a remission of a penalty dissociated from the pardon of an offense—yet it was exercised only by the pardoning power." In re Court of Pardons, (N. J.) 129 A 624, 627. See also Remission ante note 27 [a].

42. New Standard D. [quot Rowlands v. State Loan Bd., 24 Ariz. 116, 207 P 359, 360].

"Postpone" 49 C. J. p 1238.

43. New Standard D. [quot Rowlands v. State Loan Bd., 24 Ariz. 116, 207 P 359, 360].

[a] **Taxes.**—Taylor v. Guelph, 41 Ont. L. 33, 37, 39 DomLR 416.

44. Webster D. [quot Rowlands v. State Loan Bd., 24 Ariz. 116, 207 P 359, 360].

45. Webster D. [quot Rowlands v. State Loan Bd., supra].

46. Webster D. [quot Rowlands v. State Loan Bd., supra].

47. Rowlands v. State Loan Bd., supra [quot Cyc].

48. Webster New Int. D. [quot Rowlands v. State Loan Bd., supra].

"Relinquish" ante.

49. Webster New Int. D. [quot Rowlands v. State Loan Bd., 24 Ariz. 116, 207 P 359, 360].

50. Cook v. Middlesex County, 26 N. J. L. 326, 328 ("There is no doubt that the word remit is sometimes used in the sense of return or restoration, though in this sense Dr. Johnson says that the word is obsolete").

51. Cook v. Middlesex County, supra.

52. Colvin v. U. S. Mutual Acc. Assoc., 66 Hun 543, 545, 21 NYS 734.

[a] **To remit a cause** is to send it back to the same court from which it has been removed by appeal or otherwise, for the purpose of retrying the cause when judgment has been reversed, or of issuing execution when it has been affirmed. Irvine v. Marshall, 3 Minn. 72, 76.

53. Nicoletti v. Los Banos Bank, 190 Cal. 637, 214 P 51, 27 ALR 1479, 1483; Roxboro First Nat. Bank v. People's Bank, 194 N. C. 720, 140 SE 705, 706; Hollowell v. Virginia L. Ins. Co., 126 N. C. 398, 402, 35 SE 616.

[a] **By mail.**—(1) Defendant abroad contracted to sell goods sent to him and remit the proceeds to England by bills. In construing this contract Herschell, J., said: "I cannot doubt that the word remit there means this and nothing beyond this—that the bank-post bills, when obtained in favor of the plaintiffs, should be sent in the ordinary course and the ordinary manner in which such documents are sent by commercial men, namely, by mail, and that as soon as that had been done all obligation and all liability of the defendant ceased." Comber v. Leyland, [1898] A. C. 530. See Fanning v. Consequa, 17 Johns. (N. Y.) 511, 8 AmD 442. (2) "The term remit does not of itself mean remit by mail. But when it is remembered that Cook's Law Office, the place of defendant's residence, was remote from any bank, that a safe private conveyance thence to Charleston was not likely to be obtained in reasonable time, and that remittance by mail was there usually adopted and had proved safe, it will be perceived that in using the term remit the defendant had reference to the mail." Townsend v. Henry, 43 S. C. L. 318, 323. (3) Where an accident-insurance policy had lapsed, the company wrote to the insured a letter stating that if he would remit his check for a certain amount the company would reinstate his policy and carry it for a certain period. It was held that the word remit in the company's letter implied, in the absence of any specific direction as to the mode of sending the check, a direction to send it by mail; that the deposit of the check in the mail, in pursuance of that direction, was an acceptance by the insured of the condition of reinstatement stated by the company, and the contract of reinstatement was then complete. Colvin v. U. S. Mutual Acc. Assoc., 66 Hun 543, 21 NYS 734.

[b] **"Deliver" distinguished.**—Nicoletti v. Los Banos Bank, 190 Cal. 637, 214 P 51, 27 ALR 1479, 1482.

"Forward" 26 C. J. p 1001.

54. New Int. D. [quot Nicoletti v. Los Banos Bank, 190 Cal. 637, 214 P 51, 27 ALR 1479, 1483; Katcher v. American Express Co., 94 N. J. L. 165, 109 A 741].

55. Century D. [quot Nicoletti v. Los Banos Bank, supra; Katcher v. American Express Co., supra].

56. Webster D. [quot Gibson v. Peo., 5 Hun (N. Y.) 542, 543].

57. Custer County v. Story, 26 Mont. 517, 69 P 56.

58. Holmes v. Gayle, 1 Ala. 517, 520 ("In the one [copy of an account] the plaintiff is credited by a sum of money 'received from' him; while in the other he is credited by the same sum remitted by him. The legal effect of the entries in each copy of the account, is precisely the same").

59. Katcher v. American Express Co., 94 N. J. L. 165, 109 A 741.

60. Lill v. Gleason, 92 Kan. 754, 142 P 287.

61. Black L. D. See also Remit ante; Remittance post.

REMITTANCE.[62] Money sent by one person to another either in specie, bill of exchange, check, or otherwise.[63]

REMITTEE. A person to whom a remittance is made.[64]

REMITTER. A word, which when technically used, refers to a person procuring a foreign bill of exchange.[65]

In the law of real property "remitter" is defined to be "where he who hath the true property or jus proprietatis in lands, but is out of possession thereof, and hath no right to enter without recovering possession in an action, hath afterwards the freehold cast upon him by some subsequent, and of course defective, title; in this case he is remitted, or sent back by operation of law, to his ancient and more certain title.[66]

REMITTITUR. [§ 1] **A. In General.** The returning or sending back by a court of appeal of the record and proceedings in a cause, after its decision thereon, to the court whence the appeal came, in order that the cause may be tried anew, (where it is so ordered,) or that judgment may be entered in accordance with the decision on appeal, or execution be issued, or any other necessary action be taken in the court below.[67] The term may be used interchangeably with "mandate"[68] or "procedendo."[69]

At common law "remittitur of record" is a writ by which an appellate court hands back jurisdiction to the trial court.[70]

[§ 2] **B. Remittitur Damna.**[71] An entry made on record, in cases where a jury has given greater damages than a plaintiff has declared for.[72] While formerly "remittitur damna" was equivalent to a "retraxit,"[73] in its modern use it is more like a "discontinuance."[74]

***REMNANTS AND SURPLUSES.** A technical term, said to mean the remainder of the proceeds from the sale of ships to satisfy claims for seamen's wages, for bottomry bonds, for salvage services, and for supplies of material-men, after the satisfaction of such claims.[75]

REMODEL. A word of broad meaning.[76] Among other definitions it means to reform, reshape;[77] reconstruct;[78] to make over in a somewhat different way.[79]

Remodeling of a building is more than repairing it or making minor changes therein. The ordinary significance of the term imports a change in the remodeled building practically equivalent to a new one.[80]

REMONSTRANCE.[81] Expostulation; showing of reasons against something proposed.[82] More particularly, a petition to a court or deliberative body, in which those who have signed it request that something which is in contemplation to perform shall not be done;[83] a representation made to a court or legislative body wherein certain persons unite in urging that a contemplated measure be not adopted or passed.[84] The distinction between remonstrance and appeal is clear.[85]

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[62] **Remittance by mail as payment** see Payment § 9.

[63] Black L. D.

[64] Black L. D. See also Remitter post.

[65] Boston Steel, etc., Co. v. Steuer, 183 Mass. 140, 144, 66 NE 646, 97 AmSR 426. See also Bills and Notes § 83 et seq.

[66] Blackstone Comm. [quot Draughon v. French, 4 Port. (Ala.) 352, 364].

[67] Black L. D. See Appeal and Error § 3255 et seq.

[a] **Filing and docketing of a transcript** of a judgment of the supreme court in any county of the state, for the purpose of issuing an execution, is not a remittitur, under supreme court rule 29. La Crosse, etc., Packet Co. v. Reynolds, 12 Minn. 213, 215.

[68] State v. Banning, 205 Iowa 826, 218 NW 572.

[a] **In California Sup. Ct.** Rules, rule 34, providing that, when a judgment of a District Court of Appeal becomes final therein, the remittitur shall not be issued until after the lapse of 30 days thereafter, unless otherwise ordered, "remittitur" designates the judgment of the appellate tribunal which is authenticated to the court from which the appeal is taken, and corresponds to "mandate," used in the practice of the United States Supreme Court. Noel v. Smith, 2 Cal. A. 158, 83 P 167, 169.

"Mandate" 38 C. J. p 956.

[69] See Procedendo 50 C. J. p 424.

[70] Donnell v. Wright, 199 Mo. 304, 97 SW 928, 931.

[71] **Remittitur damna:**
As affecting:
  Excessive verdict see Appeal and Error § 2849.
  Jurisdiction see Appeal and Error § 238; Courts § 71; Justices of the Peace § 92.
  Right to costs on appeal see Costs § 622.
As condition of refusing new trial see New Trial § 151.
As cure of error see Appeal and Error § 3147.
As ground for affirmance see Appeal and Error § 3147.
Authority of attorney to enter see Attorney and Client § 164.

[72] Black L. D. [cit 2 Tidd Pr. 896].

[73] Holbrook v. Quinlan, 84 Vt. 411, 420, 421, 80 A 339.

"Though the exact nature of a remittitur damna, as known to the early English courts, is somewhat obscure, it seems to have been a final relinquishment or surrender of the damages awarded. Its first application was to cases where the jury awarded greater damages than were declared for. It is now sometimes so defined,—34 Cyc 1207—and frequently so used." Holbrook v. Quinlan, supra.

"Retraxit" see Dismissal and Nonsuit § 4.

[74] See cases infra this note.

"Whatever may have been the character and effect of the common law remittitur, in recent times its use has been much extended and the effect given to it has been correspondingly modified. . . . With the change in the use and effect of a remittitur has come a change in the meaning of the term itself. Were we assured that it was used by the circuit court of appeals in its common law sense, we might feel constrained to give to it its common law effect. But we have come to use it, not in its common law sense, but in its modern sense,—to denote a mere temporary waiver,—a writing off of so much of the verdict,—an agreement not to proceed further for that particular item in that particular suit." Holbrook v. Quinlan, 84 Vt. 411, 421, 423, 80 A 339.

[a] **Of the nature of a discontinuance** and is governed by the same rules. Gayden v. Louisville, etc., R. Co., 39 La. Ann. 269, 271, 1 S 792; Holbrook v. Quinlan, 84 Vt. 411, 80 A 339, 343.

"Discontinuance" see Dismissal and Nonsuit § 2.

[75] China Mut. Ins. Co. v. Force, 142 N. Y. 90, 99, 36 NE 874, 40 AmSR 576.

Generally see Admiralty § 294; Seaman [35 Cyc 1232]; Shipping [36 Cyc 203].

[76] Dallas v. Davis, (Tex. Civ. A.) 266 SW 544.

[a] **"Remodeling" and "erection."**—That the remodeling of a building is not equivalent to an erection thereof is too narrow a construction. Cotter v. Joint School Dist. No. 3, 164 Wis. 13, 158 NW 80.

[77] Dallas v. Davis, (Tex. Civ. A.) 266 SW 544, 547.

"Reform" ante.

[78] Beauchamp v. Livingston County Cons. School Dist. No. 4, 297 Mo. 64, 247 SW 1004, 1005.

"Reconstruct" ante.

[79] Dallas v. Davis (Tex. Civ. A.) 266 SW 544, 547.

[80] Cotter v. Joint School Dist. No. 3, 164 Wis. 13, 15, 158 NW 80.

[a] **"Repairing" not synonymous.**—Mayville v. Rosing, 19 N. D. 98, 123 NW 393, 395, 26 LRANS 120.

[81] **Remonstrance against:**
Annexation of territory see Municipal Corporations § 91.
Confirmation of referee's report see References § 212.
Establishment of drain see Drains §§ 78–81.
Establishment of highway see Highways §§ 78, 79.
Grant of liquor license see Intoxicating Liquors §§ 133–137.
Public improvement see Municipal Corporations §§ 2416–2420.
Removal of county seat see Counties § 76.
Vacation of highway see Highways § 238.

[82] Black L. D.

*By Carolan Jefferson Walsh (Remnants–Removal inclusive).

REMONSTRATE.[86] To present and urge reasons in opposition to an act, measure, or any course of proceeding.[87]

REMOTE.[88] Removed;[89] inconsiderable; slight.[90] It is a very flexible term, which in the abstract conveys no definite idea;[91] a relative term.[92]

Phrases: "Remote and speculative damages,"[93] "remote damages,"[94] "remote or collateral facts,"[95] "remote profits,"[96] and "remote purchaser;"[97] also, "in a remote degree,"[98] "posts remote from the seacoast,"[99] "wools of merino blood, near or remote."[1]

REMOTE CAUSE.[2] While it has been impracticable to prescribe by abstract definition, applicable to all possible states of facts, what is a remote cause,[3] it has been defined as one which is inconclusive in reasoning, because from it no certain conclusion can be legitimately drawn;[4] or in other words, a cause the connection between which and the effect is uncertain, vague, or indeterminate;[5] one that does not contain in itself the element of necessity between it and its effect.[6] Among other definitions given to the term,[7] it has been defined as meaning that cause of which some indefinite[8] or independent force merely took advantage to accomplish something not the probable or natural effect thereof;[9] that which may have happened, and yet no injury have occurred notwithstanding that no injury could have occurred if it had not happened.[10]

REMOTENESS OF EVIDENCE.[11] When the fact or facts proposed to be established as a foundation from which indirect evidence may be drawn, by way of inference, have not a visible, plain, or necessary connection with the proposition eventually to be proved, such evidence is rejected for "remoteness."[12] The essence of remoteness is such a want of open and visible connection between the evidentiary and principal facts that, all things considered, the former is not worthy or safe to be admitted in proof of the latter.[13]

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[83] Bouvier L. D. [quot Noble v. Vincennes, 42 Ind. 125, 130].

[84] Black L. D.

[a] **Within meaning of liquor license law,** a remonstrance is one "for or against a single or particular application." In re Mercer County License Applications, 3 Pa. Co. 43, 45.

[85] Girvin v. Simon, 127 Cal. 491, 59 P 945.

[a] **Distinction stated.**—A remonstrance is made to the acts or proceedings of the council, and is made before the assessment. An appeal is made after the assessment, and relates to the acts of the superintendent of streets in accepting work not done as required by the contract, or other acts of his specified in the statute. Girvin v. Simon, 127 Cal. 491, 59 P 945.

[86] See Remonstrance ante.

[87] Webster D. [quot Girvin v. Simon, 127 Cal. 491, 494, 59 P 945].

[88] **Remote:**
Cause see Remote Cause post.
Evidence see Remoteness of Evidence post.

[89] Webster D. [quot Pennsylvania R. Co. v. Kerr, 62 Pa. 353, 366, 1 AmR 431].

[a] **Antonyms** of "remote" are "proximate" and "immediate." Herke v. St. Louis, etc., R. Co., 141 Mo. A. 613, 125 SW 822.

[90] Newsome v. Louisville, etc., R. Co., 20 Ala. A. 349, 102 S 61.

[91] State v. Burton, 166 La. 842, 118 S 40.

[92] Lawrence v. Com., 81 Va. 484, 485; Craft v. Com., 24 Gratt. (65 Va.) 602, 615.

[a] **What would be "remote"** from the vicinage of a small town . . . would be near the vicinage in the country, in a sparsely settled county. Lawrence v. Com., 81 Va. 484, 485; Craft v. Com., 24 Gratt. (65 Va.) 602, 615.

[93] Portland First Nat. Bank v. Carroll, 35 Mont. 302, 88 P 1012. And see Trial [38 Cyc 1687 note 5].

[94] See Damages § 41.

[95] See Evidence § 183.

[96] Dickerson v. Finley, 158 Ala. 149, 48 S 548. And see Damages § 199.

[97] Smith v. Woodward, 122 Va. 356, 94 SE 916.

[98] Newsome v. Louisville, etc., R. Co., 20 Ala. A. 349, 102 S 361.

[99] Simpson v. U. S., 199 U. S. 397, 26 SCt 54, 50 L. ed. 245.

[a] **Synonymous** with "posts and camps in the interior of the island." Simpson v. U. S., 199 U. S. 397, 26 SCt 54, 50 L. ed. 245.

[1] U. S. v. Midgley, 42 Fed. 668. And see Customs Duties § 40.

[2] **Remote cause:**
Accident Insurance § 180.
Carriers §§ 153 (excepting cause not a remote cause), 1392 (remote causes of personal injuries).
Cause 11 C. J. p 36.
Collision § 15.
Damages § 89.
Death § 56.
Fire Insurance § 430.
Highways § 456 (injuries from defects and obstructions).
Intoxicating Liquors § 304 (injuries caused by furnishing intoxicants).
Marine Insurance § 310.
Motor Vehicles § 588.
Negligence §§ 477, 528.
Proximate Cause 50 C. J. p 836.
Railroads § 1286.
Torts [38 Cyc 445].
Workmen's Compensation Acts § 65.

[3] Cleveland v. Bangor, 87 Me. 259, 268, 32 A 892, 47 AmSR 326.

[4] Seifter v. Brooklyn Heights R. Co., 169 N. Y. 254, 259, 62 NE 349; Laidlaw v. Sage, 158 N. Y. 73, 99, 52 NE 679, 44 LRA 216; McGovern v. Degnon-McLean Contracting Co., 120 App. Div. 524, 527, 105 NYS 408; Hoey v. Metropolitan R. Co., 70 App. Div. 60, 63, 74 NYS 1113; Marks v. Rochester R. Co., 41 App. Div. 66, 76, 58 NYS 210.

[5] Seifter v. Brooklyn Heights R. Co., 169 N. Y. 254, 259, 62 NE 349; Laidlaw v. Sage, 158 N. Y. 73, 99, 52 NE 679, 44 LRA 216; McGovern v. Degnon-McLean Contracting Co., 120 App. Div. 524, 527, 105 NYS 408.

[6] McGovern v. Degnan-McLean Contracting Co., supra.

[a] **Although a remote cause is necessary** for the existence of its effect (for unless there has been a remote cause there can be no effect), still the existence of the remote cause does not imply the existence of the effect. The remote cause being given, the effect may or may not follow. Salsedo v. Palmer, 278 Fed. 92; McGovern v. Degnon-McLean Contracting Co., 120 App. Div. 524, 105 NYS 408.

[b] **"Proximate cause" distinguished.**—It is this idea of necessity—the necessary connection between the cause and its effect—that is the prime distinction between proximate and remote cause. McGovern v. Degnon-McLean Contracting Co., 120 App. Div. 524, 105 NYS 408.

[c] **"Proximate cause"** is the antithesis of "remote cause." Fort Worth, etc., R. Co. v. Amason, (Tex. Commn. A.) 276 SW 162, 166. See also Proximate Cause 50 C. J. p 841 note 95 [a].

[7] See cases infra this note; and notes 8–10.

[a] **Other definitions.**—(1) A cause operating mediately through other causes to produce an effect. Standard D. [quot Newsome v. Louisville, etc., R. Co., 20 Ala. A. 349, 102 S 61]. (2) Improbable cause. Missouri Malleable Iron Co. v. Dillon, 206 Ill. 145, 157, 69 NE 12; Armour v. Golkowska, 202 Ill. 144, 148, 66 NE 1037; Wright v. Illinois Cent. R. Co., 119 Ill. A. 132, 135; Cavanaugh v. Centerville Block Coal Co., 131 Iowa 700, 707, 109 NW 303, 7 LRANS 907; Stephenson v. Corder, 71 Kan. 475, 479, 80 P 938, 114 AmSR 500, 69 LRA 246. (3) That which would not, according to such experience [the experience of mankind], lead to such an event [the event which happened]. Dunn v. Central State Hospital, 197 Ky. 807, 248 SW 216.

[8] Mallen v. Waldowski, 203 Ill. 87, 90, 67 NE 409.

[9] Goodlander Mill Co. v. Standard Oil Co., 63 Fed. 400, 405, 11 CCA 253, 27 LRA 583; Hickey v. Chicago City R. Co., 148 Ill. A. 197, 218; Atchison, etc., R. Co. v. Dickens, 7 Ind. T. 16, 103 SW 750, 755.

[10] Claypool v. Wigmore, 43 Ind. A. 35, 71 NE 509; Baltimore, etc., R. Co. v. Trainor, 33 Md. 542; Troy v. Cape Fear, etc., R. Co., 99 N. C. 298, 306, 6 SE 77, 6 AmSR 521.

[11] **In civil actions** see Evidence § 90 note 71; Malicious Prosecutions § 158.

In criminal actions see Criminal Law §§ 1034, 1087, 1136, 1139; Homicide §§ 372, 425.

[12] Black L. D. [cit 2 Wharton Evid. § 1226 note].

REMOTO IMPEDIMENTO, ACTIO EMERGIT.[14]

REMOVABLE.[15] Admitting of, liable to or intended for removal.[16]

Phrases: "Removable controversy,"[17] and "removable fastening."[18]

REMOVAL.[19] A change of place,[20] especially of habitation;[21] a transfer from particular specified places,[22] although, within the meaning of the word as used in some cases, there may be a removal[23] or at least a constructive removal[24] without an actual transfer or movement from a place.

Removal from office.[25] The act of a person or body, having lawful authority thereto, in depriving one of an office to which he was appointed or elected.[26]

Removal of the record. A term held to mean removal of the cause.[27]

Other phrases: "Removal at pleasure,"[28] "removal beyond the limits of the county,"[29] "removal for cause,"[30] "removal for just cause,"[31] "removal from office,"[32] "removal from premises,"[33] "removal from

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13. Best Evid. [quot State v. Kelly, 77 Conn. 266, 58 A 705; State v. Peck, 146 Wash. 101, 261 P 779]; Peo. v. Thompson, 212 N. Y. 249, 106 NE 78, LRA1915D 236, AnnCas1915D 162.

[a] **Lapse of time.**—A term which has regard for other factors than mere lapse of time, even when it is a factor as it often is not. Best Evid. [quot State v. Kelly, 77 Conn. 266, 58 A 705; State v. Peck, 146 Wash. 101, 261 P 779]. To same effect Peo. v. Thompson, 212 N. Y. 249, 106 NE 78, LRA1915D 236, Ann Cas1915D 162.

14. A maxim meaning "The obstacle being removed, the right of action emerges." Morgan Leg. Max. [cit Tray. 535].

[a] **Other form.**—"Remoto impedimento, emergit actio," "The impediment being removed, the action arises." Bouvier L. D. [cit 5 Coke. 76; Wing. Max. 20].

15. See Removal of Causes post.

16. Standard D.

17. Waynesville v. Smathers, 194 N. C. 131, 138 SE 613. See Removal of Causes post.

18. Adams v. Bellaire Stamping Co., 141 U. S. 539, 540, 12 SCt 66, 35 L. ed. 849.

19. See also Remove post.

Cross references:
Adjoining Landowners §§ 29–75.
Assignment for Benefit of Creditors §§ 303–311.
Attachment §§ 82–87.
Bills and Notes §§ 960, 961.
Bridges § 16.
Carriers §§ 386, 1165–1228.
Chattel Mortgages §§ 92, 250, 251.
Counties §§ 66–69.
Criminal Law § 555.
Domicile § 17.
Easements § 244.
Elections § 28.
Fences §§ 38–45.
Fire Insurance § 94.
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Highways §§ 378, 379.
Homesteads §§ 351–365.
Husband and Wife § 322.
Improvements §§ 7–13.
Indians §§ 110–112.
Infants §§ 37–47.
Injunctions § 169.
Juries § 184 note 80.
Landlord and Tenant §§ 827–833, 1374, 1503–1531, 1627–1630, 1725.
Liens §§ 46–48.
Limitations of Actions §§ 371–406.
Logs and Logging § 198.
Mechanics' Liens §§ 43, 447.
Mines and Minerals §§ 920–922.
Mortgages § 404.
Motor Vehicles § 1260.
Municipal Corporations §§ 473, 3707.
Navigable Waters §§ 23, 29.
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Party Walls §§ 39–41.
Paupers §§ 138–173.
Prisons § 43.
Public Lands §§ 6–36.
Quieting Title 51 C. J. p 125.
Quo Warranto § 11 note 5.
Railroads §§ 142 note 1, 370–410.
Removal of Causes post.

20. State v. Paulson, 29 Oh. A. 121, 162 NE 653.

21. State v. Paulson, supra. And see Domicile § 17.

[a] **Permanence in absence of new location** may be implied by the use of this word. In re Bowman, 28 F. (2d) 620; Barstow v. Stone, 10 Colo. A. 396, 405, 52 P 48; Ware v. Schintz, 190 Ill. 189, 192, 60 NE 67.

[b] **"Ceasing to be resident."**—"Removal" may be used in the same sense as "ceasing to be a resident of." Prather v. Hart, 17 Nebr. 598, 600, 24 NW 282.

22. U. S. v. Mangano, 299 Fed. 492.

23. U. S. v. One Durant Touring Car, 2 F. (2d) 478.

"'Transportation' or 'removal' consists in various acts. It is not altogether and alone movement. Certainly one is engaged in 'transporting' or 'removing' who is loading into the vehicle, and the vehicle which, though standing still at the time, receives the articles—into which the articles are actually loaded—is to that extent engaged in 'transportation' or 'removal.'" U. S. v. One Durant Touring Car, 2 F. (2d) 478, 479.

24. Hudson v. Chicago, etc., R. Co., 226 Fed. 38, 44.

[a] **Sale of cattle after arrival at stockyard** is a "removal" within the terms of a bill of lading, even if they did not leave stockyard pens. Hudson v. Chicago, etc., R. Co., 226 Fed. 38, 44.

25. Particular officers:
Army and Navy § 63.
Assignment for Benefit of Creditors §§ 303–311.
Bankruptcy §§ 172, 184.
Banks and Banking §§ 644, 645.
Clerks of Courts §§ 26–30.
Constitutional Law § 402.
Corporations §§ 1280, 1837.
Counties §§ 99, 157–160.
Courts § 208.
District and Prosecuting Attorneys §§ 22–27.
Elections § 71.
Executors and Administrators §§ 296–316.
Guardian and Ward §§ 139–168.
Highways § 295.
Hospitals § 23.
Husband and Wife § 516.
Insane Persons §§ 286–293.
Insolvency § 88.
Internal Revenue § 248.
Judges §§ 41–51, 149.
Judicial Sales § 38.
Justices of the Peace §§ 19, 20.
Mandamus § 289.
Municipal Corporations §§ 1079–1137, 1264, 1278–1290, 1303–1306, 1344–1380, 1455, 1458, 1468, 1469.
Notaries § 14.
Officers §§ 117, 145–209.
Paupers §§ 15–17.
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Public Utilities § 76.
Railroads §§ 688, 847.
Receivers § 112.
Schools and School Districts [35 Cyc 365, 890–893].
Sheriffs and Constables [35 Cyc 1455, 1500].
States [36 Cyc 861].
Trusts [39 Cyc 261–264].
United States [39 Cyc 727].

26. Black L. D.

[a] **"Suspension" distinguished.**—(1) Suspension is in no proper sense the same thing as removal. Poe v. State, 72 Tex. 625, 10 SW 737. (2) The difference between suspension and removal is evident. One is the mere temporary withdrawal of the power to exercise the duties of an office; the other is a complete and final deprivation of official tenure. McDowell v. Burnett, 92 S. C. 469, 75 SE 873. (3) Suspension is the ad interim stoppage or arrest of official power and pay. Removal terminates wholly the incumbency of the office or employment. State v. La Crosse Police, etc., Comrs., 159 Wis. 295, 150 NW 493, 896. (4) While there is a distinction between suspension and removal, the term suspension [in certain cases] can well be considered as but a temporary removal. State v. Medler, 19 N. M. 252, 142 P 376. (5) Other distinctions see State v. Richmond, 29 La. Ann. 705; Kelley v. Cincinnati, 9 OhS&CP 611; State v. Meeker, 19 Nebr. 444, 27 NW 427. See also Officers §§ 142, 145.

27. Hughes v. Mine Hill, etc., R. Co., 30 Pa. 517, 518. See Removal of Causes ante.

[a] **"Under the old English practice,** each case was contained in a record by itself, and the very record was sent up for further proceedings to the other court, and there remained nothing in the first court to proceed upon. With us it is not entirely so, since much of the record is kept in dockets, and only copies of them are removed." Hughes v. Mine Hill, etc., R. Co., 30 Pa. 517, 518.

28. See Officers § 146 notes 83–85.

29. Sturgis v. State, 32 Okl. Cr. 252, 240 P 750. See also Chattel Mortgages § 92.

30. See Officers §§ 147, 148.

31. Good v. San Diego, 5 Cal. A. 265, 90 P 44. See also Officers § 147.

32. See cases supra note 26; Officers §§ 145–209.

33. Wadman v. Boudreau, (Mass.) 170 NE 44.

state,"[34] "removal from the rented premises,"[35] "removal of main tracks,"[36] "removal of situs of truck to New Jersey,"[37] and "removal without proper cause;"[38] also, "discharge or removal."[39]

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[34] Ex p. Crump, 10 Okl. Cr. 133, 135 P 428, 47 LRANS 1036.

[a] **"Absent" as convertible term.**—Ex p. Crump, 10 Okl. Cr. 133, 135 P 428, 47 LRANS 1036.

[35] Smith v. First State Bank, (Tex. Civ. A.) 255 SW 511.

[36] State v. Enid, etc., R. Co., 108 Tex. 239, 191 SW 560.

[37] Hare v. Tomkinson, (N. J. Sup.) 129 A 396, 398 (within meaning of 2 Comp. St. [1910] p 2255 §§ 32, 33, relating to sales).

[38] Murray v. Boston Justices Municipal Ct., 233 Mass. 186, 123 NE 682.

[39] Cook v. Ceas, 143 Cal. 221, 77 P 65.

REMOVAL OF CAUSES

[Matters not in this Title, treated elsewhere in this Work, see Cross References infra p 207]

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  In:
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    Criminal prosecutions see **Criminal Law** §§ 233–242

For **later cases, developments** and **changes** in the law see **Annotations,** same title and section number.

I. RIGHT OF REMOVAL IN GENERAL

[By Eustace W. Tomlinson

[§ 1] **A. History and Purpose.** The purpose of the creation of the right to remove a case from a state to a federal court was to enable a defendant to have claims against him under the federal constitution or federal statutes adjudicated in the first instance by a federal tribunal, and to enable him, when sued in the courts of a state of which he is not a citizen, to obtain freedom from local prejudice or influence.[1] The right of removal was first granted by the Judiciary Act of Sept. 24, 1789.[2] It was extended by the act of March 2, 1833, passed during the attempt at nullification by South Carolina,[3] and by the acts of March 3, 1863,[4] April 9, 1866,[5] May 11, 1866,[6] July 13, 1866,[7] July 27, 1866,[8] Febr. 5, 1867,[9] March 2, 1867,[10] July 27, 1868,[11] May 31, 1870,[12] Febr. 28, 1871,[13] and March 30, 1872.[14] All of these acts were incorporated in the Revised Statutes of 1873.[15] The right was further extended by the first act of March 3, 1875, an appropriation bill, which included a clause upon the subject;[16] and by the second act, known as the Judiciary Act of March 3, 1875, which was intended to extend the same to the full extent authorized by the constitution of the United States.[17] The right of removal was restricted by the act of March 3, 1887,[18] clerical errors in the enrollment of which were corrected by a statute reënacting it, approved Aug. 13, 1888.[19] Various provisions and portions of the earlier statutes were repealed by the later enactments;[20] and the act of Febr. 8, 1894, repealed so much of the former statutes as gave a right of removal to an officer of the United States engaged in the enforcement of the act to regulate congressional elections.[21]

Statutes now in force may be found in the United States Code, title 28, §§ 71–83.[22]

[§ 2] **B. Nature and Source—1. In General.** The right of removal of causes from a state court to a federal court is purely statutory,[23] existing only in such cases as congress has seen fit to provide for;[24] and it cannot be created or conferred by consent.[25] While the right has been said to be a substantial one,[26] it is not a constitutional right,[27] except in the sense that statutes conferring it are authorized by the constitution,[28] nor is it a vested right of property;[29] so it may be restricted[30] or taken away[31] by statute, and if it has not been exercised it is taken away by the repeal of the statute conferring the right.[32] Where a cause is removable under the general statutory provisions relating thereto, an intention on the part of congress to take away the right of removal by provisions of a particular statute will not be presumed, but must clearly appear.[33] On the other hand, the repeal of a statute expressly prohibiting removal of the causes provided for therein and the substitution of another statute therefor does not authorize removal of such causes.[34]

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[1] See Gaines v. Fuentes, 92 U. S. 10, 23 L. ed. 524 (where the court said that the experiences of parties immediately following the Civil War satisfied congress that legislation was required fully to protect litigants against state prejudices and influences, and it therefore provided greater facilities for the removal of causes between citizens of different states where it appeared that such influences existed); Pittsburgh, etc., R. Co. v. Wood, (Ind. A.) 84 NE 1009 (holding that the right of removal of a cause of action from a state to a federal court is premised on the fact that the state court does have jurisdiction of the action, but by reason of a federal question being involved the party against whom such question is raised has the privilege, at his election, at the proper time, of having the cause removed); Peo. v. Fortuna Estates, 10 Porto Rico Fed. 130, 134 (where it was said: "The securing of a tribunal presumed to be more impartial than a court of the state in which one of the litigants resides is the object of the Removal Acts").

[2] 1 U. S. St. at L. 79 c 20 § 12.

[3] 4 U. S. St. at L. 633 c 57 § 3.

[4] 12 U. S. St. at L. 756 c 81 § 5.

[5] 14 U. S. St. at L. 27 c 31 § 3.

[6] 14 U. S. St. at L. 46 c 80 §§ 3, 5.

[7] 14 U. S. St. at L. 171 c 184 § 67.

[8] 14 U. S. St. at L. 306 c 288.

[9] 14 U. S. St. at L. 385 c 27.

[10] 14 U. S. St. at L. 558 c 196.

[11] 15 U. S. St. at L. 272 c 255 § 2.

[12] 16 U. S. St. at L. 144 c 114 §§ 16, 18.

[13] 16 U. S. St. at L. 438 c 99 § 16.

[14] 17 U. S. St. at L. 44 c 72.

[15] U. S. Rev. St. §§ 639–647.

[16] 18 U. S. St. at L. 401 c 130 § 8.

[17] 18 U. S. St. at L. 471 c 137 § 3. See Venable v. Richards, 28 F. Cas. No. 16,913, 1 Hughes 326 [aff 105 U. S. 636, 26 L. ed. 1196] (the purpose of the act of 1875 was not to restrict, but to enlarge, the jurisdiction of the federal court as to the causes which might be removed thereto from state courts).

[18] 24 U. S. St. at L. 552 c 373. See Empire Min. Co. v. Propeller Tow-Boat Co., 108 Fed. 900 (so stating).

[19] 25 U. S. St. at L. 433 c 866.

[20] See statutory provisions; and cases infra this note.

[a] **Acts of 1789, 1866, and 1867** were repealed by the revised statutes and the Judiciary Act of March 3, 1875. Jones v. Amazon Ins. Co., 8 Leg Gaz (Pa.) 59.

[b] **Act March 2, 1867,** was repealed by the revised statutes. Baltimore, etc., R. Co. v. New Albany, etc., R. Co., 53 Ind. 597.

[c] **U. S. Rev. St. § 639 subsecs 1 and 2,** were repealed by the general repealing section of the Judiciary Act of 1875. O'Conor v. Texas, 202 U. S. 501, 26 SCt 726, 50 L. ed. 1120; Baltimore, etc., R. Co. v. Bates, 119 U. S. 464, 467, 7 SCt 285, 30 L. ed. 436; Ayres v. Watson, 113 U. S. 594, 5 SCt 641; 28 L. ed. 1093; Holland v. Chambers, 110 U. S. 59, 3 SCt 427, 28 L. ed. 70; King v. Cornell, 106 U. S. 395, 398, 1 SCt 312, 27 L. ed. 60; Hyde v. Ruble, 104 U. S. 407, 26 L. ed. 823; Foster Fed. Judiciary Acts p 56.

[d] **U. S. Rev. St. § 639, subsec. 3,** was repealed by the general repealing clause of the Judiciary Act of March 3, 1887 (24 U. S. St. at L. 555 c 373 § 6), which repeal was reënacted by the act of Aug. 13, 1888 (25 U. S. St. at L. 436 c 866 § 6). Hanrick v. Hanrick, 152 U. S. 192, 14 SCt 835, 38 L. ed. 685; Fisk v. Henarie, 142 U. S. 459, 12 SCt 207, 35 L. ed. 1080; Ex p. Pennsylvania Co., 137 U. S. 451, 11 SCt 141, 34 L. ed. 738; Foster Fed. Judiciary Acts pp 33, 57.

[e] **U. S. Rev. St. § 640,** was expressly repealed by the Judiciary Act of March 3, 1887 (24 U. S. St. at L. 555 c 373 § 6, as reënacted by the act of Aug. 13, 1888; 25 U. S. St. at L. 436 c 866 § 6).

[f] **U. S. Rev. St. § 644,** was repealed by the general repealing clause of the Judiciary Act of March 3, 1875 (18 U. S. St. at L. 473 c 137 § 10) so far as the same is not included in section 2 of that statute, as amended by the Judiciary Act of 1887 (24 U. S. St. at L. 552 c 373 § 1), as reenacted on Aug. 13, 1888 (25 U. S. St. at L. 433 c 866 § 1). Fisk v. Henarie, 142 U. S. 459, 466, 12 SCt 207, 28 L. ed. 1117; O'Conor v. Texas, 202 U. S. 501, 507, 26 SCt 726, 50 L. ed. 1120.

[g] **U. S. Rev. St. § 645,** was repealed so far as the same was not reënacted by the Judiciary Act of 1875. 18 U. S. St. at L. 472 c 137 § 7.

[h] **U. S. Rev. St. § 646,** was repealed by the Judiciary Act 1875, § 9 so far as the same is not included in § 4 of the same act. O'Conor v. Texas, 202 U. S. 501, 507, 26 SCt 726, 50 L. ed. 1120; Fisk v. Henarie, 142 U. S. 459, 12 SCt 207, 28 L. ed. 1117.

[i] **U. S. Rev. St. § 647,** was repealed by the Judiciary Act March 3, 1875, § 10 (18 U. S. St. at L. 473 c 137), so far as the same is not included in § 1 of that statute, as amended by the act of March 3, 1887 (24 U. S. St. at L. 552 c 373 § 1), as reënacted Aug. 13, 1888 (25 U. S. St. at L. 433 c 866 § 1). O'Conor v. Texas, 202 U. S. 501, 507, 26 SCt 726, 50 L. ed. 1120; Fisk v. Henarie, 142 U. S. 459, 12 SCt 207, 28 L. ed. 1117.

[21] 28 U. S. St. at L. 36 c 25.

[22] Judicial Code §§ 28–39, together with Act April 16, 1920, c 146.

[23] U. S.—Great Northern R. Co. v. Alexander, 246 U. S. 276, 38 SCt 237, 62 L. ed. 713 [dism writ of error 51 Mont. 565, 154 P 914, LRA 1918E 852]; Smith v. Gilliam, 282 Fed. 628; Compania Minera v. American Metal Co., 262 Fed. 183; Fairview Fluorspar, etc., Co. v. Bethlehem Steel Co., 258 Fed. 681; Matarazzo v. Hustis, 256 Fed. 882; Ostrom v. Edison, 244 Fed. 228; Burnett v. Spokane, etc., R. Co., 210 Fed. 94; Anaconda Copper Min. Co. v. Butte-Balaklava Copper Co., 200 Fed. 808; Willard v. Chicago, etc., R. Co., 165 Fed. 181, 91 CCA 215 [aff 230 U. S. 413, 31 SCt 460, 55 L. ed. 521]; Manley v. Olney, 32 Fed. 708; Hubbard v. Northern R. Co., 12 F. Cas. No. 6,818, 3 Blatchf. 84, 25 Vt. 715.

Ark.—Kansas City Southern R. Co. v. Cook, 100 Ark. 467, 140 SW 579.

Ga.—Graves v. Colquitt County, 34 Ga. A. 271, 129 SE 166; Mitchell v. Southern R. Co., 23 Ga. A. 195, 98 SE 184.

Ill.—Peo. v. St. Louis, 297 Ill. 199, 130 NE 366.

Mass.—Pringle v. Storrow, 256 Mass. 561, 153 NE 26, 49 ALR 1222.

Mont.—State v. Wibaux County Bank, 85 Mont. 532, 281 P 341.

[a] **In Hawaii** the rule is the same as to the right to remove a cause

[§ 3] **2. Constitutionality of Statutes.** Statutes which provide for or restrict the removal of causes from a state to a federal court have been universally held to be within the authority conferred upon congress by the constitution of the United States, and so not unconstitutional.[35]

[§ 4] **C. Impairment, Deprivation, or Waiver of Right[36]—1. Restriction or Impairment by State.[37]** A state has no power to restrict or impair, directly or indirectly, a right granted by federal statutes to remove a cause from a court of the state to a federal court.[38] So a legislative enactment by a state which takes away a right of removal, or prohibits its exercise, is unconstitutional;[39] and a state statute creating a cause of action, and providing that it shall be enforced only in the state courts or in a designated state court, will not prevent the removal of such an action to a court of the United States.[40] Similarly, a state court cannot enjoin the removal of a cause

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from a territorial court to the federal court. Cornn v. Wardell, 4 Hawaii Fed. 605, 606 [cit Cyc].

[b] **In Porto Rico** the rule is the same as to the removal of a cause from an insular court to the federal court. Wenar v. Pohl, 1 Porto Rico Fed. 37.

24. Gaines v. Fuentes, 92 U. S. 10, 23 L. ed. 524; Illinois v. Chicago, etc., R. Co., 12 F. Cas. No. 7,006, 6 Biss. 107; Compania Minera v. American Metal Co., 282 Fed. 183; Burnett v. Spokane, etc., R. Co., 210 Fed. 94; Kansas City Southern R. Co. v. Cook, 100 Ark. 467, 140 SW 579; Butler v. Armour, 192 N. C. 510, 135 SE 350. See Isaac Kubie Co. v. Lehigh Valley R. Co., 261 Fed. 806 (holding that, while plaintiff may have a choice whether to bring his action in a state or federal court, when he has brought it in a state court defendant's right to remove is not a matter of choice); Lombardo v. Boston, etc., R. Co., 223 Fed. 427 (where the court pointed out that congress has a right to provide for the removal of one class of cases to the exclusion of other classes, even though suits arising under such excluded cases might be surrounded by local prejudices and influences of such character and extent as to deprive defendant of a fair trial in the state courts); In re Vadner, 259 Fed. 614 (holding that the mere convenience of the parties and the avoidance of expense and litigation are not grounds of federal jurisdiction, authorizing the removal of a cause from a state to a federal court).

"No case can be removed from a state to the federal court, unless it clearly comes within some provision of the removal statute." Compania Minera v. American Metal Co., 262 Fed. 183, 185.

Grounds for removal see infra § 9.

25. Re Winn, 213 U. S. 458, 29 SCt 515, 53 L. ed. 873; Minnesota v. Northern Securities Co., 194 U. S. 48, 24 SCt 598, 48 L. ed. 870; People's Bank v. Winslow, 102 U. S. 256, 26 L. ed. 101; Mullendore v. American Surety Co., 27 F. (2d) 572; Handly-Mack Co. v. Godchaux Sugar Co., 2 F. (2d) 435; Nelson v. Black Diamond Min. Co., 237 Fed. 264; Katalla Co. v. Rones, 186 Fed. 30, 108 CCA 132 [aff 182 Fed. 946]; Willard v. Chicago, etc., R. Co., 165 Fed. 181, 91 CCA 215 [certiorari granted 212 U. S. 578, 29 SCt 688, 53 L. ed. 658, and aff 220 U. S. 413, 31 SCt 460, 55 L. ed. 521]; Parkersburg First Nat. Bank v. Prager, 91 Fed. 689, 34 CCA 51; Kingsbury v. Kingsbury, 14 F. Cas. No. 7,817, 3 Biss. 60; Shohoney v. Quincy, etc., R. Co., 223 Mo. 649, 122 SW 1025; Butler v. Armour, 192 N. C. 510, 135 SE 350. Compare Isaac Kubie Co. v. Lehigh Valley R. Co., 261 Fed. 806 (holding that plaintiff by bringing in a state court an action which might have been brought in a federal court does not thereby consent to its removal to the federal court at the option of defendant; but the discussion of the court proceeds upon the theory that consent might have been given by plaintiff).

Consent to federal jurisdiction as rendering cause removable see infra § 10.

26. Young v. Southern Pac. Co., 15 F. (2d) 280.

27. Pabst v. Roxana Petroleum Co., 30 F. (2d) 953.

28. **Constitutionality of statutes conferring right** see infra § 3.

29. Teel v. Chesapeake, etc., R. Co., 204 Fed. 918, 123 CCA 240, 47 LRANS 21; Birdseye v. Shaeffer, 37 Fed. 821; Manley v. Olney, 32 Fed. 708.

30. Pabst v. Roxana Petroleum Co., 30 F. (2d) 953.

31. Pabst v. Roxana Petroleum Co., supra; Teel v. Chesapeake, etc., R. Co., 204 Fed. 918, 920, 123 CCA 240, 47 LRANS 21.

"The power in Congress to grant or withhold the right of removal is at last the power to prescribe the jurisdiction of courts. . . . Such power is continuing in its nature, and of necessity includes authority to take away, as well as to bestow, the right to remove causes." Teel v. Chesapeake, etc., R. Co., supra.

32. Birdseye v. Shaeffer, 37 Fed. 821; Manley v. Olney, 32 Fed. 708.

33. Young v. Hiawatha Gin, etc., Co., 17 F. (2d) 193.

34. Mizell v. Atlantic Coast Line R. Co., 181 N. C. 36, 106 SE 133.

35. U. S.—Strauder v. West Virginia, 100 U. S. 303, 25 L. ed. 664 [rev 11 W. Va. 745, 27 AmR 606]; Tennessee v. Davis, 100 U. S. 257, 25 L. ed. 648; Home L. Ins. Co v. Dunn, 19 Wall. 214, 22 L. ed. 68; Chicago, etc., R. Co. v. Whitton, 13 Wall. 270, 20 L. ed. 571; Teel v. Chesapeake, etc., R. Co., 204 Fed. 918, 123 CCA 240, 47 LRANS 21; Whelan v. New York, etc., R. Co., 35 Fed. 849, 1 LRA 68; San Mateo County v. Southern Pac. R. Co., 13 Fed. 145; Fisk v. Union Pac. R. Co., 9 F. Cas. No. 4,827, 6 Blatchf. 362; Johnson v. Monell, 13 F. Cas. No. 7,399, Woolw. 390; Murray v. Patrie, 17 F. Cas. No. 9,967, 5 Blatchf. 343.

Ind.—Burson v. New York Park Bank, 40 Ind. 173, 13 AmR 285; McCormick v. Humphrey, 27 Ind. 144.

Nev.—Meadow Valley Min. Co. v. Dodds, 7 Nev. 143, 8 AmR 709.

Oh.—State v. Fairfield County Ct. C. Pl., 15 Oh. St. 377.

Pa.—Hodgson v. Millward, 3 Grant 412.

Wis.—Goodman v. Oshkosh, 45 Wis. 355.

36. **Assignment for purpose of preventing removal** see infra § 176.

37. **Withdrawal of privilege of foreign corporation to do business in state upon removal of causes to federal court** see Corporations § 3969.

38. Goldey v. Morning News, 156 U. S. 518, 15 SCt 559, 39 L. ed. 517; Barron v. Burnside, 121 U. S. 186, 7 SCt 931, 30 L. ed. 915; Home Ins. Co. v. Morse, 20 Wall. (U. S.) 445; In re Utah Constr. Co.'s Water Right, 30 F. (2d) 436; Central Union F. Ins. Co. v. Kelly, 282 Fed. 772; Chicago, etc., R. Co. v. Shelby County Drain. Dist. No. 8, 253 Fed. 491; Iowa L. & T. Co. v. Fairweather, 252 Fed. 605; Ashe v. Union Cent. L. Ins. Co., 115 Fed. 234; Hulbert v. Russo, 64 Fed. 8; Rosenbaum v. Manson, 206 App. Div. 384, 201 NYS 426; Jones v. Amazon Ins. Co., 8 LegGaz (Pa.) 59; Brown v. Crippin, 4 Hen. & M. (14 Va.) 173. "The right of removal is conferred by the federal Constitution and laws, and is beyond the reach of curtailment by state action." Central Union F. Ins. Co. v. Kelly, 282 Fed. 772, 775.

[a] **Neither legislature nor judiciary** of a state can defeat a right given by an act of congress to remove a cause from a court of the state to a federal court, nor limit the effect of such removal. Goldey v. Morning News, 156 U. S. 518, 18 SCt 559, 39 L. ed. 517; Rosenbaum v. Manson, 206 App. Div. 384, 201 NYS 426.

39. Tomich v. Union Trust Co., 31 F. (2d) 515; In re Utah Constr. Co.'s Water Right, 30 F. (2d) 436; Foy v. Georgia-Alabama Power Co., 298 Fed. 643; Chicago, etc., R. Co. v. Swanger, 157 Fed. 783; Peo. v. Fortuna Estates, 10 Porto Rico Fed. 130; DeTreville v. McMahan, 137 S. C. 388, 135 SE 356.

[a] **Prescribing methods of procedure which defeat exercise of right.**—A state cannot validly adopt a statute which will defeat a right of removal given by the federal laws by providing methods of procedure which will not afford litigants an opportunity of removal. In re Utah Constr. Co.'s Water Right, 30 F. (2d) 436.

40. Clark v. Bever, 139 U. S. 96, 11 SCt 468, 35 L. ed. 88 [aff 31 Fed. 670]; Hess v. Reynolds, 113 U. S. 73, 5 SCt 377, 28 L. ed. 927; Chicago, which is removable under the acts of congress.[41]

[§ 5] **2. Waiver[42]—a. In General.** A general engagement or agreement, made in advance of the existence of any controversy, not to remove into a court of the United States any suit or action which may be brought against the contracting party in the courts of a state is void.[43] A stipulation by a defendant in a particular suit, however, not to remove such suit is valid;[44] and the right to remove a particular suit may be waived by the conduct of defendant,[45] as where, in a cause the removability of which is then existing and apparent,[46] he proceeds with trial on the merits without applying for a removal,[47] or invokes or accepts the jurisdiction of the state court for affirmative relief[48] or relief beyond his strict legal rights;[49] or by failing to apply for removal within the time limited therefor by law.[50] The right is waived or suspended during the pendency of an appeal by defendant to a state appellate court, since the cause cannot be pending in two courts at the same time.[51] A defendant should not be deemed to have waived his right or be deprived there-

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etc., R. Co. v. Whitton, 13 Wall. (U. S.) 270, 20 L. ed. 571; Kirby v. Chicago, etc., R. Co., 106 Fed. 551; Warren v. Wisconsin Valley R. Co., 29 F. Cas. No. 17,204, 6 Biss. 425. But see Elsas v. Montgomery El. Co., 38 F. (2d) 303 (holding that, where defendant had accepted the provisions of a state workmen's compensation act, which defined the rights and liabilities of the parties and provided for appeals from the administrative board to the state court, he was bound by such provisions and could not have the cause removed to the federal court).

[41] Blydenstein v. New York Security, etc., Co., 59 Fed. 12 [aff 67 Fed. 469, 15 CCA 14].

[42] **Waiver by plaintiff of objection to tardy removal** see infra § 205.

[43] U. S.—Barron v. Burnside, 121 U. S. 186, 7 SCt 931, 30 L. ed. 95; Home Ins. Co. v. Morse, 20 Wall. 445, 22 L. ed. 365; Ashe v. Union Cent. L. Ins. Co., 115 Fed. 234; Rowland v. Empire State L. Ins. Co., 20 F. Cas. No. 12,097. But see Elsas v. Montgomery El. Co., 38 F. (2d) 303 (holding that, where defendant had accepted the provisions of a state workmen's compensation act, which included provisions for a limited judicial review in a state court, he could not remove a cause arising under such act to the federal court).

Kan.—Shawnee F. Ins. Co. v. National Surety Co., 94 Kan. 305, 146 P 412.

Ky.—Com. v. East Tennessee Coal Co., 97 Ky. 238, 30 SW 608, 17 KyL 139.

N. C.—Rhodes v. New York L. Ins. Co., 197 N. C. 337, 148 SE 439.

Oh.—Erie R. Co. v. Stringer, 32 Oh. St. 468; Baltimore, etc., R. Co. v. Cary, 28 Oh. St. 208; Hartford R. Pass. Assur. Co. v. Pierce, 27 Oh. St. 155.

S. C.—DeTreville v. McMahan, 137 S. C. 388, 135 SE 356.

W. Va.—Rece v. Newport News, etc., Co., 32 W. Va. 164, 9 SE 212, 3 LRA 572.

Statutes prohibiting resort to federal courts by foreign corporations see Corporations § 3969.

[44] Hanover Nat. Bank v. Smith, 11 F. Cas. No. 6,035, 13 Blatchf. 224; Smithson v. Chicago Great Western R. Co., 71 Minn. 216, 73 NW 853; Murphy v. Stone, etc., Engineering Corp., 44 Mont. 146, 119 P 717, AnnCas 1913A 1334; Texas, etc., R. Co. v. Matkin, 107 Tex. 125, 142 SW 604 [aff (Civ. A.) 174 SW 1098]. See Southwestern Tel., etc., Co. v. Shirley, (Tex. Civ. A.) 155 SW 663 (holding that, where, a cause having been removed, the parties stipulated that it should be remanded, and an order of remand was accordingly entered, they were precluded thereby from subsequently asserting any right of removal).

[a] **In consideration of waiver of default.**—Defendant may waive his right to insist upon a removal to a federal court by his stipulation to try it in the state court in consideration of being permitted to file an answer after default, there being no question of jurisdiction. Smithson v. Chicago Great Western R. Co., 71 Minn. 216, 73 NW 853.

[45] U. S.—Rosenthal v. Coates, 148 U. S. 142, 13 SCt 576, 37 L. ed. 399; McLaughlin v. Western Union Tel. Co., 7 F. (2d) 177; Schneider v. Eldredge, 125 Fed. 638; West Virginia v. King, 112 Fed. 369; Hudson River R., etc., Co. v. Day, 54 Fed. 545; Gaffney v. Gillette, 9 F. Cas. No. 5,168, 4 Dill. 264 note; Hanover Nat. Bank v. Smith, 11 F. Cas. No. 6,035, 13 Blatchf. 224. See Orr v. Fireman's Fund Ins. Co., 36 F. (2d) 378 (dictum, that the only basis on which a federal court will be hospitable to a litigation translated from a state court is where the federal court is given the whole case to decide in all its aspects, and is thus left free to exercise a plenary jurisdiction, untrammelled by any procedural estoppels resulting from the acts or omissions of defendant who has effected the removal).

Mass.—Amy v. Manning, 144 Mass. 153, 10 NE 737.

Mont.—Murphy v. Stone, etc., Engineering Corp., 44 Mont. 146, 119 P 717, AnnCas1913A 1334.

N. Y.—Dart v. Arnis, 19 HowPr 429.

N. C.—Butler v. Armour, 192 N. C. 510, 135 SE 350. See Dixon v. Norfolk Southern R. Co., 189 N. C. 249, 126 SE 621 (holding that under the facts the conduct of defendant did not constitute a waiver).

Oh.—Pollock v. Cohen, 32 Oh. St. 514.

Okl.—St. Louis-San Francisco R. Co. v. Simmons, 116 Okl. 126, 242 P 151; Choctaw, etc., R. Co. v. Burgess, 21 Okl. 110, 95 P 606.

Wis.—Wadleigh v. Standard L., etc., Ins. Co., 76 Wis. 439, 45 NW 109.

"In the waiver of the right to resort to the Courts of the United States, in a particular case, only the private right of the individual is concerned. Its waiver touches no question of public policy. Its effectiveness stands upon the maxim, that any man may renounce a legal right which is conferred for his own advantage. The right in question may, therefore, be waived by any sufficient agreement of the party, as well by direct consent, as by that implied by the non-exercise of the right in the manner prescribed by law. A stipulation after suit commenced in the State Court would, I think, be, on the principles mentioned, a complete bar to the exercise of the right of removal; and, on the same ground, any conduct of the party which is equivalent to such a waiver ought to be enforced as such by the Court." Hanover Nat. Bank v. Smith, 11 F. Cas. No. 6,035, 13 Blatchf. 224, 226.

[46] **Cause subsequently becoming removable** see infra § 26.

[47] U. S.—Ford v. Roxana Petroleum Corp., 31 F. (2d) 765; American Bonding Co. v. Mills, 152 Fed. 107, 81 CCA 325; Case v. Olney, 106 Fed. 433.

Ind.—Lesh v. Bailey, 49 Ind. A. 254, 95 NE 341.

Ky.—Broadway Coal Min. Co. v. Robinson, 150 Ky. 707, 150 SW 1000.

Mich.—Home Ins. Co. v. Curtis, 32 Mich. 402.

Minn.—Kowalski v. Chicago, etc., R. Co., 159 Minn. 388, 199 NW 178.

N. D.—Bailey v. Davis, 49 N. D. 838, 193 NW 658.

Okl.—St. Louis-San Francisco R. Co. v. Simmons, 116 Okl. 126, 242 P 151.

Tex.—Morgan's Louisiana, etc., R., etc., Co. v. Street, 57 Tex. Civ. A. 194, 122 SW 270.

[48] Texas, etc., R. Co. v. Eastin, 214 U. S. 153, 29 SCt 564, 53 L. ed. 946 [aff 100 Tex. 556, 102 SW 105]; Hansen v. Pacific Coast Asphalt Cement Co., 243 Fed. 283; Deakins v. Los Angeles County Super. Ct., 90 Cal. A. 630, 266 P 563. See Hudson River R., etc., Co. v. Day, 54 Fed. 545 (holding that the right to a removal was waived when, contemporaneously with his petition, the party obtained from the state supreme court a writ of certiorari to remove the record thereto for review).

[49] Butler v. Armour, 192 N. C. 510, 135 SE 350; Burton v. Smith, 191 N. C. 599, 132 SE 605; Dills v. Champion Fiber Co., 175 N. C. 49, 94 SE 694; Patterson v. Champion Lumber Co., 175 N. C. 90, 94 SE 692; Pruitt v. Charlotte Power Co., 165 N. C. 416, 81 SE 624; Ford v. Pigeon River Lumber Co., 155 N. C. 352, 71 SE 439. See Hanover Nat. Bank v. Smith, 11 F. Cas. No. 6,035, 13 Blatchf. 224 (holding that, where, as a condition of obtaining a postponement of trial, defendant consented to a reference of the cause to a designated person for trial at a later time, he ought to be considered as estopped from thereafter making an application to remove the case).

[a] **Extension of time to answer.**—It has been held that a request to the state court for, or the acceptance of, an extension of time for filing his answer constitutes a waiver by defendant of any right to remove the cause to a federal court. Butler v. Armour, 192 N. C. 510, 135 SE 350; Burton v. Smith, 191 N. C. 599, 132 SE 605; Dills v. Champion Fiber Co., 175 N. C. 49, 94 SE 694; Patterson v. Champion Lumber Co., 175 N. C. 90, 94 SE 692; Pruitt v. Charlotte Power Co., 165 N. C. 416, 81 SE 624; Ford v. Pigeon River Lumber Co., 155 N. C. 352, 71 SE 439.

[50] In re Seattle, 237 Fed. 100; Murphy v. Stone, etc., Engineering Corp., 44 Mont. 146, 119 P 717, AnnCas 1913A 1334; Golden v. Northern Pac. R. Co., 39 Mont. 435, 104 P 549, 34 LRANS 1154, 18 AnnCas 886; Butler v. Armour, 192 N. C. 510, 135 SE 350.

Time for removal see infra §§ 205–211.

[51] Chicago, etc., R. Co. v. Minne-

of unless his intention to waive clearly appears,[52] the question of waiver depending upon whether the action taken by defendant exhibits such a purpose to abide by the state jurisdiction as to estop him from afterward asserting the contrary.[53]

[§ 6] **b. Acts Not Constituting Waiver.** Subject always to the rules governing the time within or before which a right to remove a cause from a state to a federal court must be asserted,[54] the right is not waived by a previous objection to the jurisdiction of the state court or by proceedings founded upon such objection,[55] such as the trial of a plea in abatement;[56] nor by an appeal from an order denying a motion to set aside the service of the summons, and a motion to stay proceedings pending such appeal;[57] nor, in the case of condemnation proceedings, by filing exceptions to the report of the jury appointed to assess damages, before the docketing of the proceeding in the state court from which removal is sought;[58] nor by opposition to an application for any interlocutory remedy, or a proceeding to dissolve such a remedy,[59] as an attachment,[60] an injunction,[61] or a receiver;[62] nor by an application to set aside a default;[63] nor by a voluntary general appearance in the state court or mere submission to its jurisdiction;[64] nor by the filing of a demurrer,[65] an answer,[66] or a plea in abatement,[67] or by argument in opposition to a motion to strike out a pleading filed,[68] at least when the same does not affect the merits of the controversy;[69] nor by taking depositions;[70] nor by consent to the appointment of an auditor[71] or of arbitrators;[72] nor, where removal has been granted, by argument in opposition to an appeal from the order of removal,[73] or by contesting the case in the state court where such court proceeds with the trial notwithstanding the proceedings for removal;[74] nor by appealing to a higher state court from an order refusing a removal;[75] nor by any subsequent proceedings taken in the state court after the right of removal has been denied,[76] such as a motion for a continuance[77] or a

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sota, etc., R. Co., 29 Fed. 337; Williams v. Lowe, 4 Nebr. 382; Miller v. Finn, 1 Nebr. 254. Compare Midland Valley R. Co. v. Clark, 96 Okl. 264, 221 P 1025 (holding that an application for removal cannot be made for the first time in the state appellate court).

Removal from court of original jurisdiction only see infra § 11.

[52] McMillen v. Indemnity Ins. Co., 8 F. (2d) 881.

[53] Duvall v. Wabash R. Co., 9 F. (2d) 83.

[54] See infra §§ 205–211.

[55] Remington v. Central Pac. R. Co., 198 U. S. 95, 25 SCt 577, 49 L. ed. 959; Donahue v. Calumet Fire-Clay Co., 94 Fed. 23; Baumgardner v. Bono Fertilizer Co., 58 Fed. 1; Lockhart v. Memphis, etc., R. Co., 38 Fed. 274.

[56] Lockhart v. Memphis, etc., R. Co., supra.

[57] Remington v. Central Pac. R. Co., 198 U. S. 95, 25 SCt 577, 49 L. ed. 959.

[58] Waynesville v. Smathers, 194 N. C. 131, 138 SE 613.

[59] Cella v. Brown, 136 Fed. 439. But see Dart v. Arnis, 19 HowPr (N. Y.) 429 (holding that the right is lost by appearing in the action, and that a motion by defendant to discharge an order of arrest is equivalent to an entry of appearance). Compare Chicago, etc., R. Co. v. Minnesota, etc., R. Co., 29 Fed. 337 (holding that where defendant appeals to the state supreme court from an order granting a temporary injunction, he has no right to remove the cause to a federal court while such appeal is pending, he having by his own acts invoked the jurisdiction of the state supreme court, and it not being permissible that the cause be pending in two courts at the same time).

[60] Cella v. Brown, 136 Fed. 439; Calderhead v. Downing, 103 Fed. 27; Whiteley Malleable Castings Co. v. Sterlingworth Railway Supply Co., 83 Fed. 853; Purdy v. Muller, 81 Fed. 513; Southern Pac. Co. v. Stewart, 88 Ga. 13, 13 SE 824.

[a] **Appearance by defendant to contest validity of attachment** affecting his individual liability only does not deprive him of his right, as a member of a partnership, to remove the case on the ground that it involves a controversy between citizens of different states. Calderhead v. Downing, 103 Fed. 27.

[b] **Filing and procuring approval of bond to dissolve attachment** is not a waiver of the right of removal. Whiteley Malleable Castings Co. v. Sterlingworth R. Supply Co., 83 Fed. 853; Purdy v. Muller, 81 Fed. 513; Southern Pac. Co. v. Stewart, 88 Ga. 13, 13 SE 824.

[61] McMillen v. Indemnity Ins. Co., 8 F. (2d) 881; Cella v. Brown, 136 Fed. 439; Champlain Constr. Co. v. O'Brien, 104 Fed. 930; Garrard v. Silver Peak Mines, 76 Fed. 1; Franklin v. Wolf, 78 Ga. 446, 3 SE 696.

[62] McMillen v. Indemnity Ins. Co., 8 F. (2d) 881; Sidway v. Missouri Land, etc., Co., 116 Fed. 381; Freeman v. Butler, 39 Fed. 1; Franklin v. Wolf, 78 Ga. 446, 3 SE 696.

[63] Burton v. Smith, 191 N. C. 599, 132 SE 605.

[64] Brown v. Davis, 13 F. (2d) 256; McMillen v. Indemnity Ins. Co., 8 F. (2d) 881; Judson v. Knights of Maccabees of World, 220 Fed. 1004; Groton Bridge, etc., Co. v. American Bridge Co., 137 Fed. 284; Conner v. Skagit Cumberland Coal Co., 45 Fed. 802; Stevens v. Richardson, 9 Fed. 191, 20 Blatchf. 53; Healy v. Prevost, 11 F. Cas. No. 6,297; Burton v. Smith, 191 N. C. 599, 132 SE 605. Contra Dart v. Arnis, 19 HowPr (N. Y.) 429; Scroggin v. Beckett, 120 Or. 687, 252 P 948.

Acceptance or invocation of jurisdiction for affirmative or additional relief see supra § 5.

[65] State Impr.-Dev. Co. v. Leininger, 226 Fed. 884; Whiteley Malleable Castings Co. v. Sterlingworth R. Supply Co., 83 Fed. 853; Conner v. Skagit Cumberland Coal Co., 45 Fed. 802; Tennessee Coal, etc., Co. v. Waller, 37 Fed. 545.

[66] McMillen v. Indemnity Ins. Co., 8 F. (2d) 881; Donahue v. Calumet Fire-Clay Co., 94 Fed. 23; Gavin v. Vance, 33 Fed. 84; American R. Express Co. v. Davis, 158 Ark. 493, 250 SW 540; Union Gas, etc., Co. v. Indian-Tex Petroleum Co., 203 Ky. 521, 263 SW 1. Compare Markey v. Chicago, etc., R. Co., 171 Iowa 255, 153 NW 1053 (holding that by filing an amendment to its answer after plaintiff had so amended his petition as to make the cause removable did not constitute a waiver of the right to remove where defendant had no actual knowledge of plaintiff's amendment).

Filing answer after denial of right of removal as waiver see infra text and note 79.

[67] Lockhart v. Memphis, etc., R. Co., 38 Fed. 274; Garrett v. Bonner, 30 La. Ann. 1305. But see Orr v. Fireman's Fund Ins. Co., 36 F. (2d) 378 (holding that, by making a motion to dismiss on the ground of plaintiff's incapacity to sue, which is regarded as the equivalent of a plea in abatement, defendant waived the right to remove the cause to a federal court).

[68] Richards v. Rock Rapids, 31 Fed. 505.

[69] Richards v. Rock Rapids, supra.

[70] Evetts v. People's L. Ins. Co., 36 F. (2d) 832; Duvall v. Wabash R. Co., 9 F. (2d) 83; McMillen v. Indemnity Ins. Co., 8 F. (2d) 881.

[71] Stone v. Sargent, 129 Mass. 503.

[72] Thorne v. Tonawanda Tanning Co., 15 Fed. 289.

[73] Mecke v. Valley Town Mineral Co., 89 Fed. 209.

[74] Nelms v. Davis, 277 Fed. 982.

Refusal of state court to relinquish jurisdiction see infra §§ 255, 266; and Courts § 654.

[75] Richards v. Rock Rapids, 31 Fed. 505.

[76] Meyer v. Delaware R. Constr. Co., 100 U. S. 457, 25 L. ed. 593; Home L. Ins. Co. v. Dunn, 19 Wall. (U. S.) 214, 22 L. ed. 68; Nelson v. Black Diamond Min. Co., 237 Fed. 264; Richards v. Rock Rapids, 31 Fed. 505; Texarkana Tel. Co. v. Bridges, 75 Ark. 116, 86 SW 841; Pennsylvania Co. v. Leeman, 160 Ind. 16, 66 NE 48. But see West Virginia v. King, 112 Fed. 369 (holding that, where, after application for removal to a federal court had been denied, defendant presented an amendment to his pleadings previously filed, which the court allowed, and thereafter prosecuted in the state court of appeals a writ of prohibition, to compel the inferior court to proceed with the cause in a particular manner, such subsequent proceedings constituted a waiver of his right to removal); Wausau First Nat. Bank v. Conway, 67 Wis. 210, 30 NW 215 (holding that by moving for a change of venue, a defendant whose petition for removal has been denied waives the application).

[77] Baltimore, etc., R. Co. v. Ford, 35 Fed. 170; Southern Pac. Co. v. Harrison, 73 Tex. 103, 11 SW 168. See Waters v. Central Trust Co., 126 Fed. 469, 62 CCA 45 (holding that, where a petition for removal was filed on the last day for filing an answer in the cause, and, hearing on the petition being postponed to a subsequent day, defendant to protect himself asked for and obtained an extension of time to plead, such appli-

cost bond,[78] or the filing of an answer,[79] or a stipulation to plead and try the case at a subsequent time or term,[80] or by defending upon a trial,[81] or by insisting, upon appeal from a judgment in his favor, on its affirmance.[82]

[§ 7] **D. As Dependent on Plaintiff's Pleadings.** In general, the right to remove a cause from a court of a state to a federal court depends upon whether or not the allegations of plaintiff's petition or complaint bring it within the removal statutes,[83] except where there is a fraudulent joinder of defendants for the purpose of preventing removal,[84] and except as a suit not originally appearing to be removable may subsequently become or be shown to be so.[85] The right of removal must accordingly be determined from the facts as they appear from the pleadings at the time removal is sought,[86] and nothing occurring thereafter can add to or subtract from the right,[87] except, it has been held, that if plaintiff files an answer,[88] to a petition for removal[89] admitting allegations therein contained or alleging additional facts material to the question of removability, the facts so admitted or alleged are material.[90]

[§ 8] **E. Second Removal.** Where a suit removed from a state court to a federal court has been remanded thereby,[91] it cannot again be removed either upon the same[92] or a different[93] ground, unless the right to remove on such ground has appeared only since the time of the first removal.[94]

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cation for time should be treated as an application for an extension of time to plead to the jurisdiction or otherwise, and so did not constitute a relinquishment or waiver of the right of removal).

[78] Western Coal, etc., Co. v. Osborne, 30 Okl. 235, 119 P 973.

[79] Avent v. Deep River Lumber Co., 174 Fed. 298; Texas, etc., R. Co. v. Davis, 93 Tex. 378, 54 SW 381, 55 SW 562; Llanez v. Chisos Min. Co., (Tex. Civ. A.) 285 SW 646.

Filing answer as waiver in general see supra text and note 66.

[80] Waite v. Phœnix Ins. Co., 62 Fed. 769; Murphy v. Stone, etc., Engineering Corp., 44 Mont. 146, 119 P 717, AnnCas1913A 1334.

[81] U. S.—Meyer v. Delaware R. Constr. Co., 100 U. S. 457, 25 L. ed. 593; Home L. Ins. Co. v. Dunn, 19 Wall. 214, 22 L. ed. 68; Queensboro Nat. Bank v. Kelly, 15 F. (2d) 395; Missouri, etc., R. Co. v. Chappell, 206 Fed. 688; Kirby v. Chicago, etc., R. Co., 106 Fed. 551; McMullen v. Northern Pac. R. Co., 57 Fed. 16; North Carolina v. Sullivan, 50 Fed. 593; Richards v. Rock Rapids, 31 Fed. 505. But see Texas, etc., R. Co. v. Eastin, 214 U. S. 153, 29 SCt 564, 53 L. ed. 946 (holding that, where, subsequent to a removal which the state court refused to recognize, defendant pleaded and recovered judgment upon a counterclaim, he waived his right of removal).

Ala.—Stix v. Keith, 90 Ala. 121, 7 S 423.

Ark.—American R. Express Co. v. Davis, 158 Ark. 493, 250 SW 540; Little Rock, etc., R. Co. v. Iredell, 50 Ark. 388, 8 SW 21; Upham v. Scoville, 40 Ark. 170.

Colo.—Miller v. Buyer, 82 Colo. 474, 261 P 659.

Mo.—Herryford v. Ætna Ins. Co., 42 Mo. 148.

Oh.—Erie R. Co. v. Stringer, 32 Oh. St. 468.

Tex.—Texas, etc., R. Co. v. Davis, 93 Tex. 378, 54 SW 381, 55 SW 562; Llanez v. Chisos Min. Co., (Civ. A.) 285 SW 646.

Wis.—Northern Pac. R. Co. v. McMullen, 86 Wis. 501, 56 NW 629. But see Marckwald v. Oceanic Steam Nav. Co., 11 Hun (N. Y.) 462 (holding that by appearing and defending at the trial defendant acquiesced in the denial of his petition to remove and waived his right to insist upon it).

[82] Texas, etc., R. Co. v. Davis, 93 Tex. 378, 54 SW 381, 55 SW 562; Llanez v. Chisos Min. Co., (Tex. Civ. A.) 285 SW 646.

[83] U. S.—Givens v. Wight, 247 Fed. 233.

Ga.—Lee v. Standard Motors Finance Co., 166 Ga. 54, 142 SE 541.

Minn.—Kowalski v. Chicago, etc., R. Co., 159 Minn. 388, 199 NW 178.

N. C.—Hill v. Director Gen. of Railroads, 178 N. C. 607, 101 SE 876.

N. D.—Bailey v. Davis, 49 N. D. 838, 193 NW 658.

[84] See infra §§ 170, 171.

[85] See infra § 26.

[86] U. S.—Boyle v. Chicago, etc., R. Co., 42 F. (2d) 633; Kelly v. Alabama Quenelda Graphite Co., 34 F. (2d) 790; Herbert v. Roxana Petroleum Corp., 12 F. (2d) 81; King v. Beaumont, 296 Fed. 531; Kellogg v. Schaueble, 273 Fed. 1012; Miller v. Soule, 221 Fed. 493; Anderson v. Western Union Tel. Co., 218 Fed. 78; West Side R. Co. v. California Pac. R. Co., 202 Fed. 331. See Paragon Coal, etc., Co. v. J. W. Kirby, etc., Coal Co., 9 F. (2d) 686 (supporting the rule, but holding irrelevant the fact that, in an attachment suit, the sheriff had not complied with certain statutory requirements as to inventory and notice at the time the application for removal was made).

Ark.—St. Louis-San Francisco R. Co. v. Britton, 163 Ark. 255, 259 SW 730.

Ill.—Northern Trust Co. v. Grand Trunk Western R. Co., 282 Ill. 565, 118 NE 986.

Kan.—Dowell v. Chicago, etc., R. Co., 83 Kan. 562, 112 P 136 [aff 229 U. S. 102, 33 SCt 684, 57 L. ed. 1090].

La.—Duncan v. St. Louis, etc., R. Co., 49 La. Ann. 1700, 22 S 924.

Mass.—Munnss v. American Agricultural Chemical Co., 216 Mass. 423, 103 NE 859.

N. Y.—New England Tire, etc., Co. v. Kelly-Springfield Tire Co., 214 App. Div. 58, 210 NYS 243.

[a] **Where state practice is not to file pleadings,** the only way to ascertain the state of the record for the purpose of deciding an application for the removal of a cause to the federal court is by affidavit. New England Tire, etc., Co. v. Kelly-Springfield Tire Co., 210 NYS 243.

[87] Kelly v. Alabama-Quenelda Graphite Co., 34 F. (2d) 790.

Removability arising from appearance of jurisdictional facts at time subsequent to commencement of suit see supra § 26.

Waiver of right by further proceedings in state court see supra § 6.

[88] **Answer to removal petition** see infra § 328.

[89] **Petitions for removal in general** see infra §§ 237-244, 256, 261.

[90] Lee v. Standard Motors Finance Co., 166 Ga. 54, 142 SE 541.

[91] **Remand in general** see infra §§ 302-341.

[92] U. S.—St. Paul, etc., R. Co. v. McLean, 108 U. S. 212, 2 SCt 498, 27 L. ed. 703 [aff 16 F. Cas. No. 8,893, 17 Blatchf. 363, 21 AlbLJ (N. Y.) 47]; Ausbrooks v. Western Union Tel. Co., 282 Fed. 733; Key v. West Kentucky Coal Co., 237 Fed. 258; Smith v. Travelers' Ins. Co., 73 Fed. 513; Frisbie v. Chesapeake, etc., R. Co., 59 Fed. 369; Brigham v. C. C. Thompson Lumber Co., 55 Fed. 881; Johnston v. Donvan, 30 Fed. 395. But see Freeman v. Butler, 39 Fed. 1 (holding that, where a cause, having been attempted to be removed, was remanded for want of jurisdiction on account of the failure of the petition for removal to set forth jurisdictional facts, a removal could thereafter be had upon a petition properly showing facts giving a right to remove).

Kan.—Bodley v. Emporia Nat. Bank, 38 Kan. 59, 16 P 88.

Ky.—West Kentucky Coal Co. v. Key, 178 Ky. 220, 198 SW 724.

Mo.—Nichols v. Stevens, 123 Mo. 96, 25 SW 578, 27 SW 613, 45 AmSR 514.

Okl.—Rowell v. Lawton, 288 P 344.

Or.—Malloy v. Marshall-Wells Hardware Co., 90 Or. 303, 173 P 267, 175 P 659, 176 P 589.

[93] Pope v. Cheney, 22 Fed. 177.

[94] Fritzlen v. Boatmen's Bank, 212 U. S. 364, 29 SCt 366, 53 L. ed. 551; Key v. West Kentucky Coal Co., 237 Fed. 258; Pope v. Cheney, 22 Fed. 177. See Powers v. Chesapeake, etc., R. Co., 169 U. S. 92, 18 SCt 264, 42 L. ed. 673 (where a second removal was permitted in such circumstances).

[a] **Changes in pleadings,** in a cause theretofore held to be unremovable and remanded to the state court, which show a right of removal, are sufficient to justify granting a second removal of the cause. Fritzlen v. Boatmen's Bank, 212 U. S. 364, 29 SCt 366, 53 L. ed. 551.

Cause subsequently becoming removable see infra § 26.

II. NATURE OF CAUSES REMOVABLE

[By Eustace W. Tomlinson]

[§ 9] **A. Statutory Provisions.** Under the statutes of the United States, as now in force,[95] the following classes of causes and proceedings may be removed from a state court, when brought therein, to a federal court, upon compliance with the provisions as to time[96] and manner[97] of removal: (1) Any suit of a civil nature, at law or in equity, arising under the constitution, laws or treaties of the United States, of which the district courts of the United States are given jurisdiction; and any other suit of a civil nature, at law or in equity, of which the district courts of the United States are given jurisdiction, where defendant is a nonresident of the state; and any suit in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state, when it shall be made to appear that a defendant, being a citizen of another state, will not be able on account of prejudice or local influence to obtain justice in the state court; except that no case arising under the federal statutes relating to the liability of common carriers for injuries to employees shall be removed, and that no suit brought against a common carrier to recover damages for delay, loss of or injury to property received for transportation by it under the Interstate Commerce Act shall be removed where the matter in controversy does not exceed the sum or value of $3000;[98] (2) Any action in which the title of land is concerned, and the parties are citizens of the same state, and the matter in dispute exceeds the sum or value of $3000, where it is made to appear that a plaintiff or defendant claims or will rely upon a right or title under a grant from one state and an adverse party claims a right or title under a grant from another state;[99] (3) Any civil suit or criminal prosecution against any person who is denied or cannot enforce, in the tribunals of the state or of the part of the state where the suit or prosecution is pending, any right secured by any law providing for the equal civil rights of citizens or persons within the jurisdiction of the United States; or against any civil or military officer for any wrong committed by virtue or under color of any civil rights law, or for refusing to do any act on the ground that it would be inconsistent with such law;[1] (4) Any civil suit or criminal prosecution against any officer appointed or acting under any revenue law of the United States, or against any person acting under or by authority of such officer, on account of any act done under color of his office or of such law, or on account of any right, title or authority claimed by such officer or other person under such law; or commenced against any person holding property by title derived from any such officer, and affecting the validity of such revenue law; or against any officer of the courts of the United States for or on account of any act done under color of his office or in the performance of his official duties; or against any person on account of anything done by him while an officer of either house of congress in the discharge of his official duty in executing any order of such house;[2] (5) A personal action brought by an alien against any citizen who is or at the time of the accrual of the alleged cause of action was a civil officer of the United States and a nonresident of the state wherein jurisdiction is obtained by the state court by personal service of process;[3] and (6) Any civil or criminal prosecution commenced in any court of a state against any officer, soldier or other preson in the military service of the United States on account of any act done under color of his office or status, or in respect to which he claims any right, title or authority under any law of the United States respecting the military forces thereof, or under the law of war.[4]

[§ 10] **B. As Dependent on Original Jurisdiction of Federal Courts.** In order to be removable from a court of a state to a federal court because arising under the constitution or a law or treaty of the United States[5] or on account of diversity of citizenship,[6] an action or proceeding must in nature and substance be one over which the federal courts could have exercised jurisdiction if it had originally been brought therein;[7] and where the federal courts could not have taken jurisdiction of a cause originally, they cannot acquire jurisdiction on such grounds by waiver or consent of the parties to the removal of the cause.[8] Thus a federal statute providing that the courts of the United States shall not have jurisdiction of particular actions or proceedings necessarily implies that such a suit brought in a state court cannot be removed to a federal court.[9] In matters of form and procedure, however, the suit need not be such that the federal court could have taken original jurisdiction of it,[10] nor is it essential that the federal court shall be able to acquire original jurisdiction of a cause in the manner in which jurisdiction thereof was acquired by the state court;[11] and it is no objection to removal that the case involves claims and defenses in both law and equity, which cannot be united in a suit in the federal court.[12] The fact that plaintiff would have an adequate remedy at law does not prevent the removal of a suit in equity which is otherwise removable if no objection on that ground is made, although the equity suit would not originally have been maintainable in the federal court if the objection had been raised.[13]

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[95] See statutory provisions.

[96] **Time for removal** see infra §§ 205-211.

[97] **Proceedings for removal** see infra §§ 235-269.

[98] USCA tit 28 § 71.

[a] **Similar construction of successive statutes.**—The provisions of the removal act of 1887 being the same as those of the Judiciary Act of 1875 as to the removal of causes in which there is a controversy between citizens of different states, except only that the right of removal was limited by the later act to defendants, such provisions should receive the same construction and application, so far as the removing defendant is concerned, as the courts had previously given to the corresponding provisions of the earlier statute. New York Constr. Co. v. Simon, 53 Fed. 1.

Cross references:
Action founded upon Employers' Liability Act see infra §§ 20, 21.
Causes involving diversity of citizenship in general see infra §§ 120-179.
Removal on account of prejudice or local influence see infra §§ 194-204.
Suits arising under constitution, laws, and treaties of the United States in general see infra §§ 46-89.
Sum or value in dispute see infra §§ 28-45.

[99] USCA tit 28 § 73.

Generally see infra §§ 118, 119.

Sum or value in dispute see infra §§ 28-45.

[1] USCA tit 28 § 74.

Generally see infra §§ 111-117.

[2] USCA tit 28 § 76.

Generally see infra §§ 90-110.

[3] USCA tit 28 § 77.

[4] USCA tit 10 § 1589.

Generally see infra § 110.

[5] **In general** see infra §§ 46-89.

[6] **In general** see infra §§ 120-179.

[7] U. S.—Re Winn, 213 U. S. 458, 29 SCt 515, 53 L. ed. 373; Enger v. Northern Finance Corp., 31 F. (2d) 136; Mullendore v. American Surety Co., 27 F. (2d) 572; In re Vadner, 259 Fed. 614; Georgia v. Southern R. Co., 255 Fed. 369; Ivanoff v. Mechanical Rubber Co., 232 Fed. 173; Turk v. Illinois Cent. R. Co., 218 Fed. 315, 134 CCA 111; Baker v. Pinkham, 211 Fed. 728; Western Union Tel. Co. v. Southeast, etc., R. Co., 208 Fed. 266, 125 CCA 466; Waterman v. Chesapeake, etc., R. Co., 199 Fed. 667; Whitney v. American Shipbuilding Co., 197 Fed. 777; Younts v. Southwestern Tel., etc., Co., 192 Fed. 200; Anderson v. Sharp, 189 Fed. 247; Canary Oil Co. v. Standard Asphalt, etc., Co., 182 Fed. 663; Hubbard v. Chicago, etc., R. Co., 176 Fed. 994; Clark v. Southern Pac. Co., 175 Fed. 122; Carp v. Queen Ins. Co., 168 Fed. 782; Mahopoulus v. Chicago, etc., R. Co., 167 Fed. 165; Blunt v. Southern R. Co., 155 Fed. 499; Terre Haute v. Evansville, etc., R. Co., 106 Fed. 545. See Kellogg v. Schaueble, 273 Fed. 1012; Golightly v. Massachusetts Bonding, etc., Co., 259 Fed. 153; Matarazzo v. Hustis, 256 Fed. 882; Jackson v. Hooper, 188 Fed. 509; State v. White River Valley R. Co., 27 S. D. 65, 129 NW 1034 (all recognizing the rule); The Annette Rolph, 285 Fed. 446 (apparently applying the rule). But see Gaines v. Fuentes, 92 U. S. 10, 23 L. ed. 524; Brainerd v. Hubbard, 79 U. S. 1, 20 L. ed. 272; Hornthall v. Collector, 9 Wall. 564, 19 L. ed. 560 (apparently contrary dicta). Compare McLaughlin v. Western Union Tel.

Concurrent original jurisdiction. From the rule, as just stated, that a cause may be removed to a federal court on the grounds specified only if it could originally have been brought there,[14] considered in connection with the further rule prohibiting removal of causes of which the state court is without jurisdiction,[15] it necessarily results that the original jurisdiction of the federal courts must be concurrent with that of the state courts, and not exclusive thereof, in order to render the cause removable because involving a federal question or diversity of citizenship.[16]

Jurisdiction and venue distinguished. By a supposed application of the foregoing rule that a cause, in order to be removable from a state court to a federal court, must be one of which the federal court could have taken original jurisdiction if it has been brought therein,[17] it was formerly held by some courts that in order to be so removable the cause must be one of which original jurisdiction in invitum could have been taken by the particular federal district court to which removal is sought,[18] unless plaintiff consents and waives objection, in which case

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Co., 7 F. (2d) 177 (holding that, where a suit is brought for personal injuries, sounding primarily in tort, with an alternative claim for relief under the state workmen's compensation law, the fact that the alternative cause of action could not be tried in the federal court would not prevent defendant from removing the cause so far as it is based upon a tort).

Iowa.—Hallowell v. McLaughlin Bros., 136 Iowa 279, 111 NW 428, 121 NW 1039 [writ of error dism 228 U. S. 278, 33 SCt 465, 57 L. ed. 835].

Ky.—Fearon Lumber, etc., Co. v. Lawson, 166 Ky. 123, 178 SW 1121.

Mont.—Phelps v. Great Northern R. Co., 66 Mont. 198, 213 P 610.

W. Va.—Baltimore, etc., R. Co. v. Pittsburg, etc., R. Co., 17 W. Va. 812.

Compare Missouri, etc., R. Co. v. Smith, (Tex. Civ. A.) 164 SW 885 (where it was said that a cause to be removable must be one of which the federal court can take cognizance when the transfer has been made).

And see cases infra this note.

[a] **Cases which may not be removed.**—(1) A creditor's bill, brought under a state statute by one who is not a judgment creditor, to set aside a conveyance as fraudulent. Parkersburg First Nat. Bank v. Prager, 91 Fed. 689, 34 CCA 51. (2) A proceeding to reach and apply, in payment of a debt, property of a debtor, which cannot be attached or taken under execution in an action at law. Mathews Slate Co. v. Mathews, 148 Fed. 490. (3) A suit against a partnership by the firm name, under a state statute which authorizes in such case judgment to be entered against the firm, only to be enforced against the partnership property, or upon all such members as have appeared or been served with notice. Ralya Market Co. v. Armour, 102 Fed. 530. (4) A suit which is in form an action of trespass to try title, wherein plaintiff relies upon an equitable title, and not maintainable in the federal court at law because of the reliance upon the equitable title, and not in equity because no equitable relief is sought. Anderson v. Sharp, 189 Fed. 247. (5) Actions and proceedings of particular characters see infra §§ 11–25.

Jurisdiction of federal courts in general see Federal Courts §§ 2–77.

To what federal court cause may be removed see infra § 264.

[8] Shirer v. Davis, 295 Fed. 317.

Creating or conferring right of removal by consent see supra § 2.

[9] Leather Mfrs. Nat. Bank v. Cooper, 120 U. S. 778, 7 SCt 777, 30 L. ed. 816.

[10] Lafayette County Road Impr. Dist. No. 2 v. St. Louis Southwestern R. Co., 257 U. S. 547, 42 SCt 250, 66 L. ed. 364 [aff 265 Fed. 524]; Chicago, etc., R. Co. v. Spencer, 283 Fed. 824; In re Stutsman County, 88 Fed. 337; Wilson v. Smith, 66 Fed. 81. And see cases infra notes 11, 12.

[a] **Statutory proceeding for collection of taxes.**—Notwithstanding a proceeding under a state statute for the collection of taxes is of such character, owing to its procedure, that it could not be commenced in the federal court, jurisdiction on removal is complete when the controversy presents every element mentioned in the statute as essential to original jurisdiction. In re Stutsman County, 88 Fed. 337.

[11] Missouri Valley Bridge, etc., Co. v. Blake, 231 Fed. 417, 145 CCA 411 (holding that, where the state court had acquired jurisdiction of a nonresident corporation, which had no officer or agent within the county, by levy of attachment, the fact that the federal court could not so have acquired original jurisdiction did not prevent the removal of the suit); State v. Taylor, 298 Mo. 474, 251 SW 383 (holding that, under 36 U. S. St. at L. p 1098 § 36 c 231 [U. S. Comp. St. § 1018], providing that when any suit is removed from a state to a federal court any attachment of the goods of defendant had in the state court shall hold such goods to answer the final judgment or decree in the same manner as if such judgment or decree had been rendered in the state court, the federal courts have jurisdiction to try cases upon removal from state courts where jurisdiction was acquired by the latter by attachment, although the federal courts could not so have acquired original jurisdiction). See Alabama Power Co. v. Gregory Hill Gold Min. Co., 5 F. (2d) 705 (dictum, that where an action has been duly commenced in a state court by suitable process, as for example by attachment, it is removable where the other jurisdictional requisites exist even though the federal court could not originally have issued the writ).

[12] Ketchum v. Black River Lumber Co., 4 Fed. 139; Tarver v. Ficklin, 60 Ga. 373.

Repleader and recasting of cause after removal see infra § 279.

[13] Finney v. Continental Baking, etc., Corp., 17 F. (2d) 107.

[14] See supra text and notes 5–13.

[15] See infra § 27.

[16] Nicholas v. Chesapeake, etc., R. Co., 127 Ky. 310, 105 SW 481, 32 KyL 270, 17 LRANS 861.

[17] See supra text and notes 7, 8.

[18] U. S.—Re Wisner, 203 U. S. 449, 27 SCt 150, 51 L. ed. 264; Coalmont Moshannon Coal Co. v. Matthew Addy SS., etc., Corp., 271 Fed. 114; Nickels v. Pullman Co., 268 Fed. 610; Perrette v. Illinois Commercial Men's Assoc., 267 Fed. 583; Kansas Gas, etc., Co. v. Wichita Natural Gas Co., 266 Fed. 614; Centaur Motor Co. v. Eccleston, 264 Fed. 852; Isaac Kubie Co. v. Lehigh Valley R. Co., 261 Fed. 806; Boise Commercial Club v. Oregon Short Line R. Co., 260 Fed. 769; Pendar v. Empire Gas, etc., Co., 260 Fed. 669; Poorman v. Cleveland, etc., R. Co., 255 Fed. 987; Guaranty Trust Co. v. McCabe, 250 Fed. 699 [certiorari den 247 U. S. 505 mem, 38 SCt 427 mem, 62 L. ed. 1240 mem]; Webb v. Southern R. Co., 248 Fed. 618, 160 CCA 518 [certiorari den 247 U. S. 518 mem, 38 SCt 582 mem, 62 L. ed. 1245 mem]; Keating v. Pennsylvania Co., 245 Fed. 155; O'Neil v. Birdseye, 244 Fed. 254; Orr v. Baltimore, etc., R. Co., 242 Fed. 608; American Oil, etc., Co. v. Western Gas Constr. Co., 239 Fed. 505, 152 CCA 383; Peninsula Lumber Co. v. Royal Indemn. Co., 237 Fed. 297; Doherty v. Smith, 233 Fed. 132; Jackson v. William Kenefick Co., 233 Fed. 130; Ivanoff v. Mechanical Rubber Co., 232 Fed. 173; Mutual L. Ins. Co. v. Painter, 220 Fed. 998; Stewart v. Cybur Lumber Co., 211 Fed. 343; Mattison v. Boston, etc., R. Co., 205 Fed. 821; Western Union Tel. Co. v. Louisville, etc., R. Co., 201 Fed. 932; Waterman v. Chesapeake, etc., R. Co., 199 Fed. 667; Baldwin v. Pacific Power, etc., Co., 199 Fed. 291; Hall v. Great Northern R. Co., 197 Fed. 488; Stone v. Chicago, etc., R. Co., 195 Fed. 832; Puget Sound Sheet Metal Works v. Great Northern R. Co., 195 Fed. 350; Turk v. Illinois Cent. R. Co., 193 Fed.

the district court to which the cause has actually been removed is treated as having jurisdiction;[19] and so, in recognition of the rule, as elsewhere stated, that removal can be had, if at all, only to the district court of the district within which the cause is pending in a state court,[20] the conclusion has been reached that where the suit could not originally have been brought in such district, because of the nonresidence therein of plaintiff or defendant,[21] it is not removable at all, notwithstanding the existence of all the facts otherwise sufficient to render the cause removable.[22] It has been pointed out, however, that this view confuses jurisdiction with venue,[23] and that the rule restricting removability to those causes of which federal jurisdiction might originally have been taken refers only to the jurisdiction of the federal district courts generally, and not to the particular district court by which the jurisdiction may be exercised, as affected by the residence of the parties;[24] and it appears now to be settled that the provisions of the statutes relating to the place of bringing suit in the federal courts, as affected by the residences of the parties, have no bearing on the question of the removability of a suit,[25] but where upon its facts a cause is shown to be within the removal statutes it may be removed to the court of the proper district, regardless of the residences of the parties and regardless of whether or not the suit could originally have been brought in that district.[26]

[§ 11] C. Character of Action or Proceeding—1.

252; Sherman v. Southern Pac. Co., 192 Fed. 711; Decker v. Southern R. Co., 189 Fed. 224; Sagara v. Chicago, etc., R. Co., 189 Fed. 220; Phelps v. Connecticut Co., 188 Fed. 765; Odhner v. Northern Pac. R. Co., 188 Fed. 507; George v. Tennessee Coal, etc., R. Co., 184 Fed. 951; Bottoms v. St. Louis, etc., R. Co., 179 Fed. 318; Hubbard v. Chicago, etc., R. Co., 176 Fed. 994; Shawnee Nat. Bank v. Missouri, etc., R. Co., 175 Fed. 456; Clark v. Southern Pac. Co., 175 Fed. 122; Carp v. Queen Ins. Co., 168 Fed. 782; Roberts v. Chicago, etc., R. Co., 168 Fed. 316; Moyer v. Chicago, etc., R. Co., 168 Fed. 105; Mahopoulos v. Chicago, etc., R. Co., 167 Fed. 165; Hill v. Woodland Amusement Co., 158 Fed. 530; Baxter, etc., Constr. Co. v. Hammond Mfg. Co., 154 Fed. 992; Yellow Aster Min., etc., Co. v. Crane Co., 150 Fed. 580, 80 CCA 566; Harold v. Iron Silver Min. Co., 33 Fed. 529. See Fairview Fluorspar, etc., Co. v. Bethlehem Steel Co., 258 Fed. 681; Webb v. Southern R. Co., 248 Fed. 618, 160 CCA 518 [certiorari den 247 U. S. 518 mem, 38 SCt 582 mem, 62 L. ed. 1245 mem] (both applying the rule); Keating v. Pennsylvania Co., 245 Fed. 155 (recognizing the rule); Consolidated Interstate Callahan Min. Co. v. Callahan Min. Co., 228 Fed. 528; Bradshaw v. Bowden, 226 Fed. 323; St. John v. U. S. Fidelity, etc., Co., 213 Fed. 685; Smellie v. Southern Pac. Co., 197 Fed. 641; Bogue v. Chicago, etc., R. Co., 193 Fed. 728; Canary Oil Co. v. Standard Asphalt, etc., Co., 182 Fed. 663; Gruetter v. Cumberland Tel., etc., Co., 181 Fed. 248; Barlow v. Chicago, etc., R. Co., 172 Fed. 513; Harding v. Standard Oil Co., 170 Fed. 651 (all recognizing the rule); Bagenas v. Southern Pac. Co., 180 Fed. 887 (apparently recognizing the rule).

Ark.—Chicago, etc., R. Co. v. Cobbs, 151 Ark. 207. 235 SW 995; Central Coal, etc.. Co. v. Orwig, 150 Ark. 635, 235 SW 390; Central Coal, etc., Co. v. Graham. 129 Ark. 550, 196 SW 940; Chicago, etc., R. Co. v. Smith, 107 Ark. 512, 156 SW 166; St. Louis, etc., R. Co. v. Kitchen, 98 Ark. 507, 136 SW 970, 50 LRANS 828.

Ga.—Pullman Co. v. Sutherlin, 150 Ga. 652, 104 SE 782 [aff 24 Ga. A. 430, 101 SE 314]; Payne v. Southern Cotton Oil Co., 27 Ga. A. 283, 108 SE 71; Southern R. Co. v. Ansley, 8 Ga. A. 325, 68 SE 1086.

Miss.—Louisville, etc., R. Co. v. Garnett, 129 Miss. 795, 93 S 241.

Okl.—Riter-Conley Mfg. Co. v. O'Donnell, 64 Okl. 229, 168 P 49; Ft. Smith, etc., R. Co. v. Knott, 60 Okl. 175, 159 P 847; St. Louis, etc., R. Co. v. Hodge, 53 Okl. 427, 157 P 60.

S. C.—Powell v. Southern R. Co., 110 S. C. 70, 96 SE 292.

Tex.—St. Louis, etc., R. Co. v. Matlock, (Civ. A.) 141 SW 1067; St. Louis, etc., R. Co. v. Casselberry, (Civ. A.) 139 SW 1161; St. Louis, etc., R. Co. v. Kiser, (Civ. A.) 136 SW 852.

Wis.—Gist v. Johnson Carey Co., 161 Wis. 79, 151 NW 382.

[a] **Removal statute construed.**—The effect of the cases supporting the rule stated in the text is to construe the removal statute [USCA tit 28 § 71], which provides for the removal of causes of which the federal courts "are given original jurisdiction," as if it referred to causes of which such courts "are given complete compulsory jurisdiction." Nickels v. Pullman Co., 268 Fed. 610 (so stating).

[19] Re Moore, 209 U. S. 490, 28 SCt 585, 706, 52 L. ed. 904; Fitzhugh v. Reid, 252 Fed. 234; Keating v. Pennsylvania Co., 245 Fed. 155; American Oil, etc., Co. v. Western Gas Constr. Co., 239 Fed. 505, 152 CCA 383; Decker v. Southern R. Co., 189 Fed. 224; Clark v. Southern Pac. Co., 175 Fed. 122; Moyer v. Chicago, etc., R. Co., 168 Fed. 105; Proctor Coal Co. v. U. S. Fidelity, etc., Co., 158 Fed. 211; Louisville, etc., R. Co. v. Fisher, 155 Fed. 68, 83 CCA 584, 11 LRANS 926; Corwin Mfg. Co. v. Henrici Washer Co., 151 Fed. 938; Philadelphia, etc., Face Brick Co. v. Warford, 123 Fed. 843. See Nelson v. Black Diamond Min. Co., 237 Fed. 264; Turk v. Illinois Cent. R. Co., 193 Fed. 252; St. Louis, etc., R. Co. v. Kiser, (Tex. Civ. A.) 136 SW 852; Eddy v. Chicago, etc., R. Co., 226 Fed. 120 (all recognizing the rule); Shawnee Nat. Bank v. Missouri, etc., R. Co., 175 Fed. 456 (dictum).

Consent to removal or waiver as conferring jurisdiction on federal courts in general see supra § 2.

[20] See infra § 264.

[21] See Federal Courts § 17.

[22] Fairview Fluorspar, etc., Co. v. Bethlehem Steel Co., 258 Fed. 681; Doherty v. Smith, 233 Fed. 132; St. John v. U. S. Fidelity, etc., Co., 213 Fed. 685; St. Louis, etc., R. Co. v. Matlock, (Tex. Civ. A.) 141 SW 1067.

[23] Re Moore, 209 U. S. 490, 28 SCt 585, 706, 52 L. ed. 904; Earles v. Germain Co., 265 Fed. 715; James v. Amarillo City Light, etc., Co., 251 Fed. 337; Louisville, etc., R. Co. v. Western Union Tel. Co., 218 Fed. 91; Rome Petroleum, etc., Co. v. Hughes Specialty Well Drilling Co., 130 Fed. 585; Burck v. Taylor, 39 Fed. 581 [aff 152 U. S. 634, 14 SCt 696, 38 L. ed. 578]. Compare Turk v. Illinois Cent. R. Co., 193 Fed. 252; Decker v. Southern R. Co., 189 Fed. 224 (both apparently recognizing that only a question of venue is involved, but holding a cause unremovable where it could not originally have been brought in the district court to which removal was sought).

And see cases infra note 24.

[24] Lee v. Chesapeake, etc., R. Co., 260 U. S. 653, 43 SCt 230, 67 L. ed. 443; General Inv. Co. v. Lake Shore, etc., R. Co., 260 U. S. 261, 43 SCt 106, 67 L. ed. 244.

Residence of parties as affecting federal district court in which suit may be brought see Federal Courts §§ 17-22.

[25] General Inv. Co. v. Lake Shore, etc., R. Co., 260 U. S. 261, 43 SCt 106, 67 L. ed. 244; Earles v. Germain Co., 265 Fed. 715; Rubber, etc., Harness Trimming Co. v. John L. Whiting-J. J. Adams Co., 210 Fed. 393; First Nat. Bank v. Merchants' Bank, 37 Fed. 657, 2 LRA 469; Southwestern Gas, etc., Co. v. Raines, (Tex. Commn. A.) 238 SW 904 [rev (Civ. A.) 218 SW 545]. And see cases infra note 26.

[26] U. S.—Great Northern R. Co. v. Galbreath Cattle Co., 271 U. S. 99, 46 SCt 439, 70 L. ed. 854 [rev sub nom. Phelps v. Great Northern R. Co., 66 Mont. 198, 213 P 610, 71 Mont. 56, 227 P 65]; Central Coal, etc., Co. v. Ocepek, 261 U. S. 605, 43 SCt 361, 67 L. ed. 823 [rev (Ark.) 244 SW 337]; Lee v. Chesapeake, etc., R. Co., 260 U. S. 653, 43 SCt 230, 67 L. ed. 443 [overr Ex p. Wisner, 203 U. S. 449, 27 SCt 150, 51 L. ed. 264; and qualifying Re Moore, 209 U. S. 490, 28 SCt 585, 52 L. ed. 904; General Inv. Co. v. Lake Shore, etc., R. Co., 260 U. S. 261, 43 SCt 106, 67 L. ed. 244; Atlantic Corp. v. U. S. Shipping Bd. Emergency Fleet Corp., 286 Fed. 222; Cuban Trading Co. v. Black Diamond SS. Corp., 277 Fed. 857; In re Red Cross Line, 277 Fed. 853; Earles v. Germain Co., 265 Fed. 715; Sanders v. Western Union Tel. Co., 261 Fed. 697; Matarazzo v. Hustis, 256 Fed. 882; James v. Amarillo City Light, etc., Co., 251 Fed. 337; Hohenberg v. Mobile Liners, 245 Fed. 169; Sawickas v. Singer Mfg. Co., 241 Fed. 600; Louisville, etc., R. Co. v. Western Union Tel. Co., 218 Fed. 91; Cincinnati, etc., R. Co. v. Orr, 215 Fed. 261; Rome Petroleum, etc., Co. v. Hughes Specialty Well Drilling Co., 130 Fed. 585; Amsinck v. Balderston, 41 Fed. 641; Burck v. Taylor, 39 Fed. 581 [aff 152 U. S. 634, 14 SCt 696, 38 L. ed. 578]; First Nat. Bank v. Merchants' Bank, 37 Fed. 657, 2 LRA 469; Kansas City, etc., R. Co. v. Interstate Lumber Co., 37 Fed. 3 [disappr Harold v. Iron Silver Min. Co., 33 Fed. 529].

Ark.—American R. Express Co. v. Davis, 158 Ark. 493, 250 SW 540; Missouri Pac. R. Co. v. Moore, 158 Ark. 643, 249 SW 367; Missouri Pac. R. Co. v. Phillips, 158 Ark. 643, 249 SW 356; Missouri Pac. R. Co. v. Tompkins, 157 Ark. 16, 247 SW 54.

Miss.—Louisville, etc., R. Co. v. Garnett, 132 Miss. 468, 96 S 519 [overr 129 Miss. 795, 93 S 241].

Okl.—Chicago, etc., R. Co. v. Bond, 254 P 18.

Porto Rico.—American Rice Mill-

In General. Broadly speaking, any suit at law or in equity is removable from a state court to a federal court when the requisite jurisdictional facts appear, whether it be an ordinary action or suit, or any other proceeding carried on in the ordinary judicial tribunals of the state by which an individual pursues a remedy which the law affords,[27] providing it has actually been brought[28] and has not been dismissed[29] nor the issues finally disposed of and final judgment rendered.[30] It is essential, however, to the removal of a cause other than a criminal prosecution that it be a suit or action, within the meaning of the law of the state in the courts of which it is brought, as distinguished from a mere administrative or other nonjudicial proceeding,[31] although a decision of the state court that a statutory proceeding is not a suit or action is not controlling on the federal court.[32] Thus a proceeding pending not in a court of justice, but before an administrative board or commission, is not a suit, so as to be removable as such,[33] although if the finding or decision of such board or commission is filed in or reported to a court having power to determine questions of law and fact, and in which there are parties litigant to contest the case on the one side and the other,[34] or an appeal is taken thereto,[35] it becomes a suit within the meaning of the removal statutes;[36] and it has been held that a petition of intervention merely filed in a pending action, under the practice prevailing in the state court, without service of notice or process, does not constitute a suit so as to render the matter removable.[37]

In what court brought. Since the statutes providing for the removal of causes from a state to a federal court make no distinction between superior and inferior courts, or between courts of record and not of record, or between courts of general and of limited jurisdiction,[38] an action instituted before a

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ing Co. v. Armour, 12 Porto Rico Fed. 362.

Tex.—Southwestern Gas, etc., Co. v. Raines, (Commn. A.) 238 SW 904 [rev (Civ. A.) 218 SW 545].

[a] **In Hawaii** the rule is the same as to the removal of a cause from a territorial court to the federal court. Corn v. Wardell, 4 Hawaii Fed. 605.

[b] **Leading cases** supporting the rule stated in the text are: Lee v. Chesapeake, etc., R. Co., 260 U. S. 653, 43 SCt 230, 67 L. ed. 443 [overr Re Wisner, 203 U. S. 449, 27 SCt 150, 51 L. ed. 264; and qualifying Re Moore, 209 U. S. 490, 28 SCt 585, 706, 52 L. ed. 904]; General Inv. Co. v. Lake Shore, etc., R. Co., 260 U. S. 261, 43 SCt 106, 67 L. ed. 244.

Court to which cause may be removed see infra § 264.

[27] In re Silvies River, 199 Fed. 495. See Stockton v. Oregon Short Line R. Co., 170 Fed. 627 (applying the rule).

[28] English v. Supreme Conclave I. O. H., 235 Fed. 630 (holding that complainant has filed a bill in equity in a state court for an injunction, and a temporary restraining order and an order to show cause have been made, a suit has been brought, and it would seem that complainant is estopped to assert, in opposing removal, that no suit is pending); Williston v. Raymond, 213 Fed. 527 (holding that a suit is pending, notwithstanding no summons has been served, where an order of civil arrest has been issued against defendant and defendant has attempted to enter a general appearance).

[29] New England Mortg. Security Co. v. Aughe, 12 Nebr. 504, 11 NW 753.

[30] Cooney v. Isaacks, (Tex. Civ. A.) 173 SW 901.

[31] In re Johnson Oil, etc., Co., 26 F. (2d) 951; Coyle v. Stern, 193 Fed. 582, 113 CCA 450; In re Iowa, etc., Constr. Co., 6 Fed. 799, 2 McCrary 178. See Fidelity Nat. Bank, etc., Co. v. Swope, 274 U. S. 123, 47 SCt 511, 71 L. ed. 959 [rev 2 F. (2d) 676 (aff sub nom Abernathy v. Fidelity Nat. Bank, etc., Co., 274 Fed. 801)]; Caldwell County Drainage Dist. No. 19 v. Chicago, etc., R. Co., 198 Fed. 253; Coyle v. Stern, 193 Fed. 582, 113 CCA 450; Banigan v. Worcester, 30 Fed. 392; Claflin v. Robbins, 5 F. Cas. No. 2,776, 1 Flipp. 603 (all recognizing the rule). And see cases infra notes 33, 37.

[a] **Proceedings held to be suits.**—(1) A proceeding under a statute authorizing persons whose lands are affected by a proposed drainage ditch to file exceptions to assessments for benefits, and providing for a hearing and the taking of evidence in the county court, and an appeal from its orders. Caldwell County Drain. Dist. No. 19 v. Chicago, etc., R. Co., 198 Fed. 253. (2) A statutory proceeding for the appointment by the court of commissioners to assess damages suffered by plaintiff by reason of the division of the water of a stream. Banigan v. Worcester, 30 Fed. 392. (3) A proceeding under a statute regulating the administration of assignments in trust for the benefit of creditors. Claflin v. Robbins, 5 F. Cas. No. 2,776, 1 Flipp. 603. (4) Attachment served by serving a garnishment summons containing a return of service. Dulion v. S. A. Lynch Enterprise Finance Corp., 40 Ga. A. 431, 149 SE 812. (5) Proceedings, termed by the Louisiana statute "executory process," for the seizure and sale of personal property in satisfaction of a mortgage indebtedness. Coyle v. Stern, 193 Fed. 582, 113 CCA 450. (6) Proceeding under a city charter to determine judicially the legal limits of the benefit district to be assessed for a road improvement and the validity of liens to be imposed upon designated property for the cost of the improvement. Fidelity Nat. Bank, etc., Co. v. Swope, 274 U. S. 123, 47 SCt 511, 71 L. ed. 959 [rev 2 F. (2d) 676 (aff sub nom Abernathy v. Fidelity Nat. Bank, etc., Co., 274 Fed. 801)].

[32] In re The Jarnecke Ditch, 69 Fed. 161.

[33] Upshur County v. Rich, 135 U. S. 467, 10 SCt 651, 34 L. ed. 196; Delaware County v. Diebold Safe, etc., Co., 133 U. S. 473, 10 SCt 399, 33 L. ed. 674; Ex p. Oklahoma, 37 F. (2d) 862; Marchant v. Mead-Morrison Mfg. Co., 7 F. (2d) 511; U. S. v. Haviland, 297 Fed. 431; Des Moines Water Co. v. Des Moines, 206 Fed. 657, 124 CCA 445 [aff 194 Fed. 557]; In re Silvies River, 199 Fed. 495; Kaw Valley Drain. Dist. v. U. S. Trust Co., 186 Fed. 324, 108 CCA 402; Kaw Valley Drain. Dist. v. Metropolitan Water Co., 186 Fed. 315, 108 CCA 393 [certiorari den 220 U. S. 615, 31 SCt 719, 55 L. ed. 610]; Fuller v. Colfax County, 14 Fed. 177, 4 McCrary 535; Gurnee v. Brunswick, 11 F. Cas. No. 5,872, 1 Hughes 270; Missouri Pac. R. Co. v. Izard County Highway Impr. Dist. No. 1, 143 Ark. 261, 220 SW 452; Waynesville v. Smathers, 194 N. C. 131, 138 SE 613; North Carolina Corp. Commn. v. Southern R. Co., 151 N. C. 447, 66 SE 427.

[a] **Inquisition of lunacy,** conducted, as provided by statute, by a commission appointed by a judge of the superior court, is not a civil suit or action such as to be removable. U. S. v. Haviland, 297 Fed. 431.

[b] **Court acting as administrative commission.**—Even though a proceeding is had before a court, it is not a suit so as to be removable, where the court acts legislatively or administratively under power conferred upon it by statute, and does not exercise in such proceedings the judicial functions conferred upon it by the state constitution. Missouri Pac. R. Co. v. Izard County Highway Impr. Dist. No. 1, 143 Ark. 261, 220 SW 452.

Assessment and appraisal of damages on condemnation see infra § 19.

[34] Lafayette County Road Impr. Dist. No. 2 v. St. Louis Southwestern R. Co., 257 U. S. 547, 42 SCt 250, 66 L. ed. 364 [aff 265 Fed. 524]; Marchant v. Mead-Morrison Mfg. Co., 7 F. (2d) 511; St. Louis Southwestern R. Co. v. Lafayette County Road Impr. Dist. No. 2, 265 Fed. 524 [aff 257 U. S. 547, 42 SCt 250, 66 L. ed. 364]; Toccoa v. Marchbanks, 261 Fed. 684.

[35] Upshur County v. Rich, 135 U. S. 467, 10 SCt 651, 34 L. ed. 196; Delaware County v. Diebold Safe, etc., Co., 133 U. S. 473, 10 SCt 399, 33 L. ed. 674; In re Utah Constr. Co.'s Water Right, 30 F. (2d) 436; Chicago, etc., R. Co. v. Spencer, 283 Fed. 824; Chicago, etc., R. Co. v. Shelby County Drain. Dist. No. 8, 253 Fed. 491; In re Mississippi River Power Co., 241 Fed. 194; Waha-Lewiston Land, etc., Co. v. Lewiston-Sweetwater Irr. Co., 158 Fed. 137; Fuller v. Colfax County, 14 Fed. 177, 4 McCrary 535; Gurnee v. Brunswick, 11 F. Cas. No. 5,872, 1 Hughes 270; Waynesville v. Smathers, 194 N. C. 131, 138 SE 613. See Kaw Valley Drain. Dist. v. Metropolitan Water Co., 186 Fed. 315, 108 CCA 393 [certiorari den 220 U. S. 615, 31 SCt 719, 55 L. ed. 610, app dism 223 U. S. 519, 32 SCt 246, 56 L. ed. 533 [and foll Kaw Valley Drain. Dist. v. U. S. Trust Co., 186 Fed. 324, 108 CCA 402] (dictum); Tullock v. Webster County, 40 Fed. 706 (recognizing the rule). But see North Carolina Corp. Commn. v. Southern R. Co., 151 N. C. 447, 66 SE 427 (holding that an appeal to the court from the decision of the state corporation commission, in a proceeding for the removal and relocation of a railroad depot, was not a suit so as to be removable).

Appeal to higher state court as waiving or suspending right of removal see supra § 5.

[36] See cases supra notes 34, 35.

[37] In re Iowa, etc., Constr. Co., 6 Fed. 799.

[38] See statutory provisions.

justice of the peace, clothed with judicial power to hear and determine cases and render judgments, is removable where the proper elements of federal jurisdiction are present.[39] A cause can be removed only from the court of original jurisdiction, and not from an appellate court.[40]

Mere fact that federal court acquired jurisdiction of res before state court, by reason of the commencement of a suit in the former court before the suit in the latter court was instituted, does not render removable the cause pending in the state court.[40½]

[§ 12] **2. Criminal Proceeding or Proceeding of Criminal Nature.** A criminal prosecution may, of course, be removed from a court of a state to a federal court in the cases provided for by the removal statutes.[41] Obviously, however, under those provisions of such statutes referring only to civil suits and actions,[42] criminal prosecutions are not removable.[43] Moreover, a proceeding, although civil in form,[44] and even if declared by state statute to be a civil proceeding,[45] is not removable under the statutes relating to the removal of civil suits where it is in fact criminal in its nature,[46] as in the case of an action by a state or municipality or a public officer for the imposition or collection of a penalty,[47] an information in equity by a state attorney-general to enjoin the violation of an anti-trust law,[48] or an action on a recognizance for good behavior;[49] and the fact that it is joined with a count for damages will not render such a cause removable.[50] But not every proceeding founded upon a wrongful act or in which a penalty may be adjudged against defendant is for that reason unremovable under the statutory provisions applicable to civil suits:[51] thus a proceeding to recover punitive damages for a private wrong, under a statute providing for such recovery, is not unremovable as being penal in its nature;[52] nor is an action for damages for wrongful death,[53] even though the state statute creating the cause of action therefor provides also for the payment of a fine to the decedent's estate if the wrongdoer is convicted of crime in causing the death.[54]

Commencement. Until an indictment has been found or an information has been filed against a defendant, no criminal prosecution can be said to have been commenced, so as to be removable,[55] and so one merely arrested and held to await the action of the grand jury cannot remove the proceeding at that stage.[56]

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[39] Katz v. Herschel Mfg. Co., 150 Fed. 684.

[40] Katz v. Herschel Mfg. Co., supra; Craigie v. McArthur, 6 F. Cas. No. 3,341, 4 Dill. 474, 15 AlbLJ (N. Y.) 121. Compare Brodhead v. Shoemaker, 44 Fed. 518, 11 LRA 567 (holding that, since the statute provides for removal "before the trial," a proceeding for the probate of a will is removable after appeal from the probate court to the state court of general original jurisdiction, under a statute providing for trial de novo on such appeals, since the removal statute must be construed to refer to the effective or final trial).

Appeal from administrative board to court and litigation there as removable suit see supra text and notes 34, 35.

Waiver or suspension of right of removal by appealing to higher state court see supra § 5.

[40½] Mace v. Mayfield, 10 F. (2d) 231.

[41] Tennessee v. Davis, 100 U. S. 257, 25 L. ed. 648; New Hampshire v. Grand Trunk R. Co., 3 Fed. 887.

[42] See supra § 9; and see statutory provisions.

[43] New Hampshire v. Grand Trunk R. Co., 3 Fed. 887. See Harris v. State, 93 Tex. Cr. 349, 248 SW 54 (holding that there is no authority for removing a criminal prosecution for manufacturing intoxicating liquor from a state to a federal court upon a motion showing merely that the affidavit for search warrant was made in the federal court, that the federal court has concurrent jurisdiction with the state court of such prosecutions, and that the federal prohibition law is more lenient and just than the state law, and alleging that the state law is null and void as in conflict with the federal constitution).

[44] Arkansas v. St. Louis, etc., R. Co., 173 Fed. 572.

[45] Indiana v. Alleghany Oil Co., 85 Fed. 870.

[46] Chicago, etc., R. Co. v. Iowa, 145 U. S. 631, 12 SCt 978, 36 L. ed. 856; Montgomery v. Postal Telegraph-Cable Co., 218 Fed. 471; Dey v. Chicago, etc., R. Co., 45 Fed. 82; Texas v. Day Land, etc., Co., 41 Fed. 228; Ferguson v. Ross, 38 Fed. 161, 3 LRA 322; Iowa v. Chicago, etc., R. Co., 37 Fed. 497, 3 LRA 554. And see cases infra notes 47–50.

[a] **What proceedings are of criminal nature.**—In determining whether a particular proceeding is of a civil nature or of a criminal nature, the court must look to the subject matter of the litigation, and not to its form; and the test is the nature of the right asserted and at issue, and whether the wrong is to the public or to an individual. Montgomery v. Postal Tel.-Cable Co., 218 Fed. 471. See Gruetter v. Cumberland Tel., etc., Co., 181 Fed. 248 (to same effect).

[47] Chicago, etc., R. Co. v. Iowa, 145 U. S. 631, 12 SCt 978, 36 L. ed. 857; Montgomery v. Postal Tel. Cable Co., 218 Fed. 471; Arkansas v. St. Louis, etc., R. Co., 173 Fed. 572; Indiana v. Alleghany Oil Co., 85 Fed. 870; Dey v. Chicago, etc., R. Co., 45 Fed. 82; Texas v. Day Land, etc., Co., 41 Fed. 228; Ferguson v. Ross, 38 Fed. 161, 3 LRA 322; Iowa v. Chicago, etc., R. Co., 37 Fed. 497, 3 LRA 554; Southern R. Co. v. State, (Ind. A.) 72 NE 174.

[48] Moloney v. American Tobacco Co., 72 Fed. 801. But see Ohio v. Swift, 270 Fed. 141 [certiorari den 257 U. S. 633 mem, 42 SCt 47 mem, 66 L. ed. 407 mem, app dism 260 U. S. 146, 43 SCt 22, 67 L. ed. 176] (where such a proceeding was held to be a civil suit in equity and not a penal action).

[49] Respublica v. Cobbet, 3 Dall. (Pa.) 467, 1 L. ed. 683.

[50] Texas v. Day Land, etc., Co., 49 Fed. 593.

[51] See cases infra this note; and infra notes 52–54.

[a] **Particular proceedings held removable as civil suits.**—(1) A suit by state commissioners to enjoin a railroad company from violating a state statute, and their order concerning rates. Missouri, etc., R. Co. v. Hickman, 183 U. S. 53, 22 SCt 18, 46 L. ed. 78 [rev 151 Mo. 644, 52 SW 351]; Hickman v. Missouri, etc., R. Co., 97 Fed. 113. (2) An action by the state to enjoin a federal receiver from destroying a railroad. State v. Frost, 113 Wis. 623, 88 NW 912, 89 NW 915. (3) A proceeding to punish a revenue collector for contempt of court. McCullough v. Large, 20 Fed. 309. (4) A summary statutory proceeding by a landlord to eject a tenant. Gallatin v. Sherman, 77 Fed. 337. (5) A statutory proceeding for the collection of delinquent taxes. In re Stutsman County, 88 Fed. 337. Compare Chicago, etc., R. Co. v. Com., 115 Ky. 278, 72 SW 1119, 24 KyL 2124 (where removal of such a proceeding was denied, but on the ground that a state is not a citizen within the meaning of the statute providing for the removal of civil suits between citizens of different states). (6) A suit by a state prosecuting attorney for an injunction and a receiver of the property of a corporation, violating the state anti-trust laws. Ohio v. Swift, 270 Fed. 141 [certiorari den 257 U. S. 633 mem, 42 SCt 47 mem, 66 L. ed. 407 mem, app dism 260 U. S. 146, 43 SCt 22, 67 L. ed. 176]. But see Moloney v. American Tobacco Co., 72 Fed. 801 (where such a proceeding was held to be criminal in its nature and not a civil suit).

Quo warranto see infra § 13.

[52] Gruetter v. Cumberland Tel., etc., Co., 181 Fed. 248, 251.

"Where the statute does not create any criminal offense or provide for any criminal prosecution or for the recovery by the state of any fine or penalty for any public wrong, but merely provides a money penalty for a private wrong, recoverable by the aggrieved party for his own benefit, a suit brought to recover such penalty is in its essence one of a civil nature, even though the penalty imposed by the statute amounts to punitive damages, and is hence removable to the federal court." Gruetter v. Cumberland Tel., etc., Co., supra.

[53] Brisenden v. Chamberlain, 53 Fed. 307. And see cases infra note 54.

[54] Malloy v. American Hide, etc., Co., 148 Fed. 482; Boston, etc., R. Co. v. Hurd, 108 Fed. 116, 47 CCA 615, 56 LRA 193 [certiorari den 184 U. S. 700 mem, 22 SCt 939 mem, 46 L. ed. 765 mem].

[55] Virginia v. Paul, 148 U. S. 107, 13 SCt 536, 36 L. ed. 386; Georgia v. O'Grady, 10 F. Cas. No. 5,352, 3 Woods 496. See Ex p. Huston, 282 Fed. 723 (apparently recognizing the rule). Compare Virginia v. Bingham, 88 Fed. 561 (holding that a prosecution which under the state law is to be commenced upon information and not by

[§ 13] **3. Quo Warranto.**[57] An action in the nature of a quo warranto, even if it is begun by information, is to be regarded as a civil suit and may be removed from a state court to a federal court when it arises under the constitution or laws of the United States.[58]

[§ 14] **4. Mandamus.** An original and independent action for a writ of mandamus, brought for the purpose of securing relief by such writ, is not a suit of a civil nature at law or in equity, within the meaning of the statutes authorizing the removal of such suits from a court of a state to a federal court.[59] Moreover, inasmuch as the inferior federal courts have no jurisdiction to issue the writ in an independent action,[60] such an action when brought in a state court is for that reason also not removable, notwithstanding diversity of citizenship or the existence of a federal question,[61] since the statutes authorize the removal in such cases of only those suits of which the federal courts are given jurisdiction.[62] The form of the action is not controlling, however, as to its removability, but the court must look beyond to its purpose,[63] and when a proceeding is in fact equitable, the circumstance that it is in form an action for mandamus will not prevent it from being removed;[64] but a mandamus action is not rendered removable because plaintiff applies therein for a temporary injunction as an ancillary remedy,[65] or applies for the appointment of a receiver in case the writ shall be violated.[66]

[§ 15] **5. Injunction.** A suit for a mandatory injunction is one which is removable from a state court to a federal court, under the statutes providing for the removal of civil suits in equity, where the jurisdictional requisites are present.[67]

[§ 16] **6. Probate Proceeding—a. In General.** An application for or resistance to the probate of a will is not a suit of a civil nature at law or in equity within the meaning of the statutes providing for the removal of such suits from a state court to a federal court,[68] and so is not removable, either originally[69] or on appeal.[70] Similarly, a proceeding in the court by which a will was admitted to probate, to set aside the probate thereof, cannot be removed.[71] A bill in equity, however, to establish a lost will,[72] or to annul a will as a muniment of title and to limit the operation of the decree admitting it to probate,[73] is a suit which may be removed where the jurisdictional facts exist.

[§ 17] **b. Administration of Decedent's Estate.** Inasmuch as the federal courts have no jurisdiction to undertake the general administration of a decedent's estate,[74] a proceeding therefor cannot be removed from a state court to a federal court,[75] in view

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indictment is not for that reason unremovable, commencement in either manner as prescribed by the law of the state being sufficient).

[56] Virginia v. Paul, 148 U. S. 107, 13 SCt 536, 37 L. ed. 386 [disappr North Carolina v. Kirkpatrick, 42 Fed. 689; Georgia v. Bolton, 11 Fed. 217; Georgia v. Port, 3 Fed. 117, 4 Woods 513]; Pennsylvania v. Artman, 19 F. Cas. No. 10,952, 3 Grant (Pa.) 436.

Time for removal in general see infra §§ 205-211.

[57] **Suit by stockholder to dissolve corporation** see infra § 23.

[58] Ames v. Kansas, 111 U. S. 449, 4 SCt 437, 28 L. ed. 482; Illinois v. Illinois Cent. R. Co., 33 Fed. 721; Dougherty v. Michigan Bell Tel. Co., 235 Mich. 416, 209 NW 200.

[59] U. S.—Rosenbaum v. Bauer, 120 U. S. 450, 7 SCt 633, 30 L. ed. 743; Washington v. Puget Sound Tract., etc., Co., 243 Fed. 748; Kelly v. Grand Circle W. W., 129 Fed. 830; Indiana v. Lake Erie, etc., R. Co., 85 Fed. 1; Ohio v. Columbus, etc., R. Co., 48 Fed. 626. See In re Red Cross Line, 277 Fed. 853 (where a statutory proceeding to compel compliance with an arbitration agreement was treated by the court as of the nature of mandamus and held not to be a suit within the meaning of the removal statutes). Contra Peo. v. Colorado Cent. R. Co., 42 Fed. 638; Washington Imp. Co. v. Kansas Pac. R. Co., 29 F. Cas. No. 17,242, 5 Dill. 489.

Ind.—Western Union Tel. Co. v. State, 165 Ind. 492, 76 NE 100, 3 LRA NS 153.

Kan.—State v. Flannelly, 96 Kan. 833, 154 P 235.

La.—State v. Texas, etc., R. Co., 52 La. Ann. 1850, 28 S 284; State v. Johnson, 29 La. Ann. 399.

N. C.—North Carolina Public Serv. Co. v. Southern Power Co., 181 N. C. 356, 107 SE 226; North Carolina Public Serv. Co. v. Southern Power Co., 180 N. C. 335, 104 SE 872; North Carolina Corp. Commn. v. Southern R. Co., 151 N. C. 447, 66 SE 427.

[60] See Mandamus § 523 text and note 95.

[61] North Carolina Public Serv. Co. v. Southern Power Co., 282 Fed. 837 [certiorari granted 260 U. S. 716 mem, 43 SCt 94 mem, 67 L. ed. 478 mem, certiorari dism 263 U. S. 508, 44 SCt 164, 68 L. ed. 413]; State v. White River Valley R. Co., 27 S. D. 65, 129 NW 1034. See North Carolina Corp. Commn. v. Southern R. Co., 151 N. C. 447, 66 SE 427 (apparently recognizing the rule).

[62] See cases supra note 61.

Removability as depending upon original jurisdiction of federal court in general see supra § 10.

[63] Washington v. Pacific Tel., etc., Co., 1 F. (2d) 327.

[64] Washington v. Seattle, etc., R. Co., 2 F. (2d) 264; Washington v. Seattle, etc., R. Co., 1 F. (2d) 605; Washington v. Pacific Tel., etc., Co., 1 F. (2d) 327; North Carolina Public Serv. Co. v. Southern Power Co., 282 Fed. 837 [certiorari granted 260 U. S. 716 mem, 43 SCt 94 mem, 67 L. ed. 478 mem, certiorari dism 263 U. S. 508, 44 SCt 164, 68 L. ed. 413]; Washington v. Tacoma R., etc., Co., 244 Fed. 989.

Removability of suits for mandatory injunction see infra § 15.

[65] North Carolina Public Serv. Co. v. Southern Power Co., 181 N. C. 356, 107 SE 226.

[66] Washington v. Puget Sound Tract., etc., Co., 243 Fed. 748.

[67] Washington v. Seattle, etc., R. Co., 2 F. (2d) 264; Washington v. Seattle, etc., R. Co., 1 F. (2d) 605; Washington v. Pacific Tel., etc., Co., 1 F. (2d) 327; North Carolina Public Serv. Co. v. Southern Power Co., 282 Fed. 837 [certiorari granted 260 U. S. 716 mem, 43 SCt 94 mem, 67 L. ed. 478 mem, certiorari dism 263 U. S. 508, 44 SCt 164, 68 L. ed. 413].

Removability of original proceeding for writ of mandamus see supra § 14.

[68] See cases infra notes 69, 70.

Necessity that proceeding be "suit" to be removable see supra § 11.

[69] Meadow v. Nash, 250 Fed. 911; Copeland v. Bruning, 72 Fed. 5; Hargroves v. Redd, 43 Ga. 142; Powell v. Watkins, 172 N. C. 244, 90 SE 207. Compare Brodhead v. Shoemaker, 44 Fed. 518, 11 LRA 567 (holding that probate of a will in "common form," as provided by the Georgia statute, under which the probate is not conclusive upon any one, is a probate proceeding pure and simple; but that probate in "solemn form," as provided by such statute, under which notice is given to all the heirs and the probate is conclusive, is a proceeding inter partes, and so when the heirs are brought in and contest the validity of the will or the capacity of the testator an issue or controversy is formed which is properly classed as a suit, and so is removable where the jurisdictional facts are present).

[a] **Proceeding is not adversary but one in rem,** and therefore it is not a suit within the meaning of the removal statutes. Powell v. Watkins, 172 N. C. 244, 90 SE 207.

[70] Wahl v. Franz, 100 Fed. 680, 40 CCA 638, 49 LRA 62 [rev 81 Fed. 9]; In re Aspinwall, 83 Fed. 851 [aff 90 Fed. 675, 33 CCA 217]; In re Cilley, 58 Fed. 977; In re Frazer, 9 F. Cas. No. 5,068, 18 AlbLJ (N. Y.) 353.

Removal after appeal in general see supra § 11.

[71] Reed v. Reed, 31 Fed. 49.

[72] Southworth v. Adams, 4 Fed. 1, 9 Biss. 521.

[73] Gaines v. Fuentes, 92 U. S. 10, 23 L. ed. 524. See Southworth v. Howard, 11 Reporter 46.

[74] See Executors and Administrators § 28.

[75] White v. Keown, 261 Fed. 814; Clark v. Guy, 114 Fed. 783; In re Foley, 80 Fed. 949; In re Foley, 76 Fed. 390; Foley v. Hartley, 72 Fed. 570; McElmurray v. Loomis, 31 Fed. 395; Burnside's Succ., 34 La. Ann. 728.

[a] **Rule applied.**—(1) A proceeding in a probate court for the set-

of the rule that a cause, to be removable, must be one of which the federal court could have taken original jurisdiction.[76] But an adversary proceeding which is otherwise within the scope of the statutes providing for removal is not rendered unremovable by reason of the fact that it is initiated in a probate court or is based upon rights in or claims against the estate of a decedent;[77] and a suit in equity to compel an executor to assent to a legacy to plaintiff is independent of and distinct from the administration of the estate and so is removable where the jurisdictional facts exist.[78]

[§ 18] **7. Suit for Divorce.**[79] Inasmuch as the federal courts have no jurisdiction of suits for divorce,[80] such a suit cannot be removed from a state court to a federal court under the statutory provision authorizing the removal in certain cases of civil suits of which the federal courts are given jurisdiction.[81]

[§ 19] **8. Condemnation Proceeding.** A judicial proceeding for the condemnation of land, instituted upon notice and in which interested parties are given an opportunity to oppose the taking, are removable from a state court to a federal court where the requisite difference of citizenship exists between the corporation or public agency for whose benefit the property is to be condemned and the respondent,[82] or when the proceeding arises under the constitution or laws of the United States;[83] and the existence of a controversy as to the right to condemn the lands, distinct from that as to the amount of damages to be awarded, does not prevent a removal,[84] nor does the fact that the removal of the condemnation suit and its trial in the federal court may have an indirect effect upon the proceedings as to other parties in the state court.[85] A condemnation proceeding brought by a state for its own benefit, however, is not removable on the ground of diversity of citizenship,[86] since a state is not a citizen within the meaning of the removal statutes.[87]

Appraisal and assessment of damages. A proceeding for the appointment of commissioners to appraise property to be taken by right of eminent domain, and to assess damages for the taking, is ordinarily a mere administrative proceeding and not a suit, and therefore not removable;[88] and, similarly, proceedings upon an application made to a state railroad or public utility commission for its consent to the condemnation of property are not removable.[89] If, however, the appointment of commissioners is made on notice, and an opportunity is given interested parties to oppose the condemnation, the proceeding is removable where the jurisdictional facts

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tlement of the accounts of an executor is not removable (Clark v. Guy, 114 Fed. 783; DuVivier v. Hopkins, 116 Mass. 125, 17 AmR 141); (2) nor is a proceeding by the widow for a partial distribution of the estate of decedent, and for a determination that part of the same was separate property, and the rest annuity property (In re Foley, 80 Fed. 949), (3) nor an application by a widow for an heir's support under a statute providing therefor (McElmurray v. Loomis, 31 Fed. 395), (4) nor a proceeding for the removal of an executor and the appointment of his successor (White v. Keown, 261 Fed. 814; Burnside's Succ., 34 La. Ann. 728).

[76] See supra § 10.

[77] See cases infra this note.

[a] **Particular proceedings held removable.**—(1) Proceeding in a court of probate against the administrator of an estate, to compel payment of a debt owed by the decedent during his life. Hess v. Reynolds, 113 U. S. 73, 5 SCt 377, 28 L. ed. 927; Schneider v. Eldredge, 125 Fed. 638. But see DuVivier v. Hopkins, 116 Mass. 125, 17 AmR 141 (holding that, where the utmost effect of such proceedings is to modify the list of claims and regulate the settlement of the accounts of the executor or administrator, and there is no judgment to be followed by execution, the matter is a probate proceeding and not a suit which can be removed). (2) Contest in regard to the distribution of an estate. Craigie v. McArthur, 6 F. Cas. No. 3,341, 4 Dill. 474, 15 AlbLJ (N. Y.) 121. (3) Action to recover a legacy. Wilson v. Smith, 66 Fed. 81. (4) Proceeding to collect inheritance taxes against certain property as that of decedent, which property is claimed by another as surviving joint tenant. Smith v. Douglas County, 254 Fed. 244, 155 CCA 482. (5) Application by an illegitimate child to be permitted to share in a decedent's estate because of the alleged acknowledgment of the petitioner's paternity in accordance with the state statute. In re Foley, 76 Fed. 390. (6) Special proceeding by an administrator for leave to sell the land of his decedent for the payment of debts. Elliott v. Shuler, 50 Fed. 454. (7) Suit by one executor against another, who was also the surviving partner of the decedent, to compel an account of his administration of the partnership assets. Filer v. Levy, 17 Fed. 609.

[78] Camp v. Field, 189 Fed. 285.

[79] **Removal as precluded by nonpecuniary standard for matter in controversy** see infra § 30.

[80] See Divorce § 31.

[81] Bowman v. Bowman, 30 Fed. 849; Johnson v. Johnson, 13 Fed. 193; Chappell v. Chappell, 86 Md. 532, 39 A 984.

Removability as dependent upon original jurisdiction of federal court in general see supra § 10.

[82] Madisonville Tract. Co. v. St. Bernard Min. Co., 196 U. S. 239, 25 SCt 251, 49 L. ed. 462; Searl v. Lake County School Dist. No. 2, 124 U. S. 197, 8 SCt 460, 31 L. ed. 415; Mississippi, etc., Boom Co. v. Patterson, 98 U. S. 403, 25 L. ed. 206; Fishblatt v. Atlantic City, 174 Fed. 196. See Kaw Valley Drain. Dist. v. Metropolitan Water Co., 186 Fed. 315, 108 CCA 393 [certiorari den 220 U. S. 615, 31 SCt 719, 55 L. ed. 610, app dism 223 U. S. 519, 32 SCt 246, 56 L. ed. 533, and foll Kaw Valley Drain. Dist. v. U. S. Trust Co., 186 Fed. 324, 108 CCA 402] (dictum). But see Baltimore, etc., R. Co. v. Pittsburg, etc., R. Co., 17 W. Va. 812 (holding that a foreign corporation cannot institute proceedings in the United States courts to condemn the land of a citizen of the state for the use of the corporation, and that proceedings of that nature instituted in the state courts therefore cannot be removed to the federal courts).

Diversity of citizenship in general see infra §§ 120-179.

[83] Texas, etc., R. Co. v. Kirk, 115 U. S. 1, 5 SCt 1113, 29 L. ed. 319; Helena Power Transmission Co. v. Spratt, 146 Fed. 310.

[84] Madisonville Traction Co. v. St. Bernard Min. Co., 196 U. S. 239, 25 SCt 251, 49 L. ed. 462; Searl v. Lake County School Dist. No. 2, 124 U. S. 197, 8 SCt 460, 31 L. ed. 415; Helena Power Transmission Co. v. Spratt, 146 Fed. 310; Sugar Creek, etc., R. Co. v. McKell, 75 Fed. 34.

[85] Union Pac. R. Co. v. Myers, 115 U. S. 1, 5 SCt 1113, 29 L. ed. 319.

[a] **Thus** where proceedings were had for the condemnation of property for a public purpose, under a statute providing for the assessment of the costs of the property taken against the property benefited by the improvement, and providing also that any defendant to such proceedings might appeal to the state court, in which the issue should thereupon be tried de novo, the removal to the federal court of a cause so appealed by a defendant is not prevented by the mere fact that the proceedings in the state court as to the other parties affected by the condemnation and assessment will have to await the determination by the federal court as to the right to condemn property for the proposed improvement and as to the value of the property taken from the removing defendant, and the assessments against the property benefited will be indirectly affected by such determination. Pacific R. Removal Cases, 115 U. S. 1, 5 SCt 1113, 29 L. ed. 319.

[86] Madisonville Traction Co. v. St. Bernard Min. Co., 130 Fed. 789.

[87] See infra § 127.

[88] Searl v. Lake County School Dist. No. 2, 124 U. S. 197, 8 SCt 460, 31 L. ed. 415; Texas, etc., R. Co. v. Kirk, 115 U. S. 1, 5 SCt 1113, 29 L. ed. 319; Mississippi, etc., Boom Co. v. Patterson, 98 U. S. 403, 25 L. ed. 206; Kaw Valley Drain. Dist. v. United States Trust Co., 186 Fed. 324, 108 CCA 402; Kaw Valley Drain. Dist. v. Metropolitan Water Co., 186 Fed. 315, 108 CCA 393 [certiorari den 220 U. S. 615, 31 SCt 719, 55 L. ed. 610, and app dism 223 U. S. 519, 32 SCt 246, 56 L. ed. 533]; Hartford, etc., R. Co. v. Montague, 94 Fed. 227; Waynesville v. Smathers, 194 N. C. 131, 138 SE 613. See Alabama Power Co. v. Gregory Hill Gold Min. Co., 5 F. (2d) 705 (dictum); Des Moines Water Co. v. Des Moines, 206 Fed. 657, 124 CCA 445 [aff 194 Fed. 557] (holding that such a proceeding is not a suit at least where it has progressed only so far as the organization of the board).

Removability of administrative proceedings generally see supra § 11.

[89] New York, etc., R. Co. v. Cockcroft, 46 Fed. 881.

exist;[90] and where, after appraisal has been made, process is issued by the court which appointed the commissioners directing the owner to show cause why their report should not be confirmed,[91] or a trial of fact issues may be had, either in that court[92] or in another court after appeal taken,[93] the proceeding is such a suit as to be removable in a proper case.

[§ 20] 9. Action Arising under Federal Employers' Liability Act[94]

—a. In General. Under the express provisions of the statutes relating to the removal of causes from a state court to a federal court[95] and of the federal Employers' Liability Act,[96] no action arising under that act and brought in a state court of competent jurisdiction is removable to a federal court on any ground,[97] except when brought against a receiver appointed by a federal court to take charge of and operate the business of a carrier.[98] Although it has been held that the nonremovability of such actions is a privilege extended to plaintiff and so may be waived by him,[99] the better view appears to be that it is a positive prohibition or restriction upon the jurisdiction of the federal courts as a class, which cannot be waived by the parties.[1] Since the federal act is applicable only to common carriers by railroad, it does not prevent the removal of actions by or in behalf of employees of other persons or corporations although founded upon the negligence of a carrier.[2]

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[90] Searl v. Lake County School Dist. No. 2, 124 U. S. 197, 8 SCt 460, 31 L. ed. 415; Alabama Power Co. v. Gregory Hill Gold Min. Co., 5 F. (2d) 705; Union Terminal R. Co. v. Chicago, etc., R. Co., 119 Fed. 209; Postal Tel. Cable Co. v. Southern R. Co., 88 Fed. 803 [writ of error dism 93 Fed. 393, 35 CCA 366 (aff 179 U. S. 641, 21 SCt 249, 45 L. ed. 355)]; Sugar Creek, etc., R. Co. v. McKell, 75 Fed. 34; Kansas City, etc., R. Co. v. Interstate Lumber Co., 37 Fed. 3; Banigan v. Worcester, 30 Fed. 392; Colorado Midland R. Co. v. Jones, 29 Fed. 193; Mineral Range R. Co. v. Detroit, etc., Cotton Co., 25 Fed. 515; Northern Pac. Terminal Co. v. Lowenberg, 18 Fed. 339.

[91] Madisonville Traction Co. v. St. Bernard Min. Co., 196 U. S. 239, 25 SCt 251, 49 L. ed. 462.

[92] Minneapolis, etc., R. Co. v. Nestor, 50 Fed. 1.

[93] Searl v. Lake County School Dist. No. 2, 124 U. S. 197, 8 SCt 460, 31 L. ed. 415; Texas, etc., R. Co. v. Kirk, 115 U. S. 1, 5 SCt 1113, 29 L. ed. 319; Mississippi, etc., Boom Co. v. Patterson, 98 U. S. 403, 25 L. ed. 206; Toccoa v. Marchbanks, 261 Fed. 684; Fishblatt v. Atlantic City, 174 Fed. 196; Kirby v. Chicago, etc., R. Co., 106 Fed. 551; Terre Haute v. Evansville, etc., R. Co., 106 Fed. 545; Hudson River R., etc., Co. v. Day, 54 Fed. 545; Warren v. Wisconsin Valley R. Co., 29 F. Cas. No. 17,204, 6 Biss. 425; Myers v. Chicago, etc., R. Co., 118 Iowa 312, 91 NW 1076.

Removability of administrative proceeding after appeal in general see supra § 11.

[94] **Removal of causes arising under the laws of the United States in general** see infra §§ 46-89.

[95] USCA tit 28 § 71.

[96] USCA tit 45 § 56.

[97] U. S.—Great Northern R. Co. v. Alexander, 246 U. S. 276, 38 SCt 237, 62 L. ed. 713 [dism writ of error 51 Mont. 565, 154 P 914, LRA 1918E 852]; Southern R. Co. v. Puckett, 244 U. S. 571, 37 SCt 703, 61 L. ed. 1321 [aff 16 Ga. A. 551, 85 SE 809]; St. Joseph, etc., R. Co. v. Moore, 243 U. S. 311, 37 SCt 278, 61 L. ed. 741 [aff 268 Mo. 31, 186 SW 1035]; Southern R. Co. v. Lloyd, 239 U. S. 496, 36 SCt 210, 60 L. ed. 402 [aff 166 N. C. 24, 81 SE 1003]; Kansas City Southern R. Co. v. Leslie, 238 U. S. 599, 35 SCt 844, 59 L. ed. 1478 [rev 112 Ark. 305, 167 SW 83, AnnCas1915B 834; and overr Van Brimmer v. Texas, etc., R. Co., 190 Fed. 394]; Boyle v. Chicago, etc., R. Co., 42 F. (2d) 633; Elliott v. Wheelock, 34 F. (2d) 213; Reese v. Southern R. Co., 26 F. (2d) 367; Knapp v. Byram, 21 F. (2d) 226; Thompson v. Chicago, etc., R. Co., 14 F. (2d) 230; Reindahl v. Chicago, etc., R. Co., 291 Fed. 924; Todd v. Chicago, etc., R. Co., 291 Fed. 910; Frazier v. Hines, 260 Fed. 874; Deuel v. Chicago, etc., R. Co., 253 Fed. 857; Mitchell v. Southern R. Co., 247 Fed. 819; Givens v. Wight, 247 Fed. 233; Martin v. New York, etc., R. Co., 241 Fed. 696; Flas v. Illinois Cent. R. Co., 229 Fed. 319; Peek v. Boston, etc., R. Co., 223 Fed. 448; Lombardo v. Boston, etc., R. Co., 223 Fed. 427; Strother v. Union Pac. R. Co., 220 Fed. 731; Smith v. Camas Prarie R. Co., 216 Fed. 799; Gibson v. Bellingham, etc., R. Co., 213 Fed. 488; Eng v. Southern Pac. Co., 210 Fed. 92; Patton v. Cincinnati, etc., R. Co., 208 Fed. 29; Teel v. Chesapeake, etc., R. Co., 204 Fed. 918, 123 CCA 240, 47 LRANS 21; Rice v. Boston, etc., R. Co., 203 Fed. 580; Stafford v. Norfolk, etc., R. Co., 202 Fed. 605; Kelly v. Chesapeake, etc., R. Co., 201 Fed. 602; De Atley v. Chesapeake, etc., R. Co., 201 Fed. 591 [disappr Van Brimmer v. Texas, etc., R. Co., 190 Fed. 394]; McChesney v. Illinois Cent. R. Co., 197 Fed. 85; Hulac v. Chicago, etc., R. Co., 194 Fed. 747; Ullrich v. New York, etc., R. Co., 193 Fed. 768; Lee v. Toledo, etc., R. Co., 193 Fed. 685; Saiek v. Pennsylvania R. Co., 193 Fed. 303; Strauser v. Chicago, etc., R. Co., 193 Fed. 293; Symonds v. St. Louis, etc., R. Co., 192 Fed. 353. See Geffers v. Chicago, etc., R. Co., 25 F. (2d) 774 (applying the rule); Aldredge v. Baltimore, etc., R. Co., 20 F. (2d) 655 [certiorari den 275 U. S. 550, 48 SCt 114, 72 L. ed. 420] (apparently recognizing the rule); Chunes v. Duluth, etc., R. Co., 292 Fed. 153 (recognizing the rule); Thomas v. Chicago, etc., R. Co., 202 Fed. 766 (where the question was raised but not decided).

Ark.—Lusk v. Osborne, 127 Ark. 170, 191 SW 944; St. Louis, etc., R. Co. v. Conarty, 106 Ark. 421, 155 SW 93 [rev on other grounds 238 U. S. 243, 35 SCt 785, 59 L. ed. 1290]; Kansas City Southern R. Co. v. Cook, 100 Ark. 467, 140 SW 579.

Ga.—Mitchell v. Southern R. Co., 23 Ga. A. 195, 98 SE 184.

Kan.—Griffith v. Midland Valley R. Co., 100 Kan. 500, 166 P 467 [certiorari den 245 U. S. 653, 38 SCt 12, 62 L. ed. 532, and writ of error dism 245 U. S. 633, 38 SCt 133, 62 L. ed. 522].

Ky.—Chesapeake, etc., R. Co. v. Shaw, 168 Ky. 537, 182 SW 653; De Atley v. Chesapeake, etc., R. Co., 147 Ky. 315, 144 SW 95.

La.—Jones v. Kansas City Southern R. Co., 137 La. 178, 68 S 401 [rev on other grounds 241 U. S. 181, 36 SCt 513, 60 L. ed. 943]; Porter v. Lancaster, 2 La. A. 47.

Minn.—Miner v. Chicago, etc., R. Co., 147 Minn. 21, 179 NW 483.

Miss.—St. Louis, etc., R. Co. v. Hays, 136 Miss. 701, 101 S 548; St. Louis, etc., R. Co. v. Kirk, 136 Miss. 608, 101 S 377.

Mo.—Westover v. Wabash R. Co., 6 SW (2d) 843 [certiorari den 278 U. S. 632 mem, 49 SCt 31 mem, 73 L. ed. 556 mem]; Moore v. St. Joseph, etc., R. Co., 268 Mo. 31, 186 SW 1035; Fish v. Chicago, etc., R. Co., 263 Mo. 106, 172 SW 340, AnnCas1916B 147; Pankey v. Atchison, etc., R. Co., 180 Mo. A. 185, 168 SW 274.

N. C.—Inge v. Seaboard Air Line R. Co., 192 N. C. 522, 135 SE 522; Lloyd v. North Carolina R. Co., 162 N. C. 485, 78 SE 489 [dist Calhoun v. Central of Georgia R. Co., 7 Ga. A. 528, 67 SE 274; Lemon v. Louisville, etc., R. Co., 137 Ky. 276, 125 SW 701 (both of which arose prior to the passage of the amendment making such causes nonremovable)].

Okl.—Ft. Smith, etc., R. Co. v. Blevins, 35 Okl. 378, 130 P 525.

S. C.—Cook v. Southern R. Co., 109 S. C. 377, 96 SE 148.

Tex.—Texas, etc., R. Co. v. Sherer, (Civ. A.) 183 SW 404; Texas, etc., R. Co. v. Rasmussen, (Civ. A.) 181 SW 212; Missouri, etc., R. Co. v. Bunkley, (Civ. A.) 153 SW 937.

See Northern Trust Co. v. Grand Trunk Western R. Co., 282 Ill. 565, 118 NE 986 (apparently recognizing the rule).

[a] **Strict construction of statutes.**—The provisions of the removal statutes and the Employers' Liability Act that no cause arising under such act shall be removable does not mean merely that a cause so arising shall not be removable because of having so arisen, but may be removable where any otherwise proper ground exists; rather, such statutory provisions prohibit the removal of such an action on any ground whatever, and the case against removability is even stronger since the adoption of the Judicial Code than it was before. De Atley v. Chesapeake, etc., R. Co., 201 Fed. 591 [disappr Van Brimmer v. Texas, etc., R. Co., 190 Fed. 394]; Missouri, etc., R. Co. v. Bunkley, (Tex. Civ. A.) 153 SW 937.

[b] **Even though cause is founded upon federal Safety Appliance Act** (1) it is not removable where it is brought under the Employers' Liability Act. St. Louis, etc., R. Co. v. Hays, 136 Miss. 701, 101 S 548; St. Louis, etc., R. Co. v. Kirk, 136 Miss. 608, 101 S 377. (2) Removal of cause arising under federal laws in general see infra §§ 46-89.

[c] **Plaintiff's pleadings as determining whether cause arises under the act.**—(1) Whether a cause arises under the federal Employers' Liability Act, so as to be unremovable, ordinarily depends upon the allegations of plaintiff's petition or complaint. Boyle v. Chicago, etc., R. Co., 42 F. (2d) 633; Geffers v. Chicago, etc., R. Co., 25 F. (2d) 774; Reindahl v. Chicago, etc., R. Co., 291 Fed. 924; Todd v. Chicago, etc., R. Co., 291 Fed. 910; Stafford v. Norfolk, etc., R. Co., 202 Fed. 605; Northern Trust Co. v. Grand Trunk Western R. Co., 282 Ill. 565, 118 NE 986; Cook v. Southern R. Co., 109 S. C. 377, 96 SE 148. (2) And where a cause on the face of plaintiff's pleadings appears to have arisen under the act, defendant, by denying that it arose in interstate commerce, cannot raise an issue of fact which will render the suit removable. Missouri Pac. R. Co. v. Hendrix, 169 Ark. 825, 277 SW 337 [certiorari den 270 U. S. 651, 46 SCt 351, 70 L. ed. 781]. (3) But if allegations as to injury in interstate commerce are fraudulently inserted for the purpose of defeating removal, they do not govern and the cause is removable if the other jurisdictional requisites exist. Boyle v. Chicago, etc., R. Co., supra; Farmers' Bank, etc., Co. v. Atchison, etc., R. Co., 25 F. (2d) 23 [rev 11 F. (2d) 993]. See Reindahl v. Chicago, etc., R. Co., 291 Fed. 924; Todd v. Chicago, etc., R. Co., 291 Fed. 810 (both recognizing the rule). Compare Gef-

Constitutionality of statutes. Inasmuch as the right of removal is purely statutory, and exists only where it has been conferred by congress,[3] there can be no question of the constitutionality of the provisions prohibiting the removal of actions arising under the Employers' Liability Act.[4]

[§ 21] **b. Actions by Seamen.** It appears to be well settled that an action for personal injuries, brought by a seaman against his employer under the statute permitting the bringing of such actions at law and providing that all statutes modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply,[5] cannot be removed from a state court to a federal court,[6] in view of the statutory provisions prohibiting the removal of actions arising under the federal Employers' Liability Act;[7] but there is some authority to the contrary.[8] An action not founded on negligence, however, is not unremovable because of such provisions;[9] nor is an action for injuries to one who is not a seaman, even though his employment has maritime relation.[10]

[§ 22] **10. Proceeding for Assessment or Collection of Tax.** A judicial proceeding for the collection of a delinquent tax or assessment is a suit, and removable as such, under the statutes authorizing the removal of causes from a state court to a federal court, where the jurisdictional requisites appear.[11] It has been held that a statutory proceeding in a state court, instituted by a municipal corporation for the assessment of the cost of a public improvement upon the benefited property, is a mere administrative proceeding and not a suit, and so not removable;[12] but there is authority for the contrary view, where interested parties are given an opportunity to resist or remonstrate against the proposed assessment and to have a trial on the issues.[13] A proceeding inter partes in a court to which an

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fers v. Chicago, etc., R. Co., 25 F. (2d) 774 (holding that, where the question whether the accident occurred in interstate commerce is doubtful, there can be no fraud in allegations that it did so occur). (4) And a mere allegation that the cause arose under the act does not prevent the removal of the action if the facts alleged do not show that it did so arise. Thomas v. Chicago, etc., R. Co., 202 Fed. 766. See to same effect Connolly v. Chicago, etc., R. Co., 3 F. (2d) 818; Chunes v. Duluth, etc., R. Co., 292 Fed. 153. But see De Atley v. Chesapeake, etc., R. Co., 201 Fed. 591 (holding that a suit for injuries to a brakeman engaged in interstate commerce against a carrier will be regarded as having been brought under the act, so far as concerns its removability, where expressly based upon such act, although the negligence charged may not be covered by the act, or the facts alleged may not make out the negligence charged).

[d] **Cause founded on common law, state statute, and federal act** (1) constitutes but one cause of action, although based on several grounds of liability, and so arises under the federal act and is unremovable so long as plaintiff is relying thereon, although if he should abandon the theory that the case arose under the federal act or at the trial should fail to show a case within the act, his right of removal would be protected and preserved. Rice v. Boston, etc., R. Co., 203 Fed. 580. See Mitchell v. Southern R. Co., 247 Fed. 819; Jones v. Southern R. Co., 236 Fed. 584; Strother v. Union Pac. R. Co., 220 Fed. 731; Ullrich v. New York, etc., R. Co., 193 Fed. 768 (all to same effect). But see Givens v. Wight, 247 Fed. 233; Flas v. Illinois Cent. R. Co., 229 Fed. 319 (both holding that the action is not unremovable where causes arising under the state statute and under the federal act are set up in separate counts, although both are based upon the same injury). (2) Change in condition of cause as permitting removal although not originally removable see infra § 26.

[e] **What is state court of competent jurisdiction.**—Although the constitution and laws of a state provide for a verdict by less than the whole number of the jury, the court is "competent", within the meaning of the provision prohibiting removal of actions under the Employers' Liability Act when brought in a court of competent jurisdiction, since it is within the authority of each state to set up its own courts and prescribe the method of trial therein. Gibson v. Bellingham, etc., R. Co., 213 Fed. 488.

[f] **Applicability of prohibition to actions on causes arising prior to its enactment.**—(1) The provisions of Act of April 5, 1910, amending the Employers' Liability Act by prohibiting removal of causes arising thereunder from a state to a federal court, have been held to relate not to the right of action but merely to the remedy, and so to prevent the removal of an action arising under such act although it is founded upon a cause arising prior to the enactment of the amendment. Teel v. Chesapeake, etc., R. Co., 204 Fed. 918, 123 CCA 240, 47 LRANS 21. (2) But there is authority for the contrary view. Ft. Smith, etc., R. Co. v. Blevins, 35 Okl. 378, 130 P 525.

[98] See infra § 105.

[99] Stephens v. Chicago, etc., R. Co., 206 Fed. 854. See Strother v. Union Pac. R. Co., 220 Fed. 731 (dictum).

[1] Mitchell v. Southern R. Co., 247 Fed. 819; Patton v. Cincinnati, etc., R. Co., 208 Fed. 29.

Consent or waiver as conferring jurisdiction on removal see supra § 2.

[2] Martin v. New York, etc., R. Co., 241 Fed. 696.

[a] **Employee of Pullman Company.**—Where one is employed solely by the Pullman Company, and the negligence on which the action is founded is chargeable both to such company and to a railroad company, the action is removable where the requisite diversity of citizenship exists, notwithstanding the federal Employers' Liability Act, since the cause of action does not arise thereunder. Martin v. New York, etc., R. Co., 241 Fed. 696.

[3] See supra § 2.

[4] Teel v. Chesapeake, etc., R. Co., 204 Fed. 918, 123 CCA 240, 47 LRANS 21; Kansas City Southern R. Co. v. Cook, 100 Ark. 467, 140 SW 579.

Constitutionality of statutes granting or restricting right of removal in general see supra § 3.

[5] Jones Act of June 5, 1920 § 33, amending LaFollette Act of March 4, 1915 § 20 [USCA tit 46 § 688].

[6] Anderson v. American, etc., SS. Co., 41 F. (2d) 950; Petterson v. Standard Oil Co., 41 F. (2d) 219; Cook v. Alaska SS. Co., 8 F. (2d) 207; Atianza v. U. S. Shipping Bd. Emergency Fleet Corp., 3 F. (2d) 845; Martin v. U. S. Shipping Bd. Emergency Fleet Corp., 1 F. (2d) 603; Herrera v. Pan-American Petroleum, etc., Co., 300 Fed. 563; Beer v. Clyde SS. Co., 300 Fed. 561 [disappr Wenzler v. Robin Line SS. Co., 277 Fed. 812; Malia v. Southern Pac. Co., 293 Fed. 902]; Reyes v. U. S. Shipping Bd. Emergency Fleet Corp., 299 Fed. 957. See Engel v. Davenport, 271 U. S. 33, 46 SCt 410, 70 L. ed. 813 (dictum).

[7] USCA tit 28 § 71; USCA tit 45 § 56.

Removability of actions arising under Employers' Liability Act in general see supra § 21.

[8] Malia v. Southern Pac. Co., 293 Fed. 902; Wenzler v. Robin Line SS. Co., 277 Fed. 812 [both disappr Beer v. Clyde SS. Co., 300 Fed. 561]. See Petterson v. Hobbs, 300 Fed. 811 (holding such an action removable at least when it involves an issue of a vessel's unseaworthiness and is strictly maritime); Lorang v. Alaska SS. Co., 298 Fed. 547 (denying motion to remand).

[9] Anderson v. Grace, 38 F. (2d) 889.

[a] **Action for assault by mate** under the captain's direction is outside the scope of the Jones Act and is not rendered unremovable by its provisions. Anderson v. Grace, 38 F. (2d) 889.

[10] Johnson v. American-Hawaiian SS. Co., 14 F. (2d) 534.

[a] **Stevedore** not being a seaman, an action by him against his employer for personal injuries is not rendered unremovable by the Jones Act § 33. Johnson v. American-Hawaiian SS. Co., 14 F. (2d) 534.

[11] In re Stutsman County, 88 Fed. 337.

[12] In re Chicago, 64 Fed. 897 [crit In re Stutsman County, 88 Fed. 337].

[13] In re Jarnecke Ditch, 69 Fed. 161.

assessment or determination of benefits has been reported by an administrative board or commission,[14] or to which an appeal from such determination has been taken and in which the matter is triable de novo,[15] is such a suit or judicial proceeding as to render the cause removable where the other elements of removability exist.

[§ 23] **11. Suit To Dissolve Corporation.**[16] A suit by a stockholder to procure the dissolution of a corporation is a civil suit and removable as such from a state court to a federal court where the other jurisdictional elements are present.[17]

[§ 24] **12. Creditor's Suit or Similar Proceeding.** A creditor's suit, founded upon a judgment of a state or federal court,[18] is such a suit as may be removed from a state court to a federal court where the requisite jurisdictional facts exist;[19] but a suit upon a claim which has not been reduced to judgment, although authorized by the state practice, is not removable,[20] since the federal court could not take original jurisdiction of such a suit, in view of the general rule making a judgment essential to the maintenance of a creditors' bill.[21] A bill in equity to enforce the lien of an attachment is removable, however, although plaintiff has merely a simple contract debt or a claim for unliquidated damages.[22]

[§ 25] **13. Ancillary Proceeding.** A suit which is merely ancillary and supplemental to one previously brought in a state court, and which is so connected with the original suit as to be an incident thereto or substantially a continuation thereof, cannot be removed from a court of a state to a federal court, unless the original suit has been previously or is simultaneously removed.[23] The principle is inapplicable, however, to proceedings which are not strictly ancillary to other suits.[24]

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14. Lafayette County Road Impr. Dist. No. 2 v. St. Louis Southwestern R. Co., 257 U. S. 547, 42 SCt 250, 66 L. ed. 364.

15. In re Chicago, etc., R. Co., 28 F. (2d) 56.

16. **Quo warranto** see supra § 13.

17. Klein v. Wilson, 7 F. (2d) 772 [aff 7 F. (2d) 777].

18. Kalamazoo Wagon Co. v. Snavely, 34 Fed. 823.

19. **Statutes authorizing removal of causes** see supra § 9.

20. Cates v. Allen, 149 U. S. 451, 13 SCt 883, 37 L. ed. 804; Parkersburg First Nat. Bank v. Pragler, 91 Fed. 689, 34 CCA 51.

21. See Creditors' Suits § 16.

Removability as dependent upon original jurisdiction of federal court see supra § 10.

22. Craddock v. Fulton, 140 Fed. 426.

23. Marshall v. Holmes, 141 U. S. 589, 12 SCt 60, 35 L. ed. 870; Barrow v. Hunton, 99 U. S. 80, 82, 25 L. ed. 407; Mullendore v. American Surety Co., 27 F. (2d) 572; Porter v. Davies, 223 Fed. 465, 140 CCA 11 [reh den 224 Fed. 451, 140 CCA 288]; Kalamazoo Wagon Co. v. Snavely, 34 Fed. 823; Wolcott v. Aspen Min., etc., Co., 34 Fed. 821; Richmond, etc., R. Co. v. Findley, 32 Fed. 641; Hospes v. Northwestern Mfg., etc., Co., 22 Fed. 565; Flash v. Dillon, 22 Fed. 1; Poole v. Thatcherdeft, 19 Fed. 49; Buford v. Strother, 10 Fed. 406, 3 McCrary 253; Buell v. Cincinnati, etc., Co., 9 Fed. 351, 10 Biss. 555; Chapman v. Barger, 5 F. Cas. No. 2,603, 4 Dill. 557; Webber v. Humphreys, 29 F. Cas. No. 17,326, 5 Dill. 223; State v. Flannelly, 96 Kan. 833, 154 P 235, 237 [quot Cyc]; Yglesias v. Marr, 1 Porto Rico Fed. 434; Commercial Nat. Bank v. Heid Bros., (Tex. Civ. A.) 226 SW 806. And see cases infra this note.

[a] **Rule applied to particular ancillary proceedings.**—(1) Statutory proceedings supplementary to execution. Flash v. Dillon, 22 Fed. 1; Poole v. Thatcherdeft, 19 Fed. 49; Buford v. Strother, 10 Fed. 406, 3 McCrary 253; Webber v. Humphreys, 29 F. Cas. No. 17,326, 5 Dill. 223; Yglesias v. Marr, 1 Porto Rico Fed. 434. (2) Supplemental bill by judgment creditor to reach after-acquired or newly discovered property of debtor. Smith v. St. Louis Mut. L. Ins. Co., 3 Tenn. Ch. 350. (3) Garnishment proceeding to obtain satisfaction of judgment. Brucker v. Georgia Casualty Co., 14 F. (2d) 688; Pearson v. Zacher, 177 Minn. 182, 225 NW 9. But see Baker v. Duwamish Mill Co., 149 Fed. 612 (where such a proceeding was held to be an independent suit). (4) Proceedings by or against strangers to the original suit, in connection with garnishee process (Poole v. Thatcherdeft, 19 Fed. 49; Buford v. Strother, 10 Fed. 406, 3 McCrary 253; Pratt v. Albright, 9 Fed. 634, 10 Biss. 511), (5) or attachment. King v. Shepherd, 20 Fed. 337; Burnham v. Leoti First Nat. Bank, 53 Fed. 163, 3 CCA 486. Compare Fischer v. Daudistal, 9 Fed. 145 (where the stranger proceeded against was a United States revenue officer and entitled on that ground to a removal of the cause). (6) Application for the appointment of a receiver in supplementary proceedings. Cœur d'Alene R., etc., Co. v. Spalding, 93 Fed. 28, 35 CCA 295. (7) Application by claimants of property which has been seized under execution. Alexandria First Nat. Bank v. Turnbell, 16 Wall. (U. S.) 190, 21 L. ed. 296; Flash v. Dillon, 22 Fed. 1; Hochstadter v. Harrison, 71 Ga. 21. (8) Suit by administrators for directions as to distribution of estate of their decedent. Shehane v. Smith, 257 Fed. 823. (9) Suit for an injunction against the sale under execution of land (Lawrence v. Morgan's Louisiana, etc., R., etc., Co., 121 U. S. 634, 7 SCt 1013, 30 L. ed. 1018; Besser v. Munford, 63 Ga. 446; Ralston v. British, etc., Mortg. Co., 37 La. Ann. 193; Calhoun v. Levy, 33 La. Ann. 1296; Watson v. Bondurant, 30 La. Ann. 1; Goodrich v. Hunton, 29 La. Ann. 372; Edwards Mfg. Co. v. Sprague, 76 Me. 53; Rodgers v. Rodgers, 1 Paige (N. Y.) 683) (10) or chattels. Kelly v. Sioux Nat. Bank, 81 Fed. 3. (11) Suit in equity by a tenant to set up a defense to an action of ejectment, which, by the state practice, he might have pleaded in that action. Johnson v. Christian, 125 U. S. 642, 8 SCt 989, 31 L. ed. 820; Cable v. Ellis, 110 U. S. 389, 4 SCt 85, 28 L. ed. 186; Richmond, etc., R. Co. v. Findley, 32 Fed. 641. (12) Petition, merely ancillary to an ejectment suit already passed to judgment, to have unsuccessful defendant's improvements valued and allowed to him, under the occupying claimant's law. Chapman v. Barger, 5 F. Cas. No. 2,603, 4 Dill. 557. (13) Proceeding by plaintiff, after a decree establishing his right to the products of a mine, to enforce his rights under such decree against defendant to the original suit and a third person who claims a superior title by purchase. Wolcott v. Aspen Min., etc., Co., 34 Fed. 821. (14) Proceeding under a state statute to charge with liability to the extent of corporate assets in their hands the directors of a railway company, which has passed out of existence, pending a suit against it. Houston, etc., R. Co. v. Shirley, 111 U. S. 358, 4 SCt 472, 28 L. ed. 455. (15) Bill in equity setting up a prior judgment for damages for a nuisance, and an action pending at law for the same purpose, which prays consolidation, a perpetual injunction and damages subsequent to the beginning of the pending action at law. Ladd v. West, 55 Fed. 353. (16) Bill of review for errors apparent upon the face of the record (Barrow v. Hunton, 99 U. S. 80, 25 L. ed. 407; Ranlett v. Collier White Lead Co., 30 La. Ann. 56; Goodrich v. Hunton, 29 La. Ann. 372; Jackson v. Gould, 74 Me. 564) (17) or for fraud (Caswell v. Caswell, 24 Ill. A. 548 [aff 120 Ill. 377, 11 NE 342]), (18) without showing that the facts constituting the fraud were not within the knowledge of the complainants before the rendition of the decree, or could not have been discovered in time to bring them in some appropriate mode to the attention of the state court while the decree was within its control. Marshall v. Holmes, 141 U. S. 589, 12 SCt 62, 35 L. ed. 870; Graham v. Boston, etc., R. Co., 118 U. S. 161, 6 SCt 1009, 30 L. ed. 196; Nougue v. Clapp, 101 U. S. 551, 25 L. ed. 1026.

24. See cases infra this note.

[a] **Particular proceedings held removable.**—(1) Bill in equity, such as one to reform an insurance policy, which is filed in aid of a court of law, and seeks to prevent a party from availing himself of an inequitable suit or defense in a pending suit in a common-law court, when the relief prayed could not have been obtained in the pending action. Charter Oak F. Ins. Co. v. Star Ins. Co., 5 F. Cas. No. 2,623, 6 Blatchf. 208. (2) Bill to set aside a judgment or decree of a state court for mistake (Pelzer Mfg. Co. v. Hamburg-Bremen F. Ins. Co., 62 Fed. 1) (3) or fraud (Marshall v. Holmes, 141 U. S. 589, 12 SCt 62, 35 L. ed. 870; Arrowsmith v. Gleason, 129 U. S. 86, 9 SCt 237, 32 L. ed. 630; Johnson v. Waters, 111 U. S. 640, 4 SCt 619, 28 L. ed. 547; Carver v. Jarvis-Conklin Mortg. Trust Co., 73 Fed. 9; Stackhous v. Zunts, 15 Fed. 481, 4 Woods 171; In re Iowa, etc., Constr. Co., 10 Fed. 401, 3 McCrary 310; Withers v. John Hopkins Place Sav. Bank, 104 Ga. 89, 30 SE 766). (4) Creditor's bill founded on a state judgment. Kalamazoo Wagon Co. v. Snavely, 34 Fed. 823. (5) Proceeding to enforce a judgment purporting to have been entered by confession. Lockhart v. Morey, 31 Fed. 497 [aff 123 U. S. 56, 8 SCt 65, 31 L. ed. 68]. (6) Bill filed by a stranger to a previous suit and decree, in order to prevent the execution of such decree by a levy upon property of which the complainant was the owner before the former suit

Proceeding ancillary to suit in federal court. A proceeding brought and pending in a state court is not removable to a federal court merely on the ground that it is ancillary to a suit already pending there.[25]

[§ 26] **D. Cause Subsequently Becoming Removable.** It has sometimes been stated as a general rule that a cause which when commenced is not removable from a state court to a federal court, under the statutes providing for such removals, may afterward become so;[26] but this means only that a cause not removable at the time it is brought on account of the failure of jurisdictional facts to appear may thereafter be removed whenever it is made to appear that facts authorizing a removal existed at the commencement of the suit.[27] Thus a suit apparently not removable when commenced, under the rule that the removability of a cause at its commencement depends upon the allegations of the petition or complaint,[28] will become removable, where the requisite jurisdictional facts exist, if plaintiff fails to prove allegations which, if true, would force the retention of the cause in the state court or render it unremovable,[29] or abandons a theory of the cause under which it would be unremovable,[30] or by amendment of his pleadings brings the cause within one of the classes specified by the removal statutes,[31] or if the proof discloses that the cause is in fact within such statutes.[32] A change in extrinsic circumstances, however, after the institution of a suit will not make it removable;[33] and no proof offered or defense made by defendant,[34] even though upheld by the state supreme court,[35] and no order or decision of the state court upon any issue tried upon the merits,[36] can render a cause removable where it was not so originally.

[§ 27] **E. Where State Court without Jurisdiction.**[37] The jurisdiction of a federal court, upon removal of a cause from a state court, must rest upon that of the court from which the suit is removed.[38]

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was brought. Bondurant v. Watson, 103 U. S. 281, 26 L. ed. 447. (7) Action of replevin against a sheriff, who had levied a writ of execution on chattels claimed by a stranger to the writ. Kern v. Huidekoper, 103 U. S. 485, 26 L. ed. 354. (8) Suit by a second mortgagee to redeem property from a foreclosure in a suit to which he was not a party. Title Guarantee, etc., Co. v. Studebaker, 100 Fed. 358. (9) Proceeding to enforce an attorney's lien. Pettus v. Georgia R., etc., Co., 19 F. Cas. No. 11,048, 3 Woods 620. (10) Proceeding to enjoin a stranger from violating a decree previously entered. Ward v. Congress Constr. Co., 99 Fed. 598, 39 CCA 669; Kalamazoo Wagon Co. v. Snavely, 34 Fed. 823; Hatch v. Preston, 11 F. Cas. No. 6,208, 1 Biss. 19; Garrett v. Bonner, 30 La. Ann. 1305. (11) Statutory proceeding by purchaser at sheriff's sale to compel all persons interested to show cause why the sale should not be confirmed. Parker v. Overman, 18 How. (U. S.) 137, 15 L. ed. 318. (12) Suit in which a state court has appointed a receiver. In re Iowa, etc., Constr. Co., 10 Fed. 401, 3 McCrary 310. (13) Suit for the appointment of a receiver ancillary to one previously appointed by a court in another suit. Shinney v. North American Sav., etc., Co., 97 Fed. 9. (14) Independent action by receiver appointed by state court to recover money due the estate. Porter v. Davies, 223 Fed. 465, 140 CCA 11 [reh den 224 Fed. 451, 140 CCA 288, and foll Porter v. Davies, 223 Fed. 1022, 138 CCA 664]. (15) Suit by bondholders of a corporation to foreclose a lien paramount to the rights of the stock-holders, who had procured an order of a state court placing trustees in possession of the property. Scott v. Clinton, etc., R. Co., 21 F. Cas. No. 12,527, 6 Biss. 529. (16) A feigned issue in Pennsylvania to try the validity of a judgment obtained by a creditor, which is attacked as fraudulent. Fuller v. Wright, 23 Fed. 833. (17) Motion for an execution against a stockholder after judgment and return of execution against his corporation. Lackawanna Coal, etc., Co. v. Bates, 56 Fed. 737 [overr Webber v. Humphreys, 29 F. Cas. No. 17,326, 5 Dill. 223]. (18) Garnishment proceeding to obtain satisfaction of a judgment. Baker v. Duwamish Mill Co., 149 Fed. 612. But see Brucker v. Georgia Casualty Co., 14 F. (2d) 688; Pearson v. Zacher, 177 Minn. 182, 225 NW 9 (in both of which such a proceeding was held to be merely ancillary and supplemental to the suit in which judgment was rendered).

[25] Gillmore v. Herrick, 93 Fed. 525. See State Trust Co. v. Kansas City, etc., R. Co., 110 Fed. 10; Pitkin v. Cowen, 91 Fed. 599; Ray v. Pierce, 81 Fed. 881 (all apparently applying the rule). Compare Shinney v. North American Sav., etc., Co., 97 Fed. 9; Sullivan v. Barnard, 81 Fed. 886; Carpenter v. Northern Pac. R. Co., 75 Fed. 850 (where suits in a state court against receivers appointed by a federal court were referred to as ancillary to the receivership proceeding, and removable to the federal court; but it would seem that such suits were removable because brought under the laws of the United States rather than because ancillary to a proceeding pending in the federal court).

[26] Great Northern R. Co. v. Alexander, 246 U. S. 276, 38 SCt 237, 62 L. ed. 713 [dism writ of error 51 Mont. 565, 154 P 914, LRA1918E 852]; North Carolina Public Serv. Co. v. Southern Power Co., 181 N. C. 356, 107 SE 226.

[27] Ford v. Roxana Petroleum Corp., 31 F. (2d) 765; Anaconda Copper Min. Co. v. Butte-Balaklava Copper Co., 200 Fed. 808; St. Louis-San Francisco R. Co. v. Barron, 166 Ark. 641, 267 SW 582.

Change in personnel of parties as affecting right to remove on account of diversity of citizenship see infra §§ 174, 175.

Removal by intervener or substituted party see infra § 217.

[28] See supra § 7.

[29] Great Northern R. Co. v. Alexander, 246 U. S. 276, 38 SCt 237, 62 L. ed. 713 [dism writ of error 51 Mont. 565, 154 P 914]; Rice v. Boston, etc., R. Co., 203 Fed. 580; Haynes v. Cincinnati, etc., R. Co., 145 Ky. 209, 140 SW 176, AnnCas1913B 719 [reh den 146 Ky. 739, 143 SW 380]; Bailey v. Davis, 49 N. D. 838, 193 NW 658. But see Kansas City Southern R. Co. v. Cockrell, 169 Ark. 698, 277 SW 7 (holding that the mere fact that under the undisputed evidence plaintiff has made out no case against a resident defendant does not entitle his nonresident codefendant to remove the cause where plaintiff has not dismissed against such resident and the court has refused to direct a verdict as to him).

[30] Rice v. Boston, etc., R. Co., 203 Fed. 580.

[31] Robinson v. Parker-Washington Co., 170 Fed. 850; Kowalski v. Chicago, etc., R. Co., 159 Minn. 388, 199 NW 178; Guasp v. Construction Supplies Corp., 13 Porto Rico Fed. 272.

Amendment increasing or decreasing amount in controversy see infra § 38.

Time for removal where amendment makes cause removable see infra § 205.

[32] Fielding v. Toledo, etc., R. Co., 33 F. (2d) 994.

[33] Anaconda Copper Min. Co. v. Butte-Balaklava Copper Co., 200 Fed. 808. See Ames v. Colorado Cent. R. Co., 1 F. Cas. No. 325, 4 Dill. 251 (holding that, under the statute providing for the removal of any suit "now pending or hereafter brought in any state court," a suit instituted in a territorial court is not removable although, on the admission of the territory to statehood, such suit passed into the jurisdiction of the state court). But see Kelly v. Virginia Bridge, etc., Co., 203 Fed. 566 (holding that where, in a cause not originally removable, a substitution of plaintiffs is made by order of court, a successor administrator being substituted for an executor upon the death of the latter, and a diversity of citizenship between plaintiff and defendant thereby arises, the cause is removable if the other jurisdictional requisites exist).

[34] Great Northern R. Co. v. Alexander, 246 U. S. 276, 38 SCt 237, 62 L. ed. 713 [dism writ of error 51 Mont. 565, 154 P 914, LRA1918E 852]; Chelan Electric Co. v. Wick, 148 Wash. 479, 269 P 827.

Answer or plea showing that cause arises under federal constitution, laws, or treaties see infra § 75.

Defenses as creating separable controversies see infra § 182.

[35] Great Northern R. Co. v. Alexander, 246 U. S. 276, 38 SCt 237, 62 L. ed. 713 [dism writ of error 51 Mont. 565, 154 P 914, LRA1918E 852].

[a] **Rule applied.**—Where plaintiff consistently contended that the proof supported the allegation of the complaint that plaintiff's deceased was employed in interstate commerce when he was killed, defendant railroad company could not remove the case, although its claim that deceased was not so employed, and that the prohibition against removing cases arising under federal Employers' Liability Act accordingly did not apply, was upheld by the state supreme court. Great Northern R. Co. v. Alexander, 246 U. S. 276, 38 SCt 237, 62 L. ed. 713 [dism writ of error 51 Mont. 565, 154 P 914, LRA1918E 852].

[36] Chelan Electric Co. v. Wick, 148 Wash. 479, 269 P 827.

[37] **Disposition by federal court of such cause after colorable removal:**
Dismissal see infra § 295.
Remand see infra § 303.

[38] Lambert Run Coal Co. v. Baltimore, etc., R. Co., 258 U. S. 377, 42

So a federal court cannot acquire jurisdiction by removal of proceedings of which the state court had no jurisdiction,[39] as where the cause is one of which the federal courts are given exclusive jurisdiction,[40] or one which is not within the limited jurisdiction of the state court in which it was brought,[41] or where after the institution of the suit it was held that the court in which it was brought had no legal existence;[42] and this is true even though the suit is one which might originally have been brought in the federal court.[43] The fact that defendant has not been served with process, however, does not prevent the removal of the cause by him, where valid process might issue from the state court.[44]

III. AMOUNT OR VALUE IN CONTROVERSY

[By Eustace W. Tomlinson]

[§ 28] **A. In General.** Inasmuch as the statute relating to the removal of civil suits from a court of a state to a federal court authorizes such removal only where the federal court could have taken original jurisdiction of the cause,[45] and since the federal district courts have, in general, jurisdiction of suits under the constitution, laws, or treaties of the United States, or between citizens of different states or citizens of a state and foreign states, citizens, or subjects, only where the matter in controversy exceeds a specified sum or value,[46] no such cause is removable on the ground of diversity of citizenship,[47] or because involving prejudice or local influence,[48] or because arising under the constitution, laws or treaties of the United States,[49] unless the matter in dispute exceeds the sum or value specified by the stat-

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SCt 349, 66 L. ed. 671 [mod 267 Fed. 776; Zikos v. Oregon R., etc., Co., 179 Fed. 893.

[a] **Jurisdiction of federal court derivative.**—"The jurisdiction of the federal court on removal is, in a limited sense, a derivative jurisdiction. If the state court lacks jurisdiction of the subject-matter or of the parties, the federal court acquires none, although it might in a like suit originally brought there have had jurisdiction." Lambert Run Coal Co. v. Baltimore, etc., R. Co., 258 U. S. 377, 382, 42 SCt 349, 66 L. ed. 671 [mod 267 Fed. 776].

39. Venner v. Michigan Cent. R. Co., 271 U. S. 127, 46 SCt 444, 70 L. ed. 868; National Acc. Soc. v. Spiro, 164 U. S. 281, 17 SCt 996, 41 L. ed. 435; Wabash Western R. Co. v. Brow, 164 U. S. 271, 17 SCt 126, 41 L. ed. 431; Goldey v. Morning News, 156 U. S. 518, 15 SCt 539, 39 L. ed. 517; Panstwowe Zaklady Graviozne v. Automobile Ins. Co., 36 F. (2d) 504; Lightfoot v. Atlantic Coast Line R. Co., 33 F. (2d) 765; Richter v. East St. Louis, etc., R. Co., 20 F. (2d) 220; Lorang v. Alaska SS. Co., 8 F. (2d) 206; Manufacturers' Land, etc., Co. v. U. S. Shipping Bd. Emergency Fleet Corp., 284 Fed. 231; Compton v. Carter Oil Co., 283 Fed. 22; Earles v. Germain Co., 265 Fed. 718; R. J. Darnell, Inc. v. Illinois Cent. R. Co., 190 Fed. 656; Zikos v. Oregon R., etc., Co., 179 Fed. 893; Thacker Coal, etc., Co. v. Norfolk, etc., R. Co., 171 Fed. 271; Crowley v. Southern R. Co., 139 Fed. 851; Cady v. Associated Colonies, 119 Fed. 420; Sheldon v. Wabash R. Co., 105 Fed. 785; Auracher v. Omaha, etc., R. Co., 102 Fed. 1; Summers v. White, 71 Fed. 106, 17 CCA 631; Swift v. Philadelphia, etc., R. Co., 58 Fed. 858; Goldstein v. New Orleans, 38 Fed. 626; Simpkins v. Lake Shore, etc., R. Co., 19 Fed. 802, 21 Blatchf. 554. See Utah Constr. Co. v. St. Louis Constr., etc., Co., 254 Fed. 321 (holding that where plaintiff, a foreign corporation, had not complied with a state statute and as a consequence was prohibited by state law from maintaining an action in its courts, such corporation could not, as defendant in a cross bill, better its position or confer jurisdiction upon the federal court by removing the cause thereto); Cleveland, etc., Coal Co. v. J. H. Hillman, etc., Co., 245 Fed. 200 (applying the rule). And see cases infra notes 40–43.

[a] **Thus,** where a cause is one governed exclusively by federal law, the state court could acquire no jurisdiction of a proceeding attempted to be founded upon a state law, and therefore the federal court is without jurisdiction on removal. Swift v. Philadelphia, etc., R. Co., 58 Fed. 858.

40. Lambert Run Coal Co. v. Baltimore, etc., R. Co., 258 U. S. 377, 42 SCt 349 [mod 267 Fed. 776]; General Inv. Co. v. Lake Shore, etc., R. Co., 269 Fed. 235 [mod on other grounds 260 U. S. 261, 43 SCt 106, 67 L. ed. 244]; Southern Bridge Co. v. U. S. Shipping Bd. Emergency Fleet Corp., 266 Fed. 747; Sheldon v. Wabash R. Co., 105 Fed. 785; Auracher v. Omaha, etc., R. Co., 102 Fed. 1. See National Clay Products Co. v. Heath Unit Tile Co., 40 F. (2d) 617 (recognizing the rule, but holding in the case at bar that the state court had jurisdiction); Hoyt v. Bates, 81 Fed. 641 (recognizing the rule). Compare Lowry v. Hert, 273 Fed. 698 [rev on other grounds 290 Fed. 876]; Moyes v. Stirling Co., 71 Fed. 433; American Solid Leather Button Co. v. Empire State Nail Co., 47 Fed. 741 (all of which arose under the patent laws, and were held removable, the question of the state court's jurisdiction not being raised). But see Spitzer v. The Annette Rolph, 285 Fed. 446; Ross v. Pacific SS. Co., 272 Fed. 538; Berton v. Tietjen, etc., Dry Dock Co., 219 Fed. 763 (in all of which removal was sought, or remand resisted, on the ground that the matter involved was within the exclusive jurisdiction of the federal courts as involving its admiralty or maritime jurisdiction, and in each of which language appears which intimates that if such jurisdiction were involved the cause would be properly removed to and retained in the federal courts; but it does not appear that the rule stated in the text was urged upon the court or considered by it).

41. Fidelity Trust Co. v. Gill Car Co., 25 Fed. 737.

42. Crowley v. Southern R. Co., 139 Fed. 851.

43. Lightfoot v. Atlantic Coast Line R. Co., 33 F. (2d) 765; Manufacturers' Land, etc., Co. v. U. S. Shipping Bd. Emergency Fleet Corp., 284 Fed. 231 [aff 264 U. S. 250, 44 SCt 314, 68 L. ed. 664]. And see cases supra note 40.

Removability as affected by original juridiction of federal court in general see supra § 10.

44. Yellowstone-Merchants' Nat. Bank v. Rosenbaum Bros., 277 Fed. 69.

Service or perfection of process after removal see infra § 288.

45. See supra § 10.

46. See Federal Courts § 350.

47. U. S.—Kurtz v. Moffitt, 115 U. S. 487, 6 SCt 148, 29 L. ed. 458; Leidecker Tool Co. v. Laster, 39 F. (2d) 615; Delpit v. U. S. Shipping Bd. Emergency Fleet Corp., 19 F. (2d) 60; Ross v. Pacific SS. Co., 272 Fed. 538; Blakslee v. Ocean Acc., etc., Corp., 209 Fed. 710.

Iowa.—Bacon v. Iowa Cent. R. Co., 157 Iowa 493, 137 NW 1011 [aff 236 U. S. 305, 35 SCt 357, 59 L. ed. 591].

Mass.—Munnss v. American Agricultural Chemical Co., 216 Mass. 423, 103 NE 859.

N. C.—Fields v. Equitable L. Ins. Co., 199 N. C. 454, 154 SE 738; Butler v. Armour, 192 N. C. 510, 135 SE 350.

Pa.—Rowland v. Bondholders' Committee, 41 Pa. Co. 637.

See Cates v. Bennett, 157 Ga. 888, 122 SE 547 (recognizing the rule).

Diversity of citizenship in general see infra §§ 120–179.

48. Ex p. Pennsylvania Co., 137 U. S. 451, 11 SCt 141, 34 L. ed. 738.

Prejudice or local influence in general see infra §§ 194–204.

49. Emery v. American Refrigerator Transit Co., 246 U. S. 634, 38 SCt 414, 62 L. ed. 912; Kurtz v. Moffitt, 115 U. S. 487, 6 SCt 148, 29 L. ed. 458; Delpit v. U. S. Shipping Bd. Emergency Fleet Corp., 19 F. (2d) 60; Ross v. Pacific SS. Co., 272 Fed. 538; Adams v. Chicago Great Western R. Co., 210 Fed. 362; Pitkin v. Cowen, 91 Fed. 599; Follett v. Tillinghast, 82 Fed. 241; Ray v. Peirce, 81 Fed. 881; Masters v. Traders' Nat. Bank, 223 NYS 889 [aff 129 Misc. 133, 220 NYS 499]; Missouri, etc., R. Co. v. Smith, (Tex. Civ. A.) 164 SW 885; Texas, etc., R. Co. v. Cushny, (Tex. Civ. A.) 64 SW 795.

[a] **Actions arising under revenue laws.**—(1) While removal is authorized, regardless of the amount involved, of civil suits and criminal prosecutions against a revenue officer of the United States or against any person acting under the authority of such an officer on account of an act done under color of his office or of a revenue law, or against a person holding property by a title derived from such an officer, when the suit or prosecution affects the validity of any such revenue law, no other action arising under the revenue laws of the United States can be removed where the amount in dispute is below the amount specified by the general provisions of the statute. Ex p. Pennsylvania Co., 137 U. S. 451, 457, 11 SCt 141, 143, 34 L. ed. 738, 741; Johnson v. Wells, 98 Fed. 3; Johnson v. Wells, 91 Fed. 1; Tod v. Cleveland, etc., R.

ute;[50] and, by the express provisions of the statute, a cause involving grants of land from different states is removable only in a similar circumstance.[51] Where, however, a suit arising under the federal constitution or laws is one of which the federal courts are given jurisdiction without regard to the amount in controversy, and the removal statutes contain no provision as to such amount with respect thereto, it may be removed regardless of the sum or value involved.[52]

Statutory amount must be exceeded. Where the removability of a cause depends upon the amount in controversy, it must involve a sum or value in excess of the amount specified by the statute,[53] and a cause involving only the amount so specified is not removable.[54]

Preventing removal by limiting recovery prayed. By praying judgment or decree for a sum less than the jurisdictional amount, in a suit the removability of which depends upon the amount in controversy, plaintiff can prevent the removal of the suit even though the facts would support a prayer for a larger recovery.[55]

[§ 29] **B. Basis of Estimate or Determination**[56]**— 1. In General.** In ascertaining whether or not a cause is removable from a court of a state to a federal court, the amount or value in dispute, where material, must be determined from the pleadings filed in the cause,[57] as they stand at the time of the application for removal;[58] so where the existence of the requisite amount or value does not appear therefrom it cannot be supplied by averments in the petition for removal[59] or by any pleadings filed after remov-

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Co., 65 Fed. 145, 12 CCA 521; Roraback v. Pennsylvania Co., 42 Fed. 420; Malone v. Richmond, etc., R. Co., 35 Fed. 625; Bierbower v. Miller, 30 Nebr. 161, 46 NW 431, 47 NW 1, 9 LRA 228. (2) Removal of proceedings against revenue officers and others in general see infra §§ 90–110.

[b] **Suits against federal corporations.**—(1) A suit against a corporation organized under the laws of the United States is not removable unless the amount or value in controversy exceeds that specified by the statute. Delpit v. U. S. Shipping Bd. Emergency Fleet Corp., 19 F. (2d) 60. (2) Removal of suits against federal corporations in general see infra §§ 69–72.

Causes arising under federal constitution, laws, and treaties in general see infra §§ 46–89.

[50] **Basis of estimate or determination** see infra §§ 29–39.

[51] Thompson v. Kendrick, 5 Hayw. (Tenn.) 113.

Causes wherein parties claim land under grants from different states see infra §§ 118, 119.

[52] Elliott v. Wheelock, 34 F. (2d) 213; Brashear v. Louisville, etc., R. Co., 32 F. (2d) 373; Allen v. New York, etc., R. Co., 15 F. (2d) 532; James v. U. S. Shipping Bd. Emergency Fleet Corp., 12 F. (2d) 89; Studebaker Corp. v. Florence First Nat. Bank, 10 F. (2d) 590; Hill v. U. S. Shipping Bd. Emergency Fleet Corp., 284 Fed. 398; Harry Porter Co. v. U. S. Shipping Bd. Emergency Fleet Corp., 284 Fed. 397; Ingram Day Lumber Co. v. U. S. Shipping Bd. Emergency Fleet Corp., 267 Fed. 283; Missouri, etc., R. Co. v. Miller, (Tex. Civ. A.) 211 SW 543; Missouri, etc., R. Co. v. Smith, (Tex. Civ. A.) 164 SW 885.

[a] **Action against federal receiver in respect of his trust.**—(1) A receiver appointed by a federal court may remove all suits brought against him in respect of his trust without regard to the amount or value in controversy. Elliott v. Wheelock, 34 F. (2d) 213; Berens v. Byram, 26 F. (2d) 953; Matarazzo v. Hustis, 256 Fed. 882. (2) Removal of suits against receivers appointed by federal courts in general see infra § 67.

[b] **Suit by United States against national bank.**—(1) In view of the statutory provision making the original jurisdiction of the federal courts not dependent upon the amount in controversy in suits commenced by the United States, or by direction of any officer thereof, against any national banking association, and suits for winding up the affairs of any such bank, such suits are removable regardless of the sum or value in controversy therein. Studebaker Corp. v. Florence First Nat. Bank, 10 F. (2d) 590. (2) Removal of suits against national banks in general see infra § 70.

[c] **Suit arising under law regulating commerce.**—Under the statutory provision that the requirement as to the amount in controversy shall not affect the original jurisdiction of the federal courts over all suits and proceedings arising under any law regulating commerce, a suit or proceeding arising under such a law is removable, except as the amount in controversy has been made material by the act of Jan. 20, 1914 [USCA tit 28 § 71]. Brashear v. Louisville, etc., R. Co., 32 F. (2d) 373; Allen v. New York, etc., R. Co., 15 F. (2d) 532; James v. U. S. Shipping Bd. Emergency Fleet Corp., 12 F. (2d) 89; Hill v. U. S. Shipping Bd. Emergency Fleet Corp., 284 Fed. 398; Harry Porter Co. v. U. S. Shipping Bd. Emergency Fleet Corp., 284 Fed. 397; Ingram Day Lumber Co. v. U. S. Shipping Bd. Emergency Fleet Corp., 267 Fed. 283; Missouri, etc., R. Co. v. Miller, (Tex. Civ. A.) 211 SW 543; Missouri, etc., R. Co. v. Smith, (Tex. Civ. A.) 164 SW 885.

[53] Kaufman v. I. Rheinstrom Sons Co., 188 Fed. 544; Withers v. Hopkins Place Sav. Bank, 104 Ga. 89, 30 SE 766.

[54] Kaufman v. I. Rheinstrom Sons Co., 188 Fed. 544; Withers v. Hopkins Place Sav. Bank, 104 Ga. 89, 30 SE 766.

[55] U. S.—Woods v. Massachusetts Protective Assoc., 34 F. (2d) 501; Brown v. House, 20 F. (2d) 142; Harley v. Firemen's Fund Ins. Co., 245 Fed. 471. See Holmes v. U. S. Fire Ins. Co., 142 Fed. 863 (where the court pointed out that such conduct cannot be regarded as having any fraudulent purpose); Swann v. Mutual Reserve Fund L. Assoc., 116 Fed. 232 (to same effect). Compare Collins v. Twin Falls North Side Land, etc., Co., 204 Fed. 134 (recognizing the rule, but holding that where plaintiff in one count set up a cause of action for a stated sum, and in another count a cause of action for another stated sum, the aggregate of which sums exceeded the jurisdictional amount, and then prayed relief for a sum less than the jurisdictional amount, defendant was forced to contest the whole action, since plaintiff did not waive any specific portion of either cause of action or indicate upon which cause he wished to credit or waive the difference between the amount of damage shown to have accrued and the amount for which judgment was demanded, and therefore he did not render the cause unremovable by seeking judgment for a sum less than the jurisdictional amount).

Ga.—Reliance L. Ins. Co. v. Capital Nat. Bank, 38 Ga. A. 349, 143 SE 924.

Ind.—Lesh v. Bailey, 49 Ind. A. 254, 95 NE 341.

Iowa.—Bacon v. Iowa Cent. R. Co., 157 Iowa 493, 137 NW 1011 [aff 236 U. S. 305, 35 SCt 357, 59 L. ed. 591].

Mo.—Shrank v. Chicago, etc., R. Co., 159 Mo. A. 299, 140 SW 319.

Nebr.—Bancroft Drain. Dist. v. Chicago, etc., R. Co., 102 Nebr. 455, 167 NW 731.

[56] **Averment in petition for removal of amount or value in dispute** see infra § 243.

[57] Brown v. House, 20 F. (2d) 142; Hyde v. Victoria Land Co., 125 Fed. 970; Sturgeon River Boom Co. v. W. H. Sawyer Lumber Co., 89 Fed. 113; Back v. Sierra Nevada Cons. Min. Co., 46 Fed. 673; McGinnity v. White, 16 F. Cas. No. 8,802, 3 Dill. 350; Southern R. Co. v. Clarke, 203 Ala. 248, 82 S 516; Colorado Fuel, etc., Co. v. Four Mile R. Co., 29 Colo. 90, 66 P 902; Chappell v. Chappell, 86 Md. 532, 39 A 984. And see cases infra notes 58–61. Compare Baltimore, etc., R. Co. v. Worman, 12 Ind. A 494, 40 NE 751 (holding that, under a statute providing for the removal of those causes only in which the matter in dispute exceeds the sum or value of two thousand dollars, a cause is not removable, when the prayer for relief asks for "$2,000 and all other proper relief," if, under the pleadings, no other relief can be granted); Woods v. Massachusetts Protective Assoc., 34 F. (2d) 501 (to same effect).

Amendment increasing or decreasing amount see infra § 38.

[58] Woods v. Massachusetts Protective Assoc., 34 F. (2d) 501; Twin Hills Gasoline Co. v. Bradford Oil Corp., 264 Fed. 440; New England Tire, etc., Co. v. Kelly-Springfield Tire Co., 214 App. Div. 58, 210 NYS 243.

Pleadings as determining right to remove in general see supra § 7.

Reduction of amount after removal as ground for remand see infra § 310.

[59] Sturgeon River Boom Co. v. W. H. Sawyer Lumber Co., 89 Fed. 113; Kenyon v. Knipe, 46 Fed. 309. But see Order of R. Telegraphers v. Louisville, etc., R. Co., 148 Fed. 437 [app dism 214 U. S. 529 mem, 29 SCt 695 mem, 53 L. ed. 1069 mem] (holding that in a suit in a state court for an injunction, based upon a law of the United States, where the value in controversy is not shown by the complainant's pleading, for the purpose of removal of the cause

al,[60] and, on the other hand, when plaintiff's bill or complaint indicates that the amount or value in dispute exceeds the jurisdictional amount the right of removal cannot be taken away by any showing on the part of defendant that a lesser amount is involved.[61] The jurisdiction is governed by the whole matter in controversy;[62] and all sums forming a part of the matter in dispute are to be considered.[63] Where relief is prayed in the alternative, it appears that that which involves the larger amount is the test of jurisdiction.[64] In accordance, however, with the general rule that removal cannot confer jurisdiction on a federal court where the state court had none,[65] the fact that the pleadings indicate that the controversy involves a sum or amount exceeding that required by statute will not authorize removal of the cause where the jurisdiction of the state court is limited to an amount less than the statutory minimum.[66]

Time of evaluation. Since a suit not originally removable cannot become so by any subsequent change in the facts and circumstances,[67] the sum or value in dispute must exceed the jurisdictional amount at the commencement of the suit, in order to render it removable.[68]

Value alleged by plaintiff's pleadings is ordinarily conclusive, in the absence of any contrary showing or any showing of fraud, where such value is not liquidated by law.[69]

[§ 30] **2. Pecuniary Standard.** No suit or action, the removability of which from a state court to a federal court depends upon the existence of a matter in dispute exceeding the sum or value specified by the removal statutes, can be removed unless it involves a right or claim capable of pecuniary estimation or determination.[70] Thus a proceeding for a writ of habeas corpus,[71] an inquisition of lunacy,[72] or a suit to enforce an arbitration agreement,[73] is not removable; nor is a suit for divorce,[74] or a suit to set aside a decree of divorce,[75] even though plaintiff demands alimony and counsel fees, since the proceedings therefor are ancillary to the principal suit.[76]

[§ 31] **3. Contingent Loss or Damage.** No contingent loss or damage which one of the parties may sustain by a decision against him is to be taken into consideration in the estimate of the value of the matter in dispute in a cause, as affecting its removability from a court of a state to a federal court.[77] Thus, the fact that, on account of its probative force, the judgment to be rendered may operate as an estoppel in a subsequent proceeding,[78] or that it may affect a party's rights against a stranger to the litigation,[79] does not increase the sum or value in controversy. Prospective damages which may be recoverable in the action, however, or which the bill is filed to prevent,[80] should be considered, provided they are alleged with sufficient certainty.[81]

[§ 32] **4. Interest.** As a general rule, in deter-

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it may be shown in the petition for removal); Withers v. Hopkins Place Sav. Bank, 104 Ga. 89, 30 SE 766 (where it was said that the existence of the requisite amount in controversy may be made to appear either from the pleadings in the cause or the petition for removal).

Petition for removal in general see infra §§ 237–244, 256, 261.

[60] Sturgeon River Boom Co. v. W. H. Sawyer Lumber Co., 89 Fed. 113.

[61] Riggs v. Clark, 71 Fed. 560, 18 CCA 242; Colorado Fuel, etc., Co. v. Four Mile R. Co., 29 Colo. 90, 66 P 902.

[62] Dakota Bldg., etc., Assoc. v. Price, 169 U. S. 45, 18 SCt 251, 42 L. ed. 655; Turner v. Southern Home Bldg., etc., Assoc., 101 Fed. 308, 41 CCA 379; Keith v. Levi, 2 Fed. 743, 1 McCrary 343; Brinkley v. John L. Roper Lumber Co., 166 N. C. 501, 82 SE 855; Dakota Bldg., etc., Assoc. v. Cunningham, 92 Tex. 155, 47 SW 714.

[a] **Rule applied.**—Where defendant tendered to the state treasurer the amount of taxes assessed against him, partially in money and partially in coupons of state bonds, which the state had agreed to receive in payment of taxes, and the aggregate amount of such tender was in excess of that specified by the removal statutes, the cause was removable, where the other jurisdictional facts existed, and the state treasurer could not, by applying the money to the taxes and refusing to apply the coupons, which were less in amount than the jurisdictional amount specified by statute, prevent defendant from removing an action brought against him for the balance alleged to be due. Green v. Brooks, 28 Fed. 215.

[63] Coolidge v. Ray, 75 Fed. 39.

[a] **Thus,** in a suit to foreclose a mortgage, insurance premiums paid by the mortgagee, when claimed in the bill, are to be considered a part of the jurisdictional amount. Coolidge v. Ray, 75 Fed. 39.

Interest see infra § 32.

[64] Greenfield v. U. S. Mortgage Co., 133 Fed. 784; Hayward v. Nordberg Mfg. Co., 85 Fed. 4, 29 CCA 438.

[65] See supra § 27.

[66] Bennett v. Forrest, 69 Fed. 421; New York, etc., Co. v. Milburn Gin, etc., Co., 35 Fed. 225.

[67] See supra § 26.

[68] Back v. Sierra Nevada Cons. Min. Co., 46 Fed. 673. See Kenyon v. Knipe, 46 Fed. 309 (applying the rule).

[69] Postal Telegraph Cable Co. v. Southern R. Co., 88 Fed. 803; Follett v. Seneca Falls Water Works Co., 123 Misc. 823, 206 NYS 468.

[70] Kurtz v. Moffitt, 115 U. S. 487, 6 SCt 148, 29 L. ed. 458; Farmers', etc., Bank v. Federal Reserve Bank, 274 Fed. 235; Whitney v. American Shipbuilding Co., 197 Fed. 777; Withers v. Hopkins Place Sav. Bank, 104 Ga. 89, 30 SE 766; Chappell v. Chappell, 86 Md. 532, 39 A 984. Compare Erwin v. Walsh, 27 Fed. 579, 23 Blatchf. 535 (holding that although the value in money of a right to appeal from the probate of a will cannot be appraised with exactness, yet where the right of plaintiff in the estate, if intestate, is more than the jurisdictional amount, as that might depend directly upon the power to bring the question of the validity of the will before a court, the matter in dispute has a pecuniary value and the case may be removed to the federal court).

[71] Perrine v. Slack, 164 U. S. 452, 17 SCt 79, 41 L. ed. 510; In re Burrus, 136 U. S. 586, 10 SCt 850, 34 L. ed. 1500; Kurtz v. Moffitt, 115 U. S. 487, 6 SCt 148, 29 L. ed. 458; Clifford v. Williams, 131 Fed. 100; In re Barry, 42 Fed. 113, 136 U. S. 597, 34 L. ed. 503 note; Ex p. Everts, 8 F. Cas. No. 4,581, 1 Bond 197.

[72] U. S. v. Haviland, 297 Fed. 431.

[73] In re Red Cross Line, 277 Fed. 853.

[74] Bowman v. Bowman, 30 Fed. 849; Chappell v. Chappell, 86 Md. 532, 39 A 984.

Removal of divorce suit as precluded by lack of original jurisdiction of federal courts see supra § 18.

[75] Caswell v. Caswell, 120 Ill. 377, 11 NE 342.

[76] Bowman v. Bowman, 30 Fed. 849; Chappell v. Chappell, 86 Md. 532, 39 A 984.

Removability of ancillary proceedings see supra § 25.

[77] See cases infra notes 78, 79.

[78] New England Mortg. Security Co. v. Gay, 145 U. S. 123, 12 SCt 815, 36 L. ed. 646; Bruce v. Manchester, etc., R. Co., 117 U. S. 514, 6 SCt 849, 29 L. ed. 990; Elgin v. Marshall, 106 U. S. 578, 1 SCt 484, 27 L. ed. 249; Enger v. Northern Finance Corp., 31 F. (2d) 136; Wright v. Mutual L. Ins. Co., 19 F. (2d) 117 [aff 276 U. S. 602, 48 SCt 323, 72 L. ed. 726]; Baltimore v. Postal Tel. Cable Co., 62 Fed. 500; Standard L. Ins. Co. v. Robbs, 179 Ark. 275, 6 SW (2d) 520; Reliance L. Ins. Co. v. Capital Nat. Bank, 38 Ga. A. 349, 143 SE 924. Contra Anderson v. Gerding, 1 F. Cas. No. 356, 3 Woods 487.

[79] Smith v. Adams, 130 U. S. 167, 9 SCt 566, 32 L. ed. 895.

[80] Draper v. Skerrett, 116 Fed. 206. And see case infra note 81.

Actions for damages in general see infra § 40.

[81] Oregon R., etc., Co. v. Shell, 125 Fed. 979.

ceeding the sum or value prescribed by the statutes authorizing the removal of causes from a court of a state to a federal court, interest accrued on the demand, and which is collectable only as an incident of the principal, is to be excluded from the estimate or computation.[82] But interest which is the subject of a separate contract, such as a coupon, and which might be the subject of a separate suit, is properly included;[83] so the face value of coupons due before the suit may be added to the principal named in the bond, in determining the jurisdictional amount,[84] except in the case of a coupon the nonpayment of which is the basis of a demand, under an acceleration clause, for the payment of a principal sum otherwise not yet matured.[85] Similarly, where the relief sought does not include interest as such, but a calculation of interest is used in ascertaining the amount of the demand, as in the case of damages for breach of warranty, such interest is a part of the jurisdictional amount.[86]

[§ 33] **5. Costs.** Where the removability of a suit from a court of a state to a federal court depends upon the amount or value in controversy,[87] costs are not to be considered in estimating or computing such amount.[88] Thus notarial fees for the presentment and protest of a note in suit, although paid before the commencement of the action, are to be excluded from the computation of the jurisdictional amount, being costs and not damages.[89] But where an attorney's fee is provided for by statute, or is stipulated for in a contract or note, it is not costs but a part of the amount in controversy, and is properly included in the estimate thereof.[90]

[§ 34] **6. Counterclaims.** Whether the amount of a counterclaim pleaded by defendant should be added to that of plaintiff's claim, to determine the amount or value in controversy in the suit, within the meaning of the statutes relating to the removal of causes from a state court to a federal court, has been the subject of conflicting adjudications,[91] some decisions being to the effect that a counterclaim should be included in the estimate or computation,[92] especially where, under the state statute, it would be barred unless pleaded in the suit,[93] and others that it should not be so included therein.[94]

[§ 35] **7. Defenses Apparent in Plaintiff's Pleading.** The fact that plaintiff's own pleading shows a sufficient defense to part of his claim to reduce it below the amount prescribed by the statutes relating to the removal of causes from a court of a state to a federal court does not, in the absence of bad faith and where the claim is not purely fictitious, prevent the removal of the action.[95]

[§ 36] **8. Actions by or against Multiple Parties[96]—a. Multiple Plaintiffs or Plaintiff Representing Multiple Claimants.** Where a number of plaintiffs, claiming under the same title, and having a joint or a common and undivided interest in the relief sought, unite in a suit, the adverse party having no interest in the apportionment or distribution of the amount recovered among them, the value of the matter in dispute, within the meaning of the statutes relating to the removal of causes from a state court to a federal court, is ordinarily to be regarded as the value of their united interests.[97] Similarly, where a suit is brought by one or more plaintiffs for themselves and all others of a class jointly interested in the relief sought, the aggregate interest of the whole class constitutes the matter in dispute.[98] Where, however, suit is brought by one on behalf of himself and of all others who may become plaintiffs, the cause is not removable where the amount or value of the relief sought by him does not exceed the jurisdictional amount and no other persons become plaintiffs, although the aggregate value of the relief to which all those similarly situated would be entitled is in excess of the amount specified by the statute;[99] and where, for convenience of litigation, two or more plaintiffs, having several and independent interests, unite in a single suit,[1] or one or more claimants having several and independent causes of action assign them to the holder of a similar claim to be sued upon in their behalf,[2] the suit is not removable except as to those parties whose claims, considered apart from the claims of others, exceed the amount prescribed by statute.[3]

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[82] Gilson v. Mutual Reserve Fund Life Assoc., 129 Fed. 1003; Simmons v. Mutual Reserve Fund Life Assoc., 114 Fed. 785; Greene County v. Kortrecht, 81 Fed. 241, 26 CCA 381; Moore v. Edgefield, 32 Fed. 498. See Fritchen v. Mueller, 27 F. (2d) 167 (holding that interest on a note is not to be included as a part of the amount in controversy even though the note provides that unpaid interest should become as principal). But see McGinnity v. White, 16 F. Cas. No. 8,802, 3 Dill. 350 (where the court applied the contrary rule, although confessing doubt as to its soundness).

[a] **Interest accrued after maturity.**—Interest which has accrued upon bonds and coupons after their maturity cannot be considered as a part of the amount in controversy, within the meaning of the removal statutes. Greene County v. Kortrecht, 81 Fed. 241, 26 CCA 381.

[83] Edwards v. Bates County, 163 U. S. 269, 16 SCt 967, 41 L. ed. 155 [overr Howard v. Bates County, 43 Fed. 276].

[84] Edwards v. Bates County, 163 U. S. 269, 16 SCt 967, 41 L. ed. 155.

[85] Home, etc., Inv., etc., Co. v. Ray, 69 Fed. 657.

[a] **Reason for rule.**—"The coupons cannot be considered as interest for the purpose of maturing the debt, and as separate, distinct obligations for the purpose of giving this court jurisdiction." Home, etc., Inv., etc., Co. v. Ray, 69 Fed. 657.

[86] Brown v. Webster, 156 U. S. 328, 15 SCt 377, 39 L. ed. 440.

[87] See supra § 28.

[88] Baker v. Howell, 44 Fed. 113.

[89] Baker v. Howell, supra.

[90] Conner v. Connecticut F. Ins. Co., 292 Fed. 767; Rogers v. Riley, 80 Fed. 759.

[91] Lee v. Continental Ins. Co., 74 Fed. 424 (so stating). And see cases infra notes 92-94.

[92] Kirby v. American Soda Fountain Co., 194 U. S. 141, 24 SCt 619, 48 L. ed. 911; Lovell v. Cragin, 136 U. S. 130, 10 SCt 1024, 34 L. ed. 372; Stinson v. Dousman, 20 How. (U. S.) 461, 15 L. ed. 966; San Antonio Suburban Irrigated Farms v. Shandy, 29 F. (2d) 579; Niccum v. Northern Assur. Co., 17 F. (2d) 160; Pierce v. Desmond, 11 F. (2d) 327; Price v. Ellis, 129 Fed. 482; Lee v. Continental Ins. Co., 74 Fed. 424; Wolcott v. Sprague, 55 Fed. 545; Walcott v. Watson, 46 Fed. 529; Carson, etc., Lumber Co. v. Holtzclaw, 39 Fed. 578; Clarkson v. Manson, 4 Fed. 257, 18 Blatchf. 443; Clarkson v. Manson, 60 HowPr (N. Y.) 45 [rev 59 HowPr 480].

Plaintiff as party entitled to remove where counterclaim is filed see infra § 216.

[93] Lee v. Continental Ins. Co., 74 Fed. 424.

[94] Harley v. Firemen's Fund Ins. Co., 245 Fed. 471; McKown v. Kansas, etc., Coal Co., 105 Fed. 657; Industrial, etc., Guaranty Co. v. Electrical Supply Co., 58 Fed. 732, 7 CCA 471; Bennett v. Devine, 45 Fed. 705; La Montagne v. T. W. Harvey Lumber Co., 44 Fed. 645; Falls Wire Mfg. Co. v. Broderick, 6 Fed. 654, 2 McCrary 489; Fearon Lumber, etc., Co. v. Lawson, 166 Ky. 123, 178 SW 1121.

[95] Schunk v. Moline, etc., Co., 147 U. S. 500, 13 SCt 416, 37 L. ed. 255 [foll Upton v. McLaughlin, 105 U. S. 640, 26 L. ed. 1197; Gaines v. Fuentes, 92 U. S. 10, 23 L. ed. 524, and dist Bowman v. Chicago, etc., R. Co., 115 U. S. 611, 6 SCt 192, 29 L. ed. 502]; Kearny County v. Vandriss, 115 Fed. 866, 53 CCA 192; Washington County v. Williams, 111 Fed. 801, 49 CCA 621; Waterfield v. Rice, 111 Fed. 625, 49 CCA 504; Interstate Bldg., etc., Assoc. v. Edgefield Hotel Co., 109 Fed. 692; Arapahoe Bank v. Bradley, 72 Fed. 867, 19 CCA 206; Industrial, etc., Guaranty Co. v. Electrical Supply Co., 58 Fed. 732, 7 CCA 471; Hardin v. Cass County, 42 Fed. 652; Johnston v. Straus, 26 Fed. 57.

[96] **Consolidation of causes** see infra § 39.

[97] Davies v. Corbin, 112 U. S. 36, 5 SCt 4, 28 L. ed. 627; Crawford v. Haller, 111 U. S. 796, 4 SCt 697, 28 L. ed. 602; Washington Market Co. v. Hoffman, 101 U. S. 112, 25 L. ed. 782; Shields v. Thomas, 17 How. (U. S.) 3, 15 L. ed. 93; Jones v. Mutual Fidelity Co., 123 Fed. 506; Hartford F. Ins. Co. v. Bonner Mercantile Co., 56 Fed. 378, 5 CCA 524 [rev 44 Fed. 151, 11 LRA 623]; Herbert v. Rainey, 54 Fed. 248 [aff 55 Fed. 443, 5 CCA 183]; Lovett v. Prentice, 44 Fed. 459; Prince v. Towns, 33 Fed. 161; Thornton v. Tison, 95 Ala. 589, 10 S 639.

[98] Brown v. Trousdale, 138 U. S. 389, 11 SCt 308, 34 L. ed. 987.

[§ 37] **b. Multiple Defendants.** Where two or more defendants are joined in one suit, the removability thereof, so far as it depends upon the amount or value in controversy, within the statutory provisions relating to the removal of causes from a court of a state to a federal court, is ordinarily determined by the joint or several character of the defendants' liability.[4] If their liability is joint, the value of the matters in controversy between plaintiff and all the defendants is to be regarded as the matter in dispute.[5] But if their liability is several, the cause is ordinarily not removable except as to those defendants whose several liabilities or claims separately exceed the amount prescribed by the statute.[6]

[§ 38] **9. Amendment of Pleadings.**[7] Where plaintiff, in a suit not originally removable from a state court to a federal court because the amount of or value in controversy does not exceed the sum prescribed by statute, so amends his pleadings as to increase such amount or value to a sum in excess of that specified by the statute, the cause thereupon becomes removable if the other jurisdictional requisites are present;[8] and, by the converse of this rule, a suit originally subject to removal becomes unremovable, so far as its removability depends upon the amount or value in controversy, where, before defendant's right to remove has been exercised, plaintiff, by amendment of his pleadings, reduces such amount or value below the sum specified by statute.[9]

[§ 39] **10. Consolidation of Causes.** Where neither of two or more suits pending in a state court between the same parties is removable to a federal court because the matter in dispute does not exceed the amount or value prescribed by the removal statutes, the consolidation of such suits, so that the aggregate amount involved in the consolidated cause is in excess of that specified by the statutes, will not authorize removal.[10]

[§ 40] **C. Particular Actions or Proceedings—1. Action for Damages.** Where suit is brought upon a demand on which the law liquidates the damages for a default, the amount of the damages as liquidated by the law is the value of the matter in dispute, within the meaning the statutes relating to the removal of causes from a state court to a federal court, regardless of the amount named in plaintiff's declaration or petition.[11] In other actions for damages, however, the amount for which plaintiff demands judgment is to be regarded as the sum or value in dispute,[12] unless it clearly appears that the amount named is merely colorable, and beyond the amount of a reasonable expectation of recovery,[13] or unless the allegations of the complaint show affirmatively that plaintiff is entitled to recover a lesser sum only than that for which judgment is prayed;[14] and so where the complaint or declaration contains several counts or causes of action, the aggregate amount of the damages claimed is the value of the matter in dispute,[15] unless it appears that each is founded upon the same state of facts.[16]

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[99] Massa v. Cutting, 30 Fed. 1.

[1] Robbins v. Western Auto. Ins. Co., 4 F. (2d) 249 [certiorari den 268 U. S. 698 mem, 45 SCt 515 mem, 69 L. ed. 1163 mem]; Holt v. Bergevin, 60 Fed. 1.

[2] Mutual Adjustment Co. v. Pacific Tel., etc., Co., 288 Fed. 198; State v. Title Guaranty, etc., Co., 27 Ida. 752, 152 P 189 [app dism 240 U. S. 136, 36 SCt 345, 60 L. ed. 566].

[3] See cases supra notes 1, 2.

[4] See cases infra notes 5, 6.

[5] Marshall v. Holmes, 141 U. S. 589, 12 SCt 62, 35 L. ed. 870 [rev 39 La. Ann. 325, 1 S 612].

[6] Trotier v. St. Louis, etc., R. Co., 180 Ill. 471, 54 NE 487; Warner v. 771 Objectors, 5 Philippine 330; Texas, etc., R. Co. v. Good, (Tex. Civ. A.) 151 SW 617; Texas, etc., R. Co. v. Dishman, 38 Tex. Civ. A. 277, 85 SW 319.

[7] **Amendment reducing amount in controversy after removal as necessitating remand** see infra § 310.

[8] Ft. Smith, etc., R. Co. v. Blevins, 35 Okl. 378, 130 P 525; Skelton v. Wolfe, (Tex. Civ. A.) 200 SW 901. See Brown v. House, 20 F. (2d) 142; Martin v. Richmond Cotton Oil Co., 194 Mo. A. 106, 184 SW 127 (dicta).

Amendments as rendering cause removable in general see supra § 26.

[9] Herbert v. Roxana Petroleum Corp., 12 F. (2d) 81; Anderson v. Western Union Tel. Co., 218 Fed. 78; Waite v. Phœnix Ins. Co., 62 Fed. 769; Chattanooga Boiler, etc., Co. v. Robinson, 14 Ga. A. 73, 80 SE 299; Lake Erie, etc., R. Co. v. Huffman, 177 Ind. 126, 97 NE 434, AnnCas1914C 1272; Munnss v. American Agricultural Chemical Co., 216 Mass. 423, 103 NE 859. See Domitrovich v. Stone, etc., Engineering Corp., 44 Mont. 7, 118 P 760 (where an application for removal was held to be too late when made after plaintiff had moved for leave to amend his petition by reducing the amount in controversy below the jurisdictional sum). Compare New England Tire, etc., Co. v. Kelly-Springfield Tire Co., 214 App. Div. 58, 210 NYS 243 (holding that where, after notice of removal of the action to the federal court was served on defendant, but before petition for removal was filed, plaintiff served an amended complaint reducing the amount of damages claimed below the jurisdictional amount, even if amendment of the complaint was not warranted, it at least operated as notice that plaintiff asked only for a sum less than would permit removal, and jurisdiction of the state court therefore continued).

[a] **Amendment of writ without amendment of declaration** is sufficient to reduce the amount in controversy and, where it is made less than the jurisdictional amount, to prevent the removal of the suit. Munnss v. American Agricultural Chemical Co., 216 Mass. 423, 103 NE 859.

[b] **Motive of plaintiff in making reduction** (1) is of no consequence and is not open to inquiry. Munnss v. American Agricultural Chemical Co., 216 Mass. 423, 103 NE 859. (2) So the fact that plaintiff's object in reducing his claim is to prevent removal of the suit is immaterial, and will not prevent the reduction from having that effect. Anderson v. Western Union Tel. Co., 218 Fed. 78.

[10] Cooper v. American Stores Co., 25 F. (2d) 916; Holmes v. U. S. Fire Ins. Co., 142 Fed. 863; St. Louis-San Francisco R. Co. v. Oxford, 174 Ark. 966, 298 SW 207; Mier v. Norwich Union F. Ins. Soc., 12 Porto Rico Fed. 367. See Waltman v. Union Cent. L. Ins. Co., 25 F. (2d) 320 (to same effect).

[11] Battle v. Atkinson, 191 U. S. 559, 24 SCt 845, 48 L. ed. 302 [aff 115 Fed. 384]; North American Transp., etc., Co. v. Morrison, 178 U. S. 262, 20 SCt 869, 44 L. ed. 1061; Vance v. W. A. Vandercook Co., 170 U. S. 468, 18 SCt 645, 42 L. ed. 1111; Barry v. Edmunds, 116 U. S. 550, 6 SCt 501, 29 L. ed. 729; Wilson v. Daniel, 3 Dall. (U. S.) 401, 1 L. ed. 655; Barataria Canning Co. v. Louisville, etc., R. Co., 143 Fed. 113, 74 CCA 307; Wines v. Cobb Real Estate Co., 128 Fed. 198; Bergman v. Inman, 91 Fed. 293; Baltimore v. Postal Tel. Cable Co., 62 Fed. 500; Cabot v. McMaster, 61 Fed. 129.

[12] U. S.—Wiley v. Sinkler, 179 U. S. 58, 21 SCt 17, 45 L. ed. 84; Gorman v. Havird, 141 U. S. 206, 11 SCt 943, 35 L. ed. 717; Barry v. Edmunds, 116 U. S. 550, 5 SCt 501, 29 L. ed. 729; Smith v. Greenhow, 109 U. S. 669, 3 SCt 421, 27 L. ed. 1080; Wilson v. Daniel, 3 Dall. (U. S.) 401, 1 L. ed. 655; Wilson v. Daniel, 3 Dall. 401, 1 L. ed. 655; Randall v. Becton-Dickinson Co., 18 F. (2d) 631; Barber v. Boston, etc., R. Co., 145 Fed. 52; Southern Cash Register Co. v. National Cash Register Co., 143 Fed. 659, 143 Fed. 700; Eisele v. Oddie, 128 Fed. 941; Swann v. Mutual Reserve Fund Life Assoc., 116 Fed. 232; Simmons v. Mutual Reserve Fund Life Assoc., 114 Fed. 785; Hayward v. Nordberg Mfg. Co., 85 Fed. 4, 29 CCA 438; Yarde v. Baltimore, etc., R. Co., 57 Fed. 913; Hynes v. Briggs, 41 Fed. 468; Green v. Brooks, 28 Fed. 215; Stanley v. Albany County, 15 Fed. 483, 21 Blatchf. 249; Judson v. Macon County, 14 F. Cas. No. 7,568, 2 Dill. 213. Compare Healy v. Prevost, 11 F. Cas. No. 6,297, 8 Reporter 103 (holding that where it appears clearly that the different causes of action alleged consist merely of the common counts, the value of the matter in dispute is to be determined by the amounts named in the bill of particulars).

Ind.—Lake Erie, etc., R. Co. v. Juday, 19 Ind. A. 436, 49 NE 843.

[§ 41] **2. Suit Involving Right or Title to Property.** In a suit in which plaintiff's title to real estate is in issue, or in which he seeks to quiet his title or remove a cloud therefrom, the value of such title, and not the value of the right or interest claimed by defendant, is the amount or value in controversy, within the meaning of the statutes relating to the removal of causes from a court of a state to a federal court;[17] and, similarly, in an action or proceeding to recover personal property, the amount or value in controversy is the value of such property.[18] It has been held that where land has been put to a special use by defendant, its value to him as so used should control.[19]

In condemnation suit[20] the amount in controversy is the compensation to be allowed to defendant whose property is taken.[21]

[§ 42] **3. Foreclosure Suit.** In a suit to foreclose a mortgage or other lien, the amount in dispute, within the meaning of the statutes authorizing the re-

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Iowa.—Bacon v. Iowa Cent. R. Co., 157 Iowa 493, 137 NW 1011 [aff 236 U. S. 305, 35 SCt 357, 59 L. ed. 591].

N. Y.—Disbrow v. Driggs, 8 AbbPr 305 note, 16 HowPr 346.

N. C.—Butler v. Armour, 192 N. C. 510, 135 SE 350.

N. D.—Smith v. Northern Pac. R. Co., 3 N. D. 17, 53 NW 173.

Tex.—Texas, etc., R. Co. v. Good, (Tex. Civ. A.) 151 SW 617.

Wash.—Stark v. Port Blakely Mill Co., 44 Wash. 309, 87 P 339.

[a] **Although petition or complaint contains allegations showing greater damages,** the value of the matter in dispute will be considered to be the amount claimed in plaintiff's prayer for relief, where the state practice allows the recovery of no greater amount than that prayed. Barber v. Boston, etc., R. Co., 145 Fed. 52; Swann v. Mutual Reserve Fund L. Assoc., 116 Fed. 232; Simmons v. Mutual Reserve Fund L. Assoc., 114 Fed. 785; Lake Erie, etc., R. Co. v. Juday, 19 Ind. A. 436, 49 NE 843; Smith v. Northern Pac. R. Co., 3 N. D. 17, 53 NW 173; Stark v. Port Blakely Mill Co., 44 Wash. 309, 87 P 339.

[b] **Exemplary damages.**—(1) Where plaintiff demands exemplary or punitive damages, the amount for which judgment is so demanded is the sole criterion so far as concerns the existence of the jurisdictional amount in controversy. Wiley v. Sinkler, 179 U. S. 58, 21 SCt 17, 45 L. ed. 84; Barry v. Edmunds, 116 U. S. 550, 6 SCt 501, 29 L. ed. 729; Wilson v. Daniel, 3 Dall. (U. S.) 401, 1 L. ed. 655; Hynes v. Briggs, 41 Fed. 468. (2) Exemplary damages in general see Damages §§ 268-298.

13. Bowman v. Chicago, etc., R. Co., 115 U. S. 611, 6 SCt 192, 29 L. ed. 502; Smith v. Greenhow, 109 U. S. 669, 3 SCt 421, 27 L. ed. 1080; Lee v. Watson, 1 Wall. (U. S.) 337, 17 L. ed. 557; Greene County Bank v. J. H. Teasdale Commission Co., 112 Fed. 801; Hayward v. Nordberg Mfg. Co., 85 Fed. 4, 29 CCA 438; Shields v. McCandlish, 73 Fed. 318; Arapahoe Bank v. Bradley, 72 Fed. 867, 19 CCA 206; Baltimore v. Postal Tel. Cable Co., 62 Fed. 500; Bacon v. Iowa Cent. R. Co., 157 Iowa 493, 137 NW 1011 [aff 236 U. S. 305, 35 SCt 357, 59 L. ed. 591]; Guasp v. Construction Supplies Corp., 12 Porto Rico Fed. 549. See Burmon v. Luckenbach SS. Co., 39 F. (2d) 619; Parlin, etc., Impl. Co. v. Frey, (Tex. Civ. A.) 200 SW 1143 (both applying the rule).

14. Barber v. Atlantic Coast Line R. Co., 21 Ga. A. 257, 94 SE 280.

15. Thompson v. Southern R. Co., 116 Fed. 890; Davis v. Mills, 99 Fed. 39; Bergman v. Inman, 91 Fed. 293; Weaver v. Norway Tack Co., 80 Fed. 700; Bowden v. Burnham, 59 Fed. 752, 8 CCA 248; Chase v. Sheldon Roller-Mills Co., 56 Fed. 625; Platt v. Phœnix Assur. Co., 37 Fed. 730; Bernheim v. Birnbaum, 30 Fed. 885; Hammond v. Cleaveland, 23 Fed. 1, 10 Sawy. 621; Stanley v. Albany County, 15 Fed. 483, 21 Blatchf. 249; Judson v. Macon County, 14 F. Cas. No. 7,568, 2 Dill. 213.

16. Pooser v. Western Union Tel. Co., 137 Fed. 1001; Baltimore, etc., R. Co. v. Ryan, 31 Ind. A. 597, 68 NE 923. Compare Thompson v. Southern R. Co., 116 Fed. 890 (holding that, where a petition in one count asked damages in a specified sum, less than the jurisdictional amount, and in another count asked "further" damages in the same amount, and the aggregate of such amounts exceeded the jurisdictional minimum, the cause could not be held unremovable on its face, although the court was morally certain that both the counts related to the same cause of action).

[a] **Illustrations.**—(1) Where the complaint in form stated two causes of action, each being for the failure to deliver a telegram, and each alleging damages in the sum of one thousand nine hundred dollars, the only difference between them being that in one it was alleged that the telegram was addressed to Mrs. P and in the other that it was addressed to Mr. P, it appearing that the telegram was the same and that plaintiff's counsel was uncertain from the manuscript as to which of the two was the party to whom the telegram was addressed, the cause could not be removed because the amount involved was only one thousand nine hundred dollars. Pooser v. Western Union Tel. Co., 137 Fed. 1001. (2) Where each of two paragraphs of a complaint seeks a recovery for the death of the same person, alleged to have been wrongfully caused by defendant's servants, and each relates to the same occurrence and each demands damages of two thousand dollars, the matter in dispute does not amount to four thousand dollars and does not authorize a removal. Baltimore, etc., R. Co. v. Ryan, 31 Ind. A. 597, 68 NE 923.

17. Enger v. Northern Finance Corp., 31 F. (2d) 136; Porter v. Northern Pac. R. Co., 161 Fed. 773; Greenfield v. U. S. Mortgage Co., 133 Fed. 784; Cowell v. City Water Supply Co., 121 Fed. 53, 57 CCA 393 [rev 96 Fed. 769]. See Building, etc., Assoc. v. Cunningham, 92 Tex. 155, 47 SW 714 (holding that where a petition to cancel a trust deed alleged that defendant claimed $3,200 on a bond which was secured by the trust deed, that the bond was really given for a lesser amount, that it had been reduced to $723 by partial payments, and that plaintiff was entitled to recover from defendant $652 as a statutory penalty for usury, the amount in controversy was $3,200 and the cause was removable, the other jurisdictional facts being present). But see Wetsel v. Empire Gas, etc., Co., 264 Fed. 865 [certiorari den 254 U. S. 635 mem, 41 SCt 9 mem, 65 L. ed. 450 mem] (holding in a suit to cancel a lease, that the amount in controversy was the difference between the value of the land subject to the lease and its value free from the lease); Hyde v. Victoria Land Co., 125 Fed. 970 (holding, in a suit to set aside land contracts, the value of such contracts is the amount in dispute); Thompson v. Kendrick, 5 Hayw. (Tenn.) 113 (dictum, that the value of the right asserted by the defendant seeking removal, rather than the value of the property claimed by plaintiff, should be the test). Compare Withers v. Hopkins Place Sav. Bank, 104 Ga. 89, 30 SE 766 (holding that, where one result of the judgment prayed for by plaintiff in an equitable petition to remove a cloud on his title to certain real estate would be to vest in plaintiff complete title to such real estate without paying twenty-two hundred dollars which defendant claimed was essential to plaintiff's acquisition of such title, the suit was one involving more than two thousand dollars).

[a] **Where plaintiff owns only an undivided interest** in the property, the sum or value in controversy is the value of his interest and not the value of the entire property nor the amount of defendant's right or claim. Cowell v. City Water Supply Co., 121 Fed. 53, 57 CCA 393 [rev 96 Fed. 769].

18. Hoover v. Columbia Straw-Paper Co., 68 Fed. 945; Fields v. Equitable L. Ins. Co., 199 N. C. 454, 154 SE 738.

[a] **Rule applied.**—Where personal property of defendant of a value in excess of the amount of plaintiff's claim was attached, and the receiver of defendant's property claimed to be entitled to exclusive possession and control of such property, the value of the property, and not merely the amount of plaintiff's claim, is the amount in controversy so far as concerns the right to remove the cause. Hoover v. Columbia Straw-Paper Co., 68 Fed. 945.

19. King v. Southern R. Co., 119 Fed. 1016.

[a] **Rule applied.**—In a suit to recover land on which a railroad company has built a depot, the amount or value in controversy, so far as concerns the removability of the suit, is the value of the land to the company, as then being used in its present situation, and not its value simply as land apart from other considerations. King v. Southern R. Co., 119 Fed. 1016.

20. Removability of condemnation proceedings in general see supra § 19.

21. Postal Telegraph Cable Co. v. Southern R. Co., 88 Fed. 803.

moval of causes from a state court to a federal court where the amount or value in dispute exceeds a specified sum,[22] is the amount sought to be recovered through the lien.

[§ 43] **4. Suit for Injunction—a. In General.** In a suit for an injunction, the amount or value in controversy, within the meaning of the statutes relating to the removal of causes from a state court to a federal court, is the value to plaintiff of the right for which he prays protection,[23] or the value to defendant of the acts which plaintiff seeks to restrain or prevent,[24] and not the amount of damage done to plaintiff.[25]

In action for damages and for injunction, the amount of damages claimed[26] and the value of the right involved in the injunction are to be added together in estimating or determining the amount or value in controversy.[27]

[§ 44] **b. To Restrain Municipality from Issuing Bonds.** Apparently in accordance with the general rule that the value to defendant of the acts which plaintiff in an injunction suit seeks to restrain or prevent is the amount or value in controversy, so far as concerns the right to remove the suit from a court of a state to a federal court,[28] it has been held that in a suit to enjoin a municipal corporation from issuing bonds, the amount in dispute is the total value or amount of the bonds proposed to be issued, and not the amount of the tax which might be assessed against plaintiff for the payment thereof.[29]

[§ 45] **5. Attachment Proceeding or Creditor's Suit.** In a proceeding for an attachment,[30] or a creditor's suit,[31] the amount or value in controversy, within the meaning of the statutes relating to the removal of causes from a state court to a federal court, is the amount of plaintiff's claim, rather than the value of the property sought to be reached.

IV. SUITS ARISING UNDER CONSTITUTION, LAWS, AND TREATIES OF UNITED STATES[32]

[By William G. Bannon]

[§ 46] **A. In General.** The Removal Act of 1875 provided for the removal from the state to the federal court of any suit of a civil nature, at law or in equity, then pending or thereafter brought, where the matter in dispute exceeded, exclusive of costs, the sum or value of five hundred dollars, and arising under the constitution or laws of the United States, or treaties made, or which should be made, under their authority.[33] The Act of 1887-1888 in providing for the removal of suits arising under the constitution, laws or treaties of the United States omitted any specific reference to the value of the matter in controversy, specified the suits which could be removed as those of which the circuit courts of the United States were given original jurisdiction by the preceding section of the statute, and provided specifically for removal by defendant or defendants.[34] The general policy and effect of the latter Act, which, insofar as it affects the matters here considered, is substantially the same as the present Act,[35] was actually to contract the jurisdiction of the federal courts of first resort,[36] since after the enactment of the statute, in contrast with the practice under the act of 1875, the fact that a particular suit arose under the constitution, laws, or a treaty of the United States, must appear from the allegations of plaintiff's pleading[37] and plaintiff could not remove the suit.[38] Subsequent statutes have placed other limitations on the right to remove, as, for example, the statute expressly forbidding the removal of actions under the Federal Employers' Liability Act,[39] and the statute denying jurisdiction to the federal district courts, except as to one type of corporation, of any action by or against any corporation on the

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22. Wakeman v. Throckmorton, 124 Fed. 1010; Coolidge v. Ray, 75 Fed. 39. See Wichita County Impr. Dist. v. Western Union Tel. Co., 22 F. (2d) 997 (to same effect, in suit to enforce a lien for taxes).

[a] **Insurance premiums paid by mortgagee** and for the amount of which he has an additional lien against the property are properly included in determining whether or not the jurisdictional amount is in controversy in a suit to foreclose the mortgage. Coolidge v. Ray, 75 Fed. 39.

23. Port of Seattle v. Oregon, etc., R. Co., 242 Fed. 986; Cowell v. City Water Supply Co., 121 Fed. 53, 57 CCA 393 [rev 96 Fed. 769]; Sheriff v. Turner, 119 Fed. 231; Arkansas v. Kansas, etc., Coal Co., 96 Fed. 353; Harbison v. Allen, 152 N. C. 720, 68 SE 207; State v. Frost, 113 Wis. 623, 88 NW 912, 89 NW 915.

[a] **In bill by owner of land to enjoin trespass** which it was alleged would entirely destroy the use of the land, the value of the land is the test. Sheriff v. Turner, 119 Fed. 231.

24. Studebaker v. Salina Waterworks Co., 195 Fed. 164; Memphis v. Postal Tel. Cable Co., 145 Fed. 602, 76 CCA 292; Amelia Milling Co. v. Tennessee Coal, etc., Co., 123 Fed. 811; Cowell v. City Water Supply Co., 121 Fed. 53, 57 CCA 393 [rev 96 Fed. 769]; Dickinson v. Union Mortg., etc., Co., 64 Fed. 895; Whitman v. Hubbell, 30 Fed. 81; State v. Frost, 113 Wis. 623, 88 NW 912, 89 NW 915. Compare Follett v. Seneca Falls Water Works Co., 123 Misc. 823, 206 NYS 468 (holding that in a suit to reduce water rates, where it appears that the reduction, if effectuated, would in the course of time cause defendant to lose part of its revenues and result in losses far exceeding the jurisdictional amount, the cause is removable if the other jurisdictional facts appear, defendant not being compelled to wait until actual losses have accrued before its right of removal can be exercised).

25. Studebaker v. Salina Waterworks Co., 195 Fed. 164; Memphis v. Postal Tel. Cable Co., 145 Fed. 602, 76 CCA 292; Amelia Milling Co. v. Tennessee Coal, etc., Co., 123 Fed. 811; Whitman v. Hubbell, 30 Fed. 81.

26. Amount in controversy in action for damages in general see supra § 40.

27. Miller v. Southern Bell Tel., etc., Co., 279 Fed. 806; Harbison v. Allen, 152 N. C. 720, 68 SE 207.

28. See supra § 43.

29. Brown v. Trousdale, 138 U. S. 389, 11 SCt 308, 34 L. ed. 987.

30. Randall v. Becton-Dickinson Co., 18 F. (2d) 631; Starke v. Hoerning, 206 Fed. 1006. See Skelton v. Wolfe, (Tex. Civ. A.) 200 SW 901 (apparently applying the rule).

31. Casey v. Baker, 212 Fed. 247; Cowell v. City Water Supply Co., 121 Fed. 53, 57 CCA 393 [rev 96 Fed. 769].

32. Transfer of case to federal court on admission of territory as state see Federal Courts § 363.

33. Act of March 3, 1875 (18 U. S. St. at L. 470 c 137 § 2).

34. Act of March 3, 1887 (24 U. S. St. at L. 552 c 373 § 2); Act of August 13, 1888 (25 U. S. St. at L. 433 c 886 § 2).

35. USCA tit 28 § 71.

36. Arkansas v. Kansas, etc., Coal Co., 183 U. S. 185, 22 SCt 47, 46 L. ed. 144; Tennessee v. Union, etc., Bank, 152 U. S. 454, 14 SCt 654, 38 L. ed. 511.

37. See infra § 75.

38. See infra § 214.

39. See supra § 20.

ground that it was incorporated by or under an act of congress.[40] Under the provision, here under consideration, of the present Removal Act, the suit must be one of a civil nature, at law or in equity,[41] of which the federal courts of first resort have original jurisdiction,[42] and, in general, in which the value of the matter in controversy required to give original jurisdiction, is present.[43] When the existence of a federal question through a claim of unconstitutionality determines the jurisdiction of the federal court, the same principles apply, whether the jurisdiction is invoked by original pleading or by removal petition.[44]

Decision as to all issues. Where the jurisdiction of the federal court properly attaches by removal, it extends to the whole case and to all the issues raised, whether federal or nonfederal,[45] and the federal court has power to decide all questions.[46]

Validity of statute. The constitutionality of statutes providing for the removal of suits arising under the constitution and laws of the United States has been upheld.[47]

[§ 47] **B. What Constitutes Suit Arising under Constitution, Laws, or Treaty of United States—1. What Constitutes Law.** The phrase "laws of the United States," as used in the Removal Act, has been construed as meaning Acts of congress[48] and as not including executive rules and regulations,[49] unless a recovery of damages is expressly authorized by statute for a disregard of such regulations,[50] or a presidential proclamation which is not authorized by congress.[51] There is authority for the view that where territory is ceded to the United States and the municipal law of the old sovereignty is continued in effect a case arising under such law arises under a law of the United States.[52]

[§ 48] **2. Decision Dependent on Construction of Constitution, Law, or Treaty.**[53] It is generally recognized that a suit arises under the constitution, or a law, of the United States, or, as sometimes expressed, raises a federal question,[54] whenever its correct decision depends on the construction of such constitution or law,[55] or, as set forth in greater detail, in whole or in part, in some of the cases, if, from the questions involved in a suit, it appears that some title, right, privilege, or immunity, on which the recovery depends, will be defeated by one construction of the constitution or a law of the United States, or sustained by the opposite construction, the case is one arising under the constitution or laws of the United States, within the meaning of the Removal Act;[56] if the decision does not depend on the construction of the constitution, a law or a treaty of the United States, the suit is not removable on the ground here discussed,[57] merely because in the progress of the litigation it may be necessary to give a construction to the constitution or laws of the United States.[58] The right of removal does not depend

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40. See infra § 69.

41. What constitutes suit of civil nature and forms or types of removable actions in general see supra §§ 9–27.

42. See supra § 10.

Jurisdiction of state court see supra § 27.

Original jurisdiction of federal courts as dependent on case arising under constitution, laws, or treaties of United States in general see Federal Courts §§ 29–47, 92.

43. See supra §§ 28–45.

44. Ohio v. Swift, 270 Fed. 141 [certiorari den 257 U. S. 633 mem, 42 SCt 47 mem, 66 L. ed. 407 mem, app dism 260 U. S. 146, 43 SCt 22, 67 L. ed. 176].

45. Nashville, etc., R. Co. v. Taylor, 86 Fed. 168. See Ohio v. Swift, 270 Fed. 141 [certiorari den 257 U. S. 633 mem, 42 SCt 47 mem, 66 L. ed. 407 mem, app dism 260 U. S. 146, 43 SCt 22, 67 L. ed. 176] (where the right of the federal court to retain jurisdiction on the ground of diversity of citizenship was upheld).

Remand on determination that no federal question exists see infra § 303.

46. Nashville, etc., R. Co. v. Taylor, 86 Fed. 168.

47. Tennessee v. Davis, 100 U. S. 257, 25 L. ed. 648; Nashville v. Cooper, 6 Wall. 247, 18 L. ed. 851; San Mateo County v. Southern Pac. R. Co., 13 Fed. 145; Kulp v. Ricketts, 3 Grant (Pa.) 420 (Act of Mar. 3, 1863 [12 U. S. St. at L. 756 c 81 § 3] providing for removal of suits against certain officers or persons for certain acts done during Civil War).

48. Beck v. Johnson, 169 Fed. 154.

49. Beck v. Johnson, supra.

50. Beck v. Johnson, supra.

51. Muir v. Louisville, etc., R. Co., 247 Fed. 888.

[a] **War-time control of railroads.**—Actions against a railroad company, instituted in a state court after the President by proclamation assumed control of the railroads under the act of Aug. 29, 1916, were not actions arising under constitution or laws of the United States, so as to be removable to federal courts, under Judicial Code § 28, the presidential proclamation not having the force of law. Muir v. Louisville, etc., R. Co., 247 Fed. 888.

52. Steele v. Halligan, 229 Fed. 1011.

53. Particular suits see passim infra §§ 54–75.

54. See cases infra notes 55, 56.

55. Ames v. Kansas, 111 U. S. 449, 4 SCt 437, 28 L. ed. 482; New Orleans, etc., R. Co. v. Mississippi, 102 U. S. 135, 26 L. ed. 96; Little York Gold Washing, etc., Co. v. Keyes, 96 U. S. 199, 24 L. ed. 656; American Bank, etc., Co. v. Federal Reserve Bank, 269 Fed. 4 [rev on other grounds 256 U. S. 350, 41 SCt 499, 65 L. ed. 983]; Chalmers Chemical Co. v. Chadeloid Chemical Co., 175 Fed. 995; Illinois v. Chicago Sanitary Dist., 98 Fed. 150.

56. Southern Pac. R. Co. v. California, 118 U. S. 109, 6 SCt 993, 30 L. ed. 103; Starin v. New York City, 115 U. S. 248, 6 SCt 28, 29 L. ed. 388; Ames v. Kansas, 111 U. S. 449, 4 SCt 437, 28 L. ed. 482; Oregon v. Three Sisters Irr. Co., 158 Fed. 346; South Carolina v. Port Royal, etc., R. Co., 56 Fed. 333. See Hall v. Chicago, etc., R. Co., 149 Fed. 564 (recognizing rule). Compare Rex v. Maryborough Licensing Court, 27 Austr. C. L. R. 249, 254 (statutory provision as to removal from state court to high court in Australia, becomes operative, it seems, only "when it becomes necessary for the purpose of determining rights of parties to decide a question as to the limits inter se of the constitutional powers of the Commonwealth and those of any State or States, or as to the limits inter se of the constitutional powers of any two or more States").

57. U. S.—Tennessee v. Union, etc., Bank, 152 U. S. 454, 14 SCt 654, 29 L. ed. 791; Gibbs v. Crandall, 120 U. S. 105, 7 SCt 497, 30 L. ed. 590; Germania Ins. Co. v. Wisconsin, 119 U. S. 473, 7 SCt 260, 30 L. ed. 461; Starin v. New York, 115 U. S. 248, 6 SCt 28, 29 L. ed. 388; Little York Gold Washing, etc., Co. v. Keyes, 96 U. S. 199, 24 L. ed. 656; Coyle v. Stern, 193 Fed. 582, 113 CCA 450; Leggett v. Great Northern R. Co., 180 Fed. 314; Miller v. Illinois Cent. R. Co., 168 Fed. 982; South Carolina v. Virginia-Carolina Chemical Co., 117 Fed. 727. See Schmidt v. Cobb, 119 U. S. 286, 7 SCt 1373, 30 L. ed. 321.

La.—New Orleans v. Seixas, 35 La. Ann. 36.

Nev.—State v. Reno Tract. Co., 41 Nev. 405, 171 P 375, LRA1918D 847.

N. D.—Bismarck v. Bismarck Water Supply Co., 47 N. D. 179, 181 NW 596.

Or.—State v. Southern Pac. R. Co., 23 Or. 424, 31 P 960.

Pa.—Rowland v. Bondholders' Committee, 41 Pa. Co. 637.

[a] **Contract clause of federal Constitution.**—The repudiation by a municipal corporation of an alleged contract for arbitration as to the value of certain land conveyed to such corporation was not the impairment of a contract within the meaning of the constitutional prohibition and a federal question was not presented. Grantham v. Chadron, 20 F. (2d) 40.

58. U. S.—Tennessee v. Union, etc., Bank, 152 U. S. 454, 14 SCt 654, 38 L. ed. 511; Little York Gold Washing, etc., Co. v. Keyes, 96 U. S. 199, 24 L. ed. 656; Leggett v. Great Northern R. Co., 180 Fed. 314; Miller v. Illinois Cent. R. Co., 168 Fed. 982; Iowa v. Chicago, etc., R. Co., 33 Fed. 391 [aff 145 U. S. 632 mem, 12 SCt 978 mem, 36 L. ed. 857 mem].

Ill.—Peo. v. St. Louis, 297 Ill. 199, 130 NE 366.

Mo.—Shohoney v. Quincy, etc., R. Co., 223 Mo. 649, 122 SW 1025.

Okl.—Shellenbarger v. Fewel, 34 Okl. 79, 124 P 617.

upon the validity of the claim set up under the constitution or laws of the United States.[59] This rule which recognizes the dependence of the decision on the construction of the constitution or a law of the United States as a ground for removal, must be considered in connection with the rules, under the present Removal Act, that the ground for removal must appear from the allegations of plaintiff's pleading[60] and that the right to remove may not be based on any defense which defendant may interpose.[61]

[§ 49] **3. Controversy as to Construction; Question Previously Decided.**[62] It has frequently been held or asserted that a suit does not arise under the constitution, laws, or a treaty of the United States where there is not a real and substantial[63] dispute or controversy as to the construction or effect of such constitution, laws, or treaty,[64] that where the decision depends entirely on a determination as to the facts,[65] or as to general law,[66] the suit is not removable, and that these rules apply even where plaintiff's claim is based on a federal statute.[67] The view has been expressed, however, that the jurisdiction of the federal court on removal does not depend upon whether on the trial of the case a controversy will actually arise as to the effect or construction of the constitution or a law of the United States,[68] in view of the facts that the question as to whether the suit arises under the constitution or law of the United States is to be determined from the plaintiff's pleading alone, and that the question whether the case will actually involve such controversy is not determinable from such pleading alone.[69] Moreover, it has been asserted that the statement as to the necessity for a real and substantial controversy has usually been made in cases in which the right asserted in plaintiff's pleading was not a right created by a federal law,[70] and there is authority for the view that whenever a federal law grants a right of property or of action and a suit is brought to enforce that right, such a suit arises under the law creating the right within the meaning of the Removal Act,[71] even though the particular suit may turn upon questions of fact.[72] In any event there have been cases in which the Supreme Court of the United States has recognized the right to remove although apparently a controversy as to the construction or effect of the federal statute on which plaintiff's action was based was not necessarily involved.[73]

Question previously decided. The view has frequently been expressed that where a question has once been determined by the supreme court of the United States it ceases to be a federal question,[74] since there is no longer a substantial controversy as to the statute involved,[75] and that a suit, the decision in which depends on the answer to such question is not removable on the ground here considered.[76] This view has not, however, been accepted without reservation,[77] and it has been held that in any event the right of removal of a suit involving a federal question is not affected by the fact that the supreme court has laid down in previous decisions on entirely different states of facts general principles which will probably control the decision.[78] A suit does not arise under the laws of the United States simply because the supreme court, or any other court, has decided in another suit the questions of law which are involved.[79]

[§ 50] **4. Claim of Plaintiff and Defense.**[80] The view has been expressed that in order that a suit

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S. C.—State v. Bowen, 8 S. C. 382.

Tex.—Houston, etc., R. Co. v. State, (Civ. A.) 41 SW 157 [rev on other grounds 177 U. S. 66, 20 SCt 545, 44 L. ed. 673].

Utah.—Schuyler v. Southern Pac. Co., 37 Utah 581, 612, 109 P 458, 1025 [aff 227 U. S. 601, 33 SCt 277, 57 L. ed. 662, 43 LRANS 901].

[a] **Questions arising at trial.**—Where plaintiff, in an action for injuries, stated a cause of action at common law only, and defendant's application to remove the cause to the federal court as depending on an act of Congress was denied, error in permitting plaintiff to take the benefit of an act of Congress, either in his evidence, instructions, or argument, could be corrected on appeal, and did not oust the state court of jurisdiction. Shohoney v. Quincy, etc., R. Co., 223 Mo. 649, 122 SW 1025.

[59] Southern Pac. R. Co. v. California, 118 U. S. 109, 6 SCt 993, 30 L. ed. 103; North Dakota Guaranty Co. v. Hanway, 104 Fed. 369, 44 CCA 312; South Carolina v. Port Royal, etc., R. Co., 56 Fed. 333.

[60] See infra § 75.

[61] See infra § 50.

[62] **Particular suits** see passim infra §§ 54-74.

[63] Western Union Tel. Co. v. Ann Arbor R. Co., 178 U. S. 239, 20 SCt 867, 44 L. ed. 1052; Gibbs v. Crandall, 120 U. S. 105, 7 SCt 497, 30 L. ed. 590; Bowers v. First Nat. Bank, 190 Fed. 676; Beck v. Johnson, 169 Fed. 154; Blue Bird Min. Co. v. Largey, 49 Fed. 289.

[64] Bonin v. Gulf Co., 198 U. S. 115, 25 SCt 608, 49 L. ed. 970; Shoshone Min. Co. v. Rutter, 177 U. S. 505, 20 SCt 726, 44 L. ed. 864; In re Vadner, 259 Fed. 614; Myrtle v. Nevada, etc., R. Co., 137 Fed. 193; Fitzgerald v. Missouri Pac. R. Co., 45 Fed. 812; McFadden v. Robinson, 22 Fed. 10, 10 Sawy. 398; New Orleans v. Seixas, 85 La. Ann. 36.

[65] In re Vadner, 259 Fed. 614; Nelson v. Southern R. Co., 172 Fed. 478; Miller v. Illinois Cent. R. Co., 168 Fed. 982; Myrtle v. Nevada, etc., R. Co., 137 Fed. 193; Blue Bird Min. Co. v. Largey, 49 Fed. 289; Lowry v. Chicago, etc., R. Co., 46 Fed. 83; Austin v. Gagan, 39 Fed. 626, 5 LRA 476; Orr v. Baltimore, etc., R. Co., 83 Misc. 221, 145 NYS 378.

[66] Lowry v. Chicago, etc., R. Co., 46 Fed. 83.

[67] Leggett v. Great Northern R. Co., 180 Fed. 314; Hubbard v. Chicago, etc., R. Co., 176 Fed. 994; Nelson v. Southern R. Co., 172 Fed. 478; Miller v. Illinois Cent. R. Co., 168 Fed. 982; Orr v. Baltimore, etc., R. Co., 83 Misc. 221, 145 NYS 378.

[68] McGoon v. Northern Pac. R. Co., 204 Fed. 998.

[69] See infra § 76.

[70] McGoon v. Northern Pac. R. Co., 204 Fed. 998.

[71] Hartford F. Ins. Co. v. Kansas City, etc., R. Co., 251 Fed. 332; McGoon v. Northern Pac. R. Co., 204 Fed. 998.

[72] McGoon v. Northern Pac. R. Co., supra.

[73] See Great Northern R. Co. v. Galbreath Cattle Co., 271 U. S. 99, 46 SCt 439, 70 L. ed. 854 [rev 66 Mont. 198, 213 P 610, 71 Mont. 56, 227 P 65]; Southern Pac. Co. v. Stewart, 245 U. S. 359, 562, 38 SCt 130, 203, 62 L. ed. 345.

[74] In re Vadner, 259 Fed. 614; Myrtle v. Nevada, etc., R. Co., 137 Fed. 193; Arkansas v. Choctaw, etc., R. Co., 134 Fed. 106; California v. Brown's Valley Irr. Dist., 119 Fed. 535; Blue Bird Min. Co. v. Largey, 49 Fed. 289; Kansas v. Bradley, 26 Fed. 289, 290 (per Brewer, J.); Orr v. Baltimore, etc., R. Co., 83 Misc. 221, 145 NYS 378.

[75] Bowers v. First Nat. Bank, 190 Fed. 676. See Western Union Tel. Co. v. Ann Arbor R. Co., 178 U. S. 239, 20 SCt 867, 44 L. ed. 1052 (where a remand was directed in a case in which plaintiff's bill actually rested on contract although there was also a reference to a statute, the effect of which had been determined by the supreme court); Kentucky v. Louisville Bridge Co., 42 Fed. 241 (where a remand was ordered in a case in which a statute having somewhat similar terms as one under consideration had been construed by the supreme court).

[76] See cases supra notes 74, 75.

[77] Nelms v. Davis, 277 Fed. 982; Alabama Great Southern R. Co. v. American Cotton Oil Co., 229 Fed. 11, 143 CCA 313.

[78] Alabama Great Southern R. Co. v. American Cotton Oil Co., 229 Fed. 11, 143 CCA 313; Mallon v. Hyde, 76 Fed. 388.

[79] Leather Manufacturers' Nat. Bank v. Cooper, 120 U. S. 778, 7 SCt 777, 30 L. ed. 816 [aff 29 Fed. 161]. See Berger v. Douglas County Comrs., 5 Fed. 23, 2 McCrary 483 (where motion to remand was granted).

[80] **Particular suits** see passim infra §§ 54-74.

may be removable as arising under the constitution, laws, or a treaty of the United States, it must appear that plaintiff seeks to enforce a right,[81] title, privilege, or immunity[82] given him by such constitution, laws, or treaty, or that his cause of action is based on such constitution, laws, or a treaty.[83] In any event in view of the rule that the ground for removal here discussed must appear from the allegations of plaintiff's pleading,[84] the rule under the present Removal Act, in contrast with the rule under the act of 1875,[85] is that the right to remove cannot be based on any defense which defendant may interpose.[86]

[§ 51] **5. Suit Involving State Constitution or Statute.**[87] It is the general, if not the universal, rule under the present Removal Act that if plaintiff's cause of action is based solely on a constitutional or statutory provision of a state,[88] or, if the decision is dependent on the construction of such provision,[89] the suit is not removable on the ground here considered; as, for example, a suit based on the alleged violation of a constitutional or statutory provision of a state,[90] even though a defense set up arises out of, or is based on, the constitution or laws of the United States.[91]

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[81] Venner v. New York Cent. R. Co., 293 Fed. 373; Smith v. Barnett, 242 Fed. 83; Dalles, etc., Ferry Co. v. Hendryx, 189 Fed. 268; Shields v. Boardman, 98 Fed. 455.

[a] **Collateral matters.**—That, in a suit by the owner of bonds against trustees, who were to hold securities in trust for the benefit of the owners of said bonds, a receiver appointed by United States court had begun a suit against defendants, was not ground for removal, as presenting a controversy arising under the Constitution and laws of the United States, the receiver not being a party, no relief being demanded against him, and the principal relief demanded being the removal of defendants, and the appointment of another trustee. Vanderbilt v. Kerr, 188 Fed. 537.

[82] Dalles, etc., Ferry Co. v. Hendryx, 189 Fed. 266. See Arkansas v. Kansas, etc., Coal Co., 183 U. S. 185, 22 SCt 47, 46 L. ed. 144 (where remand was directed).

[83] Re Winn, 213 U. S. 458, 29 SCt 515, 53 L. ed. 873; Visayan Refining Co. v. Standard Transp. Co., 17 F. (2d) 642; Beaumont v. Texas, etc., R. Co., 296 Fed. 523; In re Vadner, 259 Fed. 614. But see Minnesota v. Duluth, etc., R. Co., 87 Fed. 497 (where a motion to remand was denied).

[84] See infra § 75.

[85] See cases infra this note.

[a] **Based on defense.**—Under the Removal Act of 1875 (1) a suit arose under the constitution of the United States when a defense was asserted under any provision of such constitution. Southern Pac. R. Co. v. California, 118 U. S. 109, 6 SCt 993, 30 L. ed. 103; Mahin v. Preiffer, 27 Fed. 892; Kessinger v. Hinkhouse, 27 Fed. 883; San Mateo County v. Southern Pac. R. Co., 13 Fed. 145. See Chicago, etc., R. Co. v. Wiggins Ferry Co., 108 U. S. 18, 1 SCt 614, 27 L. ed. 636 [aff 11 Fed. 381, 3 McCrary 609] (where, however, an order for remand was affirmed in a case in which defendant claimed that the courts of one state had not given full faith and credit to the public acts of another state in rendering a certain judgment which was set up by plaintiff by way of estoppel). Compare Germania Ins. Co. v. Wisconsin, 119 U. S. 473, 7 SCt 260, 30 L. ed. 461 (where the federal question based on constitutional provisions did not appear). (2) Likewise a suit arose under a statute of the United States when a defense was asserted under such statute. Ames v. Kansas, 111 U. S. 449, 4 SCt 437, 28 L. ed. 482; New Orleans, etc., R. Co. v. Mississippi, 102 U. S. 135, 26 L. ed. 96; Willard v. Mueller, 23 Fed. 209; Houser v. Clayton, 12 F. Cas. No. 6,739, 3 Woods 273. (3) The rule as to a suit arising under the constitution was applied where defendant asserted that certain provisions of the state constitution were discriminatory and violative of the Fourteenth Amendment. San Mateo County v. Southern Pac. R. Co., 13 Fed. 145. (4) So the rule was applied where defendant alleged that a state statute violated a provision of the federal constitution. Illinois v. Chicago, etc., R. Co., 16 Fed. 706.

[86] In re Winn, 213 U. S. 458, 29 SCt 515, 53 L. ed. 873; Arkansas v. Kansas, etc., Coal Co., 183 U. S. 185, 22 SCt 47, 46 L. ed. 144; Houston, etc., R. Co. v. Texas, 177 U. S. 66, 20 SCt 545, 44 L. ed. 473; Tennessee v. Union, etc., Bank, 152 U. S. 454, 14 SCt 654, 38 L. ed. 511; Visayan Refining Co. v. Standard Transp. Co., 17 F. (2d) 642; Conques v. Louisiana Western R. Co., 4 F. (2d) 611; Beaumont v. Texas, etc., R. Co., 296 Fed. 523; Ohio v. Swift, 270 Fed. 141 [certiorari den 257 U. S. 633 mem, 42 SCt 47 mem, 66 L. ed. 407 mem, app dism 260 U. S. 146, 43 SCt 22, 67 L. ed. 176]; In re Vadner, 259 Fed. 614; Muir v. Louisville, etc., R. Co., 247 Fed. 888; Smith v. Barnett, 242 Fed. 83; Kansas v. Beal, 193 Fed. 543; Kentucky v. Chicago, etc., R. Co., 123 Fed. 457; South Carolina v. Virginia-Carolina Chemical Co., 117 Fed. 727; Ralya Market Co. v. Armour, 102 Fed. 530; Lincoln v. Lincoln St. R. Co., 77 Fed. 658; Kansas v. Atchison, etc., R. Co., 77 Fed. 339; Long v. Quinn Bros., 215 Mass. 85, 102 NE 348; State v. Louisville, etc., R. Co., 104 Miss. 413, 61 S 425.

[a] **Rule applied** to a suit under a state statute where the defense interposed was (1) the alleged taking of property without due process of law in violation of the Fourteenth Amendment of the federal constitution. Ohio v. Swift, 270 Fed. 14 [certiorari den 257 U. S. 633 mem, 42 SCt 47 mem, 66 L. ed. 407 mem, app dism 260 U. S. 146, 43 SCt 22, 67 L. ed. 176]; Georgia v. Southern R. Co., 255 Fed. 369; Missouri v. Chicago, etc., R. Co., 216 Fed. 562; State v. Columbia R., etc., Co., 112 S. C. 528, 100 SE 355. See Georgia v. Southern R. Co., 255 Fed. 369 (where remand was directed). But see Minnesota v. Duluth, etc., R. Co., 87 Fed. 497 (where a motion to remand was denied). (2) The rule has also been applied in the case of an alleged impairment of a contract in violation of the federal constitution. Georgia v. Southern R. Co., 255 Fed. 369; State v. Columbia R., etc., Co., 112 S. C. 528, 100 SE 355. See Georgia v. Southern R. Co., 255 Fed. 369 (where remand was directed). But see Minnesota v. Duluth, etc., R. Co., 87 Fed. 497 (where a motion to remand was denied).

[b] **Effect of defendant's petition in bankruptcy.**—A person sued in a state court cannot, by filing a voluntary petition in bankruptcy and being adjudged a bankrupt, cause the suits against him to be removed to a federal court. In re Vadner, 259 Fed. 614.

[c] **Insufficient service on foreign corporation.**—The provision of the Removal Act here under consideration does not give a foreign corporation defendant the right to remove a suit of which the federal court would not have had original jurisdiction, for the sole purpose of having that court determine, as a federal question, that the service made did not give the state court jurisdiction. Conques v. Louisiana Western R. Co., 4 F. (2d) 611.

[d] **Question as to unreasonable or arbitrary character of regulation promulgated by state commission.**—(1) The justness and feasibility of railroad regulations made by the state corporation commission are reviewable only by the state tribunals, and not by the federal courts, unless the regulations are so unreasonable or arbitrary as to violate the protective clauses of the fourteenth amendment of the constitution, when they may be reviewed only by the supreme court of the United States on a writ of error after the railroad company has exhausted its right of review afforded by the laws of the state and a proceeding to enforce such regulations is not removable. North Carolina Corp. Commn. v. Southern R. Co., 151 N. C. 447, 66 SE 427. (2) The fact that compliance with an order of the state corporation commission, requiring removal of its freight station in a city, would cost defendant more than two thousand dollars did not per se make the regulation an infraction of the Fourteenth Amendment of the federal constitution, so as to confer jurisdiction on the inferior federal courts to review such order on removal. North Carolina Corp. Commn. v. Southern R. Co., supra.

[e] **The contrary view** was apparently taken in some cases, although in some instances a conclusion not violative of the rule may have been reached. Illinois v. Rock Island, etc., Co., 71 Fed. 753; South Carolina v. Port Royal, etc., R. Co., 56 Fed. 333; Lowry v. Chicago, etc., R. Co., 46 Fed. 83; Fitzgerald v. Missouri Pac. R. Co., 45 Fed. 812; Illinois v. Illinois Cent. R. Co., 33 Fed. 721; Shohoney v. Quincy, 223 Mo. 649, 122 SW 1025. See Kentucky v. Louisville Bridge Co., 42 Fed. 241 (where a motion to remand was granted in a case in which there had been no legislative action looking to the impairment of the contract which alleged impairment was relied on as a defense).

Defenses under commerce clause of federal constitution see infra §§ 56–59.

[87] **Particular actions** see passim infra §§ 54–74.

[88] In re Red Cross Line, 277 Fed. 853; Ohio v. Swift, 270 Fed. 141 [certiorari den 257 U. S. 633 mem, 42 SCt 47 mem, 66 L. ed. 407 mem, app dism 260 U. S. 146, 43 SCt 22, 67 L. ed. 176]; Missouri v. Chicago, etc., R. Co., 216 Fed. 562; Western Union Tel. Co. v. Southeast, etc., R. Co., 208 Fed. 266, 125 CCA 466; Kansas v. Beal, 193 Fed. 543; Kentucky v. Chicago, etc., R. Co., 123 Fed. 457; State v. Columbia R., etc., Co., 112 S. C. 528, 100 SE 355. See Kentucky v. Louisville Bridge Co., 42 Fed. 241 (where a proceeding to forfeit a franchise for the use of a street was remanded). But see Minnesota v. Duluth, etc., R. Co., 87 Fed. 497 (where a motion to remand a suit to enforce a statutory forfeiture of certain lands was denied).

[a] **Forfeiture of property rights.**—(1) A state's action to obtain a judgment of forfeiture of defendants' rights in a canal because of noncompliance with conditions subsequent of a grant conveying rights, defended on the ground that the statute declaring a forfeiture and authorizing an action to recover possession was unconstitutional, was properly brought in a state court, and application for removal to the United States District

[§ 52] **6. Presence of Questions in Addition to Federal Question.** The existence in the case of other questions than that arising under the constitution or laws of the United States does not defeat the right of removal,[92] and where the jurisdiction of the federal court does properly attach by removal, it extends to the whole case and to all of the issues raised, whether federal or nonfederal.[93]

[§ 53] **C. Removability of Suits by State in General.**[94] The federal constitution does not exempt the state as plaintiff from the operation of the provision of the Removal Act under consideration[95] and an action by the state in one of its own courts is removable in a proper case if it arises under the Constitution, a law, or a treaty of the United States.[96] It seems, however, that, in view of the rule, under the present Removal Act, that the fact that a suit so arises must appear from the allegations of plaintiff's pleading,[97] and that the right to remove for that reason may not be based on any defense which defendant may interpose,[98] suits by the state are not often removable.[99]

[§ 54] **D. Removability of Suits Involving Particular Matters or Persons**[1]**—1. Patents, Copyrights, and Trade-Marks.** In view of the statutory provision making the jurisdiction of the courts of the United States in all cases arising under the patent and copyright laws exclusive of the courts of the several states,[2] and the rule that a federal court cannot acquire jurisdiction by removal of a proceeding of which the state court had no jurisdiction,[3] there is authority for the view that a federal court cannot acquire jurisdiction by removal of a particular suit, on the ground that it arises under the patent or copyright laws of the United States.[4] The federal court has however retained jurisdiction, after removal, of a complaint setting up several causes of action where one of such causes is one arising under the patent laws,[5] as, for example, a suit treated as one for the infringement of a patent.[6] Further, a suit to enjoin defendant from making the allegedly false assertion that plaintiff is selling an article which is an infringement of defendant's patented article has been retained where by such suit it is evidently the purpose to obtain an adjudication of the respective rights of the parties;[7] and a like rule has been recognized in respect of a suit to join the infringement of a registered trade-mark and for an accounting.[8] In any event, where the action or suit, involving in some respects a patent or copyright, raises no question as to the validity or infringement of the patent or copyright, ordinarily it is not removable as arising under the laws of the United States,[9] as, for example, a suit to compel the assignment of a copyright on the

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Court was properly refused. State v. Columbia R., etc., Co., 112 S. C. 528, 100 SE 355. (2) The right to remove was denied in the case of a proceeding to test title to a public office, which proceeding the incumbent sought to remove on allegations that the returning officers of election declared the incumbent elected because certain duly qualified voters were wrongfully prevented from voting for incumbent. Dubuclet v. Louisiana, 103 U. S. 550, 26 L. ed. 504.

[89] Arkansas v. Choctaw, etc., R. Co., 134 Fed. 106.

[a] **Determination of property rights under statutes.**—Actions against another railroad company which used part of the right of way of the Western & Atlantic Railroad, a road owned by the state of Georgia, which actions were brought by the state and by the lessee of the railroad under authority of the Western & Atlantic Railroad Commission, pursuant to a state statute, were actions merely to determine the rights of defendant in the property under the various acts of the state Legislature, and were not removable. Georgia v. Southern R. Co., 255 Fed. 369.

[b] **Even under the Removal Act of 1875** a suit did not arise under the constitution or laws of the United States merely because it involved the construction of a statute of another state. Chicago, etc., R. Co. v. Wiggins Ferry Co., 108 U. S. 18, 1 SCt 614, 617, 27 L. ed. 636.

[90] Galveston, etc., R. Co., v. Texas, 170 U. S. 226, 18 SCt 603, 42 L. ed. 1017; Peo. v. Bleecker, etc., R. Co., 178 Fed. 156.

[91] See supra § 50.

[92] General Inv. Co. v. Lake Shore, etc., R. Co., 260 U. S. 261, 43 SCt 106, 67 L. ed. 244; New Orleans, etc., R. Co. v. Mississippi, 102 U. S. 135, 26 L. ed. 96, 2 KyL 137; Jackson v. Gates Oil Co., 297 Fed. 549; Lowry v. Hert, 273 Fed. 698 [rev on other grounds 290 Fed. 876]; Chalmers Chemical Co. v. Chadeloid Chemical Co., 175 Fed. 995; Hall v. Chicago, etc., R. Co., 149 Fed. 564; Mastin v. Chicago, etc., R. Co., 123 Fed. 827; Manigault v. Ward, 123 Fed. 707; People v. Chicago Sanitary Dist., 98 Fed. 150; Kentucky Bank v. Stone, 88 Fed. 383; South Carolina v. Port Royal, etc., R. Co., 56 Fed. 333; Illinois v. Illinois Cent. R. Co., 16 Fed. 881; Connor v. Scott, 6 F. Cas. No. 3,119, 4 Dill. 242; Nicholas v. Chesapeake, etc., R. Co., 127 Ky. 310, 105 SW 481, 32 KyL 270, 17 LRA NS 861; Dougherty v. Michigan Bell Tel. Co., 235 Mich. 416, 209 NW 200. But see Texas v. Day Land, etc., Co., 49 Fed. 593 (the clause of the Removal Act of 1887 and 1888 authorizing the removal of civil suits arising under the constitution or laws of the United States relates only to the entire action, and does not permit the removal of a part thereof when the rest is not removable).

[93] See supra § 46.

[94] **Removability for diversity of citizenship of action by state** see infra § 127.

[95] Ames v. Kansas, 111 U. S. 449, 4 SCt 437, 28 L. ed. 482; New Orleans, etc., R. Co. v. Mississippi, 102 U. S. 135, 26 L. ed. 96.

[96] Southern Pac. R. Co. v. California, 118 U. S. 109, 6 SCt 993, 30 L. ed. 103; Ames v. Kansas, 111 U. S. 449, 4 SCt 437, 28 L. ed. 482; New Orleans, etc., R. Co. v. Mississippi, 102 U. S. 135, 26 L. ed. 96; Kentucky v. Louisville Bridge Co., 42 Fed. 241.

[97] See infra § 75.

[98] See supra § 50.

[99] See cases passim infra §§ 54–74.

[1] **Original jurisdiction of federal court of first resort** see Federal Courts §§ 34, 35.

[2] USCA tit 28 § 371. And see Courts § 633.

[3] See infra § 27.

[4] Hoyt v. Bates, 81 Fed. 641 (where, however, the case was remanded on the ground that it did not arise under the copyright laws, that the complaint presented no federal question, and, therefore, that the state court had jurisdiction). See American Well Works Co. v. Layne, etc., Co., 241 U. S. 257, 36 SCt 585, 60 L. ed. 987 (on an appeal from an order dismissing an action, entered by the lower court, on plaintiff's motion to remand, on the ground that the action arose under the patent laws, that the state court had no jurisdiction, and, therefore, that the federal court had no jurisdiction, the judgment was reversed by the supreme court on the ground that the action did not arise under the patent laws).

[5] Lowry v. Hert, 273 Fed. 698 [rev on other grounds 290 Fed. 876].

[a] **Defense based on federal statute.**—In a case decided after the Removal Act of 1887–1888, the soundness of the decision in which is questionable because a defense was considered in determining the existence of a ground for removal, it was held that a suit by one claiming as the equitable owner of the patent to compel the assignment to plaintiff of the patent by one to whom it has been assigned was removable because there was involved the construction of U. S. Rev. St. § 4898, containing provision for the protection of bona fide purchasers of the patent. American Solid Leather Button Co. v. Empire State Nail Co., 47 Fed. 741.

[6] Lowry v. Hert, 273 Fed. 698 [rev on other grounds 290 Fed. 876].

[7] Moyes v. Stirling Co., 71 Fed. 433.

[8] Rubber, etc., Harness Trimming Co. v. Whiting-J. J. Adams Co., 210 Fed. 393.

[9] Lowry v. Hert, 290 Fed. 876 [rev 273 Fed. 698]; Hoyt v. Bates, 81 Fed.

ground that it was wrongfully taken out in defendant's name,[10] an action on a contract for the use of a patent,[11] and an action for damages for an alleged conspiracy to injure plaintiff's business, which business was based on a patent monopoly.[12]

[§ 55] **2. Public Lands, Mining, and Water Rights.**[13] Under general rules and subject to applicable qualifications and limitations[14] a suit involving federal public land[15] or mining[16] laws, may be a suit arising under the laws of the United States within the meaning of the Removal Act. Where, however, there is no dispute or controversy as to the effect or construction of the constitution, laws, or a treaty of the United States, the case is not removable on the ground under consideration,[17] even though plaintiff sets up title based on a patent from the United States.[18] Thus it has been held or recognized that a suit is not removable where the decision depends only on the construction or effect of a state statute or other local enactment,[19] custom,[20] or decision of court;[21] or on the location of boundary lines described in a federal land grant or patent.[22]

[§ 56] **3. Commerce or Trade and Navigable Waters**[23]**—a. In General.** Under general rules and subject to applicable qualifications and limitations[24] a suit may be removable on the ground under consideration where it involves a federal statute regulating commerce.[25] An action, however, against an interstate carrier based solely on a state statute is not removable.[26] So the fact that there may be a

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641; American Solid Leather Button Co. v. Empire State Nail Co., 47 Fed. 741.

10. Hoyt v. Bates, 81 Fed. 641.

11. Albright v. Teas, 106 U. S. 613, 1 SCt 550, 27 L. ed. 295; American Solid Leather Button Co. v. Empire State Nail Co., 47 Fed. 741.

[a] **Thus** (1) a suit merely to recover royalties under a contract for the assignment of letters patent was not removable. Albright v. Teas, 106 U. S. 613, 1 SCt 550, 27 L. ed. 295. (2) A suit for an accounting for royalties under a contract granting a license to manufacture under a patent was not removable although an interpretation of the patent was incidentally required to determine whether a certain article was within its scope. International Fastener Co. v. Francis Mfg. Co., 259 Fed. 311.

12. Charroin v. Romort Mfg. Co., 236 Fed. 1011.

13. Original jurisdiction of federal court of first resort see Federal Courts §§ 37, 41, 42.

14. See supra §§ 46–53; infra § 79.

15. McCune v. Essig, 199 U. S. 382, 26 SCt 78, 50 L. ed. 237 [aff 122 Fed. 588, 59 CCA 429]; Spokane Falls, etc., R. Co. v. Ziegler, 167 U. S. 65, 17 SCt 728, 42 L. ed. 79; Mitchell v. Smale, 140 U. S. 406, 11 SCt 819, 840, 35 L. ed. 442; Southern Pac. R. Co. v. Townsend, 62 Fed. 161; Walker v. Richards, 55 Fed. 129; Dunton v. Muth, 45 Fed. 390; Miller v. Wattier, 24 Fed. 49.

[a] **Illustrations.**—(1) Action to recover lands which plaintiff claimed as a preëmptor under the laws of the United States and which defendant railroad company claimed under the federal Right of Way Act. Spokane Falls, etc., R. Co. v. Ziegler, 167 U. S. 65, 17 SCt 728, 42 L. ed. 79. (2) Suit by the daughter of a deceased entryman to establish title to certain lands, in which suit the construction of U. S. Rev. St. §§ 2291, 2292, relative to the rights of the survivors of an entryman, was involved. McCune v. Essig, 199 U. S. 382, 26 SCt 78, 50 L. ed. 237. (3) A suit by a state to cancel a contract between the state and defendant involving the reclamation of arid lands entered into pursuant to the Act of Aug. 18, 1894 (28 U. S. St. at L. 42 c 301) known as the Carey Act. Oregon v. Three Sisters Irr. Co., 158 Fed. 346. (4) Suit against the register of the United States land office and the register of the state land office, to enjoin the former from entering upon his records the cancellations of land selections made by the state of California in lieu of certain school lands, which suit went on the theory that the federal authorities were proceeding without authority of law, involved. State Impr.-Dev. Co. v. Leininger, 226 Fed. 884.

[b] **Rule applied** where the validity of a land patent was in dispute. Mitchell v. Smale, 140 U. S. 406, 11 SCt 819, 840, 35 L. ed. 442.

16. Evans v. Durango Land, etc., Co., 80 Fed. 433, 25 CCA 531.

17. Bonin v. Gulf Co., 198 U. S. 115, 25 SCt 608, 49 L. ed. 970; Shoshone Min. Co. v. Rutter, 177 U. S. 505, 20 SCt 726, 44 L. ed. 864; Little York Gold Washing, etc., Co. v. Keyes, 96 U. S. 199, 24 L. ed. 656; Trafton v. Nougues, 24 F. Cas. No. 14,134, 4 Sawy. 178.

[a] **A suit based on a trespass on a mining claim** does not necessarily involve a question arising under any law of the United States. Argonaut Min. Co. v. Kennedy Min., etc., Co., 84 Fed. 1; Trafton v. Nougues, 24 F. Cas. No. 14,134, 4 Sawy. 178. But see Consolidated Wyoming Gold Min. Co. v. Champion Min. Co., 62 Fed. 945 (where a motion to remand had been denied).

[b] **Proceeding to determine rights as to mining claim.**—An action brought pursuant to U. S. Rev. St. § 2326, to determine the better right to the possession of a mining claim is not necessarily removable. Mountain View Min., etc., Co. v. McFadden, 180 U. S. 533, 21 SCt 488, 45 L. ed. 656; Larned v. Jenkins, 109 Fed. 100, 48 CCA 252.

[c] **Meaning of mining terms.**—The right of removal has been denied where the decision depends solely on the (1) meaning of terms used in the federal mining laws (Blue Bird Min. Co. v. Largey, 49 Fed. 289), (2) such as "vein," "lode" or "ledge" (Blue Bird Min. Co. v. Largey, supra), (3) "top" or "apex" of a vein (Blue Bird Min. Co. v. Largey, supra).

18. Bonin v. Gulf Co., 198 U. S. 115, 25 SCt 608, 49 L. ed. 970.

[a] **Illustration.**—An action of ejectment. Bonin v. Gulf Co., 198 U. S. 115, 25 SCt 608, 49 L. ed. 970; Los Angeles Farming, etc., Co. v. Hoff, 48 Fed. 340.

19. Galveston, etc., R. Co. v. Texas, 170 U. S. 226, 18 SCt 603, 42 L. ed. 1017; In re Helena, etc., Smelting, etc., Co., 48 Fed. 609; Trafton v. Nougues, 24 F. Cas. No. 14,134, 4 Sawy. 178.

[a] **Rule applied** where the question involved was: (1) The right to pollute a stream. In re Helena, etc., Smelting, etc., Co., 48 Fed. 609. (2) The existence of an easement involving the deposit of debris on certain land. In re Helena, etc., Smelting, etc., Co., supra. (3) The validity, under the laws and constitution of Texas, of certain certificates for state public lands issued to a railroad company. Galveston, etc., R. Co. v. Texas, 170 U. S. 226, 18 SCt 603, 42 L. ed. 1017.

[b] **Title arising under municipal ordinance.**—A suit to quiet title to lands claimed by plaintiff as beneficiary of a grant to the city of San Francisco by Act of Congress of July 1, 1864, 13 St. 333 § 5, did not arise under the laws of the United States but under municipal ordinances, as ratified by the legislature, which were referred to in such act of congress. Hoadley v. San Francisco, 94 U. S. 4, 24 L. ed. 34.

20. In re Helena, etc., Smelting, etc., Co., 48 Fed. 609; Trafton v. Nougues, 24 F. Cas. No. 14,134, 4 Sawy. 178.

[a] **Illustration.**—Customs and rules of miners. Trafton v. Nougues, 24 F. Cas. No. 14,134, 4 Sawy. 178.

21. In re Helena, etc., Smelting, etc., Co., 48 Fed. 609.

22. Los Angeles Farming, etc., Co. v. Hoff, 48 Fed. 340. Compare Green v. Valley, 101 Fed. 882 (where remand was denied in a case in which the federal question relied on was the construction to be placed on surveys made under the authority of acts of congress).

23. Cross references:

Actions:
  Against United States Shipping Board Emergency Fleet Corporation see infra § 72.
  Under federal statute as to war-time control of railroads in general see Railroads §§ 82, 83.
Original jurisdiction of federal court of first resort see Federal Courts §§ 37, 39.

24. See supra §§ 46–53; infra §§ 80, 81.

25. Allen v. New York, etc., R. Co., 15 F. (2d) 532; James v. U. S. Shipping Bd. Emergency Fleet Corp., 12 F. (2d) 89; Smeltzer v. St. Louis, etc., R. Co., 168 Fed. 420. Compare Sheldon v. Wabash R. Co., 105 Fed. 785 (where a suit to prevent unjust discrimination in freight rates on interstate shipment was dismissed after removal to the federal court on the ground that the state court did not have jurisdiction of the subject matter).

[a] **For example** an action based on defendant railroad company's noncompliance with rules filed by it with the interstate commerce commission and regulations made by that body may be removable. Brashear v. Louisville, etc., R. Co., 32 F. (2d) 373.

26. Brashear v. Louisville, etc., R. Co., 32 F. (2d) 373; Venner v. New York Cent. R. Co., 293 Fed. 373. See Kentucky v. Louisville Bridge Co., 42 Fed. 241. Compare Louisiana v. Morgan's Louisiana, etc., S. S. Co., 18 F. (2d) 645 (state's suits to enjoin, because of alleged violation of state statute, domestic railroads leasing lines to foreign corporation which had applied to interstate commerce commission for authority to make leases has been held removable).

[a] **Suit to prevent issuance of securities.**—Where a suit was brought to enjoin a railroad company from issuing equipment trust bonds, on the

defense under the commerce clause of the federal constitution,[27] under statutes regulating interstate commerce,[28] or under other statutes regulating commerce,[29] is not of itself sufficient ground for removal.

[§ 57] **b. Monopolies.** Subject to applicable limitations and qualifications[30] the removability, on the ground here under consideration, of certain suits based on, or to enforce, the federal anti-trust statute has been recognized,[31] even where the state court did not have jurisdiction of the suit,[32] or where the question as to the right of plaintiff to maintain the action was involved.[33] It has been held, however, that the federal court should not have retained, after removal, jurisdiction of a suit brought by a state to declare void a contract on the ground that it violated the federal anti-trust law,[34] as the suit was not maintainable, since it was not one of the methods specified in such federal act, for its enforcement.[35] So, the removability, on the ground here under consideration, of a suit to recover penalties under a state anti-monopoly statute,[36] or otherwise to enforce such a statute,[37] has been denied.

[§ 58] **c. Shipments of Goods.**[38] Under general rules and subject to applicable limitations and qualifications,[39] the right to remove, as arising under laws of the United States, has been recognized or upheld in the case of actions against railroad companies for injury to, or loss of, property shipped by rail in interstate commerce,[40] of actions based on excess

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theory that the issue would constitute a violation of a provision of the state charter of the railroad company prohibiting it from becoming guarantor for other corporations, and that the proposed securities had not been authorized by the State Railroad Commission, and the only reference found in the petition to any federal law is the statement that the action sought to be enjoined was to be taken subject to approval of the securities by the Interstate Commerce Commission, such suit was not a suit "arising under" federal laws, and hence should be remanded to the state court. Venner v. New York Cent. R. Co., 293 Fed. 373.

[b] **Removal Act of 1875.**—An action by a state to recover from a foreign corporation certain statutory penalties for doing business in such state without complying with state laws in reference to foreign corporations, was not removable in view of the fact that, on the condition of the record, defenses based on the federal constitution, including the commerce clause, could not be considered. Germania Ins. Co. v. Wisconsin, 119 U. S. 473, 7 SCt 260, 30 L. ed. 461.

27. Kansas v. Beal, 193 Fed. 543; Kentucky v. Chicago, etc., R. Co., 123 Fed. 457; State v. Louisville, etc., R. Co., 104 Miss. 413, 61 S 425; North Carolina Corp. Commn. v. Southern R. Co., 151 N. C. 447, 66 SE 427. But see Illinois v. Rock Island, etc., R. Co., 71 Fed. 753 (where remand of a mandamus proceeding to compel defendant railroad company to run its trains to a certain station as required by a state statute, in which proceeding defendant maintained that such requirement was a substantial burden on interstate commerce, was denied); South Carolina v. Port Royal, etc., R. Co., 56 Fed. 333 (where apparently a defense was considered).

[a] **Enforcement of order of state commission.**—(1) A claim by an interstate railroad company that an order of the railroad commission, sought to be enforced against it, was an unreasonable interference with interstate commerce, was not a ground for removal, as arising out of the constitution and laws of the United States. State v. Louisville, etc., R. Co., 104 Miss. 413, 61 S 425. (2) That an order of the state corporation commission, directing a railroad company to remove its station from one side of its main line to the other, constituted an invasion of interstate commerce, and as such might be declared void by the supreme court of the United States on a writ of error, did not confer any jurisdiction on the inferior federal courts to pass on such question on removal of a proceeding to enforce such order. North Carolina Corp. Commn. v. Southern R. Co., 151 N. C. 447, 66 SE 427.

28. Re Winn, 213 U. S. 458, 29 SCt 515, 53 L. ed. 873; Bundick v. New York, etc., R. Co., 17 F. (2d) 487; Ohio v. Swift, 270 Fed. 141 [certiorari den 257 U. S. 633 mem, 42 SCt 47 mem, 66 L. ed. 407 mem, app dism 260 U. S. 146, 43 SCt 22, 67 L. ed. 176]; Smith v. Barnett, 242 Fed. 83. But see South Carolina v. Port Royal, etc., R. Co., 56 Fed. 333 (where apparently a defense was considered); Shohoney v. Quincy, etc., R. Co., 223 Mo. 649, 122 SW 1025 (where the court cited Colorado Cent. Cons. Min. Co. v. Turck, 150 U. S. 138, 143, 14 SCt 35, 37 L. ed. 1030 in which case the present Removal Act was not under consideration).

[a] **Contract as to routing.**—A suit to enjoin the violation of a contract as to the routing of traffic was not removable because of defendant's claim that the contract was void under federal statutes regulating the routing of shipments by rail. Smith v. Barnett, 242 Fed. 83.

29. Visayan Refining Co. v. Standard Transp. Co., 17 F. (2d) 642; Monroe v. Detroit, etc., R. Co., 257 Fed. 782.

30. See supra §§ 46–53; infra § 80.

31. Chalmers Chemical Co. v. Chadeloid Chemical Co., 175 Fed. 995.

[a] **Illustration.**—A suit in equity to cancel certain agreements regulating the price of paint and varnish removers, manufactured and sold under patents issued to defendant, on the ground that such agreements were in violation of the Sherman anti-trust law was a suit directly involving the construction of a law of the United States, and was therefore removable to the federal courts, regardless of the relationship of the parties. Chalmers Chemical Co. v. Chadeloid Chemical Co., 175 Fed. 995.

32. General Inv. Co. v. Lake Shore, etc., R. Co., 260 U. S. 261, 43 SCt 106, 67 L. ed. 244 [mod on other grounds 269 Fed. 235].

[a] **Rule applied** where a private corporation sought injunctive relief in the state court, under the Clayton Act. General Inv. Co. v. Lake Shore, etc., R. Co., 260 U. S. 261, 43 SCt 106, 67 L. ed. 244 [mod on other grounds 269 Fed. 235] (where, however, the dismissal of the suit by the lower federal court in so far as it was based on the federal statute, on the ground that the federal court alone had jurisdiction of the suit in that regard, was upheld).

Removability as depending on jurisdiction of state court see supra § 27.

33. Atty.-Gen. v. Michigan Bell Tel. Co., 235 Mich. 416, 209 NW 200.

[a] **Rule applied** to a proceeding by the attorney general of a state in the nature of quo warranto to test the right to continue business and to annul a telephone company's charter, based on an alleged attempt to monopolize the telephone business, both intrastate and interstate, on the ground that whether the attorney general could invoke the federal statute and whether defendant had violated it required a construction of the statute. Atty.-Gen. v. Michigan Bell Tel. Co., 235 Mich. 416, 209 NW 200.

34. Minnesota v. Northern Securities Co., 194 U. S. 48, 24 SCt 598, 48 L. ed. 870.

[a] **Rule applied** where one of the grounds relied on by the state to support the claim that suit was one arising under the laws of the United States, was that it looked to the protection of the state's proprietary interests based on the ownership of certain lands received from the United States. Minnesota v. Northern Securities Co., 194 U. S. 48, 24 SCt 598, 48 L. ed. 870.

35. Minnesota v. Northern Securities Co., supra.

36. South Carolina v. Virginia-Carolina Chemical Co., 117 Fed. 727.

37. Minnesota v. Northern Securities Co., 194 U. S. 48, 24 SCt 598, 48 L. ed. 870; Ohio v. Swift, 270 Fed. 141 [certiorari den 257 U. S. 633 mem, 42 SCt 47 mem, 66 L. ed. 407 mem, app dism 260 U. S. 146, 43 SCt 22, 67 L. ed. 176].

[a] **Full faith and credit clause of federal constitution** was not involved in a suit by a state, to which a corporation of another state was a party defendant, to enforce an anti-monopoly law of such state. Minnesota v. Northern Securities Co., 194 U. S. 48, 44 SCt 598, 48 L. ed. 87.

38. **Removability of suits against director general of railroads** see infra § 65.

39. See supra §§ 46–53; infra § 80.

40. Great Northern R. Co. v. Galbreath Cattle Co., 271 U. S. 99, 46 SCt 439, 70 L. ed. 854 [rev 66 Mont. 198, 213 P 610, 71 Mont. 56, 227 P 65]; Southern Pac. Co. v. Stewart, 245 U. S. 359, 562, 38 SCt 130, 203, 62 L. ed. 345; Alabama Great Southern R. Co. v. American Cotton Oil Co., 229 Fed. 11, 143 CCA 313; Missouri, etc., R. Co. v. Miller, (Tex. Civ. A.) 211 SW 543.

[a] **Illustrations.**—(1) Certain actions for loss or injury have been held removable as arising under the so-called Carmack Amendment, USCA tit 49 § 20, or other statutes applicable to interstate shipments. Great Northern R. Co. v. Galbreath Cattle Co., 271 U. S. 99, 46 SCt 439, 70 L. ed. 854 [rev 66 Mont. 198, 213 P 610, 71 Mont. 56, 227 P 65]; Southern Pac. Co. v. Stewart, 245 U. S. 359, 562, 38 SCt 130, 203, 62 L. ed. 345; Nelms v. Davis, 277 Fed. 987. Compare In re Winn, 213 U. S. 458, 29 SCt 515, 53 L. ed. 873 (where right to remove was denied). But see Storm Lake Tub, etc., Factory v. Minneapolis, etc., R.

freight charges for interstate shipments,[41] of actions based on delay in furnishing cars for interstate shipments,[42] and of actions in which recovery of attorney's fees in connection with the violation of duty by an interstate carrier by railroad is sought.[43] But the right to remove on the ground here under consideration has been denied in the case of an action based on a contract between a railroad company and defendant by which defendant assumed liability for the damage involved, notwithstanding the railroad company's liability was fixed by a federal statute,[44] and also in the case of an action for damages brought under a state statute.[45]

[§ 59] **d. Personal Injuries.**[46] Prior to the amendment of 1910 prohibiting the removal of cases arising under the Federal Employers' Liability Act,[47] the removability of cases based on such act,[48] or on the Federal Safety Appliance Act,[49] was recognized or upheld in several cases, but in other cases it was held that the action did not arise under a law of the United States, in the sense that the phrase is used in the Removal Act, merely because plaintiff was entitled to relief under the Federal Employers' Liability Act or the Safety Appliance Act,[50] and that where there was no controversy as to the construction of the act in question,[51] or as to what law was applicable to the case,[52] the action was not removable. Where an action for an injury to the employee of a railroad company is one at common law,[53] or is based on a state statute[54] or where a proceeding for an injury to a person working on a floating dry dock is brought under a state workmen's compensation act,[55] the cause is not removable on the ground here under consideration.

[§ 60] **e. Obstruction and Use of Navigable Waters.**[56] Under general rules and subject to applicable limitations and qualifications[57] a suit involving navigable waters may be removable on the ground here under consideration[58] as, for example, a suit by a state to compel the removal of an obstruction upon a navigable stream, on the theory that the obstruction was maintained in violation of a provision of the enabling act of the state,[59] and a suit by the people of a state to enforce an alleged right, based ultimately on federal statutes, to have a sufficient flow of water to maintain the waters of a canal at a certain level has been held to be removable.[60] A suit involving navigable waters is not removable, however, as one arising under the constitution or laws of the United States merely because it is subject to

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Co., 209 Fed. 895 (an action against a railroad company to recover for loss or damage to an interstate shipment through the alleged negligence of defendant is not one arising under any law of the United States); Orr v. Baltimore, etc., R. Co., 83 Misc. 221, 145 NYS 378 (an action under the Carmack Amendment to the Interstate Commerce Act against an interstate carrier for damages for loss of merchandise was not removable, where the only question for determination was one of fact). (2) The rule permitting removal has been applied to actions for loss of, or injury to, live stock. Hartford F. Ins. Co. v. Kansas City, etc., R. Co., 251 Fed. 332; Smith v. Atchison, etc., R. Co., 210 Fed. 988; McGoon v. Northern Pac. R. Co., 204 Fed. 998. (3) The rule permitting removal has been applied to actions against the initial carrier (McGoon v. Northern Pac. R. Co., 204 Fed. 998; Missouri, etc., R. Co. v. Smith, (Tex. Civ. A.) 164 SW 885), (4) against the connecting carrier (Great Northern R. Co. v. Galbreath Cattle Co., 271 U. S. 99, 46 SCt 439, 70 L. ed. 854 [rev 66 Mont. 198, 213 P 610, 71 Mont. 56, 227 P 65]; Missouri, etc., R. Co. v. Miller, (Tex. Civ. A.) 211 SW 543), (5) and against the initial carrier and connecting carrier jointly (Alabama Great Southern R. Co. v. American Cotton Oil Co., 229 Fed. 11, 143 CCA 313. But see Adams v. Chicago Great Western R. Co., 210 Fed. 362 [an action against several carriers engaged in an interstate shipment of wool, on the ground that the terminal carrier failed to deliver the same, did not arise under a law of the United States because the initial carrier was made liable for the default of any connecting carrier by Carmack Amend. § 7]). (6) Thus the rule permitting removal applies to an action against the initial carrier for loss or injury to live stock. Southern Pac. Co. v. Stewart, 245 U. S. 359, 562, 38 SCt 130, 203, 62 L. ed. 345. (7) So an action against a second and connecting carrier for injuries to cattle due to delay, careless handling, and failure to comply with duty as to unloading cattle into properly equipped pens for rest, water, and feeding, is removable. Great Northern R. Co. v. Galbreath Cattle Co., 271 U. S. 99, 46 SCt 439, 70 L. ed. 854 [rev 66 Mont. 198, 213 P 610, 71 Mont. 56, 227 P 65]. (8) Although an interstate shipment was stopped in transit and rebilled, without being repossessed, as an intrastate shipment in the state of destination, to original destination, an action for damage to such shipment was removable. Fielding v. Toledo, etc., R. Co., 33 F. (2d) 994.

[41] Allen v. New York, etc., R. Co., 15 F. (2d) 532; Smith v. Atchison, etc., R. Co., 210 Fed. 988; Murray v. Chicago, etc., R. Co., 62 Fed. 24 [aff on other grounds 92 Fed. 868]. But see Auracher v. Omaha, etc., R. Co., 102 Fed. 1 (where the action was dismissed on removal to the federal court, on the ground that the state court had no jurisdiction).

[42] Williams v. New York, etc., R. Co., 11 F. (2d) 363, 45 ALR 437.

[43] Smith v. Atchison, etc., R. Co., 210 Fed. 988.

[44] Emery v. American Refrigerator Transit Co., 246 U. S. 634, 38 SCt 414, 62 L. ed. 912.

[45] Brashear v. Louisville, etc., R. Co., 32 F. (2d) 373.

[46] **Removability of suits against director general of railroads** see infra § 65.

[47] **Construction and application of amendment** see supra § 20.

Federal Employers' Liability Act in general see Master and Servant § 385.

[48] Clark v. Southern Pac. Co., 175 Fed. 122; Calhoun v. Central of Georgia R. Co., 7 Ga. A. 528, 67 SE 274; Lemon v. Louisville, etc., R. Co., 137 Ky. 276, 125 SW 701.

[a] **Injury sustained in territory.**—Where the injury was sustained in a territory it was held that the action was removable as it arose under that provision of the Federal Employers' Liability Act, which applies to carriers by railroad in territories, USCA tit 45 § 52. Clark v. Southern Pac. Co., 175 Fed. 122.

[49] Nicholas v. Chesapeake, etc., R. Co., 127 Ky. 310, 105 SW 481, 32 KyL 270, 17 LRANS 861.

[50] Leggett v. Great Northern R. Co., 180 Fed. 314.

[51] Leggett v. Great Northern R. Co., supra; Hubbard v. Chicago, etc., R. Co., 176 Fed. 994; Nelson v. Southern R. Co., 172 Fed. 478; Miller v. Illinois Cent. R. Co., 168 Fed. 982. Compare Bottoms v. St. Louis, etc., R. Co., 179 Fed. 318 (an action by an employee against a railroad company to recover for a personal injury, where both parties were engaged in interstate commerce at the time of the injury, is governed by the federal employer's liability act (Act April 22, 1908 c 149 35 St. at L. 65 which supersedes all other law, and is controlling on the question of the jurisdiction of a federal court and the right of removal).

[52] Leggett v. Great Northern R. Co., 180 Fed. 314.

[53] Shohoney v. Quincy, etc., R. Co., 223 Mo. 649, 122 SW 1025.

[54] Thompson v. Wabash R. Co., 184 Fed. 554; Hall v. Chicago, etc., R. Co., 149 Fed. 564; Shohoney v. Quincy, etc., R. Co., 223 Mo. 649, 122 SW 1025.

[a] **Rule applied** to an action by a widow to recover for the death of her husband who was a railroad employee engaged in interstate commerce. Thompson v. Wabash R. Co., 184 Fed. 554.

Effect of adoption of Federal Employers' Liability Act on operation of state statutes in general see Commerce § 101.

[55] Berton v. Tietjen, etc., Dry Dock Co., 219 Fed. 763.

[56] **Original jurisdiction of federal court of first resort** see Federal Courts § 39.

[57] See supra §§ 46–53; infra § 81.

[58] See cases infra notes 59, 60.

[59] New Orleans, etc., R. Co. v. Mississippi, 102 U. S. 135, 26 L. ed. 96. See State v. White River Valley R. Co., 27 S. D. 65, 129 NW 1034 (where, however, the right to remove was denied on the ground that the federal court did not have authority to issue a writ of mandamus as an original proceeding).

[a] **Rule applied** to a suit to compel the removal of a bridge. New Orleans, etc., R. Co. v. Mississippi, 102 U. S. 135, 26 L. ed. 96 (case arose prior to Removal Act of 1887–1888 and apparently found several reasons why a federal question was involved).

[60] Illinois v. Chicago Sanitary Dist., 98 Fed. 150.

Removability of suits by state in general see supra § 53.

a defense based on such constitution or law,[61] or where plaintiff's claim is based solely on state laws[62] or on a colonial charter which was confirmed by the state.[63]

[§ 61] **4. Revenue and Taxation.**[64] The removability of a suit arising under a federal statute providing for internal revenue has been recognized.[65] However, in view of the rule, under the present Removal Act, that the fact that the suit arises under the constitution or laws of the United States must appear from the allegations of plaintiff's pleading,[66] a suit by a state to recover taxes[67] or penalties,[68] levied under its own revenue laws, or a suit by county authorities to collect taxes levied under a state statute,[69] is not removable on the ground here under consideration, notwithstanding defendant interposes a defense based on the constitution or laws of the United States.[70] Under the Removal Act of 1875 the question as to the right of plaintiff[71] to remove a suit or proceeding involving taxes or revenue arose in various instances.[72]

[§ 62] **5. Postal Laws.** Subject to applicable limitations and qualifications[73] the removability of actions arising under the postal laws has been recognized.[74]

[§ 63] **6. Indians.** Subject to applicable limitations and exceptions[75] the removability of a suit arising under federal laws applicable to the status and rights of Indians has been recognized,[76] but an action in the nature of ejectment brought by an Indian was not removable merely because a defense arising under a federal law might be interposed.[77]

[§ 64] **7. Officers or Agents of United States, and Persons Claiming under Such Officers or Agents**[78]**—a. In General.** In the absence of special authorization[79] the mere fact that defendant is an officer of the United States,[80] or that the action is between

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61. Beaumont v. Texas, etc., R. Co., 296 Fed. 523.

[a] **Illustrations.**—(1) A suit by one operating a ferry across the Columbia River from a point in Oregon to a point in Washington, under a license issued by state authority granting an exclusive ferry right for a fixed period, to restrain another from operating a ferry between the same points without any license from either state, does not involve a federal question though defendant challenges plaintiff's ferry rights on the ground that the same unlawfully interferes with interstate commerce, and the cause is not removable to the federal court on that ground. Dalles, etc., Ferry Co. v. Hendryx, 189 Fed. 266. (2) So removability has been denied in the case of a suit by a city to prevent defendant railroad company from constructing or maintaining a bridge except a bridge meeting certain requirements was not removable because it was subject to defenses based on the commerce clause of the federal constitution and on the provisions of federal statutes applicable to the construction, maintenance, and operation of bridges over navigable streams. Beaumont v. Texas, etc., R. Co., 296 Fed. 523.

[b] **Under the Removal Act of 1875,** the right to remove was recognized where defendant contended that the obstruction of a navigable stream was authorized by an act of congress. New Orleans, etc., R. Co. v. Mississippi, 102 U. S. 135, 26 L. ed. 96.

62. Dalles, etc., Ferry Co. v. Hendryx, 189 Fed. 266.

63. Starin v. New York, 115 U. S. 248, 6 SCt 28, 29 L. ed. 248.

[a] **Suit to enforce alleged right to establish ferries.**—A suit by a municipal corporation to enforce alleged rights to establish ferries over certain waters, alleged to have been granted to it by a colonial charter, subsequently confirmed by the state, was not removable. Starin v. New York, 115 U. S. 248, 6 SCt 28, 29 L. ed. 248.

64. Original jurisdiction of federal court of first resort see Federal Courts § 33.

65. Crawford v. Hubbell, 89 Fed. 1.

[a] **War revenue act.**—A cause involving the question whether an express company or its customer must furnish the stamp required by the War Revenue Act of 1898 to be affixed to a receipt given by the company is one arising under a law of the United States. Crawford v. Hubbell, 89 Fed. 1.

66. See infra §§ 75, 82.

67. Postal Tel. Cable Co. v. Alabama, 155 U. S. 482, 15 SCt 192, 39 L. ed. 231; Tennessee v. Union, etc., Bank, 152 U. S. 454, 14 SCt 654, 88 L. ed. 511; Chicago, etc., R. Co. v. Nebraska, 251 Fed. 279, 163 CCA 435; Kentucky v. Chicago, etc., R. Co., 123 Fed. 457; Darnell v. State, 174 Ind. 143, 90 NE 769 [aff 226 U. S. 390, 33 SCt 120, 57 L. ed. 267].

[a] **Rule applied** to a suit by a state to recover taxes on property omitted from taxation brought against nonresidents. Darnell v. State, 174 Ind. 143, 90 NE 769 [aff 226 U. S. 390, 33 SCt 120, 57 L. ed. 267].

68. Postal Tel. Cable Co. v. Alabama, 155 U. S. 482, 15 SCt 192, 39 L. ed. 231.

69. Sawyer v. Kochersperger, 170 U. S. 303, 18 SCt 946, 42 L. ed. 1046.

70. Kentucky v. Chicago, etc., R. Co., 123 Fed. 457. And see cases supra notes 67–69.

[a] **Under the Removal Act of 1875** the action might be removed where defendant interposed a defense based on the constitution or laws of the United States. Southern Pac. R. Co. v. California, 118 U. S. 109, 6 SCt 993, 30 L. ed. 103 [rev 65 Cal. 553, 4 P 568]; San Mateo County v. Southern Pac. R. Co., 13 Fed. 145.

Defenses under commerce clause of federal constitution in general see infra § 56.

71. Who may remove under present Removal Act in general see infra §§ 212–234.

72. See cases infra this note.

[a] **Suit on proceeding not removable.**—(1) Plaintiff's right to remove an action to recover back, under a state statute, the amount of taxes erroneously levied and collected, on the ground that it involved a federal question, was denied (Berger v. Douglas County Comrs., 5 Fed. 23), (2) notwithstanding a federal court has made a decree establishing the invalidity of the taxes in question (Berger v. Douglas County Comrs., supra). (3) Where the petitioner in a proceeding under Virginia act of Jan. 14, 1882, for the identification and verification of bond coupons tendered in payment of taxes, debts, or demands due the state, claimed the right to removal under the Removal Act of 1875, it was held that the proceeding was not a suit of a civil nature arising under the constitution or laws of the United States within the meaning of the act. Stewart v. Virginia, 117 U. S. 612, 6 SCt 922, 29 L. ed. 1006; Virginia Coupon Cases, 25 Fed. 666.

[b] **Suit or proceeding removable.**—The removability of a proceeding instituted by plaintiff as president of a national bank to attack the legality of an assessment of the capital stock of such bank was upheld on the ground that the controversy involved a federal question. Richards v. Rock Rapids, 72 Iowa 77, 33 NW 372.

73. See supra §§ 46–53; infra § 62.

74. Porter v. Coble, 246 Fed. 244, 158 CCA 404; Lewis Pub. Co. v. Wyman, 152 Fed. 200; New Orleans Nat. Bank v. Merchant, 18 Fed. 841. And see infra § 64 (as to certain actions against postal officials).

75. See supra §§ 46–53; infra § 84.

76. Jackson v. Gates Oil Co., 297 Fed. 549.

[a] **A suit by an Indian to cancel an oil lease,** which could neither be prosecuted to judgment nor defended unless the Act of May 27, 1908 [35 St. at L. 312], was construed and given effect, was removable. Jackson v. Gates Oil Co., 297 Fed. 549.

77. Shellenbarger v. Fewel, 34 Okl. 79, 124 P 617.

78. Cross references:
Official bonds see infra § 73.
Original jurisdiction of federal court of first resort see Federal Courts § 43.
Removability of suits by or against:
  Receivers appointed by federal courts see infra § 67.
  Trustees in bankruptcy see infra § 68.

79. Removal under special statutes applicable to suits against particular officers or persons:
Appointed or acting under revenue law see infra §§ 90–101.
Court officers see infra §§ 102–108.
Officers of congress see infra § 109.

80. Stanfield v. Umatilla River Water Users' Assoc., 192 Fed. 596; Rothschild v. Matthews, 22 Fed. 6; Walker v. Coleman, 55 Kan. 381, 40 P 640, 49 AmSR 254. See Ingram Day Lumber Co. v. U. S. Shipping Bd. Emergency Fleet Corp., 267 Fed. 283 (no right of removal, where a suit is brought against an agent, merely because the principal, if sued, would have to be sued in the federal court).

[a] **In Hawaii,** where under the Organic Act § 86 (d) (USCA tit 48 § 645) laws of the United States as to the removal of causes from state courts to courts of the United States are applicable as between the

such an officer and his deputy,[81] is not ground for removal. It has, however, been held or recognized that suits against officers of the United States based on acts done by virtue of or under color of their office arise under the laws of the United States and may be removed,[82] as, for example, suits or actions for damages[83] or to enjoin the performance of certain acts connected with the office.[84] In any event, in order that a suit against an officer of the United States may be removable on the ground here under consideration, the fact that it arises under the constitution or laws of the United States must appear on the face of plaintiff's pleading,[85] and the right to remove may not be based on a defense so arising.[86]

Actions against private persons. The mere fact that a private person has acquired property through an act of an officer of the United States does not render removable an action against such person, in which plaintiff seeks to establish certain rights in respect of such property,[87] but it has been held that an action based on the alleged fact that defendant wrongfully caused a United States marshal to levy execution on plaintiff's property, was one arising under the constitution or laws of the United States.[88]

[§ 65] **b. Director General of, or Government Agent for, Railroads.**[89] The removability of certain actions against the director general of railroads[90] and against the agent subsequently designated by the president to be sued in respect of causes of action arising during operation by the government,[91] including certain actions for personal injuries against the director general[92] or against the designated agent,[93] has been denied because of the prohibition in the act, under which the government took over the operation of the railroads during the Great War,[94] that there shall not be transferred to a fed-

territorial courts and the United States court in Hawaii, a like rule applies in respect of the removal of an action against an officer of the United States from a territorial court to the United States district court. Chock Sing v. Breckons, 3 Hawaii Fed. 630.

[81] Upham v. Scoville, 40 Ark. 170; Setzer v. Douglass, 91 N. C. 426.

[a] **Actions not removable.**—(1) An action by a United States marshal against his deputy, to recover, according to contract, a part of fees collected. Setzer v. Douglass, 91 N. C. 426; Hildebrand v. Douglass, 91 N. C. 430. (2) An action by a deputy marshal to recover from a marshal the value of certain official services, the compensation for which was not governed by statute. Upham v. Scoville, 40 Ark. 170.

[82] Bock v. Perkins, 139 U. S. 628, 11 SCt 677, 35 L. ed. 314; Bryant Bros. Co. v. Robinson, 149 Fed. 321, 79 CCA 259; Eighmy v. Poucher, 83 Fed. 855; Wood v. Drake, 70 Fed. 881; Drake v. Paulhamus, 66 Fed. 895, 14 CCA 162; Ellis v. Norton, 16 Fed. 4, 4 Woods 399. See Hodgson v. Millward, 12 F. Cas. No. 6,568 (suit removable under Act of March 3, 1868 [12 U. S. St. at L. 756 c 81 § 5]).

[a] **Suit to determine water rights.**—(1) A suit against the secretary of the interior and others to determine the rights of plaintiff and defendant in a certain river has been held removable on the theory that the secretary's rights, as representative of the United States, depended on certain federal statutes. North Side Canal Co. v. Twin Falls Canal Co., 12 F. (2d) 311. (2) The use of the word "control" in the provision of the Reclamation Act of June 17, 1902 (32 St. at L. 390 § 8) disclaiming any intent to affect or interfere with state laws relating to the "control," etc., of water used in irrigation does not warrant the inference that congress intended to relegate a suit against the United States or the secretary of the interior involving a right, title, or interest of the United States, to the state court for determination and to deny the right of removal. North Side Canal Co. v. Twin Falls Canal Co., supra.

[83] See cases infra this note.

[a] **United States marshals.**—The removability of certain actions against United States marshals has been upheld or recognized, as for example: (1) Actions for wrongful levy upon property. Bock v. Perkins, 139 U. S. 628, 11 SCt 677, 35 L. ed. 314 [aff 28 Fed. 123]; Ellis v. Norton, 16 Fed. 4, 4 Woods 399; Howard v. Stewart, 34 Nebr. 765, 52 NW 714. But see McKee v. Coffin, 66 Tex. 304, 1 SW 276 (holding that a suit against a marshal for a levy upon goods which, it is claimed, belonged to some one other than the person named in the writ, was not removable). (2) Action to make a United States marshal liable for the acts of his deputy. Ellis v. Norton, 16 Fed. 4, 4 Woods 399. (3) Action for false imprisonment. Wood v. Drake, 70 Fed. 881.

[b] **United States district attorney.**—An action against a United States district attorney for malicious prosecution has been held removable. Eighmy v. Poucher, 83 Fed. 855.

[c] **Warden of United States prison.**—A prisoner's action against the warden of a United States penitentiary for injuries from alleged negligence in placing plaintiff in a dangerous position for work arose under the United States laws, so as to be removable. Steele v. Halligan, 229 Fed. 1011.

[d] **Manager of reclamation project.**—An action against the project manager for the United States of a reclamation project to recover damages for his alleged negligence while acting in his representative capacity presumptively involved a federal question and the case was removable. Whiffin v. Cole, 264 Fed. 252.

[84] See cases infra this note.

[a] **United States marshal.**—Where a United States marshal in his official capacity levied on real estate under an execution issued out of the federal court, an injunction issued by a state court restraining the marshal from proceeding further under the writ was removable to the United States Circuit Court as a case arising under the laws of the United States, though the marshal was joined as a defendant with one over whom jurisdiction was dependent on other considerations. Frank v. Leopold, etc., Co., 169 Fed. 922.

[b] **Secretary of war.**—A suit to enjoin the secretary of war and others from certain acts in respect of laying out a highway and constructing a bridge, after condemnation in a federal district court, under an act of congress, of a right of way across a highway, for a feeder of a canal, was held removable. Woods v. Root, 123 Fed. 402, 59 CCA 206.

[c] **Postal officials.**—The removability of certain suits to enjoin postal officials has been recognized or upheld, as, for example: (1) Suit to enjoin postmaster from refusing the use of the mails. New Orleans Nat. Bank v. Merchant, 18 Fed. 841. (2) Suit to enjoin a postmaster from giving effect to a fraud order. Bryant Bros. Co. v. Robinson, 149 Fed. 321, 79 CCA 259. (3) Suit to enjoin the postmaster-general from forbidding the transmission of a magazine through the mails as second class matter. Lewis Pub. Co. v. Wyman, 152 Fed. 200. (4) Suit to enjoin a postal inspector from delivering to a third person certain government property in the possession of plaintiff who claimed to be the regular incumbent of the office of postmaster. Porter v. Coble, 246 Fed. 244, 158 CCA 404.

[85] See infra § 85.

[86] Walker v. Collins, 167 U. S. 57, 17 SCt 738, 42 L. ed. 76; Stanfield v. Umatilla Water Users' Assoc., 192 Fed. 596.

[87] Coyle v. Stern, 193 Fed. 582, 113 CCA 450.

[a] **Thus** an action based on a sale of property by a United States marshal to defendant, in violation of the law of the state, to which action the marshal was not a party, was not removable. Coyle v. Stern, 193 Fed. 582, 113 CCA 450.

[88] Hurst v. Cobb, 61 Fed. 1.

[89] **Removability dependent on diversity of citizenship** see infra §§ 126, 150.

[90] Davis v. Slocomb, 263 U. S. 158, 44 SCt 59, 68 L. ed. 226.

[91] Davis v. Slocomb, supra; Shirer v. Davis, 295 Fed. 317.

[a] **United States as party.**—The claim to remove on the grounds that the action arose under the laws of the United States and that the United States was in effect a party were both rejected and removability denied where plaintiff and the carrier were citizens of the same state. Shirer v. Davis, 295 Fed. 317.

[92] Davis v. Slocomb, 263 U. S. 158, 44 SCt 59, 68 L. ed. 226; Loughnan v. Hines, 261 Fed. 218. Contra Stark v. Payne, 271 Fed. 477; Westbrook v. Director Gen. of Railroads, 263 Fed. 211.

[a] **Where the railroad company was joined with the director general** the right to remove an action for injury to a passenger was denied. Mizell v. Atlantic Coast Line R. Co., 181 N. C. 36, 106 SE 133.

[93] Davis v. Slocomb, 263 U. S. 158, 44 SCt 59, 68 L. ed. 226; Schroeder v. Davis, 32 F. (2d) 454.

[94] Act of March 21, 1918 c 25 [40 U. S. St. at L. 451 c 25]; Act of Febr. 28, 1920 [41 U. S. St. at L. 456 c 91].

eral court any action which was not transferable prior to the federal control[95] but the removability of an action against the director general for injury to live stock during transportation in interstate commerce has apparently been recognized.[96]

[§ 66] **c. Receivers for, or Agents for Stockholders of, National Banks.**[97] It is usually recognized that a suit by[98] or against[99] the receiver of a national bank appointed by the controller of the currency arises under the laws of the United States and may be removed by defendant, and some of the recent cases rely on the statute giving jurisdiction to federal courts of cases for winding up the affairs of the bank[1] as ground for the removal of cases both against receivers[2] and also against agents appointed by shareholders of the bank in pursuance of the applicable federal statutes.[3] But it has been held that a suit against the receiver to recover certain moneys on the theory that they constitute a trust fund for plaintiff is not removable.[4]

[§ 67] **8. Receivers Appointed by Federal Courts.**[5] The fact that the appointment of a receiver for a corporation was made by a federal court does not of itself make all actions by[6] or against[7] such a receiver a suit arising under the constitution or laws of the United States when the appointment was made under the general equity powers of the court; nor, does the rule permitting the removal of actions against officers of the United States because of acts performed under color of office or in the performance of their duties[8] apply.[9] It has been held, however, that where the validity of an order under which the defendant receiver was acting is brought in question the suit is removable.[10] Under a statute providing in substance for the removal of actions against any officer appointed by federal courts based on acts done by such officer under color of his office or in the performance of his official duties, certain actions against receivers appointed by federal courts are removable.[11]

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[95] See cases supra notes 90–93.

[96] Hall v. Payne, 274 Fed. 237.

Removability of actions against railroad companies for injury to property in interstate commerce see supra § 58.

[97] **Cross references:**

Appointment of receiver of national bank in general see Banks and Banking § 815 et seq.

Original jurisdiction of federal court of first resort see Federal Courts § 46.

[98] Johnson v. Rankin, (Tex. Civ. A.) 95 SW 665.

[99] Studebaker Corp. v. Florence First Nat. Bank, 10 F. (2d) 590; Auburn Sav. Bank v. Hayes, 61 Fed. 911; Hot Springs Independent School Dist. No. 10 v. Hot Springs First Nat. Bank, 61 Fed. 417; Wegman v. Traders' Nat. Bank, 129 Misc. 132, 220 NYS 476. Compare Bird v. Cockrem, 3 F. Cas. No. 1,429, 2 Woods 32 (where in a case arising prior to the Removal Act of 1875 the right to remove was denied). But see Tehan v. Auburn First Nat. Bank, 39 Fed. 577 (where the petition to remove an action against a receiver to have an indebtedness due plaintiff as administrator applied to the payment of notes held by the bank against him, referred to the National Bank Act Rev. St. §§ 5234, 5236, 5242).

[a] **The receiver of a national bank is a "federal officer,"** entitled to have an action attacking validity of appointment removed to federal court. Wegman v. Traders' Nat. Bank, 129 Misc. 132, 220 NYS 476.

[1] USCA tit 28 § 41 (16).

[2] Fleming v. Gamble, 37 F. (2d) 72; Studebaker Corp. v. Florence First Nat. Bank, 10 F. (2d) 590.

[a] **Removal permitted.**—Action to recover the amount of a note alleged to have been made for the accommodation of the bank by a corporation which plaintiffs represented. Fleming v. Gamble, 37 F. (2d) 72.

[b] **Joinder of the insolvent bank and also a new bank organized to take over assets** as parties defendant in an action against the receiver did not affect the right of removal. Studebaker Corp. v. Florence First Nat. Bank, 10 F. (2d) 590.

[3] North Dakota Guarantee Co. v. Hanway, 104 Fed. 369, 44 CCA 312; Snohomish County v. Puget Sound Nat. Bank, 81 Fed. 518.

[a] **Suit removable.**—Proceeding to enjoin the agent from proceeding further in the winding up of the affairs of the bank and for the appointment of a receiver to take charge of the remaining assets. Snohomish County v. Puget Sound Nat. Bank, 81 Fed. 518.

[4] Poweshiek County v. Merchants' Nat. Bank, (Iowa) 220 NW 63.

[5] **Removability of ancillary litigation in general** see supra § 25.

[6] Pepper v. Rogers, 128 Fed. 987.

[7] Gableman v. Peoria, etc., R. Co., 179 U. S. 335, 21 SCt 171, 45 L. ed. 220; Dale v. Smith, 182 Fed. 360; Rural Home Tel. Co. v. Powers, 176 Fed. 986; Chesapeake, etc., R. Co. v. Smith, 101 Ky. 707, 42 SW 538, 19 KyL 1826; Monnett v. Columbus, etc., R. Co., 26 Oh. Cir. Ct. 469. Compare Barnette v. Wells, Fargo Nevada Nat. Bank, 270 U. S. 438, 46 SCt 438, 70 L. ed. 669 (where removal by a receiver was sustained under the Judicial Code § 28 [USCA tit 28 § 71] as supplemented by § 33 [USCA tit 28 § 76]). But see Van Wert County Comrs. v. Peirce, 90 Fed. 764 (where the right to remove was upheld).

[a] **Action for personal injury based on negligence.**—A suit against a receiver appointed by a federal court to recover damages for his negligence or that of his employees does not necessarily arise under the laws of the United States. Gableman v. Peoria, etc., R. Co., 179 U. S. 335, 21 SCt 171, 45 L. ed. 220, 101 Fed. 1, 41 CCA 160; Chesapeake, etc., R. Co. v. Smith, 42 SW 538, 19 KyL 1826. But see Pitkin v. Cowen, 91 Fed. 599; Ray v. Peirce, 81 Fed. 881 (in both cases, however, remand was granted because of lack of the jurisdictional amount).

[b] **Suit to forfeit franchise.**—(1) An action by the people of the state of New York against certain street railroad companies in New York City to forfeit their franchises, granted by the common council of the city pursuant to legislative authority, was not removable to the federal courts on the theory that it arose under the Constitution and laws of the United States by reason of the fact that receivers appointed by the federal court to which removal was sought were in possession of the property, rights, and privileges of a lessee of the property of the companies whose franchises were sought to be forfeited. New York v. Bleecker St., etc., R. Co., 178 Fed. 156. (2) In such case that no consent had been obtained to sue the receivers or that the suit was prematurely brought, did not warrant a removal of the cause to the federal court. New York v. Bleecker St., etc., R. Co., supra.

[c] **Interference with receiver's operation of railroad.**—Where receivers of an interstate railroad were appointed by a federal court, actions against them instituted by claimants in a state court were not removable to the federal court on the theory that to permit such suits to be maintained in the state court would interfere with the receivers' operation of the road and their performance of its duties to the public since the court which appoints a receiver has power to protect the integrity of the railroad and to maintain its ability to perform its functions as an interstate carrier. Dale v. Smith, 182 Fed. 360.

[d] **Receiver for a corporation organized under laws of the United States** (1) might, it seems, remove an action against him because the corporation might have removed because of its federal incorporation. Reed v. Northern Pac. R. Co., 86 Fed. 817. (2) However, any right of a receiver in this regard would seem to have ceased in view of the statute denying in practically all cases the right of a corporation to remove on the ground indicated. See USCA tit 28 § 42; and infra § 69.

[e] **Joinder of other defendants.**—The right to remove has also been denied where the receiver was joined as defendant with another who did not have the right to remove. Rupp v. Wheeling, etc., R. Co., 121 Fed. 825, 58 CCA 161; Marrs v. Felton, 102 Fed. 775; Schearman v. Trumbell, 75 Fed. 33. But see Landers v. Felton, 73 Fed. 311 (where the court upheld the right of the receiver to remove on the theory that the case arose under the laws and constitution of the United States).

[8] See supra § 64.

[9] Gableman v. Peoria, etc., R. Co., 179 U. S. 335, 21 SCt 171, 45 L. ed. 220.

[10] State v. Frost, 113 Wis. 623, 88 NW 912, 89 NW 915. See Shinney v. North American Sav., etc., Co., 97 Fed. 9 (where motion to remand was denied).

[a] **Right to remove as affected by relief obtainable in federal court.**—A federal receiver may be restrained as well in a federal court as in a state court from doing acts beyond his power, or the power of the court to direct, and hence the removal to a federal court of a suit to restrain him from doing such acts cannot be objected to on the ground that adequate relief cannot be had in that court. State v. Frost, 113 Wis. 623, 89 NW 915.

[§ 68] **9. Trustees in Bankruptcy.**[12] In the absence of statute, a suit by[13] or against[14] a trustee in bankruptcy is not removable merely because of his status as trustee; nor, it seems, is an action against him removable under the rule heretofore stated[15] permitting the removal of certain actions against officers of the United States.[16]

[§ 69] **10. Corporations Organized under Laws of United States, Officers of Such Corporations, and Persons Claiming under Such Corporations**[17]**—a. In General.** While in the absence of any statutory provision to the contrary it would seem that an action by or against a corporation organized under an act of congress would be removable under the provision of the Removal Act authorizing the removal of suits arising under the constitution or laws of the United States,[18] national banks are by statute excepted from the operation of the rule,[19] and it seems that at the present time most suits by or against a corporation organized under laws of the United States are not removable on the ground of such organization because of the statute limiting the original jurisdiction of federal district courts by providing that no such court shall have jurisdiction of any action or suit by or against any corporation on the ground that it was incorporated by or under an act of congress,[20] except in respect of corporations in which the United States is the owner of more than one-half the capital stock.[21]

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[11] See infra § 108.

[12] **Cross references:**
Jurisdiction of action to which trustee in bankruptcy a party in general see Bankruptcy §§ 398–410.
Statute permitting removal of actions against officers of court see infra § 102.

[13] Spencer v. Duplan Silk Co., 191 U. S. 526, 24 SCt 174, 48 L. ed. 287.

[14] Ford Motor Co. v. Automobile Ins. Co., 13 F. (2d) 415.

[a] **Suit to establish lien.**—A suit by a person holding a chattel mortgage on property of a bankrupt, against the trustee in bankruptcy and several insurance companies, to establish and enforce a lien on the proceeds of policies insuring against fire and to prevent payment to the trustee in bankruptcy did not arise under the constitution or laws of the United States within the meaning of the Removal Act. Ford Motor Co. v. Automobile Ins. Co., 13 F. (2d) 415.

[15] See supra § 64.

[16] Ford Motor Co. v. Automobile Ins. Co., 13 F. (2d) 415.

[17] **Necessity of showing federal character of corporation in plaintiff's pleading** see infra § 88.

Original jurisdiction of federal courts of first resort see Federal Courts § 45.

[18] Ex p. Roe, 234 U. S. 70, 34 SCt 722, 58 L. ed. 1217; Texas, etc., R. Co. v. Barrett, 166 U. S. 617, 17 SCt 707, 41 L. ed. 1136; Texas, etc., R. Co. v. Cody, 166 U. S. 606, 17 SCt 703, 41 L. ed. 1132; Butler v. National Home for Disabled Volunteer Soldiers, 144 U. S. 64, 12 SCt 581, 36 L. ed. 346; Texas, etc., R. Co. v. Kirk, 115 U. S. 1, 5 SCt 1113, 29 L. ed. 319 [rev 16 Fed. 292, 3 McCrary 578]; Heffelfinger v. Choctaw, etc., R. Co., 140 Fed. 75 (recognizing rule); Supreme Lodge K. P. W. v. Hill, 76 Fed. 468, 22 CCA 280; Allen v. Texas, etc., R. Co., 25 Fed. 513; Cruikshank v. Fourth Nat. Bank, 16 Fed. 888, 21 Blatchf. 322; Union Pac. R. Co. v. McComb, 58 HowPr (N. Y.) 478; Choctaw, etc., R. Co. v. Hendricks, 21 Okl. 135, 95 P 970; Texas, etc., R. Co. v. Watson, (Tex. Civ. A.) 43 SW 1060. Contra Scheffer v. National L. Ins. Co., 25 Minn. 534 [writ of error dism 131 U. S. cciii appendix 26 L. ed. 1110].

[a] **Reason for rule.**—"The accepted doctrine is intelligible at least since it is part of the plaintiffs' case that the defendant bank [incorporated under laws of the United States] existed and exists as an entity capable of committing the wrong alleged and of being sued." American Bank, etc., Co. v. Federal Reserve Bank, 256 U. S. 350, 41 SCt 499, 500, 65 L. ed. 983, 25 ALR 971.

[b] **The fact that another defendant was joined** (1) with such a corporation, did not of itself prevent removal. In re Dunn, 212 U. S. 374, 29 SCt 299; Washington, etc., R. Co. v. Cœur D'Alene R., etc., Co., 160 U. S. 77, 16 SCt 231, 40 L. ed. 355 [aff 60 Fed. 981, 9 CCA 303]; American Bank, etc., Co. v. Federal Reserve Bank, 269 Fed. 4 [rev on other grounds 256 U. S. 350, 41 SCt 499, 65 L. ed. 983]. But see Seattle, etc., R. Co. v. State, 52 Fed. 594 (case remanded because record did not show the corporation organized under the federal statutes was so related to the case as to be affected by the determination of the controverted question). Contra Eastin v. Texas, etc., R. Co., 99 Tex. 654, 92 SW 838 [rev on other grounds (Civ. A.) 89 SW 440]; Texas, etc., R. Co. v. Tucker, 48 Tex. Civ. A. 115, 106 SW 764; Texas, etc., R. Co. v. Huber, 33 Tex. Civ. A. 75, 75 SW 547. (2) The rule applied even if the other defendant was the receiver of the defendant corporation. Lund v. Chicago, etc., R. Co., 78 Fed. 385; Texas, etc., R. Co. v. Bloom, 85 Tex. 279, 20 SW 133. (3) The rule also applied to actions against a corporation organized under the laws of the United States and another defendant to establish a joint liability, removed on petition of all defendants. Texas, etc., R. Co. v. Eastin, 214 U. S. 153, 29 SCt 564, 53 L. ed. 946 [aff on other grounds 100 Tex. 556, 102 SW 105]; In re Dunn, 212 U. S. 374, 29 SCt 299, 53 L. ed. 558; Martin v. St. Louis Southwestern R. Co., 134 Fed. 134; Texas, etc., R. Co. v. Huber, 103 Tex. 1, 121 SW 1106; Texas, etc., R. Co. v. Beckworth, (Tex. Civ. A.) 118 SW 729. Contra Texas, etc., R. Co. v. Huber, 100 Tex. 1, 92 SW 832; Texas, etc., R. Co. v. Huber, 33 Tex. Civ. A. 75, 75 SW 547. (4) Necessity for joinders of defendants in petition in general see infra § 230.

[c] **Consolidated company.**—The rule permitting removal was applied where defendant was a railroad company created by consolidation, under an act of congress, of companies, only one of which had originally been organized under a law of the United States. Pacific R. Removal Cases, 115 U. S. 1, 5 SCt 1113, 29 L. ed. 319.

[d] **Corporations of District of Columbia.**—Corporations of the District of Columbia organized under acts of congress have been regarded as corporations organized under laws of the United States and so within the operation of the above rule. Rosenberg v. U. S. Shipping Bd. Emergency Fleet Corp., 271 Fed. 956; Union Timber Products Co. v. U. S. Shipping Bd. Emergency Fleet Corp., 252 Fed. 320; Supreme Lodge K. P. v. Wilson, 66 Fed. 785, 14 CCA 264. See Supreme Lodge, K. P. v. Beck, 181 U. S. 49, 21 SCt 532, 45 L. ed. 741; Supreme Lodge, K. P. v. Withers, 177 U. S. 260, 20 SCt 611, 44 L. ed. 762; Supreme Lodge K. P. v. Kalinski, 163 U. S. 289, 16 SCt 1047, 41 L. ed. 163 (the fact of removal appears in the foregoing three cases, but the question is not discussed). But see Layden v. Knights of Pythias, 128 N. C. 546, 39 SE 47 [disappr Southern R. Co. v. Allison, 190 U. S. 326, 23 SCt 713, 47 L. ed. 1078].

[e] **Territorial corporations.**—(1) The removability of an action to which a corporation organized under Act Febr. 18, 1901 [31 U. S. St. at L. 794 c 379] extending to the Indian Territory certain provisions of the laws of Arkansas relating to corporations was a party, was recognized under the above general rule. Canary Oil Co. v. Standard Asphalt, etc., Co., 182 Fed. 663. (2) But there is authority to the contrary. Boyd v. Great Western Coal, etc., Co., 189 Fed. 115. (3) The acts of congress of June 20, 1878 and August 2, 1882, conferring certain rights and privileges on certain corporations organized under the laws of a state and of certain territories could not be considered the basis for removal of an action against a corporation operating in a state other than the one first referred to, where the above acts of congress did not confer powers or rights to be exercised outside the territories named therein. Oregon Short Line, etc., R. Co. v. Skottowe, 162 U. S. 490, 16 SCt 869, 40 L. ed. 1048.

[f] **An early statute, now repealed,** which was substantially the same as a still earlier statute, Act of July 27, 1868 [15 U. S. St. at L. 277 c 255 § 2] (1) provided for the removal under certain circumstances of actions against corporations, other than banking corporations, organized under laws of the United States. U. S. Rev. St. § 640 [repealed by Act of March 3, 1887 (24 U. S. St. at L. 555 c 373 § 6) and Act of August 13, 1888 (25 U. S. St. at L. 436 c 866 § 6)]. (2) For the construction and operation of such statutes see Jones v. Oceanic Steam Nav. Co., 14 F. Cas. No. 7,485, 11 Blatchf. 406; Fisk v. Union Pac. R. Co., 9 F. Cas. No. 4,827, 6 Blatchf. 362; Fisk v. Union Pac. R. Co., 9 F. Cas. No. 4,828, 8 Blatchf. 243; Jones v. Oceanic Steam Nav. Co., 13 F. Cas. No. 7,485, 11 Blatchf. 406; Kain v. Texas Pac. R. Co., 14 F. Cas. No. 7,596; Magee v. Union Pac. R. Co., 16 F. Cas. No. 8,945, 2 Sawy. 447; Reding v. Texas, etc., R. Co., 20 F. Cas. No. 11,630a; Turton v. Union Pac. R. Co., 24 F. Cas. No. 14,273, 3 Dill. 366; Northern Line Packet Co. v. Binninger, 70 Ill. 571; Scheffer v. National L. Ins. Co., 25 Minn. 534 [writ of error dism 131 U. S. cciii appendix 26 L. ed. 1110]; Hazard v. Durant, 9 R. I. 602; Texas, etc., R. Co. v. McAllister, 59 Tex. 349 [rev 115 U. S. 1, 5 SCt 1113, 29 L. ed. 319]. (3) The constitutionality of the statute was upheld. Fisk v. Union Pac. R. Co., 9 F. Cas. No. 4,827, 6 Blatchf. 362.

[19] See infra § 70.

[20] USCA tit 28 § 42. See Leather Mfrs. Nat. Bank v. Cooper, 120 U. S. 778, 7 SCt 777, 30 L. ed. 816 (as to the effect generally on right to remove, of statutory provision denying original jurisdiction to federal court).

[a] **Earlier statute applicable to railroad companies.**—(1) The act of Congress of January 28, 1915 [38 U. S.

The purchaser at a foreclosure sale of the property of a railroad company organized under the laws of the United States, who assumes as part of the purchase price all liabilities incurred by the receivers in the foreclosure proceedings, does not represent such railroad company or the receivers so as to be entitled to assert a right of removal which such company and its receivers might have had because of their status.[22]

[§ 70] **b. National Banking Associations.**[23] Regardless of the general prohibitory statute referred to above,[24] by virtue of the statute providing that national banking associations shall, for the purposes of actions by or against them, and of all suits in equity, other than actions or suits enumerated, be deemed citizens of the state in which they are located,[25] actions by[26] or against[27] national banks are not removable merely on the ground of federal incorporation. The provision of such statute which gives jurisdiction to federal district courts of cases for the winding up of the affairs of national banks[28] does not render removable an action against the bank alone to establish the existence and validity of a claim against it,[29] or to compel a reconveyance of real estate;[30] but the rule is otherwise where the bank and its receiver are joined as parties defendant.[31] There is authority for the view that an action to set aside a proceeding by which it was sought to liquidate and dissolve a national bank is based on applicable federal laws and is, therefore, removable.[32]

Suits against officers and directors. An action against the officers and directors of a national bank by one who has had dealings with the bank based on the acts or representations of defendants in connection with the affairs of the bank, has been regarded as a suit arising under the banking laws on the theory that plaintiff sought to enforce the liability of defendants under a specific provision of such laws.[33]

[§ 71] **c. Federal Reserve Banks.** The above statute limiting the right of removal of actions to which national banking associations are parties[34] does not apply to federal reserve banks,[35] and it was held that under the general rule permitting the removal of cases to which corporations organized under the laws of the United States were parties,[36] actions against such banks were removable,[37] but it would seem that the rule permitting removal on the ground of federal incorporation has been abolished by the recent statute as to the jurisdiction of the federal district court of actions to which federal corporations are parties.[38]

[§ 72] **d. Emergency Fleet Corporation.**[39] Under the rule permitting removal of suits against corporations organized under laws of the United States, as suits arising under such laws, the removability of suits against the Shipping Board Emergency Fleet Corporation has been recognized,[40] and this right to remove would seem to be saved by the express ex-

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St. at L. 804 c 22] which was similar to the present statutes but applied only to railroad companies, prevented the removal of a cause of action against a railroad company organized under the laws of the United States (Texas, etc., R. Co. v. Hughes, (Tex. Civ. A.) 192 SW 1091; Texas, etc., R. Co. v. Hanson, (Tex. Civ. A.) 189 SW 289. (2) Where the cause of action arose prior to the enactment of the statute but the action was not commenced until after such enactment (Texas, etc., R. Co. v. Mercer, (Tex. Civ. A.) 195 SW 263).

[21] USCA tit 28 § 42.

[22] Reed v. Northern Pac. R. Co., 86 Fed. 817.

[23] **Original jurisdiction of federal court of first resort** see Federal Courts § 46.

Suits by or against receivers of national banks see supra § 66.

[24] See supra § 69.

[25] USCA tit 28 § 41(16).

[26] National Bank of Commerce v. Galland, 14 Wash. 502, 45 P 35.

[27] Barons v. Plainville First Nat. Bank, 28 F. (2d) 615; Moulton v. National Farmers' Bank, 27 F. (2d) 403; Wichita Nat. Bank v. Smith, 72 Fed. 568, 19 CCA 42; Masters v. Traders' Nat. Bank, 129 Misc. 133, 220 NYS 499 [aff on other grounds 223 NYS 889].

[a] **Removability denied under earlier statute.**—Leather Manufacturers' Nat. Bank v. Cooper, 120 U. S. 778, 7 SCt 777, 30 L. ed. 816 [aff 29 Fed. 161].

[28] USCA tit 28 § 41(16).

[29] Moulton v. National Farmers' Bank, 27 F. (2d) 403.

[a] **Even an action against the bank commenced after the appointment of the receiver,** was not removable where the receiver was not made a party defendant. Moulton v. National Farmers' Bank, 27 F. (2d) 403.

[30] Barons v. Plainville First Nat. Bank, 28 F. (2d) 615.

[31] Barons v. Plainville First Nat. Bank, 28 F. (2d) 615; Moulton v. National Farmers' Bank, 27 F. (2d) 403; Studebaker Corp. v. Florence First Nat. Bank, 10 F. (2d) 590.

[32] Masters v. National Bank of Commerce, 129 Misc. 131, 220 NYS 523.

[a] **Rule applied** where a stockholder of a national bank sought to set aside the proceedings through which the assets of such bank were transferred to another national bank, to restrain the enforcement and sale of a note given in connection with the transfer and to compel an accounting. Masters v. National Bank of Commerce, 129 Misc. 131, 220 NYS 523.

[33] Bailey v. Mosher, 63 Fed. 488, 11 CCA 304. See Masters v. Traders' Nat. Bank, 223 NYS 889 [aff on other grounds 220 NYS 499] (where, however, the right to remove was denied because of want of the jurisdictional amount). Compare Prescott v. Haughey, 65 Fed. 653 (the removability of an action against directors based on false representations by them which induced plaintiff to deposit money in the bank was denied on the theory that the action was a common-law action for deceit).

[a] **Illustration.**—Action to recover the amount of a loan to the bank. Bailey v. Mosher, 63 Fed. 488, 11 CCA 304.

[34] See supra § 70.

[35] American Bank, etc., Co. v. Federal Reserve Bank, 256 U. S. 350, 41 SCt 499, 65 L. ed. 983, 25 ALR 971 [rev on other grounds 269 Fed. 4].

[36] See supra § 69.

[37] American Bank, etc., Co. v. Federal Reserve Bank, 256 U. S. 350, 41 SCt 499, 65 L. ed. 983, 25 ALR 971 [rev on other grounds 269 Fed. 4].

[38] USCA tit 28 § 42.

[39] **Removability as affected by value of matter in controversy** see supra § 28.

[40] Sloan Shipyards Corp. v. U. S. Shipping Bd. Emergency Fleet Corp., 258 U. S. 549, 42 SCt 386, 66 L. ed. 762 [leave granted to present pet for reh 42 SCt 588] (dictum); James v. U. S. Shipping Bd. Emergency Fleet Corp., 12 F. (2d) 89; Hill v. U. S. Shipping Bd. Emergency Fleet Corp., 284 Fed. 398; Harry Porter Co. v. U. S. Shipping Bd. Emergency Fleet Corp., 284 Fed. 397; Rosenberg v. U. S. Shipping Bd. Emergency Fleet Corp., 271 Fed. 956.

[a] **Illustrations.**—(1) Action on a contract for the construction of vessels. Atlantic Corp. v. U. S. Shipping Bd. Emergency Fleet Corp., 286 Fed. 222. (2) Action on an alleged contract for the building of ships, which plaintiff was not allowed to build. Union Timber Products Co. v. U. S. Shipping Bd. Emergency Fleet Corp., 252 Fed. 320. (3) Action in replevin to recover certain bills of lading. Rosenberg v. U. S. Shipping Bd. Emergency Fleet Corp., 271 Fed. 956.

[b] **Organization under laws of District of Columbia.**—"In pursuance thereof [Act Sept. 7, 1916 (39 U. S. St. at L. 728)], and so authorized thereby, the Shipping Board incorporated the United States Shipping Board Emergency Fleet Corporation, under the general incorporation laws of the District of Columbia. These laws were adopted by act of Congress. The organization and incorporation were, therefore, not only in pursuance of a law of Congress expressly authorizing the same, but in pursuance also of an incorporation statute provided by Congress. Nothing is plainer than that the defendant is a corporation of the United States." Rosenberg v. U. S. Ship-

ception from the above described statute,[41] of actions by or against a corporation of which the government of the United States shall be the owner of one half of the capital stock[42] in view of the fact that the shipping board is the owner of not less than the majority of the stock of the Emergency Fleet Corporation.[43] While it has been held that various actions against such corporation are removable on the ground that they arose under a law regulating commerce,[44] there is authority for the view that an action for a personal tort against such corporation does not arise under any law regulating commerce so as to render it removable on that ground.[45]

[§ 73] **11. Judicial and Official Bonds.** Actions on bonds required by federal courts pursuant to a federal statute,[46] and on bonds required by federal statute of certain officers as a qualification for office,[47] have been regarded as actions arising under the laws of the United States within the meaning of the Removal Act. On the other hand the right of sureties on the bond of a receiver appointed by a federal court to remove, on the ground under consideration, an action against them, to which the receiver was not a party has been denied, where the receiver's liability had already been determined in the federal court.[48]

[§ 74] **12. Suits Involving Litigation in Federal Courts.** It has been held or recognized that a suit does not arise under the laws of the United States merely because it is brought on a judgment of a federal court,[49] because it becomes necessary to construe orders and decrees of a federal court according to their plain meaning,[50] because a party claims title under a sale made under an order, judgment, or decree of a federal court, when the validity and construction of that order, judgment, or decree is not in question;[51] or because a federal court has decided in another suit the questions of law which are involved.[52] A like rule has been applied where the alleged federal question arises out of what is in effect a plea of res judicata by defendant,[53] or where the decision depends on state laws.[54] In some cases, however, it has been held or recognized that a suit in which there is an attack on a decree or judgment of a federal court,[55] on the proceedings under, or for the enforcement of, such decree,[56] or on a title acquired under such decree or judgment[57] may raise a question under the laws or constitution of the United States within the meaning of the Removal Act.

[§ 75] **E. Pleading Affecting Removability—1. In General.** Under the Removal Act of 1875[58] the court was not confined to the allegations of plaintiff's initial pleading in determining whether the suit arose under the constitutions, laws or treaties of the United States,[59] and might consider the pleading of defendant[60] and the petition for removal.[61] On the

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ping Bd. Emergency Fleet Corp., 271 Fed. 956.

[41] See supra § 69.

[42] USCA tit 28 § 42.

[43] See Shipping Board Act of Sept. 7, 1916 [39 U. S. St. at L. 728 c 451]; and Sloan Shipyards Corp. v. United States Shipping Bd. Emergency Fleet Corp., 258 U. S. 549, 42 SCt 386, 66 L. ed. 762.

[44] James v. U. S. Shipping Bd. Emergency Fleet Corp., 12 F. (2d) 89; Harry Porter Co. v. U. S. Shipping Bd. Emergency Fleet Corp., 284 Fed. 397; Ingram Day Lumber Co. v. U. S. Shipping Bd. Emergency Fleet Corp., 267 Fed. 283.

[45] Delpit v. U. S. Shipping Bd. Emergency Fleet Corp., 19 F. (2d) 60.

[46] See cases infra this note.

[a] **Illustration.**—Supersedeas bond. Crane v. Buckley, 105 Fed. 401.

[47] See cases infra this note.

[a] **Illustrations.**—(1) Bond of a deputy collector of internal revenue. Orner v. Saunders, 18 F. Cas. No. 10,584, 3 Dill. 284, 1 NYWklyDig 383. (2) Bond of United States marshal. Feibelman v. Packard, 109 U. S. 421, 3 SCt 289, 27 L. ed. 984; Lawrence v. Norton, 13 Fed. 1, 4 Woods 383; McKee v. Brooks, 64 Tex. 255. Contra Phillips v. Edelstein, 2 Tex. A. Civ. Cas. § 449.

[48] U. S. v. Douglas, 113 N. C. 190, 18 SE 202.

[49] Provident Sav. L. Assur. Soc. v. Ford, 114 U. S. 635, 5 SCt 1104, 29 L. ed. 261.

[50] U. S. v. Douglas, 113 N. C. 190, 18 SE 202.

[51] Carson v. Dunham, 121 U. S. 421, 7 SCt 1030, 30 L. ed. 992; Gay v. Lyons, 10 F. Cas. No. 5,281, 3 Woods 56.

[52] See supra § 49.

[53] Long v. Quinn, 215 Mass. 85, 102 NE 348.

[54] King v. Neill, 26 Fed. 721.

[a] **Thus** it has been held that a suit by a discharged bankrupt to enjoin the levy on property set apart as a homestead, under a judgment obtained prior to the bankruptcy proceedings and prior to the homestead law, did not arise under the constitution or laws of the United States within the meaning of the Removal Act, as it was to be determined by state laws. King v. Neill, 26 Fed. 721.

[55] South Dakota Cent. R. Co. v. Continental, etc., Trust, etc., Bank, 255 Fed. 941, 167 CCA 233 [certiorari den 250 U. S. 642 mem, 39 SCt 493 mem, 63 L. ed. 1186 mem, and dist Carson v. Dunham, 121 U. S. 421, 7 SCt 1030, 30 L. ed. 992]; Johnson v. New Orleans Nat. Banking Assoc., 33 La. Ann. 479.

[56] Ceredo First Nat. Bank v. Savings Soc., 80 Fed. 581, 25 CCA 466; Johnson v. New Orleans Nat. Banking Assoc., 33 La. Ann. 479.

[a] **Suit to enjoin mandamus to compel tax levy.**—A suit to enjoin a mandamus issued by a federal court directing county court to levy a tax for the payment of a judgment was removable. Ceredo First Nat. Bank v. Savings Soc., 80 Fed. 581, 25 CCA 466.

[b] **Suit to relieve from levy of United States marshal.**—Where a suit was brought to relieve the title to certain land from the effect of the levy of a United States marshal and there was a statutory provision authorizing the federal courts by rule of court to provide for remedies to reach the property of judgment debtors similar to those provided by the laws of the state in which the federal court was held, there was a federal question as the laws of the state had by adoption become the laws of the United States. Sowles v. Whitters, 46 Fed. 497.

[c] **Suits obstructing enforcement of judgment.**—Suits in equity in a state court, the effect of which, as disclosed on the face of the bills, is to delay and obstruct, and perhaps defeat, the enforcement of a judgment of a federal court, may be removable. Cornue v. Ingersoll, 174 Fed. 666 [aff 176 Fed. 194, 99 CCA 548].

[57] South Dakota Cent. R. Co. v. Continental, etc., Trust, etc., Bank, 255 Fed. 941, 167 CCA 233 [certiorari den 250 U. S. 642 mem, 39 SCt 493 mem, 63 L. ed. 1186 mem]. See Connor v. Scott, 6 F. Cas. No. 3,119, 4 Dill. 242 (suit removable where question involved was right to enforce vendor's lien on land sold in bankruptcy proceedings). Compare Coyle v. Stern, 193 Fed. 582, 113 CCA 450 (where remand was directed).

[58] Act of March 3, 1875 [18 U. S. St. at L. 470 c 137].

[59] Tennessee v. Union, etc., Bank, 152 U. S. 454, 14 SCt 654, 88 L. ed. 511; Southern Pac. R. Co. v. California, 118 U. S. 109, 6 SCt 993, 30 L. ed. 103; Smith v. Greenhow, 109 U. S. 669, 3 SCt 421, 27 L. ed. 1080; New Orleans, etc., R. Co. v. Mississippi, 102 U. S. 135, 26 L. ed. 96. Compare Mills v. New Jersey Cent. R. Co., 7 N. J. L. J. 230.

[a] **Where plaintiff's pleading disclosed a removable cause** the right of removal by defendant was not lost by insufficient denials in the answer. Miller v. Tobin, 18 Fed. 609, 9 Sawy. 401.

[b] **Bill not disclosing federal question.**—New Jersey Cent. R. Co. v. Mills, 113 U. S. 249, 5 SCt 456, 28 L. ed. 949.

[60] Southern Pac. R. Co. v. California, 118 U. S. 109, 6 SCt 993, 30 L. ed. 103; Ames v. Kansas, 111 U. S. 449, 4 SCt 437, 28 L. ed. 482; New Orleans, etc., R. Co. v. Mississippi, 102 U. S. 135, 26 L. ed. 96. See McLane v. Leicht, 69 Iowa 401, 29 NW 327 (where an answer was examined but the right to remove was denied).

[a] **Answer insufficient to show ground for removal.**—Carson v. Dunham, 121 U. S. 421, 7 SCt 1030, 30 L. ed. 992.

[61] Little York Gold Washing, etc., Co. v. Keyes, 96 U. S. 199, 24 L. ed. 656; Kessinger v. Hinkhouse, 27 Fed. 883. Compare Rothschild v. Matthews, 22 Fed. 6 (petition for

other hand by the Removal Act of 1887–1888,[62] which is substantially the same as the present act[63] in so far as this question as to pleading is concerned, the rule was changed[64] to correspond to the rule effective in cases in which an action is brought originally in the federal court of first resort,[65] and the question as to whether a suit arises under the constitution, laws, or a treaty of the United States, within the meaning of the Removal Act is now determinable from the allegations of plaintiff's initial pleading,[66] or, as usually stated, from plaintiff's statement of his own claim or cause of action,[67] regardless of the plea or answer of defendant;[68] and if it does not appear from plaintiff's pleading that the suit arises as aforesaid,[69] or, as generally stated, if plaintiff's statement of his own claim or cause of action does not show that it so arises,[70] it is not removable on the ground here under consideration, even though plaintiff intentionally omits certain allegations for the purpose of preventing removal.[71] If

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removal could be taken as part of the record in determining removability only so far as it stated facts which might be regarded as legally consistent with the pleadings of the parties and within the purview of the issue if an issue had arisen).

62. Act of March 3, 1887 [24 U. S. St. at L. 552 c 373]; Act of Aug. 13, 1888 [25 U. S. St. at L. 433 c 866].

63. USCA tit 28 § 71.

64. Tennessee v. Union, etc., Bank, 152 U. S. 454, 14 SCt 654, 88 L. ed. 511. Contra South Carolina v. Coosaw Min. Co., 45 Fed. 804.

65. See Federal Courts § 92.

66. Missouri, etc., R. Co. v. Smith, (Tex. Civ. A.) 164 SW 885; State v. Frost, 113 Wis. 623, 88 NW 912, 89 NW 915.

Amended pleading see infra § 77.

67. Great Northern R. Co. v. Galbreath Cattle Co., 271 U. S. 99, 46 SCt 439, 70 L. ed. 854; Clark v. Southern Pac. Co., 175 Fed. 122; State v. Three Sisters Irr. Co., 158 Fed. 346; State v. Louisville, etc., R. Co., 104 Miss. 413, 61 S 425.

[a] **Reason for rule.**—"Even under the act of 1875, the jurisdiction of the circuit court of the United States could not be sustained over a suit originally brought in that court, upon the ground that the suit was one arising under the constitution, laws, or treaties of the United States, unless that appeared in the plaintiff's statement of his own claim. . . . The same rule applies, more comprehensively, to [§ 1 of] the acts of 1887 and 1888. . . . But the corresponding clause in section 2 [of the acts of 1887 and 1888] allows removals from a state court to be made only by defendants, and of suits 'of which the circuit courts of the United States are given original jurisdiction by the preceding section;' thus limiting the jurisdiction of a circuit court of the United States on removal by the defendant, under this section, to such suits as might have been brought in that court by the plaintiff under the first section." Tennessee v. Union, etc., Bank, 152 U. S. 454, 14 SCt 654, 656, 657, 29 L. ed. 791.

68. Lowry v. Hert, 273 Fed. 698 [rev on other grounds 290 Fed. 876]; McGoon v. Northern Pac. R. Co., 204 Fed. 998.

69. Great Northern R. Co. v. Alexander, 246 U. S. 276, 38 SCt 237, 62 L. ed. 713; Moulton v. National Farmers' Bank, 27 F. (2d) 403; Kansas Gas, etc., Co. v. Wichita Natural Gas Co., 266 Fed. 614; Muir v. Louisville, etc., R. Co., 247 Fed. 888; Nevada-California Power Co. v. Hamilton, 235 Fed. 317; Coyle v. Stern, 193 Fed. 582, 113 CCA 450; Beck v. Johnson, 169 Fed. 154; Arkansas v. Choctaw, etc., R. Co., 134 Fed. 106; Darton v. Sperry, 71 Conn. 339, 41 A 1052; Peo. v. St. Louis, 297 Ill. 199, 130 NE 366; Schuyler v. Southern Pac. R. Co., 37 Utah 581, 612, 109 P 458, 1025 [aff 227 U. S. 601, 33 SCt 277, 57 L. ed. 662, 43 LRANS 901].

[a] **Rule applied,** where plaintiff's pleading in an action against a railroad company did not show ground for removal, although President, under War-time Act Aug. 29, 1916, had taken possession of and assumed control of railroads before initiation of action but after cause of action arose. Muir v. Louisville, etc., R. Co., 247 Fed. 888.

70. U. S.—Re Winn, 213 U. S. 458, 29 SCt 515, 53 L. ed. 873; Minnesota v. Northern Securities Co., 194 U. S. 48, 24 SCt 598, 48 L. ed. 870 [rev 123 Fed. 692]; Arkansas v. Kansas, etc., Coal Co., 183 U. S. 185, 22 SCt 47, 46 L. ed. 144; Gableman v. Peoria, etc., R. Co., 179 U. S. 335, 21 SCt 171, 45 L. ed. 220; Western Union Tel. Co. v. Ann Arbor R. Co., 178 U. S. 239, 20 SCt 867, 44 L. ed. 1052; Houston, etc., R. Co. v. Texas, 177 U. S. 66, 20 SCt 545, 44 L. ed. 473; Third St., etc., R. Co. v. Lewis, 173 U. S. 457, 19 SCt 451, 43 L. ed. 766; Galveston, etc., R. Co. v. Texas, 170 U. S. 226, 18 SCt 603, 42 L. ed. 1017; Walker v. Collins, 167 U. S. 57, 17 SCt 738, 42 L. ed. 76; Oregon Short Line, etc., R. Co. v. Skottowe, 162 U. S. 490, 16 SCt 869, 40 L. ed. 1048; East Lake Land Co. v. Brown, 155 U. S. 488, 15 SCt 357, 39 L. ed. 233; Postal Tel. Cable Co. v. Alabama, 155 U. S. 482, 15 SCt 192, 39 L. ed. 231; Chappell v. Waterworth, 155 U. S. 102, 15 SCt 34, 39 L. ed. 85; Tennessee v. Union, etc., Bank, 152 U. S. 454, 14 SCt 654, 38 L. ed. 511; Anderson v. Trotter, 32 F. (2d) 389; Visayan Refining Co. v. Standard Transp. Co., 17 F. (2d) 642; Conques v. Louisiana Western R. Co., 4 F. (2d) 611; Venner v. New York Cent. R. Co., 293 Fed. 373; In re Vadner, 259 Fed. 614; Monroe v. Detroit, etc., R. Co., 257 Fed. 782; Wichita v. Missouri, etc., Tel. Co., 122 Fed. 100; South Carolina v. Virginia-Carolina Chemical Co., 117 Fed. 727; Ralya Market Co. v. Armour, 102 Fed. 530; Henuy v. La Compagnie Générale Transatlantique, 96 Fed. 497; Dewey Min. Co. v. Miller, 96 Fed. 1; Argonaut Min. Co. v. Kennedy Min., etc., Co., 84 Fed. 1; Kansas v. Atchison, etc., R. Co., 77 Fed. 339.

Ky.—Chesapeake, etc., R. Co. v. Smith, 101 Ky. 707, 42 SW 538, 19 KyL 1826.

Mass.—Long v. Quinn Bros., 215 Mass. 85, 102 NE 348.

N. Y.—Masters v. Traders' Nat. Bank, 129 Misc. 133, 220 NYS 499 [aff on other grounds 223 NYS 889].

Okl.—Shellenbarger v. Fewel, 34 Okl. 79, 124 P 617.

Pa.—Rowland v. Bondholders' Committee, 41 Pa. Co. 637.

S. C.—State v. Port Royal, etc., R. Co., 45 S. C. 413, 23 SE 363.

See Stuart v. Staplehurst Bank, 57 Nebr. 569, 78 NW 298 (where plaintiff's petition did not set up a cause of action arising under laws of United States).

Compare Steele v. Halligan, 229 Fed. 1011 (where the court said that the rule that before the cause is removable plaintiff's statement of the cause of action must show it to be based on the laws or Constitution of the United States is applicable rather to provisions of the Constitution and laws in effect throughout the United States than to laws depending for their effect upon the territorial jurisdiction, as in the case of reservations and sites purchased for federal purposes and uses).

And see cases infra notes 71–78.

[a] **Inconsistency between relief sought and constitutional or statutory provisions.**—Even though a bill should show on its face that the relief sought would be inconsistent with the constitution or some law of the United States, such fact would only demonstrate that the bill could not be maintained at all, and not that the cause of action arose under the constitution or laws of the United States. Arkansas v. Kansas, etc., Coal Co., 183 U. S. 185, 22 SCt 47, 46 L. ed. 144; Beaumont v. Texas, etc., R. Co., 296 Fed. 523. But see Minnesota v. Duluth, etc., R. Co., 87 Fed. 497 (where remand was denied).

[b] **Pleading not disclosing federal question.**—Complaints merely seeking to obtain a divorce, and to recover alimony, money had and received, money due on a judgment for separate maintenance, and the cancellation of conveyances as fraudulent, did not disclose a right of removal on the ground that a federal question was involved. In re Vadner, 259 Fed. 614.

[c] **In Hawaii** under the provision of the Organic Act § 86 (d) [USCA tit 48 § 645] making the laws of the United States as to the removal of causes from state courts to courts of the United States applicable as between the territorial courts and the United States court in Hawaii, a like rule applies on a motion in the United States district court to remand an action to a territorial court. Chock Sing v. Breckons, 3 Hawaii Fed. 630.

71. Bundick v. New York, etc., R. Co., 17 F. (2d) 487. See Great Northern R. Co. v. Alexander, 246 U. S. 276, 38 SCt 237, 62 L. ed. 713 (in the absence of a fraudulent purpose to defeat removal, plaintiff may by the allegations of his complaint determine the status with respect to removability). But see People's U. S. Bank v. Goodwin, 160 Fed. 727 (where, however, the allegations, which it was claimed were fraudulently omitted, would merely have anticipated a defense); Winters v. Drake, 102 Fed. 545 (where a motion to remand was denied); Shohoney v. Quincy, etc., R. Co., 223 Mo. 649, 122 SW 1025 (where the court cited Colorado Cent. Cons. Min. Co. v. Turck, 150 U. S. 138, 143, 14 SCt 35, 37 L. ed. 1030 in which the present Removal Act was not under consideration); Masters v. Traders' Nat. Bank, 129 Misc. 133, 220 NYS 499 [aff 223 NYS 889] (court will scrutinize a complaint to see that plaintiff has not purposely omitted or misstated a fact bearing upon the right of removal).

[a] **Where a complaint states a cause of action** and is not subject to demurrer, plaintiff may not justly be charged with a fraud because of the omission of allegations which would

plaintiff's pleading does not disclose a removable suit, the suit may not be rendered removable by allegations in subsequent pleadings,[72] including the answer or plea,[73] demurrer of defendant,[74] or a reply;[75] by the allegations of the petition for removal;[76] by evidence of defendant;[77] or by an order of the court upon any issue tried upon the merits.[78]

Several causes of action. If one of several causes of action set up by plaintiff arises under the constitution or laws of the United States, the fact that other causes do not so arise will not prevent removal.[79]

[§ 76] **2. Form and Sufficiency, Matters Considered, and Construction of Pleading.** Plaintiff's pleading must disclose by a statement of facts in legal and logical form, such as is required in good pleading, that the suit arises under the constitution, laws or a treaty of the United States, in order to permit a removal on the ground here under consideration.[80] Thus it has been laid down that the fact that the suit so arises must be disclosed by plaintiff's pleading clearly and distinctly,[81] and by direct and positive averment,[82] and that it is not sufficient if the fact that the suit so arises appears only by inference.[83] So the view has been expressed that the question is to be determined from the material or necessary allegations of the complaint[84] without regard to statements which are merely surplusage in so far as the cause of action is concerned[85] as, for example, conclusions of law.[86] The question whether plaintiff claims a right under the constitution or laws of the United States is to be ascertained by the legal construction of his own allegations and not by the effect attributed to such allegations by the adverse party.[87]

Reference to particular law. The omission from plaintiff's pleading of a specific reference to any law of the United States does not prevent removal where the allegations of such pleading show that the suit arises under a law of the United States.[88]

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show a cause of action arising under the laws of the United States. Washington v. Island Lime Co., 117 Fed. 777.

[72] Arkansas v. Kansas, etc., Coal Co., 183 U. S. 185, 22 SCt 47, 46 L. ed. 144; Gableman v. Peoria, etc., R. Co., 179 U. S. 335, 21 SCt 171, 45 L. ed. 220; Walker v. Collins, 167 U. S. 57, 17 SCt 738, 42 L. ed. 76; Oregon Short Line, etc., R. Co. v. Skottowe, 162 U. S. 490, 16 SCt 869, 40 L. ed. 1048; Postal Tel. Cable Co. v. Alabama, 155 U. S. 482, 15 SCt 192, 39 L. ed. 231; Chappell v. Waterworth, 155 U. S. 102, 15 SCt 34, 39 L. ed. 85; Adams v. Chicago Great Western R. Co., 210 Fed. 362; Storm Lake Tub, etc., Factory v. Minneapolis, etc., R. Co., 209 Fed. 895; Western Union Tel. Co. v. Southeast, etc., R. Co., 208 Fed. 266, 125 CCA 466; Mayo v. Dockery, 108 Fed. 897; Broadway Ins. Co. v. Chicago Great Western R. Co., 101 Fed. 507; Florida v. Charlotte Harbor Phosphate Co., 74 Fed. 578, 20 CCA 538; Peo. v. St. Louis, 297 Ill. 199, 130 NE 366; Shellenbarger v. Fewel, 34 Okl. 79, 124 P 617.

Amended pleading see infra § 77.

[73] Great Northern R. Co. v. Alexander, 246 U. S. 276, 38 SCt 237, 62 L. ed. 713; Walker v. Collins, 167 U. S. 57, 17 SCt 738, 42 L. ed. 76; In re Vadner, 259 Fed. 614; Monroe v. Detroit, etc., R. Co., 257 Fed. 782; Dalles, etc., Ferry Co. v. Hendryx, 189 Fed. 266. Compare Shohoney v. Quincy, etc., R. Co., 223 Mo. 649, 122 SW 1025 (defendant by his petition to remove cannot change plaintiff's cause of action as stated in his petition, so as to bring it within a federal law, nor can plaintiff so state his cause of action as to deprive defendant of the right of removal, if defendant by his answer or plea shows that he relies for his defense on an act of Congress or a provision of the federal Constitution). But see Fitzgerald v. Missouri Pac. R. Co., 45 Fed. 812 (where, however, the answer was bad); Kentucky v. Louisville Bridge Co., 42 Fed. 241 (where, however, the case was remanded notwithstanding the consideration given to the allegations of the answer).

[74] Tennessee v. Union, etc., Bank, 152 U. S. 454, 14 SCt 654, 88 L. ed. 511; Dalles, etc., Ferry Co. v. Hendryx, 189 Fed. 266; Shields v. Boardman, 98 Fed. 455; Indiana v. Alleghany Oil Co., 85 Fed. 870.

[75] Houston, etc., R. Co. v. Texas, 177 U. S. 66, 20 SCt 545, 44 L. ed. 673 [rev on other grounds (Tex. Civ. A.) 41 SW 157]; Shellenbarger v. Fewel, 34 Okl. 79, 124 P 617.

[76] U. S.—Great Northern R. Co. v. Alexander, 246 U. S. 276, 38 SCt 237, 62 L. ed. 713; Arkansas v. Kansas, etc., Coal Co., 183 U. S. 185, 22 SCt 47, 46 L. ed. 144; Gableman v. Peoria, etc., R. Co., 179 U. S. 335, 21 SCt 171, 45 L. ed. 220; Walker v. Collins, 167 U. S. 57, 17 SCt 738, 42 L. ed. 76; Oregon Short Line, etc., R. Co. v. Skottowe, 162 U. S. 490, 16 SCt 869, 40 L. ed. 1048; Postal Tel. Cable Co. v. Alabama, 155 U. S. 482, 15 SCt 192, 39 L. ed. 231; Chappell v. Waterworth, 155 U. S. 102, 15 SCt 34, 39 L. ed. 85; Tennessee v. Union, etc., Bank, 152 U. S. 454, 14 SCt 654, 88 L. ed. 511; Anderson v. Trotter, 32 F. (2d) 389; In re Vadner, 259 Fed. 614; Adams v. Chicago Great Western R. Co., 210 Fed. 362; Storm Lake Tub, etc., Factory v. Minneapolis, etc., R. Co., 209 Fed. 895; Western Union Tel. Co. v. Southeast, etc., R. Co., 208 Fed. 266, 125 CCA 466; McGoon v. Northern Pac. R. Co., 204 Fed. 998; Coyle v. Stern, 193 Fed. 582, 113 CCA 450; Kansas v. Beal, 193 Fed. 543; Dalles, etc., Ferry Co. v. Hendryx, 189 Fed. 266; Boyd v. Great Western Coal, etc., Co., 189 Fed. 115; Leggett v. Great Northern R. Co., 180 Fed. 314; Rural Home Tel. Co. v. Powers, 176 Fed. 986; Miller v. Illinois Cent. R. Co., 168 Fed. 982; People's U. S. Bank v. Goodwin, 160 Fed. 727; Mitchell Engineering, etc., Co. v. Worthington, 140 Fed. 947; Arkansas v. Choctaw, etc., R. Co., 134 Fed. 106; South Carolina v. Virginia-Carolina Chemical Co., 117 Fed. 727; Mayo v. Dockery, 108 Fed. 897; Broadway Ins. Co. v. Chicago Great Western R. Co., 101 Fed. 507; Indiana v. Alleghany Oil Co., 85 Fed. 870; Argonaut Min. Co. v. Kennedy Min., etc., Co., 84 Fed. 1; Florida v. Charlotte Harbor Phosphate Co., 74 Fed. 578, 20 CCA 538.

Conn.—Darton v. Sperry, 71 Conn. 339, 41 A 1052.

Mass.—Long v. Quinn Bros., 215 Mass. 85, 102 NE 348.

Miss.—State v. Louisville, etc., R. Co., 104 Miss. 413, 61 S 425.

N. Y.—Masters v. Traders' Nat. Bank, 129 Misc. 133, 220 NYS 499 [aff on other grounds 223 NYS 889].

Okl.—Shellenbarger v. Fewel, 34 Okl. 79, 124 P 617.

Pa.—Rowland v. Bondholders' Committee, 41 Pa. Co. 637.

S. C.—State v. Port Royal, etc., R. Co., 45 S. C. 413, 23 SE 363.

Wis.—State v. Frost, 113 Wis. 623, 88 NW 912, 89 NW 915 (recognizing rule).

[a] **Rule applied** in a case in which the petition contained allegations of fraud in omitting from the complaint certain allegations which might have rendered the action removable. Bundick v. New York, etc., R. Co., 17 F. (2d) 487.

[b] **A contrary view** was apparently taken in some of the earlier cases, in which the court considered the petition for removal. Winters v. Drake, 102 Fed. 545; Consolidated Wyoming Gold Min. Co. v. Champion Min. Co., 62 Fed. 945; South Carolina v. Port Royal, etc., R. Co., 56 Fed. 333; Fitzgerald v. Missouri Pac. R. Co., 45 Fed. 812; South Carolina v. Coosaw Min. Co., 45 Fed. 804; Illinois v. Illinois Cent. R. Co., 33 Fed. 721.

[77] Great Northern R. Co. v. Alexander, 246 U. S. 276, 38 SCt 237, 62 L. ed. 713.

[78] Great Northern R. Co. v. Alexander, supra.

[79] Lowry v. Hert, 273 Fed. 698 [rev on other grounds 290 Fed. 876]; Chalmers Chemical Co. v. Chadeloid Chemical Co., 175 Fed. 995; Nicholas v. Chesapeake, etc., R. Co., 127 Ky. 310, 105 SW 481, 32 KyL 270, 17 LRANS 861.

[80] Western Union Tel. Co. v. Ann Arbor R. Co., 178 U. S. 239, 20 SCt 867, 44 L. ed. 1052; Coyle v. Stern, 193 Fed. 582, 113 CCA 450.

[81] Argonaut Min. Co. v. Kennedy Min., etc., Co., 84 Fed. 1.

[82] Visayan Refining Co. v. Standard Transp. Co., 17 F. (2d) 642; Venner v. New York Cent. R. Co.. 293 Fed. 373.

[83] Venner v. New York Cent. R. Co., supra. See Western Union Tel. Co. v. Ann Arbor R. Co., 178 U. S. 239, 20 SCt 867, 44 L. ed. 1052 (where remand to the state court was directed).

[84] Masters v. Traders' Nat. Bank, 129 Misc. 133, 220 NYS 499 [aff on other grounds 223 NYS 889]; Shellenbarger v. Fewel, 34 Okl. 79, 124 P 617.

[85] Masters v. Traders' Nat. Bank, 129 Misc. 133, 220 NYS 499 [aff on other grounds 223 NYS 889]; Shellenbarger v. Fewel, 34 Okl. 79, 124 P 617.

[86] Masters v. Traders' Nat. Bank, 129 Misc. 133, 220 NYS 499 [aff on other grounds 223 NYS 889].

Pleading conclusions in general see Equity § 407; Pleading § 17 et seq.

[87] Tennessee v. Union, etc., Bank, 152 U. S. 454, 14 SCt 654, 29 L. ed. 791; New Jersey Cent. R. Co. v. Mills, 113 U. S. 249, 5 SCt 456, 28 L. ed. 949 [aff 20 Fed. 449].

[88] Hartford F. Ins. Co. v. Kansas City, etc., R. Co., 251 Fed. 332; Alabama Great Southern R. Co. v. American Cotton Oil Co., 229 Fed. 11, 143

Controversy as to construction or effect of constitution, law or treaty. It has been laid down in cases in which plaintiff's pleading was under consideration, that it must appear that the suit does really and substantially involve a dispute or controversy[89] as to a right which depends on the construction of the constitution, a law, or a treaty of the United States,[90] but this rule has been criticized in so far as it requires a disclosure by plaintiff's pleading of a dispute or controversy as to the construction of the constitution, law, or treaty,[91] and there are cases in the United States supreme court, in which the right to remove is recognized although apparently plaintiff's pleading did not necessarily disclose that there was such a dispute or controversy.[92]

Anticipating defense based on constitution, law, or treaty.[93] The suit is not rendered removable by allegations in plaintiff's initial pleading in anticipation,[94] or denial or avoidance,[95] of a defense based on the constitution, a law, or a treaty of the United States. Conversely plaintiff's anticipatory attempt to meet a possible defense will not defeat the right to remove.[96]

Whole pleading and attached documents considered. In determining whether a suit arises under the laws of the United States plaintiff's pleading is to be considered as a whole,[97] including attached documents and exhibits where they constitute a part of such pleading.[98]

Prayer for relief. While the prayer for relief may be considered in determining whether or not the suit arises under the constitution or laws of the United States[99] it has been held that a prayer, which, when considered alone, may be broader in its demands than is warranted by allegations in the body of the bill or complaint, must be construed in connection with, and must be limited by, such allegations.[1]

Judicial notice.[2] The omission from the complaint of matters of which judicial notice must be taken does not prevent the removal, even though such matters are a necessary element of a showing that the case arises under the constitution, laws, or a treaty of the United States,[3] but it seems that the court cannot take judicial notice of matters on which plaintiff does not choose to rely in the statement of his claim in his pleading, in order to work out the right to remove,[4] nor can such right be worked out by judicial knowledge of what the finally controlling laws may be.[5]

[§ 77] **3. Amendments.** A case not removable under the original complaint may subsequently become removable where by amendment the complaint presents a case arising under the constitution or laws of the United States,[6] but there is authority for the view that an amendment made in the federal court cannot be given effect.[7]

CCA 313; Chalmers Chemical Co. v. Chadeloid Chemical Co., 175 Fed. 995; Lemon v. Louisville, etc., R. Co., 137 Ky. 276, 125 SW 701.

[89] **Necessity for existence of dispute or controversy as to construction of constitution, law, or treaty in general** see supra § 49.

[90] Gableman v. Peoria, etc., R. Co., 179 U. S. 335, 21 SCt 171, 45 L. ed. 220; Western Union Tel. Co. v. Ann Arbor R. Co., 178 U. S. 239, 20 SCt 867, 44 L. ed. 1052 (while court said record must show the existence of dispute or controversy, it was giving application to the rule that the question as to whether the suit arose under the constitution or laws of the United States depended on plaintiff's statement of his own case); Leggett v. Great Northern R. Co., 180 Fed. 314; Nelson v. Southern R. Co., 172 Fed. 478; Beck v. Johnson, 169 Fed. 154. See Spencer v. Duplan Silk Co., 191 U. S. 526, 24 SCt 174, 48 L. ed. 287 (where court emphasized the fact that plaintiff's declaration set forth no matter raising any controversy under the constitution, laws, or treaties of the United States). Compare Bowers v. First Nat. Bank, 190 Fed. 676 (where the view was expressed that it was sufficient if the existence of the controversy could be raised by demurrer).

[91] See McGoon v. Northern Pac. R. Co., 204 Fed. 998, 1003, 1004.

"It must be entirely plain that the plaintiff by his statement of his own cause of action cannot show whether the defendant will take issue as to matters of fact or matters of law, and it is therefore impossible for the plaintiff to show by his complaint that the case will 'really and necessarily involve a dispute or controversy as to a right which depends on the construction of the Constitution or some law or treaty of the United States.' . . . What, then, do the courts mean when they say that the construction of federal law must be involved in order to confer this jurisdiction? Certainly not that the case will necessarily turn upon an interpretation of the statute, but simply that the complaint must set forth a cause of action of which federal law is an essential ingredient, and which may, therefore, properly involve a construction of that law." McGoon v. Northern Pac. R. Co., supra.

[92] See Great Northern R. Co. v. Galbreath Cattle Co., 271 U. S. 99, 46 SCt 439, 70 L. ed. 854 [rev 66 Mont. 198, 213 P 610, 71 Mont. 56, 227 P 65]; Southern Pac. Co. v. Stewart, 245 U. S. 359, 562, 38 SCt 130, 203, 62 L. ed. 345.

[93] **Anticipating defense in general** see Equity passim §§ 404–424; Pleading § 165.

[94] Arkansas v. Kansas, etc., Coal Co., 183 U. S. 185, 22 SCt 47, 46 L. ed. 144; Allen v. New York, etc., R. Co., 15 F. (2d) 532; Beaumont v. Texas, etc., R. Co., 296 Fed. 523; Venner v. New York Cent. R. Co., 293 Fed. 373; Monroe v. Detroit, etc., R. Co., 257 Fed. 782; Nevada-California Power Co. v. Hamilton, 235 Fed. 317; McGoon v. Northern Pac. R. Co., 204 Fed. 998; People's U. S. Bank v. Goodwin, 160 Fed. 727; Kansas v. Atchison, etc., R. Co., 77 Fed. 339; Masters v. Traders' Nat. Bank, 129 Misc. 133, 220 NYS 499 [aff on other grounds 223 NYS 889]; Shellenbarger v. Fewel, 34 Okl. 79, 124 P 617.

[95] Monroe v. Detroit, etc., R. Co., 257 Fed. 782; Nevada-California Power Co. v. Hamilton, 235 Fed. 317.

[96] Lowry v. Hert, 273 Fed. 698 [rev on other grounds 290 Fed. 876].

[97] Lowry v. Hert, 273 Fed. 698 [rev on other grounds 290 Fed. 876].

[98] Louisiana v. Morgan's Louisiana, etc., SS. Co., 18 F. (2d) 645; Allen v. New York, etc., R. Co., 15 F. (2d) 532; Jackson v. Gates Oil Co., 297 Fed. 549.

[99] Lowry v. Hert, 273 Fed. 698 [rev on other grounds 290 Fed. 876].

[1] Starin v. New York, 115 U. S. 248, 6 SCt 28, 29 L. ed. 388. See Western Union Tel. Co. v. Ann Arbor R. Co., 178 U. S. 239, 20 SCt 867, 44 L. ed. 1052 (prayer for general relief construed with allegations in bill).

[2] **Judicial notice of laws in general** see Evidence §§ 1944–1962; Statutes [36 Cyc 1236–1252].

Pleading matters judicially involved in general see Pleading § 11.

[3] Re Dunn, 212 U. S. 374, 29 SCt 299, 53 L. ed. 558; Texas, etc., R. Co. v. Cody, 166 U. S. 606, 17 SCt 703, 41 L. ed. 1132. See Moulton v. National Farmers' Bank, 27 F. (2d) 403 (where, however, the right to remove was denied). But see Oregon Short Line, etc., R. Co. v. Skottowe, 162 U. S. 490, 16 SCt 869, 40 L. ed. 1048 (where the right to remove was denied).

[4] Arkansas v. Kansas, etc., Coal Co., 183 U. S. 185, 22 SCt 47, 46 L. ed. 144; Mountain View Min., etc., Co. v. McFadden, 180 U. S. 533, 21 SCt 488, 45 L. ed. 656; Visoyan Refining Co. v. Standard Transp. Co., 17 F. (2d) 642; Washington v. Island Lime Co., 117 Fed. 777. But see South Carolina v. Coosaw Min. Co., 45 Fed. 804 (as to judicial notice of a state statute not referred to in the complaint).

[5] Venner v. New York Cent. R. Co., 293 Fed. 373.

[6] Allen v. New York, etc., R. Co., 15 F. (2d) 532; Myrtle v. Nevada, etc., R. Co., 137 Fed. 193 (recognizing rule). See Great Northern R. Co. v. Alexander, 246 U. S. 276, 38 SCt 237, 62 L. ed. 713 [dism writ of error 51 Mont. 565, 154 P 914, LRA1918E 852]; Mitchell v. Southern R. Co., 23 Ga. A. 195, 98 SE 184 (both cases apparently recognizing rule); Nicholas v. Chesapeake, etc., R. Co., 127 Ky. 310, 105 SW 481, 32 KyL 270, 17 LRANS 861 (where an amendment was considered in a case in which the right to remove was upheld).

[7] Caples v. Texas, etc., R. Co., 67 Fed. 9; Texas, etc., R. Co. v. Caples, (Tex. Civ. A.) 36 SW 516.

Time for removal in general see infra §§ 205–211.

[§ 78] **4. Pleadings in Suits Involving Particular Matters or Persons**[8]**—a. Patents and Copyrights.** In accordance with the general rule[9] the question as to whether a suit arises under the copyright or patent laws is determinable from the allegations of plaintiff's pleading.[10]

[§ 79] **b. Public Lands, Mining, and Water Rights.**[11] The general rule that the question as to whether a suit arises under the constitution, laws, or treaties of the United States is determinable from the allegations of plaintiff's pleading[12] has been applied in cases involving public lands, or what were public lands, of the United States,[13] including mineral lands.[14] In determining that a suit was removable the court has taken judicial notice of certain matters not pleaded by plaintiff[15] but an action in support of an adverse claim to an application for a patent to a mining claim may not be rendered removable by judicial notice of facts which plaintiff did not choose to rely on in his pleading to support his claim.[16]

[§ 80] **c. Commerce or Trade and Navigable Waters**[17]**—(1) In General.** In accordance with the general rule[18] whether a suit is one arising under the provisions of the constitution or laws of the United States in respect of commerce or trade is determinable from the allegations of plaintiff's pleading,[19] and where such pleading does not disclose a case so arising, it is not removable on the ground here considered,[20] even though, for the purpose of preventing removal, plaintiff omits from his pleading a reference to interstate commerce.[21] The mere fact that plaintiff's complaint shows that defendant is engaged in interstate commerce is not sufficient to show that the suit arises under the constitution or law of the United States.[22] The omission from plaintiff's pleading, however, of a reference to a specific federal statute applicable to commerce or trade does not prevent a removal where the allegations contained in such pleading show that the suit arises under such a statute.[23] The rule making the determination of the question dependent on the allegations of plaintiff's pleading has been applied in suits to recover damages based on the loss of, or injury to, property shipped by railroad in interstate commerce,[24] to recover for excess charges on shipments in interstate commerce;[25] to recover for injuries to servants or employees of defendant,[26] and to enforce or to assert rights under the federal statutes aimed at restraint of trade.[27]

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[8] **Removability of suits arising under copyright or patent laws in general** see supra § 54.

[9] See supra § 75.

[10] Lowry v. Hert, 273 Fed. 698 [rev on other grounds 290 Fed. 876]; Hoyt v. Bates, 81 Fed. 641.

[a] **Pleading not disclosing suit under patent law.**—Lowry v. Hert, 290 Fed. 876 [rev 273 Fed. 698]; International Fastener Co. v. Francis Mfg. Co., 259 Fed. 311.

[b] **Pleading not disclosing suit under copyright laws.**—Hoyt v. Bates, 81 Fed. 641.

[11] **Removability of suits involving public lands, mining, and water rights in general** see supra § 55.

[12] See supra § 75.

[13] East Lake Land Co. v. Brown, 155 U. S. 488, 15 SCt 357, 39 L. ed. 233; Florida v. Charlotte Harbor Phosphate Co., 74 Fed. 578, 20 CCA 538.

[a] **Pleading not disclosing federal question.**—East Lake Land Co. v. Brown, 155 U. S. 488, 15 SCt 357, 39 L. ed. 233; Washington v. Island Lime Co., 117 Fed. 777; Florida v. Charlotte Harbor Phosphate Co., 74 Fed. 578, 20 CCA 538.

[b] **Pleading disclosing federal question.**—Action by a state for cancellation, for nonperformance, of a contract between the state and defendant for the reclamation of arid lands, pursuant to the Act of Aug. 18, 1894 [28 U. S. St. at L. 422 c 301], known as the Carey Act. Oregon v. Three Sisters Irr. Co., 158 Fed. 346.

[c] **Under the act of 1875** the petition to remove could be examined in determining whether the suit arose under laws of the United States relative to public lands, mining or water rights. Little York Gold Washing, etc., Co. v. Keyes, 96 U. S. 199, 24 L. ed. 656.

[14] Mountain View Min., etc., Co. v. McFadden, 180 U. S. 533, 21 SCt 488, 45 L. ed. 656; Dewey Min. Co. v. Miller, 96 Fed. 1; Haggin v. Lewis, 66 Fed. 199.

[a] **Pleading not disclosing federal question.**—(1) Suit in support of adverse mining claim. Mountain View Min., etc., Co. v. McFadden, 180 U. S. 533, 21 SCt 488, 45 L. ed. 656. (2) Action based on alleged trespass on mining claim. Argonaut Min. Co. v. Kennedy Min., etc., Co., 84 Fed. 1. But see Consolidated Wyoming Gold Min. Co. v. Champion Min. Co., 62 Fed. 945 (where a previous motion to remand had been denied).

[b] **Pleading disclosing federal question.**—Complaint, in an action to recover the value of coal taken, framed for the purpose of showing that, by filing his so-called "coal declaratory statement," plaintiff acquired such an interest in the lands in controversy as to recover, when a patent was issued, the value of coal taken intermediate the date of such filing and the date of patent. Evans v. Durango Land, etc., Co., 80 Fed. 433, 25 CCA 531.

[15] Spokane Falls, etc., R. Co. v. Ziegler, 167 U. S. 65, 17 SCt 728, 42 L. ed. 79.

[a] **Thus** judicial notice was taken of the authority of a territory to legislate in respect of the right of a territorial railroad company to enter upon the public lands of the United States was derived from the Right of Way Act of 1875. Spokane Falls, etc., R. Co., 167 U. S. 65, 17 SCt 728, 42 L. ed. 79.

[16] Mountain View Min., etc., Co. v. McFadden, 180 U. S. 533, 21 SCt 488, 45 L. ed. 656.

[17] **Removability of suits involving commerce and navigable waters in general** see supra §§ 56-60.

[18] See supra § 75.

[19] Great Northern R. Co. v. Galbreath Cattle Co., 271 U. S. 99, 46 SCt 439, 70 L. ed. 854; Missouri, etc., R. Co. v. Smith, (Tex. Civ. A.) 164 SW 885. But see South Carolina v. Port Royal, etc., R. Co., 56 Fed. 333; Lowry v. Chicago, etc., R. Co., 46 Fed. 83 (in both cases matters in petition for removal were considered and motions to remand were denied). And see cases infra note 20.

[20] Allen v. New York, etc., R. Co., 15 F. (2d) 532 (recognizing rule); Beaumont v. Texas, etc., R. Co., 296 Fed. 523; Venner v. New York Cent. R. Co., 293 Fed. 373; Ohio v. Swift, 270 Fed. 141 [certiorari den 257 U. S. 633 mem, 42 SCt 47 mem, 66 L. ed. 407 mem, app dism 260 U. S. 146, 43 SCt 22, 67 L. ed. 176]; Monroe v. Detroit, etc., R. Co., 257 Fed. 782; Western Union Tel. Co. v. Southeast, etc., R. Co., 208 Fed. 266, 125 CCA 466; Kansas v. Beal, 193 Fed. 543; Myrtle v. Nevada, etc., R. Co., 137 Fed. 193; State v. Louisville, etc., R. Co., 104 Miss. 413, 61 S 425; Schuyler v. Southern Pac. Co., 37 Utah 581, 612, 109 P 458, 1025 [aff 227 U. S. 601, 33 SCt 277, 57 L. ed. 662, 43 LRANS 901].

[a] **Anticipating defense.**—A suit by a city against an interurban railway company to restrain the violation of a contract fixing rates, made by a franchise ordinance, was not removable as one arising under the laws of the United States, although the bill alleged, in anticipation of the defense that defendant was authorized to increase its rates by the interstate commerce commission, the invalidity of the order. Monroe v. Detroit, etc., R. Co., 257 Fed. 782.

[b] **Allegation in petition for removal.**—A suit in a state court brought by the state of Kansas for creating a nuisance by maintaining places within the state where liquors were sold in violation of Sess. L. (1901) c 232 § 1, was not removable as one arising under the laws of the United States because of averments in the petition for removal that defendant was engaged in interstate commerce. Kansas v. Beal, 193 Fed. 543.

[c] **Condemnation of right of way along railroad right of way.**—Petition by a telegraph company under a state statute, for condemnation of a right of way along the right of way of a railroad company within the state did not present a federal question so as to permit removal because the proposed condemnation might interfere with interstate commerce and might involve an interference with navigable waters of the United States within its jurisdiction. Western Union Tel. Co. v. Southeast, etc., R. Co., 208 Fed. 266, 125 CCA 466.

[d] **Effect of remarks by appellate court.**—Where the supreme court construed the complaint in an action against the carrier for the death of a passenger and held that it did not present a federal question under the Hepburn Act (Act June 29, 1906, c 3591 § 1 par 4, 34 Stat. 584), as the complaint did not show on its face that deceased's right to transportation was derived from the federal statute, or that his cause of action was based on such statute, a further remark by the court that under the allegations of the complaint it did not constitute a fatal variance under the state statute for plaintiff to prove that deceased was a gratuitous passenger at the time of the accident was insufficient to negative the construction made by the court, and to introduce a federal question into the cause. Schuyler v. Southern Pac. Co., 37 Utah 612, 109 P 1025 [aff 227 U. S. 601, 33 SCt 277, 57 L. ed. 662, 43 LRANS 901].

[21] Bundick v. New York, etc., R. Co., 17 F. (2d) 487. But see Shohoney v. Quincy, etc., R. Co., 223 Mo. 649, 122 SW 1025 (where the court cited Colorado Cent. Cons. Min. Co. v. Turck, 150 U. S. 138, 143, 14 SCt 35, 37 L. ed. 1030 in which case the present Removal Act was not under consideration).

[a] **Supplying omission.**—The omission from the body of the plaintiff's pleading may be supplied by reference to an account, attached to the pleading as required by law, which contains the necessary statements. Allen v. New York, etc., R. Co., 15 F. (2d) 532.

[22] Myrtle v. Nevada, etc., R. Co., 137 Fed. 193.

[§ 81] **(2) Obstruction and Use of Navigable Waters.** The general rule that the question as to whether a suit arises under the constitution, laws, or treaties of the United States is determinable from the allegations of plaintiff's pleading[28] applies in cases involving the obstruction or use of navigable waters.[29] In determining that a suit to enforce certain claims as to navigable waters was not removable on the allegations of plaintiff's pleading the prayer for relief was considered in connection with the allegations in the body of the pleading and was limited accordingly.[30]

[§ 82] **d. Revenue and Taxation.**[31] The general rule that the question as to whether a suit arises under the constitution, laws or treaties of the United States is determinable from the allegations of plaintiff's pleading,[32] has been applied in determining that an action by a state,[33] or by officers of a county,[34] to enforce the collection of taxes or to recover penalties, imposed by state laws, was not removable on the ground under consideration.

[§ 83] **e. Postal Laws.**[35] The general rule that the question as to whether a suit arises under the constitution, laws, or treaties of the United States is determinable from the allegations of plaintiff's pleading[36] has been applied where the postal laws were involved.[37]

[§ 84] **f. Indians.**[38] The general rule that the question as to whether a suit arises under the constitution, laws, or a treaty of the United States is determinable from the allegations of plaintiff's pleadin,[39] has been applied where actions were brought by Indians.[40]

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23. Hartford F. Ins. Co. v. Kansas City, etc., R. Co., 251 Fed. 332; Alabama Great Southern R. Co. v. American Cotton Oil Co., 229 Fed. 11, 143 CCA 313; Lemon v. Louisville, etc., R. Co., 137 Ky. 276, 125 SW 701; Atty.-Gen. v. Michigan Bell Tel. Co., 235 Mich. 416, 209 NW 200.

24. See cases infra this note.

[a] **Pleading disclosing federal question.**—Great Northern R. Co. v. Galbreath Cattle Co., 271 U. S. 99, 46 SCt 439, 70 L. ed. 854 [rev 71 Mont. 56, 227 P 65, 66 Mont. 198, 213 P 610]; Southern Pac. Co. v. Stewart, 245 U. S. 359, 562, 38 SCt 130, 203, 62 L. ed. 345; Fielding v. Toledo, etc., R. Co., 33 F. (2d) 994; Hartford F. Ins. Co. v. Kansas City, etc., R. Co., 251 Fed. 332; Alabama Great Southern R. Co. v. American Cotton Oil Co., 229 Fed. 11, 143 CCA 313; McGoon v. Northern Pac. R. Co., 204 Fed. 998; Missouri, etc., R. Co. v. Smith, (Tex. Civ. A.) 164 SW 885. But see Re Winn, 213 U. S. 458, 29 SCt 515, 53 L. ed. 873 (where, however, the allegations of plaintiff's pleading are not set forth in the opinion); Adams v. Chicago Great Western R. Co., 210 Fed. 362 (where motion to remand action based on failure to deliver wool shipped by rail in interstate commerce was granted); Storm Lake Tub, etc., Factory v. Minneapolis, etc., R. Co., 209 Fed. 895 (where motion to remand action based on damage to butter shipped in interstate commerce was granted).

25. See cases infra this note.

[a] **Pleading disclosing federal question.**—Allen v. New York, etc., R. Co., 15 F. (2d) 532.

26. See cases infra this note.

[a] **Pleading disclosing federal question.**—Clark v. Southern Pac. Co., 175 Fed. 122; Lemon v. Louisville, etc., R. Co., 137 Ky. 276, 125 SW 701. Compare cases infra this note [b].

[b] **Pleading not disclosing federal question.**—Leggett v. Great Northern R. Co., 180 Fed. 314; Hubbard v. Chicago, etc., R. Co., 176 Fed. 994; Nelson v. Southern R. Co., 172 Fed. 478; Miller v. Illinois Cent. R. Co., 168 Fed. 982. See Shohoney v. Quincy, etc., R. Co., 223 Mo. 649, 122 SW 1025 (defendant could not by his petition for removal bring plaintiff's cause of action as stated in his complaint within provisions of federal Safety Appliance Act of 1893 as amended).

Amendment prohibiting removal of actions under Federal Employers' Liability Act see supra § 20.

27. See cases infra this note.

[a] **Pleading disclosing federal question.**—(1) Bill by a private corporation for injunctive relief under the Sherman and Clayton Acts. General Inv. Co. v. Lake Shore, etc., R. Co., 260 U. S. 261, 43 SCt 106, 67 L. ed. 244 (where, however, the dismissal of the bill insofar as it was sought to enforce the federal statutes was upheld on the ground that only the federal court had jurisdiction of such action, and, therefore, that it could not acquire jurisdiction on removal from state court). (2) Suit to avoid a contract on the ground that it was in unlawful restraint of trade. Chalmers Chemical Co. v. Chadeloid Chemical Co., 175 Fed. 995. (3) Information in the nature of quo warranto to test the right to continue business and to annul a telephone corporation's charter, alleging conspiracy to monopolize the telephone business, both intrastate and interstate, in effect charged a violation of the Sherman Anti-Trust Act. Dougherty v. Michigan Bell Tel. Co., 235 Mich. 416, 209 NW 200.

[b] **Pleading not disclosing federal question within jurisdiction of federal court.**—Suit by a state to enforce the provisions of the federal anti-trust act. Minnesota v. Northern Securities Co., 194 U. S. 48, 24 SCt 598, 48 L. ed. 870.

28. See supra § 75.

29. See cases infra this note.

[a] **Pleading not disclosing federal question.**—(1) Suit by city to prevent obstruction of navigable stream. Beaumont v. Texas, etc., R. Co., 296 Fed. 523. (2) Bill for injunction to enforce a claimed exclusive right to operate a ferry between points in different states. Dalles, etc., Ferry Co. v. Hendryx, 189 Fed. 266.

[b] **Pleading disclosing federal question.**—Suit by people of state of Illinois against sanitary district of Chicago to maintain the navigability of the Illinois and Michigan Canal. Illinois v. Chicago Sanitary Dist., 98 Fed. 150.

[c] **Under the Removal Act of 1875** in an action by a state to prevent the obstruction of a navigable stream the federal question could be raised by defendant's answer. New Orleans, etc., R. Co. v. Mississippi, 102 U. S. 135, 26 L. ed. 96.

30. Starin v. New York, 115 U. S. 248, 6 SCt 28, 29 L. ed. 388.

31. **Removability of suits involving revenue and taxation in general** see supra § 61.

32. See supra § 75.

33. Postal Tel. Cable Co. v. Alabama, 155 U. S. 482, 15 SCt 192, 39 L. ed. 231; Tennessee v. Union, etc., Bank, 152 U. S. 454, 14 SCt 654, 88 L. ed. 511; Chicago, etc., R. Co. v. Nebraska, 251 Fed. 279, 163 CCA 435; Darnell v. State, 174 Ind. 143, 90 NE 769 [aff 226 U. S. 390, 33 SCt 120, 57 L. ed. 267].

[a] **Under the Removal Act of 1875** the federal question could be raised by allegations in the answer. Southern Pac. R. Co. v. California, 118 U. S. 109, 6 SCt 993, 30 L. ed. 103.

34. Sawyer v. Kochersperger, 170 U. S. 303, 18 SCt 946, 42 L. ed. 1046 (where apparently a defense was anticipated).

35. **Removability of suits involving postal laws in general** see supra § 62.

36. See supra § 75.

37. See cases infra this note.

[a] **Pleading disclosing federal question.**—Lewis Pub. Co. v. Wyman, 152 Fed. 200.

38. **Removability of suit to which Indian party in general** see supra § 63.

39. See supra § 75.

40. See cases infra this note.

[a] **Pleading disclosing federal question.**—Complaint in a suit to cancel an oil and gas lease, executed under Act May 27, 1908, by the guardian of a minor, who was a full-blood Choctaw Indian. Jackson v. Gates Oil Co., 297 Fed. 549.

[b] **Pleading not disclosing federal question.**—Action in ejectment. Shellenbarger v. Fewel, 34 Okl. 79, 124 P 617.

[§ 85] **g. Officers or Agents of United States.** Notwithstanding the rule permitting the removal of actions against officers of the United States under certain circumstances[41] under the general rule[42] a case is not removable on the ground here under consideration where on the face of the complaint there is nothing to show that the controversy was one arising under the laws of the United States,[43] as, for example, where, in an action based on a tort, there is nothing to show that defendant is an officer of the United States or that, in respect of the matters complained of, he had acted as such officer or under color of office.[44] Where, however, the complaint contained an allegation that defendant occupied a certain office of the United States during the time covered by the complaint, the right to remove was upheld.[45]

[§ 86] **h. Receivers Appointed by Federal Courts.**[46] The general rule that the question as to whether a suit arises under the constitution, laws, or a treaty of the United States is determinable from the allegations of plaintiff's pleading,[47] has been applied in denying the removability of certain actions against receivers appointed by federal courts.[48]

[§ 87] **i. Trustees in Bankruptcy.**[49] The general rule that the question as to whether a suit arises under the constitution, laws, or a treaty of the United States is determinable from the allegations of plaintiff's pleading,[50] has been applied in determining as to the removability of an action to which a trustee in bankruptcy was a party.[51]

[§ 88] **j. Corporations Organized under Laws of United States, and Officers of Such Corporations.**[52] Where the right to remove depends on the fact that defendant was a corporation organized under the laws of the United States, which right is now considerably curtailed,[53] the general rule requiring that the fact that the suit arises under the constitution, laws, or a treaty of the United States must appear from plaintiff's statement of his case,[54] may in certain aspects be regarded as qualified;[55] in any event the omission from plaintiff's pleading of an averment of the fact of federal incorporation,[56] or an erroneous statement of incorporation under state laws,[57] does not defeat the right to remove, since the court will take judicial notice of the fact of federal incorporation,[58] and, in this connection, consideration has even been given to defendant's petition for removal.[59]

National banking associations. As already pointed out the mere fact that a suit is by or against a national banking association does not render such suit removable as arising under the constitution or laws of the United States,[60] and the general rule that the question as to whether a suit arises under the constitution, laws, or a treaty of the United States is determinable from the allegations of plaintiff's pleading,[61] has been applied in actions to which national banks[62] or directors or officers of national banks[63] were parties.

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[41] See supra § 64.

[42] See supra § 75.

[43] Walker v. Collins, 167 U. S. 57, 17 SCt 738, 42 L. ed. 76.

[a] **Illustration.**—Action to recover for an alleged unlawful seizure of goods, in which defendants set up that one of the defendants was a United States marshal and that the other defendants were his deputies, and that the seizure was duly made under an order of attachment issued by a federal court. Walker v. Collins, 167 U. S. 57, 17 SCt 738, 42 L. ed. 76.

[b] **In Hawaii** a like rule applies in respect of the removal of an action from a territorial court to the United States district court. Chock Sing v. Breckons, 3 Hawaii Fed. 630. See Organic Act of Hawaii § 86 (d) [USCA tit 48 § 645] (making laws of the United States as to removal of causes from the state courts to the courts of the United States, applicable as between the territorial courts and the United States court in Hawaii).

[c] **Removal Act of 1875.**—The record in certain actions against officers of the United States, including pleadings of the parties and the petition for removal, were held not to show the existence of a suit arising under the constitution and laws of the United States. Rothschild v. Matthews, 22 Fed. 6.

[44] People's U. S. Bank v. Goodwin, 160 Fed. 727. But see Wood v. Drake, 70 Fed. 881 (where in a complaint in an action for false imprisonment there was no allegation that defendants were a United States marshal and a deputy marshal but motion to remand was denied).

[a] **Illustrations.**—(1) Action for libel. People's U. S. Bank v. Goodwin, 160 Fed. 727. (2) Action for wrongful seizure of property. Mitchell Engineering, etc., Co. v. Worthington, 140 Fed. 947; Mayo v. Dockery, 108 Fed. 897.

[45] Eighmy v. Poucher, 83 Fed. 855.

[a] **Illustration.**—Action against a United States district attorney for malicious prosecution. Eighmy v. Poucher, 83 Fed. 855.

[46] **Removability of suit to which receiver appointed by federal court a party in general** see supra § 67.

[47] See supra § 75.

[48] Rural Home Tel. Co. v. Powers, 176 Fed. 986; Lincoln v. Lincoln St. R. Co., 77 Fed. 658. But see Winters v. Drake, 102 Fed. 545 (where there was no allegation that defendant was a receiver appointed by a federal court); Pitkin v. Cowen, 91 Fed. 599 (the court will take judicial notice of the fact that a defendant is a receiver, although there is no allegation to that effect in plaintiff's pleading).

[49] **Removability of suit to which trustees in bankruptcy a party in general** see supra § 68.

[50] See supra § 75.

[51] See cases infra this note.

[a] **Pleading not disclosing federal question in action against trustee in bankruptcy.**—Ford Motor Co. v. Automobile Ins. Co., 13 F. (2d) 415.

[52] **Removability of suit to which federal corporation a party in general** see supra § 69.

[53] See supra § 69.

[54] See supra § 75.

[55] Texas, etc., R. Co. v. Cody, 166 U. S. 606, 17 SCt 703, 41 L. ed. 1132.

[56] Re Dunn, 212 U. S. 374, 29 SCt 299, 53 L. ed. 558; Texas, etc., R. Co. v. Barrett, 166 U. S. 617, 17 SCt 707, 41 L. ed. 1136; Texas, etc., R. Co. v. Cody, 166 U. S. 606, 17 SCt 703, 41 L. ed. 1132; Scott v. Choctaw, etc., R. Co., 112 Fed. 180. Contra Caples v. Texas, etc., R. Co., 67 Fed. 9; Texas, etc., R. Co. v. Caples, (Tex. Civ. A.) 36 SW 516; Texas, etc., R. Co. v. Hightower, 12 Tex. Civ. A. 41, 33 SW 541.

[a] **Action against United States Shipping Board Emergency Fleet Corporation.**—James v. U. S. Shipping Bd. Emergency Fleet Corp., 12 F. (2d) 89.

[57] Texas, etc., R. Co. v. Cody, 166 U. S. 606, 17 SCt 703, 41 L. ed. 1132; Greer v. Texas, etc., R. Co., 17 Tex. Civ. A. 356, 42 SW 1038.

[58] Re Dunn, 212 U. S. 374, 29 SCt 299, 53 L. ed. 558; Texas, etc., R. Co. v. Cody, 166 U. S. 606, 17 SCt 703, 41 L. ed. 1132. But see Oregon Short Line, etc., R. Co. v. Skottowe, 162 U. S. 490, 16 SCt 869, 40 L. ed. 1048 (where, however, even though the court was obliged to take judicial notice of defendant company's charter, so far as appeared defendant existed and was doing business in the state in which the action was brought, solely under the authority of that state).

[a] **Action against United States Shipping Board Emergency Fleet Corporation.**—Harry Porter Co. v. U. S. Shipping Bd. Emergency Fleet Corp., 284 Fed. 397.

[59] Texas, etc., R. Co. v. Cody, 166 U. S. 606, 17 SCt 703, 41 L. ed. 1132; James v. U. S. Shipping Bd. Emergency Fleet Corp., 12 F. (2d) 89; Supreme Lodge K. P. v. Wilson, 66 Fed. 785, 14 CCA 264; Greer v. Texas, etc., R. Co., 17 Tex. Civ. A. 356, 42 SW 1038.

[60] See supra § 70.

[61] See supra § 75.

[62] See cases infra this note.

[a] **Pleading not disclosing federal question.**—Wichita Nat. Bank v. Smith, 72 Fed. 568, 19 CCA 42.

[b] **Pleading disclosing federal question.**—Bowers v. First Nat. Bank, 190 Fed. 676.

[63] See cases infra this note.

[a] **Pleading in action against directors not disclosing federal question.**—Prescott v. Haughey, 65 Fed. 653.

[b] **Pleading in action against of-**

[§ 89] **k. Litigation in Federal Courts.** The general rule that the question as to whether a suit arises under the constitution, laws, or a treaty of the United States is determinable from the allegations of plaintiff's pleading,[64] has been applied in determining as to the removability of suits involving, or growing out of, litigation in federal courts.[65]

V. SUITS AND PROSECUTIONS AGAINST CERTAIN OFFICERS OR PERSONS ACTING OR CLAIMING UNDER SUCH OFFICERS; PERSONS IN MILITARY SERVICE[66]

[BY WILLIAM G. BANNON]

[§ 90] **A. Revenue or Prohibition Officers, and Persons Acting or Claiming under Such Officers—1. In General.** By statute,[67] any civil suit[68] or criminal prosecution[69] commenced in any court of a state against any officer[70] appointed under or acting by authority of any revenue law[71] of the United States, or against any person[72] acting under or by authority of any such officer, on account of any act[73] done under color of his office or of any such law, or on account of any right, title, or authority claimed by such officer or other person, under any such law, or is commenced against any person holding property or estate by title derived from any such officer and affects the validity of any such revenue law, may at any time before the trial or final hearing thereof[74] be removed for trial[75] into the district court next to be holden in the district where the same is pending[76] upon the petition[77] of such defendant[78] in the manner specified.[79] By a provision of the National Prohibition Act the benefit of this removal statute is extended to prohibition officers or agents engaged in the enforcement of such act and it seems, to persons acting under the authority and direction of such officers or agents in such enforcement.[80]

Discretion of federal court as to taking jurisdiction. The federal court has no discretion to refuse to take jurisdiction where the facts found bring the matter within the terms of the statute.[81]

[§ 91] **2. Validity, Construction, and Operation of Statute in General.** The constitutionality of the removal statute here under consideration,[82] including the provision for removal of criminal prosecutions,[83] such as prosecutions against prohibition officers or agents,[84] has been recognized or upheld under the constitutional provision[85] that the judicial power of the United States shall extend to all cases in law and equity arising under the constitution, the laws of the United States, and treaties made or which shall be made under their authority.[86] There is authority for the view that the statute should be liberally construed in favor of removal,[87] but it should not be extended to give jurisdiction where jurisdiction does not appear to have been intended,[88] and it has been

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ficers and directors disclosing federal question.—Bailey v. Mosher, 63 Fed. 488, 11 CCA 304.

[64] See supra § 75.

[65] Coyle v. Stern, 193 Fed. 582, 113 CCA 450; Long v. Quinn Bros., 215 Mass. 85, 102 NE 348.

[a] **Pleading not disclosing federal question.**—Complaint in suit by one claiming under the mortgage of a vessel, to protect his rights as against an alleged purchaser at a sale of the vessel by a United States marshal. Coyle v. Stern, 193 Fed. 582, 113 CCA 450.

[66] **Removal of suits against officer of United States as arising under constitution or laws of United States in general** see supra §§ 64-66.

[67] USCA tit 28 § 76.

[a] **History of statute.**—(1) The provision of the U. S. Revised Statutes dealing with the matter in question was substantially the same as the present statutory provision. Rev. St. § 643. (2) Still earlier statutes contained similar provisions. Act July 13, 1866 [14 U. S. St. at L. p 171 c 184 § 67]; Act June 30, 1864 [13 U. S. St. at L. p 241 c 173 § 50]; Act March 2, 1833 [4 U. S. St. at L. p 633 c 57 § 3]. (3) "Section 33 [of the Judicial Code, now USCA tit 28 § 76] was derived from section 643 of the Revised Statutes, which in turn was derived from the Act of July 13, 1866, 14 Stat. 171, c. 184, § 67, and the Act of June 30, 1864, 13 Stat. 241, c. 173, § 50. These acts extend the Act of March 2, 1833, Stat. 633, c. 57, § 3, applying to officers engaged in collection of customs duties to those engaged in the collection of internal revenue." Maryland v. Soper, 270 U. S. 9, 46 SCt 185, 190, 70 L. ed. 449. (4) The provisions of Rev. St. § 643 were not repealed by the Removal Act of 1875. Venable v. Richards, 105 U. S. 636, 26 L. ed. 1196 [aff 28 F. Cas. No. 16,913, 1 Hughes 326]. (5) For other details as to the history of the statute see Maryland v. Soper, 270 U. S. 9, 46 SCt 185, 70 L. ed. 449; Tennessee v. Davis, 100 U. S. 257, 25 L. ed. 648; Philadelphia v. Collector, 5 Wall. (U. S.) 720, 18 L. ed. 614; Findley v. Satterfield, 9 F. Cas. No. 4,792, 3 Woods 504; State v. Hoskins, 77 N. C. 530.

[b] **Suits or proceedings involving elective franchise.**—(1) The Revised Statutes and a still earlier statute contained also a provision, not contained in the present statute, giving the right to remove to officers or persons acting under statutory provisions relating to the elective franchise. U. S. Rev. St. § 643; Act Febr. 28, 1871 [16 U. S. St. at L. p 438 c 99 § 16]. (2) Prosecution held not removable under such statute see Illinois v. Fletcher, 22 Fed. 776; Ex p. Anderson, 1 F. Cas. No. 349, 3 Woods 124. (3) Provision repealed. Act Febr. 8, 1894 [28 U. S. St. at L. p 36 c 25].

[c] **In Hawaii** the operation of the statute has been extended to the removal of cases from a territorial court to the federal district court. See Organic Act § 86 (d) [USCA tit 48 § 645]; and Corn v. Wardell, 4 Hawaii Fed. 601.

[68] See infra § 95.

[69] See infra §§ 96, 97.

[70] **Officers included** see infra § 99.

[71] **What are revenue laws** see infra § 92.

[72] **Persons included** see infra § 100.

[73] **Acts included** see infra §§ 93, 94.

[74] **Time for removal** see infra § 211.

[75] **Trial after removal** see infra § 298.

[76] **District court to which removable** see infra § 264.

[77] **Requisites of petition** see infra § 261.

[78] **Defendant's right to remove** see infra § 98.

[79] **Method of removal** see infra § 261.

[80] See infra §§ 99, 100.

[81] Rhode Island v. Richardson, 32 F. (2d) 301; Peo. v. Moody, 9 F. (2d) 628.

[82] Tennessee v. Davis, 100 U. S. 257, 25 L. ed. 648; State v. Hoskins, 77 N. C. 530.

[83] Tennessee v. Davis, 100 U. S. 257, 25 L. ed. 648; Findley v. Satterfield, 9 F. Cas. No. 4,792, 3 Woods 504; State v. Deaver, 77 N. C. 555; State v. Hoskins, 77 N. C. 530.

[84] Maryland v. Soper, 270 U. S. 9, 40 SCt 185, 70 L. ed. 449; Peo. v. Moody, 9 F. (2d) 628.

Right of prohibition officers or agents to benefit of statute in general see infra § 99.

[85] U. S. Const. art 3 § 2,

[86] Tennessee v. Davis, 100 U. S. 257, 25 L. ed. 648; Findley v. Satterfield, 9 F. Cas. No. 4,792, 3 Woods 504.

[a] **Mr. Chief Justice Taft has said** that: "The constitutional validity of the section rests on the right and power of the United States to secure the efficient execution of its laws and to prevent interference therewith, due to possible local prejudice, by state prosecutions instituted against federal officers in enforcing such laws, by removal of the prosecutions to a federal court to avoid the effect of such prejudice." Maryland v. Soper, 270 U. S. 9, 46 SCt 185, 190, 70 L. ed. 449.

[87] Ward v. Congress Constr. Co., 99 Fed. 598, 39 CCA 669; North Carolina v. Sullivan, 50 Fed. 593.

[88] Johnson v. Wells, 98 Fed. 3. See Smith v. Gilliam, 282 Fed. 628

asserted that where the question as to jurisdiction is doubtful the doubt should be resolved against the jurisdiction of the federal court.[89] Although the earlier statute,[90] from which the removal statute in question derives, was enacted because of attempts of one of the states to nullify a tariff act,[91] the statute as amended and extended is not limited to the removal of cases arising out of attempts by state legislatures to nullify laws of the United States.[92]

[§ 92] **3. What Are Revenue Laws.** It has been said that the phrase "revenue law of the United States," as used in the statute in question is comprehensive[93] and that it includes any law under which the government may derive from any source funds to carry on its activities;[94] but the phrase does not include all laws appropriating money for the expenditure of revenue.[95]

Particular laws. Among other laws which have been regarded as revenue laws within the purview of the statute are a statute imposing a direct tax on the state[96] and the statute forbidding the fermenting of mash or wort or the making of spirits therefrom in any other than a distillery authorized by law, or by a duly authorized distiller.[97] So too, postal laws have been regarded as within the purview of the statute,[98] although there is apparently authority for the view that every statute regulating the postal service is not necessarily a revenue law.[99] Among other laws which, it has been held or recognized, are not revenue laws within the meaning of the statute are the reclamation act,[1] naval appropriation act,[2] and the statute prohibiting the importation of opium for other than medicinal purposes.[3] It has been held or recognized that the National Prohibition Act is not a "revenue act" within the meaning of the removal statute,[4] but there is authority to the contrary;[5] in any event prohibition officers or agents are entitled to the benefit of the removal statute in question on a different theory.[6]

[§ 93] **4. What Acts Included—a. In General.** The statute does not include an act of an officer which is not done in the performance of his official duties, or under the color of his office.[7] So in order that a prosecution may be removed as having been instituted "on account of" acts done by defendant as a federal officer under color of his office or of the revenue or prohibition law, there must be causal connection between what the officer has done under asserted official authority and the state prosecution,[8] and it must appear that the prosecution has arisen out of the acts done by him under color of federal authority and in enforcement of federal law.[9] The statute does not, however, require that the proceeding against him must be for the very acts which the officer admits to have been done by him under federal authority,[10] and it is enough that his acts or his presence at the place in performance of his official duty constitute the basis, although mistaken or false, of such proceeding;[11] accordingly, it is not necessary, in order that he may remove, that the officer should admit that he performed the act for which he is prosecuted,[12] and a like rule applies to the removal of a civil suit against an officer who denies the performance of the act charged.[13] While an act of a federal officer, not expressly authorized by a federal statute, may be such an inevitable outgrowth of such officer's discharge of his federal duty and so closely interrelated with it as to bring such act within the Removal Act,[14] certain acts not a part of his official duty, although having some relation to such duty, may be too remote to come within the purview of the removal statute in question.[15] The statute makes a mere claim by a federal officer within its purview that the acts complained of were done in the discharge of his duties as a federal officer a basis of federal jurisdiction, at least until such claim shall prove unfounded.[16] In general the acts which are within the purview of the statute if performed by a federal officer are also within it if performed by a person acting under such officer's authority and direction.[17]

[§ 94] **b. Particular Acts.** Under general rules and subject to applicable limitations and qualifica-

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(where a motion to remand was granted).

[89] Johnson v. Wells, 98 Fed. 3.

[90] Act March 2, 1833 [4 U. S. St. at L. p 633 c 57 § 3].

[91] See Tennessee v. Davis, 100 U. S. 257, 25 L. ed. 648; and cases supra § 90 note 67 [a].

[92] Findley v. Satterfield, 9 F. Cas. No. 4,792, 3 Woods 504.

Suits or prosecutions removable in general see infra §§ 96–97.

[93] West v. Prudential Ins. Co., 34 F. (2d) 449.

[94] West v. Prudential Ins. Co., supra.

[95] Underwood v. Dismukes, 266 Fed. 559.

[96] Peyton v. Bliss, 19 F. Cas. No. 11,055, Woolw. 170 (under Act March 2, 1833 [4 U. S. St. at L. 633 c 57 § 3]).

[97] Maryland v. Soper, 270 U. S. 9, 40 SCt 185, 70 L. ed. 449 (U. S. Rev. St. § 3282).

[98] West v. Prudential Ins. Co., 34 F. (2d) 449; Ward v. Congress Constr. Co., 99 Fed. 598, 39 CCA 669. See Bryant Bros. Co. v. Robinson, 149 Fed. 321, 79 CCA 259 (where a refusal to remand was upheld).

[a] **Act of 1833.**—Post-office laws were regarded as "revenue laws," within the meaning of Act March 2, 1833 [4 U. S. St. at L. p 633 c 57 § 3], which provided for the removal of a suit brought against a person for an act done under the revenue laws of the United States, or under color thereof. Warner v. Fowler, 29 F. Cas. No. 17,182, 4 Blatchf. 311.

[99] People's U. S. Bank v. Goodwin, 162 Fed. 937.

[1] Stanfield v. Umatilla River Water Users' Assoc., 192 Fed. 596; Twin Falls Canal Co. v. Foote, 192 Fed. 583.

[2] Underwood v. Dismukes, 266 Fed. 559.

[3] Chock Sing v. Breckons, 3 Hawaii Fed. 630 (attempted removal from territorial court to federal district court).

[4] Wolkin v. Gidney, 3 F. (2d) 960; Massachusetts v. Bogan, 285 Fed. 668; Smith v. Gilliam, 282 Fed. 628. See Morse v. Higgins, 273 Fed. 930 (where the petition for removal was not sufficient to warrant removal).

[5] Oregon v. Wood, 268 Fed. 975.

[6] See infra § 99.

[7] Florida v. Huston, 283 Fed. 687; Virginia v. De Hart, 119 Fed. 626; Kelsey v. Dallon, 14 F. Cas. No. 8,678. See People's U. S. Bank v. Goodwin, 162 Fed. 937 (holding that the case involved was not removable).

[8] Maryland v. Soper, 270 U. S. 9, 46 SCt 185, 70 L. ed. 449.

[9] Maryland v. Soper, supra.

[10] Maryland v. Soper, supra.

[a] **Prosecution removable.**—Acts under National Prohibition Act. Rhode Island v. Richardson, 32 F. (2d) 301.

[11] Maryland v. Soper, 270 U. S. 9, 46 SCt 185, 70 L. ed. 449.

[12] Maryland v. Soper, supra; Oregon v. Wood, 268 Fed. 975.

[13] Cleveland, etc., R. Co. v. McClung, 119 U. S. 454, 7 SCt 262, 30 L. ed. 465.

[14] Maryland v. Soper, 270 U. S. 9, 46 SCt 185, 70 L. ed. 449; Virginia v. De Hart, 119 Fed. 626.

[15] Maryland v. Soper, 270 U. S. 9, 46 SCt 185, 70 L. ed. 449; Florida v. Huston, 283 Fed. 687. See Virginia v. De Hart, 119 Fed. 626 (apparently recognizing rule).

[16] Tennessee v. Davis, 100 U. S. 257, 26 L. ed. 648.

[17] Davis v. South Carolina, 107 U. S. 597, 2 SCt 636, 27 L. ed. 574. And see cases passim infra §§ 94, 100.

tions,[18] among other acts by an officer or a person acting under or by his authority which have been regarded as within the purview of the removal statute are acts done in self defense[19] against an assault which would have interfered with the performance of a duty under a revenue law;[20] acts in connection with the service of process of arrest for violation of a revenue law;[21] shooting a person while the latter was fleeing from arrest for a violation of the National Prohibition Act;[22] acts done by a prohibition agent while guarding a truck containing articles seized in the performance of his duty;[23] exaction of revenue duties;[24] and uttering allegedly defamatory matter in connection with official duties.[25] Among other acts which, it has been held or recognized, are not within the purview of the statute are allegedly illegal exactment by a United States commissioner of money as costs and fees in a case arising under a revenue law, in which such commissioner acted as magistrate;[26] an act committed while searching for opium imported for other than medicinal purposes in violation of law;[27] and giving allegedly false testimony in an investigation by local authorities of a transaction with which the officer giving the testimony was officially connected, where such testimony was given voluntarily and not under the compulsion of any state or federal law.[28]

[§ 95] **5. Proceedings Removable—a. Civil Suits.**[29] The statute in specific terms includes,[30] and has frequently been applied in permitting the removal of, civil suits.[31]

Particular suits. Subject to applicable rules and qualifications in respect of what are revenue laws, and what acts are within the removal statute in question,[32] and as to what officers or persons are within, or entitled to the benefit of, such statute,[33] and in accordance with the general rule herein stated, it has been held or recognized that, among others, the following suits or actions are within the purview of such removal statute: An action against a collector of internal revenue to recover back moneys alleged to have been illegally exacted as internal revenue duties;[34] an action against a collector of customs by a carrier to recover freight charges which, it was alleged, the collector had received in the performance of his official duties;[35] an action by an informer to recover from a collector of customs part of the proceeds of forfeited goods;[36] an action against a postmaster for refusal to deliver a letter;[37] an action against a prohibition agent;[38] an action for slander against a collector of customs,[39] and against a surveyor of a port,[40] based on statements in connection with official duties; a summary proceeding by a landlord to recover from a lessee possession of premises used as a bonded warehouse, to which proceeding a collector of internal revenue and a United States storekeeper are made parties defendant;[41] a proceeding under a writ of foreign attachment issued in a suit between private individuals, upon the property of defendant which was in the possession of a collector of customs;[42] a proceeding to punish a collector of internal revenue for contempt in refusing to permit the sheriff to enter a warehouse;[43] an action for acts done by defendant under authority of post office inspectors;[44] an action for assault against a state enforcement officer who, at the time of the alleged assault, was assisting a federal prohibition officer;[45] and a suit to enjoin a contractor from proceeding with the construction of a post office under contract with the secretary of the treasury.[46] Among other suits which, it has been held or recognized, are not removable under the removal statute in question are: An action against an assistant treasurer of the United States to recover the value of United States bonds, the possession of which plaintiff had permitted defendant to take, and which defendant had retained on the ground that they were the property of a state;[47] a suit to enjoin a naval officer from interfering with certain land which, defendant claimed, was purchased for military purposes under a naval appropriation act;[48] an action to recover back from a United States commissioner moneys received by him as costs and fees in a case arising under a revenue law in which he acted as a magistrate;[49] an action against a United States district attorney for trespass, alleged to have been committed while he was searching for opium imported for other than medicinal purposes in violation of law;[50] and an action against a common carrier for refusal to accept goods for transportation because of nonpayment of a stamp tax by the shipper.[51]

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[18] See supra § 93.

[19] Tennessee v. Davis, 100 U. S. 257, 25 L. ed. 648; Massachusetts v. Bogan, 285 Fed. 668; Virginia v. Bingham, 88 Fed. 561; Carico v. Wilmore, 51 Fed. 196.

[20] Virginia v. De Hart, 119 Fed. 626. See Virginia v. Felts, 133 Fed. 85 (where the right to remove was upheld).

[21] Davis v. South Carolina, 107 U. S. 597, 2 SCt 636, 27 L. ed. 574; Virginia v. De Hart, 119 Fed. 626.

[22] Wynn v. Baker, 23 F. (2d) 530.

[23] New York v. Walsh, 40 F. (2d) 58.

[24] Venable v. Richards, 105 U. S. 636, 26 L. ed. 1196 [aff 29 F. Cas. No. 16,913, 1 Hughes 326]; Brainard v. Hubbard, 12 Wall. (U. S.) 1, 20 L. ed. 272 (recognizing rule); Philadelphia v. Collector, 5 Wall. (U. S.) 720, 18 L. ed. 614.

[25] Buttner v. Miller, 4 F. Cas. No. 2,254, 1 Woods 620 (decided under Act of March 2, 1833 [4 U. S. St. at L. p 633 c 57 § 3]); Corn v. Wardell, 4 Hawaii Fed. 601 (removal from territorial court to federal district court).

[26] Benchley v. Gilbert, 3 F. Cas. No. 1,291, 9 Blatchf. 147 (decided under Act of July 13, 1866 [14 U. S. St. at L. p 171 c 184 § 67]).

[27] Chock Sing v. Breckons, 3 Hawaii Fed. 630 (attempted removal from territorial court to federal district court).

[28] Maryland v. Soper, 270 U. S. 44, 46 SCt 194, 70 L. ed. 462.

[29] **Removability as dependent on existence of original jurisdiction of federal court** see supra § 10.

[30] USCA tit 28 § 76.

[31] See cases passim this section.

[32] See supra §§ 92–94.

[33] See infra §§ 99, 100.

[34] Venable v. Richards, 105 U. S. 636, 26 L. ed. 1196 [aff 29 F. Cas. No. 16,913, 1 Hughes 326]; Brainard v. Hubbard, 12 Wall. (U. S.) 1, 20 L. ed. 272 (recognizing rule); Philadelphia v. Collector, 5 Wall. (U. S.) 720, 18 L. ed. 614.

[35] Cleveland, etc., R. Co. v. McClung, 119 U. S. 454, 7 SCt 262, 30 L. ed. 465.

[36] Van Zandt v. Maxwell, 28 F. Cas. No. 16,884, 2 Blatchf. 421.

[37] Warner v. Fowler, 29 F. Cas. No. 17,182, 4 Blatchf. 311 (decided under Act March 2, 1833 [4 U. S. St. at L. p 633 c 57 § 3]).

[38] In re Higgins, 273 Fed. 832.

[39] Buttner v. Miller, 4 F. Cas. No. 2,254, 1 Woods 620 (decided under Act March 2, 1833 [4 U. S. St. at L. p 633 c 57 § 3]).

[40] Corn v. Wardell, 4 Hawaii Fed. 601.

[41] Gallatin v. Sherman, 77 Fed. 337.

[42] Fischer v. Daudistal, 9 Fed. 145.

[43] McCullough v. Large, 20 Fed. 309.

[44] West v. Prudential Ins. Co., 34 F. (2d) 449.

[45] Wynn v. Baker, 23 F. (2d) 530.

[46] Ward v. Congress Constr. Co., 99 Fed. 598, 39 CCA 669.

[47] Victor v. Cisco, 28 F. Cas. No. 16,934, 5 Blatchf. 128 (decided under Act of March 2, 1833 [4 U. S. St. at L. p 633 c 57 § 3]).

[48] Underwood v. Dismukes, 266 Fed. 559.

[49] Benchley v. Gilbert, 3 F. Cas. No. 1,291, 8 Blatchf. 147 (decided un-

[§ 96] **b. Criminal Prosecutions—(1) In General.** The statute in specific terms includes,[52] and, subject to general rules as to what are revenue laws, and what acts are, within the statute,[53] and as to what officers or persons are within, or entitled to the benefit of, such statute,[54] has frequently been applied in permitting[55] the removal of criminal prosecutions, including a prosecution for a misdemeanor which may be prosecuted without indictment.[56] The prosecutions which are removable under the statute in question are those instituted for alleged violations of state laws,[57] in which defenses are set up or claimed under United States laws or authority.[58]

[§ 97] **(2) Particular Prosecutions.** In accordance with general rules and subject to applicable qualifications and limitations,[59] among other prosecutions, which, it has been held or recognized, are removable, are: A prosecution against a revenue officer for assault,[60] against a deputy internal revenue officer for murder,[61] against a revenue officer for conspiracy to extort money;[62] a prosecution against a deputy United States marshal for murder;[63] a prosecution against a prohibition agent[64] for assault,[65] and for murder or manslaughter;[66] and a prosecution against a member of a posse comitatus of a deputy United States marshal for assault,[67] and for murder.[68] Among other prosecutions which, it has been held or recognized, are not removable under the removal statute in question are: A prosecution against a prohibition agent for reckless driving while not engaged in the performance of his duty,[69] for obstructing justice by giving false testimony before a coroner,[70] and for perjury alleged to have been committed in a proceeding before a coroner;[71] and a prosecution for selling liquor in violation of a state law against a person holding a license from the United States,[72] against a person who sold liquor on which the internal revenue tax had been paid,[73] and against a person who sold liquor, the formula for which was approved by the federal prohibition commissioner.[74]

[§ 98] **6. Persons or Parties within or Entitled to Benefit of Statute—a. In General.** The terms of the statute confine the right to remove to removal by defendant.[75]

[§ 99] **b. Federal Officers.** The benefit of the statute is not extended to all officers of the United States.[76]

Particular officers. Subject to applicable rules and qualifications as to what are revenue laws, and as to what acts are, within the purview of the removal statute in question,[77] among other officers who, it has been held or recognized in cases in which removal was sought either by an officer or by one claiming to have acted under or by the authority of an officer,[78] are within the purview of the statute are a collector of customs,[79] a surveyor of a port,[80] and other customs officers;[81] a collector of internal revenue,[82] and a deputy collector of internal revenue;[83] a United States marshal,[84] and a deputy United States marshal,[85] while acting under, or engaged in

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der Act of July 13, 1866 [14 U. S. St. at L. p 171 c 184 § 67]).

[50] Chock Sing v. Breckons, 3 Hawaii Fed. 630 (attempted removal from territorial court to federal district court).

[51] Johnson v. Wells, 98 Fed. 3.

[52] USCA tit 28 § 76.

[53] See supra §§ 92-94.

[54] See infra §§ 99, 100.

[55] Florida v. Peters, 284 Fed. 612; State v. Hoskins, 77 N. C. 530. And see cases passim infra § 97.

[a] **Act of 1833.**—Act March 2, 1833, from which the present act derives, included criminal cases. Tennessee v. Davis, 100 U. S. 257, 25 L. ed. 648. But see Com. v. Casey, 12 Allen (Mass.) 214 (where, however, the denial of the right to remove was based on another ground also). Contra Ex p. Carson, 5 F. Cas. No. 2,459, 4 Hughes 215.

[56] Virginia v. Bingham, 88 Fed. 561.

[57] Tennessee v. Davis, 100 U. S. 257, 25 L. ed. 648.

[58] Tennessee v. Davis, supra.

[59] See supra § 96.

[60] State v. Hoskins, 77 N. C. 530.

[61] Tennessee v. Davis, 100 U. S. 257, 25 L. ed. 648; Georgia v. Port, 3 Fed. 117, 4 Woods 513.

[62] State v. Deaver, 77 N. C. 555.

[63] Carter v. Tennessee, 18 F. (2d) 850; Virginia v. Felts, 133 Fed. 85; Carico v. Wilmore, 51 Fed. 196; Georgia v. Bolton, 11 Fed. 217.

[64] Peo. v. Moody, 9 F. (2d) 628.

[65] New York v. Walsh, 40 F. (2d) 58.

[a] **Effect of former conviction of chauffeur of officers who seek to remove.**—Prohibition agents charged with assault were not precluded from having a prosecution removed to a federal court by a prior conviction of their chauffeur for driving while intoxicated, where the chauffeur was not a party to the prosecution or proceeding to remove. New York v. Walsh, 40 F. (2d) 58.

[66] Massachusetts v. Bogan, 285 Fed. 668; Oregon v. Wood, 268 Fed. 975.

[67] Virginia v. De Hart, 119 Fed. 626.

[68] Davis v. South Carolina, 107 U. S. 597, 2 SCt 636, 27 L. ed. 574; Carter v. Tennessee, 18 F. (2d) 850.

[69] Florida v. Huston, 283 Fed. 687.

[70] Maryland v. Soper, 270 U. S. 36, 46 SCt 192, 70 L. ed. 459.

[71] Maryland v. Soper, supra.

[72] State v. Elder, 54 Me. 381; Com. v. Casey, 12 Allen (Mass.) 214 (both cases decided under Act of March 2, 1833 [4 U. S. St. at L. p 633 c 57 § 3], and Act of June 30, 1864 [13 U. S. St. at L. p 241 c 173 § 50]).

[73] Stommel v. Timbrel, 84 Iowa 336, 51 NW 159.

[74] Shumpka's Application, 268 Fed. 686.

[75] USCA tit 28 § 26.

Joinder in removal see infra § 227.

[76] West v. Prudential Ins. Co., 34 F. (2d) 449; Twin Falls Canal Co. v. Foote, 192 Fed. 583.

[77] See supra §§ 92-94.

[78] **Persons other than officer entitled to remove in general** see infra § 100.

[79] Cleveland, etc., R. Co. v. McClung, 119 U. S. 454, 7 SCt 262, 30 L. ed. 465; Fischer v. Daudistal, 9 Fed. 145; Buttner v. Miller, 4 F. Cas. No. 2,254, 1 Woods 620 (decided under Act of March 2, 1833 [4 U. S. St. at L. p 633 c 57 § 3]).

[80] Corn v. Wardell, 4 Hawaii Fed. 601 (removal from territorial court to federal district court).

[81] Ex p. Dickson, 14 F. (2d) 609 (recognizing rule).

[a] **Immigration inspector.**—Ex p. Dickson, 14 F. (2d) 609 (recognizing rule).

[82] Brainard v. Hubbard, 12 Wall. (U. S.) 1, 20 L. ed. 272; Philadelphia v. Collector, 5 Wall. (U. S.) 720, 18 L. ed. 614; McCullough v. Large, 20 Fed. 309.

[83] Venable v. Richards, 105 U. S. 636, 26 L. ed. 1196 [aff 29 F. Cas. No. 16,913, 1 Hughes 326]; Tennessee v. Davis, 100 U. S. 257, 25 L. ed. 648; Virginia v. Bingham, 88 Fed. 561; Georgia v. Port, 3 Fed. 117, 4 Woods 513.

[84] Davis v. South Carolina, 107 U. S. 597, 2 SCt 636, 27 L. ed. 574.

Removal of suits against United States marshal as arising under constitution or laws of United States in general see supra § 64.

[85] Davis v. South Carolina, 107 U. S. 597, 2 SCt 636, 27 L. ed. 574; Carter v. Tennessee, 18 F. (2d) 850; Virginia v. Felts, 133 Fed. 85; Virginia v. De Hart, 119 Fed. 626; Carico v. Wilmore, 51 Fed. 196; Georgia v. Bolton, 11 Fed. 217.

Removal of suits against deputy United States marshal as arising under constitution or laws of United States in general see supra § 64.

attempts to enforce, a revenue law; and the secretary of the treasury in administering a law for the construction of a post office,[86] a post-office inspector,[87] and a postmaster.[88] By virtue of a provision in the National Prohibition Act[89] prohibition officers and agents, in respect of their enforcement of such act, are entitled to the benefit of the statute here under consideration;[90] and apart from such provision of the Prohibition Act, such officers and agents are, it seems, entitled to the benefit of the removal statute in respect of acts performed while they are engaged in the enforcement of a revenue law.[91] On the other hand, it has been held or recognized that the secretary of the interior,[92] an engineer appointed and acting under the reclamation act,[93] a United States commissioner while acting as an examining and committing magistrate in a case arising out of a revenue law,[94] and a United States district attorney when not acting under a revenue law,[95] are not within the purview of the statute.

[§ 100] **c. Persons Other than Federal Officers.** In general, where the case is otherwise within the purview of the removal statute in question, all who lawfully assist a federal officer in the performance of his duties are entitled to remove the proceeding under such statute,[96] but, in respect of persons other than federal officers, it has been held that the statute applies only to persons who so assist federal officers or act under or by the authority of such officers,[97] and does not include other persons who merely claim rights or authority under revenue laws.[98]

Particular persons. Subject to applicable rules as to what are revenue laws, and as to what acts are, within the purview of the removal statute in question,[99] and to the general rules and qualifications herein stated as to what persons are within the statute, it has been held or recognized that, among others, the following persons, not federal officers, are entitled to remove under such statute: A member of a posse comitatus of a deputy internal revenue collector,[1] and of a United States marshal acting under a revenue law,[2] a local police officer assigned to assist post office inspectors,[3] and a corporation constructing a post office under the authority of the secretary of the treasury.[4] By virtue of a provision of the National Prohibition Act[5] persons acting under the authority and direction of prohibition officers or agents, in the enforcement of such act, are, it seems, entitled to the benefit of the statute here under consideration,[6] and it seems that, apart from such provision of the National Prohibition Act, such persons are entitled to the benefit of the removal statute in respect of acts done while the prohibition officers are engaged in the enforcement of a revenue law.[7] Among others to whom the right to remove under the removal statute in question has been denied are: A person, prosecuted under a state liquor law,[8] who holds a license from the United States to keep and sell liquor,[9] or who sells a preparation the formula for which has been approved by the federal prohibition commissioner,[10] and a carrier which claimed to be acting under a revenue law in refusing to accept a shipment for transportation.[11]

[§ 101] **7. Pleading or Indictment as Affecting Removability.** In a civil suit, the fact that the act complained of is one within the removal statute in question[12] may appear either from plaintiff's pleading[13] or in the petition for removal.[14] In the case of a criminal prosecution, the right to remove may not be defeated by the brevity, permissible under state practice, of a charge in an indictment which renders difficult a determination as to whether the accused officer was acting under color of his office in performing the act on which the indictment is based.[15]

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[86] Ward v. Congress Constr. Co., 99 Fed. 598, 39 CCA 669.

[87] West v. Prudential Ins. Co., 34 F. (2d) 449.

[88] Warner v. Fowler, 29 F. Cas. No. 17,182, 4 Blatchf. 311 (decided under Act of March 2, 1833 § 3). See Bryant Bros. Co. v. Robinson, 149 Fed. 321, 79 CCA 259 (where a refusal to remand was upheld).

[89] USCA tit 27 § 45.

[a] **Word "protection," as used in National Prohibition Act § 28 (USCA tit 27 § 45)** (1) was inserted for the purpose of giving to officers and persons acting under the authority of the National Prohibition Act in enforcement of its provisions, the same protection of a trial in a federal court of state prosecutions as is accorded to revenue officers under Judicial Code § 33 (USCA tit 28 § 76). Maryland v. Soper, 270 U. S. 9, 46 SCt 185, 70 L. ed. 449. (2) "The natural meaning of the word would be protection against resistance or attack when carrying out their duties; and there are provisions in the revenue laws to which it might apply. The danger, however, which such an officer would incur in the performance of his duties, if subject to prosecution or suit in local courts, in perhaps an unfriendly atmosphere and surroundings, might be very considerable. . . . I think that the right of removal is a 'protection' to the prohibition agents in the enforcement of the act, within the meaning of section 28 [USCA tit 27 § 45]." Massachusetts v. Bogan, 285 Fed. 668, 669.

[90] Maryland v. Soper, 270 U. S. 9, 46 SCt 185, 70 L. ed. 449; New York v. Walsh, 40 F. (2d) 58; Rhode Island v. Richardson, 32 F. (2d) 301; Wynn v. Baker, 23 F. (2d) 530; Peo. v. Moody, 9 F. (2d) 628; Massachusetts v. Bogan, 285 Fed. 668; In re Higgins, 273 Fed. 832; Oregon v. Wood, 268 Fed. 975. See U. S. v. Pennsylvania, 293 Fed. 931 (where remand was denied). But see Morse v. Higgins, 273 Fed. 830 (where the right to remove was denied). Contra Wolkin v. Gibney, 3 F. (2d) 960; Smith v. Gilliam, 282 Fed. 628.

[91] Maryland v. Soper, 270 U. S. 44, 46 SCt 194, 70 L. ed. 462. But see Smith v. Gilliam, 282 Fed. 628 (where a motion to remand was granted).

[92] North Side Canal Co. v. Twin Falls Canal Co., 12 F. (2d) 311.

[93] Stanfield v. Umatilla River Water Users' Assoc., 192 Fed. 596.

[94] Benchley v. Gilbert, 3 F. Cas. No. 1,291, 8 Blatchf. 147 (decided under Act of July 13, 1866 [14 U. S. St. at L. p 171 c 184 § 67]). Compare State v. Deaver, 77 N. C. 555 (where the right to remove a prosecution for conspiracy to extort money, against a deputy collector of internal revenue and a United States commissioner was recognized).

[95] Chock Sing v. Breckons, 3 Hawaii Fed. 630 (attempted removal from territorial court to federal district court).

[96] Davis v. South Carolina, 107 U. S. 597, 2 SCt 638, 27 L. ed. 574; Wynn v. Baker, 23 F. (2d) 530; Virginia v. De Hart, 119 Fed. 626.

[97] Johnson v. Wells, 98 Fed. 3.

[98] Johnson v. Wells, supra.

[99] See supra §§ 92–94.

[1] Virginia v. Bingham, 88 Fed. 561.

[2] Davis v. South Carolina, 107 U. S. 597, 2 SCt 636, 27 L. ed. 574; Virginia v. De Hart, 119 Fed. 626; Carter v. Tennessee, 18 F. (2d) 850.

[a] **Illustration.**—A noncommissioned officer of the United States Army detailed to assist a United States marshal. Davis v. South Carolina, 107 U. S. 597, 2 SCt 636, 27 L. ed. 574.

[3] West v. Prudential Ins. Co., 34 F. (2d) 449.

[4] Ward v. Congress Constr. Co., 99 Fed. 598, 39 CCA 669.

[5] USCA tit 27 § 45.

[6] Maryland v. Soper, 270 U. S. 9, 46 SCt 185, 70 L. ed. 449.

[a] **Chauffeur** of prohibition agents may, in a proper case, claim the benefit of the removal statute. Maryland v. Soper, 270 U. S. 9, 46 SCt 185, 70 L. ed. 449.

[b] **State enforcement officer,** summoned by and acting under the direction of a prohibition officer as a member of a posse of such officer, may, in a proper case, claim the benefit of the removal statute. Wynn v. Baker, 23 F. (2d) 530.

[7] Maryland v. Soper, 270 U. S. 9, 46 SCt 185, 70 L. ed. 449.

[8] **What prosecutions removable in general** see supra §§ 96, 97.

[9] State v. Elder, 54 Me. 381; Com. v. Casey, 12 Allen (Mass.) 214 (both cases decided under Act of March 2, 1833 [4 U. S. St. at L. p 633 c 57 § 3], and Act of June 30, 1864 [13 U. S. St. at L. p 241 c 173 § 50]).

[10] Shumpka's Application, 268 Fed. 686.

[11] Johnson v. Wells, 98 Fed. 3.

[§ 102] **B. Officers of Federal Courts—1. In General.** By statute,[16] any civil suit or criminal prosecution[17] commenced in any court of a state against any officer of the courts of the United States[18] for or on account of any act[19] done under color of his office or in the performance of his duties as such officer, may at any time before the trial or final hearing thereof[20] be removed for trial[21] into the district court next to be holden in the district where the same is pending[22] upon the petition[23] of such defendant[24] in the manner specified.[25]

[§ 103] **2. Validity of Statute.** The constitutionality of the statute has been upheld[26] in cases in which it was applied to receivers of federal courts.[27]

[§ 104] **3. Acts Included.**[28] In cases involving receivers appointed by federal courts the statute here considered has been given a broad construction so as to include practically any act performed by him in connection with his trust,[29] as, for example, acts performed by him in the operation of property entrusted to him under his appointment.[30] So, too, acts in connection with service of process by a deputy United States marshal have been regarded as acts within the statute.[31] On the other hand, in determining the removability of a suit against a trustee in bankruptcy the rule has been laid down that the statute includes only acts of a court officer,[32] as distinguished from mere claims of title or other legal rights.[33]

[§ 105] **4. Proceedings Removable—a. Civil Suits.** The specific terms of the statute include,[34] and have been applied in permitting,[35] the removal of civil suits. While it has been laid down that the mere fact that defendant is an officer of a federal court does not render a suit against him removable under the removal statute here considered,[36] actions otherwise removable under this statute are removable regardless of the amount in controversy[37] and the citizenship, allegiance, or residence of the parties;[38] and the tendency is to give the statute a broad construction in respect of what suits are removable.[39] Thus it has been held or recognized that the statute authorizes the removal of any suit against a receiver[40] appointed by a federal court, for acts directly connected with the receiver's trust,[41] including acts in the operation or management of property in the receiver's care under his appointment.[42] On the other hand, in determining the removability of a suit against a trustee in bankruptcy, it has been held that the statute does not apply to a suit to establish a lien in which such trustee merely sets up a claim of title acquired by operation of law, and not by any of the trustee's own acts, from the bankrupt.[43]

Action under Federal Employers' Liability Act. Notwithstanding the statutory provisions forbidding the removal of suits under the Federal Employers'

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[12] **What acts within statutes** see supra §§ 93, 94.

[13] Cleveland, etc., R. Co. v. McClung, 119 U. S. 454, 7 SCt 262, 30 L. ed. 465; Corn v. Wardell, 4 Hawaii Fed. 601 (application for removal from territorial to federal district court).

[14] Corn v. Wardell, supra (application for removal from territorial to federal district court).

[15] Rhode Island v. Richardson, 32 F. (2d) 301.

[a] **Illustration.**—Indictment in prosecution against a prohibition agent for alleged conspiracy to steal certain property, which did not allege any specific or overt acts. Rhode Island v. Richardson, 32 F. (2d) 301.

[16] USCA tit 28 § 76.

[a] **For history of statute** see Elliott v. Wheelock, 34 F. (2d) 213; Berens v. Byram, 26 F. (2d) 953.

[17] **Suits or prosecutions removable** see infra §§ 105, 106.

[18] **Who are officers of court** see infra § 108.

[19] **Acts included** see infra § 104.

[20] **Time of removal** see infra § 211.

[21] **Trial after removal in general** see infra § 298.

[22] **District court to which proceedings removable in general** see infra § 264.

[23] **Requisites of petition** see infra § 237.

[24] **Right confined to defendant** see infra § 107.

[25] **Method of removal** see infra § 261.

[26] Berens v. Byram, 26 F. (2d) 953; Matarazzo v. Hustis, 256 Fed. 882.

[27] Berens v. Byram, 26 F. (2d) 953; Matarazzo v. Hustis, 256 Fed. 882. See Barnette v. Wells Fargo Nevada Nat. Bank, 270 U. S. 438, 46 SCt 326, 70 L. ed. 669 (where removal by a receiver was sustained).

Right of receiver to claim benefit of statute in general see infra § 108.

[28] **Suits and prosecutions removable** see infra §§ 105, 106.

[29] Elliott v. Wheelock, 34 F. (2d) 213.

[30] Elliott v. Wheelock, supra; Berens v. Byram, 26 F. (2d) 953; Newell v. Byram, 26 F. (2d) 200; Matarazzo v. Hustis, 256 Fed. 882. Contra Slover v. Chicago, etc., R. Co., 16 F. (2d) 609; Hartman v. Fleming, (Mo.) 264 SW 873.

[31] Peo. v. Moody, 9 F. (2d) 628.

[32] Ford Motor Co. v. Automobile Ins. Co., 13 F. (2d) 415.

[33] Ford Motor Co. v. Automobile Ins. Co., supra.

[34] USCA tit 28 § 76.

[35] See cases passim this section.

[36] Ford Motor Co. v. Automobile Ins. Co., 13 F. (2d) 415.

[37] See supra § 28.

[38] Elliott v. Wheelock, 34 F. (2d) 213; Berens v. Byram, 26 F. (2d) 953; Matarazzo v. Hustis, 256 Fed. 882.

[a] **Suit by alien in district other than residence of defendant receiver.**—Judicial Code § 34 [USCA tit 28 § 77], authorizing removal of suits by aliens against civil officers of the United States brought in a state other than that in which defendant resides, does not impliedly prohibit the removal of a suit by aliens against an officer of court brought in a state other than that in which defendant resides. Matarazzo v. Hustis, 256 Fed. 882.

[39] See Elliott v. Wheelock, 34 F. (2d) 213.

[40] **Right of receiver to remove in general** see infra § 108.

[41] Elliott v. Wheelock, 34 F. (2d) 213.

[a] **Suit for surrender and cancellation of deed and to recover money** from defendant receiver, based on alleged duress in procuring the conveyance, was properly removed under Judicial Code § 28 (USCA tit 28 § 71), as supplemented by § 33 (USCA tit 28 § 76). Barnette v. Wells Fargo Nevada Nat. Bank, 270 U. S. 438, 46 SCt 326, 70 L. ed. 669.

[b] **Suit involving good faith of receiver in the performance of his duties as receiver,** and based on alleged delinquencies in association with other defendants, was removable. American Locomotive Co. v. Histed, 18 F. (2d) 656.

[42] Elliott v. Wheelock, 34 F. (2d) 213; Newell v. Byram, 26 F. (2d) 200; Matarazzo v. Hustis, 256 Fed. 882. Contra Slover v. Chicago, etc., R. Co., 16 F. (2d) 609.

[a] **Action for personal injury** against the receiver of a railroad company as the result of allegedly negligent operation while the receiver was operating the railroad under his appointment, has been held removable. Newell v. Byram, 26 F. (2d) 200; Matarazzo v. Hustis, 256 Fed. 882. Contra Hartman v. Fleming, (Mo.) 264 SW 873.

[43] Ford Motor Co. v. Automobile Ins. Co., 13 F. (2d) 415.

[a] **Suit by chattel mortgagee.**—A suit by a chattel mortgagee to enforce a lien on the proceeds of fire policies on the mortgaged property of the bankrupt was not removable by defendant trustee in bankruptcy. Ford Motor Co. v. Automobile Ins. Co., 13 F. (2d) 415.

Liability Act,[44] it has been held or recognized that an action under such act against a receiver is removable under the said removal statute,[45] regardless of the amount in controversy[46] and the citizenship of the parties[47] on the theory that the said removal statute and the said statutory provision forbidding removal are inconsistent and that the removal statute, being the later statute and clearly including the removal in question, must be given effect.[48]

[§ 106] **b. Criminal Prosecutions.** The statute in specific terms provides for the removal of criminal prosecutions[49] and applies to a criminal prosecution against a deputy United States marshal.[50]

[§ 107] **5. Who May Remove—a. In General.** The terms of the statute here considered which specifically provide for removal by defendant, does not permit, it seems, removal by plaintiff.[51]

[§ 108] **b. What Officers Included.** It has been held or recognized that the statute gives the right to remove to a receiver appointed by a federal court,[52] to a United States commissioner,[53] to a United States marshal,[54] and to a deputy United States marshal.[55] On the other hand, the statute does not include the secretary of the interior.[56]

[§ 109] **C. Officers of Either House of Congress.**[57] By statute,[58] any civil suit or criminal prosecution against any person for or on account of any act done by him while an officer of either house of congress in the discharge of his official duties in executing any order of such house may at any time before trial or final hearing thereof[59] be removed for trial[60] into the district court next to be holden in the district where the same is pending[61] upon the petition[62] of such defendant in the manner specified.[63] The secretary of the interior, when acting under a reclamation statute, is not an officer of either house of congress within the meaning of the statute.[64]

[§ 110] **D. Persons in Military Service of United States.** The statute providing for the removal of suits or prosecutions against any officer, soldier, or other person in the military service of the United States under certain circumstances[65] has no application where defendant at the time when the occurrence complained of occurred was not engaged in an enterprise in any way connected with or incident to his duties as a soldier.[66]

VI. DENIAL OF, OR INABILITY TO ENFORCE, CIVIL RIGHTS[67]

[By William G. Bannon]

[§ 111] **A. In General.** By statute,[68] any civil suit or criminal prosecution[69] commenced in any state court, for any cause whatever, against any person[70] who is denied or cannot enforce[71] in the judicial tribunals of the state or in the part of the state where such suit or prosecution is pending, any right[72] secured to him by any law[73] providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States,[74] or against any officer, civil or military, or other person, for any arrest or imprisonment or other trespasses or wrongs made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforesaid, or for refusing to do any act on the ground that it would be inconsistent with such law, may, upon the petition of such defendant,[75] filed in said state court[76] at any time before trial or final hearing[77] of the cause, stating the facts and verified by oath,[78] be removed for trial[79] into the next district court to be held in the district where it is pending.[80] In view of the general rule that the denial of, or inability to enforce, an equal civil right referred to in the statute is a denial or inability to enforce effected by a provision of a state constitution or law,[81] it would seem that the right to remove under such statute exists in comparatively few cases.[82]

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[44] USCA tit 45 § 56; tit 28 § 71.

Removability of actions arising under Federal Employers' Liability Act in general see supra § 20.

[45] Elliott v. Wheelock, 34 F. (2d) 213; Berens v. Byram, 26 F. (2d) 953. Contra Knapp v. Byram, 21 F. (2d) 226.

[a] **Right purely statutory.**—Right to remove personal injury action against receivers appointed is purely statutory. Berens v. Byram, 26 F. (2d) 953.

[46] See supra § 28.

[47] Elliott v. Wheelock, 34 F. (2d) 213; Berens v. Byram, 26 F. (2d) 953.

[48] Berens v. Byram, 26 F. (2d) 953. Contra Knapp v. Byram, 21 F. (2d) 226.

[49] USCA tit 28 § 76.

[50] Peo. v. Moody, 9 F. (2d) 628.

[51] USCA tit 28 § 76.

Joinder in removal see infra § 227.

[52] Barnette v. Wells Fargo Nevada Nat. Bank, 270 U. S. 438, 46 SCt 326, 70 L. ed. 669; Elliott v. Wheelock, 34 F. (2d) 213; Berens v. Byram, 26 F. (2d) 953; Newell v. Byram, 26 F. (2d) 200; American Locomotive Co. v. Histed, 18 F. (2d) 656; Slover v. Chicago, etc., R. Co., 16 F. (2d) 609 (recognizing rule); Matarazzo v. Hustis, 256 Fed. 882.

[a] **Ancillary receivership.**—The rule has been applied where a receiver of a railroad company originally appointed by the federal court in one district was later appointed in ancillary proceedings in the federal court of the district in which the suit was brought. Matarazzo v. Hustis, 256 Fed. 882.

[b] **Effect of joinder of another defendant.**—Receiver's right to remove is not affected by the joinder of other defendants. Newell v. Byram, 18 F. (2d) 657 [aff 26 F. (2d) 200]. See American Locomotive Co. v. Histed, 18 F. (2d) 656 (where removal was permitted).

Removability of suits against receivers of federal courts as arising under constitution or laws of United States in general see supra § 67.

[53] See Matarazzo v. Hustis, 256 Fed. 882, 890.

Removal of suits against United States commissioner under revenue officers' statute see supra § 99.

[54] See Matarazzo v. Hustis, 256 Fed. 882, 890.

Removal of suits against United States marshal under:
General statute for removal of suits arising under constitution or laws of United States see supra § 64.
Revenue officers' statute see supra § 99.

[55] Peo. v. Moody, 9 F. (2d) 628.

Removal of suits against deputy United States marshal under:
General statute for removal of suits arising under constitution or laws of United States see supra § 64.
Revenue officers' statute see supra § 99.

[56] North Side Canal Co. v. Twin Falls Canal Co., 12 F. (2d) 311.

[57] **Joinder in removal** see infra § 227.

[58] USCA tit 28 § 76.

[59] **Time for removal of causes in general** see infra § 211.

[60] **Trial of causes in federal court after removal in general** see infra § 298.

[61] **District to which causes removable in general** see infra § 264.

[62] **Requisites of petition for removal of causes in general** see infra § 261.

[63] **Procedure for removal of causes in general** see infra § 261.

[64] North Side Canal Co. v. Twin Falls Canal Co., 12 F. (2d) 311.

[65] USCA tit 10 § 1589.

[66] Funk v. State, 84 Tex. Cr. 402, 208 SW 509.

[67] **Review by United States supreme court of decisions of state courts because of claim of denial of due process or equal protection of law** see Federal Courts §§ 286, 287.

[68] USCA tit 28 § 74.

[a] **History of statute.**—(1) The revised statutes of the United States contained statutory provisions substantially the same as the statute here considered. U. S. Rev. St. § 641. (2) For earlier statutes see Act of May 31, 1870 [16 U. S. St. at L. p 144 c 114 § 18]; Act of May 11, 1866 [14 U. S. St. at L. p 46 c 80 § 3]; Act of April 9, 1866 [14 U. S. St. at L. p 27 c 31 § 3].

[b] **Statute giving right of action for deprivation of rights, privileges, and immunities under federal constitution** in certain cases and providing for enforcement in the federal courts, Act of April 20, 1871 (17 U. S. St. at L. p 13 c 22 § 1), did not authorize a removal from the state court of a suit based on a deprivation which was within the terms of the statute. Illinois v. Chicago, etc., R. Co., 12 F. Cas. No. 7,006, 6 Biss. 107; Gaughan v. Northwestern Fertilizing Co., 10 F. Cas. No. 5,272, 3 Biss. 485.

[69] **Suits or prosecutions removable** see infra § 117.

[70] **Persons entitled to benefit of statute** see infra § 116.

[71] **What constitutes denial of, or inability to enforce, civil rights** see infra §§ 113–115.

[§ 112] **B. Validity of Statute.** The constitutionality of the removal statute here considered has been upheld,[83] authority for its enactment being found in the Fourteenth Amendment to the federal constitution.[84]

[§ 113] **C. Equal Civil Rights Protected, and Denial or Inability To Protect Such Rights—1. In General.** The removal statute in question includes equal civil rights secured by the federal statute[85] securing equal rights in respect of person, property, contracts, litigation, prosecution, and punishment,[86] and, it seems, certain rights secured by the Fourteenth Amendment to the federal constitution,[87] although it has been held or recognized that the Fourteenth Amendment is broader than the removal statute and that the statute does not necessarily authorize the removal of a cause because of a denial of a right under such amendment.[88] A state statute which denies to defendant an equal civil right which is within the purview of the removal statute may be made the basis of removal,[89] but such removal statute is in general limited to a denial of, or an inability to enforce, equal civil rights, resulting from the constitution or laws of a state,[90] and does not include the possibility of an administration of a state law which would be discriminatory,[91] an actually wrongful administration of a state law,[92] or, in general, any discrimination due to illegal, corrupt, or other improper acts of administrative or other officers, not authorized by the constitution or laws of the state as interpreted by its highest court.[93] So, where the denial claimed does not result from the constitution or laws of the state, the statute does not apply to a denial or possibility or apprehension of a denial by judicial action during the trial,[94] in the sentence,[95] or in the execution of the sentence.[96] Where a statute which would constitute a denial of equal rights within the meaning of the removal statute has been declared unconstitutional by the highest court of the state, a right to remove cannot thereafter be based on such invalid statute.[97] In Porto Rico there is authority for the view that even though a local law violates a right, it may not be made a basis of removal under the removal statute here considered if it is applicable to all alike and is in no sense discriminatory.[98]

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[72] **What rights protected** see infra § 113.

[73] **Particular laws securing rights** see infra §§ 113, 115.

[74] **Persons entitled to benefit of statute** see infra § 116.

[75] **Right confined to defendant** see infra § 116.

[76] **Procedure for removal in general** see infra §§ 235-269.

[77] **Time for removal in general** see infra § 211.

[78] **Requisites of petition** see infra § 251.

[79] **Trial in federal court after removal in general** see infra § 298.

[80] **District court to which cause removable in general** see infra § 264.

[81] See infra § 113.

[82] See Kentucky v. Powers, 201 U. S. 1, 26 SCt 387, 50 L. ed. 633, and cases passim infra §§ 113-115.

[83] Virginia v. Rives, 100 U. S. 313, 25 L. ed. 667 (recognizing rule); Strauder v. West Virginia, 100 U. S. 303, 25 L. ed. 664 [rev 11 W. Va. 745, 27 AmR 606].

[84] Virginia v. Rives, 100 U. S. 313, 25 L. ed. 667 (recognizing rule); Strauder v. West Virginia, 100 U. S. 303, 25 L. ed. 664 [rev 11 W. Va. 745, 27 AmR 606].

[85] USCA tit 8 § 41.

[86] Strauder v. West Virginia, 100 U. S. 303, 25 L. ed. 664.

[87] Strauder v. West Virginia, supra. See Williams v. Mississippi, 170 U. S. 213, 18 SCt 583, 42 L. ed. 1012 (apparently recognizing rule).

[88] Gibson v. Mississippi, 162 U. S. 565, 16 SCt 904, 40 L. ed. 1075; Neal v. Delaware, 103 U. S. 370, 26 L. ed. 567; Virginia v. Rives, 100 U. S. 313, 25 L. ed. 667.

[89] Strauder v. West Virginia, 100 U. S. 303, 25 L. ed. 664 [rev 11 W. Va. 745, 27 AmR 606].

[90] **U. S.**—Kentucky v. Powers, 201 U. S. 1, 26 SCt 387, 50 L. ed. 633 [rev 139 Fed. 452]; Williams v. Mississippi, 170 U. S. 213, 18 SCt 583, 42 L. ed. 1012; Murray v. Louisiana, 163 U. S. 101, 16 SCt 990, 41 L. ed. 87; Smith v. Mississippi, 162 U. S. 592, 16 SCt 900, 40 L. ed. 1082; Gibson v. Mississippi, 162 U. S. 565, 16 SCt 904, 40 L. ed. 1075; Neal v. Delaware, 103 U. S. 370, 26 L. ed. 597; Virginia v. Rives, 100 U. S. 313, 25 L. ed. 667; New Jersey v. Weinberger, 38 F. (2d) 298; White v. Keown, 261 Fed. 814; New Jersey v. Corrigan, 139 Fed. 758; Scott v. Kinney, 137 Fed. 1009; California v. Chue Fan, 42 Fed. 865; Ex p. Wells, 29 F. Cas. No. 17,386, 3 Woods 128. See Dubuclet v. Louisiana, 103 U. S. 550, 26 L. ed. 504 (where the right to remove was denied); Ohio v. Swift, 270 Fed. 141 [certiorari den 257 U. S. 633 mem, 42 SCt 47 mem, 66 L. ed. 407 mem, app dism 260 U. S. 146, 43 SCt 22, 67 L. ed. 176].

Ala.—Thomas v. State, 58 Ala. 365.

Ariz.—Lawrence v. State, 29 Ariz. 247, 318, 240 P 863, 241 P 511 [certiorari den 269 U. S. 585, 46 SCt 201, 70 L. ed. 425].

Cal.—Central Sav. Bank v. Lake, 201 Cal. 438, 257 P 521.

Iowa.—Stommel v. Timbrel, 84 Iowa 336, 51 NW 159.

Md.—Cooper v. State, 64 Md. 40, 20 A 986.

Miss.—Dixon v. State, 74 Miss. 271, 20 S 839.

N. C.—Fitzgerald v. Allman, 82 N. C. 492.

Va.—Patterson v. Com., 139 Va. 589, 123 SE 657.

"The denial or inability to enforce in the judicial tribunals of a State, rights secured to a defendant by any law providing for the equal civil rights of all persons citizens of the United States, of which sect. 641 [Rev. St.] speaks, is primarily, if not exclusively, a denial of such rights, or an inability to enforce them, resulting from the Constitution or laws of the State, rather than a denial first made manifest at the trial of the case. In other words, the statute has reference to a legislative denial or an inability resulting from it." Virginia v. Rives, 100 U. S. 313, 319, 25 L. ed. 667.

[a] **In Porto Rico** a like rule applies where removal from an insular court to the federal district court is sought under the removal statute here considered. Peo. v. Cardona, 8 Porto Rico Fed. 277.

[91] Williams v. Mississippi, 170 U. S. 213, 18 SCt 583, 42 L. ed. 1012; Ex p. Wells, 29 F. Cas. No. 17,386, 3 Woods 128.

[92] Virginia v. Rives, 100 U. S. 313, 25 L. ed. 667; New Jersey v. Corrigan, 139 Fed. 758; California v. Chue Fan, 42 Fed. 865.

[93] Kentucky v. Powers, 201 U. S. 1, 26 SCt 387, 50 L. ed. 683 [rev 139 Fed. 452]; Neal v. Delaware, 103 U. S. 370, 26 L. ed. 567; Virginia v. Rives, 100 U. S. 313, 25 L. ed. 667; White v. Keown, 261 Fed. 814; Scott v. Kinney, 137 Fed. 1009; Ex p. Murray, 66 Fed. 297; California v. Chue Fan, 42 Fed. 865; Cooper v. State, 64 Md. 40, 20 A 986; Dixon v. State, 74 Miss. 271, 20 S 839.

[a] **In Porto Rico** a like rule applies where removal from an insular court to the federal district court is sought under the removal statute here considered. Peo. v. Cardona, 8 Porto Rico Fed. 277.

[94] Gibson v. Mississippi, 162 U. S. 565, 16 SCt 904, 40 L. ed. 1075; Virginia v. Rives, 100 U. S. 313, 320, 25 L. ed. 667; New Jersey v. Weinberger, 38 F. (2d) 298; Stommel v. Timbrel, 84 Iowa 336, 51 NW 159.

"The statute was not, therefore, intended as a corrective of errors or wrongs committed by judicial tribunals in the administration of the law at the trial." Virginia v. Rives, supra.

[95] Virginia v. Rives, supra.

[96] Virginia v. Rives, supra.

[§ 114] **2. Particular State or Local Statutes.** In view of the fact that negroes are entitled to freedom from the discrimination effected by rejecting negroes as jurors,[99] it has been held or recognized that such exclusion of negroes from a grand or petit jury under authority of a state statute is such a denial of an equal civil right as will permit removal of a prosecution by a negro defendant.[1] Among other state statutes which, it has been held or recognized, did not deny an equal civil right or were not discriminatory, and, therefore, did not furnish a ground for removal under the removal statute in question are: certain statutes governing the qualifications and selection of jurors,[2] a statute prohibiting the sale of intoxicating liquors,[3] statutes aimed at gambling, betting, or lotteries,[4] and a statute which permits the state to sue in its own name without giving bond or other security or causing affidavit to be made, which is applicable to all suits by the state.[5] So it has been held that there was no ground for the removal of a prosecution of an alien, sought on the theory that under the state statute he could not obtain a jury de medietate linguæ,[6] where, although one statutory provision made citizenship a qualification of jurors, another provided for juries de medietate linguæ, and there had been neither a demand by accused for a jury de medietate linguæ nor refusal by the state courts to direct such a jury.[7] So it has been held that an immunity statute applicable to testimony before a legislative committee was not a denial of a civil right within the meaning of the removal statute in question.[8] The fact that a state statute permits a judge challenged because of alleged disqualification to pass on the challenge does not furnish a ground for removal where in the particular case the judge is not within the provisions of the statute defining the grounds of disqualification.[9] In Porto Rico it has been held that a statute which makes provision for a change of venue on the application of the prosecuting officer for cause shown may not be the basis of a removal from an insular court to the federal district court under the removal act here considered, where the venue statute applies to all alike and is in no sense discriminatory.[10]

[§ 115] **3. Particular Acts.** The federal statute securing civil rights[11] and the Fourteenth Amendment to the federal constitution secure to a negro the right to immunity from discrimination against him by the rejection of negroes as jurors because of their color, and such rejection may be made the basis of removal.[12] In accordance with the general rule, however, that the denial of or inability to enforce a right, on which a right to remove is based, must be found in the state constitution or other law,[13] it has been held or recognized that a right to remove cannot successfully be claimed, where the denial or inability to enforce is not based on the state constitution or law, because of alleged irregularities in respect of the selection of a jury;[14] the wrongful exclusion from the grand jury or petit jury of a certain class of persons;[15] the conduct of a judge[16] or the foreman of the grand jury[17] with respect to proceedings of the grand jury; the alleged bias of a judge;[18] the conduct of a prosecuting officer;[19] postponements of the trial against the protest of defendant;[20] inability of defendant to obtain an attorney;[21] alleged prevention of attendance of a witness because of threatened service of process on such witness;[22] the refusal of the state courts to recognize a pardon given to defendant;[23] and decisions of the highest court of the state which give a different effect, as between the right of sale under a mortgage and the right of sale under a deed of trust, to a state statute of limitations which has effected a bar of the debt.[24] So, too, it has been held that the right to remove may not be based on the mere fact that there is no appeal to the highest court in the state from the refusal of a motion to quash an indictment[25] or the jury panel.[26] The fact that the grand jury which returned the indictment against accused was organized under a statute not applicable to the case because enacted after the offense charged was committed, is not a ground for removal if such statute does not deny a right within the rules as to what constitutes a denial.[27] The existence of a general prejudice against accused is not ground for removal under the statute in question,[28] as, for example, prejudice because of defendant's color, which might prevent a fair trial.[29] The mere fact that the suit is by a state in one of its own courts against a citizen of another state is not such a denial of the equal protection of the laws, within the meaning of the Fourteenth Amendment of the constitution of the United States, as to furnish ground for removal.[30]

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[97] Bush v. Kentucky, 107 U. S. 110, 1 SCt 625, 27 L. ed. 354 [rev on other grounds 80 Ky. 244, 3 KyL 740].

[98] Peo. v. Cardona, 8 Porto Rico Fed. 277 (where removal from an insular court to the federal district court was sought).

[99] See infra § 115.

[1] Strauder v. West Virginia, 100 U. S. 303, 25 L. ed. 664.

[2] Williams v. Mississippi, 170 U. S. 213, 18 SCt 583, 42 L. ed. 1012; Virginia v. Rives, 100 U. S. 313, 25 L. ed. 667; Ex p. Murray, 66 Fed. 297; Ex p. Wells, 29 F. Cas. No. 17,386, 2 Woods 128; Dixon v. State, 74 Miss. 271, 20 S 839; Patterson v. Com., 139 Va. 589, 123 SE 657. And see cases infra § 115 notes 14, 15.

[a] **State constitutional provision rendered inoperative by Fifteenth Amendment to federal constitution.**—It has been held that the civil right of a negro in respect of freedom from discrimination by exclusion of negroes from juries, was not denied, within the meaning of the removal statute, by a state statute making the right to vote a qualification for jury service, when construed with a provision of the state constitution restricting the right to vote to certain white citizens, where such constitutional provision was adopted long before the adoption of the Fifteenth Amendment to the federal constitution which forbids the denial of the right to vote on account of color, since the adoption of the Fifteenth Amendment removed from the state constitution, or rendered inoperative, such restrictive provision. Neal v. Delaware, 103 U. S. 370, 26 L. ed. 567.

[b] **Statute as to jurors declared invalid.**—Where a state court of final resort had held that state laws excluding from grand and petit juries citizens of African descent were unconstitutional and void, a right to remove could not thereafter be based on such statute. Bush v. Kentucky, 107 U. S. 110, 1 SCt 625, 27 L. ed. 354.

[c] **Challenge for age.**—2 Gen. St. N. J. p 1853 § 47, relative to the qualifications of grand jurors, and providing that persons to be competent must be above the age of twenty-one and under the age of sixty-five years, and that no exception to any such juror on account of his age shall be allowed after he has been sworn, did not deny or prevent the enforcement of any equal civil right, so as to permit removal by a person indicted for an offense committed after the grand jury was sworn, although a juror was more than sixty-five years old. New Jersey v. Corrigan, 139 Fed. 758.

[3] Stommel v. Timbrel, 84 Iowa 336, 51 NW 159. See Schmidt v. Cobb, 119 U. S. 286, 7 SCt 1373, 30 L. ed. 321.

[4] New York v. Bennett, 113 Fed. 515; California v. Chue Fan, 42 Fed. 865.

[a] **Acts punishable when committed in certain places.**—An anti-betting statute does not necessarily deny an equal civil right within the meaning of the removal statute because it makes certain acts punishable as a crime if committed in certain places, and does not make such acts punishable if committed in other places. New York v. Bennett, 113 Fed. 515.

[5] Alabama v. Wolffe, 18 Fed. 86.

[6] **"Jury de Medietate Linguæ" defined** see Juries § 5.

[7] Kentucky v. Wendling, 182 Fed. 140.

[8] New Jersey v. Weinberger, 38 F. (2d) 298.

[9] New Jersey v. Weinberger, supra.

[10] Peo. v. Cardona, 8 Porto Rico Fed. 277.

[11] See supra § 113.

[12] Strauder v. West Virginia, 100 U. S. 303, 25 L. ed. 664 [rev 11 W. Va. 745, 27 AmR 606].

[13] See supra § 113.

Particular statutes see supra § 114.

[14] Midkiff v. State, 29 Ariz. 523, 243 P 601; Lawrence v. State, 29 Ariz. 247, 318, 240 P 863, 241 P 511 [certiorari den 269 U. S. 585, 46 SCt 201, 70 L. ed. 425].

[15] U. S.—Kentucky v. Powers, 201 U. S. 1, 26 SCt 387, 50 L. ed. 633 [rev 139 Fed. 452]; Murray v. Louisiana, 163 U. S. 101, 16 SCt 990, 41 L. ed. 87 [aff 47 La. Ann. 1424, 17 S 832]; Gibson v. Mississippi, 162 U. S. 565, 16 SCt 904, 40 L. ed. 1075; Virginia v. Rives, 100 U. S. 313, 25 L. ed. 667.

Ark.—Ware v. State, 146 Ark. 321, 225 SW 626.

Md.—Cooper v. State, 64 Md. 40, 20 A 986.

Miss.—Dixon v. State, 74 Miss. 271, 20 S 839.

Va.—Patterson v. Com., 139 Va. 589, 123 SE 657.

[a] **Illustrations.**—(1) Exclusion of negroes. Murray v. Louisiana, 163 U. S. 101, 16 SCt 990, 41 L. ed. 87; Smith v. Mississippi, 162 U. S. 592, 16 SCt 900, 40 L. ed. 1082; Gibson v. Mississippi, 162 U. S. 565, 16 SCt 904, 40 L. ed. 1075; Neal v. Delaware, 103 U. S. 370, 26 L. ed. 567; Virginia v. Rives, 100 U. S. 313, 25 L. ed. 667; Ex p. Murray, 66 Fed. 297; Ware v. State, 146 Ark. 321, 225 SW 626; Tillman v. State, 121 Ark. 322, 181 SW 890; Cooper v. State,

[§ 116] **D. Persons or Parties Entitled to Benefit of Statute.** The right to remove under the statute in question is limited to defendant.[31] Subject to the above rules as to what equal civil rights are protected and as to what constitutes a denial of, or inability to enforce, such rights,[32] a member of the negro or black race is entitled to the benefit of the removal statute here considered,[33] but the operation of the statute is not confined to negroes,[34] and a member of the white race can claim the benefit in a proper case.[35]

[§ 117] **E. Proceedings Removable.** Subject to the above rules as to what equal civil rights are protected and as to what constitutes a denial of, or inability to enforce, such rights,[36] by the express terms of the statute both civil suits[37] and criminal prosecutions[38] are removable, and the statute has been applied in permitting the removal of criminal prosecutions.[39]

VII. SUITS INVOLVING LAND CLAIMED UNDER GRANTS FROM DIFFERENT STATES

[By Eustace W. Tomlinson]

[§ 118] **A. In General.** Under the statute providing for the removal from a state court to a federal court of suits in which plaintiffs and defendants claim land under grants from different states,[40] such a suit is removable although both grants were founded upon warrants issued by one of the states which at the time comprehended the entire territory afterward divided between the two upon the creation of the second state;[41] but a suit is not removable where the second grant was made by the one state under power delegated by the other, from which its territory had been separated upon its creation.[42]

[§ 119] **B. Who May Remove.** By the express provisions of the statute relating to the removal, from a court of a state to a federal court, of suits in which the parties claim land under grants from different states, a right of removal may be exercised by either plaintiff or defendant.[43]

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64 Md. 40, 20 A 986; Dixon v. State, 74 Miss. 271, 20 S 839; Patterson v. Com., 139 Va. 589, 123 SE 657. But see Ex p. Reynolds, 20 F. Cas. No. 11,720, 3 Hughes 559 (where the right to remove was upheld). (2) Exclusion of members of accused's political party. Kentucky v. Powers, 201 U. S. 1, 26 SCt 387, 50 L. ed. 633 [rev 139 Fed. 452]. (3) The fact that for a number of years negroes had been excluded did not give the right to remove. Gibson v. Mississippi, supra.

[16] New Jersey v. Weinberger, 38 F. (2d) 298.

[17] New Jersey v. Weinberger, supra.

[18] New Jersey v. Weinberger, supra.

[19] New Jersey v. Weinberger, supra.

[20] Scott v. Kinney, 137 Fed. 1009.

[21] Scott v. Kinney, supra.

[22] Chappell v. Baltimore Real-Estate Pooling Co., 89 Md. 258, 42 A 936.

[23] Kentucky v. Powers, 201 U. S. 1, 26 SCt 387, 50 L. ed. 633 [rev 139 Fed. 452].

[a] **Rule applies** even if the refusal to recognize the pardon is a denial of a right secured by any law, including the federal constitution. Kentucky v. Powers, 201 U. S. 1, 26 SCt 387, 50 L. ed. 683 [rev 139 Fed. 452].

[24] Central Sav. Bank v. Lake, 201 Cal. 438, 257 P 521.

[25] Kentucky v. Powers, 201 U. S. 1, 26 SCt 387, 50 L. ed. 633 [rev 139 Fed. 452].

[26] Kentucky v. Powers, supra.

[27] Gibson v. Mississippi, 162 U. S. 565, 16 SCt 904, 40 L. ed. 1075.

[28] New Jersey v. Weinberger, 38 F. (2d) 298.

[29] Gibson v. Mississippi, 162 U. S. 565, 16 SCt 904, 40 L. ed. 1075; Ex p. Wells, 29 F. Cas. No. 17,386, 3 Woods 128; Fowlkes v. Fowlkes, 9 F. Cas. No. 5,005; Ex p. State, 71 Ala. 363; Fitzgerald v. Allman, 82 N. C. 492; State v. Smalls, 11 S. C. 262.

[a] **Under Act of April 9, 1866** [14 U. S. St. at L. p 27 c 31 § 3], a like rule was applied. Texas v. Gaines, 23 F. Cas. No. 13,847, 2 Woods 342. Contra State v. Dunlap, 65 N. C. 491, 6 AmR 746; Gaines v. State, 39 Tex. 606.

[30] Alabama v. Wolffe, 18 Fed. 836.

[31] Cole v. Garland, 107 Fed. 759, 46 CCA 626 [dism 183 U. S. 693, 22 SCt 933, 46 L. ed. 393].

Joinder in removal see infra § 228.

[32] See supra §§ 113-115.

[33] Kentucky v. Powers, 201 U. S. 1, 26 SCt 387, 50 L. ed. 633 [rev on other grounds 139 Fed. 452].

[34] Kentucky v. Powers, supra.

[35] Kentucky v. Powers, supra.

[36] See supra §§ 113-115.

[37] USCA tit 28 § 74.

[a] **Under Act of April 9, 1867** (14 U. S. St. at L. p 27 c 31 § 3) (1) removal of a proceeding by quo warranto to try title to a state office was refused. State v. Gleason, 12 Fla. 190. (2) A like rule was applied in the case of an action on the bond of a United States marshal for a wrongful entry and seizure of goods. McKee v. Rains, 10 Wall. (U. S.) 22, 19 L. ed. 860.

[38] USCA tit 28 § 74.

[39] Strauder v. West Virginia, 100 U. S. 303, 25 L. ed. 664.

[40] USCA tit 28 § 73.

[41] Colson v. Lewis, 2 Wheat. (U. S.) 777, 4 L. ed. 266.

[42] Thompson v. Kendrick, 5 Hayw. (Tenn.) 113.

[43] USCA tit 28 § 73.

Who may remove in general see infra §§ 212-234.

VIII. DIVERSITY OF CITIZENSHIP OR ALLEGIANCE AND CHARACTER OF PARTIES[44]

[By William G. Bannon]

[§ 120] **A. In General.** The earliest statute giving a right to remove based on the citizenship or alienage of parties or a party to the suit was the provision of the Judiciary Act of 1789.[45] Later general provisions for removal on such ground are found in the Revised Statutes of the United States,[46] in the Removal Act of 1875,[47] and in the Removal Act of 1887–1888;[48] and the provisions in the present Removal Act are, in this regard, substantially the same as the provisions of the act of 1887–1888.[49] The constitutionality of statutory provisions for removal on the ground in question has been recognized, or upheld,[50] but the tendency is against a construction which will enlarge the right to remove,[51] although this rule does permit the denial of the right to remove as against statutory provisions which are definite and free from ambiguity.[52] As affecting the question of removability on this ground, there must be considered the statutory provisions for removal on the ground of prejudice or local influence,[53] and on the ground of the existence of a separable controversy between parties.[54] The right to remove is limited by the rules requiring that, in order that a suit may be removed, it must be one of which the federal court would have original jurisdiction,[55] and by restrictions as to the nature or type of suits which are removable.[56]

Necessity for controversy. The right to remove does not depend upon whether defendant is actually controverting or disputing the relief sought provided plaintiff's pleading shows a case justifying relief.[57]

Whole case removed. Where one of several defendants removes a suit to enforce a joint liability, without joinder of the other defendant or defendants who would be entitled to remove but who have not been served with process,[58] the whole case is thereby removed,[59] and defendant or defendants not served may, upon being duly served or upon entering an appearance, either have the suit remanded, or permit it to proceed in the federal court.[60] In the case of the removal of a suit, brought in the name of a state on the relation of a public officer, because defendant has raised, in good faith, the question of the constitutionality of the statute which plaintiff seeks to enforce,[61] the federal court has jurisdiction of all questions involved.[62]

[§ 121] **B. Suits Between Citizens of Different States in General.**[63] Subject to rules hereinbefore and hereinafter stated,[64] in general diversity of state citizenship between plaintiff and defendant is ground for removal,[65] the provision of the Removal Act[66] that any other suit of a civil nature, at law or in equity, of which the district courts of the United States are given jurisdiction may be removed into the district court of the United States for the proper district,[67] by defendant or defendants therein,[68] being nonresidents of that state,[69] when read in connection with the statutory provision conferring original jurisdiction on the federal district courts,[70] being the basis for removal generally on this ground.[71] Removal for diversity of citizenship involves removal in certain cases, because of prejudice or local influence,[72] and because of the existence of a separable controversy.[73] Where, however, both plaintiff and defendant are citizens of the same state, the suit is not, of course, removable on the ground here under consideration.[74]

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[44] **Petition for removal** see passim infra §§ 237–244.

Time for removal see passim infra §§ 205–211.

[45] Act Sept. 24, 1789 (1 U. S. St. at L. 79 c 20 § 12).

[46] U. S. Rev. St. § 639.

[47] Act March 3, 1875 (18 U. S. St. at L. 470 c 137 § 2).

[48] Act March 3, 1887 (24 U. S. St. at L. 552 c 373 § 2); Act August 13, 1888 (25 U. S. St. at L. 433 c 866 § 2).

[49] USCA tit 28 § 71.

[50] The Moses Taylor, 4 Wall. (U. S.) 411, 18 L. ed. 397; Meadow Valley Min. Co. v. Dodds, 7 Nev. 143, 8 AmR 709.

Constitutionality of statutory provisions for removal because of prejudice or local influence see infra § 195.

[51] McCaffrey v. Wilson, 10 F. (2d) 368.

[52] Lee v. Chesapeake, etc., R. Co., 260 U. S. 653, 43 SCt 230, 67 L. ed. 443.

[53] See infra §§ 194–204.

[54] See infra §§ 180–193.

[55] See supra § 10.

[56] See supra §§ 11–25.

[57] Memphis Sav. Bank v. Houchens, 115 Fed. 96, 52 CCA 176.

[58] **Necessity for joinder of defendant who has not been served with process in general** see infra § 233.

[59] Hunt v. Pearce, 284 Fed. 321 [aff 271 Fed. 498].

[60] Keenan v. Gladys Belle Oil Co., 11 F. (2d) 418; Hunt v. Pearce, 284 Fed. 321 [aff 271 Fed. 498].

[61] See infra § 151.

[62] Ohio v. Swift, 270 Fed. 141 [certiorari den 257 U. S. 633 mem, 42 SCt 47 mem, 66 L. ed. 407 mem, app dism 260 U. S. 146, 43 SCt 22, 67 L. ed. 176].

[63] **Cross references:**
Construction and validity of statutory provisions in general see supra § 120.
Determination as to place of citizenship see passim infra §§ 135–143.
Disregarding parties see passim infra §§ 144–176.
Effect of diversity between parties on same side of controversy see infra § 146.
Who are or may be citizens see infra §§ 125–134.

[64] **Cross references:**
Diversity as to all adverse parties see infra § 145.
Jurisdictional amount see passim supra §§ 28–45.
Necessity for federal court's having original jurisdiction see supra § 10.
Realignment of parties see infra § 147.
Restriction on removal of actions to enforce Federal Employers' Liability Act see supra § 20.
Time as of which diversity must exist see infra § 177.

[65] Gainesville v. Brown-Crummer Ins. Co., 277 U. S. 54, 48 SCt 454, 72 L. ed. 781 [rev on other grounds 20 F. (2d) 497]; Anderson v. Grace, 38 F. (2d) 889; In re Utah Constr. Co.'s Water Right, 30 F. (2d) 436; Johnson v. American-Hawaiian SS. Co., 14 F. (2d) 534; Scoggins v. Union Pac. R. Co., 292 Fed. 162; Savarin v. Union Pac. R. Co., 292 Fed. 157; Ewing v. Leszynsky, 236 Fed. 811; Northern Trust Co. v. Grand Trunk Western R. Co., 282 Ill. 565, 118 NE 986. Compare Nickels v. Pullman, 268 Fed. 610 (where the court said that the parties to a suit are citizens of different states and the requisite amount is involved is not sufficient to give a federal court jurisdiction on removal).

[a] **The purpose of the removal acts** (1) in giving the federal courts jurisdiction of controversies between citizens of different states of the Union is, it has been stated, to secure a tribunal presumed to be more impartial than a court of the state in which one of the litigants resides. Hall v. Great Northern R. Co., 197 Fed. 488. (2) But a suit brought in a state in which neither plaintiff nor defendant resides may be removed provided the requisite diversity of citizenship, and all other jurisdictional requisites exist. See infra note 75; supra § 10; and infra § 225.

[b] **Suit by trustee in bankruptcy.**—A suit by a trustee in bankruptcy to avoid a transfer of property made by the bankrupt, fraudulent as to creditors under a state law, is removable for diversity of citizenship under the general Removal Act where such diversity and the other jurisdictional requisites exist. Ewing v. Leszynsky, 236 Fed. 811. See Corbitt v. Farmers' Bank, 113 Fed. 417 (where the right to remove was recognized); Spencer v. Duplan Silk Co., 191 U. S. 526, 24 SCt 174, 48 L. ed. 287. And see cases passim infra §§ 144–176.

[66] USCA tit 28 § 71.

[67] **District court to which suit removable** see infra § 264.

[68] **Who may remove** see passim infra §§ 212–234.

[69] **Residence of defendant in state other than that in which suit brought** see infra § 225.

Plaintiff's citizenship or residence in state in which suit brought. Under the present Removal Act, where a suit is otherwise removable because of diversity of citizenship in general, the fact that plaintiff is not a citizen and resident of the state in which the suit is brought does not prevent removal,[75] notwithstanding the statutory provisions regulating venue as between federal districts,[76] and the statutory provisions as to the district to which the suit is removable.[77]

[§ 122] C. Suits to Which Alien Party in General.[78]

Where an alien brings an action in a state court, it is not removable by defendant unless authority for such removal is found in some federal statute.[79] The right to remove, within certain limitations, suits to which aliens are parties has, however, been conferred by congress,[80] and subject to rules hereinbefore and hereinafter stated,[81] in general a suit by an alien against a citizen of a state,[82] or against an alien by a citizen of a state,[83] is removable, the provision of the Removal Act[84] that any suit of a civil nature, at law or in equity, of which the district courts of the United States are given jurisdiction, may be removed into the district court of the United States for the proper district[85] by defendant or defendants therein,[86] being nonresidents of that state,[87] when read in connection with the statutory provision conferring original jurisdiction on the federal district courts,[88] being the basis for removal generally on the ground that an alien and a citizen are adverse parties to the suit.[89] The courts of the United States cannot, however, obtain jurisdiction by removal because of the citizenship or allegiance of the parties where the controversy is between two aliens,[90] or where the suit is by a state against an alien.[91]

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[70] USCA tit 28 § 41.

[71] Haire v. Rome R. Co., 57 Fed. 321. And see cases supra note 65.

[72] See infra §§ 194–204.

[73] See infra §§ 180–193.

[74] Horne v. Boston, etc., R. Co., 62 N. H. 454; Risley v. Indianapolis, etc., R. Co., 1 Hun 202, 4 Thomps. & C. 13 [rev on other grounds 62 N. Y. 240]. And see cases infra § 145.

[75] Lee v. Chesapeake, etc., R. Co., 260 U. S. 653, 43 SCt 230, 67 L. ed. 443; Monroe v. Williamson, 81 Fed. 977; First Nat. Bank v. Merchants' Bank, 37 Fed. 657, 2 LRA 469. See Mattison v. Boston, etc., R. Co., 205 Fed. 821 (the right of a nonresident defendant to remove the suit to a federal court could not be defeated by the act of plaintiff in bringing the suit in a state in which neither plaintiff nor defendant resided). But see Re Wisner, 203 U. S. 449, 27 SCt 150, 51 L. ed. 264 (where the right to remove was denied).

[a] **Rule applied** where only one of several plaintiffs was a resident citizen of the state where the action was brought. Alley v. Edward Hines Lumber Co., 64 Fed. 903.

[b] **Prior to the act of 1875** (1) where an action was brought in a state other than that of which either party was a citizen, there could be no removal. Sewing Mach. Cos.' Case, 18 Wall. (U. S.) 553, 21 L. ed. 914. (2) Under the Judiciary Act of 1789, providing for removal where a suit was commenced by a citizen of the state in which the suit was brought, against a citizen of another state, there could be no removal, where plaintiff was a citizen of a state other than that in which suit was brought, although other plaintiffs were citizens of that state. In re Frazer, 9 F. Cas. No. 5,068, 3 CincLBul 668; Hubbard v. Northern R. Co., 12 F. Cas. No. 6,818, 3 Blatchf. 84; Hubbard v. Northern R. Co., F. Cas. No. 6,818, 25 Vt. 715. See Boylan v. Meeker, 28 N. J. L. 274, 477.

Citizenship and residence of plaintiff in case of removal for prejudice or local influence see infra § 202.

[76] See supra § 10.

[77] See infra § 264.

[78] **Cross references:**

Alien as citizen of state see infra § 133.
Construction and effect of statutory provisions in general see supra § 120.
Determination as to existence of alienage see passim infra §§ 135–143.
Disregarding parties see passim infra §§ 144–176.
Effect of diversity between parties on same side of controversy see infra § 146.
Prejudice or local influence see infra §§ 200, 204.
Separable controversy see infra § 193.

[79] Pringle v. Storrow, 256 Mass. 561, 153 NE 26, 49 ALR 1222.

[80] See cases infra notes 82, 83, 89.

[a] **The purpose of the removal acts** (1) in giving the federal courts jurisdiction of controversies between citizens of one state and aliens is, it has been said, to secure a tribunal presumed to be more impartial than the state court. Hall v. Great Northern R. Co., 197 Fed. 488. (2) But it seems that a suit is removable from a court of a state of which the citizen party is not a citizen or resident. See supra § 10; and infra § 225.

[81] **Cross references:**

Diversity as to all adverse parties see infra § 145.
Jurisdictional amount see passim supra §§ 28–45.
Necessity for federal court's having original jurisdiction of suit see supra § 10.
Realignment of parties see infra § 147.
Restriction on removal of actions to enforce Federal Employers' Liability Act see supra § 20.

[82] Cuban Trading Co. v. Black Diamond SS. Corp., 277 Fed. 857; In re Red Cross Line, 277 Fed. 853; Matarazzo v. Hustis, 256 Fed. 882; Guaranty Trust Co. v. McCabe, 250 Fed. 699, 163 CCA 31 [certiorari den 247 U. S. 505 mem, 38 SCt 427 mem, 62 L. ed. 1240 mem]; Smellie v. Southern Pac. Co., 197 Fed. 641; Decker v. Southern R. Co., 189 Fed. 224; Katalla Co. v. Rones, 186 Fed. 30, 108 CCA 132; Bagenas v. Southern Pac. Co., 180 Fed. 887; Barlow v. Chicago, etc., R. Co., 164 Fed. 765 [reh den 172 Fed. 713]; Iowa Lillooet Gold Min. Co. v. Bliss, 144 Fed. 446; Morris v. Clark Constr. Co., 140 Fed. 756; Creagh v. U. S. Equitable L. Assur. Soc., 83 Fed. 849; Stalker v. Pullman's Palace-Car Co., 81 Fed. 989; Sherwood v. Newport News, etc., Co., 55 Fed. 1; Uhle v. Burnham, 42 Fed. 1. See Lewicki v. Wiardi, 213 Fed. 647 (recognizing rule).

[a] **The contrary view** (1) has been taken, however, where defendant was a nonresident of the state where the action was brought and plaintiff did not consent to removal, on the theory that where a citizen of a state is sued by an alien, suit must be brought in the district of which defendant is an inhabitant. Jackson v. William Kenefick Co., 233 Fed. 130; Ivanoff v. Mechanical Rubber Co., 232 Fed. 173; Hall v. Great Northern R. Co., 197 Fed. 488; Sagara v. Chicago, etc., R. Co., 189 Fed. 220; Odhner v. Northern Pac. R. Co., 188 Fed. 507; Mahopoulos v. Chicago, etc., R. Co., 167 Fed. 165; Harold v. Iron Silver Min. Co., 33 Fed. 529. **(2) But it** would seem that the rule permitting removal in such cases has prevailed or ultimately will prevail. See supra § 10.

[b] **Under the Removal Act of 1866–1867,** an action by an alien against a defendant who was a citizen of a state other than that in which the action was brought was not removable. Knickerbocker L. Ins. Co v. Gorbach, 70 Pa. 150.

[83] National SS. Co. v. Tugman, 106 U. S. 118, 1 SCt 58, 27 L. ed. 87; Best v. Great Northern R. Co., 243 Fed. 789; Bradshaw v. Bowden, 226 Fed. 323; Attleboro Mfg. Co. v. Frankfort, etc., Ins. Co., 202 Fed. 293; Wind River Lumber Co. v. Frankfort Mar., etc., Ins. Co., 196 Fed. 340, 116 CCA 160; Cooley v. McArthur, 35 Fed. 372. See Craigie v. McArthur, 6 F. Cas. No. 3,341, 4 Dill. 474, 15 AlbLJ (N. Y.) 121 (where, however, the removal was not applied for in time).

[a] **Suit by corporation of a state other than that in which action brought.**—The fact that plaintiff corporation is organized under the laws of a state other than the one in which suit is brought does not prevent the removal of a suit against an alien. Attleboro v. Frankfort Mar., etc., Ins. Co., 202 Fed. 293; Wind River Lumber Co. v. Frankfort Mar., etc., Ins. Co., 196 Fed. 340, 116 CCA 160.

[b] **The fact that plaintiffs are citizens of different states** does not prevent removal by an alien defendant notwithstanding the wording of the statute which gives jurisdiction to the federal courts of suits between citizens of "a state" and foreign citizens or subjects. Niccum v. Northern Assur. Co., 17 F. (2d) 160.

[84] USCA tit 28 § 71.

[85] **District to which suit removable** see infra § 264.

[86] **Who may remove** see passim infra §§ 212–234.

[87] **Residence of defendant in state other than that in which suit brought** see infra § 225.

[88] USCA tit 28 § 41.

[89] Matarazzo v. Hustis, 256 Fed. 882. And see cases supra notes 82, 83.

A member of an Indian tribe who is not a citizen of the United States is not a citizen or subject of a foreign state within the meaning of the statutory provisions for removal.[92]

[§ 123] **D. Removability of Suits to Which United States Party in General.** The United States is not a citizen of any state within the meaning of statutory provisions authorizing removal on the ground of diversity of state citizenship,[93] and where it is a real and necessary party to the suit, the suit is not removable on such ground.[94] Removal sought solely because the United States was a party, has been denied on the ground that in the particular case the United States was merely a formal party.[95] By special statute, the United States may intervene in a suit to which a restricted member of the Five Civilized Tribes in Oklahoma is a party and remove such suit to the federal district court.[96]

[§ 124] **E. Removability of Suits to Federal Court in Porto Rico in General.** Under the provisions of the Organic Act of Porto Rico, defining the jurisdiction of the federal district court there, and making applicable, as between such court and the local courts, the laws of the United States as to removal of causes,[97] it is not necessary that plaintiff should be a citizen of Porto Rico or of any sovereign power where defendants are citizens or subjects of a foreign state or states, or citizens of a state, territory or district of the United States, and not domiciled in Porto Rico,[98] as, for example, where Porto Rico is itself the plaintiff.[99] Where all parties to the proceeding are domiciled in Porto Rico, there can be no removal.[1]

[§ 125] **F. Who Are or May Be Considered Citizens—1. In General.** The citizens referred to in statutes under which removal of suits from state to federal courts is authorized are citizens of states of the United States,[2] and a removal cannot be based on the citizenship of a citizen of the United States, who is not a citizen of any state.[3]

Inanimate object. A vessel is not a citizen within the meaning of the Removal Act.[4]

[§ 126] **2. United States and Officers Representing United States.** The United States is not, of course, a citizen of any state within the meaning of the provisions of the Removal Act here under consideration.[5] So, too, the view has been taken that an officer of the United States is not to be regarded as a citizen of a state when he is sued in his official capacity as representing the United States.[6]

[§ 127] **3. State.**[7] A state is not a citizen within the meaning of the provisions of the Removal Act here under consideration,[8] and jurisdiction cannot be taken by removal of a controversy between a state and a citizen of another state,[9] or between a state and an alien,[10] on the grounds here under consideration.

[§ 128] **4. Political Subdivision of State.**[11] Within the meaning of the Removal Act, various political subdivisions of the state have been considered citizens[12] of the state under the laws of which they are organized,[13] so as to permit the removal to the federal courts of suits to which they are parties where all other requisites for removal are present. This rule applies to municipal corporations,[14] such as incorporated cities;[15] and other public corporations and quasi corporations,[16] such as counties,[17] county poor districts,[18] and school districts.[19] There is, however, apparently authority for the view that under the statutes of some states neither a board of supervisors[20] nor a drainage district[21] may be regarded as a citizen within the meaning of the Removal Act.

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[90] Merchants' Cotton Press, etc., Co. v. Insurance Co. of North America, 151 U. S. 368, 14 SCt 367, 36 L. ed. 195; Compania Minera v. American Metal Co., 262 Fed. 183; Sawyer v. Switzerland Mar. Ins. Co., 21 F. Cas. No. 12,408, 14 Blatchf. 451; Orosco v. Gagliardo, 22 Cal. 83; Barrowcliffe v. La Caisse Generale des Assurance, 58 HowPr 131, 1 NYCityCt 151. See Johnson v. Accident Ins. Co., 35 Fed. 374 (apparently recognizing rule).

[91] O'Conor v. Texas, 202 U. S. 501, 26 SCt 726, 50 L. ed. 1120 [aff 96 Tex. 404, 73 SW 1041].

[92] Paul v. Chilsoquie, 70 Fed. 401.

[93] See infra § 126.

[94] See infra § 150.

[95] U. S. v. Douglas, 113 N. C. 190, 18 SE 202.

[a] **Rule applied** in the case of a suit in the name of the United States on a receiver's bond for the benefit of another. U. S. v. Douglas, 113 N. C. 190, 18 SE 202.

[96] See infra § 226.

[97] Act March 2, 1917 (39 U. S. St. at L. 951 §§ 41, 42).

[98] Porto Rico v. Fortuna Estates, 279 Fed. 500 [certiorari den 259 U. S. 587 mem, 42 SCt 590 mem, 66 L. ed. 1077 mem].

[99] Porto Rico v. Fortuna Estates, 279 Fed. 500 [certiorari den 259 U. S. 587 mem, 42 SCt 590 mem, 66 L. ed. 1077 mem]; Peo. v. Russell, 12 Porto Rico Fed. 309; Peo. v. Fortuna Estates, 10 Porto Rico Fed. 130. Contra Peo. v. Rivera Zayas, 29 Porto Rico 423.

[1] Correa v. Kramer, 13 Porto Rico Fed. 375.

[2] Marks v. Marks, 75 Fed. 321; Pringle v. Storrow, 256 Mass. 561, 153 NE 26, 49 ALR 1222.

[3] Hough v. Société Electrique Westinghouse, 231 Fed. 341; Marks v. Marks, 75 Fed. 321. But see Poppenhauser v. India-Rubber Comb Co., 14 Fed. 707 (where motion to remand was denied although the court, while conceding that plaintiff might not be an alien, held that plaintiff was not a citizen of a state).

[a] **Rule applied** where defendant, a citizen of the United States, resident in England, was temporarily sojourning in New York where suit was brought. Hough v. Société Electrique Westinghouse, 231 Fed. 341.

[4] Spitzer v. The Annette Rolph, 285 Fed. 446.

[a] **Thus** a cause instituted in a state court by a citizen of the state against a vessel, the home port of which was in another state, could not be removed on the ground of diversity of citizenship. Spitzer v. The Annette Rolph, 285 Fed. 446.

[5] Schroeder v. Davis, 32 F. (2d) 454; Westbrook v. Director Gen. of Railroads, 263 Fed. 211.

[6] Westbrook v. Director Gen. of Railroads, supra.

[a] **Rule applied** to the Director General of Railroads on the ground that he stood for the United States in an action against him. Westbrook v. Director Gen. of Railroads, 263 Fed. 211.

[7] **Original jurisdiction of federal court where state a party** see Federal Courts § 59.

Removal of suit arising under the constitution or laws of the United States to which state a party see supra § 53.

[8] U. S.—Arkansas v. Kansas, etc., Coal Co., 183 U. S. 185, 22 SCt 47, 46 L. ed. 144; Postal Tel. Cable Co. v. Alabama, 155 U. S. 482, 15 SCt 192, 39 L. ed. 231; Upshur County v. Rich, 135 U. S. 467, 10 SCt 651, 34 L. ed. 196; Ex p. Oklahoma, 37 F. (2d) 862; Ohio v. Swift, 270 Fed. 141 [certiorari den 257 U. S. 633 mem, 42 SCt 47 mem, 66 L. ed. 407 mem, app dism 260 U. S. 146, 43 SCt 22, 67 L. ed. 176]; Chicago, etc., R. Co. v. Nebraska, 251 Fed. 279, 163 CCA 435; Nevada-California Power Co. v. Hamilton, 235 Fed. 317; In re Silvies River, 199 Fed. 495; Madisonville Tract. Co. v. St. Bernard Min. Co., 130 Fed. 789; Indiana v. Alleghany Oil Co., 85 Fed. 870; Ferguson v. Ross, 38 Fed. 161, 3 LRA 322; New Jersey v. Babcock, 18 F. Cas. No. 10,163, 4 Wash. C. C. 344.

Ill.—Peo. v. St. Louis, 297 Ill. 199, 130 NE 366.

Ind.—Darnell v. State, 174 Ind. 143, 90 NE 769 [aff 226 U. S. 390, 33 SCt 120, 57 L. ed. 267].

Mass.—Com. v. Norman, 249 Mass. 123, 144 NE 66.

Nev.—State v. Reno Tract. Co., 41 Nev. 405, 171 P 375, LRA1918D 847.

[9] See infra § 151.

[10] See supra § 122.

[11] **Original jurisdiction of federal court where municipal corporation a party** see Federal Courts § 67.

[12] See infra notes 14–19.

[13] See infra § 137.

[14] Port of Seattle v. Oregon, etc.,

[§ 129] **5. Corporation.**[22] For the purpose of determining the question as to the removability of a suit to which a corporation organized under the laws of a state is a party, such corporation is treated as a citizen[23] of the state by which it was created.[24]

[§ 130] **6. Unincorporated Association.**[25] An unincorporated joint stock association or company is not as such a citizen[26] of the state under whose laws it was organized[27] within the meaning of the Removal Act.

[§ 131] **7. Partnership.**[28] A partnership as such is not a citizen[29] of any state[30] within the meaning of the Removal Act.

[§ 132] **8. Resident or Citizen of District of Columbia and Territories.** The federal courts cannot acquire jurisdiction by removal because of diversity of citizenship of a suit to which a citizen of the United States domiciled in the District of Columbia,[31] or a citizen of a territory,[32] is a party. So a corporation organized under the laws of the District of Columbia is not a citizen of any state in the sense that its presence as a party will give rise to diversity of citizenship.[33]

[§ 133] **9. Alien and Indian.** An alien[34] or a tribal Indian,[35] is not a citizen of a state within the meaning of the statutory provisions as to removal here under consideration.

[§ 134] **10. Infant.** That an infant may be a citizen of a state within the meaning of statutes governing the jurisdiction of federal courts on removal has been recognized.[36]

[§ 135] **G. What Constitutes Citizenship and Determination as to Place of Citizenship or Allegiance[37]—1. Natural Person—a. In General.** "Citizenship" in a state, as affecting the jurisdiction of federal courts under the statutory provisions permitting removal, is generally regarded as having the same meaning as "domicile",[38] and in general im-

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R. Co., 255 U. S. 56, 41 SCt 237, 65 L. ed. 500; Chicago, etc., R. Co. v. Spencer, 283 Fed. 824. See Rock Rapids Independent Dist. v. Rock Rapids Bank, 48 Fed. 2 (independent district was regarded as a citizen).

[15] Ysleta v. Canda, 67 Fed. 6; New Orleans v. Sheppard, 10 La. Ann. 268; State v. Reno Tract. Co., 41 Nev. 405, 171 P 375, LRA1918D 847.

[16] **Municipal and quasi-municipal corporations defined and distinguished in general** see Municipal Corporations §§ 1-14.

[17] Pearl River County v. Wyatt Lumber Co., 270 Fed. 26 [rev on other grounds 267 Fed. 605]; Missouri v. New Madrid County, 73 Fed. 304; Board of Comrs. v. Hurd, 49 Ga. 462, 15 AmR 682.

[18] Com. v. U. S. Fidelity, etc., Co., 18 Pa. Dist. 656.

[19] Parks v. Carriere Cons. School Dist., 12 F. (2d) 37.

[a] **Right to sue or to be sued.**—The fact that a school district could not be sued is immaterial since authority to sue in its own name subjects it to the burdens of suitors arising under the Removal Act. Parks v. Carriere Cons. School Dist., 12 F. (2d) 37.

[20] Buena Vista County v. Title Guaranty, etc., Co., 267 Fed. 477 (Iowa).

[21] Buena Vista County v. Title Guaranty, etc., Co., supra.

[22] **Cross references:**
Alien corporation as citizen or subject of country where organized see infra § 141.
Corporation:
  As citizen in general see Corporations § 14.
  Organized under laws of District of Columbia see infra § 132.
Municipal corporation see supra § 128.
National banking association as citizen of state where located see infra § 140.
Original jurisdiction of federal court where corporation a party see Federal Courts § 67.

[23] U. S.—Southern R. Co. v. Allison, 190 U. S. 326, 23 SCt 713, 47 L. ed. 1078; Hidden v. Washington-Oregon Corp., 217 Fed. 303; Barney v. Globe Bank, 2 F. Cas. No. 1,031, 5 Blatchf. 107; Terry v. Imperial F. Ins. Co., 23 F. Cas. No. 13,838, 3 Dill. 408.

Ark.—Missouri Pac. R. Co. v. Tompkins, 157 Ark. 16, 247 SW 54.

Ind.—Western Union Tel. Co. v. Dickinson, 40 Ind. 444, 13 AmR 295.

La.—Duncan v. St. Louis, etc., R. Co., 49 La. Ann. 1700, 22 S 924.

Me.—Hobbs v. Manhattan Ins. Co., 56 Me. 417, 96 AmD 472.

Mass.—Morton v. New York Mut. L. Ins. Co., 105 Mass. 141, 7 AmR 505.

Mo.—Stanley v. Chicago, etc., R. Co., 62 Mo. 508.

Nev.—Quigley v. Central Pac. R. Co., 11 Nev. 350, 21 AmR 757.

N. Y.—Mix v. Andes Ins. Co., 74 N. Y. 53, 30 AmR 260; Stevens v. Phœnix Ins. Co., 41 N. Y. 149; DeCamp v. New Jersey Mut. L. Ins. Co., 32 N. Y. Super. 481.

N. C.—Huntley v. Southeastern Express Co., 191 N. C. 696, 132 SE 786.

Oh.—Shelby v. Hoffman, 7 Oh. St. 450.

Pa.—Fox v. American Casualty Ins., etc., Co., 2 Pa. Dist. 158, 12 Pa. Co. 207; Newhall v. Atlantic F. & M. Ins. Co., 8 Phila. 106.

S. C.—Wilson v. Southern R. Co., 36 SE 701.

Wis.—Knorr v. Home Ins. Co., 25 Wis. 143, 3 AmR 26.

And see cases passim infra § 138.

[24] See infra § 138.

[25] **Original jurisdiction of federal courts where unincorporated association a party** see Federal Courts § 68.

[26] Taylor v. Weir, 171 Fed. 636, 96 CCA 438; Saunders v. Adams Express Co., 136 Fed. 494; Whitman v. Hubbel, 30 Fed. 81.

[27] See infra § 142.

[28] **Original jurisdiction of federal court where partnership a party** see Federal Courts § 69.

[29] Bruett v. F. C. Austin Drain. Excavator Co., 174 Fed. 668; Ralya Market Co. v. Armour, 102 Fed. 530; Adams v. May, 27 Fed. 907; Erskine Motors Co. v. Chevrolet Motor Co., 180 N. C. 619, 105 SE 420.

[30] See infra § 143.

[31] Cameron v. Hodges, 127 U. S. 322, 8 SCt 1154, 32 L. ed. 132.

[a] **Suit against an alien** brought by a resident of the District of Columbia was not removable from the state court in which it was brought. Cissel v. McDonald, 5 F. Cas. No. 2,729, 16 Blatchf. 150, 57 HowPr (N. Y.) 175.

Original jurisdiction of federal court where citizen of District of Columbia a party see Federal Courts § 70.

[32] Cameron v. Hodges, 127 U. S. 322, 8 SCt 1154, 32 L. ed. 132; Anaconda Copper Min. Co. v. Butte-Balaklava Copper Co., 200 Fed. 808; Chapman v. Chapman, 28 Fed. 1; Darst v. Peoria, 13 Fed. 561; Kansas City Southern R. Co. v. McGinty, 76 Ark. 356, 88 SW 1001.

[a] **Porto Rico.**—An action in a state court against defendants, some of whom are citizens of Porto Rico, is not removable on the ground of diversity of citizenship. Healy v. McCormick, 157 Fed. 318.

Original jurisdiction of federal court where citizen of territory a party see Federal Courts § 70.

[33] Delpit v. U. S. Shipping Bd. Emergency Fleet Corp., 19 F. (2d) 60.

[a] **Emergency Fleet Corporation.**—(1) The rule denying the right to remove has been applied where the suit was against the Emergency Fleet Corporation. Delpit v. U. S. Shipping Bd. Emergency Fleet Corp., 19 F. (2d) 60. Compare Atlantic Corp. v. U. S. Shipping Bd. Emergency Fleet Corp., 286 Fed. 222 (where, however, the right to remove apparently could be based on the fact that the suit arose under the laws of the United States). (2) Removal of suit against Emergency Fleet Corporation on ground of existence of federal question see supra § 72.

[34] Compania Minera v. American Metal Co., 262 Fed. 183; Pringle v. Storrow, 256 Mass. 561, 153 NE 26, 49 ALR 1222.

Original jurisdiction of federal court where alien a party in general see Federal Courts § 57.

[35] Paul v. Chilsoquie, 70 Fed. 401.

Jurisdiction of federal courts where Indian a party in general see Indians §§ 12, 127-133.

[36] Marks v. Marks, 75 Fed. 321; Woolridge v. McKenna, 8 Fed. 650.

[37] **Cross references:**
Citizenship in general see Citizens 11 C. J. p 772.
Domicile in general see Domicile 19 C. J. p 390.
Original jurisdiction of federal courts see Federal Courts § 60.
"Residence" [34 Cyc 1647].

[38] Nichols v. Nichols, 92 Fed. 1; Marks v. Marks, 75 Fed. 321; McDon-

ports permanent residence in a state with an intention to remain.[39] Residence alone is not the equivalent of citizenship,[40] as a person may be a citizen of a state and reside temporarily elsewhere.[41]

Married woman and widow. It has been held that a husband and wife who are not living apart under a legal separation cannot be citizens of different states,[42] and in general the domicile and citizenship of a widow remain that of her deceased husband until she changes them.[43]

Infant. In general, in the absence of emancipation or the surrender of parental control, the domicile of an infant party is that of his father,[44] and upon the death of the father, the domicile becomes that of the mother.[45]

State citizenship. The citizens referred to in statutes under which removal is authorized are citizens of states of the United States.[46]

Estoppel to deny citizenship. Statements in a document signed by a person, that such person is "of" or is "residing in" a certain state do not prevent such person subsequently from denying citizenship in such state as bearing on the matter of removal, at least where such statements did not induce conduct on the part of others which would operate to the prejudice of such others if such denial were permitted.[47]

Evidence. While residence in a certain state is prima facie evidence of citizenship,[48] it is not conclusive.[49] A party's own evidence as to his citizenship[50] and evidence as to his declarations in this regard[51] may be considered, and where supported by collateral facts and circumstances may be sufficient to show citizenship in accordance with such evidence and declarations,[52] but, in the face of conflicting acts and declarations, statements of a party tending to show citizenship in a certain state are not conclusive.[53]

[§ 136] **b. Change of Citizenship or Allegiance.**[54] In general, a domicile fixing citizenship[55] once existing, continues until another is acquired,[56] but, as affecting jurisdiction by removal, there may be a change of citizenship from one state to another by a change of residence with the intention that such residence shall be permanent.[57] In order to effect a change of citizenship from one state to another state,[58] or from a state to a territory,[59] the change must be made with the intention permanently to remain in such other state or in such territory, and the change must be a voluntary act of the party;[60] but it is not necessary that the person making the change should reside for any particular period in the state to which the change is made;[61] nor is it necessary that there should be a fixed residence in such state.[62]

Married woman. Where a husband changes his domicile, it has been held that that of his wife is also changed where they are not living apart under a legal separation.[63]

Infant. The domicile of an infant ordinarily changes with that of the parents,[64] and while the widowed mother of an infant remains unmarried, by changing her domicile, she thereby changes that of the infant.[65] Conversely, in general the domicile of an infant is not changed notwithstanding a sojourn in a state other than that of which the father remains a citizen.[66]

Alien. The filing of a declaration of his intention to become a citizen of the United States does not terminate a party's alienage, or render him a citizen of a particular state,[67] even though he is permitted, by the laws of the state where he resides, to vote and to hold office;[68] and it has been held that

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ald v. Salem Capital Flour-Mills Co., 31 Fed. 577, 12 Sawy. 492 (recognizing rule).

[39] Sherman v. Southern Pac. Co., 192 Fed. 711; Harding v. Standard Oil Co., 182 Fed. 421; Nichols v. Nichols, 92 Fed. 1; Marks v. Marks, 75 Fed. 321; McDonald v. Salem Capital Flour-Mills Co., 31 Fed. 577, 12 Sawy. 492; Winn v. Gilmer, 27 Fed. 817.

[40] Reckling v. McKinstry, 185 Fed. 842; Marks v. Marks, 75 Fed. 321; McDonald v. Salem Capital Flour-Mills Co., 31 Fed. 577, 12 Sawy. 492.

[41] Reynolds v. Adden, 136 U. S. 348, 10 SCt 843, 34 L. ed. 360; Chiatovich v. Hanchett, 78 Fed. 193; McDonald v. Salem Capital Flour-Mills Co., 31 Fed. 577, 12 Sawy. 492.

[42] Nichols v. Nichols, 92 Fed. 1; Poppenhauser v. India-Rubber Comb Co., 14 Fed. 707. But see generally Domicile § 34.

[a] **Rule applied** where defendant's right to remove the action, which was brought by his wife, was denied. Nichols v. Nichols, 92 Fed. 1.

[43] Flynn v. Fidelity, etc., Co., 145 Fed. 265; Marks v. Marks, 75 Fed. 321.

[44] Marks v. Marks, 75 Fed. 321; Woolridge v. McKenna, 8 Fed. 650.

Acquisition of domicile by infant in general see Infants §§ 25–32.

[45] Marks v. Marks, 75 Fed. 321.

[46] See supra § 125.

[47] Reynolds v. Adden, 136 U. S. 348, 10 SCt 843, 34 L. ed. 360.

[48] McDonald v. Salem Capital Flour-Mills Co., 31 Fed. 577, 12 Sawy. 492.

[49] McDonald v. Salem Capital Flour-Mills Co., supra; Sanger v. Seymour, 25 Fed. 289.

[50] Fisk v. Chicago, etc., R. Co., 53 Barb. (N. Y.) 472, 3 AbbPrNS 453.

[51] Fisk v. Chicago, etc., R. Co., supra.

[52] Fisk v. Chicago, etc., R. Co., supra.

[a] **Voting.**—The fact that the party whose citizenship was in question voted in a certain state was given weight in determining citizenship. Fisk v. Chicago, etc., R. Co., 53 Barb. (N. Y.) 472, 3 AbbPrNS 453.

[53] New Orleans v. Sheppard, 10 La. Ann. 268.

[54] **Continuance or loss of domicile in general** see Domicile §§ 49–55.

[55] See supra § 135.

[56] Marks v. Marks, 75 Fed. 321.

[57] Reynolds v. Adden, 136 U. S. 348, 10 SCt 843, 34 L. ed. 360; Chicago, etc., R. Co. v. Ohle, 117 U. S. 123, 6 SCt 632, 29 L. ed. 837; Marks v. Marks, 75 Fed. 321; New Orleans v. Sheppard, 10 La. Ann. 268.

[a] **Domicile of nativity or origin is more easily reacquired,** or reverts more readily, than a domicile of choice may be acquired; at least less evidence is required to establish such a change. Marks v. Marks, 75 Fed. 321.

[58] Sanger v. Seymour, 25 Fed. 289.

[59] Corel v. Chicago, etc., R. Co., 123 Fed. 452.

[60] Guarantee Co. of North America v. Lynchburg First Nat. Bank, 95 Va. 480, 28 SE 909.

[a] **An officer of the United States Army** does not lose his citizenship in a particular state by remaining in another state in the performance of his duties. Stoker v. Leavenworth, 7 La. 390.

[b] **Imprisonment in another state.**—The citizenship of defendant was not changed where he was removed by governmental authorities to another state and imprisoned in a federal prison in such other state. Guarantee Co. of North America v. Lynchburg First Nat. Bank, 95 Va. 480, 28 SE 909.

[61] Marks v. Marks, 75 Fed. 321.

[62] Marks v. Marks, supra.

[63] Nichols v. Nichols, 92 Fed. 1. But see Domicile § 34.

[64] Marks v. Marks, 75 Fed. 321.

[65] Marks v. Marks, supra.

[66] Woolridge v. McKenna, 8 Fed. 650.

[a] **Rule applied** where the father, after the mother's death, had placed the child in question under the permanent care of her aunt at the latter's residence in another state. Woolridge v. McKenna, 8 Fed. 650.

[67] Wallenburg v. Missouri Pac. R. Co., 159 Fed. 217; Creagh v. Equitable L. Assur. Soc., 88 Fed. 1; Maloy v. Duden, 25 Fed. 673; Orosco v. Gagliardo, 22 Cal. 83.

[68] Lanz v. Randall, 14 F. Cas. No. 8,080, 4 Dill. 425.

by marriage to an alien a citizen who continued to reside in the United States did not lose her citizenship within the meaning of the Removal Act.[69]

Taking oath of allegiance to foreign sovereign. It has been held that the fact that a citizen took an oath of allegiance to the sovereign of a foreign country and accepted from such sovereign an appointment as consul, did not render such citizen an alien within the meaning of the removal statute.[70]

Change to acquire domicile for purpose of suit.[71] Unless the change is only ostensible and without the intention to reside permanently in the new abode,[72] the fact that defendant has moved from one state to another merely to enable him to invoke federal jurisdiction, does not defeat his right to remove;[73] and a like rule has been applied when one of the purposes of plaintiff in going to another state was to prevent the removal of a suit which he might bring in a state court.[74]

Evidence. In general, domicile once shown to exist is presumed to continue,[75] and the burden is on the person asserting the change to prove it.[76] The intention as to a change of domicile and citizenship by a particular person is to be gathered largely from the acts of such person,[77] and while his own evidence,[78] and evidence as to his declarations,[79] in this regard, may be considered, such evidence is not conclusive,[80] but a party's evidence as to his intention in this regard may be sufficient to determine the question where such evidence is in accord with collateral facts and circumstances.[81] While residence outside the state in which a party was a resident may be evidence of a change of citizenship,[82] such evidence is not conclusive.[83]

[§ 137] **2. Political Subdivision of State.** A political subdivision of a state, which as already pointed out is usually, at least, treated as a citizen within the statutes permitting removal,[84] is regarded as a citizen of the state in which it is located and under whose laws it is organized.[85]

[§ 138] **3. Corporation[86]—a. In General.** In determining the question as to the removability of a suit to which a corporation is a party, where removal depends on the place of citizenship of such corporation, the general rule is that it is a citizen[87] of the state by, or under the laws of, which it was incorporated, chartered, or created,[88] on the theory that the corporation is presumed to be composed of citizens of such state,[89] or, as sometimes expressed, that the incorporators and stockholders are presumed to be citizens of such state,[90] which presumptions are conclusive.[91] The foregoing rule applies notwithstanding the fact that the corporation of one state may have an office in another state;[92] that it may engage in business or exercise its functions in another state,[93] under a license or permit;[94] that it may own property in another state;[95] that it may have appointed an agent or attorney in another state on whom service of process may be made;[96] or that the individual members or stockholders may not be citizens of the state of incorporation.[97]

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[69] Wallenburg v. Missouri Pac. R. Co., 159 Fed. 217. But see Citizens § 19.

[70] Fish v. Stoughton, 2 Johns. Cas. (N. Y.) 407.

[71] **Change of citizenship pending suit** see infra § 177.

[72] Sullivan v. Lloyd, 213 Fed. 275.

[73] Sullivan v. Lloyd, supra.

[74] Chicago, etc., R. Co. v. Ohle, 117 U. S. 123, 6 SCt 632, 29 L. ed. 837.

[75] Flynn v. Fidelity, etc., Co., 145 Fed. 266; Marks v. Marks, 75 Fed. 321; Fisk v. Chicago, etc., R. Co., 53 Barb. (N. Y.) 472, 3 AbbPr NS 453.

[76] Flynn v. Fidelity, etc., Co., 145 Fed. 266; Corel v. Chicago, etc., R. Co., 123 Fed. 452.

[77] Corel v. Chicago, etc., R. Co., supra.

[78] Sanger v. Seymour, 25 Fed. 289; Fisk v. Chicago, etc., R. Co., 53 Barb. (N. Y.) 472, 3 AbbPrNS 453.

[79] Corel v. Chicago, etc., R. Co., 123 Fed. 452; Fisk v. Chicago, etc., R. Co., 53 Barb. (N. Y.) 472, 3 Abb PrNS 453.

[80] Corel v. Chicago, etc., R. Co., 123 Fed. 452.

[81] Sanger v. Seymour, 25 Fed. 289; Fisk v. Chicago, etc., R. Co., 53 Barb. (N. Y.) 472, 3 AbbPrNS 453.

[82] McDonald v. Salem Flour-Mills Co., 31 Fed. 577, 12 Sawy. 492.

[83] Corel v. Chicago, etc., R. Co., 123 Fed. 452; Chiatovich v. Hanchett, 78 Fed. 193; McDonald v. Salem Flour-Mills Co., 31 Fed. 577, 12 Sawy. 492.

[a] **Residence for part of year.**—The fact that for a part of the year a citizen of a particular state resides elsewhere, does not show a loss of citizenship in such state. Sanger v. Seymour, 25 Fed. 289.

[84] See supra § 128.

[85] Port of Seattle v. Oregon, etc., R. Co., 255 U. S. 56, 41 SCt 237, 65 L. ed. 500; Chicago, etc., R. Co. v. Spencer, 283 Fed. 824; New Orleans v. Sheppard, 10 La. Ann. 268. And see cases supra § 128 notes 14–19.

[a] **Rule applied** (1) to the Port of Seattle in the State of Washington (Port of Seattle v. Oregon, etc., R. Co., 255 U. S. 56, 41 SCt 237, 65 L. ed. 500) (2) and to a school district (Parks v. Carriere Cons. School Dist., 12 F. (2d) 37).

[86] **Municipal corporation** see supra § 137.

Validity of state statute forbidding foreign corporation to remove suit see Corporations § 3969.

[87] See supra § 129.

[88] U. S.—Southern R. Co. v. Allison, 190 U. S. 326, 23 SCt 713, 47 L. ed. 1078; Home Ins. Co. v. Morse, 20 Wall. 445, 22 L. ed. 365; Chicago, etc., R. Co. v. Whitton, 13 Wall. 270, 20 L. ed. 571; Martin v. Matson Nav. Co., 239 Fed. 188; Hidden v. Washington-Oregon Corp., 217 Fed. 303; Baldwin v. Pacific Power, etc., Co., 199 Fed. 291; Crawford v. Seattle, etc., R. Co., 198 Fed. 920; Stone v. Chicago, etc., R. Co., 195 Fed. 832; Keller v. Kansas City, etc., R. Co., 135 Fed. 202; Roberts v. Pacific, etc., R., etc., Co., 104 Fed. 577; Conn v. Chicago, etc., R. Co., 48 Fed. 177; Rock Rapids Independent Dist. v. Rock Rapids Bank, 48 Fed. 2; Baughman v. National Water-Works Co., 46 Fed. 4; Chicago, etc., R. Co. v. Minnesota, etc., R. Co., 29 Fed. 337; Hatch v. Chicago, etc., R. Co., 11 F. Cas. No. 6,204, 6 Blatchf. 105; Owen v. New York L. Ins. Co., 18 F. Cas. No. 10,631, 1 Hughes 322.

Ark.—Missouri Pac. R. Co. v. Moore, 158 Ark. 643, 249 SW 367; Missouri Pac. R. Co. v. Tompkins, 157 Ark. 16, 247 SW 54.

La.—Duncan v. St. Louis, etc., R. Co., 49 La. Ann. 1700, 22 S 924. See Oakey v. Commercial, etc., Bank, 14 La. 515 (where the right to remove was upheld on the ground that the officers and members of a corporation incorporated in a state other than that in which the action was brought were either aliens or citizens of states other than the state of which plaintiff was a citizen).

Mass.—Morton v. New York Mut. L. Ins. Co., 105 Mass. 141, 7 AmR 505.

Nev.—Quigley v. Central Pac. R. Co., 11 Nev. 350, 21 AmR 757.

N. Y.—Mix v. Andes Ins. Co., 74 N. Y. 53, 30 AmR 260; Cooke v. Boston State Nat. Bank, 52 N. Y. 96, 11 AmR 667; Stevens v. Phœnix Ins. Co., 41 N. Y. 149; DeCamp v. New Jersey Mut. L. Ins. Co., 32 N. Y. Super. 481.

N. C.—Huntley v. Southeastern Express Co., 191 N. C. 696, 132 SE 786.

Pa.—Com. v. U. S. Fidelity, etc., Co., 18 Pa. Dist. 656; Fox v. American Casualty Ins., etc., Co., 2 Pa. Dist. 158, 12 Pa. Co. 207; Newhall v. Atlantic F. & M. Ins. Co., 8 Phila. 106.

S. C.—Wilson v. Southern R. Co., 36 SE 701.

Wis.—Gist v. Equitable Surety Co., 161 Wis. 79, 151 NW 382; Knorr v. Home Ins. Co., 25 Wis. 143, 3 AmR 26.

And see cases infra notes 89–97.

[89] Southern R. Co. v. Allison, 190 U. S. 326, 23 SCt 713, 47 L. ed. 1078; Hobbs v. Manhattan Ins. Co., 56 Me. 417, 96 AmD 472.

[90] Southern R. Co. v. Allison, 190 U. S. 326, 23 SCt 713, 47 L. ed. 1078; National SS. Co. v. Tugman, 106 U. S. 118, 1 SCt 58, 27 L. ed. 87; Walters v. Chicago, etc., R. Co., 104 Fed. 377 [aff 186 U. S. 479, 22 SCt 941, 46 L. ed. 1266]; Taylor v. Illinois Cent. R. Co., 89 Fed. 119; Hollingsworth v. Southern R. Co., 86 Fed. 353; Pacific R. Co. v. Missouri Pac. R. Co., 23 Fed. 565; Hobbs v. Manhattan Ins. Co., 56 Me. 417, 96 AmD 472; Allegheny County v. Cleveland, etc., R. Co., 51 Pa. 228, 88 AmD 579.

[91] Southern R. Co. v. Allison, 190 U. S. 326, 23 SCt 713, 47 L. ed. 1078; National SS. Co. v. Tugman, 106 U. S. 118, 1 SCt 58, 27 L. ed. 87. And see cases supra notes 89, 90.

[§ 139] **b. Reincorporation or Domestication and Consolidation and Merger.** In determining the question as to removability, a corporation may be regarded solely as a citizen of the state by which it was originally created, although it is afterward constituted what is termed, or is in form, a domestic corporation of another state,[98] as where a corporation is compelled, in order to do business or to exercise its functions in a state other than that of original incorporation, to become a corporation of such other state,[99] or, in general, acts under, or takes advantage of, so-called domestication acts,[1] and where the corporation is sued in such other state, it may, if otherwise entitled to remove, assert a right to remove as a citizen of the state of original incorporation.[2] So too a corporation ordinarily does not lose citizenship in the state where it originally was incorporated by incorporation in another state.[3] There are cases, however, in which it has been held or recognized that a corporation may be created a corporation of a state and so become in effect a citizen of that state insofar as the question as to removability is concerned, although it has the same organization as a corporation created in another state;[4] and where suit is brought against the corporation in the state in which the later incorporation occurred by a citizen of that state, the corporation cannot remove on the ground of diversity of citizenship.[5]

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[92] Pacific R. Co. v. Missouri Pac. R. Co., 23 Fed. 565; Hatch v. Chicago, etc., R. Co., 11 F. Cas. No. 6,204, 6 Blatchf. 105; Fisk v. Chicago, etc., R. Co., 53 Barb. (N. Y.) 472.

[93] U. S.—Miller v. Southern Bell Tel., etc., Co., 279 Fed. 806; Martin v. Matson Nav. Co., 239 Fed. 188; Fales v. Chicago, etc., R. Co., 32 Fed. 673; Hatch v. Chicago, etc., R. Co., 11 F. Cas. No. 6,204, 6 Blatchf. 105.

Iowa.—Treadway v. Chicago, etc., R. Co., 21 Iowa 351.

N. Y.—Holden v. Putnam F. Ins. Co., 46 N. Y. 1, 7 AmR 287; Fisk v. Chicago, etc., R. Co., 53 Barb. 472; DeCamp v. New Jersey Mut. L. Ins. Co., 32 N. Y. Super. 481.

N. C.—Hyder v. Southern R. Co., 167 N. C. 584, 83 SE 689.

Wis.—Knorr v. Home Ins. Co., 25 Wis. 143, 3 AmR 26.

[a] **Operation of railroad in state other than state of incorporation.**—(1) Application of rule fixing citizenship in state of incorporation is not affected by the fact that a railroad company operates a railroad in another state under a lease from a domestic corporation. Baltimore, etc., R. Co. v. Koontz, 104 U. S. 5, 26 L. ed. 643 [rev 29 Gratt. (70 Va.) 43, 26 AmR 384]; Willson v. Winchester, etc., R. Co., 99 Fed. 642, 41 CCA 215 [aff 82 Fed. 15]; Wilkinson v. Delaware, etc., R. Co., 22 Fed. 353; Crane v. Chicago, etc., R. Co., 20 Fed. 402 [aff 113 U. S. 424, 5 SCt 578, 28 L. ed. 1064]; Callahan v. Louisville, etc., R. Co., 11 Fed. 536 [aff 122 U. S. 391, 7 SCt 1254, 30 L. ed. 1230]; Treadway v. Chicago, etc., R. Co., 21 Iowa 351; Hyder v. Southern R. Co., 167 N. C. 584, 83 SE 689 (assumption of certain liabilities by lessee). Contra Baltimore, etc., R. Co. v. Noell, 32 Gratt. (73 Va.) 394. (2) A like rule applies where the operation is under a purchase from a domestic corporation. Cummins v. Chicago, etc., R. Co., 193 Fed. 238; Morgan v. East Tennessee, etc., R. Co., 48 Fed. 705; Conn v. Chicago, etc., R. Co., 48 Fed. 177; Williams v. Missouri, etc., R. Co., 29 F. Cas. No. 17,728, 3 Dill. 267. See Southern R. Co. v. Hudgins, 108 Ga. 524, 33 SE 1011 (where the nature of the arrangement under which a railroad company operated a line in another state was not shown, and the right of such company to remove was recognized); Ferris v. Southern R. Co., 194 N. C. 653, 140 SE 607 (where the right to remove was upheld).

[b] **Rule applies** although the corporation was organized for the purpose of doing business in other states. Baughman v. National Water-Works Co., 46 Fed. 4.

[94] U. S.—Martin v. Baltimore, etc., R. Co., 151 U. S. 673, 14 SCt 533, 38 L. ed. 311; Goodlett v. Louisville, etc., R. Co., 122 U. S. 391, 402, 403, 7 SCt 1254, 30 L. ed. 1230 [aff sub nom. Callahan v. Louisville, etc., R. Co., 11 Fed. 536]; Baldwin v. Pacific Power, etc., Co., 199 Fed. 291; Hubble v. Nashville, etc., R. Co., 185 Fed. 535.

N. Y.—Stevens v. Phœnix Ins. Co., 41 N. Y. 149.

N. C.—Van Dyke v. Prudential Ins. Co., 192 N. C. 206, 134 SE 460.

Pa.—Com. v. U. S. Fidelity, etc., Co., 18 Pa. Dist. 656; Newhall v. Atlantic F. & M. Ins. Co., 8 Phila. 106.

Wis.—Gist v. Equitable Surety Co., 161 Wis. 79, 151 NW 382.

[a] **Special statutory authorization.**—The rule fixing citizenship in the state of incorporation has been applied where a corporation of one state was authorized by special act to carry on business and to exercise its functions in another state. Goodloe v. Tennessee Coal, etc., Co., 117 Fed. 348; Chapman v. Alabama Great Southern R. Co., 59 Fed. 370.

[b] **Baltimore and Ohio Railroad Company.**—The rule has been applied in holding that the Baltimore and Ohio Railroad Company, a Maryland corporation, was not a corporation of West Virginia, and, therefore, that it could remove suits against it brought in the state courts of West Virginia by citizens of West Virginia. Martin v. Baltimore, etc., R. Co., 151 U. S. 673, 14 SCt 533, 38 L. ed. 311; Baltimore, etc., R. Co. v. Ford, 35 Fed. 170; Taylor County Ct. v. Baltimore, etc., R. Co., 35 Fed. 161. Contra Quarrier v. Baltimore, etc., R. Co., 20 W. Va. 424; Henen v. Baltimore, etc., R. Co., 17 W. Va. 881; Baltimore, etc., R. Co. v. Pittsburg, etc., R. Co., 17 W. Va. 812.

[95] Miller v. Southern Bell Tel., etc., Co., 279 Fed. 806.

[96] U. S.—Home Ins. Co. v. Morse, 20 Wall. 445, 22 L. ed. 365; Baldwin v. Pacific Power, etc., Co., 199 Fed. 291; Amsden v. Norwich Union F. Ins. Soc., 44 Fed. 515; Hatch v. Chicago, etc., R. Co., 11 F. Cas. No. 6,204, 6 Blatchf. 105; Lee v. Ætna Ins. Co., 14 F. Cas. No. 8,181; Owen v. New York L. Ins. Co., 18 F. Cas. No. 10,631, 1 Hughes 322.

Me.—Hobbs v. Manhattan Ins. Co., 56 Me. 417, 96 AmD 472.

Mass.—Morton v. New York Mut. L. Ins. Co., 105 Mass. 141, 7 AmR 505.

N. Y.—Stevens v. Phœnix Ins. Co., 41 N. Y. 149; Fisk v. Chicago, etc., R. Co., 53 Barb. 472.

Pa.—Fox v. American Casualty Ins., etc., Co., 2 Pa. Dist. 158, 12 Pa. Co. 207; Newhall v. Atlantic F. & M. Ins. Co., 8 Phila. 106.

Wis.—Knorr v. Home Ins. Co., 25 Wis. 143, 3 AmR 26.

But see Continental Ins. Co. v. Kasey, 27 Gratt. (27 Va.) 216 (where, however, the right to remove was denied on other grounds also).

[97] Westheider v. Wabash R. Co., 115 Fed. 840; Pacific R. Co. v. Missouri Pac. R. Co., 23 Fed. 565; Cooke v. Boston State Nat. Bank, 52 N. Y. 96, 11 AmR 667.

[98] Southern R. Co. v. Allison, 190 U. S. 326, 23 SCt 713, 47 L. ed. 1078; Foy v. Georgia-Alabama Power Co., 298 Fed. 643; Baldwin v. Pacific Power, etc., Co., 199 Fed. 291; Lee v. Atlantic Coast Line R. Co., 150 Fed. 775 [rev on other grounds 166 Fed. 850, 94 CCA 128]; Walters v. Chicago, etc., R. Co., 104 Fed. 377 [aff 186 U. S. 479, 22 SCt 941, 46 L. ed. 1266]; Taylor v. Illinois Cent. R. Co., 89 Fed. 119; Hollingsworth v. Southern R. Co., 86 Fed. 353; Stephens v. St. Louis, etc., R. Co., 47 Fed. 530, 14 LRA 184; Moore v. Chicago, etc., R. Co., 21 Fed. 817; Illinois Cent. R. Co. v. Hibbs, 78 SW 1116, 25 KyL 1899; Lewis v. Maysville, etc., R. Co., 76 SW 526, 25 KyL 948; Wilson v. Southern R. Co., 64 S. C. 162, 36 SE 701, 41 SE 971 [overr Matthis v. Southern R. Co., 53 S. C. 246, 31 SE 240]; Calvert v. Southern R. Co., 64 S. C. 139, 36 SE 750, 41 SE 963. Compare Mowery v. Southern R. Co., 129 N. C. 351, 40 SE 88 (where a foreign corporation, subsequent to the injury on which the suit was based, became a citizen of the state where the injury was done, it was held that for the purposes of the suit it would be treated as a foreign corporation). Contra Debnam v. Southern Bell Tel., etc., Co., 126 N. C. 831, 36 SE 269, 65 LRA 915.

[a] **Even though the statute authorizes, in terms, incorporation and not domestication,** the rule fixing citizenship is not affected. Foy v. Georgia-Alabama Power Co., 298 Fed. 643.

Domestication of foreign corporation in general see Corporations §§ 3934–3937.

[99] Southern R. Co. v. Allison, 190 U. S. 326, 23 SCt 713, 47 L. ed. 1078 [rev 129 N. C. 336, 40 SE 91]; Hollingsworth v. Southern R. Co., 86 Fed. 353.

[1] Lightfoot v. Atlantic Coast Line R. Co., 33 F. (2d) 765; Foy v. Georgia-Alabama Power Co., 298 Fed. 643; Lee v. Atlantic Coast Line R. Co., 150 Fed. 775 [rev on other grounds 166 Fed. 850, 94 CCA 128]; Markwood v. Southern R. Co., 65 Fed. 817.

[a] **Filing of copy of charter.**—The filing in the office of the secretary of state of a state other than that of original incorporation, of a duly authenticated copy of its charter and by-laws does not make a foreign corporation a citizen of such other state and cut off its right of removal. Southern R. Co. v. Allison, 190 U. S. 326, 23 SCt 713, 47 L. ed. 1078 [rev 129 N. C. 336, 40 SE 91].

[2] Southern R. Co. v. Allison, 190 U. S. 326, 23 SCt 713, 47 L. ed. 1078; Foy v. Georgia-Alabama Power Co., 298 Fed. 643. And see cases supra notes 98–1.

Consolidation or merger. Where corporations of different states are consolidated into a new corporation which is organized under the laws of each of such states, the consolidated corporation is to be treated as a corporation of each of the states[6] and when sued in one of the states in which it is chartered by a citizen of the state in which suit is brought, the corporation cannot remove.[7] A distinction has been made in connection with the matter here under discussion, between consolidation and merger,[8] and the view has been taken that where by merger a corporation of one state absorbs a corporation of another state, the former alone remains in existence, and, for the purpose of the removability of suits to which it is a party, is regarded as a citizen only of the state in which it was incorporated.[9]

[§ 140] **c. National Banking Association.** The statute providing that for the purposes of actions other than those mentioned in the statute, by or against national banking associations, such associations shall be deemed citizens of the state in which they are respectively located,[10] applies where the question as to removability of a suit against such an association turns on citizenship.[11]

[§ 141] **d. Alien Corporation.** In determining the question as to removal, the individual members of a corporation created by the laws of a foreign country are conclusively presumed to be citizens or subjects of such foreign country,[12] and such corporation is, therefore, regarded as an alien.[13]

[§ 142] **4. Unincorporated Association.** An unincorporated joint-stock association is not as such regarded as a citizen[14] of the state under the laws of which such association is organized,[15] and the citizenship of the members of the association governs,[16] even where the state statute authorizes suit against an officer of the association, without joining the individual members.[17]

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[3] Fairfield v. Great Falls Mfg. Co., 175 Fed. 305; Horne v. Boston, etc., R. Co., 62 N. H. 454.

[4] Patch v. Wabash R. Co., 207 U. S. 277, 28 SCt 80, 52 L. ed. 204; Martin v. Baltimore, etc., R. Co., 151 U. S. 673, 14 SCt 533, 38 L. ed. 311; Memphis, etc., R. Co. v. Alabama, 107 U. S. 581, 2 SCt 432, 27 L. ed. 518; Chicago, etc., R. Co. v. Whitton, 13 Wall. (U. S.) 270, 20 L. ed. 571; Dodd v. Louisville Bridge Co., 130 Fed. 186; Colglazier v. Louisville, etc., R. Co., 22 Fed. 568; Horne v. Boston, etc., R. Co., 18 Fed. 50; Hurst v. Southern R. Co., 162 N. C. 368, 78 SE 434; Allegheny County v. Cleveland, etc., R. Co., 51 Pa. 228, 88 AmD 579.

[a] **Statute constituting purchaser of railroad on foreclosure a new corporation.**—A suit against a purchasing corporation could not be removed from the state to the federal court upon the ground of diversity of citizenship by the purchasing corporation, which was a foreign corporation purchasing under a mortgage foreclosure by virtue of Code § 697, which provided that upon the conveyance being made the mortgagor corporation shall ipso facto be dissolved and the purchaser be a new corporation. Hurst v. Southern R. Co., 162 N. C. 368, 78 SE 434; Carolina Coal, etc., Co. v. Southern R. Co., 144 N. C. 732, 57 SE 444.

[5] Martin v. Baltimore, etc., R. Co., 151 U. S. 673, 14 SCt 533, 38 L. ed. 311; Memphis, etc., R. Co. v. Alabama, 107 U. S. 581, 2 SCt 432, 27 L. ed. 518.

[6] Patch v. Wabash R. Co., 207 U. S. 277, 28 SCt 80, 52 L. ed. 204; Case v. Atlanta, etc., R. Co., 225 Fed. 862; Wasley v. Chicago, etc., R. Co., 147 Fed. 608; Fitzgerald v. Missouri Pac. R. Co., 45 Fed. 812; Cohn v. Louisville, etc., R. Co., 39 Fed. 227; Uphoff v. Chicago, etc., R. Co., 5 Fed. 545; Duncan v. St. Louis, etc., R. Co., 49 La. Ann. 1700, 22 S 924. Compare Pacific R. Co. v. Missouri Pac. R. Co., 23 Fed. 565 (presumption, if any, is that the persons composing the consolidated corporation are citizens of the different states under whose laws such corporation was formed).

[a] **The Wabash Railroad Company** (1) has been regarded as a citizen and resident of one of the states in which one of the constituent companies existed, other than Ohio, and not as solely a citizen of Ohio. Patch v. Wabash R. Co., 207 U. S. 277, 28 SCt 80, 52 L. ed. 204; Winn v. Wabash R. Co., 118 Fed. 55. Contra Westheider v. Wabash R. Co., 115 Fed. 840. (2) So where it was sued in Illinois, the right of the company to remove was denied. Patch v. Wabash R. Co., 207 U. S. 277, 28 SCt 80, 52 L. ed. 204.

[7] Case v. Atlanta, etc., R. Co., 225 Fed. 862; Wasley v. Chicago, etc., R. Co., 147 Fed. 608; Fitzgerald v. Missouri Pac. R. Co., 45 Fed. 812; Paul v. Baltimore, etc., R. Co., 44 Fed. 513; Johnson v. Philadelphia, etc., R. Co., 9 Fed. 6; Uphoff v. Chicago, etc., R. Co., 5 Fed. 545; Chicago, etc., R. Co. v. Lake Shore, etc., R. Co., 5 Fed. 19, 10 Biss. 122.

[8] Lee v. Atlantic Coast Line R. Co., 150 Fed. 775 [rev on other grounds 166 Fed. 850, 94 CCA 128].

[9] Lightfoot v. Atlantic Coast Line R. Co., 33 F. (2d) 765; Atlantic Coast Line R. Co. v. Dunning, 166 Fed. 850 [rev on other grounds 150 Fed. 775]. See Walters v. Chicago, etc., R. Co., 104 Fed. 377 [aff 186 U. S. 479, 22 SCt 941, 46 L. ed. 1266] (where citizenship followed state of original incorporation). But see Angier v. East Tennessee, etc., R. Co., 74 Ga. 634 (the soundness of the decision which is questioned in Southern R. Co. v. Hudgins, 108 Ga. 524, 33 SE 1011).

[a] **Atlantic Coast Line Railroad Company.**—(1) Where the Atlantic Coast Line Railroad Company, a line resulting from the merger or consolidation of various roads established in several different states, **was defendant** in suits brought in the state courts of South Carolina, lower federal courts, on a consideration of the applicable statutes of South Carolina and the various transactions which resulted in the formation of the line in question, have taken the view that such defendant is a citizen of Virginia for the purpose of removal. Lightfoot v. Atlantic Coast Line R. Co., 33 F. (2d) 765. (2) The subsequent acceptance of a paper described as a charter issued by the secretary of state of South Carolina and reciting a merger, union, and consolidation of a domestic with a foreign corporation did not change the rule. Lee v. Atlantic Coast Line R. Co., 150 Fed. 775 [rev on other grounds 166 Fed. 850, 94 CCA 128]; Staton v. Atlantic Coast Line R. Co., 144 N. C. 135, 56 SE 794.

[10] USCA tit 28 § 41 (16).

[11] Wichita Nat. Bank v. Smith, 72 Fed. 568, 19 CCA 42. See Cooke v. Boston State Nat. Bank, 52 N. Y. 96, 11 AmR 667 [aff 1 Lans. 494]; Chatham Nat. Bank v. Merchants' Nat. Bank, 1 Hun (N. Y.) 702, 4 Thomps. & C. 196 (in both of which cases a like conclusion was reached apparently in the absence of statute).

Where removability of suit arising under laws of United States involved see supra § 70.

[12] National SS. Co. v. Tugman, 106 U. S. 118, 1 SCt 58, 27 L. ed. 87; Terry v. Imperial F. Ins. Co., 23 F. Cas. No. 13,838, 3 Dill. 408.

[13] Merchants' Cotton-Press, etc., Co. v. Insurance Co. of North America, 151 U. S. 368, 14 SCt 367, 38 L. ed. 195; National SS. Co. v. Tugman, 106 U. S. 118, 1 SCt 158, 27 L. ed. 87; Niccum v. Northern Assur. Co., 17 F. (2d) 160; Attleboro Mfg. Co. v. Frankfort Mar., etc., Ins. Co., 202 Fed. 293; Wind River Lumber Co. v. Frankfort Mar., etc., Ins. Co., 196 Fed. 340, 116 CCA 160; Baumgarten v. Alliance Assur. Co., Ltd., 153 Fed. 301; Roberts v. Pacific, etc., R., etc., Co., 104 Fed. 577; Purcell v. British Land, etc., Co., 42 Fed. 465; Terry v. Imperial F. Ins. Co., 23 F. Cas. No. 13,838, 3 Dill. 408; Barrowcliffe v. La Caisse Generale des Assurance, 58 HowPr (N. Y.) 131, 1 NYCityCt 151. See Lucania Societa Italiana Di Navigazione v. U. S. Shipping Bd. Emergency Fleet Corp., 15 F. (2d) 568 (an action by an alien corporation against a shipbuilding company and United States Shipping Board Emergency Fleet Corporation was not "between citizens of different states"). But see Scott v. Texas Land, etc., Co., 41 Fed. 225 (where a cause was remanded on the ground that defendant corporation which was chartered by the laws of Great Britain had become a resident of the state in which the action was brought).

[14] See supra § 130.

[15] Re Winn, 213 U. S. 458, 29 SCt 515, 53 L. ed. 873; Taylor v. Weir, 171 Fed. 636, 96 CCA 438; Saunders v. Adams Express Co., 136 Fed. 494; Whitman v. Hubbell, 30 Fed. 81. But see Rosenfield v. Adams Express Co., 21 La. Ann. 233 (where, however, it appeared that all the members of a joint-stock company were citizens of states other than that of which the opposite party was a citizen); Adams Express Co. v. Trego, 35 Md. 47 (where, however, the right to remove was denied on other grounds); Fargo

[§ 143] **5. Partnership.** A partnership as such is not a citizen[18] of any state within the meaning of statutory provisions under which the right to remove depends on citizenship,[19] and this rule has been applied to a limited partnership association organized under the laws of a state,[20] and the actual citizenship of the several partners is the determining factor.[21] Where a partnership is sued in the partnership name without joining the partners as individuals, as authorized by a state statute, it has been held that there could not be a removal on the ground of diversity of citizenship on the theory that citizenship could not be predicated of a partnership as such,[22] but a different conclusion has been reached where, under the statute, plaintiff sues in the partnership name.[23] Under the provisions of the Porto Rican Organic Law making applicable, as between the local courts of Porto Rico and the federal district court of Porto Rico, the laws of the United States as to removal, the question as to removal is to be determined by the citizenship of the members of the partnership whether or not under the law of the place of origin of the partnership it is regarded as an entity and may sue and be sued in the partnership name.[24]

[§ 144] **H. What Constitutes Diversity and What Parties or Persons Considered—1. In General.** The question as to the right to remove on the ground here under discussion is not determinable solely from the designation of the parties, or from their alignment as plaintiffs or defendant set forth in plaintiff's pleading and in this connection it frequently becomes necessary for the court to determine whether or not the parties so designated are merely formal or nominal parties whose presence may be disregarded,[25] whether or not there has been an improper or fraudulent joinder of parties,[26] and whether or not the alignment set forth in plaintiff's pleading is in accordance with the actual relation of the parties to the controversy.[27] While ordinarily only a party to the record is to be considered,[28] there are cases in which the court looks beyond the pleadings in this regard.[29] In general, it seems that the question of a plaintiff's rightful status as a party in an action at law is to be determined by the law of the state.[30]

[§ 145] **2. Necessity for Diversity as to All Adverse Parties.**[31] A controversy or suit between citizens of different states which may be removed from a state to a federal court is one in which every party upon one side is a citizen of a different state from that of every party upon the other;[32] and subject to the rules governing the removal of separable controversies,[33] and the rules permitting the court, under certain circumstances, to disregard persons who have been formally made parties,[34] plaintiffs and defendants, when arranged according to their true interests,[35] must all be considered;[36] and the suit may not be removed where citizens of the same state are ranged on opposite sides, although citizens of other states are also parties;[37] and in cases arising

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v. McVicker, 55 Barb. (N. Y.) 437, 38 HowPr 1 (where the court took the view that the rule applicable to corporations should apply to joint-stock companies). Contra Maltz v. American Express Co., 16 F. Cas. No. 9,002, 1 Flipp. 611.

16. Taylor v. Weir, 171 Fed. 636, 96 CCA 438 [rev 162 Fed. 585].

17. Taylor v. Weir, 171 Fed. 636, 96 CCA 438 [rev 162 Fed. 585]. But see Boatner v. American Express Co., 122 Fed. 714 (where the treasurer of such a joint-stock association who had voluntarily entered an appearance was allowed to remove a suit). Contra Whitman v. Hubbell, 30 Fed. 81; Baltimore, etc., R. Co. v. Adams Express Co., 22 Fed. 404.

Officer as nominal party see infra § 154.

18. See supra § 131.

19. Bruett v. F. C. Austin Drain. Excavator Co., 174 Fed. 668; Ralya Market Co. v. Armour, 102 Fed. 530; Adams v. May, 27 Fed. 907; Erskine Motors Co. v. Chevrolet Motor Co., 180 N. C. 619, 105 SE 420 (holding out as corporation).

20. Fred Macey Co. v. Macey, 135 Fed. 725, 68 CCA 363 (organized under Michigan laws). But see Bushnell v. Park Bros., 46 Fed. 209 (as to removability of a suit to which a limited partnership organized under the laws of Pennsylvania).

[a] **Presumption as to citizenship of partners or members.**—There is no presumption that the members of a limited partnership association are citizens of the state under whose laws the association was organized. Fred Macey Co. v. Macey, 135 Fed. 725, 68 CCA 363.

21. Grace v. American Cent. Ins. Co., 109 U. S. 278, 3 SCt 207, 27 L. ed. 932; Erskine Motors Co. v. Chevrolet Motor Co., 180 N. C. 619, 105 SE 420. And see cases supra notes 19, 20.

22. Ralya Market Co. v. Armour, 102 Fed. 530; Hallowell v. McLaughlin Bros., (Iowa) 121 NW 1039 [writ of error dism 228 U. S. 278, 33 SCt 465, 57 L. ed. 835] (where the court said that a remand of the cause must be deemed to have been ordered on the ground that, as under the local practice the firm had been sued as an entity without joining individual partners, there was no diversity of citizenship).

23. Bruett v. F. C. Austin Drain. Excavator Co., 174 Fed. 668. But see Adams v. May, 27 Fed. 907 (where remand was directed).

24. Porto Rico v. Fortuna Estates, 279 Fed. 500 [certiorari den 259 U. S. 587 mem, 42 SCt 590 mem, 66 L. ed. 1077 mem]; Alonso v. Oben, 13 Porto Rico Fed. 237.

[a] **Illustration.**—A limited partnership organized under the laws of Porto Rico, all the members of which were domiciled outside of Porto Rico. Alonso v. Oben, 13 Porto Rico Fed. 237; Peo. v. Russell, 12 Porto Rico Fed. 309. Contra Peo. v. Rivera Zayas, 29 Porto Rico 423.

25. See infra §§ 148–166.

26. See infra §§ 170, 171.

27. See infra § 147.

28. Hill v. Director-Gen. of Railroads, 178 N. C. 607, 101 SE 376.

Right of person other than party to record to remove see infra § 212.

29. See passim infra §§ 148–166.

30. Turk v. Illinois Cent. R. Co., 218 Fed. 315, 134 CCA 111; Palmer v. Oregon-Washington R., etc., Co., 208 Fed. 666.

31. **In case of prejudice or local influence** see infra § 201.

Suit to enforce joint cause of action see infra §§ 167–173.

32. Shainwald v. Lewis, 108 U. S. 158, 2 SCt 385, 27 L. ed. 691 [aff 5 Fed. 510, 6 Sawy. 585]; Hyde v. Ruble, 104 U. S. 407, 26 L. ed. 823; Blake v. McKim, 103 U. S. 336, 26 L. ed. 563; Ayers v. Chicago, 101 U. S. 184, 25 L. ed. 838; Meyer v. Delaware R. Constr. Co., 100 U. S. 457, 27 L. ed. 593; Rand v. Hercules Powder Co., 28 F. (2d) 131; Mace v. Mayfield, 10 F. (2d) 231; Broadway Nat. Bank v. Adams, 130 Mass. 431; Fisk v. Chicago, etc., R. Co., 53 Barb. (N. Y.) 472. And see cases infra notes 36, 37.

[a] **"Suit" and "controversy."**—In this connection the term "a suit" between citizens of different states has been construed to mean the same as "a suit in which there is a controversy between" citizens of different states. Hanrick v. Hanrick, 153 U. S. 192, 14 SCt 835, 38 L. ed. 685; Sewing Mach. Cos.' Case, 18 Wall. (U. S.) 553, 21 L. ed. 914 [aff 110 Mass. 71, 14 AmR 579]; Fisk v. Chicago, etc., R. Co., 53 Barb. (N. Y.) 472.

33. See infra §§ 180–193.

34. See passim infra §§ 148–176.

35. See infra § 147.

36. In re Frazer, 9 F. Cas. No. 5,068, 3 CincLBul 668. And see cases infra note 37.

37. U. S.—Gage v. Carraher, 154 U. S. 656, 14 SCt 1190, 25 L. ed. 989; Merchants' Cotton Press, etc., Co. v. Insurance Co. of North America, 151 U. S. 368, 14 SCt 367, 38 L. ed. 195; Brown v. Trousdale, 138 U. S. 389, 11 SCt 308, 34 L. ed. 987; Coney v. Winchell, 116 U. S. 227, 6 SCt 366, 29 L. ed. 610; Ayres v. Wiswall, 112 U. S. 187, 5 SCt 90, 28 L. ed. 693; Winchester v. Loud, 108 U.

under the Removal Act, since it has required that the defendant seeking removal shall be a nonresident of the state in which the suit is brought, the right to remove has been denied[38] where plaintiff and a defendant or defendants are citizens and residents of the state in which the suit is brought and another defendant or defendants are citizens and residents of another state or states.[39]

Where an alien is a party, all the parties on each side must be considered, and the requisite jurisdictional citizenship must exist as to each,[40] and where there are several defendants or plaintiffs and there is an alien on each side,[41] or there is a citizen of the same state as that of the opposite party on the same side of the controversy as an alien,[42] there can be no removal.

[§ 146] **3. Diversity between Parties on Same Side of Controversy.** Parties on the same side of the controversy need not be citizens of the same state;[43] it is sufficient if they are all citizens of states other than those of which the opposite party is a citizen;[44] and the fact that plaintiffs are citizens of different states does not prevent the removal of a suit against an alien.[45] There is a conflict of authority, however, as to whether a suit is removable where, although the citizenship of each and every plaintiff differs from that of each and every defendant, some of the parties on the same side of the controversy are citizens of a state or states and others are alien.[46] Thus, where some of the defendants were citizens and some aliens, in some cases the right to remove has been

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S. 130, 2 SCt 311, 27 L. ed. 677; Fraser v. Jennison, 106 U. S. 191, 1 SCt 171, 27 L. ed. 131; Hyde v. Ruble, 104 U. S. 407, 26 L. ed. 823; Blake v. McKim, 103 U. S. 336, 26 L. ed. 563; Ayres v. Chicago, 101 U. S. 184, 25 L. ed. 838; Vannevar v. Bryant, 21 Wall. 41, 22 L. ed. 476; Rand v. Hercules Powder Co., 28 F. (2d) 131; Kiefer v. Idaho Falls, 19 F. (2d) 538; Highway Constr. Co. v. McClelland, 14 F. (2d) 406 [reh den 15 F. (2d) 187]; Uden v. Great Northern Constr. Co., 1 F. (2d) 743; Irvin v. Anthony Shoals Power Co., 277 Fed. 926; Whitaker v. Condon, 217 Fed. 139; Richardson v. Southern Idaho Water Power Co., 209 Fed. 949; Crawford v. Seattle, etc., R. Co., 198 Fed. 920; Gates Iron Works v. Pepper, 98 Fed. 449; Davis v. Randolph County Ct., 88 Fed. 705; In re San Antonio, etc., R. Co., 44 Fed. 145; Rumsey v. Call, 28 Fed. 769; Hazard v. Robinson, 21 Fed. 193; Walser v. Memphis, etc., R. Co., 19 Fed. 152; Mitchell v. Tillotson, 12 Fed. 737, 11 Biss. 325; Karns v. Atlantic, etc., R. Co., 10 Fed. 309; Walsh v. Memphis, etc., R. Co., 6 Fed. 797; Burke v. Flood, 1 Fed. 541, 6 Sawy. 220; Chicago, etc., R. Co. v. McComb, 5 F. Cas. No. 2,670, 17 Blatchf. 371; In re Frazer, 9 F. Cas. No. 5,068, 3 CincL Bul 668; Petterson v. Chapman, 19 F. Cas. No. 11,042, 13 Blatchf. 395; Van Brunt v. Corbin, 28 F. Cas. No. 16,832, 14 Blatchf. 496. But see Girardey v. Moore, 10 F. Cas. No. 5,462, 3 Woods 397 (apparently recognizing a contrary rule under the Removal Act of 1875).

Ala.—Southern R. Co. v. Bailey, 220 Ala. 385, 125 S 403; Ex p. Grimball, 61 Ala. 598.

Conn.—Security Co. v. Pratt, 65 Conn. 161, 32 A 396.

La.—New Orleans v. Seixas, 35 La. Ann. 36; Tesson v. Gusman, 26 La. Ann. 248.

Mass.—Danvers Sav. Bank v. Thompson, 130 Mass. 490; Broadway Nat. Bank v. Adams, 130 Mass. 431.

Mo.—Rodgers v. Gaines Bros. Co., 220 Mo. A. 876, 295 SW 492.

N. J.—Mills v. New Jersey Cent. R. Co., 7 N. J. L. J. 230.

N. Y.—Fairchild v. Durand, 8 Abb Pr 305.

Tenn.—Smith v. St. Louis Mut. L. Ins. Co., 2 Tenn. Ch. 656.

Tex.—Sabens v. Cochran, (Civ. A.) 292 SW 281. See Blum v. Thomas, 60 Tex. 158 (where the right to remove was denied). See Wabash R. Co. v. Keeler, 127 Ill. A. 265 (apparently recognizing rule); Dobson v. Southern R. Co., 129 N. C. 289, 40 SE 42; Thompson v. Fitzgerald, 233 Pa. 242, 82 A 212; Middleton v. Middleton, 7 WklyNC (Pa.) 144 (in all of which cases the right to remove was denied).

And see cases supra note 32.

[a] **Corporation as party.**—(1) The rule stated in the text applies where a corporation of one state is joined as defendant with a citizen of another state of which plaintiff is a citizen. Hidden v. Washington-Oregon Corp., 217 Fed. 303. (2) It applies also where a corporation joined as defendant is a corporation of the same state of which plaintiff is a citizen. Irvin v. Anthony Shoals Power Co., 277 Fed. 926; Crawford v. Seattle, etc., R. Co., 198 Fed. 920; Keller v. Kansas City, etc., R. Co., 135 Fed. 202; Dodd v. Louisville Bridge Co., 130 Fed. 186; Washington v. Columbus, etc., R. Co., 53 Fed. 673; Foy v. Georgia-Alabama Power Co., 159 Ga. 14, 124 SE 513; Porsmer v. Davis, 152 Minn. 181, 188 NW 279.

[b] **Under the Judiciary Act of 1789** (1) providing for the removal of suits commenced by a citizen of the state in which the suit was brought against a citizen of another state, the above rule was recognized or applied. In re Frazer, 9 F. Cas. No. 5,068, 3 CincLBul 668; Ward v. Arredondo, 29 F. Cas. No. 17,148, 1 Paine 410; Fairchild v. Durand, 8 AbbPr (N. Y.) 305; North River Steam Boat Co. v. Hoffman, 5 Johns. Ch. (N. Y.) 300. See Boylan v. Meeker, 28 N. J. L. 274, 477. (2) A suit could not be removed where one or more of the defendants were citizens of the state where suit was brought although other defendants were citizens of other states. Wilson v. Blodget, 30 F. Cas. No. 17,792, 4 McLean 363; Ex p. Grimball, 61 Ala. 598; Calderwood v. Braly, 28 Cal. 97; Miller v. Lynde, 2 Root (Conn.) 444, 1 AmD 86; Bliss v. Rawson, 43 Ga. 181, 19 AmR 164; Fisk v. Chicago, etc., R. Co., 53 Barb. (N. Y.) 472; Ludlow v. Kidd, 3 Oh. 48; Williams v. Price, 5 Munf. (19 Va.) 507; Bell v. Bell, 3 W. Va. 183.

[38] **Right of nonresident defendant to remove where diversity exists but one defendant citizen and resident of state where suit brought** see infra § 225.

[39] U. S.—Von Herberg v. Seattle, 27 F. (2d) 457 [certiorari den 278 U. S. 644 mem, 49 SCt 80 mem, 73 L. ed. 558 mem]; Whitaker v. Condon, 217 Fed. 139. See Continental Trust Co. v. Butts County, 242 Fed. 539 (where remand was directed).

Ark.—Maryland Fidelity, etc., Co. v. Cunningham, 177 Ark. 638, 7 SW (2d) 332.

Ga.—Standard Oil Co. v. Turner, 33 Ga. A. 726, 127 SE 785.

Ky.—Mogg v. Farley, 205 Ky. 25, 265 SW 449.

Miss.—Kress v. Crosby, 98 S 437.

Mo.—Rodgers v. Gaines Bros. Co., 220 Mo. A. 876, 295 SW 492.

N. C.—Jackson County Bank v. Hester, 188 N. C. 68, 123 SE 308; Morganton v. Hutton, etc., Co., 187 N. C. 736, 122 SE 842.

Tex.—Sabens v. Cochrum, (Civ. A.) 292 SW 281.

[40] Sawyer v. Switzerland Mar. Ins. Co., 21 F. Cas. No. 12,408, 14 Blatchf. 451.

[a] **Rule applied** where the members of a partnership, some of whom were aliens, were parties plaintiff. Sawyer v. Switzerland Mar. Ins. Co., 21 F. Cas. No. 12,408, 14 Blatchf. 451.

[41] Compania Minera v. American Metal Co., 262 Fed. 183; Sawyer v. Switzerland Mar. Ins. Co., 21 F. Cas. No. 12,408, 14 Blatchf. 451.

[42] King v. Cornell, 106 U. S. 395, 1 SCt 312, 27 L. ed. 60; Ward v. Arredondo, 29 F. Cas. No. 17,148, 1 Paine 410; Peo. v. Hager, 20 Cal. 167; Guarantee Co. of North America v. Lynchburg First Nat. Bank, 95 Va. 480, 28 SE 909; Williams v. Price, 5 Munf. (19 Va.) 507. See Davis v. Cook, 9 Nev. 134 (as to removal under Act of 1866).

[a] **Thus** a suit by a citizen against a citizen of same state and an alien is not removable. Merchants' Cotton Press, etc., Co. v. Insurance Co. of North America, 151 U. S. 368, 14 SCt 367, 38 L. ed. 195; King v. Cornell, 106 U. S. 395, 1 SCt 312, 27 L. ed. 60; Guarantee Co. of North America v. Lynchburg First Nat. Bank, 95 Va. 480, 28 SE 909. See Hervey v. Illinois Midland R. Co., 12 F. Cas. No. 6,434, 7 Biss. 103 (where under the condition of the record the federal court could not take jurisdiction under the Act of 1875).

[43] Niccum v. Northern Assur. Co., 17 F. (2d) 160.

[44] Meyer v. Delaware R. Constr. Co., 100 U. S. 457, 25 L. ed. 593.

[45] Niccum v. Northern Assur. Co., 17 F. (2d) 160.

[46] See cases infra notes 47, 48.

[a] **Under the Judiciary Act of 1789,** where one plaintiff was a citizen of the state in which suit was brought and other plaintiffs were aliens, removability was denied. Denniston v. New York, etc., R. Co., 1 Hilt. (N. Y.) 62, 2 AbbPr 278.

[b] **Under the Removal Act of 1875,** the removability of a suit by a nonresident citizen and an alien against a nonresident citizen of a state other than that of the citizen plaintiff was recognized. Carson v. Hyatt, 118 U. S. 279, 6 SCt 1050, 30 L. ed. 167.

upheld,[47] and in others it has been denied.[48]

[§ 147] **4. Arrangement or Alignment of Parties.**[49] While under the Removal Acts prior to the Act of 1875, a contrary rule prevailed,[50] under the Act of 1875 and subsequent acts, in determining between whom the controversy exists or who are opposing parties, the court is not bound by the title of the cause or the form of the pleadings,[51] but may and should examine the record and, regardless of the formal places of the parties as plaintiffs or defendants, arrange them on opposite sides of the controversy, according to the facts, upon ascertaining the matter in dispute[52] and the actual interests of the party;[53] and the rule applies where an alien is a party,[54] and where a resultant realignment either defeats the right to remove,[55] or sustains such right.[56] The alignment of the parties in plaintiff's pleading will govern, however, where it appears that the parties are properly aligned by such pleading.[57]

What constitutes similar interest. The fact that the ultimate interest of two parties may be the same is not of itself sufficient to authorize their alignment on the same side,[58] and where one of such parties has taken a position antagonistic to the other, and is under the control of still another party, whose position is similarly antagonistic, the parties who otherwise would have a common interest should be aligned on opposite sides.[59]

Where several controversies are involved, the authority of the court to realign the parties as to one controversy has apparently been recognized, although some of the parties placed on the same side are adversary parties as to another and different controversy.[60]

In a garnishment proceeding in which the garnishee denies liability to the judgment debtor, the judgment creditor and the judgment debtor have been aligned on the same side.[61]

Stockholders' suits. In a suit by a stockholder of a corporation to enforce a right of the corporation, the corporation is properly aligned as a defendant where it takes a position antagonistic to plaintiff[62] and is under the control of another defendant;[63] but where the corporation or those in control of the corporation are not opposed to the object sought by plaintiff,[64] or where plaintiff is in control of the corporation,[65] the corporation ordinarily should be aligned with plaintiff.

Creditors' suits. In a suit by an attaching creditor to set aside certain judgments against the debtor, other attaching creditors who were joined as defendants have been treated as plaintiffs.[66]

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[47] Compania Minera v. American Metal Co., 262 Fed. 183 (dictum); Baker v. Pinkham, 211 Fed. 728; Roberts v. Pacific, etc., R., etc., Co., 121 Fed. 785, 58 CCA 61 [aff 104 Fed. 577]; Roberts v. Pacific, etc., R., etc., Co., 104 Fed. 577; Ballin v. Lehr, 24 Fed. 193.

[48] Tracy v. Morel, 88 Fed. 801. See Carp v. Queen Ins. Co., 168 Fed. 782 (where a motion to remand was granted); Harvey v. Illinois Midland R. Co., 3 Fed. 707 (apparently recognizing rule).

[49] **Rearrangement of parties on interposition of counterclaim as affecting right to consider plaintiff as defendant** see infra § 216.

[50] Meyer v. Delaware R. Constr. Co., 100 U. S. 457, 25 L. ed. 593.

[51] Meyer v. Delaware R. Constr. Co., supra; Egyptian Novaculite Co. v. Stevenson, 8 F. (2d) 576 (recognizing rule); Harrison v. Harrison, 5 F. (2d) 1001; Boatmen's Bank v. Fritzlen, 135 Fed. 650, 68 CCA 288 [rev 128 Fed. 608, and certiorari den 198 U. S. 586, 25 SCt 803, 49 L. ed. 1174]. And see cases infra notes 52–56.

[52] Evers v. Watson, 156 U. S. 527, 15 SCt 430, 39 L. ed. 520; Carson v. Hyatt, 118 U. S. 279, 6 SCt 1050, 30 L. ed. 167; Barney v. Latham, 103 U. S. 205, 26 L. ed. 514; Meyer v. Delaware R. Constr. Co., 100 U. S. 457, 25 L. ed. 593; Kiefer v. Idaho Falls, 19 F. (2d) 538 (dictum); Zumbrunn v. Schwartz, 17 F. (2d) 609; Colleton Mercantile, etc., Co. v. Savannah River Lumber Co., 280 Fed. 358; Boatmen's Bank v. Fritzlen, 135 Fed. 650, 68 CCA 288 [rev 128 Fed. 608, and certiorari den 198 U. S. 586, 25 SCt 803, 49 L. ed. 1174]; Groel v. New Jersey United Electric Co., 132 Fed. 252. See Rand v. Hercules Powder Co., 28 F. (2d) 131 (apparently recognizing rule). And see cases infra note 53.

[53] Hellenthal v. John Hancock Mut. L. Ins. Co., 31 F. (2d) 997 (recognizing rule); Rose v. United American Ins. Co., 17 F. (2d) 854; Egyptian Novaculite Co. v. Stevenson, 8 F. (2d) 576 (recognizing rule); Harrison v. Harrison, 5 F. (2d) 1001; Baker v. Duwamish Mill Co., 149 Fed. 612; Lucas v. Milliken, 139 Fed. 816; Boatmen's Bank v. Fritzlen, 135 Fed. 650, 68 CCA 288 [rev 128 Fed. 608, and certiorari den 198 U. S. 586, 25 SCt 803, 49 L. ed. 1174]; Jarvis v. Crozier, 98 Fed. 753; Hutton v. Bancroft, 77 Fed. 481; Brown v. Murray, 43 Fed. 614; Anderson v. Bowers, 40 Fed. 708; Sayer v. La Salle, etc., Gas-Light, etc., Co., 14 Fed. 69, 9 Biss. 372; Burke v. Flood, 1 Fed. 541, 6 Sawy. 220; Hutton v. Bancroft, 8 Del. Ch. 55, 67 A 972; Boatmen's Bank v. Fritzlen, 75 Kan. 479, 89 P 915, 22 LRA NS 1235 [aff 212 U. S. 364, 29 SCt 366, 53 L. ed. 551]; Swann v. Myers, 79 N. C. 101. And see cases supra note 52.

[a] **Creditor and trustee in bankruptcy.**—In a suit to set aside a fraudulent transfer, in which suit the fraudulent grantor's trustee in bankruptcy, a citizen of the same state as defendants, intervened, it was held that there was no diversity of citizenship making the cause removable, the interest of plaintiff and the trustee in bankruptcy being the same. Casey v. Baker, 212 Fed. 247.

[54] Niccum v. Northern Assur. Co., 17 F. (2d) 160. See Merchants' Cotton Press, etc., Co. v. Insurance Co. of North America, 151 U. S. 368, 14 SCt 367, 36 L. ed. 195.

[55] Casey v. Baker, 212 Fed. 247; Pollok v. Louchheim, 19 Fed. 465.

[56] Harter Tp. v. Kernochan, 103 U. S. 562, 26 L. ed. 411; Meyer v. Delaware R. Constr. Co., 100 U. S. 457, 25 L. ed. 593; Real Estate Loan Co. v. Brown, 23 F. (2d) 329; Rose v. United American Ins. Co., 17 F. (2d) 854; Harrison v. Harrison, 5 F. (2d) 1001; Consolidated Textile Corp. v. Iserson, 294 Fed. 289; Colleton Mercantile, etc., Co. v. Savannah River Lumber Co., 280 Fed. 358; First Nat. Bank v. Bridgeport Trust Co., 117 Fed. 969; Jarvis v. Crozier, 98 Fed. 753; Boatmen's Bank v. Fritzlen, 75 Kan. 479, 89 P 915, 22 LRANS 1235 [aff 212 U. S. 364, 29 SCt 366, 53 L. ed. 551]. And see cases supra notes 52, 53.

[57] Venner v. Great Northern R. Co., 209 U. S. 24, 28 SCt 328, 52 L. ed. 666; Hellenthal v. John Hancock Mut. L. Ins. Co., 31 F. (2d) 997; Kiefer v. Idaho Falls, 19 F. (2d) 538; Egyptian Novaculite Co. v. Stevenson, 8 F. (2d) 576; Hidden v. Washington-Oregon Corp., 217 Fed. 303; Whitaker v. Condon, 217 Fed. 139; Groel v. New Jersey United Electric Co., 132 Fed. 252; Schwarzler v. Great American Ins. Co., 135 Misc. 913, 239 NYS 684.

[58] Venner v. Great Northern R. Co., 209 U. S. 24, 28 SCt 328, 52 L. ed. 666; Hellenthal v. John Hancock Mut. L. Ins. Co., 31 F. (2d) 997.

[59] Venner v. Great Northern R. Co., 209 U. S. 24, 28 SCt 328, 52 L. ed. 666; Hellenthal v. John Hancock Mut. L. Ins. Co., 31 F. (2d) 997.

[60] Fritzlen v. Boatmen's Bank, 212 U. S. 364, 29 SCt 366, 53 L. ed. 551 [aff 75 Kan. 479, 89 P 915, 22 LRANS 1235]; Boatmen's Bank v. Fritzlen, 135 Fed. 650, 68 CCA 288 [rev 128 Fed. 608, and certiorari den 198 U. S. 586, 25 SCt 803, 49 L. ed. 1174]. But see Woodrum v. Clay, 33 Fed. 897; Springer v. Sheets, 115 N. C. 370, 20 SE 469 (in both cases realignment was refused).

Separable controversies in general see infra §§ 180–193.

[61] Baker v. Duwamish Mill Co., 149 Fed. 612 (garnishee proceeding after judgment against defendant in the principal action).

[62] East Tennessee, etc., R. Co. v. Grayson, 119 U. S. 240, 7 SCt 190, 30 L. ed. 382; New Jersey Cent. R. Co. v. Mills, 113 U. S. 249, 5 SCt 456, 28 L. ed. 949.

[63] Venner v. Great Northern R. Co., 209 U. S. 24, 28 SCt 328, 52 L. ed. 666; Baillie v. Backus, 230 Fed. 711; Crawford v. Seattle, etc., R. Co., 198 Fed. 920; Groel v. New Jersey United Electric Co., 132 Fed. 252; MacGinniss v. Boston, etc., Consol. Copper, etc., Min. Co., 119 Fed. 96, 55 CCA 648; De Neufville v. New York, etc., R. Co., 81 Fed. 10, 26 CCA 306.

[64] Groel v. New Jersey United Electric Co., 132 Fed. 252 (dictum); Hutton v. Bancroft, 77 Fed. 481.

[65] Lucas v. Milliken, 139 Fed. 816.

[66] Pollok v. Louchheim, 19 Fed. 465.

Taxpayers' suits. In suits by taxpayers to prevent the levy of taxes and payments on bonds of political subdivisions of the state, public officers who are made defendants should under certain circumstances be realigned with plaintiff on the side opposite from defendant bondholders;[67] but a different rule has been applied in the case of a suit to cancel, or to prevent the performance of, a contract entered into by such a political subdivision, and realignment of such subdivision and its officers with plaintiff on the side opposite from the defendant contractor has been refused.[68]

In a suit in which the validity of a mortgage is in issue, ordinarily the mortgagor is aligned with the parties who are attacking the mortgage.[69]

In a suit by a cestui que trust to enforce a right, on refusal of the trustee to sue, the propriety of realigning defendant trustee with plaintiff has been recognized.[70]

Partition. The rule providing for realignment of parties has been applied so as to permit the removal of a suit for partition.[71]

[§ 148] 5. Real, Necessary, and Formal or Nominal Parties[72]

—a. In General. In passing on the right to remove, in general the courts consider the real parties[73] and only those who are indispensable or necessary parties;[74] and in this connection, an indispensable party has been defined as one who has such an interest in the subject matter of the controversy that a final decree cannot be rendered between the other parties to the suit, without radically and injuriously affecting his interest, or without leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience.[75] So, in determining the question here involved, a party who is merely a nominal or formal party with no real interest in the controversy,[76] and, under certain circumstances at least, a party who while a proper, is not a necessary or indispensable, party to the controversy,[77] may be disregarded; and in general the suit is removable where the requisite diversity and other jurisdictional requisites exist upon omission from consideration of formal or nominal parties,[78] or other than necessary or indispensable parties.[79] Indispensable or necessary parties cannot, however, be disregarded,[80] and where such a party defendant is a citizen of the same state as plaintiff,[81] or is a resident of the state where the suit is brought,[82] or where such a party is an alien defendant and plaintiff is also an alien,[83] the suit is not removable. So, where plaintiff might have set up either a joint or severable cause of action, he may properly sue on the joint cause of action, even though his action in this regard prevents the removal of the suit.[84]

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[67] Harter Tp. v. Kernochan, 103 U. S. 562, 26 L. ed. 411; Anderson v. Bowers, 40 Fed. 708.

[68] Kiefer v. Idaho Falls, 19 F. (2d) 538; Egyptian Novaculite Co. v. Stevenson, 8 F. (2d) 576.

[69] Fritzlen v. Boatmen's Bank, 212 U. S. 364, 29 SCt 366, 53 L. ed. 551 [aff 75 Kan. 579, 89 P 915, 22 LRA NS 1235]; Boatmen's Bank v. Fritzlen, 135 Fed. 650, 68 CCA 288 [rev 128 Fed. 608]; Wolcott v. Sprague, 55 Fed. 545. Compare Springer v. Sheets, 115 N. C. 370, 20 SE 469 (where realignment of plaintiff mortgagor with the trustee and beneficiary of a trust deed or mortgage executed by plaintiff was refused although plaintiff sought as part of the relief the cancellation of another mortgage).

[70] Swann v. Myers, 79 N. C. 101. Compare Hack v. Chicago, etc., R. Co., 23 Fed. 356 (where the citizenship of a trustee who was not made a party was disregarded).

[71] Jarvis v. Crozier, 98 Fed. 753.

[72] **Cross references:**

Improper joinder of:
  Defendants see infra § 168.
  Plaintiffs see infra § 167.
Parties in general see Equity 21 C. J. §§ 253–356; Parties 47 C. J. p 1.
Suits on joint causes of actions see passim infra §§ 167–173.

[73] In re Utah Constr. Co.'s Water Right, 30 F. (2d) 436; Grosso v. Butte Electric R. Co., 217 Fed. 422; Cella v. Brown, 136 Fed. 439 [aff 144 Fed. 742, 75 CCA 608, and certiorari den 202 U. S. 620, 26 SCt 766, 50 L. ed. 1174]; Bates v. New Orleans, etc., R. Co., 16 Fed. 294; Danvers Sav. Bank v. Thompson, 133 Mass. 182.

[a] **One who is neither a party of record** nor a party in interest should not be considered. Westbrook v. Director Gen. of Railroads, 263 Fed. 211.

[74] Lee v. Lehigh Valley Coal Co., 267 U. S. 542, 45 SCt 385, 69 L. ed. 782 (recognizing rule); Salem Trust Co. v. Manufacturers' Finance Co., 264 U. S. 182, 44 SCt 266, 68 L. ed. 628, 31 ALR 867 [rev on other grounds 280 Fed. 803]; Geer v. Mathieson Alkali Works, 190 U. S. 428, 23 SCt 807, 47 L. ed. 1122; Genuine Panama Hat Works v. Webb, 36 F. (2d) 265; Von Herberg v. Seattle, 27 F. (2d) 457 [certiorari den 278 U. S. 644 mem, 49 SCt 80 mem, 73 L. ed. 558 mem]; Davidson v. Montana-Dakota Power Co., 22 F. (2d) 688; Niccum v. Northern Assur. Co., 17 F. (2d) 160; Egyptian Novaculite Co. v. Stevenson, 8 F. (2d) 576; Fienup v. Kleinman, 5 F. (2d) 137; Washington v. Pacific Tel., etc., Co., 1 F. (2d) 327; Hamilton v. Empire Gas, etc., Co., 297 Fed. 422; Rogers v. Penobscot Min. Co., 154 Fed. 606, 83 CCA 380; Politz v. Wabash R. Co., 153 Fed. 941; Cella v. Brown, 144 Fed. 742, 75 CCA 608 [aff 136 Fed. 439, and certiorari den 202 U. S. 620, 26 SCt 766, 50 L. ed. 1174]; New York v. New Jersey SS. Transp. Co., 24 Fed. 817; Deford v. Mehaffy, 14 Fed. 181; Ruckman v. Ruckman, 1 Fed. 587. See Rose v. United American Ins. Co., 17 F. (2d) 854 (where the right to remove was upheld); Follett v. Seneca Falls Water Works Co., 123 Misc. 823, 206 NYS 468 (where the right to remove was recognized).

Necessary or indispensable parties in general see Equity §§ 276–297.

[75] Fienup v. Kleinman, 5 F. (2d) 137; Rogers v. Penobscot Min. Co., 154 Fed. 606, 83 CCA 380.

[76] U. S.—Ex p. Nebraska, 209 U. S. 436, 28 SCt 581, 52 L. ed. 876; Maryland v. Baldwin, 112 U. S. 490, 5 SCt 278, 28 L. ed. 822; Bacon v. Rives, 106 U. S. 99, 1 SCt 3, 27 L. ed. 69; Meyer v. Delaware R. Constr. Co., 100 U. S. 457, 25 L. ed. 593; Wood v. Davis, 18 How. 467, 15 L. ed. 460; In re Utah Constr. Co.'s Water Right, 30 F. (2d) 436; Rand v. Hercules Powder Co., 28 F. (2d) 131 (recognizing rule); Washington v. Pacific Tel., etc., Co., 1 F. (2d) 327; Richardson v. Southern Idaho Water Power Co., 209 Fed. 949; Bagenas v. Southern Pac. Co., 180 Fed. 887; Rogers v. Penobscot Min. Co., 154 Fed. 606, 83 CCA 380; Johnston R. Frog, etc., Co. v. Buda Foundry, etc., Co., 148 Fed. 883; Wirgman v. Persons, 126 Fed. 449, 62 CCA 63 [aff 116 Fed. 877, and app dism 196 U. S. 636 mem, 25 SCt 795 mem, 49 L. ed. 629 mem]; Title Guarantee, etc., Co. v. Studebaker, 100 Fed. 358; Garrard v. Silver Peak Mines, 76 Fed. 1; Carver v. Jarvis-Conklin Mortg. Trust Co., 73 Fed. 9; Sioux City, etc., R. Co. v. Chicago, etc., R. Co., 27 Fed. 770; Chicago, etc., R. Co. v. McComb, 5 F. Cas. No. 2,670, 17 Blatchf. 371; Edgerton v. Gilpin, 8 F. Cas. No. 4,280, 3 Woods 277; Girardey v. Moore, 10 F. Cas. No. 5,462, 3 Woods 397; Hervey v. Illinois Midland R. Co., 12 F. Cas. No. 6,434, 7 Biss. 103; Taylor v. Rockefeller, 23 F. Cas. No. 13,802, 7 NYWklyDig 3, 6 WklyNC (Pa.) 283.

Ga.—Louisville, etc., R. Co. v. Newman, 128 Ga. 283, 57 SE 515; Withers v. John Hopkins Place Sav. Bank, 104 Ga. 89, 30 SE 766; Steiner v. Mathewson, 77 Ga. 657.

Ky.—Harper v. Gaitheman, 1 KyL 419.

N. C.—Calloway v. Ore Knob Copper Co., 74 N. C. 200.

Oh.—Hadley v. Dunlap, 10 Oh. St. 1; Smith v. Baltimore, etc., R. Co., 7 OhS&CP 542, 7 OhNP 145.

[77] Barney v. Latham, 103 U. S. 205, 26 L. ed. 514; In re Utah Constr. Co.'s Water Right, 30 F. (2d) 436; McHenry v. New York, etc., R. Co., 25 Fed. 65; Corbin v. Boies, 18 Fed. 3; Deford v. Mehaffy, 14 Fed. 181; Ruckman v. Ruckman, 1 Fed. 587. Compare Wilson v. Big Joe Block Coal Co., 135 Iowa 531, 113 NW 348, 14 AnnCas 266 (where the right to remove was denied).

Proper but not indispensable party to separable controversy see infra § 193.

[78] Salem Trust Co. v. Manufacturers' Finance Co., 264 U. S. 182, 44 SCt 266, 68 L. ed. 628, 31 ALR 867 [rev on other grounds 280 Fed. 803]; In re Utah Constr. Co.'s Water Right, 30 F. (2d) 436; Davidson v. Montana-Dakota Power Co., 22 F. (2d) 688; Brown v. Murray, 43 Fed. 614; Edgerton v. Gilpin, 8 F. Cas. No. 4,280, 3 Woods 277; Hatch v. Chicago, etc., R. Co., 11 F. Cas. No. 6,204, 6 Blatchf. 105; Ferris v. Southern R. Co., 194 N. C. 653, 140 SE 607; Allred v. Trexler Lumber Co., 194 N. C. 547, 140 SE 157. And see cases supra note 74.

[79] Salem Trust Co. v. Manufacturers' Finance Co., 264 U. S. 182, 44 SCt 266, 68 L. ed. 628, 31 L. ed. 867 [rev on other grounds 280 Fed. 803]; Bacon v. Rives, 106 U. S. 99, 1 SCt 3, 27 L. ed. 69; Fienup v. Kleinman, 5 F. (2d) 137; Rogers v. Penobscot Min. Co., 154 Fed. 606, 83 CCA 380; Wirgman v. Persons, 126 Fed. 449, 62 CCA 63 [app dism 196 U. S. 636, 25 SCt 795, 49 L. ed. 629]; Corbitt v. Farmers' Bank, 113 Fed. 417; Lee v. Standard Motors Finance Co., 166 Ga. 54, 142 SE 541.

[80] Merchants' Cotton Press Co. v. Insurance Co. of North America, 151 U. S. 368, 14 SCt 367, 38 L. ed. 195; Pepper v. Fordyce, 119 U. S. 469, 7 SCt 287, 30 L. ed. 435; Rand v. Walker, 117 U. S. 340, 6 SCt 769, 29 L. ed. 907; Coney v. Winchell, 116 U. S. 227, 6 SCt 366, 29 L. ed. 610; Egyptian

Bar by statute of limitations. The fact that the statute of limitations has run against defendant whose presence prevents removal does not authorize the elimination or disregard of such defendant.[85]

[§ 149] **b. Disclaimer or Release of Interest and Default.** It has been held or recognized that a party to the suit may not be disregarded in determining removability merely because he disclaims an interest in the controversy,[86] at least where it is apparent that an interest in property involved remains in such party;[87] but there is authority for the view that a party who has disclaimed interest may be disregarded;[88] and it has been held that where, after the suit is commenced, a necessary party defendant releases his interest in the subject matter of the suit, such defendant may be disregarded.[89]

Default in appearance or pleading. The fact that judgment by default for want of pleading or appearance has been taken against the defendant whose presence prevents removal does not permit the disregard of such defendant.[90]

[§ 150] **c. Particular Parties or Persons—(1) United States and United States Officer.** In view of the rule that the United States cannot be considered a citizen of any state,[91] there can be no removal on the ground of diversity of citizenship where the United States is a real party,[92] even though the citizenship of a United States officer against whom the suit is brought, if such citizenship could be considered, would furnish the necessary diversity,[93] such officer being regarded as a nominal party.[94] A United States marshal in a suit in his name on a forthcoming bond, for the use of attaching creditors, has been regarded merely as a formal or nominal party whose presence does not affect the removability of the suit.[95]

Director general of railroads and railroad agent. The rule that a removal may not be based on the citizenship of an officer representing the United States as a party has been recognized or applied in the case of suits against the designated agent for personal injuries resulting from the operation of a railroad during federal control.[96] By virtue of statute,[97] such an action against either the designated agent or the director general of railroads is removable where it would have been removable if there had been no federal control and the action had been against the railroad company which owned the railroad;[98] otherwise not.[99]

[§ 151] **(2) State and Officer in State.**[1] Under the rule that the state is not a citizen within the

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Novaculite Co. v. Stevenson, 8 F. (2d) 576; Irvin v. Anthony Shoals Co., 277 Fed. 926; Sullivan v. Lloyd, 213 Fed. 275; Moloney v. Cressler, 210 Fed. 104, 126 CCA 618; Ward v. Arredondo, 29 F. Cas. No. 17,148, 1 Paine 410; New Orleans v. Seixas, 35 La. Ann. 36; Nulton v. Isaacs, 30 Gratt. (71 Va.) 726.

[a] **The fact that a defendant is pecuniarily irresponsible** (1) so that a judgment against him would be of no value, does not make him a formal party. Deere v. Chicago, etc., R. Co., 85 Fed. 876. (2) Pecuniary irresponsibility as evidence of fraudulent joinder see infra § 171.

[b] **Condemnation proceedings.**—All owners or claimants of property which it is sought to condemn have been regarded as necessary parties for purposes of removal where the law of the state in which the proceeding is prosecuted makes such owners or claimants necessary parties. West Side R. Co. v. California Pacific R. Co., 202 Fed. 331.

81. Pepper v. Fordyce, 119 U. S. 469, 7 SCt 287, 30 L. ed. 435; Coney v. Winchell, 116 U. S. 227, 6 SCt 366, 29 L. ed. 610; Egyptian Novaculite Co. v. Stevenson, 8 F. (2d) 576; Foy v. Georgia-Alabama Power Co., 159 Ga. 14, 124 SE 513; Danvers Sav. Bank v. Thompson, 130 Mass. 490.

82. Rand v. Hercules Powder Co., 28 F. (2d) 131; Bryan v. Barriger, 251 Fed. 328; Mogg v. Farley, 205 Ky. 25, 265 SW 449; Jackson County Bank v. Hester, 188 N. C. 68, 123 SE 308. See Continental Trust Co. v. Butts County, 242 Fed. 539 (where remand was directed).

Nonresidence in state where suit brought as element of defendant's right to remove see infra § 225.

83. Compania Minera v. American Metal Co., 262 Fed. 183.

84. See infra § 168.

85. Patton v. Champion Fibre Co., 192 N. C. 48, 133 SE 174. But see Seattle v. Great Northern R. Co., 239 Fed. 1009 (where, however, a question as to fraudulent joinder was involved).

86. Hax v. Caspar, 31 Fed. 499; New Jersey Zinc Co. v. Trotter, 18 F. Cas. No. 10,167.

87. Washington v. Columbus, etc., R. Co., 53 Fed. 673.

88. Day v. Oatis, 85 Miss. 128, 37 S 559; Reed v. Hardeman County, 77 Tex. 165, 13 SW 1024.

89. Danvers Sav. Bank v. Thompson, 133 Mass. 182.

90. Brooks v. Clark, 119 U. S. 502, 7 SCt 301, 30 L. ed. 482; Putnam v. Ingraham, 114 U. S. 57, 5 SCt 746, 29 L. ed. 65; Lederer v. Sire, 105 Fed. 529; Fairchild v. Durand, 8 AbbPr (N. Y.) 305. But see Judah v. Iowa Barb-Wire Co., 32 Fed. 561 (where remand was denied).

Effect of failure to serve process see infra § 175.

91. See supra § 126.

92. North Side Canal Co. v. Twin Falls Canal Co., 12 F. (2d) 311; Westbrook v. Director Gen. of Railroads, 263 Fed. 211.

93. Schroeder v. Davis, 32 F. (2d) 454; North Side Canal Co. v. Twin Falls Canal Co., 12 F. (2d) 311.

94. Schroeder v. Davis, 32 F. (2d) 454.

95. Wade v. Worstman, 29 Fed. 754; Worstman v. Wade, 77 Ga. 651, 4 AmSR 102.

96. Schroeder v. Davis, 32 F. (2d) 454; Shirer v. Davis, 295 Fed. 317. See Hill v. Director-Gen. of Railroads, 178 N. C. 607, 101 SE 376 (apparently recognizing rule).

97. Federal Control Act March 21, 1918 (40 U. S. St. at L. 456 c 25 § 10); Transportation Act Febr. 28, 1920 (41 U. S. St. at L. 461 c 91 § 206 [a]).

98. Schroeder v. Davis, 32 F. (2d) 454; Ellis v. Davis, 4 F. (2d) 323; Davis v. Hawkins, 28 Ga. A. 203, 110 SE 500. See Davis v. Slocomb, 263 U. S. 158, 44 SCt 59, 68 L. ed. 226 (writ of error dismissed on the ground that the only ground for removal was diversity of citizenship; hence the judgment of the Circuit Court of Appeals was final); Hall v. Payne, 274 Fed. 237 (where motion to remand suit for injury to live stock during transportation was denied and motion to amend petition for removal was granted). But see Westbrook v. Director Gen. of Railroads, 263 Fed. 211 (an action in a state court against the director general of railroads, as government operator of a line of railroad, was not removable on the ground of diversity of citizenship between plaintiff and the corporation owning such line).

99. Shirer v. Davis, 295 Fed. 317; Payne v. Southern Cotton Oil Co., 27 Ga. A. 283, 108 SE 71; Porsmer v. Davis, 152 Minn. 181, 188 NW 279; Mizell v. Atlantic Coast Line R. Co., 181 N. C. 36, 106 SE 133; Hill v. Director-Gen. of Railroads, 178 N. C. 607, 101 SE 376.

[a] **Where the director general of railroads obtained a stay of proceedings** in an action against him and a railroad company of the state in which the action was brought, on the ground that under his own order the action should be brought only against him, he should be regarded as a party only because of his control and management of defendant railroad company, and the action was not removable. Hill v. Director-Gen. of Railroads, 178 N. C. 607, 101 SE 376.

1. **Original jurisdiction of federal courts of suits to which state a party nominally or in interest** see Federal Courts § 54.

Removability of suit to which state a party as arising under constitution or laws of United States in general see supra § 53.

meaning of the Removal Act,[2] if the state is the real party, the suit is not removable on the ground here considered.[3] So, removability has been denied where the state is both the nominal or formal and the real party,[4] and also where, although the state is the real party plaintiff, it is not a party to the record,[5] the state officer who brings the suit being regarded merely as a nominal party.[6] Where, however, the state has no real interest in the controversy,[7] and is merely a nominal or formal party,[8] or not an indispensable[9] party to the suit, its presence does not prevent removal where the required diversity of citizenship otherwise exists and the other jurisdictional requisites are present; and the right to remove will not be denied merely because the suit is brought by a state officer.[10] The view has been expressed that the interest must be one in the state as an artificial person,[11] and that the right to remove will not be denied merely because the state has a general governmental interest in a suit brought by state officers,[12] because, as an incident to the relief sought in a suit by state officers, certain penalties may be recovered for the benefit of a political subdivision of the state,[13] or because the state may, in certain contingencies, become liable for the costs of a suit brought by state officers.[14] So, the courts have declined to apply the rule prohibiting removal where a political subdivision of the state as plaintiff has an independent interest in the controversy,[15] notwithstanding the state also has an interest;[16] and it has been laid down broadly that the mere fact that the state would be the beneficiary of a recovery in a suit by one of its political subdivisions duly authorized to sue, did not affect the right to remove.[17]

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[2] See supra § 127.

[3] U. S.—Title Guaranty, etc., Co. v. Idaho, 240 U. S. 136, 36 SCt 345, 60 L. ed. 566; Arkansas v. Kansas, etc., Coal Co., 183 U. S. 185, 22 SCt 47, 46 L. ed. 144; Postal Tel. Cable Co. v. Alabama, 155 U. S. 482, 15 SCt 192, 39 L. ed. 231; Germania Ins. Co. v. Wisconsin, 119 U. S. 473, 7 SCt 260, 30 L. ed. 461; Stone v. South Carolina, 117 U. S. 430, 6 SCt 799, 29 L. ed. 962; Ex p. Oklahoma, 37 F. (2d) 862; In re Johnson Oil, etc., Co., 26 F. (2d) 951 (recognizing rule); Parks v. Carriere Cons. School Dist., 12 F. (2d) 37; Robertson v. Ingram Day Lumber Co., 271 Fed. 1023; Ohio v. Swift, 270 Fed. 141 [certiorari den 257 U. S. 633 mem, 42 SCt 47 mem, 66 L. ed. 407 mem, app dism 260 U. S. 146, 43 SCt 22, 67 L. ed. 176]; Robertson v. Jordan River Lumber Co., 269 Fed. 606; Chicago, etc., R. Co. v. Nebraska, 251 Fed. 279, 163 CCA 435; Nevada-California Power Co. v. Hamilton, 235 Fed. 317; In re Silvies River, 199 Fed. 495; West Virginia v. King, 112 Fed. 369; Indiana v. Alleghany Oil Co., 85 Fed. 870; Minnesota v. Guaranty Trust, etc., Co., 73 Fed. 914; Indiana v. Tolleston Club, 53 Fed. 18; Ferguson v. Ross, 38 Fed. 161, 3 LRA 322; Grinnell v. Johnson, 28 Fed. 2; Alabama v. Wolffe, 18 Fed. 836; New Jersey v. Babcock, 18 F. Cas. No. 10,163, 4 Wash. C. C. 344. See Place v. Illinois, 69 Fed. 481, 16 CCA 300 (where case was remanded).

Ill.—Peo. v. St. Louis, 297 Ill. 199, 130 NE 366.

Ind.—Darnell v. State, 174 Ind. 143, 90 NE 769 [aff 226 U. S. 390, 33 SCt 120, 57 L. ed. 267].

Ky.—Com. v. Ayer, etc., Tie Co., 117 Ky. 161, 77 SW 686, 79 SW 290, 25 KyL 1068, 2061; Chicago, etc., R. Co. v. Com., 115 Ky. 278, 72 SW 1119, 24 KyL 2124.

Mass.—Com. v. Norman, 249 Mass. 123, 144 NE 66.

Nev.—State v. Reno Tract. Co., 41 Nev. 405, 171 P 375, LRA1918D 847.

N. C.—U. S. v. Douglas, 113 N. C. 190, 18 SE 202.

N. D.—Bismarck v. Bismarck Water Supply Co., 47 N. D. 179, 181 NW 596.

Oh.—State v. Adams, 9 Oh. Cir. Ct. 21, 6 Oh. Cir. Dec. 46.

See Com. v. U. S. Fidelity, etc., Co., 18 Pa. Dist. 656 (apparently recognizing rule).

[a] **State as trustee.**—The state, as the holder of the legal title to lands in trust for a class as beneficiaries, was not a merely nominal party to a suit in respect of such lands, and the suit, therefore, could not be removed to the United States court for diversity of citizenship. Robertson v. Ingram Day Lumber Co., 271 Fed. 1023; Robertson v. Jordan River Lumber Co., 269 Fed. 606.

[b] **Proceeding to list omitted taxable property.**—In Oklahoma, a proceeding to list omitted taxable property, under Comp. St. (1921) §§ 9798–9801, has been held a proceeding by the state and not removable for diverse citizenship. Ex p. Oklahoma, 37 F. (2d) 862. But see In re Johnson Oil, etc., Co., 26 F. (2d) 951 (where it was held that the county was the real party in interest).

[4] U. S.—Missouri v. Chicago, etc., R. Co., 216 Fed. 562.

Ill.—Peo. v. St. Louis, 297 Ill. 199, 130 NE 366.

Ind.—Southern R. Co. v. State, (A.) 72 NE 174.

Mass.—Com. v. Norman, 249 Mass. 123, 144 NE 66.

Nev.—State v. Reno Tract. Co., 41 Nev. 405, 171 P 375, LRA1918D 847.

N. D.—Bismarck v. Bismarck Water Supply Co., 47 N. D. 179, 181 NW 596.

And see cases supra note 3.

[a] **Proceeding for collection of taxes.**—(1) Proceeding by the people on the relation of a county collector for a judgment of sale for taxes, which was governed by Illinois Rev. L. (Hurd's St. [1919] p 2501) §§ 191, 203, was not removable. Peo. v. St. Louis, 297 Ill. 199, 130 NE 366. (2) A suit by the commissioner of corporations and taxation in the name of the commonwealth to enforce the payment of income tax to the commonwealth was a suit by the state, and there could be no removal on the ground of diversity of citizenship, although defendant in the petition for removal alleged that the assessment of the tax was unlawful and confiscatory and the personal act of the commissioner. Com. v. Norman, 249 Mass. 123, 144 NE 66.

[b] **Action to recover penalties** from a railroad company for failure to post the arrival of trains, brought under Burns Annot. St. (1901) § 5186, was not removable. Southern R. Co. v. State, (Ind. A.) 72 NE 174.

[c] **Quo warranto** (1) by state, on relation of city, against foreign corporation, for failure to comply with franchise granted by a city, instituted by the Attorney General, under Rev. L. §§ 5656–5659, 5663, as to quo warranto, was an action by the state, and not by the city, preventing removal for diversity of citizenship. State v. Reno Tract. Co., 41 Nev. 405, 171 P 375, LRA1918D 847. (2) A quo warranto proceeding to determine defendant's title to office in a corporation organized under the laws of the state in which the suit was brought was not removable. Place v. Illinois, 69 Fed. 481, 16 CCA 300.

[d] **Suit to recover excess freight charges for benefit of shippers.**—A suit by a state to recover back, for the benefit of shippers, from certain railroad companies, freight charges in excess of the amount fixed by or under a state statute, was not removable to the federal court as involving diversity of citizenship, whether the state sued as trustee or otherwise. Missouri v. Chicago, etc., R. Co., 216 Fed. 562.

[5] Ex p. Nebraska, 209 U. S. 436, 28 SCt 581, 52 L. ed. 876 (recognizing rule); Missouri, etc., R. Co. v. Missouri R., etc., Comrs., 183 U. S. 53, 22 SCt 18, 46 L. ed. 78 (recognizing rule); Hickman v. Missouri, etc., R. Co., 97 Fed. 113 (recognizing rule); Ferguson v. Ross, 38 Fed. 161, 3 LRA 322. See Louisiana v. Jumel, 107 U. S. 711, 2 SCt 128, 27 L. ed. 448 (where the right to relief against certain state officers in a proceeding by mandamus removed under the Removal Act of 1875 was denied); In re Silvies River, 199 Fed. 495 (where a motion to remand a proceeding for the determination of water rights was granted).

[a] **Illustration.**—An action by a share inspector to recover penalties under New York L. (1875) c 604, as amended by L. (1885) c 414, for depositing prohibited materials in the waters of the bay and harbor of New York which penalties were to be paid into the state treasury. Ferguson v. Ross, 38 Fed. 161, 3 LRA 322.

[6] Ferguson v. Ross, 38 Fed. 161, 3 LRA 322.

[a] **A suit by an agent of the state as a nominal party in behalf of the state** presents a controversy to which the state is a party and cannot be removed on the ground of diversity of citizenship. Robertson v. Ingram Day Lumber Co., 271 Fed. 1023; Robertson v. Jordan River Lumber Co., 269 Fed. 606.

[7] Ex p. Nebraska, 209 U. S. 436, 28 SCt 581, 52 L. ed. 876. See Madisonville Tract. Co. v. St. Bernard Min. Co., 130 Fed. 789 (where the state was not a party either actually or formally to a condemnation proceeding by a railroad company and a motion to remand was denied).

[8] Ex p. Nebraska, 209 U. S. 436, 28 SCt 581, 52 L. ed. 876; Maryland v. Baldwin, 112 U. S. 490, 5 SCt 278, 28 L. ed. 822; Ohio v. Swift, 270 Fed. 141; Missouri v. Alt, 73 Fed. 302; Com. v. U. S. Fidelity, etc., Co., 18 Pa. Dist. 656.

[a] **Illustration.**—Suit in the name of the state for the use of an individual or of a political subdivision of the state. Maryland v. Baldwin, 112 U. S. 490, 5 SCt 278, 28 L. ed. 822; Missouri v. Alt, 73 Fed. 302; Com. v. U. S. Fidelity, etc., Co., 18 Pa. Dist. 656.

[9] Ex p. Nebraska, 209 U. S. 436, 28 SCt 581, 52 L. ed. 876.

[10] Missouri, etc., R. Co. v. Missouri R., etc., Comrs., 183 U. S. 53, 22 SCt 18, 46 L. ed. 78 [rev 151 Mo. 644, 52 SW 351]; Hickman v. Missouri, etc., R. Co., 97 Fed. 113.

[11] Missouri, etc., R. Co. v. Missouri R., etc., Comrs., 183 U. S. 53, 22 SCt 18, 46 L. ed. 78 [rev 151 Mo. 644, 52 SW 351].

[12] Missouri, etc., R. Co. v. Missouri R., etc., Comrs., supra; Hickman v. Missouri, etc., R. Co., 97 Fed. 113.

[13] Missouri, etc., R. Co., v. Missouri R., etc., Comrs., 183 U. S. 53, 22 SCt 18, 46 L. ed. 78 [rev 151 Mo. 644, 52 SW 351].

Constitutionality of statute, the enforcement of which is sought. There is authority for the view that a public officer, who brings a suit in the name of the state to enforce a statute which is violative,[18] or which defendant in good faith claims to be violative,[19] of the federal constitution, is the real party plaintiff, that the suit is removable where the requisite diversity of citizenship exists between such officer and defendant and the other jurisdictional requisites are present,[20] and that in such case a decision of the state court that the state is the party plaintiff is not binding on the federal court.[21] It has been held, however, that the principle involved in the rule so laid down has no application, where the state is itself acting in its sovereign capacity and is the only nominal and real party in interest.[22]

State officer as defendant. A state officer has been regarded as more than a mere nominal party and his citizenship as an individual has been given effect in a suit to impound certain property in his hands, of which property, in his official capacity, he holds title as trustee.[23] Where, however, the state officer has no real interest in the controversy, it has been held that his presence as defendant does not prevent removal.[24]

[§ 152] **(3) Political Subdivision of State, and Officer of Such Subdivision.** In accordance with general rules,[25] and in view of the rule that ordinarily a political subdivision of a state is regarded as a citizen within the rules as to removal,[26] the presence of such a political subdivision as a necessary party must be given effect in determining the question of removability;[27] but its presence may be disregarded where it is merely a nominal party and not a necessary party.[28] A public officer against whom no relief is sought except an injunction against an official act in aid of an act of another defendant, as to which an injunction is also sought, has been regarded merely as a formal party whose presence may be disregarded in determining the question of removability;[29] but it has been held that in a suit by an assignee for the benefit of creditors to protect the trust and to enjoin a deputy sheriff from selling the assigned property, the deputy sheriff was not a mere formal party within the rule here under discussion.[30]

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[14] Missouri, etc., R. Co. v. Missouri R., etc., Comrs., supra.

[15] Pearl River County v. Wyatt Lumber Co., 270 Fed. 26 [rev on other grounds 267 Fed. 605].

[a] **Suit by county in respect of school lands.**—Under Miss. Code (1906) §§ 4695-4716 (Hemingway Code §§ 7505-7527), which, as construed by the courts of that state, conferred on counties all the powers of suit regarding the sixteenth sections of land given to the state for school purposes under the Enabling Act, and made said counties the beneficiaries of the funds derived from such conveyances, a suit by a county to construe a conveyance and lease of timber on such sections, executed to a foreign corporation by the county board of supervisors, was a controversy between the county and the lessee, not between the state and lessee, and the cause was removable to the federal court. Pearl River County v. Wyatt Lumber Co., 270 Fed. 26 [rev on other grounds 267 Fed. 605].

[16] Port of Seattle v. Oregon, etc., R. Co., 255 U. S. 56, 41 SCt 237, 65 L. ed. 500.

[a] **Quieting title to tidelands.**—Under Wash. L. (1913) p 582, providing for payments by abutting owners in the nature of a rental for permits to use parts of waterways in the erection of wharves, docks, or other structures, and that seventy-five per cent of such rental shall be paid to the county for the use of the port of Seattle, such port had an independent financial interest in a suit by it to quiet the title of the state to tidelands as against the right of an adjoining owner to build piers, wharves, and other structures, and the suit was properly removed to a federal court, as against the objection that the state was the real party in interest. Port of Seattle v. Oregon, etc., R. Co., 255 U. S. 56, 41 SCt 237, 65 L. ed. 500.

[17] Parks v. Carriere Cons. School Dist., 12 F. (2d) 37.

[18] Ohio v. Swift, 270 Fed. 141 [certiorari den 257 U. S. 633 mem, 42 SCt 47 mem, 62 L. ed. 407 mem, app dism 260 U. S. 146, 43 SCt 22, 67 L. ed. 176].

[19] Ohio v. Swift, supra.

[20] Ohio v. Swift, supra.

[21] Ohio v. Swift, supra.

[22] Com. v. Norman, 249 Mass. 123, 144 NE 66.

[a] **Tax suit.**—In a suit by the state to recover a tax, the view was taken that the claim that the statute under which the tax was levied was invalid was immaterial in respect of the question as to removability. Com. v. Norman, 249 Mass. 123, 144 NE 66.

[23] Smith v. St. Louis Mut. L. Ins. Co., 2 Tenn. Ch. 656.

[24] Aroma Tp. v. Public Accounts Auditor, 2 Fed. 33.

[a] **Proceeding in respect of diversion of water.**—Proceedings by a Utah corporation to change the place of diversion of water, commenced before Idaho reclamation commissioner and opposed by Idaho residents, was removable for diversity of citizenship on contestants' appeal, petitioner being real party in interest, and not the department of reclamation. In re Utah Constr. Co.'s Water Right, 30 F. (2d) 436.

[b] **Prayer for injunction.**—Where the relief sought against a state officer was merely to restrain action by him in aid of another defendant, the presence of such officer did not, it was held, prevent removal. Aroma Tp. v. Public Accounts Auditor, 2 Fed. 33.

[25] See supra § 148.

[26] See supra § 128.

[27] See cases infra this note.

[a] **Suit involving conflicting series of county warrants.**—A county in Georgia which issued two series of warrants on the same consideration was a proper and necessary party to a suit between the holders of the two series. Continental Trust Co. v. Butts County, 242 Fed. 539.

[b] **Where it was sought to avoid disposal of certain land by a county** on the ground that such disposal was fraudulent on the part of the county, the county was a necessary party and its presence must be given effect. Missouri v. New Madrid County, 73 Fed. 304.

[c] **Avoidance of contract entered into by city.**—A city and a power company, which contracted for the city's payment of bonds from operating revenues of a street railway system, were necessary parties in a suit by a warrant holder to annul the contract and to restrain payments thereunder. Von Herberg v. Seattle, 27 F. (2d) 457 [certiorari den 278 U. S. 644 mem, 49 SCt 80 mem, 73 L. ed. 558 mem].

[28] See cases infra this note.

[a] **Suit to avoid conveyance of land because of formal defect.**—It has been held that a county was not a necessary party to a suit by a board of education brought in the name of a state for the benefit of the public schools of such county to have a deed to swamp lands declared invalid and cancelled because of lack of a seal, and to recover for trees removed, and that since plaintiff was a citizen and defendant other than the county was an alien, the suit was removable. Missouri v. Alt, 73 Fed. 302.

[29] Hyde v. Victoria Land Co., 125 Fed. 970 [app dism 137 Fed. 1022, 70 CCA 683]; May v. St. John, 38 Fed. 770; Sioux City, etc., R. Co. v. Chicago, etc., R. Co., 27 Fed. 770; Aroma Tp. v. Public Accounts Auditor, 2 Fed. 33.

[a] **Prayer to restrain sheriff from delivering deed.**—Where controversy in a suit to redeem from a sheriff's sale under a foreclosure decree was entirely between the mortgagor and the assignee of the mortgage, who apparently was also the purchaser, and a citizen of another state, except that plaintiff sought to restrain the sheriff from delivering the sheriff's deed pending the final determination, the sheriff was not an indispensable party, and the controversy was entirely between citizens of the different states. Fienup v. Kleinman, 5 F. (2d) 137.

[b] **Officer of court.**—In a suit to restrain a sale under a decree of court, the officer appointed by the court to make the sale was regarded merely as a formal party. Carver v. Jarvis-Conklin Mortg. Trust Co., 73 Fed. 9.

[§ 153] **(4) Corporation and Persons Connected with or Dealing with Corporation.**[31] Under general rules[32] a corporation has been regarded not as a formal party, but as a necessary party whose presence must be given effect in determining the removability of a suit by a stockholder or stockholders of such corporation to avoid a contract or other transaction of the corporation,[33] of a suit by a stockholder to recover for the corporation secret profits which, it is alleged, were obtained in the promotion or organization of such corporation;[34] of a suit to enforce a judgment against a corporation by compelling contribution from stockholders of the corporation,[35] of a suit to compel the transfer to plaintiff, on the books of the corporation, of stock which stands in the name of, or is claimed by, a codefendant of the corporation,[36] and of a suit seeking the appointment of a receiver for, and the sale of the property of, the corporation.[37] On the other hand, under general rules stated above,[38] it has been held or recognized that where the corporation is not a necessary or indispensable party to a suit,[39] as, for example, a suit brought by a stockholder or stockholders of the corporation,[40] its presence as a party may be disregarded in determining the question as to removability.

Incorporators and stockholders. Where stockholders of a corporation are parties in their individual rights, their own citizenship, and not that of the corporation, governs, notwithstanding certain corporate matters may be involved;[41] and to a suit to enforce a judgment against a corporation by compelling contribution from its stockholders, any stockholder who applies to have determined the equitable share of the judgment indebtedness, for which he is liable, is a necessary party whose presence must be given effect.[42] On the other hand, the view has been taken that to a suit against a corporation to establish and enforce plaintiff's interest in respect of certain lands which certain incorporators and stockholders of such corporation had conveyed to it, such incorporators and stockholders were not necessary parties within the rules here under consideration,[43] and a like rule has been applied in respect of an incorporator who owned most, if not all, of the corporate stock, in a suit to enjoin certain acts of the corporation.[44]

Corporate officers, agents, or employees. Where, in suits involving directly or indirectly the affairs of a corporation, under general rules,[45] the presence of an officer or agent of the corporation who is the real,[46] or who is a necessary,[47] party, must be given

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30. Nye v. Nightingale, 6 R. I. 439.

31. **Cross references:**
Determination as to citizenship of corporation see supra §§ 138-141.
Suits between persons not connected with corporations and lessor and lessee of railroad see infra § 161.
Suits by insurance company to enforce liability of tort feasor see infra § 162.

32. See supra § 148.

33. East Tennessee, etc., R. Co. v. Grayson, 119 U. S. 240, 7 SCt 190, 30 L. ed. 382. See Foy v. Georgia-Alabama Power Co., 159 Ga. 14, 124 SE 513 (where a suit by minority stockholders against the majority stockholders of the corporation, based on acts detrimental to such corporation's interests, was not removable).

[a] **Illustration.**—The lessor company was a necessary party defendant to a suit by stockholders of such company to set aside a lease of a railroad. East Tennessee, etc., R. Co. v. Grayson, 119 U. S. 240, 7 SCt 190, 30 L. ed. 382; New Jersey Cent. R. Co. v. Mills, 113 U. S. 249, 5 SCt 456, 28 L. ed. 949 [aff 20 Fed. 449]; Thouron v. East Tennessee, etc., R. Co., 38 Fed. 673.

34. Groel v. New Jersey United Electric Co., 132 Fed. 252.

35. Walsh v. Memphis, etc., R. Co., 6 Fed. 797, 2 McCrary 156. Compare Wellman v. Howland Coal, etc., Works, 19 Fed. 51 (where plaintiff's motion to remand was denied in the case of a suit brought by a creditor against a stockholder to enforce liability in respect of the latter's unpaid subscription).

36. Crump v. Thurber, 115 U. S. 56, 5 SCt 1154, 29 L. ed. 328; St. Louis, etc., R. Co. v. Wilson, 114 U. S. 60, 5 SCt 738, 29 L. ed. 66; Patterson v. Farmington St. R. Co., 111 Fed. 262; Rogers v. Van Nortwick, 45 Fed. 513. See Irvin v. Anthony Shoals Power Co., 277 Fed. 926 (fact that a corporation had no interest in its own stock, except to see that it was not improperly transferred, did not render it merely a formal party to a suit in which the sale of all of the stock was involved).

37. Irvin v. Anthony Shoals Power Co., supra.

[a] **Failure of complaint to show ground for relief prayed.**—Question as to failure to state cause of action against the corporation or one warranting the appointment of a receiver, involved a decision as to the merits and was not a reason for holding that the corporation was not a necessary party. Irvin v. Anthony Shoals Power Co., 277 Fed. 926.

38. See supra § 148.

39. Barney v. Latham, 103 U. S. 205, 26 L. ed. 514.

[a] **Suit involving matters occurring before incorporation.**—Where, in a suit to establish and enforce plaintiff's rights in respect of certain lands, part of which was conveyed to a corporation by certain incorporators and stockholders of such corporation, relief was sought against such incorporators and stockholders in respect of a transaction in connection with the lands prior to incorporation, the corporation was not an indispensable party. Barney v. Latham, 103 U. S. 205, 26 L. ed. 514.

[b] **Enforcement of agreement to sell shares.**—It has been held that a corporation was not a necessary party to, and that its presence did not prevent the removal of, a suit for the specific performance of an agreement by a stockholder to sell certain shares of the stock issued by such corporation. Lucas v. Milliken, 139 Fed. 816.

40. Rogers v. Penobscot Min. Co., 154 Fed. 606, 83 CCA 380; Higgins v. Baltimore, etc., R. Co., 99 Fed. 640. See Taylor County Ct. v. Baltimore, etc., R. Co., 35 Fed. 161 (where the right to remove was upheld).

[a] **Illustrations.**—(1) In a suit by a stockholder of a corporation against another stockholder of such corporation to avoid the purchase of stock by such other stockholder, and to prevent the latter from exercising rights as a stockholder, on the ground that the ownership of such stock by such other stockholder was ultra vires and invalid, the presence, as defendant, of such corporation, which was organized in the state in which the suit was brought, did not prevent removal. Higgins v. Baltimore, etc., R. Co., 99 Fed. 640. (2) In a suit to compel one defendant to convey to a defendant corporation certain mining claims, pursuant to a contract to which the corporation was not a party, the corporation was not an indispensable party to the suit, which was removable notwithstanding such corporation was a citizen of the same state as plaintiff. Rogers v. Penobscot Min. Co., 154 Fed. 606, 83 CCA 380. (3) To a suit to determine rights in the stock of a corporation of the state of which complainant was a citizen, in which no cause of action was alleged against the corporation and no rights of the corporation were involved, the corporation was not an indispensable party, and its joinder for the purpose of enjoining it from permitting stock to be voted in violation of complainant's rights did not prevent removal to a federal court, where there was diversity of citizenship between complainant and the defendants other than the corporation. Harvey v. Harvey, 290 Fed. 653.

41. Dodd v. Louisville Bridge Co., 130 Fed. 186.

42. Walsh v. Memphis, etc., R. Co., 6 Fed. 797, 2 McCrary 156.

43. Barney v. Latham, 103 U. S. 205, 36 L. ed. 514.

44. New York v. New Jersey Steamboat Transp. Co., 24 Fed. 817.

[a] **Illustration.**—In an action to restrain a corporation from operating a boat, an individual owning most, if not all, of the corporate stock, but who did not personally own and control the boat, was not a necessary party. New York v. New Jersey Steamboat Transp. Co., 24 Fed. 817.

45. See supra § 148.

46. Rike v. Floyd, 42 Fed. 247.

[a] **Where individuals sued in their own names,** "as trustees of the Printing Establishment of the United Brethren in Christ," which was averred to be a corporation, the individuals and not the corporation were the real plaintiffs. Rike v. Floyd, 42 Fed. 247.

47. Fox v. Mackay, 60 Fed. 4; Blackwell's Durham Tobacco Co. v. American Tobacco Co., 144 N. C. 352, 57 SE 5, 9 LRANS 270.

effect in determining as to removability. On the other hand, the presence of corporate officers, agents, or employees as parties may be disregarded in connection with the matters here under consideration where they are formal or nominal, and not necessary, parties,[48] as, for example, directors in suits by stockholders,[49] including suits to avoid certain transactions of the corporation.[50]

Person dealing with or controlling corporation. To a suit by a stockholder to avoid a contract or transaction entered into by the corporation, ordinarily the other party to such contract or transaction is regarded as a necessary party within the rules here under consideration,[51] and to such suit persons in control of the corporation may also be necessary parties.[52] So, in a suit by minority stockholders against majority stockholders in respect of acts detrimental to the corporation, involved in the control and ownership of the stock of another corporation, it was held that such other corporation was a necessary party.[53]

[§ 154] **(5) Joint Stock Association, and Officer of Such Association.** As already pointed out, a joint stock association as such is not a citizen within the rules here under discussion,[54] and an officer of such an association who may be a plaintiff[55] or defendant[56] in an action in favor of or against the individual members of the association is not a real party, but is merely a nominal party whose citizenship is immaterial.

[§ 155] **(6) Stakeholder or Depositary, and Person Summoned by Trustee or Garnishee Process.**[57] There is authority for the view that a mere stakeholder,[58] depositary,[59] or one summoned by trustee or garnishee process,[60] or in a similar position,[61] who has no interest in the controversy, is not to be regarded as such a necessary or indispensable party as to require that effect should be given to his presence as a party. A depositary,[62] a garnishee,[63] or other person indebted to another party to a suit[64] may, however, have such a relation to the controversy as to make him a necessary party to the suit, whose presence must be given effect, as where a depositary has certain active duties to perform in respect of the deposited property;[65] and it has been held that a party may not be regarded as a mere stakeholder where he specifically aligns himself with one of the claimants and asserts his intention to pay to such claim-

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[a] **Particular officer regarded as necessary party.**—Fox v. Mackay, 60 Fed. 4; Seddon v. Virginia, etc., Iron Co., 36 Fed. 6, 1 LRA 108.

[48] Geer v. Mathieson Alkali Works, 190 U. S. 428, 23 SCt 807, 47 L. ed. 1122; Lamm v. Parrott Silver, etc., Co., 111 Fed. 241; New York v. New Jersey Steamboat Transp. Co., 24 Fed. 817; Lyndon Nat. Bank v. Wells River Mfg. Co., 7 Fed. 750; Pond v. Sibley, 7 Fed. 129, 19 Blatchf. 189; Hatch v. Chicago, etc., R. Co., 11 F. Cas. No. 6,204, 6 Blatchf. 105.

[a] **Certain officers held formal or nominal and not necessary parties.**—Geer v. Mathieson Alkali Works, 190 U. S. 428, 23 SCt 807, 47 L. ed. 1122; Politz v. Wabash R. Co., 153 Fed. 941; Pond v. Sibley, 7 Fed. 129, 19 Blatchf. 189; Hatch v. Chicago, etc., R. Co., 11 F. Cas. No. 6,204, 6 Blatchf. 105.

[b] **Local manager.**—In a suit by a stockholder for the appointment of a receiver of an alien corporation and to wind up its affairs and to distribute its assets, it was held that a local manager was not a necessary party within the rules here considered. Sidway v. Missouri Land, etc., Co., 116 Fed. 381.

[a] **Employees.**—A city, suing a telephone company to compel it to comply with franchise terms as to rate, and to desist from threatening to discontinue service of those who refused to pay increased rate, could not defeat the jurisdiction of the federal court on the ground of diversity of citizenship by joining employees of the telephone company as defendants; such employees not being necessary parties. Washington v. Pacific Tel., etc., Co., 1 F. (2d) 327.

[49] Geer v. Mathieson Alkali Works, 190 U. S. 428, 23 SCt 807, 47 L. ed. 1122.

[50] Keenan v. Gladys Belle Oil Co., 11 F. (2d) 418; Venner v. Southern Pac. Co., 279 Fed. 832 [certiorari den 258 U. S. 628 mem, 42 SCt 461 mem, 66 L. ed. 799 mem].

[a] **Rescission of contracts and cancellation of instruments.**—(1) Joining, in their official capacity, directors of a corporation who were not necessary parties to a suit by a stockholder for the rescission or to prevent the performance of a contract made by the corporation, cannot defeat the corporation's right to remove on the ground of diversity of citizenship. Keenan v. Gladys Belle Oil Co., 11 F. (2d) 418; Venner v. Southern Pac. Co., 279 Fed. 832 [certiorari den 258 U. S. 628 mem, 42 SCt 461 mem, 66 L. ed. 799 mem]. (2) To a stockholder's suit to cancel a bond and mortgage given by a corporation, the directors were not necessary parties. Keenan v. Gladys Belle Oil Co., supra.

[b] **Issuance or exchange of stocks or bonds.**—(1) To a stockholder's suit to enjoin the exchange by his corporation of debentures for new mortgage bonds with a stock bonus, the individual directors, the registrar of the stock, the depositary of the debentures, the trustees of the mortgage, and a committee representing the debenture holders in the transaction were not necessary parties. Politz v. Wabash R. Co., 153 Fed. 941. (2) To a stockholders' suit to set aside issue of stock, to be given as a bonus to purchasers of stock, directors of a voting trust were not necessary parties. Keenan v. Gladys Belle Oil Co., 11 F. (2d) 418.

[51] Thouron v. East Tennessee, etc., R. Co., 38 Fed. 673; Burke v. Flood, 1 Fed. 541, 6 Sawy. 220.

[a] **Suit to set aside lease.**—To a suit by stockholders of the lessor company to set aside a lease of a railroad, the lessee company is a necessary party. Thouron v. East Tennessee, etc., R. Co., 38 Fed. 673.

[52] Burke v. Flood, 1 Fed. 541, 6 Sawy. 220.

[53] Foy v. Georgia-Alabama Power Co., 159 Ga. 14, 124 SE 513.

[54] See supra §§ 130, 142.

[55] Taylor v. Weir, 171 Fed. 636, 96 CCA 438 [rev 162 Fed. 585].

[56] Taylor v. Weir, supra.

[57] **Trustee or other person in representative capacity** see infra §§ 156-160.

[58] American Nat. Bank v. National Ben., etc., Co., 70 Fed. 420; New York Constr. Co. v. Simon, 53 Fed. 1; Reeves v. Corning, 51 Fed. 774.

[59] Salem Trust Co. v. Manufacturers' Finance Co., 264 U. S. 182, 44 SCt 266, 68 L. ed. 628, 31 ALR 867 [rev on other grounds 280 Fed. 803].

[a] **Illustration.**—Where money was deposited as a result of an agreement between adverse claimants, which agreement provided that one of the parties to the agreement would collect, and deposit the amount of the claim in a trust account for the benefit of the claimant who would be entitled to it as thereafter agreed upon by them, or as thereafter determined by a court of competent jurisdiction, the presence of the depositary as a party did not affect the removability of a suit between such adverse claimants to establish the ownership of the fund. Salem Trust Co. v. Manufacturers' Finance Co., 264 U. S. 182, 44 SCt 266, 68 L. ed. 628, 31 ALR 867 [rev on other grounds 280 Fed. 803].

[60] Bacon v. Rives, 106 U. S. 99, 1 SCt 3, 27 L. ed. 69; Sullivan v. Lloyd, 213 Fed. 275 (recognizing rule); Macurda v. Globe Newspaper Co., 165 Fed. 104; Cook v. Whitney, 6 F. Cas. No. 3,166, 3 Woods 715; Dunbar v. Rosenbloom, 230 Mass. 176, 119 NE 829. See Weeks v. Billings, 55 N. H. 371.

[61] Corbitt v. Farmers' Bank, 113 Fed. 417; Deford v. Mehaffy, 14 Fed. 181.

[62] Wilson v. Oswego Tp., 151 U. S. 56, 14 SCt 259, 38 L. ed. 70.

[63] Sullivan v. Lloyd, 213 Fed. 275.

[a] **Garnishee, brought in after judgment against defendant** in the principal action, is a real party where the garnishee denies liability to such defendant. Baker v. Duwamish Mill Co., 149 Fed. 612.

[64] Jackson County Bank v. Hester, 188 N. C. 68, 123 SE 308.

[65] Scoutt v. Keck, 73 Fed. 900, 20 CCA 103.

[a] **Actual or assumed duties.**—A person in whose hands a certain deed has been placed by the grantor for delivery to the grantee has been regarded as a necessary party to a suit by the grantee for the specific performance of the contract in connection with which the deed was deposited, where the depositary assumed, either arbitrarily or on his construction of the contract, to lay down terms on which delivery to the grantee would be made. Ward v. Arredondo, 29 F. Cas. No. 17,148, 1 Paine 410.

ant unless otherwise directed by judicial decree.[66]

Interpleader. In an interpleader suit plaintiff has been regarded as a mere stakeholder whose presence as a party can be disregarded,[67] even though he has not paid the disputed fund into court.[68] There is, however, authority for the view that where a complainant files a bill against a citizen of the same state and other claimants who are citizens of other states, the cause cannot be removed to a federal court before the complainant has fully performed the duty required of him and has been discharged, for until that time he continues to be a substantial and necessary party,[69] and where a bank which was sued for a deposit interpleaded a claimant other than plaintiff, pursuant to statute, but retained possession of the fund and continued as a party, it was regarded as a necessary party whose presence must be given effect.[70] So it has been held that a defendant who filed a bill of interpleader asking for a discharge from liability and that one of the parties named should be restrained from proceeding against such defendant, must be regarded as a party to the suit.[71]

[§ 156] **(7) Representative or Fiduciary, and Person Represented or Beneficiary**[72]**—(a) Trustee and Cestui Que Trust.** A trustee vested with legal title to the trust estate who sues[73] or is sued[74] in his representative capacity is usually regarded as the real party and his citizenship, and not that of the cestui que trust, governs in determining the question as to removability.[75] Moreover a trustee who has legal title and whose presence is necessary in order that the relief demanded may be obtained,[76] the performance of whose duty is directly involved in the suit,[77] or whose trust is active and who has a power over the property directly involved,[78] is regarded as a necessary party and his presence must be given effect. So a trustee is a necessary party plaintiff in a suit to enforce a contract which he has entered into in his capacity as trustee.[79] The presence, however, of a trustee who is not a necessary or indispensable party has been disregarded,[80] as where the connection with the suit of a trustee who is sued in his representative capacity is collateral and subsidiary to the main issue.[81] So where a person has taken title to property for the benefit of himself and another, the necessity for giving effect to the citizenship of such other has been asserted both where such holder of the legal title has sued[82] or where he is sued,[83] and the residence or citizenship of a beneficiary, and not that of a mere agent or trustee whose authority is revocable at any time and who has no power coupled with an interest, will govern.[84]

[§ 157] **(b) Executor or Administrator, Beneficiary, and Decedent.** Where an executor or administrator sues or is sued in his representative capacity, his citizenship,[85] and not that of the beneficiaries or next of kin,[86] or that of the decedent,[87] governs, regardless of the state in which the appointment is made.[88] Moreover, executors have been regarded as necessary or indispensable parties defendant, whose presence must be given effect, to a suit to enforce a contract of suretyship entered into by their testator,[89] and also to a suit to set aside the will,[90] as has an administrator in a proceeding by the wid-

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66. Von Herberg v. Seattle, 27 F. (2d) 457 [certiorari den 278 U. S. 644 mem, 49 SCt 80 mem, 73 L. ed. 558 mem].

67. First Nat. Bank v. Bridgeport Trust Co., 117 Fed. 969.

68. First Nat. Bank v. Bridgeport Trust Co., supra.

69. Leonard v. Jamison, 2 Edw. (N. Y.) 136; George v. Pilcher, 28 Gratt. (69 Va.) 299, 26 AmR 350.

70. Bailey v. New York Sav. Bank, 2 Fed. 14.

71. Von Herberg v. Seattle, 27 F. (2d) 457 [certiorari den 278 U. S. 644 mem, 49 SCt 80 mem, 73 L. ed. 558 mem].

72. **State suing as trustee** see supra § 151.

73. Mead v. Walker, 15 Wis. 499.

74. Miller v. Sunde, 1 N. D. 1, 44 NW 301; Dunn v. Waggoner, 3 Yerg. (Tenn.) 59; Smith v. St. Louis Mut. L. Ins. Co., 2 Tenn. Ch. 656.

75. Dunn v. Waggoner, 3 Yerg. (Tenn.) 59; Mead v. Walker, 15 Wis. 499.

76. Myers v. Swan, 107 U. S. 546, 2 SCt 685, 27 L. ed. 583; Gardner v. Brown, 21 Wall. (U. S.) 36, 22 L. ed. 527.

[a] **Resignation of resident defendant sued as trustee.**—The resignation of a trustee, being a party defendant in his official capacity, who is a citizen of the same state as the complainant, does not make the cause removable by the remaining defendants. Ruohs v. Jarvis-Conklin Mortg. Trust Co., 84 Fed. 513.

77. Barth v. Coler, 60 Fed. 466, 9 CCA 81; Mayer v. Denver, etc., R. Co., 41 Fed. 723; Broadway Nat. Bank v. Adams, 130 Mass. 431.

78. Peper v. Fordyce, 119 U. S. 469. 7 SCt 287, 30 L. ed. 435 [rev 16 Fed. 516, 5 McCrary 221]; Thayer v. Life Assoc. of America, 112 U. S. 717, 5 SCt 355, 28 L. ed. 864. Contra Chester v. Wellford, 5 F. Cas. No. 2,662, 2 Flipp. 347.

79. Knapp v. Troy, etc., R. Co., 20 Wall. (U. S.) 117, 22 L. ed. 328.

80. Lawrence v. Southern Pac. Co., 165 Fed. 241.

81. Bates v. New Orleans, etc., R. Co., 16 Fed. 294.

82. Banigan v. Worcester, 30 Fed. 392.

[a] **Illustration.**—Statutory proceeding to determine damages to property resulting from defendant city's taking a stream for a water supply. Banigan v. Worcester, 30 Fed. 392.

83. Rand v. Walker, 117 U. S. 340, 6 SCt 769, 29 L. ed. 907.

[a] **Illustration.**—In an action for the assignment of dower, brought in a state court by a citizen of Illinois, it appeared that of two defendants who were in possession of the property, one, who was a citizen of New York, held the legal title as trustee for his codefendant, a citizen of Illinois, although it did not appear that he was authorized to represent his interests in the property for the purposes of the suit, and it was held that the beneficiary was a necessary party, and, being a citizen of the same state as plaintiff, was not entitled to a removal, and that, the controversy not being separable, the trustee, although a citizen of another state, could not sustain a petition for removal. Rand v. Walker, 117 U. S. 340, 6 SCt 769, 29 L. ed. 907.

84. Bogue v. Chicago, etc., R. Co., 193 Fed. 728.

85. U. S.—Hess v. Reynolds, 113 U. S. 73, 5 SCt 377, 28 L. ed. 927; Sands v. James Carruthers & Co., Ltd., 243 Fed. 636.

Conn.—Security Co. v. Pratt, 65 Conn. 161, 32 A 396.

Ky.—Roach v. Ohio Nat. L. Ins. Co., 201 Ky. 713, 258 SW 300.

Miss.—Hill v. Henderson, 14 Miss. 351.

N. H.—Geyer v. John Hancock Mut. L. Ins. Co., 50 N. H. 224, 9 AmR 185.

N. D.—Miller v. Sunde, 1 N. D. 1, 44 NW 301.

Pa.—Middleton v. Middleton, 7 WklyNC 144.

[a] **Administrator with will annexed** has been regarded as a real party to a suit for the construction of the will, so that the citizenship of such administrator must be given effect. Security Co. v. Pratt, 64 Fed. 405; Security Co. v. Pratt, 65 Conn. 161, 32 A 396.

[b] **Administrator pro tem** appointed, under the Illinois statute, to defend for the estate in a proceeding by the regular administrator to establish a claim against the estate, has been regarded as the actual party in interest and his citizenship has been given effect. Schneider v. Eldridge, 125 Fed. 638.

86. Roach v. Ohio Nat. L. Ins. Co., 201 Ky. 713, 258 SW 300; Miller v. Sunde, 1 N. D. 1, 44 NW 301.

87. Hess v. Reynolds, 113 U. S. 73, 5 SCt 377, 28 L. ed. 427; Hill v. Henderson, 14 Miss. 351; Geyer v. John Hancock Mut. L. Ins. Co., 50 N. H. 224, 9 AmR 185; Middleton v. Middleton, 7 WklyNC (Pa.) 144.

88. Miller v. Sunde, 1 N. D. 1, 44 NW 301. But see Lemon v. Louisville, etc., R. Co., 137 Ky. 276, 125 SW 701 (the personal representative of a nonresident deceased, having qualified as such in this state, was a "citizen" of the state for purposes of the action, and as bearing on the question of removal of the cause).

89. Blake v. McKim, 103 U. S. 336, 26 L. ed. 563.

90. American Bible Soc. v. Price,

ow of the intestate to have a year's support set aside to her out of the intestate's estate.[91] On the other hand, it has been held that an administrator is a mere nominal party defendant whose presence does not affect the removability of a suit to enforce an alleged oral contract of decedent to devise and bequeath a share of his property to plaintiff,[92] and that the citizenship of the heirs as parties defendant governs.[93] So the executor of a deceased trustee named as such in a deed of trust has been regarded as a mere formal party defendant whose presence would not prevent the removal of a suit to enjoin the foreclosure of such deed.[94]

Action for wrongful death. While in an action for causing the wrongful death of the intestate, the citizenship of the administrator as plaintiff has been given effect,[95] in an action under a statute authorizing the personal representative to sue, but providing that the recovery shall inure to the exclusive benefit of persons of a specified class, the administrator as plaintiff has been regarded as a nominal party whose citizenship is immaterial,[96] the citizenship of the beneficiaries controlling,[97] even though they are not named as parties.[98]

[§ 158] **(c) Guardian or Next Friend, and Ward.** Where a guardian of an insane person was appointed in the state of which the insane person was a citizen, and in which the action was brought, it was held that in view of the terms of the statute under which the appointment was made, the citizenship of the insane person, and not that of the guardian, would govern in determining the question as to removability.[99] So the citizenship of the next friend or guardian ad litem of an infant,[1] or of a married woman[2] has been disregarded.

[§ 159] **(d) Agent and Principal.** An agent has been regarded merely as a formal or nominal, and not as a necessary, party plaintiff[3] or defendant[4] to a suit involving a transaction or controversy between the principal and the opposite party to the suit, and the presence of such agent has, therefore, been disregarded; and, where an agent and the principal are joined as parties defendant, the latter has been regarded as the real, and not as a nominal, party.[5]

[§ 160] **(e) Receiver.** Where a receiver sues[6] or is sued[7] in a representative capacity, his citizenship governs, regardless of the fact that the appointment was by the court of a state other than that of which the receiver is a citizen.[8]

[§ 161] **(8) Landlord and Tenant.**[9] While it has been held or recognized that in an action of ejectment the presence as a party defendant of a mere tenant at will who has no interest in the land,[10] and, under the practice of the state in which the action originated, the presence of a tenant for a term of years,[11] and also the presence of a lessee in an action of trespass to try title brought under a state statute,[12] may be disregarded, a tenant or lessee may have such an interest as to require that effect shall be given to the presence of such tenant or lessee as a party defendant in ejectment,[13] and a like rule preventing the disregard of the presence of the lessor as defendant in ejectment has been applied.[14] So a suit to set aside for fraud a conveyance to a lessor and also the lease, the lessee is not a mere nominal party, and his presence as a party defendant must be given effect,[15] and in a suit by a lessor to set aside the lease, the presence as a party defendant of the original lessee as a codefendant with the person holding under such lessee through intermediate transfers, has been given effect.[16] The removability of a proceeding to acquire by condemnation an interest in a railroad right of way held under lease has been denied where the necessary diversity did not exist between the petitioner for condemnation and the lessor

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110 U. S. 61, 3 SCt 440, 28 L. ed. 70.

[a] **Illustration.—**A will, under which money was bequeathed to executors as trustees for a designated person for the life of such person and thereafter for the children of such person. American Bible Soc. v. Price, 110 U. S. 61, 3 SCt 440, 28 L. ed. 70.

[91] McElmurray v. Loomis, 31 Fed. 395.

[92] Sullivan v. Curry, 40 F. (2d) 948.

[93] Sullivan v. Curry, supra.

[94] Allred v. Trexler Lumber Co., 194 N. C. 547, 140 SE 157.

[95] Missouri Pac. R. Co. v. Tompkins, 157 Ark. 16, 247 SW 54.

[96] Carter v. St. Louis-San Francisco R. Co., 29 F. (2d) 628.

[97] Carter v. St. Louis-San Francisco R. Co., supra.

[98] Carter v. St. Louis-San Francisco R. Co., supra.

[99] Wilcoxen v. Chicago, etc., R. Co., 116 Fed. 444. But see Federal Courts § 65 (as to what citizenship governs in determining as to the original jurisdiction of federal courts).

[1] Sullivan v. Curry, 40 F. (2d) 948; Nickels v. Pullman Co., 268 Fed. 610; Blumenthal v. Craig, 81 Fed. 320, 26 CCA 427; Voss v. Neineber, 68 Fed. 947; Woolridge v. McKenna, 8 Fed. 650. See Re Moore, 209 U. S. 490, 28 SCt 585, 706, 52 L. ed. 904 (where, apparently, the citizenship of a next friend was not considered). But see In re McClean, 26 Fed. 49 (where, however, it is not clear as to what type of guardian was a party).

[2] Ruckman v. Palisade Land Co., 1 Fed. 367.

[3] Overman Wheel Co. v. Pope Mfg. Co., 46 Fed. 577.

[4] Wood v. Davis, 18 How. (U. S.) 467, 15 L. ed. 460; Genuine Panama Hat Works v. Webb, 36 F. (2d) 265; Cella v. Brown, 136 Fed. 439; Carothers v. McKinley Min., etc., Co., 122 Fed. 305; Sidway v. Missouri Land, etc., Co., 116 Fed. 381; Brown v. Murray, 43 Fed. 614; New York v. New Jersey Steam-Boat Transp. Co., 24 Fed. 817; Lee v. Standard Motors Finance Co., 166 Ga. 54, 142 SE 541. See Patton v. Meadows Co., 173 Fed. 224 (where the court said that one defendant who, it was alleged, was agent for the other defendants, "is more nearly the nominal party than the" other defendants).

[5] Patton v. Meadows Co., 173 Fed. 224; Lee v. Standard Motors Finance Co., 166 Ga. 54, 142 SE 541.

[a] **Action on contract.—**Where plaintiff's declaration in an action on a contract in a state court against three defendants alleged that the defendant which made the contract in its own name acted in doing so as the agent for its codefendants, who were the real parties, such codefendants could not be treated as merely nominal or unnecessary parties to the suit, for the purposes of removal of the cause to the federal court. Patton v. Meadows Co., 173 Fed. 224.

[6] Pepper v. Rogers, 128 Fed. 987; Miller v. Sunde, 1 N. D. 1, 44 NW 301.

[7] Moore v. Los Angeles Iron, etc., Co., 89 Fed. 73; Brisenden v. Chamberlain, 53 Fed. 307; Davies v. Lathrop, 12 Fed. 353, 20 Blatchf. 397. See American Nat. Bank v. National Ben., etc., Co., 70 Fed. 420 (where citizenship of a receiver who intervened as defendant was given effect).

[8] Davies v. Lathrop, 12 Fed. 353, 20 Blatchf. 397.

[9] **Lessor and lessee as joint defendants in action for tort** see infra § 173.

Suit by stockholder attacking lease by corporation see supra § 153.

[10] Wallin v. Reagan, 171 Fed. 758.

[11] Doe v. Harmer, 4 Oh. 435.

[12] Texas v. Lewis, 12 Fed. 1.

[13] Phelps v. Oaks, 117 U. S. 236, 6 SCt 714, 29 L. ed. 888; Cleveland v. Cleveland, etc., R. Co., 147 Fed. 171, 77 CCA 467; Beardsley v. Torrey, 2 F. Cas. No. 1,190, 4 Wash. C. C. 286.

[14] Cleveland v. Cleveland, etc., R. Co., 147 Fed. 171, 77 CCA 467.

[15] Miller v. Sharp, 37 Fed. 161.

[16] Wilson v. Big Joe Block Coal Co., 135 Iowa 531, 113 NW 348.

corporation.[17] On the other hand in a proceeding to compel the granting of railroad switch connections, it has been held that the lessee corporation which held under a long term lease and had assumed the obligations of the lessor was the real party defendant whose citizenship would govern in determining the right to remove.[18]

[§ 162] **(9) Insurer and Insured.**[19] Where an insurance company pays part of a loss and joins with the insured to recover at law for the loss from the tort feasor, under code provisions abolishing the distinction between forms of actions at law and in equity and providing that every action shall be prosecuted by the real party in interest, according to some cases, the presence of the insurance company as a party must be given effect,[20] and a like rule has been applied in the case of an action by the insurer and the insured where the insurer has taken a written assignment from the insured;[21] but there is authority to the contrary even where a written assignment has been taken.[22] In a suit in equity by an insurance company which has paid on account of a loss, against the insured and another, in which the insurance company seeks to assert a claimed right of subrogation, and to recover from such other for the loss which, it is alleged, was caused by such other, the presence of the insured as a necessary party has been given effect.[23]

[§ 163] **(10) Principal and Surety.** In an action against a principal and surety on an obligation in respect of which both have assumed liability, the presence neither of the principal[24] nor of the surety[25] may be disregarded.

[§ 164] **(11) Mortgagor or Pledgor.** A mortgagor in a controversy as to the priority of liens upon mortgaged lands has been regarded as a nominal party where the validity of the liens is not in dispute,[26] and a like rule has been applied where by the suit it was sought to determine the ownership of a bond and mortgage.[27] On the other hand, a mortgagor who has parted with title to the property, but who remains liable for the mortgage debt, has been regarded as a necessary party to a suit to foreclose the mortgage and to recover a deficiency judgment, whose presence cannot be disregarded,[28] so a suit by the holder of bonds secured by a mortgage for the removal of the trustee under the mortgage, the mortgagee is an indispensable party whose citizenship must be given effect.[29] It has also been held that in a suit by a pledgee to foreclose the right to redeem pledged securities, the presence as a party of one claiming, under the immediate pledgor, the right to redeem, must be given effect although such pledgor was himself an intermediate pledgee and the original pledgor was a party.[30]

[§ 165] **(12) Use Party.** The state,[31] a state officer,[32] and a United States marshal,[33] to suits in its or his name for the use of another, have been regarded merely as nominal parties whose presence does not affect the removability of the suit. On the other hand, where the suit is brought for the use of a designated person on a nonnegotiable contract by the holder of the legal title,[34] or is brought, for the use of another, by the holder of the legal title to recover for the destruction of property,[35] the person in whose name the action is brought has been regarded as a real, and not a nominal party, while in the case both of the action on contract[36] and also of the action for the destruction of property,[37] the person designated as the one for whose use the action is brought has been regarded merely as a formal or nominal party, although the rule may be affected by local statutes as to who is the real party.[38]

[§ 166] **(13) Parties Designated by Fictitious Names.** While it has been held that defendants designated by fictitious names are to be treated as formal parties whose presence on the record does not affect the removability of the suit,[39] there is authority to the contrary.[40]

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[17] Bellaire v. Baltimore, etc., R. Co., 146 U. S. 117, 13 SCt 16, 36 L. ed. 910; Washington v. Columbus, etc., R. Co., 53 Fed. 673. Compare Seaboard Air Line R. Co. v. North Carolina R. Co., 123 Fed. 629 (where the right to remove was recognized notwithstanding the presence of the lessor corporation, a corporation of the state in which the proceeding was initiated).

[18] Chase v. Beech Creek R. Co., 144 Fed. 571; Olanta Coal Min. Co. v. Beech Creek R. Co., 144 Fed. 150 [aff 158 Fed. 36, 85 CCA 148].

[19] **Cross references:**
Effect of venue statute on right to remove see supra § 10.
Insurer named as one for whose use action brought see infra § 165.
Parties to actions to charge tort feasors for loss of, or damage to, insured property by fire in general see Fire Insurance §§ 629–635.

[20] Turk v. Illinois Cent. R. Co., 218 Fed. 315, 134 CCA 111; Palmer v. Oregon-Washington R., etc., Co., 208 Fed. 666; Gaugler v. Chicago, etc., R. Co., 197 Fed. 79. Contra Turk v. Illinois Cent. R. Co., 193 Fed. 252.

[21] Chicago, etc., R. Co. v. Cobbs, 151 Ark. 207, 235 SW 995.

[22] Over v. Lake Erie, etc., R. Co., 63 Fed. 34.

[23] Broadway Ins. Co. v. Chicago Great Western R. Co., 101 Fed. 507.

[24] Maryland Fidelity, etc., Co. v. Cunningham, 177 Ark. 638, 7 SW (2d) 332.

[a] **Bankruptcy of principal.**—A suit against a contractor, who is a citizen of the same state as plaintiff, and the surety on his bond which is a citizen of another state, is not removable on the ground that the contractor has been adjudicated as bankrupt and therefore eliminated as an interested party. Uden v. Great Northern Constr. Co., 1 F. (2d) 743.

[25] Mutual Reserve Fund Life Assoc. v. Farmer, 77 Fed. 929, 23 CCA 574.

[26] Meyer v. Delaware R. Constr. Co., 100 U. S. 457, 25 L. ed. 593. But see Thompson v. Dixon, 28 Fed. 5 (where a mortgagor was regarded as a necessary party in a suit to foreclose a mortgage and to adjust various liens).

[27] Ruckman v. Ruckman, 1 Fed. 587.

[28] Coney v. Winchell, 116 U. S. 227, 6 SCt 366, 29 L. ed. 610 [aff 24 Fed. 865]; Ayres v. Wiswall, 112 U. S. 187, 5 SCt 90, 28 L. ed. 693; U. S. Mortgage Co. v. McClure, 42 Or. 190, 70 P 543 [writ of error dism 197 U. S. 624, 25 SCt 798, 49 L. ed. 911].

[29] Hidden v. Washington-Oregon Corp., 217 Fed. 303.

[30] Danvers Sav. Bank v. Thompson, 130 Mass. 490.

[31] See supra § 151.

[32] See supra § 151.

[33] See supra § 150.

[34] Dimmick v. Doolittle, 29 Fed. 545.

[35] Webb v. Southern R. Co., 248 Fed. 618, 160 CCA 518 [rev 235 Fed. 578, and certiorari den 247 U. S. 518 mem, 38 SCt 582 mem, 62 L. ed. 1245 mem]; Southern R. Co. v. Barrett, etc., Co., 141 Ga. 584, 81 SE 863.

Joinder of insurer and insured as coplaintiffs see supra § 162.

[36] Dimmick v. Doolittle, 29 Fed. 545.

[37] Southern R. Co. v. Barrett, etc., Co., 141 Ga. 584, 81 SE 863.

[38] Webb v. Southern R. Co., 248 Fed. 618, 160 CCA 518 [rev 235 Fed. 578, and certiorari den 247 U. S. 518 mem, 38 SCt 582 mem, 62 L. ed. 1245 mem].

[a] **Illustration.**—Where a statute of the state in which the action was brought required that in an action brought by plaintiff, having the legal right, for the use of another, such other shall be considered a party to the record, the citizenship of such other must be given effect in determining removability. Webb v. Southern R. Co., 248 Fed. 618, 160 CCA 518 [rev 235 Fed. 578, and certiorari den 247 U. S. 518 mem, 38 SCt 582 mem, 62 L. ed. 1245 mem].

[39] Loop v. Winters, 115 Fed. 362; Parkinson v. Barr, 105 Fed. 81. See

[§ 167] **6. Joint Cause of Action and Improper Inclusion or Joinder of Parties—a. Plaintiffs.** Where it appears on the face of the bill that a person has been improperly joined with others as plaintiff, his citizenship may and should be disregarded in determining the right of defendant to remove,[41] and a like rule has been applied in respect of a single formal plaintiff where he institutes a fictitious action against a resident defendant and a nonresident defendant merely to permit the resident defendant to litigate in the state court a cause of action against the nonresident defendant.[42] Where, however, plaintiffs join in the assertion of a joint claim, the citizenship of each must be given effect.[43]

[§ 168] **b. Defendants[44]—(1) In General.** It has been laid down in general terms that where persons who are not proper parties have been joined as defendants,[45] as, for example, persons against whom no relief is prayed, and whose presence is not essential to a complete disposition of the controversy,[46] or persons whose joinder is fraudulent or sham,[47] the suit may be removed if the requisite difference of citizenship exists between plaintiff and the remaining defendant or defendants. Where, however, the citizenship, allegiance, or residence of one or more of several defendants against whom a joint cause of action,[48] sounding either in tort[49] or in contract,[50] is set up, is such as to prevent the existence of the necessary diversity, the suit is not removable notwithstanding plaintiff could have proceeded against the individual defendants severally,[51] unless the joinder of the defendant whose presence would prevent removal may be disregarded.[52] The foregoing rule preventing removal applies to an action at law where under the state or local law the joinder is proper,[53] even though the law as enforced in the

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Galehouse v. Baltimore, etc., R. Co., 274 Fed. 370 (where remand was refused in a case in which summons was not served on defendant designated as "Doe," whose true name was unknown); Bagenas v. Southern Pac. Co., 180 Fed. 887 (where the court said that a defendant sued purely by a fictitious name, without other facts identifying him as a proper or necessary party to the action stated, will be regarded as a formal party merely, whose presence on the record will not affect the right of removal by one otherwise entitled thereto).

[40] Grosso v. Butte Electric R. Co., 217 Fed. 422.

[41] Over v. Lake Erie, etc., R. Co., 63 Fed. 34; McHenry v. New York, etc., R. Co., 25 Fed. 65.

[a] **Illustration.**—Where it appears on the face of the bill that one of a number of plaintiffs is not entitled to relief, and that the others are the real parties litigant his joinder does not prevent a removal. McHenry v. New York, etc., R. Co., 25 Fed. 65.

[42] Boatmen's Bank v. Fritzlen, 75 Kan. 479, 89 P 915, 22 LRANS 1235 [aff 212 U. S. 364, 29 SCt 366, 53 L. ed. 551].

[43] Merchants' Cotton-Press, etc., Co. v. Insurance Co. of North America, 151 U. S. 368, 14 SCt 367, 38 L. ed. 195; James v. Thurston, 6 R. I. 428.

[44] **Action to enforce joint cause of action:**

Contract in general see Contracts passim §§ 549–580.

Tort in general see Torts [38 Cyc 483 et seq.].

Change in personnel see infra §§ 174, 175.

Separable controversy see infra §§ 180–193.

[45] Hamilton v. Empire Gas, etc., Co., 297 Fed. 422; Iowa Lillooet Gold Min. Co. v. Bliss, 144 Fed. 446; Chattanooga, etc., R. Co. v. Cincinnati, etc., R. Co., 44 Fed. 456; Hatch v. Chicago, etc., R. Co., 11 F. Cas. No. 6,204, 6 Blatchf. 105. See Mahon v. Somers, 112 Fed. 174 (where a motion to remand was denied); Diday v. New York, etc., R. Co., 107 Fed. 565 (where a defendant was joined by mistake and a motion to remand was refused).

[46] Chattanooga, etc., R. Co. v. Cincinnati, etc., R. Co., 44 Fed. 456; Arapahoe County v. Kansas Pac. R. Co., 1 F. Cas No. 502, 4 Dill. 277.

[47] See infra § 170.

[48] Torrence v. Shedd, 144 U. S. 527, 12 SCt 726, 36 L. ed. 528; St. Louis, etc., R. Co. v. Wilson, 114 U. S. 60, 5 SCt 738, 29 L. ed. 66; Cleveland v. Cleveland, etc., R. Co., 147 Fed. 171, 77 CCA 467; Sabens v. Cochrum, (Tex. Civ. A.) 292 SW 281. See Rock Rapids Independent Dist. v. Rock Rapids Bank, 48 Fed. 2 (where remand was granted); Wilson v. Big Joe Block Coal Co., 135 Iowa 531, 113 NW 348, 14 AnnCas 266 (where right to remove was denied).

[49] U. S.—McAllister v. Chesapeake, etc., R. Co., 243 U. S. 302, 37 SCt 274, 61 L. ed. 735; Chicago, etc., R. Co. v. Dowell, 229 U. S. 102, 33 SCt 684, 57 L. ed. 1090 [aff 83 Kan. 562, 112 P 136]; Chesapeake, etc., R. Co. v. Dixon, 179 U. S. 131, 21 SCt 67, 45 L. ed. 121 [aff 104 Ky. 608, 47 SW 615]; Powers v. Chesapeake, etc., R. Co., 169 U. S. 92, 18 SCt 264, 42 L. ed. 673; Plymouth Cons. Gold Min. Co. v. Amador, etc., Canal Co., 118 U. S. 264, 6 SCt 1034, 30 L. ed. 232; Starin v. New York, 115 U. S. 248, 6 SCt 28, 29 L. ed. 388; Breymann v. Pennsylvania, etc., R. Co., 38 F. (2d) 209; Sanders v. Atlantic Coast Line R. Co., 33 F. (2d) 1010; Fidler v. Western Coal, etc., Co., 33 F. (2d) 158; Rand v. Hercules Powder Co., 28 F. (2d) 131; Benway v. Missouri, etc., R. Co., 26 F. (2d) 383 (recognizing rule); Burt v. Missouri Pac. R. Co., 294 Fed. 911; Bagenas v. Southern Pac. Co., 180 Fed. 887; Atlantic Coast Line R. Co. v. Daniels, 175 Fed. 302; Knuth v. Butte Electric R. Co., 148 Fed. 73; Thomas v. Great Northern R. Co., 147 Fed. 83, 77 CCA 255; Fogarty v. Southern Pac. Co., 123 Fed. 973; Charman v. Lake Erie, etc., R. Co., 105 Fed. 449. See Rupp v. Wheeling, etc., R. Co., 121 Fed. 825, 58 CCA 161 (where the right to remove suit against a railroad company and its receiver where all parties were citizens of the state in which the action was brought was denied).

Ark.—Chicago, etc., R. Co. v. McKamy, 180 Ark. 1095, 25 SW (2d) 5.

Ga.—Western Union Tel. Co. v. Griffith, 104 Ga. 56, 30 SE 420; Standard Oil Co. v. Turner, 33 Ga. A. 726, 127 SE 785; Postal Telegraph-Cable Co. v. Puckett, 24 Ga. A. 458, 101 SE 397.

Ida.—Sumey v. Craig Mountain Lumber Co., 31 Ida. 234, 170 P 112 [certiorari den 246 U. S. 667 mem, 38 SCt 336 mem, 62 L. ed. 929 mem].

Ky.—Carter Coal Co. v. Prichard, 166 Ky. 776, 179 SW 1038; Broadway Coal Min. Co. v. Robinson, 150 Ky. 707, 150 SW 1000; Chesapeake, etc., R. Co. v. Banks, 144 Ky. 137, 137 SW 1066; Illinois Cent. R. Co. v. Coley, 121 Ky. 385, 89 SW 234, 28 KyL 336, 1 LRANS 370.

Miss.—Kress v. Crosby, 98 S 437.

Mo.—Clark v. Atchison, etc., R. Co., 319 Mo. 865, 6 SW (2d) 954; Johnson v. St. Joseph Terminal R. Co., 203 Mo. 381, 101 SW 641; Sears v. Atchison, etc., R. Co., 163 Mo. A. 711, 147 SW 860.

N. C.—Queen v. Suncrest Lumber Co., 193 N. C. 149, 136 SE 494; Crisp v. Champion Fibre Co., 193 N. C. 77, 136 SE 238; Crisp v. Montvale Lumber Co., 189 N. C. 733, 128 SE 146; Patterson v. Champion Lumber Co., 175 N. C. 90, 94 SE 692; Blackwell's Durham Tobacco Co. v. American Tobacco Co., 144 N. C. 352, 57 SE 5, 9 LRANS 270.

S. C.—Calder v. Southern R. Co., 89 S. C. 287, 71 SE 841, AnnCas1913A 894 [writ of error dism 223 U. S. 740 mem, 32 SCt 531 mem, 56 L. ed. 637 mem].

[50] Brooks v. Clark, 119 U. S. 502, 7 SCt 301, 30 L. ed. 482; Little v. Giles, 118 U. S. 596, 7 SCt 32, 30 L. ed. 269; Pirie v. Tvedt, 115 U. S. 41, 5 SCt 1034, 1161, 29 L. ed. 331; Louisville, etc., R. Co. v. Ide, 114 U. S. 52, 5 SCt 735, 29 L. ed. 63; Maryland Fidelity, etc., Co. v. Cunningham, 177 Ark. 638, 7 SW (2d) 332; Schwarzler v. Great American Ins. Co., 135 Misc. 913, 239 NYS 684.

[51] Chicago, etc., R. Co. v. Dowell, 229 U. S. 102, 33 SCt 684, 57 L. ed. 1090 [aff 83 Kan. 562, 112 P 136]; Powers v. Chesapeake, etc., R. Co., 169 U. S. 92, 18 SCt 264, 42 L. ed. 673; Queen v. Suncrest Lumber Co., 193 N. C. 149, 136 SE 494; Crisp v. Champion Fibre Co., 193 N. C. 77, 136 SE 238.

[52] See infra §§ 169, 170.

[53] Chicago, etc., R. Co. v. McWhirt, 243 U. S. 422, 37 SCt 392, 61 L. ed. 826; McAllister v. Chesapeake, etc., R. Co., 243 U. S. 302, 37 SCt 274, 61 L. ed. 735; Chicago, etc., R. Co. v. Whiteaker, 239 U. S. 421, 36 SCt 152, 60 L. ed. 360; Chesapeake, etc., R. Co. v. Cockrell, 232 U. S. 146, 34 SCt 278, 58 L. ed. 544; Chicago, etc., R. Co. v. Dowell, 229 U. S. 102, 33 SCt 684, 57 L. ed. 1090; Chicago, etc., R. Co. v. Schwyhart, 227 U. S. 184, 33 SCt 250, 57 L. ed. 473 [aff sub nom. Schwyhart v. Barrett, 145 Mo. A. 332, 130 SW 388]; Chicago, etc., R. Co. v. Willard, 220 U. S. 413, 31 SCt 460, 55 L. ed. 521 [aff 165 Fed. 181, 91 CCA 215]; Illinois Cent. R. Co. v. Sheegog, 215 U. S. 308, 30 SCt 101, 54 L. ed. 208 [aff

federal courts may be to the contrary,[54] or where there is reasonable ground for doubt as to the question of the joint liability which plaintiff alleges, and the question is an open one.[55]

Motive or purpose of joinder. In the absence of fraud or bad faith[56] the motive of plaintiff in joining a defendant whose presence prevents removal is immaterial,[57] and plaintiff's joinder of such a defendant will prevent removal where the cause of action set up is joint even though the joinder was for the express purpose of preventing removal.[58]

[§ 169] **(2) Failure To State Cause of Action.** The holdings as to the effect, in the absence of a claim or showing of fraud or bad faith,[59] of plaintiff's failure, in attempting to state a joint cause of action against defendants, to state a cause of action against a defendant whose presence as a party would prevent removal, are not wholly reconcilable.[60] It has been asserted that in order that the presence of such defendant should prevent removal, plaintiff's pleading should show with at least reasonable clearness that a cause of action is set forth against such defendant,[61] and in many cases it has been held or recognized, apparently apart from a consideration of the effect of fraud or bad faith, that removal is not prevented by the mere joinder of such defendant if there is a failure to state a cause of action against him,[62] the state law, as interpreted by the highest court of the state, governing in respect of the statement of the cause of action,[63] and this rule permitting removal has been applied or recognized where no cause of action is stated against an employee joined as defendant with his employer,[64] and where no cause of action is stated against a lessor joined as defendant with his lessee.[65] In a few cases, however, it has been held or recognized that, in the absence of fraud or bad faith, a mere failure to state a cause of action against a defendant whose presence as a party prevents removal[66] and the fact that plaintiff's pleading is subject to demurrer for such failure,[67] or, at least, a mere failure, through inadvertence or want of skill, perfectly to state the facts constituting the cause of action,[68] will not constitute a basis for removal on the ground of diversity between plaintiff and the other defendant or defendants.

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126 Ky. 252, 103 SW 323, 31 KyL 692]; Cincinnati, etc., R. Co. v. Bohon, 200 U. S. 221, 26 SCt 166, 50 L. ed. 448; Benway v. Missouri, etc., R. Co., 26 F. (2d) 383 (recognizing rule); Burt v. Missouri Pac. R. Co., 294 Fed. 911; Thomas v. Great Northern R. Co., 147 Fed. 83, 77 CCA 255; Illinois Cent. R. Co. v. Houchins, 121 Ky. 526, 89 SW 530, 28 KyL 499, 123 AmSR 205, 1 LRANS 375; Hurt v. Savona Mfg. Co., 198 N. C. 1, 150 SE 632; Clark v. American Agricultural Chemical Co., 111 S. C. 230, 97 SE 705. But see Yeates v. Illinois Cent. R. Co., 137 Fed. 943 (where a motion to remand was denied).

[54] Alabama Southern R. Co. v. Thompson, 200 U. S. 206, 36 SCt 161, 50 L. ed. 441, 4 AnnCas 1147; Thomas v. Great Northern R. Co., 147 Fed. 83, 77 CCA 255. But see Curtis v. Cleveland, etc., R. Co., 140 Fed. 777 (where the court followed what it considered the weight of federal decisions in holding that joint liability did not exist).

[55] Alabama Great Southern R. Co. v. Thompson, 200 U. S. 206, 26 SCt 161, 50 L. ed. 441; Breymann v. Pennsylvania, etc., R. Co., 38 F. (2d) 209; Person v. Illinois Cent. R. Co., 118 Fed. 342. And see cases infra § 170 notes 72, 73.

[56] See infra § 170.

[57] U. S.—Chicago, etc., R. Co. v. Whiteaker, 239 U. S. 421, 36 SCt 152, 60 L. ed. 360 [aff 252 Mo. 438, 160 SW 1009]; Chesapeake, etc., R. Co. v. Dixon, 179 U. S. 131, 21 SCt 67, 45 L. ed. 121 [aff 104 Ky. 608, 47 SW 615]; Young v. Standard Oil Co., 35 F. (2d) 551; Kraus v. Chicago, etc., R. Co., 16 F. (2d) 79 [rev 3 F. (2d) 277]; Lynes v. Standard Oil Co., 300 Fed. 812; Poorman v. Cleveland, etc., R. Co., 255 Fed. 985; Thomas v. Great Northern R. Co., 147 Fed. 83, 77 CCA 255.

Ida.—Sumey v. Craig Mountain Lumber Co., 31 Ida. 234, 170 P 112 [certiorari den 246 U. S. 667 mem, 38 SCt 336 mem, 62 L. ed. 929 mem].

Ind.—Southern R. Co. v. Sittasen, (A.) 74 NE 898.

Ky.—Buskirk v. Caudill, 182 Ky. 685, 206 SW 867, 181 Ky. 45, 203 SW 864 [writ of error dism 249 U. S. 619 mem, 39 SCt 258 mem, 63 L. ed. 804 mem]; Broadway Coal Min. Co. v. Robinson, 150 Ky. 707, 150 SW 1000.

N. C.—Hollifield v. Southern Bell Tel., etc., Co., 172 N. C. 714, 90 SE 996; Hough v. Southern R. Co., 144 N. C. 692, 57 SE 469.

S. C.—Towill v. Southern R. Co., 121 S. C. 447, 114 SE 416; Clark v. American Agricultural Chemical Co., 111 S. C. 230, 97 SE 705; Able v. Southern R. Co., 73 S. C. 173, 52 SE 962.

Tenn.—Louisville, etc., R. Co. v. Vincent, 116 Tenn. 317, 95 SW 179, 8 AnnCas 66.

[58] Young v. Standard Oil Co., 35 F. (2d) 551; Thomas v. Great Northern R. Co., 147 Fed. 83, 77 CCA 255; Hukill v. Maysville, etc., R. Co., 72 Fed. 745; Broadway Coal Min. Co. v. Robinson, 150 Ky. 707, 150 SW 1000. And see cases infra § 170 note 74.

[59] **Failure to state cause of action as evidence of fraudulent joinder** see infra § 171.

[60] See McAllister v. Chesapeake, etc., R. Co., 198 Fed. 660 [remand directed 243 U. S. 302, 37 SCt 274, 61 L. ed. 735] (where the cases are reviewed).

[61] Leverentz v. Chicago, etc., R. Co., 7 F. (2d) 396.

[62] Cathey v. Charlotte, 34 F. (2d) 352; Hancock v. Missouri-Kansas-Texas R. Co., 28 F. (2d) 45; King v. Beaumont, 296 Fed. 531; Lockard v. St. Louis, etc., R. Co., 167 Fed. 675; Chicago, etc., R. Co. v. Stepp, 151 Fed. 908 [aff 164 Fed. 785, 90 CCA 431, 22 LRANS 350]; Axline v. Toledo, etc., R. Co., 138 Fed. 169; Sidway v. Missouri Land, etc., Co., 116 Fed. 381; Hukill v. Maysville, etc., R. Co., 72 Fed. 745; Louisville, etc., R. Co. v. Newman, 128 Ga. 283, 57 SE 515; Slaughter v. Nashville, etc., R. Co., 91 SW 744, 28 KyL 1195; Cincinnati, etc., R. Co. v. Robertson, 115 Ky. 858, 74 SW 1061, 25 KyL 265. See Benway v. Missouri-Kansas-Texas R. Co., 26 F. (2d) 383; McAllister v. Chesapeake, etc., R. Co., 198 Fed. 660 [remand directed 243 U. S. 302, 37 SCt 274, 61 L. ed. 735]; Kelly v. Chicago, etc., R. Co., 122 Fed. 286; Rivers v. Bradley, 53 Fed. 305; Nelson v. Hennessey, 33 Fed. 113 (in all of which cases a motion to remand was denied); Jones v. Casey-Hedges Co., 213 Fed. 43 (apparently recognizing rule); Pioneer SS. Co. v. Sanday, 210 App. Div. 318, 206 NYS 338; Follett v. Seneca Falls Water Works Co., 123 Misc. 823, 206 NYS 468; Simmons v. Zurich Gen. Acc., etc., Ins. Co., 196 N. C. 667, 146 SE 569 (in all of which cases the right to remove was upheld or recognized). Compare Cathey v. Charlotte, 197 N. C. 309, 148 SE 426 (where right to remove was denied).

[63] Cathey v. Charlotte, 34 F. (2d) 352; Hancock v. Missouri-Kansas-Texas R. Co., 28 F. (2d) 45. See McAllister v. Chesapeake, etc., R. Co., 198 Fed. 660 [remand directed 243 U. S. 302, 37 SCt 274, 61 L. ed. 735] (where remand was denied).

[64] Stokes v. Great Southern Lumber Co., 21 F. (2d) 185; Leverentz v. Chicago, etc., R. Co., 7 F. (2d) 396; Plunkett v. Gulf Refining Co., 259 Fed. 968; Bryce v. Southern R. Co., 125 Fed. 958, 122 Fed. 709; Davis v. Chesapeake, etc., R. Co., 116 Ky. 144, 75 SW 275, 25 KyL 342; Cincinnati, etc., R. Co. v. Robertson, 115 Ky. 858, 74 SW 1061, 25 KyL 265. See Morefield v. Ozark Pipe Line Corp., 27 F. (2d) 890; Galehouse v. Baltimore, etc., R. Co., 274 Fed. 370 (in both cases motion to remand was denied); Atlantic Coast Line R. Co. v. Barkley, 151 Fed. 891 (where right to remove was recognized). And see cases supra note 62.

[65] Axline v. Toledo, etc., R. Co., 138 Fed. 169; Hukill v. Maysville, etc., R. Co., 72 Fed. 745.

[66] Evans v. Felton, 96 Fed. 176. See Hax v. Caspar, 31 Fed. 499 (where a motion to remand was granted).

[67] Riser v. Southern R. Co., 116 Fed. 215.

[68] Richardson v. Southern Idaho Water Power Co., 209 Fed. 949, 952.

"The plaintiff's right to retain the action in the state court should not be defeated by a mere failure, through inadvertence or want of skill, perfectly to state the facts constituting the cause of action, or where there is some doubt whether or not the facts disclosed should, under the rule prevailing in the state court, be held to constitute a cause of action against the resident defendant. In the one case the defect may be remedied by amendment, and in the other the plaintiff has the right to have the question passed upon by the state court." Richardson v. Southern Idaho Water Power Co., supra.

[§ 170] **(3) Fraudulent or Sham Joinder**[69]**—(a) In General.** It is well settled that the presence of a party whom plaintiff has joined with fraudulent intent for the purpose of preventing removal may be disregarded in determining the question as to removability and will not prevent removal if all jurisdictional requisites otherwise exist.[70] Fraudulent or sham joinder may not, however, be predicated of the mere joinder of a defendant whose presence as a party prevents removal, where plaintiff has the right to join such defendant,[71] where there is reasonable ground for plaintiff's belief that the defendant whose presence would prevent removal is liable,[72] or where, according to some cases, the right to join defendants under certain circumstances is an open one in the state in which action is brought and there are reasonable grounds for plaintiff's belief that such right will be upheld,[73] even though the joinder is made to prevent removal,[74] and the defendant whose presence prevents removal,[75] or all defendants,[76] may not, in fact, be liable. On the other hand, where a defendant who has no real connection with the controversy is joined in bad faith, the suit may be removed if the requisite diversity exists between plaintiff and the other defendants and the other jurisdictional requisites exist,[77] whether or not the local law recognizes a joint liability,[78] whether or not the joinder is fair on its face,[79] and even though plaintiff's pleading in form sets out a joint cause of action against defendants,[80] as where plaintiff, with knowledge of the facts or with means to acquire such knowledge, makes misstatements of facts in order to state a joint cause of action;[81] and these rules have been recognized or applied in the case of a fraudulent joinder of an employee as a defendant in an action against his employer.[82]

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[69] **Allegations as to fraud in petition for removal** see infra § 240.

[70] Wilson v. Republic Iron, etc., Co., 257 U. S. 92, 42 SCt 35, 66 L. ed. 144; Wecker v. National Enameling, etc., Co., 204 U. S. 176, 27 SCt 184, 51 L. ed. 430, 9 AnnCas 757; Nelson v. Black Diamond Min. Co., 237 Fed. 264; Bradshaw v. Bowden, 226 Fed. 323; Clark v. Chicago, etc., R. Co., 194 Fed. 505 (recognizing rule); Zigich v. Tuolumne Copper Min. Co., 260 Fed. 1014; Price v. Southern Power Co., 206 Fed. 496 (recognizing rule); Lewis v. Cincinnati, etc., R. Co., 192 Fed. 654; Gustafson v. Chicago, etc., R. Co., 128 Fed. 85; Boatner v. American Express Co., 122 Fed. 714; Lisanby by Illinois Cent. R. Co., 209 Ky. 325, 272 SW 753 (recognizing rule); Hercules Powder Co. v. Sistrunk, 145 Miss. 299, 110 S 674; Cox v. Whitmer-Parsons Pulp, etc., Co., 193 N. C. 28, 136 SE 254; Morganton v. Hutton, etc., Co., 187 N. C. 736, 122 SE 842 (recognizing rule). See Boatmen's Bank v. Fritzlen, 135 Fed. 650, 68 CCA 288 [rev 128 Fed. 608, and certiorari den 198 U. S. 586, 25 SCt 803, 49 L. ed. 1174] (where remand was directed); Alonso v. Oben, 13 Porto Rico Fed. 237 (where, however, the case was not removable because the jurisdictional amount was lacking).

[71] U. S.—McAllister v. Chesapeake, etc., R. Co., 243 U. S. 302, 37 SCt 274, 61 L. ed. 735; Chicago, etc., R. Co. v. Willard, 220 U. S. 413, 31 SCt 460, 55 L. ed. 521; Southern R. Co. v. Miller, 217 U. S. 209, 30 SCt 450, 54 L. ed. 732; Illinois Cent. R. Co. v. Sheegog, 215 U. S. 308, 30 SCt 101, 54 L. ed. 208; Whitcomb v. Smithson, 175 U. S. 635, 20 SCt 248, 44 L. ed. 303; Plymouth Cons. Gold Min. Co. v. Amador, etc., Canal Co., 118 U. S. 264, 6 SCt 1034, 30 L. ed. 232; Fidler v. Western Coal, etc., Co., 33 F. (2d) 158; Atlantic Coast Line R. Co. v. Feaster, 260 Fed. 881; Evans v. Sioux City Serv. Co., 206 Fed. 841; Clark v. Chicago, etc., R. Co., 194 Fed. 505; Armstrong v. Kansas City Southern R. Co., 192 Fed. 608; Bagenas v. Southern Pac. Co., 180 Fed. 887; Keller v. Kansas City, etc., R. Co., 135 Fed. 202; Hukill v. Maysville, etc., R. Co., 72 Fed. 745.

Ark.—Chicago, etc., R. Co. v. McKamy, 180 Ark. 1095, 25 SW (2d) 5; Lusk v. Osborne, 127 Ark. 170, 191 SW 944.

Ga.—Atlantic Coast Line R. Co. v. Renfroe, 27 Ga. A. 198, 107 SE 881; Postal Telegraph-Cable Co. v. Puckett, 24 Ga. A. 458, 101 SE 397.

Ida.—Sumey v. Craig Mountain Lumber Co., 31 Ida. 234, 170 P 112 [certiorari den 246 U. S. 667 mem, 38 SCt 336 mem, 62 L. ed. 929 mem].

Ky.—Carter Coal Co. v. Prichard, 166 Ky. 776, 179 SW 1038; Broadway Coal Min. Co. v. Robinson, 150 Ky. 707, 150 SW 1000.

Mo.—Clark v. Atchison, etc., R. Co., 319 Mo. 865, 6 SW (2d) 954; Brown v. Louisiana, etc., R. Co., 256 Mo. 522, 165 SW 1060.

N. C.—Frizzell v. Southern Mica Co., 198 N. C. 128, 150 SE 715; Hurt v. Savona Mfg. Co., 198 N. C. 1, 150 SE 632; Feaster v. McLellan Stores Co., 198 N. C. 31, 150 SE 639; Slaughter v. Bemis Lumber Co., 197 N. C. 395, 148 SE 460; Walters v. Phœnix Utility Co., 196 N. C. 817, 145 SE 926; Givens v. Savona Mfg. Co., 196 N. C. 377, 145 SE 681; Queen v. Suncrest Lumber Co., 193 N. C. 149, 136 SE 494; Crisp v. Champion Fibre Co., 193 N. C. 77, 136 SE 238; Patton v. Champion Fibre Co., 192 N. C. 48, 133 SE 174; Hollifield v. Southern Bell Tel., etc., Co., 172 N. C. 714, 90 SE 996.

S. C.—Towill v. Southern R. Co., 121 S. C. 447, 114 SE 416; Clark v. American Agricultural Chemical Co., 111 S. C. 230, 97 SE 705; Calder v. Southern R. Co., 89 S. C. 287, 71 SE 841, AnnCas1913A 894 [writ of error dism 223 U. S. 740 mem, 32 SCt 531 mem, 56 L. ed. 637 mem]; Baber v. Southern R. Co., 76 S. C. 4, 56 SE 540, 11 AnnCas 960.

Tenn.—Louisville, etc., R. Co. v. Vincent, 116 Tenn. 317, 95 SW 179, 8 AnnCas 66.

[a] **Willful or negligent misstatement of fact** must in general, it has been stated, have been made in order that the joinder may be regarded as fraudulent. McGravey v. Butte Miner Co., 199 Fed. 671.

[72] Lynes v. Standard Oil Co., 300 Fed. 812; Gulledge v. Director Gen. of Railroads, 270 Fed. 276; Zigich v. Tuolumne Copper Min. Co., 260 Fed. 1014; Poorman v. Cleveland, etc., R. Co., 255 Fed. 985; Price v. Southern Power Co., 206 Fed. 496; Clark v. Chicago, etc., R. Co., 194 Fed. 505; Jacobson v. Chicago, etc., R. Co., 176 Fed. 1004; Keller v. Kansas City, etc., R. Co., 135 Fed. 202. See Hough v. Société Electrique Westinghouse, 231 Fed. 341 (that the state courts could give no judgment against a defendant, alleged to have been joined to prevent removal, except in violation of the Fourteenth Amendment, does not entitle defendant to removal).

[73] Kraus v. Chicago, etc., R. Co., 16 F. (2d) 79 [rev 3 F. (2d) 277]; McGarvey v. Butte Miner Co., 199 Fed. 671. See Knuth v. Butte Electric R. Co., 148 Fed. 73 (where remand was granted); and cases supra § 168 note 55.

[74] U. S.—McAllister v. Chesapeake, etc., R. Co., 243 U. S. 302, 37 SCt 274, 61 L. ed. 735; Chicago, etc., R. Co. v. Whiteaker, 239 U. S. 421, 36 SCt 152, 60 L. ed. 360 [aff 252 Mo. 438, 160 SW 1009]; Chicago, etc., R. Co. v. Dowell, 229 U. S. 102, 33 SCt 684, 57 L. ed. 1090 [aff 83 Kan. 562, 112 P 136]; Chicago, etc., R. Co. v. Schwyhart, 227 U. S. 184, 33 SCt 250, 57 L. ed. 473 [aff sub nom. Schwyhart v. Barrett, 145 Mo. A. 332, 130 SW 388]; Chicago, etc., R. Co. v. Willard, 220 U. S. 413, 31 SCt 460, 55 L. ed. 521; Illinois Cent. R. Co. v. Sheegog, 215 U. S. 308, 30 SCt 101, 54 L. ed. 208 [aff 126 Ky. 252, 103 SW 323, 31 KyL 692]; Kraus v. Chicago, etc., R. Co., 16 F. (2d) 79 [rev 3 F. (2d) 277]; Lynes v. Standard Oil Co., 300 Fed. 812; Atlantic Coast Line R. Co. v. Feaster, 260 Fed. 881; Hough v. Société Electrique Westinghouse, 231 Fed. 341; Evans v. Sioux City Serv. Co., 206 Fed. 841; McGarvey v. Butte Miner Co., 199 Fed. 671; Clark v. Chicago, etc., R. Co., 194 Fed. 505; Armstrong v. Kansas City Southern R. Co., 192 Fed. 608; Bagenas v. Southern Pac. Co., 180 Fed. 887; Jacobson v. Chicago, etc., R. Co., 176 Fed. 1004; Atlantic Coast Line R. Co. v. Daniels, 175 Fed. 302; Knuth v. Butte Electric R. Co., 148 Fed. 73; Hukill v. Maysville, etc., R. Co., 72 Fed. 745.

Ida.—Sumey v. Craig Mountain Lumber Co., 31 Ida. 234, 170 P 112 [certiorari den 246 U. S. 667 mem, 38 SCt 336 mem, 62 L. ed. 929 mem].

Ind.—Southern R. Co. v. Sittasen, (Ind. A.) 74 NE 898.

Ky.—Buskirk v. Caudill, 182 Ky. 685, 206 SW 867, 181 Ky. 45, 203 SW 864 [writ of error dism 249 U. S. 619 mem, 39 SCt 258 mem, 63 L. ed. 804 mem]; Broadway Coal Min. Co. v. Robinson, 150 Ky. 707, 150 SW 1000.

Mo.—Williams v. Short, 219 Mo. A. 99, 268 SW 706.

N. C.—Crisp v. Champion Fibre Co., 193 N. C. 77, 136 SE 238; Patton v. Champion Fibre Co., 192 N. C. 48, 133 SE 174; Hollifield v. Southern Bell Tel., etc., Co., 172 N. C. 714, 90 SE 996; Pruitt v. Charlotte Power Co., 165 N. C. 416, 81 SE 624; Hough v. Southern R. Co., 144 N. C. 692, 57 SE 469; Blackwell's Durham Tobacco Co. v. American Tobacco Co., 144 N. C. 352, 57 SE 5, 9 LRANS 270.

S. C.—Towill v. Southern R. Co., 121 S. C. 447, 114 SE 416; Clark v. American Agricultural Chemical Co., 111 S. C. 230, 97 SE 705; Baber v. Southern R. Co., 76 S. C. 4, 56 SE 540, 11 AnnCas 960.

Tenn.—Louisville, etc., R. Co. v. Vincent, 116 Tenn. 317, 95 SW 179, 8 AnnCas 66.

[75] Lynes v. Standard Oil Co., 300 Fed. 812; Guledge v. Director Gen. of Railroads, 270 Fed. 276; Zigich v. Tuolumne Copper Min., Co., 260 Fed. 1014; Poorman v. Cleveland, etc., R. Co., 255 Fed. 985; Deutsch v. Alaska Gastineau Min. Co., 237 Fed. 215; Price v. Southern Power Co., 206 Fed. 496; Broadway Coal Min. Co. v. Robinson, 150 Ky. 707, 150 SW 1000; Towill v. Southern R. Co., 121 S. C. 447, 114 SE 416. But see Landers v. Cincinnati, etc., R. Co., 156 Ky. 301, 160 SW 1050 (earlier rule in Kentucky).

[76] Towill v. Southern R. Co., 121 S. C. 447, 114 SE 416. See Sanders v. Atlantic Coast Line R. Co., 33 F. (2d) 1010 (where the view was expressed that the mere fact that there is an absence of good faith on the part of plaintiff in bringing the action at all did not necessarily show fraudulent joinder).

[77] Wilson v. Republic Iron, etc., Co., 257 U. S. 92, 42 SCt 35, 66 L. ed. 144; Wecker v. National Enameling,

Necessity of fraudulent joinder of all defendants. The fact that a defendant is fraudulently joined does not give the right to remove where another or other defendants, whose presence, if given effect, will prevent removal, are joined, as to whom no claim of fraudulent joinder is made.[83]

Fraudulent inclusion of party to render cause removable. It seems that the presence of a defendant who has fraudulently been joined merely for the purpose of rendering a suit removable may be disregarded.[84]

Fraudulent joinder of defendant who seeks removal does not give the right to remove the suit.[85]

[§ 171] **(b) Evidence as to Fraudulent Joinder.** The burden of showing that the defendant, whose presence, if given effect, would prevent removal, has been fraudulently joined is on the party who relies on the existence of the alleged fraud to support the removability of the action.[86] The existence of such fraud may be shown from the surrounding circumstances.[87] It has been held or recognized, however, that the fact that a defendant is a person of small means,[88] or is insolvent,[89] or the fact, related to the preceding two circumstances, that a judgment against him cannot be collected,[90] or, according to some cases, that plaintiff does not intend to prosecute the action to a conclusion against a defendant,[91] is not of itself sufficient to show the existence of a fraudulent intent in joining such defendant. So, while the fact that plaintiff had discontinued, after removal, an earlier action against defendant who now seeks to remove, is a circumstance tending to show fraud in joining a defendant whose presence, if given effect, would prevent removal,[92] it is not conclusive;[93]

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etc., Co., 204 U. S. 176, 27 SCt 184, 51 L. ed. 430; Sanders v. Atlantic Coast Line R. Co., 33 F. (2d) 1010 (recognizing rule); Lynes v. Standard Oil Co., 300 Fed. 812 (recognizing rule); Seattle v. Great Northern R. Co., 239 Fed. 1009; Martin v. Matson Nav. Co., 239 Fed. 188; Bradshaw v. Bowden, 226 Fed. 323; Shaver v. Pacific Coast Condensed Milk Co., 185 Fed. 316; McGuire v. Great Northern R. Co., 153 Fed. 434; Dishon v. Cincinnati, etc., R. Co., 133 Fed. 471, 66 CCA 345; Crawford v. Illinois Cent. R. Co., 130 Fed. 395; Gustafson v. Chicago, etc., R. Co., 128 Fed. 85; Boatner v. American Express Co., 122 Fed. 714; Free v. Western Union Tel. Co., 122 Fed. 309; Carothers v. McKinley Min., etc., Co., 122 Fed. 305; Kelly v. Chicago, etc., R. Co., 122 Fed. 286; Ross v. Erie R. Co., 120 Fed. 703; Union Terminal R. Co. v. Chicago, etc., R. Co., 119 Fed. 209; Diday v. New York, etc., R. Co., 107 Fed. 565; McCormick v. Illinois Cent. R. Co., 100 Fed. 250; Prince v. Illinois Cent. R. Co., 98 Fed. 1; Shepherd v. Bradstreet Co., 65 Fed. 142; Dow v. Bradstreet Co., 46 Fed. 824; Collins v. Wellington, 31 Fed. 244; St. Louis-San Francisco R. Co. v. Britton, 163 Ark. 255, 259 SW 730; Wright v. Phœnix Utility Co., 198 N. C. 204, 151 SE 241; Matthews v. Blackwood Lumber Co., 198 N. C. 129, 150 SE 704; Newton v. Liggett, etc., Tobacco Co., 194 N. C. 816, 140 SE 742; Ferris v. Atlantic, etc., R. Co., 194 N. C. 653, 140 SE 607; Cox v. Whitmer-Parsons Pulp, etc., Co., 193 N. C. 28, 136 SE 254; Swain v. Interstate Cooperage Co., 189 N. C. 528, 127 SE 538 (recognizing rule); Johnson v. Blackwood Lumber Co., 189 N. C. 81, 126 SE 165; Stevens v. Blackwood Lumber Co., 186 N. C. 749, 120 SE 329; Rea v. Standard Mirror Co., 158 N. C. 24, 73 SE 116; Towill v. Southern R. Co., 121 S. C. 447, 114 SE 416 (recognizing rule).

78. Wilson v. Republic Iron, etc., Co., 257 U. S. 92, 42 SCt 35, 66 L. ed. 144.

[a] **Suit is removable,** according to some cases, where a defendant is joined who may not properly be joined under the local law. Scherrer v. Foster, 5 F. (2d) 236; Robbins v. Pennsylvania Co., 245 Fed. 435, 157 CCA 597. See Kraus v. Chicago, etc., R. Co., 16 F. (2d) 79 [rev on other grounds 3 F. (2d) 277] (where, however, fraudulent joinder was not shown).

79. Wilson v. Republic Iron, etc., Co., 257 U. S. 92, 42 SCt 35, 66 L. ed. 144; Chesapeake, etc., R. Co. v. Cockrell, 232 U. S. 146, 34 SCt 278, 58 L. ed. 544; Lynes v. Standard Oil Co., 300 Fed. 812; Sanders v. Atlantic Coast Line R. Co., 33 F. (2d) 1010; Swain v. Interstate Cooperage Co., 189 N. C. 528, 127 SE 538 (last four cases recognizing rule).

80. Wecker v. National Enameling, etc., Co., 204 U. S. 176, 27 SCt 184, 51 L. ed. 430, 9 AnnCas 757; Jones v. Casey-Hedges Co., 213 Fed. 43; Clark v. Chicago, etc., R. Co., 194 Fed. 505 (recognizing rule); Lewis v. Cincinnati, etc., R. Co., 192 Fed. 654; Shaver v. Pacific Coast Condensed Milk Co., 185 Fed. 316; Gustafson v. Chicago, etc., R. Co., 128 Fed. 85; Cox v. Whitmer-Parsons Pulp, etc., Co., 193 N. C. 28, 136 SE 254. See Genuine Panama Hat Works v. Webb, 36 F. (2d) 265 (where a motion to remand was denied); Morefield v. Ozark Pipe Line Corp., 27 F. (2d) 890 (nonresident defendant cannot be denied removal because of allegations against resident defendants, which plaintiff cannot reasonably expect to establish). But see Stevenson v. Illinois Cent. R. Co., 192 Fed. 956; Enos v. Kentucky Distilleries, etc., Co., 189 Fed. 342, 111 CCA 74 (in both cases remand was ordered).

81. See infra § 171.

82. Wilson v. Republic Iron, etc., Co., 257 U. S. 92, 42 SCt 35, 66 L. ed. 144; Wecker v. National Enameling, etc., Co., 204 U. S. 176, 27 SCt 184, 51 L. ed. 430, 9 AnnCas 757; Gray v. Oregon Short Line R. Co., 37 F. (2d) 591; Feaster v. Southern R. Co., 15 F. (2d) 540; Scherrer v. Foster, 5 F. (2d) 236; Martin v. Matson Nav. Co., 239 Fed. 188; Shaver v. Pacific Coast Condensed Milk Co., 185 Fed. 316; Wright v. Phœnix Utility Co., 198 N. C. 204, 151 SE 241; Matthews v. Blackwood Lumber Co., 198 N. C. 129, 150 SE 704; Newton v. Liggett, etc., Tobacco Co., 194 N. C. 816, 140 SE 742; Cox v. Whitmer-Parsons Pulp, etc., Co., 193 N. C. 28, 136 SE 254; Johnson v. Blackwood Lumber Co., 189 N. C. 81, 126 SE 165. And see cases supra notes 77–80.

83. Enos v. Kentucky Distilleries, etc., Co., 189 Fed. 342, 111 CCA 74; Louisville, etc., R. Co. v. Roberts, 136 Ga. 270, 71 SE 425.

84. See Pennsylvania R. Co. v. Allegheny Valley R. Co., 25 Fed. 113.

85. Lilienthal v. Carpenter, 148 Ky. 50, 146 SW 2.

86. Russell v. Champion Fibre Co., 214 Fed. 963, 131 CCA 259 [certiorari den 235 U. S. 700, 35 SCt 200, 59 L. ed. 432].

Burden of proof on motion to remand see infra § 330.

87. Price v. Southern Power Co., 206 Fed. 496.

[a] **Evidence insufficient to show fraudulent joinder.**—Price v. Southern Power Co., 206 Fed. 496; Willard v. Chicago, etc., R. Co., 165 Fed. 181, 91 CCA 215 [certiorari granted 212 U. S. 578, 29 SCt 688, 53 L. ed. 658, and aff 220 U. S. 413, 31 SCt 460, 55 L. ed. 521].

88. Chicago, etc., R. Co. v. Whiteaker, 239 U. S. 421, 35 SCt 152, 60 L. ed. 360 [aff 252 Mo. 438, 160 SW 1009]; Chicago, etc., R. Co. v. Dowell, 229 U. S. 102, 33 SCt 684, 57 L. ed. 1090 [aff 83 Kan. 562, 112 P 136]; Chicago, etc., R. Co. v. Schwyhart, 227 U. S. 184, 33 SCt 250, 57 L. ed. 473 [aff sub nom. Schwyhart v. Barrett, 145 Mo. A. 332, 130 SW 388]; Kraus v. Chicago, etc., R. Co., 16 F. (2d) 79 [rev on other grounds 3 F. (2d) 277]. See Clark v. American Agricultural Chemical Co., 111 S. C. 230, 97 SE 705 (where the right to remove was denied).

89. Deere v. Chicago, etc., R. Co., 85 Fed. 876; Hollifield v. Southern Bell Tel., etc., Co., 172 N. C. 714, 90 SE 996; Hough v. Southern R. Co., 144 N. C. 692, 57 SE 469; Louisville, etc., R. Co. v. Vincent, 116 Tenn. 317, 95 SW 179, 8 AnnCas 66.

90. Able v. Southern R. Co., 73 S. C. 173, 52 SE 962.

91. Kraus v. Chicago, etc., R. Co., 16 F. (2d) 79 [rev 3 F. (2d) 277]. See McAllister v. Chesapeake, etc., R. Co., 243 U. S. 302, 37 SCt 274, 61 L. ed. 735 (where remand was directed in a case in which the petition to remove alleged that plaintiff did not intend to prove against the defendant, whose presence would prevent removal, any of the acts of negligence alleged); Chicago, etc., R. Co. v. Whiteaker, 239 U. S. 421, 36 SCt 152, 60 L. ed. 360 (where a refusal to permit removal was upheld in a case in which the petition to remove alleged that plaintiff had no reasonable intention to recover judgment against defendant whose presence prevented removal).

92. Burt v. Missouri Pac. R. Co., 294 Fed. 911; Warax v. Cincinnati, etc., R. Co., 72 Fed. 637; Arrowsmith v. Nashville, etc., R. Co., 57 Fed. 165; Johnson v. Blackwood Lumber Co., 189 N. C. 81, 126 SE 165.

93. Burt v. Missouri Pac. R. Co., 294 Fed. 911; Warax v. Cincinnati, etc., R. Co., 72 Fed. 637; Patton v. Champion Fibre Co., 192 N. C. 48, 133 SE 174; Johnson v. Blackwood Lum-

nor is the fact that a former suit was dismissed upon the filing of a petition to remove,[94] nor is the fact that there was an abortive attempt to dismiss the earlier action.[95] Where the evidence tends to show liability of the defendant whose presence prevents removal or is sufficient to take to the jury the question as to such liability, in general it is sufficient to show that the joinder was not fraudulent,[96] and the mere failure of the jury to return a verdict against such defendant does not show that the joinder was fraudulent.[97]

Consideration of pleading. The existence of fraudulent intent in joining a defendant, whose presence, if given effect, would prevent removal, may be based on the fact that plaintiff has made misstatements of fact in order to state a joint cause of action although he had knowledge of the facts,[98] or could have had such knowledge if he had made the inquiry that the law requires.[99] While it is generally recognized that the failure of plaintiff to state a cause of action against such defendant is at least a circumstance indicating a fraudulent or sham joinder,[1] and in some cases the view has been taken that the failure of plaintiff's pleading to show on its face a cause of action against such defendant is of itself sufficient to show fraudulent joinder,[2] there is authority for the view that while an inference of fraud may arise from such failure,[3] such failure has evidentiary value only,[4] and does not conclusively show fraudulent intent.[5] In such case the question as to whether a cause of action is stated depends on the state or local law,[6] and the court will not examine plaintiff's pleading closely enough to determine whether a flaw might be found in it on the interposition of a special demurrer.[7]

[§ 172] **(4) Action against Employer and Employee.**[8] The question as to the removability of actions in which a joint cause of action against several defendants is set up frequently arises in actions against employers and employees in which the residence or citizenship of the employee defendant is such that if his presence as a party is given effect the action would not be removable, and in accordance with general rules and subject to applicable qualifications and limitations,[9] such an action is not removable,[10] as, for example, where plaintiff seeks to enforce lia-

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ber Co., 189 N. C. 81, 126 SE 165; Chesapeake, etc., R. Co. v. Hendricks, 88 Tenn. 710, 13 SW 696, 14 SW 488.

[94] Evans v. Sioux City Serv. Co., 206 Fed. 841.

[95] Young v. Standard Oil Co., 35 F. (2d) 551.

[96] West Kentucky Coal Co. v. Key, 178 Ky. 220, 198 SW 724; Broadway Coal Min. Co. v. Robinson, 150 Ky. 707, 150 SW 1000; Cincinnati, etc., R. Co. v. McElroy, 146 Ky. 668, 142 SW 1009; Chesapeake, etc., R. Co. v. Banks, 144 Ky. 137, 137 SW 1066; Illinois Cent. R. Co. v. Coley, 121 Ky. 385, 89 SW 234, 28 KyL 336, 1 LRANS 370. And see cases infra note 97.

[97] Buskirk v. Caudill, 182 Ky. 685, 206 SW 867, 181 Ky. 45, 203 SW 864 [writ of error dism 249 U. S. 619 mem, 39 SCt 258 mem, 63 L. ed. 804 mem]; West Kentucky Coal Co. v. Key, 178 Ky. 220, 198 SW 724; Illinois Cent. R. Co. v. Outland, 160 Ky. 714, 170 SW 48.

[98] Jacobson v. Chicago, etc., R. Co., 176 Fed. 1004 (recognizing rule); Reinartson v. Chicago Great Western R. Co., 174 Fed. 707; McGuire v. Great Northern R. Co., 153 Fed. 434; Gustafson v. Chicago, etc., R. Co., 128 Fed. 85; Carothers v. McKinley Min., etc., Co., 122 Fed. 305; St. Louis-San Francisco R. Co. v. Britton, 163 Ark. 255, 259 SW 730; St. Louis Southwestern R. Co. v. Adams, 87 Ark. 136, 112 SW 186 (recognizing rule); Sears v. Atchison, etc., R. Co., 163 Mo. A. 711, 147 SW 860; Matthews v. Blackwood Lumber Co., 198 N. C. 129, 150 SE 704; Cox v. Whitmer-Parsons Pulp, etc., Co., 193 N. C. 28, 136 SE 254. And see cases supra § 170 note 77.

[99] Wecker v. National Enameling, etc., Co., 204 U. S. 176, 27 SCt 184, 51 L. ed. 430, 9 AnnCas 757; Gustafson v. Chicago, etc., R. Co., 128 Fed. 85. See Benway v. Missouri, etc., R. Co., 26 F. (2d) 383 (where motion to remand was denied); and see cases supra § 170 note 77.

[1] Martin v. Matson Nav. Co., 239 Fed. 188; Price v. Southern Power Co., 206 Fed. 496; Macutis v. Cudahy Packing Co., 203 Fed. 291; Clark v. Chicago, etc., R. Co., 194 Fed. 505 (recognizing rule); Loop v. Winters, 115 Fed. 362. See Henry v. Illinois Cent. R. Co., 132 Fed. 715 (where a motion to remand was denied). Compare Deutsch v. Alaska Gastineau Min. Co., 237 Fed. 215 (in determining the right of defendant, charged with a joint tort, to remove the cause to the federal court, on the ground that joinder with his codefendant was fraudulent, questions as to the sufficiency of pleadings to show liability cannot be decided, such matters being for the trial court, and not affecting the right of removal).

Failure to state cause of action in general as affecting removal see supra § 169.

[2] Gray v. Oregon Short Line R. Co., 37 F. (2d) 591; Burt v. Missouri Pac. R. Co., 294 Fed. 911; Clark v. Chicago, etc., R. Co., 194 Fed. 505 (recognizing rule); Floyt v. Shenango Furnace Co., 186 Fed. 539; Stratton's Independence v. Sterrett, 51 Colo. 17, 117 P 351; Chicago, etc., R. Co. v. Witt, (Okl.) 291 P 59.

[3] Richardson v. Southern Idaho Water Power Co., 209 Fed. 949.

[4] Richardson v. Southern Idaho Water Power Co., supra.

[5] Richardson v. Southern Idaho Water Power Co., supra; McGarvey v. Butte Miner Co., 199 Fed. 671; Erskine Motors Co. v. Chevrolet Motor Co., 180 N. C. 619, 105 SE 420 (recognizing rule).

[6] Chicago, etc., R. Co. v. Schwyhart, 227 U. S. 184, 33 SCt 250, 57 L. ed. 473.

[7] Chicago, etc., R. Co. v. Schwyhart, supra; Erskine Motors Co. v. Chevrolet Motor Co., 180 N. C. 619, 105 SE 420 (recognizing rule). See Jacobson v. Chicago, etc., R. Co., 176 Fed. 1004 (where a motion to remand was granted).

[8] **Joinder of employer and employee as defendants in general** see Agency §§ 606, 607; Master and Servant §§ 434, 1153, 1515; Torts [38 Cyc 488].

[9] See supra §§ 169–171.

[10] U. S.—Chesapeake, etc., R. Co. v. Cockrell, 232 U. S. 146, 34 SCt 278, 58 L. ed. 544 [aff 144 Ky. 139, 137 SW 1066]; Cincinnati, etc., R. Co. v. Bohon, 200 U. S. 221, 26 SCt 166, 50 L. ed. 448; Southern R. Co. v. Miller, 217 U. S. 209, 30 SCt 450, 54 L. ed. 732; Chesapeake, etc., R. Co. v. Dixon, 179 U. S. 131, 21 SCt 67, 45 L. ed. 121 [aff 104 Ky. 608, 47 SW 615]; Young v. Standard Oil Co., 35 F. (2d) 551; Kraus v. Chicago, etc., R. Co., 16 F. (2d) 79 [rev 3 F. (2d) 277]; Highway Constr. Co. v. McClelland, 14 F. (2d) 406 [reh den 15 F. (2d) 187]; Atlantic Coast Line R. Co. v. Feaster, 260 Fed. 881; Russell v. Champion Fibre Co., 214 Fed. 963, 131 CCA 259 [certiorari den 235 U. S. 700, 35 SCt 200, 59 L. ed. 432]; Evans v. Sioux City Serv. Co., 206 Fed. 841; Clark v. Chicago, etc., R. Co., 194 Fed. 505; Knuth v. Butte Electric R. Co., 148 Fed. 73; Thomas v. Great Northern R. Co., 147 Fed. 83, 77 CCA 255.

Ark.—Chicago, etc., R. Co. v. McKamy, 180 Ark. 1095, 25 SW (2d) 5; New Coronado Coal Co. v. Jasper, 144 Ark. 58, 222 SW 22.

Ga.—Louisville, etc., R. Co. v. Roberts, 136 Ga. 270, 71 SE 425; Atlantic Coast Line R. Co. v. Williams, 27 Ga. A. 202, 107 SE 886; Atlantic Coast Line R. Co. v. Renfroe, 27 Ga. A. 198, 107 SE 881.

Ida.—Sumey v. Craig Mountain Lumber Co., 31 Ida. 234, 170 P 112 [certiorari den 246 U. S. 667 mem, 38 SCt 336 mem, 62 L. ed. 929 mem].

Ky.—Buskirk v. Caudill, 182 Ky. 685, 206 SW 867, 181 Ky. 45, 203 SW 864 [writ of error dism 249 U. S. 619 mem, 39 SCt 258 mem, 63 L. ed. 804 mem]; West Kentucky Coal Co. v. Key, 178 Ky. 220, 198 SW 724; Carter Coal Co. v. Prichard, 166 Ky. 776, 179 SW 1038; Chesapeake, etc., R. Co. v. Banks, 144 Ky. 137, 137 SW 1066; Illinois Cent. R. Co. v. Cane, 90 SW 1061, 28 KyL 1018; Illinois Cent. R. Co. v. Leisure, 90 SW 269, 28 KyL 768; Illinois Cent. R. Co. v. Proctor, 122 Ky. 92, 89 SW 714, 28 KyL 598; Illinois Cent. R. Co. v. Coley, 121 Ky. 385, 89 SW 234, 28 KyL 336, 1 LRANS 370; Jones v. Illinois Cent. R. Co., 66 SW 609, 26 KyL 481.

Mo.—Stotler v. Chicago, etc., R. Co., 200 Mo. 107, 98 SW 509; Williams v. Short, 219 Mo. A. 99, 268 SW 706.

N. C.—Frizzell v. Southern Mica Co., 198 N. C. 128, 150 SE 715; Feaster v. McLellan Stores Co., 198 N. C. 31, 150 SE 639; Hurt v. Savona Mfg. Co., 198 N. C. 1, 150 SE 632; Slaughter v. Bemis Lumber Co., 197 N. C. 395, 148 SE 460; Givens v. Savona Mfg. Co., 196 N. C. 377, 145 SE 681; Queen v. Suncrest Lumber Co., 193 N. C. 149, 136 SE 494; Crisp v. Champion Fibre Co., 193 N. C. 77, 136 SE 238; Patton v. Champion Fibre Co., 192 N. C. 48, 133 SE 174; Swain v. Interstate Cooperage Co., 189 N. C. 528, 127 SE 538; Hollifield v. Southern Bell Tel., etc., Co., 172 N. C. 714, 90 SE 996; Hough

For **later cases, developments** and **changes** in the law see **Annotations,** same title and section number.

bility for injury resulting from joint and concurrent fault or action of all defendants.[11] This rule preventing removal has been recognized or applied where defendant employer is not charged with any act of concurrence or direction, but is charged solely as the principal or master for the alleged tort of the defendant employee,[12] as, for example, where the action is against a railroad company and its employee or employees,[13] including an engineer or conductor.[14]

[§ 173] **(5) Action against Lessor and Lessee or Receiver of Lessee.**[15] In accordance with general rules, and subject to applicable qualifications and limitations,[16] the removability, on the ground under consideration, of an action in which a joint cause of action sounding in tort is set up against the lessor and the lessee of certain property,[17] including the lessor and lessee of a railroad,[18] or against the lessor and the receiver of the lessee,[19] has been denied where the residence or citizenship of either defendant is such as to prevent removal if his presence as a party is given effect.

[§ 174] **7. Change in Personnel—a. Intervention.**[20] Where the nature of the action prevents removal[21] the intervention of plaintiff's attorney to enforce his statutory lien does not render the action removable because of diversity of citizenship between the intervener and defendant.[22]

[§ 175] **b. Elimination of Defendant by Plaintiff or Court.** Where plaintiff voluntarily dismisses or discontinues as to a defendant or defendants whose presence prevents removal, the suit thereupon becomes removable where the necessary diversity exists between plaintiff and the remaining defendant or defendants, and the other jurisdictional requisites are present.[23] The rule is otherwise, however, in the case of a disposition of the suit as to the defend-

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v. Southern R. Co., 144 N. C. 692, 57 SE 469.

S. C.—Clark v. American Agricultural Chemical Co., 111 S. C. 230, 97 SE 705; Jones v. Postal Telegraph Cable Co., 91 S. C. 273, 74 SE 492; Baber v. Southern R. Co., 76 S. C. 4, 56 SE 540, 11 AnnCas 960.

Tenn.—Louisville, etc., R. Co. v. Vincent, 116 Tenn. 317, 95 SW 179.

Controversy as not separable see infra § 186.

[11] Chicago, etc., R. Co. v. Dowell, 229 U. S. 102, 33 SCt 684, 57 L. ed. 1090 [aff 83 Kan. 562, 112 P 136]; Chicago, etc., R. Co. v. Schwyhart, 227 U. S. 184, 33 SCt 250, 57 L. ed. 473 [aff sub nom. Schwyhart v. Barrett, 145 Mo. A. 332, 130 SW 388]; Chesapeake, etc., R. Co. v. Dixon, 179 U. S. 131, 21 SCt 67, 45 L. ed. 121 [aff 104 Ky. 608, 47 SW 615]; Zigich v. Tuolumne Copper Min. Co., 260 Fed. 1014 (recognizing rule); Poorman v. Cleveland, etc., R. Co., 255 Fed. 985; Roberts v. Shelby Steel Tube Co., 131 Fed. 729, 65 CCA 589; American Bridge Co. v. Hunt, 130 Fed. 302, 64 CCA 548; Towill v. Southern R. Co., 121 S. C. 447, 114 SE 416. See Southern R. Co. v. Miller, 217 U. S. 209, 30 SCt 450, 54 L. ed. 732 (where the right to remove was denied).

[12] U. S.—Alabama Great Southern R. Co. v. Thompson, 200 U. S. 206, 26 SCt 161, 50 L. ed. 441, 4 AnnCas 1147; La Flower v. Merrill, 28 F. (2d) 784; Deutsch v. Alaska Gastineau Min. Co., 237 Fed. 215; Enos v. Kentucky Distilleries, etc., Co., 189 Fed. 342, 111 CCA 74; Creagh v. Equitable L. Assur. Soc., 88 Fed. 1. Compare Shaffer v. Union Brick Co., 128 Fed. 97 (where a motion to remand was denied).

Ark.—Lusk v. Osborne, 127 Ark. 170, 191 SW 944.

Ga.—Postal Telegraph-Cable Co. v. Puckett, 24 Ga. A. 458, 101 SE 397.

Ky.—Broadway Coal Min. Co. v. Robinson, 150 Ky. 707, 150 SW 1000.

Miss.—Kress v. Crosby, 98 S 437.

[13] Alabama Great Southern R. Co. v. Thompson, 200 U. S. 206, 26 SCt 161, 50 L. ed. 441, 4 AnnCas 1147; Sanders v. Atlantic Coast Line R. Co., 33 F. (2d) 1010; Burt v. Missouri Pac. R. Co., 294 Fed. 911; Davenport v. Southern R. Co., 135 Fed. 960, 68 CCA 444; Doremus v. Root, 94 Fed. 760; Winston v. Illinois Cent. R. Co., 111 Ky. 954, 65 SW 133, 23 KyL 1283, 55 LRA 603. See Chesapeake, etc., R. Co. v. Cockrell, 232 U. S. 146, 34 SCt 278, 58 L. ed. 544; Grosso v. Butte Electric R. Co., 217 Fed. 422; Knuth v. Butte Electric R. Co., 148 Fed. 73; Riser v. Southern R. Co., 116 Fed. 215 (in all of which cases the right to remove was denied or remand was directed).

[14] U. S.—Chicago, etc., R. Co. v. Whiteaker, 239 U. S. 421, 35 SCt 152, 60 L. ed. 360 [aff 252 Mo. 438, 160 SW 1009]; Cincinnati, etc., R. Co. v. Bohon, 200 U. S. 221, 26 SCt 166, 50 L. ed. 448; Alabama Great Southern R. Co. v. Thompson, 200 U. S. 206, 26 SCt 161, 50 L. ed. 441; Kraus v. Chicago, etc., R. Co., 16 F. (2d) 79 [rev 3 F. (2d) 277]; Armstrong v. Kansas City Southern R. Co., 192 Fed. 608. But see Sessions v. Southern Pac. Co., 134 Fed. 313; Gustafson v. Chicago, etc., R. Co., 128 Fed. 85; Warax v. Cincinnati, etc., R. Co., 72 Fed. 637 (in all of which cases a motion to remand was denied).

Ga.—Southern R. Co. v. Grizzle, 124 Ga. 735, 53 SE 244, 110 AmSR 191.

Ky.—Illinois Cent. R. Co. v. Houchins, 121 Ky. 526, 89 SW 530, 28 KyL 499, 123 AmSR 205, 1 LRANS 375; Cincinnati, etc., R. Co. v. Cook, 113 Ky. 161, 67 SW 383, 23 KyL 2410; Winston v. Illinois Cent. R. Co., 111 Ky. 954, 65 SW 13, 23 KyL 1283, 55 LRA 603.

Mo.—Lanning v. Chicago Great Western R. Co., 196 Mo. 647, 94 SW 491.

S. C.—Able v. Southern R. Co., 73 S. C. 173, 52 SE 962.

[15] **Joint liability of lessor and lessee in action for tort:**
In general see Landlord and Tenant § 970; Torts [38 Cyc 488].
Railroad see Railroads §§ 1184-1187.

Lessor and lessee as necessary parties see supra § 161.

[16] See supra §§ 168-171.

[17] McAllister v. Chesapeake, etc., R. Co., 243 U. S. 302, 47 SCt 374, 61 L. ed. 735; Chicago, etc., R. Co. v. Willard, 220 U. S. 413, 31 SCt 460, 55 L. ed. 521 [aff 165 Fed. 181, 91 CCA 215]; Illinois Cent. R. Co. v. Sheegog, 215 U. S. 308, 30 SCt 101, 54 L. ed. 208 [aff 126 Ky. 252, 103 SW 323, 31 KyL 691]; Breymann v. Pennsylvania, etc., R. Co., 38 F. (2d) 209; Keller v. Kansas City, etc., R. Co., 135 Fed. 202; Person v. Illinois Cent. R. Co., 118 Fed. 342; Southern R. Co. v. Sittasen, (Ind. A.) 74 NE 898; Brown v. Louisiana, etc., R. Co., 256 Mo. 522, 165 SW 1060; Calder v. Southern R. Co., 84 S. C. 287, 71 SE 841, AnnCas1913A 894 [writ of error dism 223 U. S. 740 mem, 32 SCt 531 mem, 56 L. ed. 637 mem]. But see Curtis v. Cleveland, etc., R. Co., 140 Fed. 777 (where the court refused to follow the rule as laid down by the highest court in the state, and held that a corporation of the state in which suit was brought and which was the lessor, was not liable for personal injuries due to negligence); Yeates v. Illinois Cent. R. Co., 137 Fed. 943; Kelly v. Chicago, etc., R. Co., 122 Fed. 286; Williard v. Spartanburg, etc., R. Co., 124 Fed. 796 (in all three cases a motion to remand was denied); Spangler v. Atchison, etc., R. Co., 42 Fed. 305 (where, however, a motion to remand was granted on another ground).

[18] Illinois Cent. R. Co. v. Sheegog, 215 U. S. 308, 30 SCt 101, 54 L. ed. 208 [aff 126 Ky. 252, 103 SW 323, 31 KyL 691]. And see cases supra note 17.

[19] Central Ohio R. Co. v. Mahoney, 114 Fed. 732, 52 CCA 364. Contra Chamberlain v. New York, etc., R. Co., 71 Fed. 636.

[20] **Effect of intervention after removal** see infra § 312.

Right of intervener to remove see infra §§ 217, 226.

[21] **Nature of action preventing removal in general** see passim supra §§ 9-27.

[22] Thompson v. Chicago, etc., R. Co., 14 F. (2d) 230; Miner v. Chicago, etc., R. Co., 147 Minn. 21, 179 NW 483.

[23] U. S.—American Car, etc., Co. v. Kettelhake, 236 U. S. 311, 35 SCt 355, 59 L. ed. 594 [aff 171 Mo. A. 528, 153 SW 552]; Powers v. Chesapeake, etc., R. Co., 169 U. S. 92, 18 SCt 264, 42 L. ed. 673 [aff 65 Fed. 129]; Ford v. Roxana Petroleum Co., 31 F. (2d) 765; Bagenas v. Southern Pac. Co., 180 Fed. 887; Fogarty v. Southern Pac. Co., 121 Fed. 941; Cookerly v. Great Northern R. Co., 70 Fed. 277.

Ala.—Illinois Cent. R. Co. v. Robinson, 189 Ala. 523, 66 S 519 (recognizing rule).

Ark.—Kansas City Southern R. Co. v. Cockrell, 169 Ark. 698, 277 SW 7.

Ga.—Cuyler v. Smith, 78 Ga. 662, 3 SE 408.

N. C.—Hill v. Director-Gen. of Railroads, 178 N. C. 607, 101 SE 376; Gurley v. Southern Power Co., 173 N. C. 447, 92 SE 262; Lloyd v. North Carolina R. Co., 162 N. C. 485, 78 SE 489.

Tex.—Morgan's Louisiana, etc., R., etc., Co. v. Street, 57 Tex. Civ. A. 194, 122 SW 270.

[a] **Even though defendants dismissed appear to be necessary parties** to the suit, it becomes removable by the remaining defendants where the jurisdictional facts are present as to them. Cuyler v. Smith, 78 Ga. 662, 3 SE 408.

[b] **Dismissal at time of trial.**—The dismissal by plaintiff of his suit as against the resident defendants, leaving only nonresident defendants, renders the cause removable where

ant or defendants whose presence prevents removal, otherwise than by the voluntary act of plaintiff,[24] as, for example, where there is an involuntary dismissal or nonsuit,[25] a directed verdict,[26] the sustaining of a demurrer to the evidence,[27] or a judgment of reversal on appeal.[28]

Failure to serve process or to bring defendant into court. While the mere failure to serve process on the defendant or defendants whose presence prevents removal does not, it seems, render the suit removable where there was an attempted service,[29] according to some cases where plaintiff fails to serve process upon, or otherwise fails to bring into court, the defendant or defendants whose presence as a party would prevent removal, and proceeds or elects to proceed against the other defendant or defendants alone, the suit is removable provided there is the required diversity in respect of such other defendant or defendants and the other jurisdictional requisites are present,[30] and in some cases a like rule permitting removal has been applied even where there is nothing to show an election to proceed against such other defendant or defendants;[31] but the contrary view has been taken,[32] and it has apparently been held that such failure does not render the suit removable even where plaintiff has proceeded against such other defendant or defendants.[33]

[§ 176] **8. Suits on Assigned Chose in Action.**[34] Under the Judiciary Act of 1875 it was held that the exception of suits by assignees, which could not have been there instituted by the assignors, from the original jurisdiction of the circuit courts of the United States, did not affect the right of removal;[35] but under the provisions of subsequent removal acts

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the other jurisdictional elements exist, even though such dismissal is made upon the trial. Powers v. Chesapeake, etc., R. Co., 169 U. S. 92, 18 SCt 264, 42 L. ed. 673.

[c] **Amendment of plaintiff's pleading** may amount to a discontinuance within the meaning of the rule. Bagenas v. Southern Pac. Co., 180 Fed. 887.

[24] U. S.—Great Northern R. Co. v. Alexander, 246 U. S. 276, 38 SCt 237, 62 L. ed. 713 (recognizing rule); Southern R. Co. v. Lloyd, 239 U. S. 496, 36 SCt 210, 60 L. ed. 402 [aff 166 N. C. 24, 81 SE 1003]; American Car, etc., Co. v. Kettelhake, 236 U. S. 311, 35 SCt 355, 59 L. ed. 594 [aff 171 Mo. A. 528, 153 SW 552]; Southern R. Co. v. Carson, 194 U. S. 136, 24 SCt 609, 48 L. ed. 907 [aff 68 S. C. 55, 46 SE 525]; Kansas City Suburban Belt R. Co. v. Herman, 187 U. S. 63, 23 SCt 24, 47 L. ed. 76; Whitcomb v. Smithson, 175 U. S. 635, 20 SCt 248, 44 L. ed. 303; Fidler v. Western Coal, etc., Co., 33 F. (2d) 158 (recognizing rule); Ford v. Roxana Petroleum Corp., 31 F. (2d) 765; Henly v. Community Natural Gas Co., 24 F. (2d) 252; Springer v. American Tobacco Co., 201 Fed. 199; Ruohs v. Jarvis-Conklin Mortg. Trust Co., 84 Fed. 513. But see Yulee v. Vose, 99 U. S. 539, 25 L. ed. 355 [rev 64 N. Y. 449 (aff 4 Hun 628)] (holding that where an action was brought against several defendants jointly, some of whom were citizens of the same state as plaintiff, and after a dismissal as to all, the state court of appeals affirmed such judgment of dismissal, except as regards a citizen of another state, there was thus a severance of the action, and that the remaining defendant might remove the same).

Ala.—Bailey v. Southern R. Co., 215 Ala. 677, 112 S 203; Southern R. Co. v. Williams, 211 Ala. 235, 100 S 203.

Ill.—Gordon v. Grand Trunk Western R. Co., 209 Ill. A. 145.

Ky.—Cincinnati, etc., R. Co. v. Evans, 110 SW 844, 33 KyL 596.

Minn.—Flygen v. Chicago, etc., R. Co., 115 Minn. 197, 132 NW 10.

Miss.—Illinois Cent. R. Co. v. Harris, 85 Miss. 15, 38 S 225.

Mo.—Zumwalt v. Chicago, etc., R. Co., 266 SW 717; Swab v. Smith Bros., 222 Mo. A. 872, 6 SW (2d) 56; McNulty v. Atlas Portland Cement Co., (A.) 249 SW 730.

N. C.—Hill v. Director-Gen. of Railroads, 178 N. C. 607, 101 SE 376; Gurley v. Southern Power Co., 173 N. C. 447, 92 SE 262; Lloyd v. North Carolina R. Co., 162 N. C. 485, 78 SE 489.

Wash.—Howe v. Northern Pac. R. Co., 30 Wash. 569, 70 P 1100, 60 LRA 949.

See Mitchell v. Southern R. Co., 23 Ga. A. 195, 98 SE 184.

[a] **Voluntary dismissal or discontinuance not shown.**—A statement of plaintiff's counsel that he would not insist on a verdict against the resident defendant did not constitute a dismissal as to such defendant such as would authorize the nonresident defendant to remove the cause to the federal court. Illinois Cent. R. Co. v. Robinson, 189 Ala. 523, 66 S 519.

[25] U. S.—Southern R. Co. v. Lloyd, 239 U. S. 496, 36 SCt 210, 60 L. ed. 402 [aff 166 N. C. 24, 81 SE 1003]; American Car, etc., Co. v. Kettelhake, 236 U. S. 311, 35 SCt 355, 59 L. ed. 594 [aff 171 Mo. A. 528, 153 SW 552]; Lathrop, etc., Co. v. Interior Constr., etc., Co., 215 U. S. 246, 30 SCt 76, 54 L. ed. 177 [rev 150 Fed. 666]; Ford v. Roxana Petroleum Corp., 31 F. (2d) 765; Moeller v. Southern Pac. Co., 211 Fed. 239.

Ida.—Sumey v. Craig Mountain Lumber Co., 31 Ida. 234, 170 P 112 [certiorari den 246 U. S. 667 mem, 38 SCt 336 mem, 62 L. ed. 929 mem].

Minn.—Flygen v. Chicago, etc., R. Co., 115 Minn. 197, 132 NW 10.

Mo.—Zumwalt v. Chicago, etc., R. Co., 266 SW 717; Swab v. Smith Bros., 222 Mo. A. 872, 6 SW (2d) 56. Compare State v. Falkenhainer, 317 Mo. 707, 296 SW 386 (where a decision that a nonresident defendant was not entitled to remove after the entry of an order dismissing the cause as to the resident defendants was placed on the ground that plaintiff's time to appeal from such order had not expired).

N. C.—Lloyd v. North Carolina R. Co., 162 N. C. 485, 78 SE 489.

[26] U. S.—Whitcomb v. Smithson, 175 U. S. 635, 20 SCt 248, 44 L. ed. 303; Henly v. Community Natural Gas Co., 24 F. (2d) 252; Springer v. American Tobacco Co., 208 Fed. 199.

Ala.—Southern R. Co. v. Williams, 211 Ala. 235, 100 S 203.

Ga.—Southern R. Co. v. Nichols, 135 Ga. 34, 68 SE 789.

Ill.—Gordon v. Grand Trunk Western R. Co., 209 Ill. A. 195.

Ky.—Landers v. Tracy, 171 Ky. 657, 188 SW 763 [overr Landers v. Cincinnati, etc., R. Co., 156 Ky. 301, 160 SW 1050; Byrne v. Chesapeake, etc., R. Co., 151 Ky. 553, 152 SW 538; Haynes v. Cincinnati, etc., R. Co., 145 Ky. 209, 140 SW 176, AnnCas1913B 719]; Carter Coal Co. v. Prichard, 166 Ky. 776, 179 SW 1038; Cincinnati, etc., R. Co. v. Evans, 110 SW 844, 33 KyL 596.

Mo.—McNulty v. Atlas Portland Cement Co., (A.) 249 SW 730. Compare Loyal Order of Moose v. Gustin, 202 Ala. 246, 80 S 84 (holding that a petition for removal, where the court had directed a verdict for the other defendants, came too late where the jury had rendered a verdict against the removing defendant before the petition was filed).

[27] Kansas City Suburban Belt R. Co. v. Herman, 187 U. S. 63, 23 SCt 24, 47 L. ed. 76; Danforth v. Pure Oil Co., 20 F. (2d) 387; Bailey v. Southern R. Co., 215 Ala. 677, 112 S 203; Zumwalt v. Chicago, etc., R. Co., (Mo.) 266 SW 717; Craig v. Kansas City Terminal R. Co., 271 Mo. 516, 197 SW 141.

[28] Central Sav. Bank v. Lake, 201 Cal. 438, 257 P 521; Gurley v. Southern Power Co., 173 N. C. 447, 92 SE 262.

[29] Fidler v. Western Coal, etc., Co., 33 F. (2d) 158.

Separable controversy see infra § 181.

[30] Berry v. St. Louis, etc., R. Co., 118 Fed. 911; McHenry v. New York, etc., R. Co., 25 Fed. 65; Murphy v. Stone, etc., Engineering Corp., 44 Mont. 146, 119 P 717, AnnCas1913A 1334; Golden v. Northern Pac. R. Co., 39 Mont. 435, 104 P 549, 34 LRA NS 1154, 18 AnnCas 886.

Failure to serve defendant as excusing nonjoinder of such defendant in petition to remove see infra § 233.

[31] Galehouse v. Baltimore, etc., R. Co., 274 Fed. 370; Carlisle v. Sunset Tel., etc., Co., 116 Fed. 896,

[32] Grosso v. Butte Electric R. Co., 217 Fed. 422.

[33] Rodgers v. Gaines Bros. Co., 220 Mo. A. 876, 295 SW 492.

[34] **Original jurisdiction of suit on assigned chose in action** see Federal Courts § 71.

[35] Delaware County v. Diebold Safe, etc., Co., 133 U. S. 473, 10 SCt 399, 33 L. ed. 674; Claflin v. Commonwealth Ins. Co., 110 U. S. 81, 3 SCt 507, 28 L. ed. 76; Glenn v. Walker, 27 Fed. 577; Rosenbaum v. Council Bluffs Ins. Co., 37 Fed. 724; Bell v. Noonan, 19 Fed. 225; Rosenblatt v. Reliance Lumber Co., 18 Fed. 705; Waterbury v. Laredo, 29 F. Cas. No. 17,252, 3 Woods 371; Leutze v. Butterfield, 7 Daly (N. Y.) 24, 1 Abb NCas 367, 52 HowPr 376.

[a] **Removal by either party.**—Under the Judiciary Act of 1875 the rule stated in the text applied whether removal was sought by plaintiff

which limit the right to remove to suits of which the federal courts have original jurisdiction,[36] suits by an assignee of a chose in action, within such exception of suits by assignees,[37] cannot be removed on the ground that plaintiff and defendant are citizens of different states[38] or that one party is a citizen of a state and the adverse party an alien,[39] if the citizenship or allegiance of the assignor was such as to prevent a suit in the federal court if there had been no assignment. In a suit by an assignee, however, the term "chose in action" has been construed as not to include the claim on which action was brought, so that the foregoing rule preventing removal did not apply.[40] Where both the assignor and the assignee are citizens of states different from that of defendant, the statute and rule in question do not prevent removal,[41] nor, it has been held, do they prevent removal where the action is brought by the administrator of the assignee.[42] There is authority for the view that the whole case is removable where the complaint sets forth several causes of action, one of which is removable, although other causes are on assigned claims of which the federal court would not have original jurisdiction,[43] and this rule has been applied in a suit against an alien where some of the plaintiff's assignors were citizens and some were aliens.[44]

Consent to assignment. In a case arising under Removal Act of 1875 the view was taken that where defendant consented to the assignment, the citizenship of the assignor could be disregarded in a suit by the assignee.[45]

Assignment to prevent removal. An assignment of a cause of action to a citizen of the same state as that of which defendant is a citizen prevents the removal of a suit thereon to a federal court on the ground of diversity of citizenship, even though the assignment is made for the purpose of preventing removal.[46-47]

[§ 177] **I. Time of Existence of Ground for Removal.**[48] Subject to the rules as to the effect of subsequent changes in personnel,[49] as to the right of intervenors and substituted parties to remove,[50] and as to the dependence of the right to remove on the pleading or record when removal is sought,[51] the

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or by defendant. Claflin v. Commonwealth Ins. Co., 110 U. S. 81, 3 SCt 507, 28 L. ed. 76.

[b] **Under Judiciary Act of 1789** a like rule was applicable. Green v. Custard, 23 How. (U. S.) 484, 16 L. ed. 471; Bushnell v. Kennedy, 9 Wall. (U. S.) 387, 19 L. ed. 736; Ayres v. Western R. Corp., 45 N. Y. 260 [rev 48 Barb. 132, 32 HowPr 351]. Contra Anderson v. Manufacturers' Bank, 14 AbbPr (N. Y.) 436.

36. USCA tit 28 § 71. And see supra § 10.

37. USCA tit 28 § 41.

38. North American Transp., etc., Co. v. Morrison, 178 U. S. 262, 20 SCt 869, 44 L. ed. 1061 [rev 85 Fed. 802]; Mexican Nat. R. Co. v. Davidson, 157 U. S. 201, 15 SCt 563, 39 L. ed. 672; State Bank v. Chicago, etc., R. Co., 281 Fed. 345; Chase v. Sheldon Roller-Mills Co., 56 Fed. 625.

[a] **Illustrations of choses in action within statute and rule.**—(1) Oral contract. Utah-Nevada Co. v. De Lamar, 133 Fed. 113, 66 CCA 179 [certiorari den 199 U. S. 605, 26 SCt 746, 50 L. ed. 330]. (2) Contract of carriage. North American Transp., etc., Co. v. Morrison, 178 U. S. 262, 20 SCt 869, 44 L. ed. 1061 [rev 85 Fed. 802]. (3) Bill of lading. Swea City State Bank v. Chicago, etc., R. Co., 281 Fed. 345. (4) Claim for money due under a contract providing for payment by a railroad company of a debt due to a construction company. Mexican Nat. R. Co. v. Davidson, 157 U. S. 201, 15 SCt 563, 39 L. ed. 672. (5) Compare cases in Federal Courts § 71.

[b] **Assignee made formal defendant but realigned as plaintiff.**—The materiality of the citizenship of an intermediate assignor of a life insurance policy has been asserted in a suit by the administratrix of insured to recover on the policy and to determine the interest of the assignee of such intermediate assignor, in which suit the insurance company and such assignee were made defendants, the assignee, however, being realigned as a plaintiff because of his rights against the insurance company. McNulty v. Connecticut Mut. L. Ins. Co., 46 Fed. 305.

[c] **Presumption as to citizenship of assignor president of assignee corporation.**—It may not be presumed that the assignor, who was president of plaintiff corporation to which the assignment was made, was a citizen of the state of which plaintiff was a corporation. Utah-Nevada Co. v. De Lamar, 133 Fed. 113, 66 CCA 179 [certiorari den 199 U. S. 605, 26 SCt 746, 50 L. ed. 330].

[d] **Effect of statutory provisions as to venue.**—(1) The residence of the assignor in respect of the judicial district has been given effect in directing a remand in a case in which both the assignor and the assignee were citizens of the same state, under the holdings now overruled (see supra § 10), which regarded the statutory provisions as to venue as jurisdictional to the extent of preventing removal, even though diversity of state citizenship existed, if the suit was not brought in the district of either plaintiff or defendant. Guaranty Trust Co. v. McCabe, 250 Fed. 699, 163 CCA 31 [certiorari den 247 U. S. 505 mem, 38 SCt 427 mem, 62 L. ed. 1240 mem]. (2) A like rule was applied where the assignor was a citizen of a different state from that of the assignee and suit was brought in the state of which the assignee was a citizen. Waterman v. Chesapeake, etc., R. Co., 199 Fed. 667. (3) Even before such holdings as to the effect of the statutory provisions as to venue were overruled, however, in some cases the position was taken that the fact that the suit was brought in a district other than that of assignor or defendant did not prevent removal, provided there was diversity of citizenship between the defendant and both the assignor and the assignee. Cincinnati, etc., R. Co. v. Orr, 215 Fed. 261; Stimson v. United Wrapping Mach. Co., 156 Fed. 298.

39. Sands v. James Carruthers & Co., Ltd., 243 Fed. 636 (recognizing rule).

40. Conn v. Chicago, etc., R. Co., 48 Fed. 177.

[a] **Claim for excess freight charges.**—(1) The materiality of the citizenship of the assignor of a claim for excess freight charges, as bearing on the removability of a suit by the assignee to recover on such claim, has been denied. Conn v. Chicago, etc., R. Co., 48 Fed. 177. (2) Compare cases in Federal Courts § 71.

41. Cincinnati, etc., R. Co. v. Orr, 215 Fed. 261; Stimson v. United Wrapping Mach. Co., 156 Fed. 298. Compare cases supra note 38 [d].

42. Sands v. James Carruthers & Co., Ltd., 243 Fed. 636.

[a] **Rule applied** where an alien had assigned to a citizen a chose in action against another alien and on the death of the assignee the administrator of the assignee brought suit on the assigned chose in action. Sands v. James Carruthers & Co., Ltd., 243 Fed. 636. But see North American Transp., etc., Co. v. Morrison, 178 U. S. 262, 20 SCt 869, 44 L. ed. 1061 [rev 85 Fed. 802] (where, however, a question as to jurisdictional amount was apparently involved).

43. Hoge v. Canton Ins. Office, 103 Fed. 513; Sharkey v. Port Blakely Mill Co., 92 Fed. 425 [aff 102 Fed. 259, 42 CCA 329].

44. Patterson v. Bucknall SS. Lines, 203 Fed. 1021.

45. Delaware County v. Diebold Safe, etc., Co., 133 U. S. 473, 10 SCt 399, 33 L. ed. 674.

46–47. Leather Manufacturers' Nat. Bank v. Cooper, 120 U. S. 778, 7 SCt 777, 30 L. ed. 816; Oakley v. Goodnow, 118 U. S. 43, 6 SCt 944, 30 L. ed. 61; Provident Sav. L. Assur. Soc. v. Ford, 114 U. S. 635, 5 SCt 1104, 29 L. ed. 261; Hawley v. Chicago, etc., R. Co., 71 Iowa 717, 29 NW 787; Vimont v. Chicago, etc., R. Co., 69 Iowa 296, 22 NW 906, 28 NW 612; Goodnow v. Oakley, 68 Iowa 25, 25 NW 912; Goodnow v. Litchfield, 67 Iowa 691, 25 NW 882; Vimont v. Chicago, etc., R. Co., 64 Iowa 513, 17 NW 31, 21 NW 9; Hayday v. Hammermill Paper Co., 176 Minn. 315, 223 NW 614, 63 ALR 210 (recognizing rule). See Jackson v. William Kenefick Co., 233 Fed. 130 (where the right to remove an action by an alien against nonresidents of state where action was brought was denied); Wells v. Western Union Tel. Co., 144 Iowa 605, 123 NW 371, 138 AmSR 317, 24 LRANS 1045 (where there was no testimony in support of defendant's action in a state court that assignment was without consideration and colorable and made to prevent removal to federal court). But see Goodnow v. Litchfield, 47 Fed. 753 (where motion to remand was denied).

48. Change of citizenship after removal see infra § 316.

Statements in petition for removal see infra § 238.

49. See supra §§ 174, 175.

50. See infra §§ 217, 226.

51. See infra § 179.

general rule is that the diversity of citizenship[52] and the nonresidence of defendant[53] must exist at the time the suit is commenced, and also at the time when the petition to remove is filed.[54]

[§ 178] **J. Pleading or Record as Affecting Removability[55]—1. In General.** In the absence of a claim or showing in the petition for removal of fraudulent or sham joinder[56] in which case the removability of the cause is determined upon the issue thereby raised,[57] and subject to the rules as to the effect of changes in the status or personnel of parties to the suit,[58] where the existence of diversity of citizenship depends on the nature or subject matter of the suit,[59] in general such question is determinable from the case made by plaintiff's pleading,[60] as, for example, where there is a question as to whether a defendant is a formal or a necessary party,[61] although it may become necessary to determine the question as to whether one is a formal or necessary party by a consideration of the nature of the suit as presented by the whole record.[62]

Joint cause of action. It has frequently been held or recognized that, in the absence of any claim or showing as to fraudulent or sham joinder,[63] where the question as to removability turns on whether plaintiff has relied on a joint cause of action against all defendants, such question is determinable from the case made by plaintiff's pleading,[64] and that, if the cause of action as stated in such pleading is joint, the suit is not removable where plaintiff and one defendant are citizens of the same state,[65] or one defendant is a resident of the state where the action is brought.[66]

Place of citizenship. While, in the absence of any contrary showing, the allegations of plaintiff's pleading as to the place of citizenship or residence may be given effect,[67] the omission from plaintiff's writ,[68] or pleading,[69] of any allegation as to the citizenship of the parties does not prevent removal on the ground of diversity of citizenship, as the omission may be supplied by the petition for removal.[70] On the other hand, the fact that plaintiff's pleading alleges that a party is a citizen of a specified state does not prevent defendant from showing that such party is a citizen of another state, and removing the cause on that ground.[71]

Designation or arrangement of parties. The designation of parties in the title of plaintiff's pleading will not govern if such designation is not supported by the allegations in the body of the pleading.[72] There is authority for the view that the designation of parties in the notice or summons will govern as to who are parties plaintiff even though in plaintiff's pleading, subsequently filed, there is a variance from the notice or summons in this regard.[73] As already pointed out, plaintiff's designation of a particular party as plaintiff or defendant is not conclusive and the court may realign the parties in accordance to their real interests and the subject matter of the suit.[74]

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[52] U. S.—Kinney v. Columbia Sav., etc., Assoc., 191 U. S. 78, 24 SCt 30, 48 L. ed. 103 (recognizing rule); Mattingly v. Northwestern Virginia R. Co., 158 U. S. 53, 15 SCt 725, 39 L. ed. 894; Kellam v. Keith, 144 U. S. 568, 12 SCt 922, 36 L. ed. 544; Jackson v. Allen, 132 U. S. 27, 10 SCt 9, 33 L. ed. 249; Stevens v. Nichols, 130 U. S. 230, 9 SCt 518, 32 L. ed. 914; Smith v. Akers, 117 U. S. 97, 6 SCt 669, 29 L. ed. 888; Houston, etc., R. Co. v. Shirley, 111 U. S. 358, 4 SCt 472, 28 L. ed. 455; Gibson v. Bruce, 108 U. S. 561, 2 SCt 873, 27 L. ed. 825; Phœnix Ins. Co. v. Pechner, 95 U. S. 183, 24 L. ed. 427 [aff 65 N. Y. 195]; Anaconda Copper Min. Co. v. Butte-Balaklava Copper Co., 200 Fed. 808; Nash v. McNamara, 145 Fed. 541; Dalton v. Germania Ins. Co., 118 Fed. 936; Foster v. Paragould Southeastern R. Co., 74 Fed. 273; Glover v. Shepperd, 15 Fed. 833, 11 Biss. 572.

Ala.—Southern R. Co v. Bailey, 220 Ala. 385, 125 S 403.

Iowa.—O'Conner v. Chicago, etc., R. Co., 144 Iowa 289, 122 NW 947.

Mass.—Tapley v. Martin, 116 Mass. 275.

N. Y.—Dart v. Walker, 4 Daly 188.

[a] **Fact that plaintiff changed his domicile after suit** was commenced did not create the requisite diversity. Southern R. Co. v. Bailey, 220 Ala. 385, 125 S 403.

[b] **Citizenship in territory when suit commenced.**—Where suit was brought by a citizen of Montana against a citizen of Arizona which became a state pending suit, defendant was not then entitled to remove the cause for diversity of citizenship. Anaconda Copper Min. Co. v. Butte-Balaklava Copper Co., 200 Fed. 808.

[c] **Under Judiciary Act of 1789** there could be no removal unless the claimed diversity of citizenship existed when the suit was commenced. Phœnix Ins. Co. v. Pechner, 95 U. S. 183, 24 L. ed. 427.

[53] Camprelle v. Balbach, 46 Fed. 81.

[a] **Change of residence after suit commenced** does not render removable a suit otherwise not removable. Camprelle v. Balbach, 46 Fed. 81.

[54] Kinney v. Columbia Sav., etc., Assoc., 191 U. S. 78, 24 SCt 30, 48 L. ed. 103 (recognizing rule); Jackson v. Allen, 132 U. S. 27, 10 SCt 9, 33 L. ed. 249; Stevens v. Nichols, 130 U. S. 230, 9 SCt 518, 32 L. ed. 914; Gibson v. Bruce, 108 U. S. 561, 2 SCt 873, 27 L. ed. 825; Foster v. Paragould, etc., R. Co., 74 Fed. 273; Chicago, etc., R. Co. v. McComb, 5 F. Cas. No. 2,670, 17 Blatchf. 371 (recognizing rule); Southern R. Co. v. Bailey, 220 Ala. 385, 125 S 403; O'Conner v. Chicago, etc., R. Co., 144 Iowa 289, 122 NW 947. But see Bruett v. F. C. Austin Drain. Excavator Co., 174 Fed. 668 (where the court said that the right to remove depends upon the citizenship of the parties at the time the action is commenced and that a subsequent change does not defeat the right).

[55] **Effect of failure to state cause of action as to party whose presence prevented removal** see supra § 169.

[56] **Showing fraud by petition for removal** see infra § 240.

[57] Deutsch v. Alaska Gastineau Min. Co., 237 Fed. 215; Trana v. Chicago, etc., R. Co., 228 Fed. 824.

[58] See supra §§ 174, 175.

[59] **Real, necessary, and formal parties in general** see supra § 148.

[60] Kiefer v. Idaho Falls, 19 F. (2d) 538; Rose v. United American Ins. Co., 17 F. (2d) 854; New Jersey Zinc Co. v. Trotter, 18 F. Cas. No. 10,167; Mogg v. Farley, 205 Ky. 25, 265 SW 449; Hill v. Director-Gen. of Railroads, 178 N. C. 607, 101 SE 376.

[61] Plymouth Consol. Gold Min. Co. v. Amador, etc., Canal Co., 118 U. S. 264, 6 SCt 1034, 30 L. ed. 232; Bryce v. Southern R. Co., 122 Fed. 709; Mayer v. Denver, etc., R. Co., 41 Fed. 723; New Jersey Zinc Co. v. Trotter, 18 F. Cas. No. 10,167; Mogg v. Farley, 205 Ky. 25, 265 SW 449.

[62] Ex p. Nebraska, 209 U. S. 436, 28 SCt 581, 52 L. ed. 876; McHenry v. New York, etc., R. Co., 25 Fed. 65. See Lee v. Standard Motors Finance Co., 166 Ga. 54, 142 SE 541.

[63] **As to fraudulent joinder** see supra note 57.

Fraudulent joinder notwithstanding complaint in form alleging joint cause of action see supra § 170.

[64] Breymann v. Pennsylvania, etc., R. Co., 38 F. (2d) 209; Martin v. Matson Nav. Co., 239 Fed. 188; Thomas v. Great Northern R. Co., 147 Fed. 83, 77 CCA 255; Southern R. Co. v. Sittasen, (Ind. A.) 74 NE 898; Sears v. Atchison, etc., R. Co., 163 Mo. A. 711, 147 SW 860 (recognizing rule).

Existence of separable controversy see infra § 182.

[65] Chicago, etc., R. Co. v. McWhirt, 243 U. S. 422, 37 SCt 392, 61 L. ed. 826; Chesapeake, etc., R. Co. v. Cockrell, 232 U. S. 146, 34 SCt 278, 58 L. ed. 544; Chicago, etc., R. Co. v. Dowell, 229 U. S. 102, 33 SCt 684, 57 L. ed. 1090; Southern R. Co. v. Miller, 217 U. S. 209, 30 SCt 454, 54 L. ed. 732; Swain v. Interstate Cooperage Co., 189 N. C. 528, 127 SE 538; Hough v. Southern R. Co., 144 N. C. 692, 57 SE 469. And see cases supra § 168 notes 48–50.

[66] Russell v. Champion Fibre Co., 214 Fed. 963, 131 CCA 259 [certiorari den 235 U. S. 700, 35 SCt 200, 59 L. ed. 432].

[67] St. Louis, etc., R. Co. v. Kitchen, 98 Ark. 507, 136 SW 970, 50 LRA NS 828. See Duncan v. St. Louis, etc., R. Co., 49 La. Ann. 1700, 22 S 924 (where the right to remove was denied).

[a] **Particular allegations.**—(1) Allegation that "plaintiff is a citizen and taxpayer, resident at Hartsville, in the Town of Hartsville, in the county of Darlington, in the state of South Carolina," is equivalent to alleging that plaintiff is a citizen of South Carolina. Miller v. Southern Bell Tel., etc., Co., 279 Fed. 806. (2) Allegation that "defendant is a corporation chartered and existing under and by the laws of the state of New York" is sufficient to show defendant's citizenship in New York. Miller v. Southern Bell Tel., etc., Co., supra.

Place of citizenship in general see passim supra §§ 135–143.

[68] Ladd v. Tudor, 14 F. Cas. No. 7,975, 3 Woodb. & M. 325.

[69] Ysleta v. Canda, 67 Fed. 6.

[70] **Allegations of petition for removal as to diversity of citizenship** see infra §§ 238–241.

[71] Harrington v. Great Northern R. Co., 169 Fed. 714.

[§ 179] **2. Time as of Which Record Considered.**[75] The right to remove depends on the case disclosed by the pleadings,[76] or the whole record when that is considered,[77] when the petition for removal is filed.

IX. SEPARABLE CONTROVERSIES

[By Eustace W. Tomlinson]

[§ 180] **A. In General.** While, under the provision of the statute relating to the removal of causes from a state court to a federal court that when in such a suit, the removal of which is authorized, there shall be a controversy which is wholly between citizens of different states and which can be fully determined between them, then either one or more of the defendants actually interested in such controversy may remove the suit,[78] there is authority for the view that removal of such a suit may be had by any one or more of defendants even though the suit involves only one controversy,[79] such statutory provision is ordinarily held to refer to a case in which there are two or more controversies, one of which is separable from the other or others,[80] and the general rule is that, in order to be removable by less than the whole number of defendants, the suit must be separable into parts, so that in one of them a controversy will be presented, wholly between citizens of different states, which can be fully determined without the presence of the other parties.[81]

Extent of removal. The removal of a suit by one or more defendants, under the statutory provision applicable to separable controversies, takes into the federal court the whole case, and not merely the separable controversy.[82]

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[72] Ohio v. Swift, 270 Fed. 141 [certiorari den 257 U. S. 633 mem, 42 SCt 47 mem, 66 L. ed. 407 mem, app dism 260 U. S. 146, 43 SCt 22, 67 L. ed. 176].

[73] Bruett v. F. C. Austin Drain. Excavator Co., 174 Fed. 668.

[74] See supra § 147.

[75] **Consideration of record by state court** see infra § 253.

[76] Salem Trust Co. v. Manufacturers' Finance Co., 264 U. S. 182, 44 SCt 266, 68 L. ed. 628, 31 ALR 867 [rev on other grounds 280 Fed. 803]; Merchants' Cotton Press, etc., Co. v. Insurance Co. of North America, 151 U. S. 368, 14 SCt 367, 38 L. ed. 195; Graves v. Corbin, 132 U. S. 585, 10 SCt 196, 33 L. ed. 462; Von Herberg v. Seattle, 27 F. (2d) 457 [certiorari den 278 U. S. 644 mem, 49 SCt 80 mem, 73 L. ed. 558 mem]; Northern Trust Co. v. Grand Trunk Western R. Co., 282 Ill. 565, 118 NE 986.

[77] Chicago, etc., R. Co. v. McComb, 5 F. Cas. No. 2,670, 17 Blatchf. 371; St. Louis-San Francisco R. Co. v. Britton, 163 Ark. 255, 259 SW 730; Rodgers v. Gaines Bros. Co., 220 Mo. A. 876, 295 SW 492.

[78] USCA tit 28 § 71.

[79] Hunter v. Conrad, 85 Fed. 803; Garner v. Providence Second Nat. Bank, 66 Fed. 369; Stanbrough v. Cook, 38 Fed. 369, 3 LRA 400; Grindrod v. Crine, 22 Fed. 257; Mutual L. Ins. Co. v. Champlin, 21 Fed. 85, 22 Blatchf. 334; Arapahoe County v. Kansas Pac. R. Co., 1 F. Cas. No. 502, 4 Dill. 277.

[80] Chicago, etc., R. Co. v. Martin, 178 U. S. 245, 20 SCt 854, 44 L. ed. 1055; Fletcher v. Hamlet, 116 U. S. 408, 6 SCt 426, 29 L. ed. 679; Houston, etc., R. Co. v. Shirley, 111 U. S. 358, 4 SCt 472, 28 L. ed. 455; Blackburn v. Blackburn, 142 Fed. 90; Huntington v. Pinney, 126 Fed. 237; Yarnell v. Felton, 102 Fed. 369; Mutual Reserve Fund Life Assoc. v. Farmer, 77 Fed. 929, 23 CCA 574; Watson v. Asbury Park, etc., St. R. Co., 73 Fed. 1; Thompson v. Chicago, etc., R. Co., 60 Fed. 773; Rogers v. Van Nortwick, 45 Fed. 513; Arkansas Valley Smelting Co. v. Cowenhoven, 41 Fed. 450; Sexton v. Seelye, 39 Fed. 705; Western Union Tel. Co. v. Brown, 32 Fed. 337. Compare Tullar v. Illinois Cent. R. Co., 213 Fed. 280 (holding that the separable controversies provision does not enlarge the previous clauses of the statute which particularly specify the suits that may be removed, but provides only that in the cases to which it refers one or more defendants interested in the controversy may remove the suit). And see cases infra note 81.

[81] U. S.—Torrence v. Shedd, 144 U. S. 527, 12 SCt 726, 36 L. ed. 528; Winchester v. Loud, 108 U. S. 130, 2 SCt 311, 27 L. ed. 677; Fraser v. Jennison, 106 U. S. 191, 1 SCt 171, 27 L. ed. 131; Yulee v. Vose, 99 U. S. 539, 25 L. ed. 355; Gardner v. Brown, 21 Wall. 36, 22 L. ed. 527; Warren v. Midland Valley R. Co., 36 F. (2d) 828; Highway Constr. Co. v. McClelland, 14 F. (2d) 406 [reh den 15 F. (2d) 187]; James Ferry, Inc. v. John R. Wiggins Co., 287 Fed. 421; Casey v. Baker, 212 Fed. 247; Richardson v. Southern Idaho Water Power Co., 209 Fed. 949; Snow v. Smith, 88 Fed. 657; Scoutt v. Keck, 73 Fed. 900, 20 CCA 103; McNulty v. Connecticut Mut. L. Ins. Co., 46 Fed. 305; Weller v. J. B. Pace Tobacco Co., 32 Fed. 860; Anderson v. Appleton, 32 Fed. 855; Capital City Bank v. Hodgin, 22 Fed. 209; Gudger v. Western North Carolina R. Co., 21 Fed. 81; New Jersey Zinc, etc., Co. v. Trotter, 18 Fed. 337; Langdon v. Fogg, 18 Fed. 5, 21 Blatchf. 392; Connell v. Utica, etc., R. Co., 13 Fed. 241; Maine v. Gilman, 11 Fed. 214; Bixby v. Couse, 3 F. Cas. No. 1,451, 8 Blatchf. 73. See Fletcher v. Hamlet, 116 U. S. 408, 6 SCt 426, 29 L. ed. 679 [aff 24 Fed. 305] (applying the rule).

Ga.—Carter v. Scott, 82 Ga. 297, 8 SE 421.

Iowa.—Burch v. Davenport, etc., R. Co., 46 Iowa 449, 26 AmR 150.

La.—Townsend v. Sykes, 38 La. Ann. 410.

N. J.—National Docks, etc., Connecting R. Co. v. Pennsylvania R. Co., 52 N. J. Eq. 58, 28 A 71 [aff 52 N. J. Eq. 590, 33 A 50].

N. C.—Morganton v. Hutton, etc., Co., 187 N. C. 736, 122 SE 842.

Pa.—Bowen v. Bowen Anchor Co., 28 Pa. Dist. 202.

[a] **Principle distinguished.**—In a suit which is removable under the statute, if there be one defendant he may remove the cause, and if there be more than one defendant then all uniting may remove it; but less than the whole number of defendants can remove a cause only where there is a separable controversy wholly between citizens of different states and which can be fully determined between them. Casey v. Baker, 212 Fed. 247.

What controversies are separable see infra §§ 181–191.

[82] Gainesville v. Brown-Crummer Inv. Co., 277 U. S. 54, 48 SCt 454, 79 L. ed. 781 [rev 20 F. (2d) 497]; Barney v. Latham, 103 U. S. 205, 26 L. ed. 514; Jennings v. Southern R. Co., 40 F. (2d) 951; Tensas Parish School Bd. v. Pannell, 26 F. (2d) 495; Hoffman v. Lynch, 23 F. (2d) 518; Davidson v. Montana-Dakota Power Co., 22 F. (2d) 688; Lynch v. Springfield F. & M. Ins. Co., 15 F. (2d) 725; Slate v. Hutcherson, 15 F. (2d) 551; Hamilton v. Empire Gas, etc., Co., 297 Fed. 422; James Ferry, Inc. v. John R. Wiggins Co., 287 Fed. 421; Colleton Mercantile, etc., Co. v. Savannah River Lumber Co., 280 Fed. 358; Bedell v. Baltimore, etc., R. Co., 245 Fed. 788; Strother v. Union Pac. R. Co., 220 Fed. 731; Sharkey v. Port Blakely Mill Co., 92 Fed. 425 [aff 102 Fed. 259]; Atlantic, etc., Fertilizing Co. v. Carter, 88 Fed. 707; Corbin v. Boies, 18 Fed. 3; Sheldon v. Keokuk Northern Line Packet Co., 1 Fed. 789, 9 Biss. 307; Carraher v. Brennan, 5 F. Cas. No. 2,441, 7 Biss. 497; Farmers' L. & T. Co. v. Chicago, etc., R. Co., 8 F. Cas. No. 4,665, 9 Biss. 133; Girardey v. Moore, 10 F. Cas. No. 5,462, 3 Woods 397; Hervey v. Illinois Midland R. Co., 12 F. Cas. No. 6,434, 7 Biss. 103; Barney v. Latham, 3 KyL 144; Ivy River Land, etc., Co. v. American Ins. Co., 190 N. C. 801, 130 SE 864; Swan v. Mansfield, etc., R. Co., 7 Oh. Dec. (Reprint) 669, 4 CincLBul 898. But see Little Six Oil Co. v. Noble, 17 F. (2d) 728 (holding that the cause was properly removed only as to the removing defendant, and plaintiff's right to proceed in the state court against the other defendants was not affected); Manufacturers' Commercial Co. v. Brown Alaska Co., 148 Fed. 308 (holding that removal carries only the controversy between the removing defendant and plaintiff, and does not give the federal court juris-

Separable controversies and independent causes distinguished. Separable controversies are clearly distinguishable from separate and independent causes of action joined in the same suit for convenience of litigation.[83] In the latter class of cases each cause of action may be treated independently, and the defendant or defendants in one, who could remove the suit if the other defendants or causes had not been joined, may still do so;[84] but a removal of one of the causes does not carry with it the other causes involved in the suit.[85]

[§ 181] **B. What Controversies Separable—1. In General.** A controversy is separable, within the meaning of the statutes relating to the removal of causes from a state court to a federal court, where the right asserted against the defendant interested therein is separate and distinct from that asserted against his codefendants, so that it may be wholly determined between such defendant and plaintiff;[86] and it is not separable where full and complete relief cannot be afforded without the presence of all the parties to the suit.[87] Accordingly, where there is but one issue in the suit and can be but a single decree, there is no separable controversy;[88] and the fact that there are separate remedies against the several parties does not create separable controversies where the cause of action against each is the same.[89] Similarly, the mere fact that one of two or more defendants has not been served with process,[90] or has made default in appearing or pleading,[91] or has

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diction over other defendants or the causes of action against them); Sturgeon v. Wabash R. Co., (Mo. A.) 17 SW (2d) 616 (apparently applying the contrary rule). Compare Idaho v. American Surety Co., 218 Fed. 678 (recognizing the rule but holding that it could not be applied to a suit by a nominal plaintiff joining numerous independent causes of action, of some of which the federal court would not have jurisdiction); St. Louis, etc., R. Co. v. Ransom, 29 Kan. 298 (holding that other defendants may have their controversies removed to the federal court along with the separable one, but are not bound so to do).

83. Alabama Power Co. v. Gregory Hill Gold Min. Co., 5 F. (2d) 705; Deepwater R. Co. v. Western Pocahontas Coal, etc., Co., 152 Fed. 824. And see cases infra notes 84, 85.

84. Lucania Societa Italiana Di Navigazione v. U. S. Shipping Bd. Emergency Fleet Corp., 15 F. (2d) 568; Young v. Southern Pac. Co., 15 F. (2d) 280.

85. Alabama Power Co. v. Gregory Hill Gold Min. Co., 5 F. (2d) 705; Deepwater R. Co. v. Western Pocahontas Coal, etc., Co., 152 Fed. 824; Stuart v. Colorado Eastern R. Co., 61 Colo. 58, 156 P 152. But see Bedell v. Baltimore, etc., R. Co., 245 Fed. 788 (holding that, where plaintiff sets up against defendant two separate causes of action, even in the alternative, and seeking one recovery, and one of such causes would be removable and the other would not be, defendant may remove the entire suit); St. Louis-San Francisco R. Co. v. Boudreaux, 159 Ark. 684, 252 SW 913 (to same effect).

86. U. S.—Torrence v. Shedd, 144 U. S. 527, 12 SCt 726, 36 L. ed. 528; Brown v. Trousdale, 138 U. S. 389, 11 SCt 308, 34 L. ed. 987; Fraser v. Jennison, 106 U. S. 191, 1 SCt 171, 27 L. ed 131; Tensas Parish School Bd. v. Pannell, 26 F. (2d) 495; Davidson v. Montana-Dakota Power Co., 22 F. (2d) 688; Keenan v. Gladys Belle Oil Co., 11 F. (2d) 418; Harrison v. Harrison, 5 F. (2d) 1001; James Ferry, Inc. v. John R. Wiggins Co., 287 Fed. 421; Old Dominion Oil Co. v. Superior Oil Corp., 283 Fed. 636; Colleton Mercantile, etc., Co. v. Savannah River Lumber Co., 280 Fed. 358; Venner v. Southern Pac. Co., 279 Fed. 832 [certiorari den 258 U. S. 628 mem, 42 SCt 461 mem, 66 L. ed. 799 mem]; Winfield v. Wichita Natural Gas Co., 267 Fed. 47; Roberts v. Underwood Typewriter Co., 257 Fed. 583; Wright v. Ankeny, 217 Fed. 985; Moloney v. Cressler, 210 Fed. 104, 126 CCA 618; In re Silvies River, 199 Fed. 495; Buck v. Felder, 196 Fed. 419; Stimson v. United Wrapping Mach. Co., 156 Fed. 298; Cella v. Brown, 144 Fed. 742, 75 CCA 608; Iowa Lillooet Gold Min. Co. v. Bliss, 144 Fed. 446; Boatmen's Bank v. Fritzlen, 135 Fed. 650, 68 CCA 288 [rev 128 Fed. 608, and certiorari den 198 U. S. 586, 25 SCt 803, 49 L. ed. 1174]; Golden v. Bruning, 72 Fed. 2; Wilson v. Union Sav. Assoc., 30 Fed. 521; Capital City Bank v. Hodgin, 22 Fed. 209; Bybee v. Hawkett, 5 Fed. 1, 6 Sawy. 593; Wormser v. Dahlman, 30 F. Cas. No. 18,048, 16 Blatchf. 319, 57 HowPr (N. Y.) 286. See Sanders v. Atlantic Coast Line R. Co., 33 F. (2d) 1010 (apparently recognizing the rule). Compare Sheldon v. Keokuk Northern Line Packet Co., 1 Fed. 789, 794, 9 Biss. 307 (pointing out that the statute "does not say an actual controversy, which would exclude merely nominal parties, nor the principal controversy, which would devolve upon the court the duty of determining between them which should be considered the main and which the subordinate controversy; but the language is 'a controversy,' which means any actual controversy in which both parties have an interest").

Ga.—Postal Telegraph-Cable Co. v. Puckett, 24 Ga. A. 458, 101 SE 397.

N. J.—Smathers v. Leith, 92 N. J. Eq. 165, 111 A 406.

N. C.—Ivy River Land, etc., Co. v. American Ins. Co., 190 N. C. 801, 130 SE 864; Crisp v. Montvale Lumber Co., 189 N. C. 733, 128 SE 146; Morganton v. Hutton, etc., Co., 187 N. C. 736, 122 SE 842.

Tex.—Odward v. Foster, (Civ. A.) 5 SW (2d) 240; Parlin, etc., Impl. Co. v. Frey, (Civ. A.) 200 SW 1143.

And see cases infra note 87.

"Separate and distinct causes of action disclosed by the record in a single suit, upon either of which a separate suit could have been maintained, and the determination of neither of which is essential to the disposition of the other, constitute separate controversies, within the meaning of the acts of Congress." Boatmen's Bank v. Fritzlen, 135 Fed. 650, 663, 68 CCA 288 [rev 128 Fed. 608, and certiorari den 198 U. S. 586, 25 SCt 803, 49 L. ed. 1174].

[a] **Indirect interest of one defendant in determination as to another.**—Where a controversy existed between plaintiff and one of two corporations joined as defendants, which could be fully determined between them without the presence of the other corporation, the fact that the former corporation is a stockholder of the latter corporation, and therefore indirectly interested in the determination of its controversy, does not prevent removal. Buck v. Felder, 196 Fed. 419.

87. Brown v. Trousdale, 138 U. S. 389, 11 SCt 308, 34 L. ed. 987; Winchester v. Loud, 108 U. S. 130, 2 SCt 311, 27 L. ed. 677; First Baptist Church v. Southern Mortg. Co., 39 F. (2d) 246; Hellenthal v. John Hancock Mut. L. Ins. Co., 31 F. (2d) 997; Stokely v. Reader, 12 F. (2d) 97; Allen v. Hauss, 290 Fed. 253; Genesee Valley Trust Co. v. Kansas City, etc., R. Co., 240 Fed. 524; West Side R. Co. v. California Pac. R. Co., 202 Fed. 331; In re Silvies River, 199 Fed. 495; Gates Iron Works v. Pepper, 98 Fed. 449; Golden v. Bruning, 72 Fed. 2; Burgunder v. Browne, 59 Fed. 497; Perrin v. Lepper, 26 Fed. 545; Lyddy v. Gano, 26 Fed. 177; Capital City Bank v. Hodgin, 22 Fed. 209; Burke v. Flood, 1 Fed. 541, 6 Sawy. 220; Caro Realty Co. v. Blumenthal, 166 Ga. 51, 142 SE 539; Foy v. Georgia-Alabama Power Co., 159 Ga. 14, 124 SE 513; Standard Oil Co. v. Turner, 33 Ga. A. 726, 127 SE 785; Springer v. Sheets, 115 N. C. 370, 20 SE 469; Faison v. Hardy, 114 N. C. 429, 19 SE 701. See Bloede v. Van Dyke, 222 Fed. 347 (applying the rule in a partition suit); Coram v. Davis, 182 Fed. 939 (applying the rule); Miller v. Clifford, 133 Fed. 880, 67 CCA 52, 5 LRANS 49 (recognizing the rule, and holding that bill, brought by several creditors on behalf of the rest, to enforce a statutory liability of stockholders under a Colorado statute, by requiring them each to pay the full amount of the same to a master, to be applied upon the debts pro rata, together with such sums as might be collected from other stockholders, the remainder to be returned, does not present a separate controversy between plaintiff and any one of defendants, since the case clearly calls for a proportionate liability of all stockholders). And see cases supra note 86.

[a] **Splitting cause of action into parts.**—The statute authorizing the removal of causes where the controversies are separable does not contemplate the splitting up into parts of a cause of action which plaintiff is entitled to prosecute as a single suit, simply because a part of the cause might be fully determined between the parties before the court, leaving the other part to be thereafter determined in another independent suit. Golden v. Bruning, 72 Fed. 2.

Removability where indispensable party is citizen of same state as adverse party see infra § 121.

88. Rogers v. Van Nortwick, 45 Fed. 513.

89. Merchants' Cotton-Press, etc., Co. v. Insurance Co. of North America, 151 U. S. 368, 14 SCt 367, 38 L. ed. 195; Ayers v. Wiswall, 112 U. S. 187, 5 SCt 90, 28 L. ed. 693; Winchester v. Loud, 108 U. S. 130, 2 SCt 311, 27 L. ed. 677; Gudger v. Western North Carolina R. Co., 21 Fed. 81.

90. Armstrong v. Kansas City Southern R. Co., 192 Fed. 608; Patchin v. Hunter, 38 Fed. 51. Contra Wormser v. Dahlman, 30 F. Cas. No. 18,048, 16 Blatchf. 319, 57 HowPr (N. Y.) 286.

91. Brooks v. Clark, 119 U. S. 502, 7 SCt 301, 30 L. ed. 482; Putnam v.

appeared and disclaimed,[92] or that a separate defense exists,[93] or that judgment has been rendered against one defendant before another or others have been served,[94] does not create a separable controversy; and no separable controversy is presented by the fact that two or more defendants are interested in separate parts of the same subject matter.[95] The separable controversy must be real and substantial, and not a mere fanciful claim which has no support in the allegations of the petition or bill;[96] and matters which are mere incidents to the principal subject matter of the suit do not present a separable controversy.[97] Where a separable controversy actually exists, however, it is immaterial what other controversies or grounds of action may be involved in the suit,[98] or what collateral issues are connected therewith.[99]

Joint and several suits. Where separate and distinct liabilities on the part of two or more defendants are alleged or shown by plaintiff's pleadings,[1] or where different relief is sought against the several defendants,[2] there is a separable controversy between each of them and plaintiff, even though the suit is made joint in form for the purpose or with the design of defeating removal, or, to adopt the somewhat loose terminology of some of the courts, the joinder is fraudulent;[3] and it has been held that, where defendants are sued jointly and severally, separable controversies exist,[4] but there is authority to the contrary.[5] A joint suit upon the same cause against two or more defendants, however, even though they might have been sued separately, is not separable,[6] unless the joinder of the parties is not

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Ingraham, 114 U. S. 57, 5 SCt 746, 29 L. ed. 65; Hax v. Caspar, 31 Fed. 499; Faison v. Hardy, 114 N. C. 429, 19 SE 701.

92. Louisville, etc., R. Co. v. Ide, 114 U. S. 52, 5 SCt 735, 29 L. ed. 63; Bryan v. Barriger, 251 Fed. 328; Hax v. Caspar, 31 Fed. 499; New Jersey Zinc Co. v. Trotter, 18 F. Cas. No. 10,167.

93. Stokely v. Reader, 12 F. (2d) 97; Mace v. Mayfield, 10 F. (2d) 231; German-American Mercantile Bank v. Gas Serv. Corp. of America, 228 Fed. 827; Shaver v. Hardin, 30 Fed. 801; Odward v. Foster, (Tex. Civ. A.) 5 SW (2d) 240.

Interposition of separate defense as creating separable controversy see infra § 182.

94. Brooks v. Clark, 119 U. S. 502, 7 SCt 301, 30 L. ed. 482.

95. Niccum v. Northern Assur. Co., 17 F. (2d) 160; In re Chicago, 64 Fed. 897; Rock Rapids Independent Dist. v. Rock Rapids Bank, 48 Fed. 2; Freidler v. Chotard, 19 Fed. 227; Merchants' Nat. Bank v. Thompson, 4 Fed. 876; Temple v. Smith, 4 Fed. 392, 2 McCrary 226.

96. MacGinniss v. Boston, etc., Consol. Copper, etc., Min. Co., 119 Fed. 96, 55 CCA 648. See Old Dominion Oil Co. v. Superior Oil Corp., 283 Fed. 636 (pointing out that the controversy is potential, not actual, since in some classes of suits the petition for removal is required to be filed before answer and hence before there is an actual controversy).

97. Torrence v. Shedd, 144 U. S. 527, 12 SCt 726, 36 L. ed. 528; Shainwald v. Lewis, 108 U. S. 158, 2 SCt 385, 27 L. ed. 691 [aff 5 Fed. 510, 6 Sawy. 585]; Corbin v. Van Brunt, 105 U. S. 576, 26 L. ed. 1176; Marchant v. Mead-Morrison Mfg. Co., 29 F. (2d) 40 [certiorari den 278 U. S. 655, 49 SCt 179, 73 L. ed. 565]; Campbell v. Milliken, 119 Fed. 981; MacGinniss v. Boston, etc., Consol. Copper, etc., Min. Co., 119 Fed. 96, 55 CCA 648; Wilder v. Virginia, etc., Steel, etc., Co., 46 Fed. 676; New York v. New Jersey Steam-Boat Transp. Co., 24 Fed. 817; Republic F. Ins. Co. v. Keogh, 23 Hun (N. Y.) 644.

98. Boyd v. Gill, 19 Fed. 145, 21 Blatchf. 543; Langdon v. Fogg, 18 Fed. 5, 21 Blatchf. 392; Bybee v. Hawkett, 5 Fed. 1, 6 Sawy. 593; Smathers v. Leith, 92 N. J. Eq. 165, 111 A 406, 408. But see Coram v. Davis, 182 Fed. 939 (dictum, that although a bill sets forth some claims which are separable, if any one is not separable the cause is not removable).

"The statute does not provide that, if the suit contains, amongst others, a controversy in which the petitioners for removal are necessary parties, and which is not removable because the necessary conditions as to diverse citizenship do not exist, the suit shall not be removed. The provision is just the converse—that the suit may be removed if a separate controversy between diverse citizens does exist in the suit, irrespective of what other controversies there are in the suit." Smathers v. Leith, supra.

99. Osgood v. Chicago, etc., R. Co., 18 F. Cas. No. 10,604, 6 Biss. 330.

1. U. S.—Jennings v. Southern R. Co., 40 F. (2d) 951; Stewart v. Nebraska Tire, etc., Co., 39 F. (2d) 309 [aff 32 F. (2d) 519]; Genuine Panama Hat Works v. Webb, 36 F. (2d) 265; Branchville Motor Co. v. American Surety Co., 27 F. (2d) 631; Hoffman v. Lynch, 23 F. (2d) 518; Little Six Oil Co. v. Noble, 17 F. (2d) 728; Hamilton v. Empire Gas, etc., Co., 297 Fed. 422; Gulf, etc., R. Co. v. Gulf Refining Co., 260 Fed. 262; Hough v. Société Electrique Westinghouse, 232 Fed. 635; Wright v. Ankeny, 217 Fed. 985; Caldwell County Drain. Dist. No. 19 v. Chicago, etc., R. Co., 198 Fed. 253; Stimson v. United Wrapping Mach. Co., 156 Fed. 298; Manufacturers' Commercial Co. v. Brown Alaska Co., 148 Fed. 308; Iowa Lillooet Gold Min. Co. v. Bliss, 144 Fed. 446; Youtsey v. Hoffman, 108 Fed. 693; Chicago, etc., R. Co. v. New York, etc., R. Co., 24 Fed. 516; Langdon v. Fogg, 18 Fed. 5, 21 Blatchf. 392; Sheldon v. Keokuk Northern Line Packet Co., 1 Fed. 789, 9 Biss. 307.

Colo.—Stratton's Independence v. Sterrett, 51 Colo. 17, 117 P 351.

N. C.—Ivy River Land, etc., Co. v. American Ins. Co., 190 N. C. 801, 130 SE 864.

S. C.—Jennings v. Southern R. Co., 156 S. C. 92, 152 SE 821.

Tex.—Feibleman v. Edmonds, 69 Tex. 334, 6 SW 417.

See Fidelity, etc., Co. v. Norwood, 34 Ga. A. 493, 130 SE 218 (apparently applying the rule).

[a] **Suit against maker and indorsers of promissory note.**—Where liabilities of the maker and the indorsers of a promissory note are joined as defendants, there is a separable controversy between plaintiff and each of the indorsers. Manufacturers' Commercial Co. v. Brown Alaska Co., 148 Fed. 308; Sheldon v. Keokuk Northern Line Packet Co., 1 Fed. 789, 9 Biss. 307.

[b] **Action against one party on contract and another on tort** involves separable controversies, since the liability of defendants is several and not joint. Branchville Motor Co. v. American Surety Co., 27 F. (2d) 631; Iowa Lillooet Gold Min. Co. v. Bliss, 144 Fed. 446. See St. Louis, etc., R. Co. v. West Bros., (Tex. Civ. A.) 159 SW 142 (recognizing the rule).

2. Brown v. Empire Gas, etc., Co., 26 F. (2d) 100; Wallace v. Motor Products Corp., 25 F. (2d) 655 [mod 15 F. (2d) 211, and certiorari granted 278 U. S. 589 mem, 49 SCt 21 mem, 73 L. ed. 522 mem, certiorari dism 279 U. S. 859 mem, 49 SCt 417 mem, 73 L. ed. 999 mem]; State Impr. Dev. Co. v. Leininger, 226 Fed. 884.

3. Branchville Motor Co. v. American Surety Co., 27 F. (2d) 631; Rountree v. Mt. Hood R. Co., 228 Fed. 1010; Reinartson v. Chicago Great Western R. Co., 174 Fed. 707; Iowa Lillooet Gold Min. Co. v. Bliss, 144 Fed. 446; Patton v. Champion Fibre Co., 192 N. C. 48, 133 SE 174.

Effect of joinder of improper parties on right to remove for diversity of citizenship in general see supra §§ 167–173.

4. Spangler v. Atchison, etc., R. Co., 42 Fed. 305; Boyd v. Gill, 19 Fed. 145, 21 Blatchf. 543.

5. Lynes v. Standard Oil Co., 300 Fed. 812. See Sanders v. Atlantic Coast Line R. Co., 33 F. (2d) 1010; Branchville Motor Co. v. American Surety Co., 27 F. (2d) 631 (dicta).

6. U. S.—Hay v. May Dept. Stores Co., 271 U. S. 318, 46 SCt 498, 70 L. ed. 965; McAllister v. Chesapeake, etc., R. Co., 243 U. S. 302, 37 SCt 274, 61 L. ed. 735; Chicago, etc., R. Co. v. Whiteaker, 239 U. S. 421, 36 SCt 152, 60 L. ed. 360 [aff 252 Mo. 438, 160 SW 1009]; Alabama Great Southern R. Co. v. Thompson, 200 U. S. 206, 26 SCt 151, 50 L. ed. 441, 4 AnnCas 1147; Plymouth Cons. Gold Min. Co. v. Amador, etc., Canal Co., 118 U. S. 264, 6 SCt 1034, 30 L. ed. 232; Stone v. South Carolina, 117 U. S. 430, 6 SCt 799, 29 L. ed. 962; Core v. Vinal, 117 U. S. 347, 6 SCt 767, 29 L. ed. 912; Sloane v. Anderson, 117 U. S. 275, 6 SCt 730, 29 L. ed. 899; Pirie v. Tvedt, 115 U. S. 41, 5 SCt 1034, 1161, 29 L. ed. 331; Louisville, etc., R. Co. v. Ide, 114 U. S. 52, 5 SCt 735, 29 L. ed. 63; Centerville State Bank v. National Surety Co., 37 F. (2d) 338 [rev 27 F. (2d) 552]; Warren v. Midland Valley R. Co., 36 F. (2d) 828; Sanders v. Atlantic Coast Line R. Co., 33 F. (2d) 1010; Pabst v. Roxana Petroleum Co., 30 F. (2d) 953; Branchville Motor Co. v. American Surety Co., 27 F. (2d) 631; St. Anthony v. Mason, 22 F. (2d) 306; Board of Levee Comrs., etc. v. Hulse, 17 F. (2d) 785; Highway Constr. Co. v. McClelland, 14 F. (2d) 406 [reh den 15 F. (2d) 187]; Keenan v. Gladys Belle Oil Co., 11 F. (2d) 418; Uden v. Great Northern Constr. Co., 1 F. (2d) 743; Lynes v. Standard Oil Co., 300 Fed. 812; Brunski v. Ford Motor Co., 299 Fed. 807; Hamilton v. Empire Gas, etc., Co., 297 Fed. 422; Galluchet v. Pittman, 288 Fed. 917 [aff 288 Fed. 928]; Morrell v. Lalonde, 271 Fed. 19; Boykin v. Morris Fertilizer Co., 257 Fed. 827; Bryan v. Barriger, 251 Fed. 328; Baker v. Jacksonville Tract. Co., 247 Fed. 718; Seattle v. Beer's Bldg. Co., 242 Fed.

permitted by the state law.[7] Similarly, a suit by two or more plaintiffs, or by one plaintiff to the use of two or more persons, to enforce a common right is not separable, although they might have asserted it in separate actions and the rights of the several plaintiffs depend upon different circumstances;[8] but where the rights of plaintiffs or of the persons to whose use the suit is brought are separate and independent, the controversies are separable.[9] Whether a suit is to be regarded, so far as concerns its removability, as asserting joint or several rights or liabilities depends upon plaintiff's statement of his

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988; Smith v. Barnett, 242 Fed. 83; In re Seattle, 237 Fed. 100; Baillie v. Backus, 230 Fed. 711; Rountree v. Mt. Hood R. Co., 228 Fed. 1010; German-American Mercantile Bank v. Gas Service Corp., 228 Fed. 827; Bradshaw v. Bowden, 226 Fed. 323; Beckwith v. Chicago, etc., R. Co., 223 Fed. 858; Jones v. Casey-Hedges Co., 213 Fed. 43; Buchanan v. W. M. Ritter Lumber Co., 210 Fed. 144, 126 CCA 658; Richardson v. Southern Idaho Water Co., 209 Fed. 949; Foster v. Coos Bay Gas, etc., Co., 185 Fed. 979; Shaver v. Pacific Coast Condensed Milk Co., 185 Fed. 316; Wrightsville Hardware Co. v. Hardware, etc., Mfg. Co., 180 Fed. 586; Regis v. United Drug Co., 180 Fed. 201; Galeotti v. Diamond Match Co., 178 Fed. 127; Jacobson v. Chicago, etc., R. Co., 176 Fed. 1004; Morris v. Louisville, etc., R. Co., 175 Fed. 491; Reinartson v. Chicago Great Western R. Co., 174 Fed. 707; Carp v. Queen Ins. Co., 168 Fed. 782; Pollitz v. Wabash R. Co., 176 Fed. 333, 100 CCA 1 [rev 167 Fed. 145]; Blunt v. Southern R. Co., 155 Fed. 499; Davenport v. Southern R. Co., 135 Fed. 960, 68 CCA 444 [rev 124 Fed. 983]; Lathrop, etc., Co. v. Pittsburg, etc., R. Co., 135 Fed. 619; American Bridge Co. v. Hunt, 130 Fed. 302, 64 CCA 548; Fogarty v. Southern Pac. Co., 123 Fed. 973; Dougherty v. Yazoo, etc., R. Co., 122 Fed. 205, 58 CCA 651; Hoye v. Great Northern R. Co., 120 Fed. 712; Person v. Illinois Cent. R. Co., 118 Fed. 342; Riser v. Southern R. Co., 116 Fed. 215; Ward v. Franklin, 110 Fed. 794; Marrs v. Felton, 102 Fed. 775; Evans v. Felton, 96 Fed. 176; Moore v. Los Angeles Iron, etc., Co., 89 Fed. 73; Deere v. Chicago, etc., R. Co., 85 Fed. 876; Guarantee Co. of North American v. Mechanics' Sav. Bank, etc., Co., 80 Fed. 766, 26 CCA 146; Mutual Reserve Fund L. Assoc. v. Farmer, 77 Fed. 929, 23 CCA 574; Brown v. Coxe, 75 Fed. 689; O'Harrow v. Henderson, 52 Fed. 824; Dow v. Bradstreet Co., 46 Fed. 824; Kaitel v. Wylie, 38 Fed. 865; Southworth v. Reid, 36 Fed. 451; Woodrum v. Clay, 33 Fed. 897; Western Union Tel. Co. v. Brown, 32 Fed. 337; Boyd v. Gill, 19 Fed. 145, 21 Blatchf. 543; Folsom v. Continental Nat. Bank, 14 Fed. 497, 4 Woods 521; Tuedt v. Carson, 13 Fed. 353, 4 McCrary 426. See Ohio v. Columbus, etc., R. Co., 48 Fed. 626 (applying the rule in a suit to compel the joint performance of a duty). Contra Kerling v. Cotzhausen, 16 Fed. 705, 11 Biss. 582; Clark v. Chicago, etc., R. Co., 11 Fed. 355, 3 McCrary 591.

Ark.—Steed v. Henry, 120 Ark. 583, 180 SW 508.

Ga.—Willys-Overland v. Johnson, 40 Ga. A. 700, 151 SE 414; Postal Telegraph-Cable Co. v. Puckett, 24 Ga. A. 458, 101 SE 397.

Ind.—Louisville, etc., R. Co. v. Gollihur, 40 Ind. A. 480, 82 NE 492.

Ky.—Chesapeake, etc., R. Co. v. McCoy, 228 Ky. 752, 16 SW (2d) 170; Buskirk v. Caudill, 181 Ky. 45, 203 SW 864 [writ of error dism 249 U. S. 619 mem, 39 SCt 258 mem, 63 L. ed. 804 mem].

La.—Fusz v. Trager, 38 La. Ann. 173.

Mo.—State v. Falkenhainer, 316 Mo. 651, 291 SW 466; State v. Dearing, 244 Mo. 25, 148 SW 618; State v. Mosman, 231 Mo. 474, 133 SW 38.

N. J.—Holcombe v. Ames, 87 N. J. Eq. 486, 100 A 609.

N. Y.—Schwarzler v. Great American Ins. Co., 135 Misc. 913, 239 NYS 684.

N. C.—Hurt v. Savona Mfg. Co., 198 N. C. 1, 150 SE 632; Givens v. Savona Mfg. Co., 196 N. C. 377, 145 SE 681; Crisp v. Champion Fibre Co., 193 N. C. 77, 136 SE 238; Moses v. Morganton, 192 N. C. 102, 133 SE 421; Patton v. Champion Fibre Co., 192 N. C. 48, 133 SE 174; Fenner v. Richmond Cedar Works, 191 N. C. 207, 131 SE 625; Ivy River Land, etc., Co. v. American Ins. Co., 190 N. C. 801, 130 SE 864; Crisp v. Montvale Lumber Co., 189 N. C. 733, 128 SE 146; Swain v. Interstate Cooperage Co., 189 N. C. 528, 127 SE 538; Jackson County Bank v. Hester, 188 N. C. 68, 123 SE 308; Hill v. Director-Gen. of Railroads, 178 N. C. 607, 101 SE 376; Gurley v. Southern Power Co., 173 N. C. 447, 92 SE 262; White v. Southern R. Co., 146 N. C. 340, 59 SE 1042; Davis v. Rexford, 146 N. C. 418, 59 SE 1002; Staton v. Atlantic Coast Line R. Co., 144 N. C. 135, 56 SE 794; O'Kelly v. Richmond, etc., R. Co., 89 N. C. 58.

Tenn.—Burns v. Nashville, 142 Tenn. 541, 221 SW 828.

Tex.—Parlin, etc., Impl. Co. v. Frey, (Civ. A.) 200 SW 1143; Southwestern Tel., etc., Co. v. Shirley, (Civ. A.) 155 SW 663.

[a] **Even though defendants' liability is joint and several,** there is no separable controversy where plaintiff sues to establish only the joint liability. Core v. Vinal, 117 U. S. 347, 6 SCt 767, 29 L. ed. 912; Sloane v. Anderson, 117 U. S. 275, 6 SCt 730, 29 L. ed. 899; Pirie v. Tvedt, 115 U. S. 41, 5 SCt 1034, 1161, 29 L. ed. 331; Centerville State Bank v. National Surety Co., 37 F. (2d) 338 [rev 27 F. (2d) 552]; Moore v. Los Angeles Iron, etc., Co., 89 Fed. 73; Brown v. Coxe, 75 Fed. 689; Kaitel v. Wylie, 38 Fed. 865; Tuedt v. Carson, 13 Fed. 353, 4 McCrary 426; Steed v. Henry, 120 Ark. 583, 180 SW 508. Contra Kerling v. Cotzhausen, 16 Fed. 705, 11 Biss. 582; Clark v. Chicago, etc., R. Co., 11 Fed. 355, 3 McCrary 591.

[b] **Recovery against all defendants jointly sued is not essential** to constitute the controversy a nonseparable one. Beckwith v. Chicago, etc., R. Co., 223 Fed. 858; Willys-Overland v. Johnson, 40 Ga. A. 700, 151 SE 414; Buskirk v. Caudill, 181 Ky. 45, 203 SW 864 [writ of error dism 249 U. S. 619 mem, 39 SCt 258 mem, 63 L. ed. 804 mem]. But compare Lathrop, etc., Co. v. Interior Constr., etc., Co., 143 Fed. 687 (holding that, where, in a suit upon a joint cause of action against a domestic and a foreign corporation, judgment had been entered against the latter by default, and upon a trial the domestic corporation secured a judgment in its favor, from which plaintiff appealed, until the final disposition of the appeal the foreign corporation could not apply for a removal; and intimating that if such appeal should result in an affirmance, the nonresident defendant would then be entitled to remove).

[c] **Suit against principal and surety.**—A suit against one as principal and another as surety on his bond involves but one controversy, and is not separable. St. Anthony v. Mason, 22 F. (2d) 306; Board of Levee Comrs., etc. v. Hulse, 17 F. (2d) 785; Uden v. Great Northern Constr. Co., 1 F. (2d) 743; Seattle v. Beer's Bldg. Co., 242 Fed. 988; Jackson County Bank v. Hester, 188 N. C. 68, 123 SE 308. See Fidelity, etc., Co. v. Norwood, 34 Ga. A. 493, 130 SE 218 (apparently applying the rule). But see Tensas Parish School Bd. v. Pannell, 26 F. (2d) 495 (holding a controversy separable as between a contractor and the surety on his construction bond); Iowa Lillooet Gold Min. Co. v. Bliss, 144 Fed. 446 (holding that, where a suit is brought against an employee of plaintiff, who is charged with embezzlement, and the surety upon the bond guaranteeing plaintiff against loss by any of the acts of such employee, a separable controversy exists between plaintiff and the surety).

[d] **Suit to enjoin same or connected acts.**—(1) There is no separable controversy in a joint suit against two or more defendants to enjoin them all from the performance of the same act (Starin v. New York, 115 U. S. 248, 6 SCt 28, 29 L. ed. 388 [aff 21 Fed. 593]; McMillan v. Noyes, 146 Fed. 926; Yearian v. Horner, 36 Fed. 130; New York v. New Jersey Steam-Boat Transp. Co., 24 Fed. 817; National Docks, etc., Connecting R. Co. v. Pennsylvania R. Co., 52 N. J. Eq. 58, 28 A 71 [aff 52 N. J. Eq. 590, 33 A 50]), (2) or of acts directly connected with each other (Vulcan Detinning Co. v. American Can Co., 130 Fed. 635; Davis v. Randolph County Ct., 88 Fed. 705; Anderson v. Bowers, 40 Fed. 708; Anderson v. Orient F. Ins. Co., 88 Iowa 579, 55 NW 348).

Actions for damages for negligence see infra § 186.

[7] Galehouse v. Baltimore, etc., R. Co., 274 Fed. 370; Trana v. Chicago, etc., R. Co., 228 Fed. 824; Veariel v. United Engineering, etc., Co., 197 Fed. 877; Jackson v. Chicago, etc., R. Co., 178 Fed. 432, 102 CCA 159.

[8] Isaac Kubie Co. v. Lehigh Valley R. Co., 261 Fed. 806; Georgia v. Southern R. Co., 255 Fed. 369; Webb v. Southern R. Co., 248 Fed. 618, 160 CCA 518 [rev 235 Fed. 578 and certiorari den 247 U. S. 518, 38 SCt 582, 62 L. ed. 1245]; Missouri v. Chicago, etc., R. Co., 216 Fed. 562; Gaugler v. Chicago, etc., R. Co., 197 Fed. 79; Wilder v. Virginia, etc., Steel, etc., Co., 46 Fed. 676; Reineman v. Ball, 33 Fed. 692; In re McClean, 26 Fed. 49.

[a] **Rule applied.**—In a suit by stockholders and creditors, for an accounting by directors, of funds of a corporation, which the latter have unlawfully appropriated, the fact that plaintiffs hold stock of different classes and claims of different kinds does not make the controversy separable, although they might have severally prosecuted the suit which they properly brought jointly. Wilder v. Virginia Steel, etc., Co., 46 Fed. 676.

[9] Young v. Southern Pac. Co., 15 F. (2d) 280; Idaho v. American Surety Co., 218 Fed. 678; Patterson v. Bucknall SS. Lines, 203 Fed. 1021; Ivy River Land, etc., Timber Co. v. American Ins. Co., 190 N. C. 801, 130 SE 864.

action, so that if he has made it joint in character no separable controversy is presented, in the absence of fraud.[10] So where a petition or complaint on its face sets up a joint cause of action, and there is no showing of bad faith, the question of joint liability will not be tried in the removal proceedings, but the case must be deemed to be that which plaintiff has stated in setting forth his cause of action;[11] but the court must decide whether the allegations of the pleading show a joint or a several cause, regardless of plaintiff's opinion or conclusions.[12] The right to join defendants in the state court, and the question whether the petition or complaint states a joint cause of action against them, are to be determined according to the law of the state where the action was brought, and not according to the federal law.[13] The fact that defendants who might have been sued separately are jointly sued for the particular purpose of rendering the suit unremovable does not render the controversies separable or permit the removal of the suit by less than the whole number of defendants, since the motive of plaintiff is immaterial, in the absence of fraud.[14]

Failure to state cause of action against part of defendants. It has sometimes been said that where plaintiff's complaint, in a suit against two or more defendants, fails to state a cause of action against one or more defendants, a separable controversy exists between the other defendant or defendants and plaintiff;[15] but more usually such cases have been regarded as instances of fraudulent joinder,[16] or the parties against whom no cause of action is stated have been merely disregarded in determining whether diversity of citizenship exists.[17]

Where there is but a single defendant and a single plaintiff there can be no separable controversy;[18] but where there are two or more plaintiffs a plurality of defendants is not essential to the existence of separable controversies.[19]

Particular controversies which have been held to be separable within the meaning of the statute[20] or not to be so separable[21] may be found in the footnotes.

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[10] Hay v. May Dept. Stores Co., 271 U. S. 318, 46 SCt 498, 70 L. ed. 965; Louisville, etc., R. Co. v. Ide, 114 U. S. 52, 5 SCt 735, 29 L. ed. 63; Warren v. Midland Valley R. Co., 36 F. (2d) 828; Sanders v. Atlantic Coast Line R. Co., 33 F. (2d) 1010; Brunski v. Ford Motor Co., 299 Fed. 807; Galluchat v. Pittman, 288 Fed. 917 [aff 288 Fed. 928]; Trana v. Chicago, etc., R. Co., 228 Fed. 824; Foster v. Coos Bay Gas, etc., Co., 185 Fed. 979; Galeotti v. Diamond Match Co., 178 Fed. 127; Jacobson v. Chicago, etc., R. Co., 176 Fed. 1004; Carp v. Queen Ins. Co., 168 Fed. 782; Willys-Overland v. Johnson, 40 Ga. A. 700, 151 SE 414; Chesapeake, etc., R. Co. v. McCoy, 228 Ky. 752, 16 SW (2d) 170; Cowart v. Suncrest Lumber Co., 194 N. C. 787, 140 SE 736; Hurt v. Savona Mfg. Co., 198 N. C. 1, 150 SE 632; Walters v. Phœnix Utility Co., 196 N. C. 817, 145 SE 926; Givens v. Savona Mfg. Co., 196 N. C. 377, 145 SE 681; Fenner v. Richmond Cedar Works, 191 N. C. 207, 131 SE 625; Crisp v. Montvale Lumber Co., 189 N. C. 733, 128 SE 146; Swain v. Interstate Cooperage Co., 189 N. C. 528, 127 SE 538; Gurley v. Southern Power Co., 173 N. C. 447, 92 SE 262.

Separability of controversies as determined from plaintiff's pleadings in general see infra § 182.

[11] Foster v. Coos Bay Gas, etc., Co., 185 Fed. 979.

[12] Hough v. Société Electrique Westinghouse, 232 Fed. 635.

Court will go to essence of suit rather than form of pleading in determining removability see infra § 182.

[13] Hancock v. Missouri-Kansas-Texas R. Co., 28 F. (2d) 45; Stephens v. Southern Pac. Co., 16 F. (2d) 288; Connolly v. Standard Oil Co., 264 Fed. 383; Kelly v. Robinson, 262 Fed. 695; Rountree v. Mt. Hood R. Co., 228 Fed. 1010; McAllister v. Chesapeake, etc., R. Co., 198 Fed. 660 [remand directed 243 U. S. 302, 37 SCt 274, 61 L. ed. 735]; Morris v. Louisville, etc., R. Co., 175 Fed. 491; State v. Falkenhainer, 316 Mo. 651, 291 SW 466; Whiteaker v. Chicago, etc., R. Co., 252 Mo. 438, 160 SW 1009 [aff 239 U. S. 421, 36 SCt 152, 60 L. ed. 360]; State v. Mosman, 231 Mo. 474, 133 SW 38. See Galehouse v. Baltimore, etc., R. Co., 274 Fed. 370 (holding that, if under the state law a joint action cannot be maintained against defendants, the controversy is a separable one).

[14] Chicago, etc., R. Co. v. Willard, 220 U. S. 413, 31 SCt 460, 55 L. ed. 521 [aff 165 Fed. 181, 91 CCA 215]; Branchville Motor Co. v. American Surety Co., 27 F. (2d) 631; Lynes v. Standard Oil Co., 300 Fed. 812; Buchanan v. W. M. Ritter Lumber Co., 210 Fed. 144, 126 CCA 658; Foster v. Coos Bay Gas, etc., Co., 185 Fed. 979; Shaver v. Pacific Coast Condensed Milk Co., 185 Fed. 316; Louisville, etc., R. Co. v. Gollihur, 40 Ind. A. 480, 82 SE 492; Whiteaker v. Chicago, etc., R. Co., 252 Mo. 438, 160 SW 1009 [aff 239 U. S. 421, 36 SCt 152, 60 L. ed. 360]; Patton v. Champion Fibre Co., 192 N. C. 48, 133 SE 174.

[15] Epperson v. Midwest Refining Co., 22 F. (2d) 622; Stokes v. Great Southern Lumber Co., 21 F. (2d) 185; Galluchat v. Pittman, 288 Fed. 917 [aff 288 Fed. 928]; Kelly v. Robinson, 262 Fed. 695; Gulf, etc., R. Co. v. Gulf Refining Co., 260 Fed. 262; Foster v. Coos Bay Gas, etc., Co., 185 Fed. 979; Ireton v. Pennsylvania Co., 185 Fed. 84, 107 CCA 304 [certiorari den 223 U. S. 728, 32 SCt 526, 56 L. ed. 633]; Lockard v. St. Louis, etc., R. Co., 167 Fed. 675. Compare Adams v. Tolerton, 22 F. (2d) 863 (holding that the fact that the petition, in a suit against resident and nonresident defendants, fails to state a cause of action against the latter does not create a separable controversy).

[16] **Fraudulent joinder** see supra §§ 170, 171.

[17] **Disregard of parties** see supra § 169.

[18] Missouri v. Barker, 216 Fed. 562; Drovers' Deposit Nat. Bank v. Tichenor, 202 Fed. 1013. See Tullar v. Illinois Cent. R. Co., 213 Fed. 280 (holding that the provisions of the statute relating to separable controversies have no reference or application to suits upon two or more causes of action between a plaintiff and a single defendant, one of which causes if separately brought would have been removable but the other or others would not).

[19] Young v. Southern Pac. Co., 15 F. (2d) 280. See Idaho v. American Surety Co., 218 Fed. 678 (applying the rule).

[20] See cases infra this note.

[a] **Illustrations.**—(1) Suit for a conveyance of an undivided interest in lands held by a corporation together with an accounting by such corporation of a similar proportion of the proceeds of lands by it sold, and also for an accounting by individual defendants for the proceeds of the sale of lands acquired under the same title and sold by them before title was acquired by defendant corporation. Barney v. Latham, 103 U. S. 205, 26 L. ed. 514. (2) Suit to establish an indebtedness against an insolvent corporation and for judgment against a second defendant which has assumed the indebtedness of the first corporation. Mecke v. Valleytown Mineral Co., 93 Fed. 697, 35 CCA 151 [aff 89 Fed. 209]. (3) Suit by remaindermen against the life tenant and a company which has insured the property, plaintiffs alleging that the former had settled a claim under the policy for less than the amount of the loss, and praying that she be charged, as a trustee, of the fund, to hold for herself for life, and the remainder to plaintiffs; and that the insurance company be obliged to pay the whole face value of the policy; a bill charging one of several defendants with failure to perform his contract, to transfer a patent to the complainant; and that the others, with knowledge of his default, had bought machines of him, for the use of which they should account. Nesmith v. Calvert, 18 F. Cas. No. 10,123, 2 Robb Pat. Cas. 311, 1 Woodb. & M. 34. (4) Suit to recover the possession of town bonds when the party in possession disclaims all interest in them except a lien for storage and counsel fees, while one of the depositors of the bonds and the township disputes the right of plaintiff to possession and claims that the bonds were void. Wilson v. Union Sav. Assoc., 30 Fed. 521. (5) Suit to set aside a franchise against the assignee of the same and his mortgagee, where the mortgagee claims that plaintiff is estopped by its representation when the mortgage was executed that the franchise was valid. Galesburg v. Galesburg Water Co., 27 Fed. 321. (6) Suit by a mortgagor to remove one of the trustees under the mortgage and to restrain it from foreclosing the same against the wishes of the other trustee and of a majority of the bondholders. Lake St. El. R. Co. v. Farmers' L. & T. Co., 72 Fed. 804. (7) Suit to enjoin the sale of land by a defendant claiming title to part of the same under a deed of trust to secure the payment of certain promissory notes, in which the title of the trustee defendant depends upon the question whether the notes had been paid, and two of the other defendants, each of whom claims an interest in

[§ 182] 2. **How Determined.** Whether or not a controversy in a suit is separable, so as to authorize removal of the cause from a state court to a federal court by one or more defendants, under the provisions of the statutes relating to the removal of separable controversies, must be determined solely upon the petition, declaration or complaint,[22] as

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the land hostile to each other, depending upon the question whether these notes were paid. Snow v. Smith, 88 Fed. 657, 4 Hughes 204. (8) Suit to cancel a promissory note, where fraud by one defendant is charged, and there is no allegation that the other, as indorsee, was cognizant of such fraud. New York Constr. Co. v. Simon, 53 Fed. 1. (9) Suit by the beneficiary under a will, against the executors, the testamentary trustees, and a loss of part of the trust estate; where the complaint prays that the executors may complete the trust fund for plaintiff's benefit by conveying real estate to the trustees; that the trustees pay to her whatever may be due for interest on said trust fund; and also pay to her for her benefit, out of the estate, other moneys which she claims; that the trustees be enjoined from charging against her certain moneys which the estate has paid, and from paying to trustees of certain residuary trusts, any moneys which may be in or may hereafter come into their hands; and that the rent of the part of the trust held by them, which may become due under the lease to the remaining defendant, be paid to plaintiff. Stevens v. Richardson, 9 Fed. 191, 20 Blatchf. 53. (10) Where a suit is brought against two corporations and the directors of one of them, to set aside a conveyance made by this to the other, for an injunction against the directors as managing the affairs of the corporation, and for the appointment of a receiver thereof, the controversy between complainant and the directors is separable from that between him and the two corporations, and the latter may remove the suit. Geer v. Mathieson Alkali Works, 190 U. S. 428, 23 SCt 807, 47 L. ed. 1122. (11) Upon a bill of interpleader, the controversy between the two defendants is separable from that between them and complainant and will justify a removal. First Nat. Bank v. Bridgeport Trust Co., 117 Fed. 969. Contra New York Mut. L. Ins. Co. v. Allen, 134 Mass. 389; Republic F. Ins. Co. v. Keogh, 23 Hun (N. Y.) 644; George v. Pilcher, 28 Gratt. (69 Va.) 299, 26 AmR 350. (12) Where remaindermen sued to set aside a settlement by the life tenant with an insurance company, for a less amount than the face value of the policy, charging that the life tenant held the insurance impressed with the trust for plaintiffs' benefit, and praying judgment against both defendants for the face value of the policy, with interest, and that they be required to pay the same into court, to be invested for the benefit of plaintiffs and the life tenant, interest only to be paid the latter during her life, there was a separable controversy between the insurance company and plaintiffs. Harley v. Home Ins. Co., 125 Fed. 792. (13) Where plaintiff sues upon two similar claims, one of which has been assigned to him, there is a separable controversy as regards the claim to which he had an original right. Sharkey v. Port Blakely Mill Co., 92 Fed. 425 [aff 102 Fed. 259, 42 CCA 329]. (14) Where exemplary damages upon special facts are claimed against one of two defendants, sued upon a joint obligation, there is a separable controversy, which may be removed. Feibleman v. Edmonds, 69 Tex. 334, 6 SW 417.

[21] See cases infra this note.

[a] **Illustrations.**—(1) In a suit to prevent one corporation from obtaining and exercising control over another, there is no separable controversy between plaintiff and the former. MacGinniss v. Boston, etc., Cons. Copper, etc., Min. Co., 119 Fed. 96, 55 CCA 648 [overr Lamm v. Parrott Silver, etc., Co., 111 Fed. 241]. (2) In a suit to compel a corporation to transfer to plaintiff stock standing in the name of any defendant, the controversy is not separable. St. Louis, etc., R. Co. v. Wilson, 114 U. S. 60, 5 SCt 738, 29 L. ed. 66 [aff 22 Fed. 3]. (3) A suit by a stockholder of a domestic corporation against the same and a foreign corporation praying the cancellation and surrender of shares of the capital stock of the former, held by the latter; and injunction against the voting by the latter upon any of said shares, and against its exercising any control over the officers, agents, property, or business of the former; an injunction against the former from allowing any transfer of the said shares upon its books, and from permitting any of them to be voted by the latter company; and an injunction against the directors of the former from acting as directors or officers thereof does not present a separable controversy, which can be removed by the foreign corporation. MacGinniss v. Boston, etc., Cons. Copper, etc., Min. Co., 119 Fed. 96, 55 CCA 648 [overr Lamm v. Parrott Silver, etc., Co., 111 Fed. 241]. (4) In a stockholder's suit to set aside a contract by his corporation, the controversy between him and the contractor is not separable from that to which the corporation is a party. Hanover Nat. Bank v. Credits Commutation Co., 118 Fed. 110; Wilder v. Virginia Steel, etc., Co., 46 Fed. 676; Cape Girardeau, etc., R. Co. v. Winston, 5 F. Cas. No. 2,390; Douglas v. Richmond, etc., R. Co., 106 N. C. 65, 10 SE 1048. (5) In a suit by stockholder against a corporation to declare invalid certain shares of stock, there is no separable controversy between plaintiff and the holder of such stock where its ownership is not in controversy. Shumway v. Chicago, etc., R. Co., 4 Fed. 385. (6) In a suit to enforce the right of subrogation to several fire insurance policies upon the same property, and to collect losses upon them, resulting from the same fire, there is no separable controversy between plaintiff and defendant insurance companies. Merchants' Cotton-Press, etc., Co. v. Insurance Co. of North America, 151 U. S. 368, 14 SCt 367, 38 L. ed. 195 [aff 91 Tenn. 537, 19 SW 755, and overr Insurance Co. of North America v. Delaware Mut. Ins. Co., 50 Fed. 243]. (7) In a suit by an insurance company to enforce its right of subrogation, and to collect the claim of the insured against a person who caused the loss, the controversy between the insurance company and such wrongdoer is not separable from that to which the insured is an indispensable party. Broadway Ins. Co. v. Chicago Great Western R. Co., 101 Fed. 507; Green Bay First Presby. Soc. v. Goodrich Transp. Co., 7 Fed. 257, 10 Biss. 312.

[22] U. S.—Pabst v. Roxana Petroleum Co., 30 F. (2d) 953; Nelson v. Arcade Inv. Co., 30 F. (2d) 695; Highway Constr. Co. v. McClelland, 15 F. (2d) 187 [den reh 14 F. (2d) 406]; Brunski v. Ford Motor Co., 299 Fed. 807; Beal v. Chicago, etc., R. Co., 298 Fed. 180; King v. Beaumont, 296 Fed. 531; Galluchat v. Pittman, 288 Fed. 917 [aff 288 Fed. 928]; In re Vadner, 259 Fed. 614; Roberts v. Underwood Typewriter Co., 257 Fed. 583; Puckett v. Columbus Power Co., 248 Fed. 353; Hough v. Société Electrique Westinghouse, 232 Fed. 635; Baillie v. Backus, 230 Fed. 711; Bernheim v. Louisville Property Co., 221 Fed. 273; Idaho v. American Surety Co., 218 Fed. 678; Wright v. Ankeny, 217 Fed. 985; Davey v. Yolo Water, etc., Co., 211 Fed. 345; Zoede v. Colorado Springs, 200 Fed. 99; Jackson v. Chicago, etc., R. Co., 178 Fed. 432, 102 CCA 159; Galeotti v. Diamond Match Co., 178 Fed. 127; Reinartson v Chicago Great Western R. Co., 174 Fed. 707; Blunt v. Southern R. Co., 155 Fed. 499; Thomas v. Great Northern R. Co., 147 Fed. 83, 77 CCA 255; Elkins v. Howell, 140 Fed. 157; Laden v. Meck, 130 Fed. 877, 65 CCA 361; Harley v. Home Ins. Co., 125 Fed. 792; Fogarty v. Southern Pac. Co., 123 Fed. 973; Dougherty v. Yazoo, etc., R. Co., 122 Fed. 205, 58 CCA 651; Union Terminal R. Co. v. Chicago, etc., R. Co., 119 Fed. 209; MacGinnis v. Boston, etc., Cons. Copper, etc., Min. Co., 119 Fed. 96, 55 CCA 648; Riser v. Southern R. Co., 116 Fed. 215; Ames v. Chicago, etc., R. Co., 39 Fed. 881; Vinal v. Continental Constr., etc., Co., 35 Fed. 673; Long v. Buford, 24 Fed. 241. Compare Henderlong v. Standard Oil Co., 17 F. (2d) 184, 185 (where it was said that the question must be determined "solely from the complaint and pleadings on file").

Ala.—Southern R. Co. v. Arnold, 162 Ala. 570, 50 S 293.

Colo.—Stratton Cripple Creek Min., etc., Co. v. Ellison, 42 Colo. 498, 94 P 303.

Ga.—Willys-Overland, Inc., v. Johnson, 40 Ga. A. 700, 151 SE 414; Standard Oil Co. v. Turner, 33 Ga. A. 726, 127 SE 785; Atlantic Coast Line R. Co. v. Bremer, 9 Ga. A. 640, 72 SE 43.

Ind.—Southern R. Co. v. Sittasen, (A.) 74 NE 898.

Miss.—Illinois Cent. R. Co. v. Harris, 85 Miss. 15, 38 S 225.

Mo.—Whiteaker v. Chicago, etc., R. Co., 252 Mo. 438, 160 SW 1009 [aff 239 U. S. 421, 36 SCt 152, 60 L. ed. 360]; State v. Mosman, 231 Mo. 474, 133 SW 38.

N. J.—National Docks, etc., Connecting R. Co. v. Pennsylvania R. Co., 52 N. J. Eq. 58, 28 A 71 [aff 52 N. J. Eq. 590, 33 A 50].

N. Y.—Levy v. O'Neill, 14 AbbPrNS 63.

N. C.—Cowart v. Suncrest Lumber Co., 194 N. C. 787, 140 SE 736; Cox v. Whitmer-Parsons Pulp, etc., Co., 193 N. C. 28, 136 SE 254; Crisp v. Champion Fibre Co., 193 N. C. 77, 136 SE 238; Fenner v. Richmond Cedar Works, 191 N. C. 207, 131 SE 625; Ivy River Land, etc., Co. v. American Ins. Co., 190 N. C. 801, 130 SE 864; Morganton v. Hutton, etc., Co., 187 N. C. 736, 122 SE 842.

Pa.—Bowen v. Bowen Anchor Co., 28 Pa. Dist. 202.

Tex.—Parlin, etc., Impl. Co. v. Frey, (Civ. A.) 200 SW 1143.

See Stephenson v. Illinois Cent. R.

amended,[23] which must be taken as confessed,[24] and construed in the light of the state law,[25] without regard to pleadings filed after the application to remove,[26] and without regard to the judicial knowledge of the court;[27] and the allegations of the petition for removal are immaterial to the question of separability,[28] except, it has been stated, where the petitioner alleges a fraudulent joinder of defendants for the purpose of preventing removal.[29] In determining from plaintiff's pleadings whether or not a separable controversy is presented, the court will go to the essence of the suit, without regard to the pleader's conclusions, or the form in which he has cast his suit.[30]

Amendment of plaintiff's pleadings in such manner as to create a separable controversy where none had been originally presented renders the cause removable if the other jurisdictional facts exist.[31]

Defendant cannot create a separable controversy, and so render the cause removable, by pleading a separate claim, whether by cross bill, counterclaim, or otherwise, which is purely a matter of defense, or is directly connected with plaintiff's pleading or with the answer;[32] and the interposition by the several defendants of separate defenses will not make a suit removable as involving separable controversies,[33] even though one of them arises under the constitution or laws of the United States, if all the defendants are not interested therein.[34] Similarly, a defendant cannot render a cause separable and removable by setting up that plaintiff has no cause of action against his codefendant,[35] or that the right to sue such codefendant is barred by a statute of limitations.[36] One who is a necessary party to a suit, however, and who has not been made a defendant, may become a party to the cause and then remove it if his controversy with plaintiff is separable, where the other jurisdictional facts exist.[37]

[§ 183] **3. Particular Suits or Proceedings—a. Accounting.** In a suit against two or more defendants, there are separable controversies, within the meaning of the statutes relating to the removal of causes from a court of a state to a federal court, where an accounting is prayed against one or more, but not all, of defendants, and there is an actual controversy between the other or others and plaintiff,[38] or where the complaint prays a joint and

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Co., 75 SW 260, 25 KyL 442 (apparently applying the rule).

[23] See infra text and note 31.

[24] Southern R. Co. v. Arnold, 162 Ala. 570, 50 S 293.

[25] Beal v. Chicago, etc., R. Co., 298 Fed. 180.

[26] King v. Beaumont, 296 Fed. 531; Bernheim v. Louisville Property Co., 221 Fed. 273; Cella v. Brown, 144 Fed. 742, 75 CCA 608 [certiorari den 202 U. S. 620 mem, 26 SCt 766 mem, 50 L. ed. 1174 mem]; Elkins v. Howell, 140 Fed. 157; Laden v. Meck, 130 Fed. 877, 65 CCA 361; Stratton Cripple Creek Min., etc., Co. v. Ellison, 42 Colo. 498, 94 P 303.

[27] Stratton Cripple Creek Min., etc., Co. v. Ellison, supra.

[28] Southern R. Co. v. Lloyd, 239 U. S. 496, 36 SCt 210, 60 L. ed. 402 [aff 166 N. C. 24, 81 SE 1003]; Highway Constr. Co. v. McClelland, 15 F. (2d) 187 [den reh 14 F. (2d) 406]; Elkins v. Howell, 140 Fed. 157; Fogarty v. Southern Pac. Co., 123 Fed. 973; Hazard v. Robinson, 21 Fed. 193; Southern R. Co. v. Arnold, 162 Ala. 570, 50 S 293; Levy v. O'Neill, 14 Abb PrNS (N. Y.) 63; Crisp v. Montvale Lumber Co., 189 N. C. 733, 128 SE 146. See St. Louis Southwestern R. Co. v. Adams, 87 Ark. 136, 112 SW 186 (holding that, where the complaint on its face does not show that the cause is removable, it cannot be made so by raising an issue of fact in the petition for removal as to whether or not a separable controversy exists). Compare Henderlong v. Standard Oil Co., 17 F. (2d) 184 (holding that a duly verified petition for removal, which is not in conflict with the complaint, may be considered in ascertaining the facts as to whether or not a separable controversy exists).

Petition for removal in general see infra §§ 237–244, 256, 261.

[29] Louisville, etc., R. Co. v. Wangelin, 132 U. S. 599, 10 SCt 203, 33 L. ed. 473.

Allegations as to fraudulent joinder in general see infra § 240.

[30] Jennings v. Southern R. Co., 40 F. (2d) 951; Genuine Panama Hat Works v. Webb, 36 F. (2d) 265. See Winfield v. Wichita Natural Gas Co., 267 Fed. 47 (applying the rule); Hough v. Société Electrique Westinghouse, 232 Fed. 635 (holding that the court must decide whether the allegations of plaintiff's pleadings create separable or inseparable controversies, regardless of plaintiff's opinion or belief).

[31] Fritzlen v. Boatmen's Bank, 212 U. S. 364, 29 SCt 366, 53 L. ed. 551; Hill v. Director-Gen. of Railroads, 178 N. C. 607, 101 SE 376; Gurley v. Southern Power Co., 173 N. C. 447, 92 SE 262.

Amendments as rendering cause removable in general see supra § 26.

[32] Wilson v. Oswego Tp., 151 U. S. 56, 14 SCt 259, 38 L. ed. 70; Uden v. Great Northern Constr. Co., 1 F. (2d) 743; Maish v. Bird, 48 Fed. 607; Shaver v. Hardin, 30 Fed. 801; Rumsey v. Call, 28 Fed. 769; Brande v. Gilchrist, 18 Fed. 465; Donohoe v. Mariposa Land, etc., Co., 7 F. Cas. No. 3,989, 5 Sawy. 163; Cleburne Electric, etc., Co. v. McCoy, (Tex. Civ. A.) 149 SW 534. But see Kline v. Murray, 7 F. (2d) 404, 405 (where plaintiff sued to cancel notes executed in favor of one of several defendants, and, for damages for conspiracy among all defendants, and, after removal by such one defendant on the ground of the existence of a separable controversy, plaintiff dismissed the part of his suit seeking cancellation of the notes, but retained allegations regarding such notes as part of the means of executing the conspiracy alleged; and thereupon the removing defendant filed a counterclaim for the amount of such notes, to which plaintiff filed a defensive reply; and it was held that a separable controversy still existed, so that the jurisdiction of the federal court was not lacking, "for the statute does not distinguish between controversies whether initiated by complaint or by cross-complaint").

[33] Alabama Great Southern R. Co. v. Thompson, 200 U. S. 206, 26 SCt 161, 50 L. ed. 441, 4 AnnCas 1147; Chicago, etc., R. Co. v. Martin, 178 U. S. 245, 20 SCt 854, 44 L. ed. 1055; Torrence v. Shedd, 144 U. S. 527, 12 SCt 726, 36 L. ed. 528; Louisville, etc., R. Co. v. Wangelin, 132 U. S. 599, 10 SCt 203, 33 L. ed. 473; Little v. Giles, 118 U. S. 596, 7 SCt 34, 30 L. ed. 269 [rev 13 Fed. 100, 2 McCrary 370]; Plymouth Gold Min. Co. v. Amador, etc., Canal Co., 118 U. S. 264, 6 SCt 1034, 30 L. ed. 232; Core v. Vinal, 117 U. S. 347, 6 SCt 767, 29 L. ed. 912; Sloane v. Anderson, 117 U. S. 275, 6 SCt 730, 29 L. ed. 899; Starin v. New York, 115 U. S. 248, 6 SCt 28, 29 L. ed. 388 [aff 21 Fed. 593, 22 Fed. 801]; Pirie v. Tvedt, 115 U. S. 41, 5 SCt 1034, 1061, 29 L. ed. 331; Putnam v. Ingraham, 114 U. S. 57, 5 SCt 746, 29 L. ed. 65; Louisville, etc., R. Co. v. Ide, 114 U. S. 52, 5 SCt 735, 29 L. ed. 63; First Baptist Church v. Southern Mortg. Co., 39 F. (2d) 246; Sanders v. Atlantic Coast Line R. Co., 33 F. (2d) 1010; Branchville Motor Co. v. American Surety Co., 27 F. (2d) 631; Lynes v. Standard Oil Co., 300 Fed. 812; Brunski v. Ford Motor Co., 299 Fed. 807; King v. Beaumont, 296 Fed. 531; Lomax v. Foster Lumber Co., 174 Fed. 959, 99 CCA 463; Boatmen's Bank v. Fritzlen, 135 Fed. 650, 68 CCA 288 [rev 128 Fed. 608, and certiorari den 198 U. S. 586, 25 SCt 803, 49 L. ed. 1174]; American Bridge Co. v. Hunt, 130 Fed. 302, 64 CCA 548; Robbins v. Ellenbogen, 71 Fed. 4, 18 CCA 83; Thurber v. Miller, 67 Fed. 371, 14 CCA 432; Arrowsmith v. Nashville, etc., R. Co., 57 Fed. 165; O'Harrow v. Henderson, 52 Fed. 769; In re San Antonio, etc., R. Co., 44 Fed. 145; Patchin v. Hunter, 38 Fed. 51; State v. Adams, 9 Oh. Cir. Ct. 21, 6 Oh. Cir. Dec. 46.

Existence of separate defenses as rendering controversy separable see supra § 181.

[34] Chicago, etc., R. Co. v. Martin, 178 U. S. 245, 20 SCt 854, 44 L. ed. 1055.

[35] Lynes v. Standard Oil Co., 300 Fed. 812; Cathey v. Charlotte, 197 N. C. 309, 148 SE 426.

[36] Patton v. Champion Fibre Co., 192 N. C. 48, 133 SE 174.

[37] Hack v. Chicago, etc., R. Co., 23 Fed. 356.

Who may remove separable controversy in general see infra § 192.

[38] Geer v. Mathieson Alkali Works, 190 U. S. 428, 23 SCt 807, 47 L. ed. 1122; Harrison v. Harrison, 5 F. (2d) 1001; Bybee v. Hawkett, 5 Fed. 1, 6 Sawy. 593.

[a] **Illustration.**—Where a suit is brought to set aside a contract between two corporations, to enjoin its directors from any further disposition of its property, for a reconveyance of the same, and an accounting by the grantee for the damages caused by the transfer, with which was joined a prayer that defendants, who were directors of the grantor, should account for their actions in the prem-

several accounting,[39] as by trustees for the fraudulent misappropriation of trust funds,[40] or where it prays separate accountings by different defendants,[41] unless such defendants are jointly liable or each is interested in the accounts of the others, in which case the controversy between them and plaintiff is not separable.[42]

[§ 184] **b. Creditor's Bill or Similar Suit.** Upon a creditor's bill for the collection and preservation of a debtor's assets and their application to plaintiff's debt or their distribution pro rata among the creditors, there is no separate controversy within the meaning of the statutes relating to the removal of causes from a state court to a federal court, between plaintiff and defendants who claim a prior lien upon the assets,[43] nor between him and defendants who he contends should be excluded from participating in the distribution,[44] nor between him and a defendant who is alleged in the bill to have assumed the obligations of the insolvent debtor.[45] The same principles have been applied to similar suits by an administrator[46] and by an assignee for the benefit of creditors,[47] and to a suit by a partner for a dissolution of the partnership and the distribution of its assets.[48]

[§ 185] **c. Condemnation Proceeding.**[49] A separable controversy, within the meaning of the statutes relating to the removal of causes from a court of a state to a federal court, exists between the petitioner and each of the owners of property involved in a proceeding to condemn land for a public use, when the only question in dispute is the amount of damages, and the respondents have no joint interest in any of the parcels to be condemned, nor in the damages to be awarded,[50] except when a state statute directs that the proceedings against all of the respondents shall be tried together, and that a single finding be made including all the awards and all the assessments for benefits, in which case no separable controversy can exist.[51] There is, however, no separable controversy with the petitioner as between two or more respondents to such a proceeding who have separate interests in the same property,[52] as in the case of a lessor and lessee,[53] although where only a part of the property has been leased the controversy as to the part not leased is separable as between the lessor and lessee.[54]

Where petitioner's right to condemn is in issue, as such, there is but a single controversy between him and all those who dispute his right;[55] but where the issue is merely as to his right to condemn particular property his controversy with the owners of such property is separable from the controversy between him and the owners of the other property sought to be condemned.[56]

[§ 186] **d. Action for Damages for Negligence.** Separable controversies, within the meaning of the statutes relating to the removal of causes from a state court to a federal court, exist in an action against two or more defendants to recover damages for negligence, when the several defendants are charged with different and nonconcurrent negligence,[57] or negligence is charged in the violation of separate and distinct duties,[58] even though there is also an allegation of concurrent negligence on the part of all the defendants;[59] but there is no separa-

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ises and be required to make good all allowance and damage caused by their wrongful conduct, the controversy between plaintiff and the directors is separable. Geer v. Mathieson Alkali Works, 190 U. S. 428, 23 SCt 807, 47 L. ed. 1122.

[39] Hoffman v. Lynch, 23 F. (2d) 518. And see cases infra note 40.

Suit against defendants jointly and severally liable as presenting separable controversy in general see supra § 181.

[40] Boyd v. Gill, 19 Fed. 145, 21 Blatchf. 543; Langdon v. Fogg, 18 Fed. 5, 21 Blatchf. 392.

[41] Vinal v. Continental Constr., etc., Co., 34 Fed. 228; Langdon v. Fogg, 18 Fed. 5, 21 Blatchf. 392.

Separable controversies where liabilities of defendants are several in general see supra § 181.

[42] Baillie v. Backus, 230 Fed. 711; Campbell v. Milliken, 119 Fed. 981; German Sav., etc., Soc. v. Dormitzer, 116 Fed. 471, 53 CCA 639; Fox v. Mackay, 60 Fed. 4; Sexton v. Seelye, 39 Fed. 705; Chicago, etc., R. Co. v. New York, etc., R. Co., 24 Fed. 516; Burke v. Flood, 1 Fed. 541, 6 Sawy. 220.

Separability of controversies where defendants' liability is joint in general see supra § 181.

[43] Rosenthal v. Coates, 148 U. S. 142, 13 SCt 576, 37 L. ed. 399; Torrence v. Shedd, 144 U. S. 527, 12 SCt 726, 36 L. ed. 528; Graves v. Corbin, 132 U. S. 571, 10 SCt 196, 33 L. ed. 462 [rev 34 Fed. 692]; Fidelity Ins., etc., Co. v. Huntington, 117 U. S. 280, 6 SCt 733, 29 L. ed. 898; Turnbull Wagon Co. v. Linthicum Carriage Co., 80 Fed. 4; Palmer v. Inman, 122 Ga. 226, 50 SE 86; Peters v. Peters, 41 Ga. 242; State v. Adams, 9 Oh. Cir. Ct. 21, 6 Oh. Cir. Dec. 46. But see Hack v. Chicago, etc., R. Co., 23 Fed. 356; Corbin v. Boies, 18 Fed. 3 (both permitting removal in such case on the ground that a separable controversy existed).

[44] Graves v. Corbin, 132 U. S. 571, 10 SCt 196, 33 L. ed. 462 [rev 34 Fed. 692]; Colburn v. Hill, 101 Fed. 500, 41 CCA 467; Burts v. Loyd, 45 Ga. 104, 12 AmR 574.

[45] Mecke v. Valleytown Mineral Co., 122 N. C. 790, 29 SE 781.

[46] Burts v. Loyd, 45 Ga. 104, 12 AmR 574; Peters v. Peters, 41 Ga. 242.

[47] Rosenthal v. Coates, 148 U. S. 142, 13 SCt 576, 37 L. ed. 399.

[48] Shainwald v. Lewis, 108 U. S. 158, 2 SCt 385, 27 L. ed. 691.

[49] **As "suit" within meaning of removal statutes** see supra § 19.

[50] Texas, etc., R. Co. v. Kirk, 115 U. S. 1, 5 SCt 1113, 29 L. ed. 319 [aff 19 Fed. 150]; Deep Water R. Co. v. Western Pocahontas Coal, etc., Co., 152 Fed. 824; South Dakota Cent. R. Co. v. Chicago, etc., R. Co., 141 Fed. 578, 73 CCA 176; New York, etc., R. Co. v. Cockcroft, 46 Fed. 881; Northern Pac. Terminal Co. v. Lowenberg, 18 Fed. 339, 9 Sawy. 348; Chicago v. Hutchinson, 15 Fed. 129, 11 Biss. 484.

[51] Kansas City v. Hennegan, 152 Fed. 249.

[52] Bellaire v. Baltimore, etc., R. Co., 146 U. S. 117, 13 SCt 16, 36 L. ed. 910; Helena Power Transmission Co. v. Spratt, 146 Fed. 310; Washington v. Columbus, etc., R. Co., 53 Fed. 673; Seattle, etc., R. Co. v. State, 52 Fed. 594. And see cases infra note 53.

[53] Bellaire v. Baltimore, etc., R. Co., 146 U. S. 117, 13 SCt 16, 36 L. ed. 910; Washington v. Columbus, etc., R. Co., 53 Fed. 673; Le Mars v. Iowa Falls, etc., R. Co., 48 Fed. 661.

[a] **Even where lessor files disclaimer** the lessee is not a defendant interested in a separable controversy such as to entitle him to remove the proceeding. Washington v. Columbus, etc., R. Co., 53 Fed. 673.

[54] Sugar Creek, etc., R. Co. v. McKell, 75 Fed. 34.

[55] Perkins v. Lake Superior, etc., R. Co., 140 Fed. 906; In re Jarnecke Ditch, 69 Fed. 161.

[56] South Dakota Cent. R. Co. v. Chicago, etc., R. Co., 141 Fed. 578, 73 CCA 176.

[57] Stephens v. Southern Pac. Co., 16 F. (2d) 288; Beal v. Chicago, etc., R. Co., 298 Fed. 180; Trivette v. Chesapeake, etc., R. Co., 212 Fed. 641, 129 CCA 177; Nichols v. Chesapeake, etc., R. Co., 195 Fed. 913, 115 CCA 601; Cayce v. Southern R. Co., 195 Fed. 786; Adderson v. Southern R. Co., 177 Fed. 571; Yeates v. Illinois Cent. R. Co., 137 Fed. 943; Henry v. Illinois Cent. R. Co., 132 Fed. 715; Williard v. Spartanburg, etc., R. Co., 124 Fed. 796; Kelly v. Chicago, etc., R. Co., 122 Fed. 286; Coker v. Monaghan Mills, 110 Fed. 803; Hartshorn v. Atchison, etc., R. Co., 77 Fed. 9; Fergason v. Chicago, etc., R. Co., 63 Fed. 177; Spangler v. Atchison, etc., R. Co., 42 Fed. 305; McKenzie v. Standard Oil Co., 31 Ga. A. 615, 121 SE 847; Fogarty v. Bates, etc., Constr. Co., 180 Ky. 848, 203 SW 720.

[58] Schotis v. North Coast Stevedoring Co., 24 F. (2d) 591 [motion to retax den 24 F. (2d) 592]; Puckett v. Columbus Power Co., 248 Fed. 353; Murray v. Southern Bell Tel., etc., Co., 210 Fed. 925; Bainbridge Grocery Co. v. Atlantic Coast Line R. Co., 182 Fed. 276; Marach v. Columbia Box Co., 179 Fed. 412; Batey v. Nashville, etc., R. Co., 95 Fed. 368.

[59] Puckett v. Columbus Power

ble controversy in an action founded wholly upon the concurrent negligence of two or more defendants,[60] as a lessor and lessee,[61] or a corporation and the receiver of its property,[62] nor in an action against a servant and his master, whether a specific and concurrent negligent act or omission on the part of the master is alleged or his liability is asserted merely under the doctrine of respondeat superior,[63] even though the liability of one defendant exists, if at all, only by virtue of statute while the liability of the other rests on the common law.[64]

[§ 187] **e. Suit To Quiet Title or Recover Possession of Land.** A suit to quiet the title to real property,[65] or to recover possession of land,[66] involves separable controversies, within the meaning of the statutes relating to the removal of causes from a state court to a federal court, when defendants do not claim under a common right or through a common course, but not when all of them assert a joint or common right or claim title from the same source,[67] nor where the only defendant not so claiming is the common source of the titles asserted by all

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Co., 248 Fed. 353; Nichols v. Chesapeake, etc., R. Co., 195 Fed. 913, 115 CCA 601; Adderson v. Southern R. Co., 177 Fed. 571; Henry v. Illinois Cent. R. Co., 132 Fed. 715; McIntyre v. Southern R. Co., 131 Fed. 985; Southern R. Co. v. Edwards, 115 Ga. 1022, 42 SE 375; McKenzie v. Standard Oil Co., 31 Ga. A. 615, 121 SE 847.

Controversies as separable where defendants are sued jointly and severally see supra § 181.

[60] Hay v. May Dept. Stores Co., 271 U. S. 318, 46 SCt 498, 70 L. ed. 965; Best Foods v. Mitsubishi Shoji Kaisha, Ltd., 39 F. (2d) 619; Sanders v. Atlantic Coast Line R. Co., 33 F. (2d) 1010; Nelson v. Arcade Inv. Co., 30 F. (2d) 695; Adams v. Tolerton, 22 F. (2d) 863; Nichols v. Spokane, etc., R., etc., Co., 21 F. (2d) 620; Slate v. Hutcherson, 15 F. (2d) 551; Fox v. Yazoo, etc., R. Co., 4 F. (2d) 282; Lynes v. Standard Oil Co., 300 Fed. 812; Beal v. Chicago, etc., R. Co., 298 Fed. 180; Gray v. Seattle, etc., R. Co., 295 Fed. 222; Morgan v. Hines, 260 Fed. 585; Deutsch v. Alaska Gastineau Min. Co., 237 Fed. 215; Goede v. Colorado Springs, 200 Fed. 99; Foster v. Coos Bay Gas, etc., Co., 185 Fed. 979; Taylor v. Southern R. Co., 178 Fed. 380; Galeotti v. Diamond Match Co., 178 Fed. 127; Haire v. Rome R. Co., 57 Fed. 321; Willys-Overland, Inc., v. Johnson, 40 Ga. A. 700, 151 SE 414; Standard Oil Co. v. Turner, 33 Ga. A. 726, 127 SE 785; Atlantic Coast Line R. Co. v. Bryant, 7 Ga. A. 707, 67 SE 1051; Atlantic Coast Line R. Co. v. Bryant, 7 Ga. A. 703, 67 SE 1049; Central Union Tel. Co. v. Riggs, 47 Ind. A. 45, 91 NE 834; Feaster v. McLellan Stores Co., 198 N. C. 31, 150 SE 639; Walters v. Phœnix Utility Co., 196 N. C. 817, 145 SE 926; Givens v. Savona Mfg. Co., 196 N. C. 377, 145 SE 681; Rea v. Standard Mirror Co., 158 N. C. 24, 73 SE 116. And see cases infra notes 61, 62.

[a] **Fact that negligence of one defendant was act of misfeasance and of other act or nonfeasance** does not make the controversies separable. Nelson v. Arcade Inv. Co., 30 F. (2d) 695.

[b] **Action against municipality and property owner for injuries from defective sidewalk,** both defendants being charged with having negligently permitted the walk to become unsafe and out of repair, states a joint cause of action, the duty resting upon each defendant and the breach alleged against each being the same, and there is no separable controversy. Goede v. Colorado Springs, 200 Fed. 99.

Separability of controversies where liability of defendants is joint in general see supra § 181.

[61] Chicago, etc., R. Co. v. McWhirt, 243 U. S. 422, 37 SCt 392, 61 L. ed. 826 [aff (Mo.) 187 SW 830]; Chicago, etc., R. Co. v. Willard, 220 U. S. 413, 31 SCt 460, 55 L. ed. 521 [aff 165 Fed. 181, 91 CCA 215]; Curtis v. Cleveland, etc., R. Co., 140 Fed. 777; Keller v. Kansas City, etc., R. Co., 135 Fed. 202; Person v. Illinois Cent. R. Co., 118 Fed. 342; Central Ohio R. Co. v. Mahoney, 114 Fed. 732, 52 CCA 364; Fleming v. Louisiana, etc., R. Co., 263 Mo. 180, 172 SW 355; Brown v. Louisiana, etc., R. Co., 256 Mo. 522, 165 SW 1060. Compare Yeates v. Illinois Cent. R. Co., 137 Fed. 943; Williard v. Spartanburg, etc., R. Co., 124 Fed. 796; Kelly v. Chicago, etc., R. Co., 122 Fed. 286; Spangler v. Atchison, etc., R. Co., 42 Fed. 305 (in all of which the liabilities of the lessor and lessee were held to be not merely joint, but several, or joint and several, is that the controversies were separable).

[62] Whitcomb v. Smithson, 175 U. S. 635, 20 SCt 248, 44 L. ed. 303; Dougherty v. Atchison, etc., R. Co., 126 Fed. 239; Moore v. Los Angeles Iron, etc., Co., 89 Fed. 73.

[63] U. S.—Hay v. May Dept. Stores Co., 271 U. S. 318, 46 SCt 498, 70 L. ed. 965; Chicago, etc., R. Co. v. Dowell, 229 U. S. 102, 33 SCt 684, 57 L. ed. 1090 [aff 83 Kan. 562, 112 P 136]; Southern R. Co. v. Miller, 217 U. S. 209, 30 SCt 450, 54 L. ed. 732 [aff 3 Ga. A. 410, 59 SE 1115]; Cincinnati, etc., R. Co. v. Bohon, 200 U. S. 221, 26 SCt 166, 50 L. ed. 448; Alabama Great Southern R. Co. v. Thompson, 200 U. S. 206, 26 SCt 161, 50 L. ed. 441; Powers v. Chesapeake, etc., R. Co., 169 U. S. 92, 18 SCt 264, 42 L. ed. 673; Warren v. Midland Valley R. Co., 36 F. (2d) 828; Genuine Panama Hat Works v. Webb, 36 F. (2d) 265; La Flower v. Merrill, 28 F. (2d) 784; Beal v. Chicago, etc., R. Co., 298 Fed. 180; Atlantic Coast Line R. Co. v. Feaster, 260 Fed. 881; Plunkett v. Gulf Refining Co., 259 Fed. 974; Poorman v. Cleveland, etc., R. Co., 255 Fed. 985; Baker v. Jacksonville Tract. Co., 247 Fed. 718; Trivette v. Chesapeake, etc., R. Co., 212 Fed. 641, 129 CCA 177; Buchanan v. W. M. Ritter Lumber Co., 210 Fed. 144, 126 CCA 658; Stevenson v. Illinois Cent. R. Co., 192 Fed. 956; Lewis v. Cincinnati, etc., R. Co., 192 Fed. 654; Armstrong v. Kansas City Southern R. Co., 192 Fed. 608; Foster v. Coos Bay Gas, etc., Co., 185 Fed. 979; Painter v. Chicago, etc., R. Co., 177 Fed. 517; Knuth v. Butte Electric R. Co., 148 Fed. 73; Thomas v. Great Northern R. Co., 147 Fed. 83, 77 CCA 255; Heffelfinger v. Choctaw, etc., R. Co., 140 Fed. 75; Davenport v. Southern R. Co., 135 Fed. 960, 68 CCA 444; Lathrop, etc., Co. v. Pittsburg, etc., R. Co., 135 Fed. 619; Roberts v. Shelby Steel Tube Co., 131 Fed. 729, 65 CCA 589; American Bridge Co. v. Hunt, 130 Fed. 302, 64 CCA 548; Dougherty v. Atchison, etc., R. Co., 126 Fed. 239; Fogarty v. Southern Pac. R. Co., 123 Fed. 973. But see Henderlong v. Standard Oil Co., 17 F. (2d) 184 (holding that a separable controversy is involved in such an action unless concurrent negligence on the part of the master and servant is charged, and not merely imputed negligence on the part of the master).

Colo.—Stratton Cripple Creek Min., etc., Co. v. Ellison, 42 Colo. 498, 94 P 303.

Ga.—Louisville, etc., R. Co. v. Roberts, 136 Ga. 270, 71 SE 425; Vanzant v. Southern R. Co., 135 Ga. 444, 69 SE 721; Atlantic Coast Line R. Co. v. Williams, 27 Ga. A. 202, 107 SE 886; Atlantic Coast Line R. Co. v. Renfroe, 27 Ga. A. 198, 107 SE 881; Postal Telegraph-Cable Co. v. Puckett, 24 Ga. A. 458, 101 SE 397; Southern R. Co. v. Sewell, 18 Ga. A. 544, 90 SE 94.

Kan.—Dowell v. Chicago, etc., R. Co., 83 Kan. 562, 112 P 136 [aff 229 U. S. 102, 33 SCt 684, 57 L. ed. 1090.

Ky.—Chesapeake, etc., R. Co. v. McCoy, 228 Ky. 752, 16 SW (2d) 170.

Mo.—State v. Falkenhainer, 316 Mo. 651, 291 SW 466; Zumwalt v. Chicago, etc., R. Co., 266 SW 717; Whiteaker v. Chicago, etc., R. Co., 252 Mo. 438, 160 SW 1009 [aff 239 U. S. 421, 36 SCt 152, 60 L. ed. 360]; State v. Mosman, 231 Mo. 474, 133 SW 38; Baird v. Larabee Flour Mills Corp., 203 Mo. A. 432, 220 SW 988; Schwyhart v. Barrett, 145 Mo. A. 332, 130 SW 388 [aff 227 U. S. 184, 33 SCt 250, 57 L. ed. 473].

N. C.—Johnston v. Phœnix Utility Co., 197 N. C. 393, 148 SE 429; Carroll v. Clinchfield Products Corp., 192 N. C. 710, 135 SE 783; Swain v. Interstate Cooperage Co., 189 N. C. 528, 127 SE 538; Smith v. Harris Granite Quarries Co., 164 N. C. 338, 80 SE 388.

S. C.—Powell v. Southern R. Co., 110 S. C. 70, 96 SE 292; Able v. Southern R. Co., 73 S. C. 173, 52 SE 962.

Tex.—W. P. Carmichael Co. v. Miller, (Civ. A.) 178 SW 976.

Joint liability preventing removal because of diversity of citizenship generally see supra § 168.

[64] Atlantic Coast Line R. Co. v. Feaster, 260 Fed. 881; Painter v. Chicago, etc., R. Co., 177 Fed. 517; Dowell v. Chicago, etc., R. Co., 83 Kan. 562, 112 P 136 [aff 229 U. S. 102, 33 SCt 684, 57 L. ed. 1090]; Schwyhart v. Barrett, 145 Mo. A. 332, 130 SW 388 [aff 227 U. S. 184, 33 SCt 250, 57 L. ed. 473]; Powell v. Southern R. Co., 110 S. C. 70, 96 SE 292.

[65] First Baptist Church v. Southern Mortg. Co., 39 F. (2d) 246; Harrison v. Harrison, 5 F. (2d) 1001; Colleton Mercantile, etc., Co. v. Savannah River Lumber Co., 280 Fed. 358; McMullen v. Halleck Cattle Co., 193 Fed. 282; Carothers v. McKinley Min., etc., Co., 116 Fed. 947; Bates v. Carpentier, 98 Fed. 452; Illinois v. Illinois Cent. R. Co., 16 Fed. 881; Field v. Lownsdale, 9 F. Cas. No. 4,769, Deady 288; Goodenough v. Warren, 10 F. Cas. No. 5,534, 5 Sawy. 494; Steinkul v. York, 22 F. Cas. No. 13,356, 2 Flipp. 376; Miller v. Buyer, 82 Colo. 474, 261 P 659.

[66] Laidly v. Huntington, 121 U. S. 179, 7 SCt 855, 30 L. ed. 883; Cleveland v. Cleveland, etc., R. Co., 147 Fed. 171, 77 CCA 467; Forsyth Mfg. Co. v. Putnam, 139 Fed. 1007, 71 CCA 684; Knight v. Lutcher, etc., Lumber Co., 136 Fed. 404, 69 CCA 248, 139 Fed. 1007, 71 CCA 684; Stanbrough v. Cook, 38 Fed. 369, 3 LRA 400; Anderson v. Appleton, 32 Fed. 855; Collins v. Wellington, 31 Fed. 244; Sharp v. Whiteside, 19 Fed. 150.

[67] Davey v. Yolo Water, etc., Co.,

the other parties.[68] So there is no separable controversy in such a suit where one of two defendants is sued as trustee for the other,[69] or where defendants are mortgagor and mortgagee,[70] or where all the defendants are charged with a conspiracy to cloud plaintiff's title or defraud him of his property;[71] but the mere fact that the bill alleges that all parties defendant make some claim under a particular deed does not make the controversies inseparable where the validity of such deed is not the only matter in issue.[72]

[§ 188] **f. Suit To Set Aside Conveyance or Cancel Mortgage.** In an action to set aside a conveyance to which action the grantor and grantee in such conveyance are defendants, there is no separable controversy with plaintiff as between such grantor and grantee, within the meaning of the statutes relating to the removal of causes from a state court to a federal court,[73] or as between the grantor and his trustee in bankruptcy,[74] nor is there a separable controversy between plaintiff and a subsequent grantee of the property;[75] and, similarly, in a suit to cancel a mortgage there is no separable controversy with plaintiff as between the mortgagor and mortgagee.[76]

[§ 189] **g. Foreclosure Suit.** In a suit to foreclose a mortgage or other lien, a defendant who is alleged to be personally liable for a deficiency has no separable controversy, within the meaning of the statutes relating to the removal of causes from a state court to a federal court, from that between plaintiff and the owner of the equity of redemption;[77] and defendants sued as junior encumbrancers cannot remove a foreclosure suit on the ground that their controversy with the mortgagee is separable from that of the mortgagor,[78] even though, it has been held, they contest the validity or priority of the mortgage,[79] but on this point there is authority to the contrary.[80] Where, however, in a suit to foreclose a mortgage the avoidance of a prior mortgage is prayed, the controversies are separable.[81] A prayer for the reformation of the mortgage sought to be foreclosed is merely incidental to the foreclosure, and so does not create a separable controversy.[82] But where the property covered by the mortgage is in dispute, the controversy between plaintiff and defendants who are interested in the disputed portion of the property is separable.[83]

[§ 190] **h. Suit for Specific Performance.** In a suit for the specific performance of a contract for the sale of land, brought against the vendor and one to whom he has subsequently conveyed the property, there is a separable controversy between plaintiff and such grantee.[84]

[§ 191] **i. Proceeding in Probate.**[85] In proceedings upon an application for the admission of a will to probate,[86] or to contest its validity,[87] or in an action to establish a will,[88] or a suit to determine the construction thereof,[89] there is no separable controversy, within the meaning of the statutes relating to the removal of causes from a court of a state to a federal court.

[§ 192] **C. Who May Remove.** A plaintiff cannot in any case remove a cause from a state court to a federal court on account of the existence of a separable controversy.[90] Any one or more of the nonresident defendants interested in a separable controversy may remove the cause;[91] but a defendant not interested therein cannot do so.[92] An intervener,[93] or a party brought in on the motion of plain-

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211 Fed. 345; In re Foley, 80 Fed. 949. But see Miller v. Buyer, 82 Colo. 474, 261 P 659, 660 (where it was said without qualification that "a suit to quiet title is severable as to each defendant. . . . The rights of none [of defendants] are dependent on the action or right of any other. If any action is severable, an action to quiet title must be").

[68] Smedley v. Smedley, 110 Fed. 255.

[69] Rand v. Walker, 117 U. S. 340, 6 SCt 769, 29 L. ed. 907.

[70] Chester v. Chester, 7 Fed. 1.

[71] Little v. Giles, 118 U. S. 596, 7 SCt 32, 30 L. ed. 269 [rev 13 Fed. 100, 2 McCrary 370]; O'Neil v. Birdseye, 244 Fed. 254.

[72] Bacon v. Felt, 38 Fed. 870.

[73] In re Vadner, 259 Fed. 614; German Sav., etc., Soc. v. Dormitzer, 116 Fed. 471, 53 CCA 639; Reineman v. Ball, 33 Fed. 692; Winnemans v. Edgington, 27 Fed. 324; Moore v. North River Constr. Co., 19 Fed. 803.

[74] Casey v. Baker, 212 Fed. 247.

[75] Stokely v. Reader, 12 F. (2d) 97; American Surety Co. v. Conway, 222 Fed. 140.

[76] Oakes v. Yonah Land, etc., Co., 89 Fed. 243.

[77] Lewis v. Weidenfeld, 76 Fed. 145; Ames v. Chicago, etc., R. Co., 39 Fed. 881; Union Iron, etc., Co. v. Sonnefield, 113 La. 436, 37 S 20; U. S. Mortgage Co. v. McClure, 42 Or. 190, 70 P 543.

[78] Citizens', etc., Bank v. Pine Forest Inn Co., 31 F. (2d) 301; Mace v. Mayfield, 10 F. (2d) 231; Maher v. Tower Hotel Co., 90 Fed. 225; Robbins v. Ellenbogen, 71 Fed. 4, 18 CCA 83; Sweeney v. Grand Island, etc., R. Co., 61 Fed. 3; Donohoe v. Mariposa Land, etc., Co., 7 F. Cas. No. 3,989, 5 Sawy. 163; Manhattan First Nat. Bank v. King Wrought-Iron Bridge Co., 9 F. Cas. No. 4,803; Flynn v. Des Moines, etc., R. Co., 63 Iowa 490, 19 NW 312; Springer v. Sheets, 115 N. C. 370, 20 SE 469; Northwestern, etc., Bank v. Suksdorf, 15 Wash. 475, 46 P 1027. But see Osgood v. Chicago, etc., R. Co., 18 F. Cas. No. 10,604, 6 Biss. 330 (contra). Compare Wabash, etc., R. Co. v. Central Trust Co., 23 Fed. 513 (holding that a suit to foreclose a mortgage, in which subsequent encumbrancers are defendants, may be removed by the mortgagor, upon the ground that a separable controversy exists between it and plaintiff).

And see cases infra note 79.

[79] Thurber v. Miller, 67 Fed. 371, 14 CCA 432; Marsh v. Atlanta, etc., R. Co., 53 Fed. 168; Bissell v. Canada, etc., R. Co., 39 Fed. 225. Compare California Safe-Deposit, etc., Co. v. Cheney Electric Light, etc., Co., 56 Fed. 257 (holding that, where a complaint in a foreclosure suit alleged that a defendant claimed an interest in the mortgaged property, without stating its nature, and it subsequently appeared that the claim was to a title paramount to that of the mortgagor and mortgagee, the cause would be remanded); Thompson v. Dixon, 28 Fed. 5 (to same effect).

[80] California Safe-Deposit, etc., Co. v. Cheney Electric Light, etc., Co., 56 Fed. 257; Foster v. Chesapeake, etc., R. Co., 47 Fed. 369 [dis Fidelity Ins., etc., Co. v. Huntington, 117 U. S. 280, 6 SCt 733, 29 L. ed. 898]; Capital City Bank v. Hodgin, 22 Fed. 209.

[81] Fritzlen v. Boatmen's Bank, 212 U. S. 364, 29 SCt 366, 53 L. ed. 551 [aff 75 Kan. 479, 89 P 915, 22 LRANS 1235]; Boatmen's Bank v. Fritzlen, 135 Fed. 650, 68 CCA 288 [rev 128 Fed. 608].

[82] Winchell v. Coney, 27 Fed. 482.

Incidental matters as separable controversies in general see supra § 181.

[83] New England Water Works Co. v. Farmers' L. & T. Co., 136 Fed. 521, 69 CCA 297.

[84] Wheeling Creek Gas Coal, etc., Co. v. Elder, 170 Fed. 215; Elkins v. Howell, 140 Fed. 157.

[85] **As "suit" within meaning of removal statutes** see supra §§ 16, 17.

[86] Fraser v. Jennison, 106 U. S. 191, 1 SCt 171, 27 L. ed. 131.

[87] Reed v. Reed, 31 Fed. 49.

[88] Anderson v. Appleton, 32 Fed. 855.

[89] Security Co. v. Pratt, 64 Fed. 405.

[90] Western Union Tel. Co. v. Brown, 32 Fed. 337.

Right of plaintiff to remove cause in general see infra § 214.

[91] Rand v. Walker, 117 U. S. 340, 6 SCt 769, 29 L. ed. 907; Grindrod v. Crine, 22 Fed. 257; Greene v. Klinger, 10 Fed. 689; Field v. Lownsdale, 9 F. Cas. No. 4,769, Deady 288; Fields v. Lamb, 9 F. Cas. No. 4,775, Deady 430; Lewis v. White, 15 F. Cas. No. 8,335; McGinnity v. White, 16 F. Cas. No. 8,802, 3 Dill. 350.

[92] Rand v. Walker, 117 U. S. 340, 6 SCt 769, 29 L. ed. 907.

[93] Mitchell v. Smale, 140 U. S.

tiff[94] or defendant,[95] may remove because of a separable controversy, when the necessary difference of citizenship exists between him and the party on the opposite side thereof, provided he presents some new and independent interest or question; but not otherwise.[96] One whose application to intervene has been denied ordinarily has no standing to remove the cause or controversy;[97] but one who shows himself clearly entitled to intervene, and who has wrongfully been denied permission so to do, may be regarded as a party for the purposes of obtaining a removal.[98] It has been held that the joinder, in an application for removal on account of a separable controversy, of a party not entitled to such removal with parties who have a right to remove does not defeat the removal, such joinder being treated as a nullity.[99]

[§ 193] **D. Citizenship and Residence of Parties as Affecting Removability.** Inasmuch as the statutory provisions now under consideration authorize the removal thereunder of such controversies only as are wholly between citizens of different states and can be fully determined between them,[1] a separable controversy to which an alien is a party, whether as plaintiff[2] or defendant,[3] cannot be removed under such provisions; nor can one to which a state is a party.[4] For the same reason, there can be no removal under such provisions where an indispensable party to the controversy is a citizen of the same state as any party on the side opposite to him;[5] but the citizenship of a party who, although proper, is not indispensable to the controversy will not prevent such removal.[6] Furthermore, the rule appears to be well established that a defendant who is a resident of the state where the suit is brought cannot remove a separable controversy under the statutory provisions now being considered;[7] but there is some authority, to the contrary, that the residence of defendant is not material.[8]

X. PREJUDICE OR LOCAL INFLUENCE[9]

[By William G. Bannon]

[§ 194] **A. In General.** The earliest statute specifically authorizing removal because of prejudice or local influence,[10] as reënacted in substance in the United States revised statutes[11] was repealed by the Removal Act of 1887–1888.[12] The act of 1887–1888 contained provisions covering the same subject mat-

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406, 11 SCt 819, 840, 35 L. ed. 442 [dist Chicago, etc., R. Co. v. Martin, 178 U. S. 245, 20 SCt 854, 44 L. ed. 1055]; Life Assoc. of America v. Rundle, 103 U. S. 222, 26 L. ed. 337; American Nat. Bank v. National Ben., etc., Co., 70 Fed. 420; Pennsylvania R. Co. v. Allegheny Valley R. Co., 25 Fed. 115; Hack v. Chicago, etc., R. Co., 23 Fed. 356; Snow v. Texas Trunk R. Co., 16 Fed. 1, 4 Woods 394; Burdick v. Peterson, 6 Fed. 840, 2 McCrary 135.

[94] Jackson, etc., Co. v. Pearson, 60 Fed. 113.

[95] Greene v. Klinger, 10 Fed. 689.

[96] Torrence v. Shedd, 144 U. S. 527, 12 SCt 726, 36 L. ed. 528; Thorn Wire Hedge Co. v. Fuller, 122 U. S. 535, 7 SCt 1265, 30 L. ed. 1235; Kidder v. Northwestern Mut. L. Ins. Co., 117 Fed. 997; Farmers', etc., Nat. Bank v. Schuster, 86 Fed. 161, 29 CCA 649; Turnbull Wagon Co. v. Linthicum Carriage Co., 80 Fed. 4; Watson v. Asbury Park, etc., St. R. Co., 73 Fed. 1; Olds Wagon Works v. Benedict, 67 Fed. 1, 14 CCA 285; Burnham v. Leoti First Nat. Bank, 53 Fed. 163, 3 CCA 486; Hakes v. Burns, 40 Fed. 33; Bronson v. St. Croix Lumber Co., 35 Fed. 634; Weller v. J. B. Pace Tobacco Co., 32 Fed. 860; Ohlquist v. Farwell, 13 Fed. 305, 4 McCrary 401; Allin v. Robinson, 1 F. Cas. No. 249, 1 Dill. 119; Ellerman v. New Orleans, etc., R. Co., 8 F. Cas. No. 4,382, 2 Woods 120; Ex p. Girard, 10 F. Cas. No. 5,457, 3 Wall. Jr. 263; Ex p. Turner, 24 F. Cas. No. 14,245, 3 Wall. Jr. 258; Baltimore, etc., Tel. Co. v. Morgan's Louisiana, etc., R., etc., Co., 37 La. Ann. 883; Davis v. Montgomery 36 La. Ann. 874; Hebert v. Lefevre, 31 La. Ann. 363; Gudger v. Western North Carolina R. Co., 87 N. C. 325; Sifford v. Beaty, 12 Oh. St. 189.

[a] **Where intervener unites himself with party,** asserting the same right or defense, there is no separable controversy and the intervener cannot remove the cause. Thorn Wire Hedge Co. v. Fuller, 122 U. S. 535, 7 SCt 1265, 30 L. ed. 1235.

[b] **One who occupies position of intervening plaintiff** cannot remove a controversy. In re San Antonio, etc., R. Co., 44 Fed. 145.

[c] **Intervener claiming whatever may be set off to plaintiff in partition suit.**—One who intervenes in a partition suit and claims to have an equitable title to whatever property may be set off to plaintiff does not thereby create a separable controversy so as to justify removal of the suit. Torrence v. Shedd, 144 U. S. 527, 12 SCt 726, 36 L. ed. 528.

[97] Bertha Zinc, etc., Co. v. Carico, 61 Fed. 132.

[98] Hack v. Chicago, etc., R. Co., 23 Fed. 356; Snow v. Texas Trunk R. Co., 16 Fed. 1, 4 Woods 394.

[99] Snow v. Smith, 88 Fed. 657.

[1] See statutory provisions.

[2] Compania Minera v. American Metal Co., 262 Fed. 183; Creagh v. Equitable L. Assur. Soc., 88 Fed. 1; Deakin v. Lea, 7 F. Cas. No. 3,695, 11 Biss. 27. Contra Iowa Lillooet Gold Min. Co. v. Bliss, 144 Fed. 446.

[3] Merchants' Cotton-Press, etc., Co. v. Insurance Co. of North America, 151 U. S. 368, 14 SCt 367, 38 L. ed. 195; King v. Cornell, 106 U. S. 395, 1 SCt 312, 27 L. ed. 60; Compania Minera v. American Metal Co., 262 Fed. 183; Tracy v. Morel, 88 Fed. 801; Insurance Co. of North America v. Delaware Mut. Ins. Co., 50 Fed. 243; Woodrum v. Clay, 33 Fed. 897.

[4] Rand v. Walker, 117 U. S. 340, 6 SCt 769, 29 L. ed. 907; Texas v. Day Land, etc., Co., 49 Fed. 593; State v. Adams, 9 Oh. Cir. Ct. 21, 6 Oh. Cir. Dec. 46.

State as "citizen" within meaning of removal statute see supra § 127.

[5] Merchants' Cotton-Press, etc., Co. v. Insurance Co. of North America, 151 U. S. 368, 14 SCt 367, 38 L. ed. 195 [aff 91 Tenn. 537, 19 SW 755]; St. Louis, etc., R. Co. v. Wilson, 114 U. S. 60, 5 SCt 738, 29 L. ed. 66 [aff 22 Fed. 3]; Ayres v. Wiswall, 112 U. S. 187, 5 SCt 90, 28 L. ed. 693; Consolidated Independent School Dist. v. Cross, 7 F. (2d) 491; In re Vadner, 259 Fed. 614; Bernheim v. Louisville Property Co., 221 Fed. 273; Buchanan v. W. M. Ritter Lumber Co., 210 Fed. 144, 126 CCA 658; Moloney v. Cressler, 210 Fed. 104, 126 CCA 618; Cornue v. Coram, 182 Fed. 941; Fishblatt v. Atlantic City, 174 Fed. 196; Oakes v. Yonah Land, etc., Co., 89 Fed. 243; Bailey v. New York Sav. Bank, 23 Fed. 14, 18 Blatchf. 77. See Ivy River Land, etc., Co. v. American Ins. Co., 190 N. C. 801, 130 SE 864 (recognizing the rule).

Controversy as not separable where presence of other defendants is indispensable to full relief see supra § 181.

[6] Geer v. Mathieson Alkali Works, 190 U. S. 428, 23 SCt 807, 47 L. ed. 1122; Barney v. Latham, 103 U. S. 205, 26 L. ed. 514, 3 KyL 144; James Ferry, Inc. v. John R. Wiggins Co., 287 Fed. 421; Winfield v. Wichita Natural Gas Co., 267 Fed. 47; Port of Seattle v. Oregon, etc., R. Co., 242 Fed. 986; English v. Supreme Conclave I. O. H., 235 Fed. 630; Boatmen's Bank v. Fritzlen, 135 Fed. 650, 68 CCA 288 [certiorari den 198 U. S. 586 mem, 25 SCt 803 mem, 49 L. ed. 1174 mem]; Taylor County Ct. v. Baltimore, etc., R. Co., 35 Fed. 161; Stevens v. Richardson, 9 Fed. 191, 20 Blatchf. 53; Chester v. Wellford, 5 F. Cas. No. 2,662, 2 Flipp. 347; Stewart v. Mordecai, 40 Ga. 1, 2 AmR 55; Ivy River Land, etc., Co. v. American Ins. Co., 190 N. C. 801, 130 SE 864.

[7] Rand v. Hercules Powder Co., 28 F. (2d) 131; Visayan Refining Co. v. Standard Transp. Co., 17 F. (2d) 642; Batchelder v. S. C. Quimby Land Co., 267 Fed. 483; Whitaker v. Condon, 217 Fed. 139; Drovers' Deposit Nat. Bank v. Tichenor, 202 Fed. 1013; Thurber v. Miller, 67 Fed. 371, 14 CCA 432.

[8] Stanbrough v. Cook, 38 Fed. 369, 3 LRA 400. See Battle Creek Nat. Bank v. Howard, 54 Misc. 81, 103 NYS 814 (to same effect).

[9] **Procedure for removal** see infra §§ 256–260.

Remand of causes see infra §§ 302–341.

[10] Act March 2, 1867 (14 U. S. St. at L. p 558 c 196).

[11] U. S. Rev. St. § 639 subd 3.

[12] Cochran v. Montgomery County, 199 U. S. 260, 26 SCt 58, 50 L. ed. 182; Hanrick v. Hanrick, 153 U. S. 192, 14 SCt 835, 38 L. ed. 685; Fisk v. Henarie, 142 U. S. 459, 12 SCt 207, 35 L. ed. 1080; Ex p. Pennsylvania Co., 137 U. S. 451, 11 SCt 141, 34 L. ed. 738.

ter,[13] which in some respects narrowed the right to remove given by the earlier act,[14] and these provisions in all material respects were the same as those contained in the present removal act[15] which provides that where a suit is brought in any state court, in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state,[16] any defendant, being such citizen of another state,[17] may remove such suit into the district court of the United States for the proper district,[18] at any time before the trial thereof,[19] when it shall be made to appear to said district court[20] that from prejudice or local influence[21] he will not be able to obtain justice[22] in said state court, or in any other state court to which the said defendant may, under the laws of the state, have the right, on account of such prejudice or local influence, to remove said cause.[23] The statutory provision in question does not furnish a separate and independent ground of federal jurisdiction,[24] but is a special case of removal on the ground of diversity of citizenship.[25]

Purpose and source of statute. The first statute[26] specifically authorizing removal for prejudice or local influence was enacted because of the conditions in various communities resulting from the Civil War.[27] The statute is intended to carry out more effectively the purpose of the constitutional provision that the judicial power of the United States shall extend to controversies between citizens of different states,[28] by securing for such controversies a tribunal independent of local influences and surroundings.[29]

[§ 195] **B. Validity and Construction of Statute in General.**[30] The constitutionality of statutes providing for removal on the ground of prejudice or local influence has been recognized.[31] In referring to the original act providing specifically for removal because of prejudice or local influence the view was expressed that it was remedial and therefore should be given a liberal construction in favor of removal,[32] but the contrary view was also expressed,[33] and, as already pointed out, later statutes narrowed in some respects the right to remove given by the original act.[34]

[§ 196] **C. Suits Removable.**[35] Subject to the general rule that a suit may not be removed unless it originally could have been brought in the federal court,[36] and to the rule that the requisite jurisdictional amount must be involved,[37] the right to remove under the statute in question applies both to actions at law[38] and to suits in equity.[39]

Suit on assigned chose. While under the Act of 1867, the statutory provision denying original jurisdiction to federal courts of suits on assigned choses in action if there would not have been jurisdiction if no assignment had been made did not apply so as to prevent removal,[40] it would seem that under the present statute, in view of the holdings as to suits on assigned choses in action in the ordinary case of attempted removal for diversity of citizenship,[41] there can be no removal if the citizenship of the assignor is such as would prevent a suit in the federal court if no assignment had been made.[42]

[§ 197] **D. What Constitutes Prejudice or Local Influence or Obtaining Justice, and Matters Considered—1. In General.** The prejudice or local influence which the statute makes a ground for removal may relate either to the person of the litigant or the subject matter of the litigation;[43] but in either case there must exist improper bias, partiality, unreasonable predilection, or hostility in the local community or courts, which will work injustice, or prevent the party seeking a removal from obtaining justice.[44] It does not mean, however, merely a prejudice or influence primarily against the party who seeks removal;[45] but includes as well prejudice or local influence favorable to his adversary.[46]

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[13] Act March 3, 1887 (24 U. S. St. at L. p 552 c 373 § 2); Act Aug. 13, 1888 (25 U. S. St. at L. p 433 c 866 § 2).

[14] See Cochran v. Montgomery County, 199 U. S. 260, 26 SCt 58, 50 L. ed. 182.

Showing as to prejudice or local influence see infra §§ 197–199, 256–260.

Removal by plaintiff or defendant see infra § 204.

[15] USCA tit 28 § 71.

[16] **Citizenship of plaintiff** see infra § 202.

Requisite diversity see infra § 201.

[17] **Who may remove** see infra § 204.

[18] **District to which suit removable** see infra § 264.

[19] **Time for removal** see infra § 210.

[20] **Method of showing prejudice or local influence** see infra § 256 et seq.

[21] **What constitutes prejudice or local influence** see infra §§ 197–199.

[22] **What constitutes inability to obtain justice** see infra §§ 197–199.

[23] **Effect of right to change of venue** see infra § 198.

[24] Cochran v. Montgomery County, 199 U. S. 260, 26 SCt 58, 50 L. ed. 182; Ex p. Pennsylvania Co., 137 U. S. 451, 11 SCt 141, 34 L. ed. 738; Cleveland v. Chicago, etc., R. Co., 147 Fed. 171, 77 CCA 467; Southern R. Co. v. Thomason, 146 Fed. 972, 77 CCA 170; Malone v. Richmond, etc., R. Co., 35 Fed. 625. But see Whelan v. New York, etc., R. Co., 35 Fed. 849, 856, 1 LRA 65 (where the court said that the statutory provision in question "is a distinct, separate, and independent provision referring to a class of cases not embraced in or covered by the three preceding" provisions).

[25] Cochran v. Montgomery County, 199 U. S. 260, 26 SCt 58, 50 L. ed. 182; Malone v. Richmond, etc., R. Co., 35 Fed. 625.

[26] Act March 2, 1867 (14 U. S. St. at L. p 558 c 196).

[27] Gaines v. Fuentes, 92 U. S. 10, 23 L. ed. 524; Hone v. Dillon, 29 Fed. 465.

[28] U. S. Const. art 3 § 2.

[29] Gaines v. Fuentes, 92 U. S. 10, 23 L. ed. 524; In re Sherwood, 259 Pa. 254, 103 A 42, LRA1918D 447.

[30] **Validity of removal acts in general** see supra § 3.

[31] Home L. Ins. Co. v. Dunn, 19 Wall. (U. S.) 214, 22 L. ed. 68; Chicago, etc., R. Co. v. Whitton, 13 Wall. (U. S.) 270, 20 L. ed. 571; Whelan v. New York, etc., R. Co., 35 Fed. 849, 1 LRA 65. See Gaines v. Fuentes, 92 U. S. 10, 23 L. ed. 524.

Constitutionality of provision in early act permitting removal by plaintiff see infra § 204 note 2 [b].

[32] Hone v. Dillon, 29 Fed. 465.

[33] Kingsbury v. Kingsbury, 14 F. Cas. No. 7,817, 3 Biss. 60.

[34] See supra § 194.

[35] **Suits removable in general** see supra §§ 11–25.

[36] See supra § 10.

[37] **Amount or value in controversy** see supra §§ 28–45.

[38] Detroit v. Detroit City R. Co., 54 Fed. 1.

[39] Detroit v. Detroit City R. Co., supra.

[40] Lexington v. Butler, 14 Wall. (U. S.) 282, 20 L. ed. 809; Barclay v. Levee Comrs., 2 F. Cas. No. 977, 1 Woods 254; Hobby v. Allison, 13 Fed. 401 (removal by plaintiff).

[41] See cases passim supra § 176.

[42] See USCA tit 28 §§ 41, 71.

[43] Adelbert College v. Toledo, etc., R. Co., 47 Fed. 836 [app dism 146 U. S. 354, 13 SCt 281, 36 L. ed. 1002]; Neale v. Foster, 31 Fed. 53, 12 Sawy. 424.

[a] **"Prejudice" or "local influence" compared.**—"The term 'local influence,' if not synonymous with 'prejudice,' manifestly refers to an improper influence exerted by or existing in favor of one side, or against the other, which will prevent the latter from obtaining justice in the state courts." Adelbert College v. Toledo, etc., R. Co., 47 Fed. 836, 844 [app dism 146 U. S. 354, 13 SCt 281, 36 L. ed. 1002] (per Jackson, J.).

[44] Adelbert College v. Toledo, etc., R. Co., supra.

[45] Neale v. Foster, 31 Fed. 53, 12 Sawy. 424.

Prejudice or influence affecting either judge or jury. The right to remove is not confined to cases in which the prejudice or local influence may affect a jury, but includes also cases in which prejudice or local influence may affect a judge;[47] therefore, the right to remove may extend to a case in which the only questions involved are questions of law,[48] and also to a case in which, as a result of the waiver of a jury trial, a judge alone will try the case.[49] The view has been expressed that it is presumed that the state judge will be affected by the existence of prejudice or local influence in the community[50] and that where prejudice or local influence exists in the community, it is sufficient regardless of the probable ability of the state judge to resist such influence.[51] The fact, however, that the federal judge who will try the case is a member of the community in which the prejudice or local influence exists will not defeat the right to remove.[52]

"Justice," which the defendant must be prevented from obtaining in the state court, in order that he may remove, is not a judgment or decree,[53] or any other particular result[54] in his favor, but it refers to the "influences" which will operate on the state tribunal in deciding the case.[55]

Prejudice or local influence as between defendants. A defendant cannot remove where the only prejudice or local influence he relies on is between himself and another defendant.[56]

Existence of right of appeal to an unprejudiced state court is not sufficient to prevent removal.[57]

[§ 198] **2. Provision for Change of Venue.** While there is authority for the view that removal for prejudice or local influence may not be had where defendant may move for a change of venue, and it does not appear that the same prejudice or local influence exists in the counties to which the change can be made, even though the right to such change is not absolute under the state statute,[58] the contrary view has been taken;[59] in any event, the right to remove has been upheld where an application for a change of venue had been denied.[60] Where prejudice and local influence of the judge of the state court, as well as prejudice and local influence of the community, is relied on and made to appear, and under the state practice such judge might have tried the case in any county to which the case might have been removed, removal may be had.[61]

[§ 199] **3. Particular Matters Considered or Sufficient.** Prejudice or local influence favorable to the adversary of the party who seeks to remove the case may, according to some cases, appear from the fact that such adversary is long resident and favorably known in the community,[62] and also from the fact that such adversary has influence in respect of political matters in the community.[63] Matters or circumstances which have been regarded as tending, or sufficient, to show prejudice or local influence in the particular case are the display of animus of citizens of the community against parties to the suit at a public meeting,[64] or otherwise by public denunciation;[65] statements of a local administrative officer criticizing parties to the suit;[66] a recommendation by the grand jury that one of the parties should not oppose the suit;[67] disorder and display of animus toward the party who seeks to remove, in connection with previous litigation in which such party was involved;[68] the fact that many leading and influential members of the community maintain that they were defrauded in the transaction out of which the litigation grew;[69] and expressions of the desire of many members of the community for the success in the suit of the adversary of the party who seeks to remove, based either on the influence of such adversary or on dislike for the party who seeks to remove.[70] On the other hand, the fact that decisions of the state court upon the question in controversy differ from those in the federal court,[71] or that decisions of the state court are not favorable to the party who seeks to remove,[72] does not constitute prejudice or local influence. So it has been held that the fact that local newspapers have, in connection with the controversy, denounced the party who seeks to remove is not of itself sufficient.[73]

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[46] Neale v. Foster, supra.

[47] Montgomery County v. Cochran 116 Fed. 985 [rev on other grounds 199 U. S. 260, 26 SCt 58, 50 L. ed. 182]; Detroit v. Detroit City R. Co., 54 Fed. 1; In re Sherwood, 259 Pa. 254, 103 A 42, LRA1918D 447. See Ellison v. Louisville, etc., R. Co., 112 Fed. 805, 50 CCA 530 [certiorari den 186 U. S. 485, 22 SCt 942, 46 L. ed. 1260] (apparently recognizing rule).

Particular matters affecting judge see infra § 199.

[48] Detroit v. Detroit City R. Co., 54 Fed. 1.

[49] Montgomery County v. Cochran, 116 Fed. 985 [rev on other grounds 199 U. S. 260, 26 SCt 58, 50 L. ed. 182].

[50] Detroit v. Detroit City R. Co., 54 Fed. 1.

[51] Montgomery County v. Cochran, 116 Fed. 985 [rev on other grounds 199 U. S. 260, 26 SCt 58, 50 L. ed. 182].

[52] Montgomery County v. Cochran, supra.

[53] Golightly v. Massachusetts Bonding, etc., Co., 295 Fed. 153; Detroit v. Detroit City R. Co., 54 Fed. 1.

[54] Golightly v. Massachusetts Bonding, etc., Co., 295 Fed. 153; Detroit v. Detroit City R. Co., 54 Fed. 1.

[55] Golightly v. Massachusetts Bonding, etc., Co., 295 Fed. 153; Detroit v. Detroit City R. Co., 54 Fed. 1.

[56] Hanrick v. Hanrick, 153 U. S. 192, 14 SCt 835, 38 L. ed. 685.

[a] **Thus** a defendant who is a citizen of another state cannot remove a cause because of prejudice or local influence in favor of other defendants, citizens of the state where the suit is brought, with whom he has a controversy, when he and some of plaintiffs are citizens of the same state. Hanrick v. Hanrick, 153 U. S. 192, 14 SCt 835, 38 L. ed. 685.

[57] Detroit v. Detroit City R. Co., 54 Fed. 1.

[58] New London Water Comrs. v. Robbins, 125 Fed. 656; Robison v. Hardy, 38 Fed. 49. See Rike v. Floyd, 48 Fed. 247 (where the right to remove was denied in a case in which it does not appear whether or not the right to a change of venue was absolute); Southworth v. Reid, 36 Fed. 451 (where the right to remove was denied and it does not clearly appear that the right to a change of venue was absolute in all cases).

[59] Golightly v. Massachusetts Bonding, etc., Co., 295 Fed. 153; Tacoma v. Wright, 84 Fed. 836; Detroit v. Detroit City R. Co., 54 Fed. 1. See Bonner v. Meikle, 77 Fed. 485 (where removal was permitted).

[60] Smith v. Crosby Lumber Co., 46 Fed. 819.

[61] Walcott v. Watson, 46 Fed. 529.

[62] Neale v. Foster, 31 Fed. 53, 12 Sawy. 424. Compare Dennison v. Brown, 38 Fed. 535 (where a motion to remand was granted).

[63] Neale v. Foster, 31 Fed. 53, 12 Sawy. 424.

[64] Detroit v. Detroit City R. Co., 54 Fed. 1.

[65] Tacoma v. Wright, 84 Fed. 836.

[66] Detroit v. Detroit City R. Co., 54 Fed. 1.

[67] Montgomery County v. Cochran, 116 Fed. 985 [rev on other grounds 199 U. S. 260, 26 SCt 58, 50 L. ed. 182].

[68] Herndon v. Southern R. Co., 76 Fed. 398.

[69] Hall v. Chattanooga Agricultural Works, 48 Fed. 599.

[70] Smith v. Crosby Lumber Co. 46 Fed. 819.

[71] Adelbert College v. Toledo, etc., R. Co., 47 Fed. 836 [app dism 146 U. S. 354, 13 SCt 281, 36 L. ed. 1002]; In re Breckenridge, 31 Nebr. 489, 48 NW 142.

[72] In re Breckenridge, supra.

Temper and character of judge before whom the suit would be tried in the state court is, according to some cases, a matter to be considered,[74] but a mere remark of a local judge, in connection with the litigation, in line with his duty, which cannot be regarded as showing bias on his part, is not sufficient to show the requisite prejudice or local influence.[75]

[§ 200] **E. Requirement that Parties Be Citizens of States.**[76] A suit to which an alien,[77] a citizen of a territory or of the District of Columbia,[78] or a member of an Indian tribe who is not a citizen of the United States,[79] is a party cannot be thus removed.

[§ 201] **F. Necessity for Diversity of Citizenship.** Subject to rules permitting the disregard of parties under certain circumstances,[80] as in the case of removal on the ground of diversity of citizenship in general,[81] in the case of removal for prejudice or local influence it is necessary that all the parties on one side of the controversy shall be citizens of different states from the parties on the other side.[82]

[§ 202] **G. Citizenship of Plaintiff.** In contrast with an ordinary case of removal on the ground of diversity of citizenship,[83] in order that a suit may be removed because of prejudice or local influence the plaintiff must be a citizen of the state in which the suit is brought,[84] and where there are several plaintiffs, all must be citizens of such state,[85] upon the alignment of the parties according to the subject matter and their actual interests.[86]

[§ 203] **H. Time When Requisites as to Citizenship and Interest Must Appear.** As in the ordinary case of removal on the ground of diversity of citizenship,[87] the requisite diversity of citizenship[88] and noncitizenship of defendant in the state in which the suit is brought[89] must exist both when the suit is commenced[90] and also when the petition to remove is filed;[91] but under the act of 1867[92] the view was taken that the fact that, pending suit and before he applied to remove, plaintiff became for a time a citizen of the state in which the action was brought did not prevent removal by him where he was a citizen of another state when suit was commenced and when application to remove was made.[93] It has been held that a defendant who seeks to remove must have the requisite interest in the litigation when removal is sought.[94]

[§ 204] **I. Who May Remove, and Joinder in Removal.**[95] Subject to the rules heretofore and hereinafter stated,[96] under the present removal act a citizen defendant may remove on the ground of prejudice or local influence.[97] Only a defendant, however,[98] who is a necessary party to the suit and not merely a formal party without interest, personal or representative,[99] and who is a citizen of a state other than that in which the suit is brought,[1] may remove; plaintiff cannot remove[2] unless, according to some cases, he may be regarded as defendant for the purpose of removal when the original defendant sets up a counterclaim.[3]

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[73] Turnbull Wagon Co. v. Linthicum Carriage Co., 80 Fed. 4.

[74] Neale v. Foster, 31 Fed. 53, 12 Sawy. 424.

[75] Turnbull Wagon Co. v. Linthicum Carriage Co., 80 Fed. 4.

[76] **Citizenship in state as requisite to removal on ground of diversity in general** see supra § 125.

[77] Grand Trunk R. Co. v. Twitchell, 59 Fed. 727, 8 CCA 237; Cohn v. Louisville, etc., R. Co., 39 Fed. 227; Dahlonega Co. v. Frank W. Hall Merchandise Co., 88 Ga. 339, 14 SE 473.

Right of alien to remove see infra § 204.

[78] Dahlonega Co. v. Frank W. Hall Merchandise Co., 88 Ga. 339, 14 SE 473 (dictum).

[79] Paul v. Chilsoquie, 70 Fed. 401.

[80] See supra §§ 148-176.

[81] See supra § 145.

[82] Cochran v. Montgomery County, 199 U. S. 260, 26 SCt 58, 50 L. ed. 182 [rev 116 Fed. 985]; Armstrong v. Kansas City Southern R. Co., 192 Fed. 608; Cleveland v. Chicago, etc., R. Co., 147 Fed. 171, 77 CCA 467; Southern R. Co. v. Thomason, 146 Fed. 972, 77 CCA 170; Campbell v. Milliken, 119 Fed. 982; Terre Haute v. Evansville, etc., R. Co., 106 Fed. 545; Adelbert College v. Toledo, etc., R. Co., 47 Fed. 836; Wilder v. Virginia, etc., Steel, etc., Co., 46 Fed. 676. And see cases infra § 204 note 11.

[a] **An intervener may not remove** unless all the parties on his side of the controversy are citizens of a different state from all those upon the other. Adelbert College v. Toledo, etc., R. Co., 47 Fed. 836 [app dism 146 U. S. 354, 13 SCt 281, 36 L. ed. 1002]; Martin v. Coons, 24 La. Ann. 169.

[b] **Earlier statutes.**—(1) Under the original statute of 1867, reënacted in the Revised Statutes of the United States and repealed by the Removal Act of 1887-1888 (see supra § 194), a like rule applied or was recognized (Young v. Parker, 132 U. S. 267, 10 SCt 75, 33 L. ed. 352; Myers v. Swann, 107 U. S. 546, 2 SCt 685, 27 L. ed. 583; Vannevar v. Bryant, 21 Wall. (U. S.) 41, 22 L. ed. 476; Sewing Mach. Cos.' Case, 18 Wall. (U. S.) 553, 21 L. ed. 914; Fowlkes v. Fowlkes, 9 F. Cas. No. 5,005; Howland Coal, etc., Works v. Brown, 13 Bush (Ky.) 681. See Bliss v. Rawson, 43 Ga. 181, 19 AmR 164; Fish v. Chicago, etc., R. Co., 53 Barb. (N. Y.) 472, 3 AbbPrNS 453), (2) notwithstanding there was a separable controversy between parties having the requisite citizenship (Young v. Parker, 132 U. S. 267, 10 SCt 75, 33 L. ed. 352; Myers v. Swann, 107 U. S. 546, 2 SCt 685, 27 L. ed. 583), (3) or the principal controversy is between citizens of different states (Myers v. Swann, supra).

[83] See supra § 121.

[84] Cochran v. Montgomery County, 199 U. S. 260, 26 SCt 58, 50 L. ed. 182.

[85] Gann v. Northeastern R. Co., 57 Fed. 417; Adelbert College v. Toledo, etc., R. Co., 47 Fed. 836 [app dism 146 U. S. 354, 13 SCt 281, 36 L. ed. 1002]; Wilder v. Virginia, etc., Iron Co., 46 Fed. 676; Niblock v. Alexander, 44 Fed. 306; Rike v. Floyd, 42 Fed. 247; Thouron v. East Tennessee, etc., R. Co., 38 Fed. 673; Baird v. Richmond, etc., R. Co., 113 N. C. 603, 18 SE 698 (recognizing rule).

[a] **Rule applied** where some plaintiffs were citizens of states other than that in which the suit was brought, and other plaintiffs were aliens. Adelbert College v. Toledo, etc., R. Co., 47 Fed. 836 [app dism 146 U. S. 354, 13 SCt 281, 36 L. ed. 1002].

[86] Adelbert College v. Toledo, etc., R. Co., supra.

Alignment of parties in general see supra § 147.

[87] See supra § 177.

[88] **Diversity in general** see supra § 201.

[89] **Noncitizenship of defendant in general** see infra § 204.

[90] Bradley v. Ohio, etc., R. Co., 78 Fed. 387; Bradley v. Ohio River, etc., R. Co., 119 N. C. 744, 26 SE 169.

[a] **Under U. S. Rev. St. § 639 subd 3, and Act March 2, 1867** (14 U. S. St. at L. p 558 c 196), which in substance is reënacted in Rev. St. § 639 subd 3, a like rule applied. Young v. Ewart, 132 U. S. 267, 10 SCt 75, 33 L. ed. 352; Schnadig v. Flescher, 29 Fed. 465; Frelinghuysen v. Baldwin, 19 Fed. 49; Martin v. Coons, 24 La. Ann. 169; Tapley v. Martin, 116 Mass. 275. See Dart v. Walker, 4 Daly (N. Y.) 188, 43 HowPr 29. Contra Hone v. Dillon, 29 Fed. 465; Miller v. Chicago, etc., R. Co,, 17 Fed. 97, 3 McCrary 460; Hammond v. Buchanan, 68 Ga. 728; Nye v. Northern Cent. R. Co., 24 Hun (N. Y.) 556.

[91] See USCA tit 28 § 71; and cases supra note 90.

[a] **Under U. S. Rev. St. § 639 subd 3, and Act March 2, 1867** (14 U. S. St. at L. p 558 c 196), which in substance was reënacted in Rev. St. § 639 subd 3 (1) a like rule applied. Young v. Parker, 132 U. S. 267, 10 SCt 75, 33 L. ed. 352. (2) The right to remove was denied in the case of an attempted removal by the administrator of a defendant who was not a citizen of the state where suit was brought, where the administrator was substituted for such defendant and was a citizen of such state. Goodnow v. Grayson, 15 Fed. 1, 5 McCrary 16.

[92] Act March 2, 1867 (14 U. S. St. at L. p 558 c 196).

[93] Johnson v. Monell, 13 F. Cas. No. 7,399, Woolw. 390.

[94] Adelbert College v. Toledo, etc., R. Co., 47 Fed. 836.

[95] **Effect of prejudice or local influence as between defendants** see supra § 197.

[96] See supra §§ 194-203; and infra this section.

[97] Cochran v. Montgomery County, 199 U. S. 260, 26 SCt 58, 50 L. ed. 152.

Corporation. The right of a corporation[4] to remove for prejudice or local influence in a proper case has been recognized or upheld.[5]

Added parties. The right of an intervenor to remove for prejudice or local influence in a proper case has been upheld.[6] A purchaser pendente lite of property involved in the suit, who is brought in as defendant by a proceeding ancillary to the main suit is, however, subject to all disabilities, as to removal, of the party under whom he claims,[7] and an intervening defendant who comes into the suit merely to assist in the defense and to protect himself from a liability to indemnify the original defendant, cannot remove if the original defendant cannot.[8]

Alien may not remove under the statute in question.[9]

Member of Indian tribe who is not a citizen of the United States cannot remove.[10]

Where there are several defendants, all defendants must be citizens of a state or states other than that in which the suit is brought,[11] except where any defendant who is a citizen of the state in which suit is brought is merely a nominal party[12] or is interested with plaintiff adversely to defendant;[13] but it seems that if removal is otherwise permissible, one defendant may remove without the joinder of his codefendants.[14]

XI. TIME OF REMOVAL[15]

[By Eustace W. Tomlinson]

[§ 205] **A. In General.** Inasmuch as the right to remove a cause from a court of a state to a federal court depends wholly upon the statutes providing therefor,[16] removal may be had only within the time prescribed by such statutes,[17] which is, in the case of suits arising under the constitution, laws, or treaties of the United States,[18] or suits involving diversity of citizenship, but not involving prejudice or local influence,[19] at the time or before defendant is required by the laws of the state or court rules to answer or plead;[20] and in the case of suits of which removal is sought on account of prejudice or local influence,[21] or suits between persons claiming land under grants from different states,[22] at any time before the trial thereof;[23] and in the case of suits against persons denied civil rights,[24] or suits or criminal prosecutions against revenue officers or persons acting under them or holding property by title derived from them, or against officers of the federal courts or of either house of congress,[25] or suits and prosecutions against officers, soldiers, or other persons in the military service of the United States,[26] or, it would seem, suits by aliens against civil officers of the United States,[27] at any time before the trial or final hearing thereof.[28] Proceedings for a removal are taken in time where the removal papers are actually filed within the time limited by law, although the filing is not then endorsed upon them,[29] or although they are not presented to[30] or acted upon by[31] the court until after the statutory time to remove has expired, the approval of the court relating back to the time of filing the papers;[32] but presentment to the court within the time limited by the statute is not sufficient where the papers are not filed until after the expiration of such time.[33] A suit cannot be removed after it has been dismissed,[34] nor after a stipulation admitting plaintiff's claim has been filed, where there is no other controversy in the suit.[35] Proceedings to obtain a removal are not, of course, too early because commenced earlier than necessary under the statutes.[36] An application for removal filed after the expiration of the statutory time is ineffectual,[37] unless objection to the tardiness is waived by the opposite party.[38]

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[98] Cochran v. Montgomery County, supra.

[99] Adelbert College v. Toledo, etc., R. Co., 47 Fed. 836.

[1] Cochran v. Montgomery County, 199 U. S. 260, 26 SCt 58, 50 L. ed. 182; Golightly v. Massachusetts Bonding, etc., Co., 295 Fed. 153 (recognizing rule); Bradley v. Ohio, etc., R. Co., 78 Fed. 387.

[2] Cochran v. Montgomery County, 199 U. S. 260, 26 SCt 58, 50 L. ed. 182; Campbell v. Collins, 62 Fed. 849.

[a] **Upon taxpayer's appeal** from the decision of a board, allowing a claim against a county, the claimant was considered to be a plaintiff, and was consequently denied the right of removal. Kirby v. Chicago, etc., R. Co., 106 Fed. 551; Tullock v. Webster County, 40 Fed. 706.

[b] **Under earliest statute providing for removal for prejudice or local influence** [Act March 2, 1867 (14 U. S. St. at L. p 558 c 196), substantially reënacted in U. S. Rev. St. § 639 subd 3], (1) either party who was not a citizen of the state in which the suit was brought could remove where the other party was a citizen of such state. Hanrick v. Hanrick, 153 U. S. 192, 14 SCt 835, 38 L. ed. 685; Sewing Mach. Cos.' Case, 18 Wall. (U. S.) 553, 21 L. ed. 914; Bliss v. Rawson, 43 Ga. 181, 19 AmR 164. (2) The constitutionality of the provision permitting plaintiff to remove was recognized or upheld. Chicago, etc., R. Co. v. Whitton, 13 Wall. (U. S.) 270, 20 L. ed. 571; Johnson v. Monell, 13 F. Cas. No. 7,399, Woolw. 390; Burson v. New York Nat. Park Bank, 40 Ind. 173, 13 AmR 285; Meadow Valley Min. Co. v. Dodds, 7 Nev. 143, 8 AmR 709; Goodman v. Oshkosh, 45 Wis. 355. Contra Whiton v. Chicago, etc., R. Co., 25 Wis. 424, 3 AmR 101. (3) Repeal of statute see supra § 194.

[3] Walcott v. Watson, 46 Fed. 529; Carson, etc., Lumber Co. v. Holtzclaw, 39 Fed. 578.

[4] **Citizenship of corporation where right to remove involved for diversity in general** see supra §§ 129, 138.

[5] Southern R. Co. v. Allison, 190 U. S. 326, 23 SCt 713, 47 L. ed. 1078; Farmers' L. & T. Co. v. Maquillan, 8 F. Cas. No. 4,668, 3 Dill. 379 (removal by plaintiff under Act of 1867); Mix v. Andes Ins. Co., 74 N. Y. 53, 30 AmR 260. See Quigley v. Central Pac. R. Co., 11 Nev. 350, 21 AmR 757 (per Hawley, C. J.). But see Cooke v. Boston State Nat. Bank, 52 N. Y. 96, 11 AmR 667 (pro forma decision).

Affidavit by corporation see infra § 256 text and note 8.

[6] In re Iowa, etc., Constr. Co., 10 Fed. 301, 3 McCrary 310.

[7] Jefferson v. Driver, 117 U. S. 272, 6 SCt 729, 29 L. ed. 897.

[8] Olds Wagon Works v. Benedict, 67 Fed. 1, 14 CCA 285.

[9] Sewing Mach. Cos.' Case, 18 Wall. (U. S.) 553, 21 L. ed. 914; Grand Trunk R. Co. v. Twitchell, 59 Fed. 727, 8 CCA 237; Dahlonega Co. v. Frank W. Hall Merchandise Co., 88 Ga. 339, 14 SE 473.

Effect of alien as party in general see supra § 200.

[10] Paul v. Chilsoquie, 70 Fed. 401.

[11] Cochran v. Montgomery County, 199 U. S. 260, 26 SCt 58, 50 L. ed. 182 [rev 116 Fed. 985, 62 CCA 680]; Cleveland v. Chicago, etc., R. Co., 147 Fed. 171, 77 CCA 467; Southern R. Co. v. Thomason, 146 Fed. 972, 77 CCA 170; Campbell v. Milliken, 119 Fed. 982; Anderson v. Bowers, 43 Fed. 321. But see Detroit v. Detroit City R. Co., 54 Fed. 1 (where apparently certain defendants were citizens of the state in which the suit was brought). Contra Parker v. Vanderbilt, 136 Fed. 246; Boatmen's Bank v. Fritzlen, 135 Fed. 650, 68 CCA 288 [rev 128 Fed. 608, and certiorari den 198 U. S. 586, 25 SCt 803, 49 L. ed. 1174]; Bonner v. Meikle 77 Fed. 485; Jackson, etc., Co. v. Pearson, 60 Fed. 113; Haire v. Rome R. Co., 57 Fed. 321; Hall v. Chattanooga Agricultural Works, 48 Fed. 599; Whelan v. New York, etc., R. Co., 35 Fed. 849, 1 LRA 65; Fisk v. Henarie, 32 Fed. 417, 13 Sawy. 38 [rev on other grounds 142 U. S. 459, 12 SCt 207, 35 L. ed. 1080]; Baird v. Richmond, etc., R. Co., 113 N. C. 603, 18 SE 698.

And see cases supra § 201 note 82.

[12] Reeves v. Corning, 51 Fed. 774; Swann v. Myers, 79 N. C. 101.

Disregarding nominal parties as affecting removal for diversity of citizenship in general see supra §§ 148–166.

[13] Reeves v. Corning, 51 Fed. 774.

Realignment of parties in general see supra § 147.

[14] Cochran v. Montgomery County, 199 U. S. 260, 26 SCt 58, 50 L. ed. 182. Compare Bliss v. Rawson, 43 Ga. 181, 19 AmR 164 (as to removal by plaintiff under act of 1867 where there was more than one plaintiff).

[15] **Cause becoming removable at time subsequent to commencement** see supra § 26.

[16] See supra § 2.

[17] Abel v. Book, 120 Fed. 47; Higson v. North River Ins. Co., 153 N. C. 35, 68 SE 920. And see cases infra note 37; and infra §§ 206–211.

Remand of cause removed after expiration of proper time see infra § 305.

[18] USCA tit 28 § 71.

[19] USCA tit 28 § 72.

[20] **Removal before time to answer or plead in general** see infra §§ 206–209.

[21] USCA tit 28 § 71.

[22] USCA tit 28 § 73.

[23] **Removal before trial in general** see infra § 210.

Before service or pleading. A defendant may remove the cause before he has been served with process,[39] or before he has filed any pleading or answer,[40] and an irregularity in filing removal papers before the entry of an order making the remover a party to the cause is cured by the subsequent entry of such order which recites the filing of such papers;[41] but this principle does not authorize one not a party to the record to remove a cause.[42]

During vacation of state court. It has been held that removal may be had while the state court is in vacation;[43] but there is also authority for the contrary view.[44]

Cause not originally removable. Where a cause is not originally removable, but becomes so at a subsequent time,[45] as by a dismissal as to all but nonresident defendants,[46] or by a substitution of parties,[47] or by failure to prove allegations rendering the cause unremovable,[48] proceedings for removal should be taken at once, although defendant will not be deemed to have lost his right to remove where he has no actual knowledge of the act or pleading rendering the cause removable, even though constructive notice thereof is to be presumed,[49] and the prior expiration of the time within which proceedings for removal would have had to be taken but for such subsequent act or pleading does not prevent removal where a right to remove the cause so arises or appears.[50] The fact, however, that defendant's misconception of the law, under which he believed a cause which was in fact removable not to be so, is subsequently corrected by a judicial decision handed down in another cause does not entitle him to remove the suit after the proper time therefor has expired.[51]

Extension of time.[52] After the time for removing a cause has expired, it cannot be extended by the court,[53] even though the failure to remove within the statutory time resulted from unavoidable accident.[54]

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[24] USCA tit 28 § 74.

[25] USCA tit 28 § 76.

[26] USCA tit 10 § 1589.

[27] USCA tit 27 § 77.

[28] **Removal before trial or final hearing in general** see infra § 211.

[29] Waite v. Phœnix Ins. Co., 62 Fed. 769.

Necessity of filing papers see infra §§ 250, 258.

[30] Burck v. Taylor, 39 Fed. 581 [aff 152 U. S. 634, 14 SCt 696, 38 L. ed. 578]; Texas, etc., R. Co. v. Bloom, 85 Tex. 279, 20 SW 133.

Filing petition and bond as effectuating removal see infra § 254.

Presentment of papers to court see infra § 250.

[31] Brady v. J. B. McCrary Co., 244 Fed. 602.

[32] Miller v. Tobin, 18 Fed. 609, 9 Sawy. 401.

[33] Elbs v. Yates-American Mach. Co., 23 F. (2d) 368.

[34] New England Mortg. Security Co. v. Aughe, 12 Nebr. 504, 11 NW 753.

[35] Keith v. Levi, 2 Fed. 743, 1 McCrary 343.

[36] Dunbar v. Rosenbloom, 230 Mass. 176, 119 NE 829.

[37] Johnson v. Butte Alex Scott Copper Co., 213 Fed. 910. And see cases infra §§ 206–211.

[38] **Waiver of objection to tardiness** see infra text and notes 57–61.

[39] Parkinson v. Barr, 105 Fed. 81. But see Woolridge v. McKenna, 8 Fed. 650 (holding that in a suit against an infant defendant, removal by his guardian or next friend before service of process on the infant is premature, inasmuch as under the federal practice an infant cannot be brought into court by substituted process or by voluntary appearance, nor can anyone appear for him until such infant has been duly served directly or by substitution or until by the state laws someone authorized to appear for him has entered his appearance in the state court; and so such removal, or the subsequent appearance in the federal court of such guardian or next friend, does not confer jurisdiction upon the court).

[40] Bramwell v. Owen, 276 Fed. 36; Creagh v. Equitable L. Assur. Soc., 83 Fed. 849; Egan v. Chicago, etc., R. Co., 53 Fed. 675; Bailey v. American Cent. Ins. Co., 8 Fed. 686, 2 McCrary 413; Hodson v. Lake Shore, etc., R. Co., 12 F. Cas. No. 6,571a. See Memphis Sav. Bank v. Houchens, 115 Fed. 96, 52 CCA 176 (holding that the existence of an actual controversy, as distinguished from a petition or bill setting up facts upon which relief could be granted against defendant, is not essential to the existence of a right of removal). But see Kerille v. Phœnix L. Ins. Co., 3 Thomps. & C. (N. Y.) 788 (holding that a defendant who, although served with process, had not appeared was not entitled to remove the suit).

Removal before expiration of time to plead see infra §§ 206–209.

[41] Sheffield First Nat. Bank v. Merchants' Bank, 37 Fed. 657, 2 LRA 469.

[42] Bertha Zinc, etc., Co. v. Carico, 61 Fed. 132.

[43] Mecke v. Valleytown Mineral Co., 93 Fed. 697, 35 CCA 151; State v. Coosaw Min. Co., 45 Fed. 804, 811; Brown v. Murray, 43 Fed. 614; Burck v. Taylor, 39 Fed. 581; Osgood v. Chicago, etc., R. Co., 18 F. Cas. No. 10,604, 6 Biss. 330. See Monroe v. Williamson, 81 Fed. 977 (where the question was raised but not decided). Compare Remington v. Central Pac. R. Co., 198 U. S. 95, 25 SCt 577, 49 L. ed. 959; Johnson v. Computing Scale Co., 139 Fed. 339 (both holding that presentation of the removal papers was sufficient when made to a judge in chambers).

[44] Williams v. Massachusetts Ben. Assoc., 37 Fed. 533; Scott v. Otis, 21 F. Cas. No. 12,543; Howard v. Southern R. Co., 122 N. C. 944, 29 SE 778; Fox v. Southern R. Co., 80 Fed. 945.

[45] See supra § 26.

Time for removal after amendment of plaintiff's pleadings rendering cause removable see infra § 209.

[46] Ætna Indemn. Co. v. Little Rock, 89 Ark. 95, 115 SW 960; Morgan's Louisiana, etc., R., etc., Co. v. Street, 57 Tex. Civ. A. 194, 122 SW 270.

[47] Kelly v. Virginia Bridge, etc., Co., 203 Fed. 566.

[48] Ford v. Roxana Petroleum Corp., 31 F. (2d) 765.

[49] Markey v. Chicago, etc., R. Co., 171 Iowa 255, 153 NW 1053.

[50] Brashear v. Louisville, etc., R. Co., 32 F. (2d) 373; Kelly v. Virginia Bridge, etc., Co., 203 Fed. 566; Bagenas v. Southern Pac. Co., 180 Fed. 887; New England Oil, etc., Co. v. Broyles, 87 Okl. 55, 209 P 312. And see cases supra notes 46–49.

[51] St. Louis-San Francisco R. Co. v. Barron, 166 Ark. 641, 267 SW 582.

[52] **Extension of time to answer or plead as extending time for removal** see infra § 207.

[53] Daugherty v. Western Union Tel. Co., 61 Fed. 138; Gibson v. John-

Revival of right after lapse. The intervention of a new party cannot revive a right of removal by one of the original parties, which right has lapsed by failure to exercise it within the proper time.[55]

Burden of showing timeliness of a proceeding to obtain a removal is upon the party seeking to remove the cause, if objection is made that the proceedings were taken too late.[56]

Waiver of objection to tardiness.[57] Plaintiff in a suit may waive any objection to a failure on the part of defendant to remove the cause within the time prescribed by statute,[58] as by consenting that an application for removal may be made at a later time,[59] or by proceeding in the federal court without raising the objection.[60] A waiver comes too late, however, after trial and verdict or decision in the state court.[61]

[§ 206] **B. Removal at or before Time To Answer or Plead—1. In General.** The statute providing for the removal of causes from a state court to a federal court at or before the time defendant is required by the state law or the rules of the state court to answer or plead[62] is imperative with respect to the time for removal,[63] as determined from the state statutes and rules of court relating to the time for answering or pleading.[64] Accordingly, a cause cannot be removed, under such provision of the removal statutes, after the time to demur has expired,[65] although a demurrer has been overruled with leave to defendant to answer,[66] nor after the time to file the first pleading, whether going in abatement or to the merits, has expired,[67] even though defendant has the right to

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son, 10 F. Cas. No. 5,397, Pet. C. C. 44; Ward v. Arredondo, 29 F. Cas. No. 17,148, 1 Paine 410.

54. Daugherty v. Western Union Tel. Co., 61 Fed. 138.

[a] **Thus** the court has no authority to extend the time for removal, even though defendant's attorney was prevented by inevitable accident from reaching the court-house until after the last day on which the petition and bond might properly have been filed. Daugherty v. Western Union Tel. Co., 61 Fed. 138.

55. In re Vadner, 259 Fed. 614.

65. Peterson v. Hecht, 135 Misc. 633, 239 NYS 94.

57. Waiver of right to remand on account of irregularities which may be waived see infra § 320.

58. Williams v. Miller, 249 Fed. 495; Williams v. Wilson Fruit Co., 222 Fed. 467; Boatmen's Bank v. Fritzlen, 75 Kan. 479, 89 P 915, 22 LRANS 1235 [aff 212 U. S. 364, 29 SCt 366, 53 L. ed. 551]. And see cases infra notes 59, 60.

59. Bryan v. Barriger, 251 Fed. 328.

60. Martin v. Baltimore, etc., R. Co., 151 U. S. 673, 14 SCt 533, 38 L. ed. 311 [aff 41 Fed. 125]; French v. Hay, 22 Wall. (U. S.) 250, 22 L. ed. 857; Collins v. Scott, 76 Fed. 613; Newman v. Schwerin, 61 Fed. 865, 10 CCA 129; Knight v. International, etc., R. Co., 61 Fed. 87, 9 CCA 376 [certiorari dism 17 SCt 995, 41 L. ed. 1187].

Waiver of objection as rendering cause removable in general see supra § 2.

61. Johnson v. Butte Alex Scott Copper Co., 213 Fed. 910.

62. See supra § 205.

63. U. S.—Southern Pac. Co. v. Stewart, 245 U. S. 359, 38 SCt 130, 62 L. ed. 345 [dism writ of error 233 Fed. 956, 147 CCA 630]; American Fountain Supply, etc. v. California Crushed Fruit Corp., 21 F. (2d) 93; Bramwell v. Owen, 276 Fed. 36; Waverly Stone, etc., Co. v. Waterloo, etc., R. Co., 239 Fed. 561; Johnson v. Butte Alex Scott Copper Co., 213 Fed. 910.

Ark.—Midland Valley R. Co. v. Hoffman Coal Co., 91 Ark. 180, 120 SW 380.

Ky.—Lilienthal v. Carpenter, etc., Co., 148 Ky. 50, 146 SW 2.

Mo.—Swab v. Smith Bros., 222 Mo. A. 872, 6 SW (2d) 56; Chicago, etc., R. Co. v. Little Tarkio Drain. Dist. No. 1, 237 Mo. 86, 139 SW 572.

Porto Rico.—Prado v. Central San Cristobal, 5 Porto Rico Fed. 600.

Va.—Maryland Casualty Co. v. Clintwood Bank, Inc., 154 SE 492.

And see cases infra note 64.

Waiver of delay or tardiness see supra § 205.

64. U. S.—Martin v. Baltimore, etc., R. Co., 151 U. S. 673, 14 SCt 533, 38 L. ed. 311; In re Utah Constr. Co.'s Water Right, 30 F. (2d) 436; Duvall v. Wabash R. Co., 9 F. (2d) 83; Lee v. Continental Ins. Co., 292 Fed. 408; Allen v. Sewanee Fuel, etc., Co., 268 Fed. 219; Toccoa v. Marchbanks, 261 Fed. 684; In re Vadner, 259 Fed. 614; In re Seattle, 237 Fed. 100; Lewis v. Cincinnati, etc., R. Co., 192 Fed. 654; Overholt v. German-American Ins. Co., 155 Fed. 488; Mays v. Newlin, 143 Fed. 574; South Dakota Cent. R. Co. v. Chicago, etc., R. Co., 141 Fed. 578, 73 CCA 176; Garrett First Nat. Bank v. Appleyard, 138 Fed. 939; Kelly v. Chicago, etc., R. Co., 122 Fed. 286; Head v. Selleck, 110 Fed. 786; Case v. Olney, 106 Fed. 433; Tenney v. American Pipe Mfg. Co., 96 Fed. 919; Mayer v. Ft. Worth, etc., R. Co., 93 Fed. 601; Wilson v. Winchester, etc., R. Co., 82 Fed. 15; Frink v. Blackinton, 80 Fed. 306; Mahoney v. New South Bldg., etc., Assoc., 70 Fed. 513; Fidelity Trust, etc., Co. v. Newport News, etc., Co., 70 Fed. 403; Turner v. Illinois Cent. R. Co., 55 Fed. 689; Detroit v. Detroit City R. Co., 54 Fed. 1; Burnham v. Leoti First Nat. Bank, 53 Fed. 163, 3 CCA 486; Mt. Washington R. Co. v. Coe, 50 Fed. 637; Minneapolis, etc., R. Co. v. Nestor, 50 Fed. 1; Amsden v. Norwich Union F. Ins. Co., 44 Fed. 515; Sowles v. Witters, 43 Fed. 700; Browning v. Reed, 39 Fed. 625; Doyle v. Beaupre, 39 Fed. 289; Lockhart v. Memphis, etc., R. Co., 38 Fed. 274; Tennessee Coal, etc., Co. v. Waller, 37 Fed. 545; Wedekind v. Southern Pac. Co., 36 Fed. 279, 13 Sawy. 475; McKeen v. Ives, 35 Fed. 801; Gavin v. Vance, 33 Fed. 84; Woolf v. Chisolm, 30 Fed. 881; McHenry v. New York, etc., R. Co., 25 Fed. 65; MacNaughton v. Southern Pac. R. Co., 19 Fed. 881; Deford v. Mehaffy, 13 Fed. 481; Van Allen v. Atchison, etc., R. Co., 3 Fed. 545, 1 McCrary 598. See Lafayette County Road Impr. Dist. No. 2 v. St. Louis Southwestern R. Co., 257 U. S. 547, 42 SCt 250, 66 L. ed. 364 [aff 265 Fed. 524] (holding that a petition to remove a proceeding for the assessment of the cost of a public improvement was in time when filed the day before the date set for hearing, on which day the landowners were required by state statute to file written objections).

Ark.—Southwest Power Co. v. Price, 180 Ark. 567, 22 SW (2d) 373 [certiorari den 281 U. S. 753 mem, 50 SCt 353 mem, 74 L. ed. 1163 mem, and app dism 281 U. S. 703 mem, 50 SCt 407 mem, 74 L. ed. 1128 mem].

Ga.—Southern Pac. Co. v. Steward, 88 Ga. 13, 13 SE 824; Stafford v. Hightower, 68 Ga. 394.

Iowa.—Wilson v. Big Joe Block Coal Co., 135 Iowa 531, 113 NW 348.

Ky.—Fearon Lumber, etc., Co. v. Lawson, 166 Ky. 123, 178 SW 1121.

Me.—Craven v. Turner, 82 Me. 383, 19 A 864.

Mass.—Olds v. City Trust, etc., Surety Co., 180 Mass. 1, 61 NE 223; American Finance Co. v. Bostwick, 151 Mass. 19, 23 NE 656.

N. C.—Williams v. Southern Bell Tel., etc., Co., 116 N. C. 558, 21 SE 298. Compare Waynesville v. Smathers, 194 N. C. 131, 138 SE 613 (holding that in a condemnation proceeding, transferred to the state court after exceptions to the report of the jury had been filed, and in which, under the state practice, no answer or other pleading was required of defendant to put the cause at issue, a petition for removal filed immediately upon the docketing of the proceeding in the state court was in time).

N. D.—State v. Barnes, 5 N. D. 350, 65 NW 688.

Okl.—Dickinson v. Foot, 68 Okl. 236, 173 P 522.

See Orzolek v. Schenck, 185 Ill. A. 169.

[a] **Where no state statute fixes the time within which an answer or pleading must be filed** (1) the time fixed therefor by the rules of the state court regulates the time for removal (Enders v. Lake Erie, etc., R. Co., 101 Fed. 202; Van Allen v. Atchison, etc., R. Co., 3 Fed. 545, 1 McCrary 598), (2) at least unless the period fixed by such rules is unreasonably short, in which case, it would seem, defendant has a reasonable time in which to remove the cause (Enders v. Lake Erie, etc., R. Co., supra).

Time to plead or answer in general see Pleading §§ 228-239.

65. Winkler v. Chicago, etc., R. Co., 108 Fed. 305; Maher v. Tower Hotel Co., 94 Fed. 225; Frink v. Blackinton, 80 Fed. 306; McDonald v. Hope Min. Co., 48 Fed. 593; Delbanco v. Singletary, 40 Fed. 177.

66. Arrigo v. Commonwealth Casualty Co., 41 F. (2d) 817; Winkler v. Chicago, etc., R. Co., 108 Fed. 305; Maher v. Tower Hotel Co., 94 Fed. 225; Frink v. Blackinton, 80 Fed. 306; McDonald v. Hope Min. Co., 48 Fed. 593; Delbanco v. Singletary, 40 Fed. 177.

67. Martin v. Baltimore, etc., R. Co., 151 U. S. 673, 14 SCt 533, 38 L. ed. 311; Arrigo v. Commonwealth Casualty Co., 41 F. (2d) 817; Heller v. Ilwaco Mill, etc., Co., 178 Fed. 111; Garrett First Nat. Bank v. Appleyard, 138 Fed. 939; New York Fidelity, etc., Co. v. Hubbard, 117 Fed. 949; First Littleton Bridge Corp. v. Connecticut River Lumber Co., 71

amend as of course within a specified time.[68] So long, however, as the time within which defendant must answer or plead has not expired, the right to removal is not lost by mere delay.[69] Thus where no valid service of process has been made upon defendant,[70] whether or not he had actual knowledge of the suit,[71] or where his default has been set aside for failure to serve a copy of the complaint with the process,[72] the time for removal ordinarily does not run, and a removal may be had after the opening of a judgment taken by default against a defendant who had not been properly served;[73] but where there are two or more defendants and the time for removal has expired as to one, the other cannot remove the cause, although he has not been served, provided he was named as a party in the bill or complaint and provided there is no separable controversy.[74] An intervener cannot remove a suit where his intervention takes place after the expiration of the original defendant's time to remove;[75] but where, after the expiration of the time within which the original defendant might have removed the cause, another party is brought in by amendment, his right of removal is not lost,[76] except where he is merely substituted for and takes the place of an original party defendant,[77] and except in the case of a purchaser pendente lite of property affected by the suit.[78] In determining whether or not a removal has been effectuated in time, a federal court will not take judicial notice of a rule of the state court extending or limiting the time prescribed by state statute for pleading or answering.[79]

Curtailment or extension of time for removal.[80] The fact that defendant pleads before the time at or by which he is required to do so does not shorten the time for removal,[81] nor does the denial of a motion to strike the bill from the files,[82] nor an appearance and argument in opposition to a motion for an injunction pendente lite,[83] a receiver,[84] or any other provisional remedy,[85] even though an appeal has been taken to a higher state court from the ruling upon such motion.[86] Similarly, an order overruling a demurrer does not curtail the time within which the cause may be removed, where the time within which defendant is required to plead has not expired;[87] but the time to answer, and therefore the time within which removal may be had, runs while the demurrer is pending.[88] On the other hand, the time for removal is not extended by filing a plea to the jurisdiction of the state court[89] or a motion to quash the service of the summons,[90] nor by an omission to enter a default,[91] nor by the fact that defendant's at-

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Fed. 225; Doyle v. Beaupre, 39 Fed. 289; Woolf v. Chisolm, 30 Fed. 881; Elms v. Crane, 118 Me. 18, 105 A 385; Bilheimer v. Herman, 1 Pa. Dist. & Co. 581; Maryland Casualty Co. v. Clintwood Bank, Inc., (Va.) 154 SE 492. But see Wilson v. Winchester, etc., R. Co., 82 Fed. 15; Mahoney v. New South Bldg., etc., Assoc., 70 Fed. 513 (both holding that the removal statutes have reference only to the time when pleas to the merits are required to be filed, and does not limit the time for removal to the period within which pleas in abatement or dilatory pleas are required by the state practice to be made).

[a] **Removal proceedings taken after time for pleading to jurisdiction but before time for pleading to merits** are too late, the statute making no distinction between different kinds of answers or pleas. Martin v. Baltimore, etc., R. Co., 151 U. S. 673, 14 SCt 533, 38 L. ed. 311.

[68] Doyle v. Beaupre, 39 Fed. 289; Woolf v. Chisolm, 30 Fed. 881. See Paolicelli v. Samuels, 278 Fed. 629 (apparently applying the rule).

[69] Williams v. Delaware, etc., R. Co., 266 Fed. 1003. And see cases infra notes 70–73.

[70] Bramwell v. Owen, 276 Fed. 36; Sullivan v. Lloyd, 213 Fed. 275; Dunbar v. Rosenbloom, 230 Mass. 176, 119 NE 829.

[a] **In Porto Rico** the rule is the same in the case of removal from an insular court to the federal court. Guasp v. Construction Supplies Corp., 12 Porto Rico Fed. 243.

[71] Dunbar v. Rosenbloom, 230 Mass. 176, 119 NE 829.

[72] Remington v. Central Pac. R. Co., 198 U. S. 95, 25 SCt 577, 49 L. ed. 959; Dancel v. Goodyear Shoe Mach. Co., 106 Fed. 551. Compare Quilbot v. Hamer, 158 Fed. 188 (holding that where the default was set aside but the order granted no time to plead, but provided only that an answer tendered with the motion might be filed at once, the time for removal expired on that day so that defendant was not thereafter entitled to remove the suit).

Necessity of serving copy of pleading with process in general see Process §§ 80–82.

[73] Harter Tp. v. Kernochan, 103 U. S. 562, 26 L. ed. 411; Tortat v. Hardin Min., etc., Co., 111 Fed. 426; Detroit v. Detroit City R. Co., 54 Fed. 1; State v. Barnes, 5 N. D. 350, 65 NW 688; Smith v. America L. Assoc., 76 Va. 380.

[74] Fletcher v. Hamlet, 116 U. S. 408, 6 SCt 426, 29 L. ed. 679; Houston, etc., R. Co. v. Shirley, 111 U. S. 358, 4 SCt 472, 28 L. ed. 455; Calderhead v. Downing, 103 Fed. 27; Davis v. Tillotson, 48 Fed. 606; Rogers v. Van Nortwick, 45 Fed. 513; Hakes v. Burns, 40 Fed. 33.

Separable controversy see supra §§ 180–193.

[75] Cable v. Ellis, 110 U. S. 359, 4 SCt 85, 28 L. ed. 186; Kidder v. Northwestern Mut. L. Ins. Co., 117 Fed. 997; Hakes v. Burns, 40 Fed. 33. But see Jackson v. Stiles, 4 Johns. (N. Y.) 493 (applying the contrary rule).

[76] Robert v. Pineland Club, 139 Fed. 1001; Green v. Valley, 101 Fed. 882.

[77] Houston, etc., R. Co. v. Shirley, 111 U. S. 358, 4 SCt 472, 28 L. ed. 455.

[78] Jefferson v. Driver, 117 U. S. 272, 6 SCt 729, 29 L. ed. 897.

[79] Randall v. New England Order of Protection, 118 Fed. 782; Yarnell v. Felton, 102 Fed. 369.

[80] **Curtailment or extension of time to plead as restricting or enlarging time for removal** see infra §§ 207–208.

[81] Atlanta, etc., R. Co. v. Southern R. Co., 131 Fed. 657, 66 CCA 601; Champlain Constr. Co. v. O'Brien, 104 Fed. 930; Whiteley Malleable Castings Co. v. Sterlingworth R. Supply Co., 83 Fed. 853; Brisenden v. Chamberlain, 53 Fed. 307; Conner v. Skagit Cumberland Coal Co., 45 Fed. 802; Evans v. Dillingham, 43 Fed. 177; Tennessee Coal, etc., Co. v. Waller, 37 Fed. 545; Gavin v. Vance, 33 Fed. 84; Fearon Lumber, etc., Co. v. Lawson, 166 Ky. 123, 178 SW 1121. See Tennessee Coal, etc., Co. v. Waller, 37 Fed. 545 (holding that the fact that a demurrer has been made and disposed of before the time at which defendant is required to plead or answer does not prevent removal of the suit). Contra Howard v. Southern R. Co., 122 N. C. 944, 29 SE 778; Duncan v. Associated Press, 81 Fed. 417.

[82] Tennessee Coal, etc., Co. v. Waller, 37 Fed. 545.

[83] Collins Mfg. Co. v. Wickwire Spencer Steel Co., 11 F. (2d) 196; Cella v. Brown, 136 Fed. 439; Champlain Constr. Co. v. O'Brien, 104 Fed. 930.

[84] Sidway v. Missouri Land, etc., Co., 116 Fed. 381.

[85] Cella v. Brown, 136 Fed. 439 [aff 144 Fed. 742, 75 CCA 608, and certiorari den 202 U. S. 620, 26 SCt 766, 50 L. ed. 1174]; Sidway v. Missouri Land, etc., Co., 116 Fed. 381; Champlain Constr. Co. v. O'Brien, 104 Fed. 930; Garrard v. Silver Peak Mines, 76 Fed. 1.

[86] Sidway v. Missouri Land, etc., Co., 116 Fed. 381; Farmers' L. & T. Co. v. Chicago, etc., R. Co., 8 F. Cas. No. 4,665, 9 Biss. 133.

[87] Garrard v. Silver Peak Mines, 76 Fed. 1; Tennessee Coal, etc., Co. v. Waller, 37 Fed. 545. But see Lantz v. Fretts, 173 Fed. 1007 (contrary dictum).

[88] Martin v. Carter, 48 Fed. 596. See Case v. Olney, 106 Fed. 433 (applying the rule).

[89] Olds v. City Trust, etc., Co., 114 Fed. 975.

[90] Hager v. New York Oil Co., 20 F. (2d) 944.

[91] Kansas City, etc., R. Co. v. Daughtry, 138 U. S. 298, 11 SCt 306, 34 L. ed. 963; Adams v. Puget Sound Tract., etc., Co., 207 Fed. 205; Wayt v. Standard Nitrogen Co., 189 Fed. 231; Heller v. Ilwaco Mill, etc., Co., 178 Fed. 111; Kaitel v. Wylie, 38 Fed. 865; Southwest Power Co. v. Price, 180 Ark. 567, 22 SW (2d) 373 [certiorari den 281 U. S. 753 mem, 50 SCt 353 mem, 74 L. ed. 1163 mem, and app dism 281 U. S. 703 mem, 50 SCt

torney was prevented by unavoidable accident from proceeding to obtain a removal,[92] or that there was an oral understanding that no default should be taken.[93]

[§ 207] **2. Extension or Curtailment of Time To Answer or Plead[94]—a. Extension.** There is marked conflict among the decisions as to whether or not an extension of the time to answer or plead in a suit brought in a state court enlarges the time for removal of the cause to a federal court, under the statute providing for removal at or before the time defendant is required to answer or plead.[95] Thus it has been held that where defendant's time to plead or answer is, before its expiration, extended by an order of the state court,[96] or by a stipulation authorized under the state statutes or court rules,[97] the time for removal of the cause is thereby similarly extended; but in both the former[98] and the latter[99] circumstances the weight of later authority appears to be to the contrary. In any event, an ex parte order[1] or an oral stipulation[2] extending the time to answer or plead, where not authorized by the state practice, will not extend the time for removal. Moreover, after the expiration of the time to plead, the time for removal cannot be extended by an order opening defendant's default and allowing him to plead,[3] although under the facts the right to have the default opened is given defendant by statute.[4]

[§ 208] **b. Curtailment.**[5] A state court cannot, by ordering a defendant to answer or plead within a time shorter than that prescribed by statute or rule of court, curtail the time within which he may remove the cause to a federal court under the statute providing for such removals at or before the time defendant is required by the laws of the state or the rules of the state court to answer or plead.[6]

[§ 209] **3. Effect of Amendment of Petition or Complaint.** If a cause not originally removable is made so by an amendment to plaintiff's petition or complaint,[7] as where he omits some of the original

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407 mem, 74 L. ed. 1128 mem]; Higson v. North River Ins. Co., 153 N. C. 35, 68 SE 920. But see Lockhart v. Memphis, etc., R. Co., 38 Fed. 274 (holding that where, under the state practice, defendant may plead as a matter of right so long as no default has been entered, a petition for removal is filed in time although the original time for pleading has expired, where a default has not been entered against him).

[92] Daugherty v. Western Union Tel. Co., 61 Fed. 138.

[93] Price v. Lehigh Valley R. Co., 65 Fed. 825.

[94] **Extension of time to:**
Plead in general see Pleading §§ 231–236.
Remove see supra §§ 205, 206.

Procurement or acceptance of extension of time to answer as waiver of right of removal see supra § 5.

[95] See cases infra notes 96–99.

[96] State Impr.-Dev. Co. v. Leininger, 226 Fed. 884; Higson v. North River Ins. Co., 184 Fed. 165; Avent v. Deep River Lumber Co., 174 Fed. 298; Russell v. Harriman Land Co., 145 Fed. 745; Sanderlin v. People's Bank, 140 Fed. 191; Dancel v. Goodyear Shoe Mach. Co., 106 Fed. 551; Lord v. Lehigh Valley R. Co., 104 Fed. 929; Mayer v. Ft. Worth, etc., R. Co., 93 Fed. 601; Tracy v. Morel, 88 Fed. 801; Chiatovich v. Hanchett, 78 Fed. 193; Allmark v. Platte SS. Co., 76 Fed. 614; Wilcox, etc., Guano Co. v. Phœnix Ins. Co., 60 Fed. 929; People's Bank v. Ætna Ins. Co., 53 Fed. 161; Rycroft v. Green, 49 Fed. 177; Sowles v. Witters, 43 Fed. 700; Wedekind v. Southern Pac. Co., 36 Fed. 279, 13 Sawy. 475; Simonson v. Jordon, 30 Fed. 721; Winberg v. Berkeley Co. R., etc., Co., 29 Fed. 721; Bacon v. Bank of Montreal, 219 Ill. A. 352. See Powell v. Assurance Soc., 187 N. C. 596, 122 SE 303; Hyder v. Southern R. Co., 167 N. C. 584, 83 SE 689 (holding that where the court entered an order extending the time for filing the complaint, by which the time for answering was also necessarily extended, a petition for removal filed within such extended time to answer was in time).

[97] La Flower v. Merrill, 28 F. (2d) 784; Citizens' Trust, etc., Bank v. Hobbs, 253 Fed. 479; Hansford v. Stone-Ordean-Wells Co., 201 Fed. 185; Tevis v. Palatine Ins. Co., 149 Fed. 560; Russell v. Harriman Land Co., 145 Fed. 745; Sanderlin v. People's Bank, 140 Fed. 191; Groton Bridge, etc., Co. v. American Bridge Co., 137 Fed. 284; Mayer v. Ft. Worth, etc., R. Co., 93 Fed. 601; Tracy v. Morel, 88 Fed. 801; Chiatovich v. Hanchett, 78 Fed. 193; Allmark v. Platte SS. Co., 76 Fed. 614; People's Bank v. Ætna Ins. Co., 53 Fed. 161, 62 Fed. 222. See Stephens v. Ringling, 102 S. C. 333, 86 SE 683 (to same effect).

[98] U. S.—Arrigo v. Commonwealth Casualty Co., 41 F. (2d) 817; American Fountain Supply, etc. v. California Crushed Fruit Corp., 21 F. (2d) 93; Collins Mfg. Co. v. Wickwire Spencer Steel Co., 11 F. (2d) 196; Waverly Stone, etc., Co. v. Waterloo, etc., R. Co., 239 Fed. 561; Pilgrim v. Ætna Life Ins. Co., 234 Fed. 958; Wayt v. Standard Nitrogen Co., 189 Fed. 231; Heller v. Ilwaco Mill, etc., Co., 178 Fed. 111; Fox v. Southern R. Co., 80 Fed. 945; Ruby Canyon Gold Min. Co. v. Hunter, 60 Fed. 305; Rock Island Nat. Bank v. J. S. Keator Lumber Co., 52 Fed. 897; Martin v. Carter, 48 Fed. 596; Spangler v. Atchison, etc., R. Co., 42 Fed. 305; Velie v. Manufacturers' Acc. Indemn. Co., 40 Fed. 545; Austin v. Gagan, 39 Fed. 626, 5 LRA 476; Dixon v. Western Union Tel. Co., 38 Fed. 377. See Williams v. Wilson Fruit Co., 222 Fed. 467 (holding that an order extending the time to plead does not ipso facto extend the time to remove, and that the state court cannot, without plaintiff's consent, enlarge the time for removal); Daugherty v. Western Union Tel. Co., 61 Fed. 138; Delbanco v. Singletary, 40 Fed. 177 (dicta).

Ark.—Midland Valley R. Co. v. Hoffman Coal Co., 91 Ark. 180, 120 SW 380.

Iowa.—Markey v. Chicago, etc., R. Co., 171 Iowa 255, 153 NW 1053; Wilson v. Big Joe Block Coal Co., 135 Iowa 531, 113 NW 348, 14 AnnCas 266.

N. C.—Bryson v. Southern R. Co., 141 N. C. 594, 54 SE 434; Mecke v. Valleytown Mineral Co., 122 N. C. 790, 29 SE 781. Compare Burton v. Smith, 191 N. C. 599, 132 SE 605 (holding that, while the state court has power to extend the time for filing an answer, it has no power to extend the time within which a petition for removal to a federal court may be filed).

Or.—Malloy v. Marshall-Wells Hardware Co., 90 Or. 303, 173 P 267, 175 P 659, 176 P 589.

Pa.—Muir v. Preferred Acc. Ins. Co., 10 Pa. Dist. 577.

[99] U. S.—Yuba City Box Co. v. Liverpool, etc., Ins. Co., 33 F. (2d) 909; American Fountain Supply, etc. v. California Crushed Fruit Corp., 21 F. (2d) 93; Collins Mfg. Co. v. Wickwire Spencer Steel Co., 11 F. (2d) 196; Solomon v. Pennsylvania R. Co., 240 Fed. 231; Wayt v. Standard Nitrogen Co., 189 Fed. 231; Heller v. Ilwaco Mill, etc., Co., 178 Fed. 111; Schipper v. Consumer Cordage Co., 72 Fed. 803; Ruby Canyon Gold Min. Co. v. Hunter, 60 Fed. 305; Martin v. Carter, 48 Fed. 596; Velie v. Manufacturers' Acc. Indemn. Co., 40 Fed. 545; Austin v. Gagan, 39 Fed. 626, 5 LRA 476; Dixon v. Western Union Tel. Co., 38 Fed. 377. See Williams v. Wilson Fruit Co., 222 Fed. 467 (holding that, in the absence of a standing rule on the subject in the state court, a stipulation extending the time to plead does not extend the time for filing a petition for removal, unless it expressly or inferentially discloses an intention on the part of plaintiff so to do).

Ark.—Midland Valley R. Co. v. Hoffman Coal Co., 91 Ark. 180, 120 SW 380.

Iowa.—Markey v. Chicago, etc., R. Co., 171 Iowa 255, 153 NW 1053.

Or.—Malloy v. Marshall-Wells Hardware Co., 90 Or. 303, 173 P 267, 175 P 659, 176 P 589.

Pa.—Muir v. Preferred Acc. Ins. Co., 10 Pa. Dist. 577.

[1] Hurd v. Gere, 38 Fed. 537.

[2] Price v. Lehigh Valley R. Co., 65 Fed. 825; Dwyer v. Peshall, 32 Fed. 497; Disbrow v. Driggs, 8 AbbPr (N. Y.) 305 note, 16 HowPr 346.

[3] Solomon v. Pennsylvania R. Co., 240 Fed. 231; Higson v. North River Ins. Co., 184 Fed. 165; Davis v. Harris, 124 Fed. 713; Price v. Lehigh Valley R. Co., 65 Fed. 825; Rock Island Nat. Bank v. J. S. Keator Lumber Co., 52 Fed. 897; Hurd v. Gere, 38 Fed. 537; Berrian v. Chetwood, 9 Fed. 678; McCallon v. Waterman, 15 F. Cas. No. 8,675, 1 Flipp. 651, 4 NYWkly Dig 382; Williams v. Southern Bell Tel., etc., Co., 116 N. C. 558, 21 SE 298. See Lantz v. Fretts, 173 Fed. 1007 (apparently applying the rule). Contra Gail v. Atlantic Coast Line R. Co., 82 Misc. 296, 143 NYS 707.

[4] Davis v. Harris, 124 Fed. 713.

[5] **Curtailment of time for removal in general** see supra § 206.

[6] Collins Mfg. Co. v. Wickwire Spencer Steel Co., 11 F. (2d) 196.

[7] See cases infra notes 8–11.

Causes becoming removable by amendment of pleadings in general see supra § 26.

parties so as to create a diversity of citizenship,[8] or increases the sum or value in dispute above the jurisdictional amount,[9] or shows that the suit arises under the constitution or laws of the United States,[10] or if defendant sued in a representative capacity is by amendment made a party in his personal capacity,[11] defendant's right to remove, under the statute providing for removal at or before the time defendant is required to answer or plead, continues until defendant must plead to the amended pleading. The same rule applies where by amendment an entirely new cause of action is set up,[12] and, similarly, where by amendment or a subsequent pleading by plaintiff a separable controversy is made to appear for the first time, the cause is removable by the defendant interested in such controversy, although the time for removal has otherwise expired;[13] but an amendment effecting no change in the cause of action does not extend the time for removal.[14]

[§ 210] **C. Removal before Trial.** Under the statutes permitting the removal of causes from a state court to a federal court before the trial,[15] a removal may be effected only before the first trial of a suit,[16] and a mistrial because of a disagreement of the jury,[17] or an order for a new trial of the cause,[18] does not extend or enlarge the time for removal. Moreover, the cause may be removed only before the first step in the trial is taken.[19] So it is too late to remove after a jury has been called or accepted,[20] even though not yet sworn,[21] or after the case has been called for trial and a motion for a continuance has been made and overruled,[22] or after time has been granted defendant to present an application for a continuance[23] or to procure counsel,[24] or after defendant has consented to a reference in order to prevent an immediate trial.[25] It is the duty of a defendant who desires to remove a cause to proceed so to do before the suit is reached for trial,[26] and the state court is under no obligation to delay a trial in order to enable defendant to prepare a petition for removal.[27] An attempt to begin the trial of a cause before it is properly triable in the regular course of procedure,[28] however, or the transfer of a cause to another part of the court for hearing on a motion, upon objection made when the case is called for trial that it is not ready,[29] is not such a step in the trial as to terminate the right of removal. The fact that the trial might have been had at an earlier term or time does not prevent the removal of a suit at any time before trial is in fact begun.[30]

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[8] Powers v. Chesapeake, etc., R. Co., 169 U. S. 92, 18 SCt 264, 42 L. ed. 673; Key v. West Kentucky Coal Co., 237 Fed. 258; Jones v. Mosher, 107 Fed. 561, 46 CCA 471.

[9] Northern Pac. R. Co. v. Austin, 135 U. S. 315, 10 SCt 758, 34 L. ed. 218; Key v. West Kentucky Coal Co., 237 Fed. 258; Barber v. Boston, etc., R. Co., 145 Fed. 52; Enders v. Lake Erie, etc., R. Co., 101 Fed. 202; Huskins v. Cincinnati, etc., R. Co., 37 Fed. 504, 3 LRA 545; Markey v. Chicago, etc., R. Co., 171 Iowa 255, 153 NW 1053.

Amendment increasing sum or value in dispute in general see supra § 38.

[10] North Dakota Guarantee Co. v. Hanway, 104 Fed. 369, 44 CCA 312; Bailey v. Mosher, 95 Fed. 223; Speckart v. German Nat. Bank, 85 Fed. 12. Compare Houston, etc., R. Co. v. State, (Tex. Civ. A.) 39 SW 390 [aff 95 Tex. 507, 68 SW 777] (holding that a motion to remove made after the filing of an amended petition setting up that the cause arose under the federal constitution and statutes came too late where the question was as much in issue before such amendment as after its filing, and defendant had already pleaded to it).

[11] Eaton v. Walker, 244 Mass. 23, 138 NE 798.

[12] Phœnix Mut. L. Ins. Co. v. Walrath, 117 U. S. 365, 6 SCt 768, 29 L. ed. 924 [aff 16 Fed. 161, 11 Biss. 432]; Edrington v. Jefferson, 111 U. S. 770, 4 SCt 683, 28 L. ed. 594; Bon v. Midwest Refining Co., 30 F. (2d) 410; Bedell v. Baltimore, etc., R. Co., 245 Fed. 788; Youtsey v. Hoffman, 108 Fed. 693; Mecke v. Valley Town Mineral Co., 89 Fed. 209; Mattoon v. Reynolds, 62 Fed. 417; Evans v. Dillingham, 43 Fed. 177; Wehl v. Wald, 29 F. Cas. No. 17,356, 17 Blatchf. 342; Fearon Lumber, etc., Co. v. Lawson, 166 Ky. 123, 178 SW 1121.

[13] Fritzlen v. Boatmen's Bank, 212 U. S. 364, 29 SCt 366, 53 L. ed. 551; Jones v. Mosher, 107 Fed. 561, 46 CCA 471.

Separable controversy in general see supra §§ 180–193.

[14] Best Foods v. Mitsubishi Shoji Kaisha, Ltd., 39 F. (2d) 620; Jones v. Mosher, 107 Fed. 561, 46 CCA 471; Painter v. New River Mineral Co., 98 Fed. 544; Gregory v. Boston Safe-Deposit, etc., Co., 88 Fed. 3; Kaitel v. Wylie, 38 Fed. 865; Independent Cotton Oil Co. v. Beacham, 31 Okl. 384, 120 P 969; Beyer v. Soper Lumber Co., 76 Wis. 145, 44 NW 750, 833.

[15] See supra § 205.

[16] McDonnell v. Jordan, 178 U. S. 229, 20 SCt 886, 44 L. ed. 1048; Fisk v. Henarie, 142 U. S. 459, 12 SCt 207, 35 L. ed. 1080 [rev 32 Fed. 417, 13 Sawy. 38, 35 Fed. 230, 13 Sawy. 318]. And see cases infra notes 17, 18.

[17] McDonnell v. Jordan, 178 U. S. 229, 20 SCt 886, 44 L. ed. 1048; Farmers' etc., Nat. Bank v. Schuster, 86 Fed. 161, 29 CCA 649; Davis v. Chicago, etc., R. Co., 46 Fed. 307. See Galpin v. Critchlow, 112 Mass. 339, 17 AmR 176 (dictum).

[18] Fisk v. Henarie, 142 U. S. 459, 12 SCt 207, 35 L. ed. 1080 [rev 32 Fed. 417, 13 Sawy. 38, 35 Fed. 230, 13 Sawy. 318]; Chandler v. Coe, 56 N. H. 184, 22 AmR 437; Jones v. Foster, 61 Wis. 25, 20 NW 785. See Galpin v. Critchlow, 112 Mass. 339, 17 AmR 176 (dictum).

[19] U. S.—Manning v. Amy, 140 U. S. 137, 11 SCt 707, 35 L. ed. 386 [aff 144 Mass. 153, 10 NE 737]; Maysville Bank v. Claypool, 120 U. S. 268, 7 SCt 545, 30 L. ed. 632; Davis v. Chicago, etc., R. Co., 46 Fed. 307; Lewis v. Smythe, 15 F. Cas. No. 8,333, 2 Woods 117; Waggener v. Cheek, 28 F. Cas. No. 17,035, 2 Dill. 560. Compare Meyer v. Delaware R. Constr. Co., 100 U. S. 457, 25 L. ed. 593 (holding that a party could not experiment on his case in the state court and then remove it if he met with unsuspected difficulties, and that removal must be taken before the trial is in good faith entered upon; but that, to bar the right of removal, it must appear that the trial had actually begun and was in progress in the orderly course of proceeding when the application was made).

Ga.—Fleming v. Philadelphia Fire Assoc., 76 Ga. 678.

Md.—Adams' Express Co. v. Trego, 35 Md. 47.

Minn.—St. Anthony Falls Water Power Co. v. King Wrought Iron Bridge Co., 23 Minn. 186, 23 AmR 682.

Nebr.—Anglo-American Provision Co. v. Evans, 34 Nebr. 44, 51 NW 310.

N. Y.—Strong v. Black, 5 AlbLJ 214.

Tex.—Watt v. White, 46 Tex. 338.

And see cases infra notes 20–25.

[20] St. Anthony Falls Water Power Co. v. King Wrought Iron Bridge Co., 23 Minn. 186, 23 AmR 682; Anglo-American Provision Co. v. Evans, 34 Nebr. 44, 51 NW 310.

[21] St. Anthony Falls Water Power Co. v. King Wrought Iron Bridge Co., 23 Minn. 186, 23 AmR 682; Anglo-American Provision Co. v. Evans, 34 Nebr. 44, 51 NW 310.

[22] Fleming v. Philadelphia Fire Assoc., 76 Ga. 678.

[23] Watt v. White, 46 Tex. 338.

[24] Fleming v. Philadelphia Fire Assoc., 76 Ga. 678.

[25] Hanover Nat. Bank v. Smith, 11 F. Cas. No. 6,035, 13 Blatchf. 224.

[26] U. S. Savings Inst. v. Brockschmidt, 72 Ill. 370.

[27] U. S. Savings Inst. v. Brockschmidt, supra.

[28] Meyer v. Delaware R. Constr. Co., 100 U. S. 457, 25 L. ed. 593.

[29] Maloy v. Duden, 25 Fed. 673.

[30] Golightly v. Massachusetts Bonding, etc., Co., 295 Fed. 153; Parker v. Vanderbilt, 136 Fed. 246; Detroit v. Detroit City R. Co., 54 Fed. 1; Huskins v. Cincinnati, etc., R. Co., 37 Fed. 504, 3 LRA 545 [app dism 154 U. S. 506, 14 SCt 1147, 38 L. ed. 1076].

[a] **A contrary rule** (1) has received some sanction in the opinions of the supreme court of the United States. Fisk v. Henarie, 142 U. S. 459, 12 SCt 207, 35 L. ed. 1080 [foll McDonnell v. Jordan, 178 U. S. 229, 20 SCt 886, 44 L. ed. 1048]. (2) Later decisions of the inferior federal courts, however, after discussing and endeavoring to explain that view, have adhered to the rule stated in the text. Golightly v. Massachusetts Bonding, etc., Co., 295 Fed. 153; Parker v. Vanderbilt, 136 Fed. 246; Detroit v. Detroit City R. Co., 54 Fed. 1.

Under former statute see infra text and notes 44–47.

Default. The entry of a default is a trial, within the meaning of the statute.[31]

Demurrer. Although there is authority to the contrary,[32] it is the general rule that a hearing upon a demurrer is a trial within the meaning of the removal statutes.[33]

Injunction or receivership. A hearing and ruling upon a motion for an injunction[34] or a receiver[35] is not a trial, so as to put an end to the time for removal, where the relief sought is merely temporary and provisional in character; but where a receiver is appointed by a final decree adjudicating the rights of the parties there has, of course, been a trial so that the right of removal no longer exists.[36]

Probate proceeding. It has been held that it is not too late to remove a proceeding pending in a state court upon appeal from a decree admitting a will to probate, where the court in which such appeal is pending has the right to try the cause de novo;[37] but otherwise it is too late to remove such a proceeding after decree and appeal.[38]

Award of commissioners or arbitrators. The statutory provision requiring removal before trial does not prevent the removal of a proceeding after an award of arbitrators,[39] or after the decision of a board of county commissioners on a claim against their county,[40] or after an appraisal made by commissioners in a condemnation proceeding,[41] where the acts of such arbitrators or commissioners are nonjudicial or administrative in character.[42]

Cross suits. Where cross suits are brought involving the same rights and subject matter, the parties only being reversed, one of such suits cannot be removed after trial of the other, since the causes must be deemed to be so identical that whatever is done in one will bind the parties in both suits.[43]

Removal before or at term at which cause could be first tried, and before trial. Under the statute, formerly in effect, providing for removal of cause before or at the term at which the cause could be first tried, and before the trial thereof,[44] proceedings for removal could be had only before or at the first term at which there was an issue for trial, whether or not the parties and court were ready to try it.[45] Where the next regular term of the court after a suit was at issue was not held, an application for removal made subsequent to the time fixed for holding such term but before the next term was in time, since the next term would be the first at which it could be tried.[46] An intervener who came into the suit after the term at which it could have been tried as between the other parties, but before trial had been had, was not too late to remove the suit.[47]

[§ 211] **D. Removal before Trial or Final Hearing.** The trial or final hearing contemplated by the statutes providing for the removal of suits or criminal prosecutions from a state court to a federal court before the trial or final hearing thereof[48] is a trial or hearing of the cause upon its merits, as distinguished from a hearing upon interlocutory matters;[49] and a ruling upon a demurrer[50] or the reversal by an appellate court of an order for a reference, and a remand of the suit to the inferior court for trial,[51] is not a trial or final hearing within the meaning of the statute. As to what trial or hearing on the merits is final, however, the courts are not in entire accord.[52] Thus there is authority for the view that, where a trial or hearing on the merits has been had, the right to remove the cause is not extended or continued by the fact that the trial resulted in a disagreement of the jury,[53] or that a right of appeal from or review of the judgment or decision exists.[54] It has frequently been held, however, on the contrary, that a removal may be taken after a jury on the first trial has disagreed,[55] or after the unsuccessful party in a trial or hearing has performed all the conditions precedent to the right to obtain a new trial,[56] or after a new trial has been ordered,[57] or where an appeal has been taken which, under the state law, vacates the judgment or decision and removes the case into the appellate court for trial de novo,[58] although there can ordinarily be no removal pending an undecided motion for a new trial[59] or an undecided appeal,[60] nor after the appellate court has ordered an accounting before a master,[61] or has directed the lower court to enter a decree in conformity with its opinion,[62] nor, after a removal by the appellate court, where the time has not expired within which a rehearing may be obtained.[63] A hearing before commissioners to whom a matter has been referred by the trial court is not a final hearing, within the meaning of the removal statutes, where their report is subject to affirmance or rejection by the court.[64]

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[31] State v. Kelley, 220 Mo. A. 413, 286 SW 724.

[32] Whelan v. New York, etc., R. Co., 35 Fed. 849, 1 LRA 65.

[33] Laidly v. Huntington, 121 U. S. 179, 7 SCt 855, 30 L. ed. 883; Gregory v. Hartley, 113 U. S. 742, 5 SCt 743, 28 L. ed. 1150; Scharff v. Levy, 112 U. S. 711, 5 SCt 360, 28 L. ed. 825; Alley v. Nott, 111 U. S. 472, 4 SCt 495, 28 L. ed. 491; Winkler v. Chicago, etc., R. Co., 108 Fed. 305; Delbanco v. Singletary, 40 Fed. 177; Lookout Mountain R. Co. v. Houston, 32 Fed. 711; Wilson v. Rock Island Paper Co., 20 Fed. 705; Boyd v. Gill, 19 Fed. 145, 21 Blatchf. 543; St. Louis, etc., R. Co. v. Weaver, 35 Kan. 412, 11 P 408, 57 AmR 176; Miller v. Kent, 60 How Pr (N. Y.) 451. See Meyer v. Norton, 9 Fed. 433 (holding that a hearing and decision upon a demurrer to an answer and cross petition was a trial within the meaning of the statute).

[34] Franklin v. Wolf, 78 Ga. 446, 3 SE 696.

[35] Franklin v. Wolf, supra.

[36] Lehigh Coal, etc., Co. v. Central R. Co., 15 F. Cas. No. 8,213, 4 WklyNC (Pa.) 187.

[37] Brodhead v. Shoemaker, 44 Fed. 518, 11 LRA 567.

[38] Craigie v. McArthur, 6 F. Cas. No. 3,341, 4 Dill. 474, 15 AlbLJ (N. Y.) 121; In re Frazer, 9 F. Cas. No. 5,068, 6 Reporter 357, 18 AlbLJ (N. Y.) 353, 7 NYWklyDig 129.

[39] Thorne v. Towanda Tanning Co., 15 Fed. 289.

[40] Delaware County v. Diebold Safe, etc., Co., 133 U. S. 473, 10 SCt 399, 33 L. ed. 674.

[41] Union Pac. R. Co. v. Myers, 115 U. S. 1, 5 SCt 1113, 29 L. ed. 319 [rev 16 Fed. 292, 3 McCrary 578].

[42] **Administrative proceeding as "suit" within meaning of removal statutes** see supra § 11.

[43] Evans v. Smith, 21 Fed. 1.

[44] Act March 3, 1875 [superseded by Act March 3, 1887, as reënacted August 13, 1888].

[45] Gurnee v. Brunswick, 11 F. Cas. No. 5,872, 1 Hughes 270. See Pettilon v. Noble, 19 F. Cas. No. 11,044, 7 Biss. 449 (holding that a cause pending in a state appellate court at the time such statute took effect, and afterwards remanded to the trial court for further proceedings, stood like a new cause so far as concerned the right of removal, so that a removal might be had at or before the term at which the case could be retried; and that, the duty to redocket the cause being on plaintiff where he had appealed, defendant was under no obligation to take any affirmative action until the suit should have been redocketed, and so did not lose his right of removal by failing to proceed pending the redocketing by plaintiff). See Paris, etc., R. Co. v. Boston, (Tex. Civ. A.) 142 SW 944 (apparently applying the rule). Compare Pullman's Palace Car Co. v. Speck, 113 U. S. 84, 5 SCt 374, 28 L. ed. 925 (recognizing the rule stated in the text, but holding that where defendant obtained from the court extensions of time to answer, the term at which the cause could have been first tried was the term at which answer would have been due if no extension had been granted, and not the first term after an answer was in fact filed).

[46] Livingston v. Frick, 76 Ga. 839.

[47] Chicago v. Hutchinson, 15 Fed. 129, 11 Biss. 484.

[48] See supra § 205.

[49] Galpin v. Critchlow, 112 Mass. 339, 17 AmR 176; Akerly v. Vilas, 24 Wis. 165, 1 AmR 166.

[50] Field v. Williams, 24 Fed. 513.

[51] Douglas v. Caldwell, 65 N. C. 248.

[52] See cases infra notes 53-63.

[53] Galpin v. Critchlow, 112 Mass. 339, 17 AmR 176.

[54] Whittier v. Hartford F. Ins. Co., 55 N. H. 141, 20 AmR 185.

[55] Osborn v. Osborn, 5 Fed. 389, 2 McCrary 455; Burson v. New York Nat. Park Bank, 40 Ind. 173, 13 AmR 285; Clark v. Delaware, etc., Canal Co., 11 R. I. 36.

[56] Home L. Ins. Co. v. Dunn, 19 Wall. (U. S.) 214, 22 L. ed. 68.

[57] Baltimore, etc., R. Co. v. Bates, 119 U. S. 464, 7 SCt 285, 30 L. ed. 436; Virginia v. Bingham, 88 Fed. 561; Sutherland v. Jersey City, etc., R. Co.,

Criminal prosecution cannot be removed after verdict and sentence.[65]

XII. WHO MAY REMOVE[66]

[By William G. Bannon]

[§ 212] **A. In General.** In general a person who is not a party of record,[67] and who is not entitled to be made a party,[68] cannot remove the suit.

[§ 213] **B. Capacity.** The view has been taken that where the necessary jurisdictional facts exist, an infant defendant may remove a case through his next friend or guardian ad litem, in the same manner and under the same circumstances as any other defendant;[69] but it has been laid down that neither an infant nor his guardian ad litem nor any one else acting on behalf of the infant can consent to a change of forum.[70] Where a wife's interest in certain property had vested in her husband as such, it was recognized that his interest was such as to permit him to remove in a proper case.[71]

A corporation which has been dissolved has the capacity to remove a suit, if the right to remove otherwise exists, where the law of the state under which it was incorporated perpetuates the corporate existence of such a corporation for the purpose of prosecuting or defending suits by or against it;[72] and it has been held that a like rule applies to a corporation adjudged insolvent, where the corporate entity still exists.[73]

[§ 214] **C. Plaintiff or Defendant—1. In General.** Under the present removal act, except in the case of a suit between citizens of the same state claiming lands under grants by different states, which suit may be removed by any one or more of plaintiffs or defendants,[74] defendant only may procure a removal.[75] By all acts of congress governing removal, however, the right to remove is given to defendant where all other jurisdictional requisites are present,[76] and the rule that only a defendant or defendants may remove must be considered in connection with the holdings as to who are, or may be treated as, the real defendant or defendants.[77]

Transfer by owner of property to permit removal.

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22 Fed. 356; Melendy v. Currier, 22 Fed. 129, 22 Blatchf. 503; Dart v. McKinney, 7 F. Cas. No. 3,583, 9 Blatchf. 359; Kellogg v. Hughes, 14 F. Cas. No. 7,662, 3 Dill. 357; Minnett v. Milwaukee, etc., R. Co., 17 F. Cas. No. 9,636, 3 Dill. 460, 13 AlbLJ (N. Y.) 254; Sims v. Sims, 22 F. Cas. No. 12,894, 17 Blatchf. 369; Brayley v. Hedges, 53 Iowa 582, 5 NW 748; Dart v. Walker, 4 Daly (N. Y.) 188; Rosenfield v. Condict, 44 Tex. 464.

[58] In re Duane, 261 Fed. 242.

[59] Vannevar v. Bryant, 21 Wall. (U. S.) 41, 22 L. ed. 476; Bryant v. Rich, 106 Mass. 180, 8 AmR 311.

[60] U. S.—Lowe v. Williams, 94 U. S. 650, 24 L. ed. 216; Stevenson v. Williams, 19 Wall. 572, 22 L. ed. 162; Brice v. Somers, 4 F. Cas. No. 1,856, 1 Flipp. 574, 2 NYWklyDig 478.

La.—Meaux v. Pittman, 32 La. Ann. 405; Williams v. Williams, 24 La. Ann. 55.

Nebr.—Miller v. Finn, 1 Nebr. 254.

N. H.—Whittier v. Hartford F. Ins. Co., 55 N. H. 141, 20 AmR 185.

Va.—Beery v. Irick, 22 Gratt. (63 Va.) 484, 12 AmR 539.

Appeal to state court as waiving or suspending right of removal see supra § 5.

[61] Jifkins v. Sweetser, 102 U. S. 177, 26 L. ed. 129.

[62] Darst v. Peoria, 13 Fed. 561.

[63] Chicago, etc., R. Co. v. McKinley, 99 U. S. 147, 25 L. ed. 272 [aff 44 Iowa 314, 24 AmR 748].

[64] Hess v. Reynolds, 113 U. S. 73, 5 SCt 377, 28 L. ed. 927.

[65] Bush v. Com., 80 Ky. 244, 3 KyL 740 [rev 107 U. S. 110, 1 SCt 625, 27 L. ed. 354].

[66] **Cross references:**
Civil rights cases see supra § 116.
Prejudice or local influence see supra § 204.
Separable controversy see supra § 192.
Suits involving land claimed under grants from different states see supra § 119.
Suits or prosecutions against particular officers see supra §§ 98–100, 107–109.

[67] Bertha Zinc, etc., Co. v. Carico, 61 Fed. 132; Chesapeake, etc., R. Co. v. Venable, 111 Ky. 41, 63 SW 35, 23 KyL 427; State v. Barnes, 5 N. D. 350, 65 NW 688; Andrews v. Rice, (Tex. Civ. A.) 198 SW 666.

Refusal of petition to intervene see infra § 226.

[68] First Nat. Bank v. Pancake, 172 N. C. 513, 90 SE 515.

[69] Woolridge v. McKenna, 8 Fed. 650 (holding, however, that this cannot be done until the infant has been served with process, or otherwise subjected to the jurisdiction of the state court, in accordance with the law of the state). See Re Moore, 209 U. S. 490, 28 SCt 585, 706, 52 L. ed. 904 (where the authority of a next friend to consent to the jurisdiction of the federal court after removal by defendant of an action by an infant was asserted).

[70] Kingsbury v. Kingsbury, 14 F. Cas. No. 7,817, 3 Biss. 60.

[71] Carswell v. Schley, 59 Ga. 17 (husband as plaintiff seeking removal under Removal Act of 1875).

[72] Groom v. Mortimer Land Co., 192 Fed. 849, 113 CCA 173 [certiorari den 225 U. S. 700 mem, 32 SCt 835 mem, 56 L. ed. 1264 mem].

[73] Paterson Second Nat. Bank v. New York Silk Mfg. Co., 11 Fed. 532.

[74] See supra § 119.

[75] Nash v. McNamara, 145 Fed. 541; McKown v. Kansas, etc., Coal Co., 105 Fed. 657; Waco Hardware Co. v. Michigan Stove Co., 91 Fed. 289, 33 CCA 511; Campbell v. Collins, 62 Fed. 849; La Montagne v. T. W. Harvey Lumber Co., 44 Fed. 645; Western Union Tel. Co. v. Brown, 32 Fed. 337; Darton v. Sperry, 71 Conn. 339, 41 A 1052; Union Gas, etc., Co. v. Indian-Tex Petroleum Co., 203 Ky. 521, 263 SW 1; Chappell v. Chappell, 86 Md. 532, 39 A 984.

[a] **Waiver by defendant.**—Where a defendant waived its right to remove a cause, the removal could not subsequently be effected by the plaintiff over the defendant's objection, by filing a transcript in the federal court. Johnson v. Butte Alex Scott Copper Co., 213 Fed. 910.

[b] **Under Judiciary Act of 1789** only defendant could remove. West v. Aurora City, 6 Wall. (U. S.) 139, 18 L. ed. 819.

[c] **Under Removal Act of 1875** either plaintiff or defendant could remove. Act March 3, 1875 (18 U. S. St. at L. p 470 c 137 § 2).

Cross references:
Civil rights cases see supra § 116.
Prosecutions or suits against certain officers and persons claiming under such officers see supra §§ 98, 107.
Removal for prejudice or local influence see supra § 204.
Separable controversy see supra § 192.

[76] See statutory provisions; and cases supra note 75.

[a] **Removal under Judiciary Act of 1789.**—Bushnell v. Kennedy, 9 Wall. (U. S.) 387, 19 L. ed. 736; Ayres v. Western R. Corp., 45 N. Y. 260 [rev 48 Barb. 132, 32 HowPr 351].

[77] See passim infra §§ 215–224.

Real, necessary, and formal parties as affecting removal for diversity of citizenship in general see supra §§

It has been held that, in the absence of fraud or collusion, the right of defendant to remove a condemnation proceeding is not defeated by a claim that, prior to the commencement of the proceeding, the property involved was transferred to defendant for the sole purpose of creating the right to remove.[78]

[§ 215] **2. Who Is Defendant—a. In General.** It has been stated in general terms that in determining whether or not a certain party is defendant and as such entitled to remove, the court will look behind the position of the parties in the title of the cause or proceeding,[79] and into the nature of the proceeding and the relation of the parties to the issues and controversy.[80] A party named as a defendant may not, however, properly assert the necessity for a realignment of the parties, which would result in giving such party the status of a party plaintiff, and thereby acquire a right to remove.[81]

[§ 216] **b. Cross Bills, Cross Complaints, or Counterclaims against Original Parties.**[82] The holdings and views as to whether, upon the filing of a cross bill or counterclaim, the original plaintiff may be treated as a defendant in respect of the cross bill or counterclaim and so entitled to remove, are conflicting.[83] In a case arising under the Judiciary Act of 1789 the supreme court took the position that the interposition, under a state code provision, of a defense coupled with a prayer for an injunction and general relief did not permit plaintiff to remove the cause,[84] and in subsequent cases in lower federal courts and in state courts arising under the present removal act or under statutory provisions in substance the same as such act, it has been held or recognized that the pleading by the original defendant of a cross bill, a counterclaim, or a demand in reconvention, which exceeds the jurisdictional amount,[85] does not put the original plaintiff in the position of a defendant so that he can remove the cause.[86] There are, however, cases in the lower federal courts, including very recent cases, some of which have sought to distinguish the above holding of the supreme court made under the Judiciary Act of 1789,[87] in which it has been held or recognized that, upon interposition of a cross bill or counterclaim, in substance the original defendant is plaintiff[88] and the original plaintiff is defendant[89] for the purposes of removal, and that the original plaintiff may remove the suit if the other jurisdictional

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148–166.

78. In re Bensel, 206 Fed. 369, 124 CCA 251 [rev on other grounds sub nom. New York v. Sage, 239 U. S. 57, 36 SCt 25, 60 L. ed. 143].

[a] **Illustration.**—Where the alleged ground for transfer was to permit resort to a tribunal in which a more liberal rule of damages obtained. In re Bensel, 206 Fed. 369, 124 CCA 251 [rev on other grounds sub nom. New York v. Sage, 239 U. S. 57, 36 SCt 25, 60 L. ed. 143].

[b] **When proceeding commenced.**—Condemnation proceedings cannot be deemed commenced before the conveyance of land so as to preclude the purchaser from removing the suit to the federal court for diverse citizenship, where the petition for commissioners was not filed until after conveyance had been made. New York v. Sage, 239 U. S. 57, 36 SCt 25, 60 L. ed. 143 [rev on other grounds sub nom. In re Bensel, 206 Fed. 369, 124 CCA 251].

79. Chicago, etc., R. Co. v. Spencer, 283 Fed. 824.

80. Chicago, etc., R. Co. v. Spencer, supra. Compare cases infra § 216 notes 84–86.

Realignment of parties as affecting removal for diversity of citizenship in general see supra § 147.

81. Mayer v. Denver, etc., R. Co., 41 Fed. 723.

82. **Defendant's filing of counterclaim as waiver or loss or right to remove** see supra §§ 5, 6.

Interveners and parties brought in after suit commenced see infra § 217.

83. See cases infra notes 84–91; and Habermel v. Mong, 31 F. (2d) 822, 825 (where the court said that "there is a decided conflict of opinion as to how far an original plaintiff has the right of removal when he has been made defendant to a counterclaim or cross-bill").

84. West v. Aurora City, 6 Wall. (U. S.) 139, 142, 18 L. ed. 819. See Aurora City v. West, 25 Ind. 148 (where the same conclusion was arrived at by the state court).

"In the case before us . . . citizens of Ohio, voluntarily resorted, as plaintiffs, to the State court of Indiana. They were bound to know of what rights the defendants to their suit might avail themselves under the code. Submitting themselves to the jurisdiction they submitted themselves to it in its whole extent. The filing of the new paragraphs, therefore, could not make them defendants to a suit, removable on their application to the Circuit Court of the United States." West v. Aurora City, supra.

[a] **Illustration.**—Plaintiff's right to remove was denied where in an action against a municipal corporation of the state of Indiana, apparently brought under the state code, to recover the amount of the matured interest coupons of certain bonds, defendant set up certain defensive matter and prayed an injunction to restrain plaintiffs from proceeding in any suit on the coupons or bonds and from transferring them to third parties, and for a decree for the cancellation of the bonds, and, upon the filing of defendant's pleading, plaintiffs entered a discontinuance of their suit. West v. Aurora, 6 Wall. (U. S.) 139, 18 L. ed. 819.

85. **Determination as to jurisdictional amount in case of counterclaim or reconvention** see supra § 34.

86. Glover Mach. Works v. Cooke Jellico Coal Co., 222 Fed. 531; Illinois Cent. R. Co. v. Waller, 164 Fed. 358; McKown v. Kansas, etc., Coal Co., 105 Fed. 657; Waco Hardware Co. v. Michigan Stove Co., 91 Fed. 289, 33 CCA 511; La Montagne v. T. W. Harvey Lumber Co., 44 Fed. 645; Union Gas, etc., Co. v. Indian-Tex Petroleum Co., 203 Ky. 521, 263 SW 1; Chappell v. Chappell, 86 Md. 532, 39 A 984; Smithers v. Smith, 35 Tex. Civ. A. 508, 80 SW 646 [aff 98 Tex. 83, 81 SW 283].

[a] **Construction of statute.**—The phrase of the removal act conferring the right to remove on "defendant or defendants" has been construed as meaning in general the actual and technical defendant or defendants. Illinois Cent. R. Co. v. Waller, 164 Fed. 358.

[b] **Rule applied** where the counterclaim was so connected with the main issue as to free the case from any suggestion of an independent suit. Mohawk Rubber Co. v. Terrell, 13 F. (2d) 266.

[c] **Illustration.**—Suit in equity in which plaintiff sought to enjoin defendant from drilling and taking oil or gas from certain premises to which plaintiff asserted the right of possession under a lease, in which suit defendant set up a so-called counterclaim by which it sought the cancellation of the lease. Union Gas, etc., Co. v. Indian-Tex Petroleum Co., 203 Ky. 521, 263 SW 1.

[d] **Even where plaintiff dismissed his suit** upon the filing of the counterclaim he could not remove. Union Gas, etc., Co. v. Indian-Tex Petroleum Co., 203 Ky. 521, 263 SW 1.

87. See Walcott v. Watson, 46 Fed. 529; Zumbrunn v. Schwartz, 17 F. (2d) 609; Pierce v. Desmond, 11 F. (2d) 327.

"The language of the opinion in West v. Aurora, 6 Wall. (U. S.) 139, 18 L. ed. 819, is broad enough to support defendant's motion to remand. The decision itself is not. In the first place, the removal statute then required the defendant to remove 'at the time of entering his appearance,' and this it did not do. Again, the record was so fragmentary that it was impossible to tell whether the paragraphs in the answer were, properly speaking, a counterclaim at all, and the court said that the state of the record was 'fatal to the supposed right of removal.' In its opinion the court spoke of the allegations of the answer as 'in the nature of defensive pleas, coupled with a prayer for injunction and general relief.' If they were 'defensive pleas,' the question here presented was not before the court." San Antonio Suburban Irrigated Farms v. Shandy, 29 F. (2d) 579, 580.

88. Bennett v. Devine, 45 Fed. 705.

89. American Fruit Growers v. La Roche, 39 F. (2d) 243; San Antonio Suburban Irrigated Farms v. Shandy, 29 F. (2d) 579; Zumbrunn v. Schwartz, 17 F. (2d) 609; Pierce v. Desmond, 11 F. (2d) 327; Price v. Ellis, 129 Fed. 482; Walcott v. Watson, 46 Fed. 529; Carson, etc., Lumber Co. v. Holtzclaw, 39 Fed. 578.

[a] **Cross bill in condemnation proceeding.**—Where a landowner, appellant in condemnation proceedings under the Iowa statute, filed a pleading in the nature of a cross bill in equity, praying for affirmative relief, the adverse party became defendant as to such pleading and was entitled to remove the cause, where the requisite grounds appeared. Hagerla v. Mississippi River Power Co., 202 Fed. 771.

requisites are present, some of the cases basing the conclusion, at least to some extent, on the general rule, affecting removability for diversity of citizenship,[90] requiring the court to realign the parties according to the real matter in controversy.[91] While it has been held that a defendant does not change his status as such so as to lose his right to remove, by filing a cross-bill in which a codefendant is made a party defendant,[92] an original defendant against whom his codefendant files a cross complaint may remove where the other jurisdictional requisites are present.[93]

[§ 217] **c. Intervener and Party Brought In after Suit Commenced.**[94] The status of an intervener as defendant with resultant right to remove has been recognized where he specially intervenes as defendant and in his pleading contests the plaintiff's claim to the property involved,[95] and also where he should originally have been made a party defendant and the original plaintiff and original defendant join in attacking the intervener's claim of interest in property involved in the suit.[96] So a new party, brought in by cross bill or cross complaint, against whom defendants seek affirmative relief, not involved in the original proceeding, may remove for diversity of citizenship where the other jurisdictional requisites are present;[97] and a like rule has been applied in respect of removal by an assignor where, in a suit by the assignee alone, defendant set up a counterclaim by which he sought to recover from the assignor.[98] There is, however, authority for the view that an intervener, whose ground for intervention is to enforce his own claim and only incidentally to oppose that of plaintiff, may not be regarded as defendant,[99] that a party who is brought in as a result of defendant's allegation that the party so brought in is a necessary party, and who claims under plaintiff, is not to be regarded as a defendant but as a plaintiff and cannot remove,[1] and that where defendant seeks to implead and to recover over against a third party for any sum for which the original defendant might be held liable, such third party cannot remove if the original defendant does not set up sufficient facts to charge such third party with liability.[2]

[§ 218] **d. Condemnation Proceeding.**[3] In condemnation proceedings the owner of the land involved is regarded as defendant[4] on a so-called appeal to the state court from a decision of commissioners or a sheriff's jury,[5] even though the state statute technically makes such owner a plaintiff,[6] and as defendant, the landowner is entitled to remove provided all other jurisdictional requisites are present.[7]

[§ 219] **e. Proceeding To Assess Benefits and Damages Resulting from Local Improvement.**[8] The landowner has been treated as defendant with the right to remove, in proceedings under certain state statutes, to assess benefits and damages to land resulting from a local improvement,[9] as where the landowner appeals to the state court from the action of administrative officers fixing the assessment.[10]

[§ 220] **f. Proceeding To Enforce Claim against**

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90. See supra § 147.

91. Zumbrunn v. Schwartz, 17 F. (2d) 609. And see cases supra notes 88, 89.

92. Pearson v. Louisville Southern R. Co., 60 Fed. 113.

93. Niccum v. Northern Assur. Co., 17 F. (2d) 160.

94. **Intervention or bringing in parties after removal** see infra § 312.

Right of added parties to remove in general see infra § 226.

95. American Nat. Bank v. National Ben., etc., Co., 70 Fed. 420.

[a] **Rule applied** in the case of intervention of the receiver of a corporation in a suit against the corporation where he was appointed prior to the commencement of the suit and had title to the corporate assets. American Nat. Bank v. National Ben., etc., Co., 70 Fed. 420.

[b] **Setting aside order making intervener party defendant** did not affect his status as such where he was entitled to become a party by filing his petition to intervene. American Nat. Bank v. National Ben., etc., Co., 70 Fed. 420.

96. Real Estate Loan Co. v. Brown, 23 F. (2d) 329.

[a] **Rule applied** where there was diversity of citizenship between the original plaintiff and the original defendant on one side, and the intervener on the other. Real Estate Loan Co. v. Brown, 23 F. (2d) 329.

97. Habermel v. Mong, 31 F. (2d) 822 [certiorari dism 280 U. S. 587 mem, 50 SCt 37 mem, 74 L. ed. 636 mem] (dist West v. Aurora City, 6 Wall. 139, 18 L. ed. 819 on the grounds that in that case no new parties were brought in, that the original defendants raised purely defensive issues, and that such case was decided under an earlier and somewhat different act). Compare Nash v. McNamara, 145 Fed. 541 (where remand was directed).

98. Consolidated Textile Corp. v. Iserson, 294 Fed. 289 (where the court said, possibly with reference to the fact that the assignee had, in the first instance, selected the state court as the tribunal for suit, that "one defendant cannot, by consenting to the jurisdiction, prevent another defendant from removing the case").

[a] **Realignment.**—Where, in an action in a state court by the assignee of a contract of a citizen of another state, defendant set up a counterclaim against the assignor, a citizen of another state, the defendant is in fact plaintiff in respect of the counterclaim, and the assignor and assignee, if they are both necessary or proper parties in respect of the counterclaim, are defendants, and the parties will be so aligned for removal purposes. Consolidated Textile Corp. v. Iserson, 294 Fed. 289.

99. In re San Antonio, etc., R. Co., 44 Fed. 145.

1. Nash v. McNamara, 145 Fed. 541.

2. Andrews v. Rice, (Tex. Civ. A.) 198 SW 666.

3. **Removability of condemnation proceedings in general** see supra § 19.

4. Williams v. Delaware, etc., R. Co., 266 Fed. 1003; Deepwater R. Co. v. Western Pocahontas Coal, etc., Co., 152 Fed. 824. Contra White v. Philadelphia, 8 Phila. (Pa.) 241.

[a] **Illustration.**—Where a private corporation seeks to acquire land under the Pennsylvania statute, the landowner is regarded as defendant. Williams v. Delaware, etc., R. Co., 266 Fed. 1003.

5. Mason City, etc., R. Co. v. Boynton, 204 U. S. 570, 27 SCt 321, 51 L. ed. 629; Hagerla v. Mississippi River Power Co., 202 Fed. 771 (recognizing rule); Hudson River R., etc., Co. v. Day, 54 Fed. 545; Mt. Washington R. Co. v. Coe, 50 Fed. 637.

[a] **Illustration.**—On a so-called appeal to the state court from the decision of the sheriff's jury, where a private corporation took land under the Iowa statute, the landowner was regarded as a defendant. Mason City, etc., R. Co. v. Boynton, 204 U. S. 570, 27 SCt 321, 51 L. ed. 629; Hagerla v. Mississippi River Power Co., 202 Fed. 771 (recognizing rule). But see Kirby v. Chicago, etc., R. Co., 106 Fed. 551; Myers v. Chicago, etc., R. Co., 118 Iowa 312, 91 NW 1076 (in both of which cases the railroad company which sought to acquire land was regarded as defendant and as such entitled to remove).

Interposition of cross bill by landowner see supra § 216.

6. Williams v. Delaware, etc., R. Co., 266 Fed. 1003; Hagerla v. Mississippi River Power Co., 202 Fed. 771 (recognizing rule).

7. Mason City, etc., R. Co. v. Boynton, 204 U. S. 570, 27 SCt 321, 51 L. ed. 629. And see cases supra notes 4–6.

8. **Removability of assessment proceeding in general** see supra § 22.

9. Lafayette County Road Impr. Dist. No. 2 v. St. Louis Southwestern R. Co., 257 U. S. 547, 42 SCt 250, 66 L. ed. 364.

[a] **Illustration.**—Removal, after filing of assessment book in county court of proceeding under Crawford & M. Ark. Dig. c 81 tit 7, to assess benefits and damages for road district improvement. Lafayette County Road Impr. Dist. No. 2 v. St. Louis Southwestern R. Co., 257 U. S. 547, 42 SCt 250.

10. Chicago, etc., R. Co. v. Spencer, 283 Fed. 824.

Political Entity.[11] Under the present Removal Act, upon an appeal from a decision of a board of county commissioners upon a county claim, the claimant cannot be treated as defendant for the purpose of permitting him to remove the cause, although he is the respondent upon such appeal.[12]

[§ 221] **g. Probate Proceeding.** Upon holding that a probate proceeding in solemn form under the Georgia statute was removable,[13] a party opposing the probate of the will in such proceeding has been regarded as defendant and entitled to remove after an appeal by him to the superior court from a decision of the ordinary granting probate of and admitting the will to record.[14]

[§ 222] **h. Proceeding To Determine Conflicting Claims for Use of Water.**[15] Where an appeal to a state court has been taken, pursuant to statute, from a decision of an administrative officer cancelling a permit to divert waters from a stream involved in an irrigation project, the propriety of removal by the appellee who has procured such cancellation, and who, by the terms of the statute, is regarded as defendant, has been recognized;[16] and a like rule permitting an appellee to remove has been applied where protestants appealed, under statute, from a decision of an administrative officer granting an application for permission to change the place of diversion of water.[17]

[§ 223] **i. Proceeding Involving Insolvent Assignment.**[18] It has been held that a claimant against an assignee for the benefit of creditors, under an assignment made under the state statute, who has filed his claim and, subsequently, a reply to the exceptions filed by the assignee, must be regarded as a plaintiff, and not as defendant for the purpose of permitting him to remove the cause.[19]

[§ 224] **j. Garnishee Proceeding.**[20] A garnishee, brought in after judgment against defendant in the principal action, has been regarded as a defendant entitled to remove the proceeding against him where the garnishee denies liability to the defendant in the principal action and such defendant is realigned as a plaintiff.[21]

[§ 225] **3. Residence or Nonresidence of Defendant.** In view of the provision of the removal act permitting removal, in the case of diversity, by a defendant or defendants, "being nonresidents" of the state where the suit is brought,[22] it is held or recognized that notwithstanding the existence of diversity of citizenship the suit is not removable, for diversity, by a defendant who is a resident of the state where the suit is brought,[23] even though the suit is otherwise removable as involving a separable controversy.[24] Where otherwise permissible on the ground of diversity of citizenship, however, a defendant sued alone,[25] the only necessary party

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[a] **Illustration.**—On an appeal by a property owner from a special sewer assessment to the district court, under Iowa Code (1897) § 839, the case being triable as in equity, de novo, appellant is in effect the defendant, and should be considered such for removal purposes. Chicago, etc., R. Co. v. Spencer, 283 Fed. 824.

[11] **Removability of proceeding in general** see supra § 11.

[12] Tullock v. Webster County, 40 Fed. 706.

[a] **Rule applied** where the appeal was taken by a taxpayer as permitted by a Nebraska statute. Tullock v. Webster County, 40 Fed. 706.

[b] **Under Removal Act of 1875,** which permitted removal by either party, the right of the claimant to remove after appeal by him has been upheld. Delaware County v. Diebold Safe, etc., Co., 133 U. S. 473, 10 SCt 399, 33 L. ed. 674.

[13] Compare cases supra §§ 16, 17 as to removability of probate proceedings.

[14] Brodhead v. Shoemaker, 44 Fed. 518, 11 LRA 567. See McDonnell v. Jordan, 178 U. S. 229, 20 SCt 886, 44 L. ed. 1048.

[15] **Removability of proceeding in general** see supra § 11.

[16] Waha-Lewiston Land, etc., Co. v. Lewiston-Sweetwater Irr. Co., 158 Fed. 137.

[17] In re Utah Constr. Co.'s Water Right, 30 F. (2d) 436.

[a] **Illustration.**—Appeal under Ida. Comp. St. § 5582 as amended. In re Utah Constr. Co.'s Water Right, 30 F. (2d) 436.

[18] **Removability of proceeding in general** see supra § 24.

[19] Hill v. Graham, 11 Colo. A. 536, 53 P 1060.

[20] **Removability of garnishee proceeding in general** see supra § 24.

[21] Baker v. Duwamish Mill Co., 149 Fed. 612.

Realignment of parties as affecting removal for diversity of citizenship in general see supra § 147.

Garnishee as real and necessary party as affecting removal for diversity of citizenship in general see supra § 155.

[22] USCA tit 28 § 71.

[a] **State in which suit is brought.**—"Being nonresidents of that State" refers to the state in which the suit is brought. Patch v. Wabash R. Co., 207 U. S. 277, 283, 28 SCt 80, 52 L. ed. 204.

[23] U. S.—Patch v. Wabash R. Co., 207 U. S. 277, 28 SCt 80, 52 L. ed. 204; Martin v. Snyder, 148 U. S. 663, 13 SCt 706, 37 L. ed. 602; Ford Motor Co. v. Automobile Ins. Co., 13 F. (2d) 415; McCaffrey v. Wilson, 10 F. (2d) 368; Handley-Mack Co. v. Godchaux Sugar Co., 2 F. (2d) 435; Genesee Valley Trust Co. v. Kansas City, etc., R. Co., 240 Fed. 524; Whitaker v. Coudon, 217 Fed. 139; Drovers' Deposit Nat. Bank v. Tichenor, 202 Fed. 1013; Baldwin v. Pacific Power, etc., Co., 199 Fed. 291; Dalles, etc., Ferry Co. v. Hendryx, 189 Fed. 266; Decker v. Southern R. Co., 189 Fed. 224; Wrightsville Hardware Co. v. Hardware, etc., Mfg. Co., 180 Fed. 586; Juillard v. Barr, 177 Fed. 921, 101 CCA 201; Illinois Cent. R. Co. v. Waller, 164 Fed. 358 (recognizing rule); Hackett v. Kuhne, 157 Fed. 317; Parkinson v. Barr, 105 Fed. 81; Fife v. Whittell, 102 Fed. 537; Wichita Nat. Bank v. Smith, 72 Fed. 568, 19 CCA 42; Freeman v. Butler, 39 Fed. 1; Anderson v. Appleton, 32 Fed. 855. See Continental Trust Co. v. Butts County, 242 Fed. 539 (where remand was directed).

Ala.—Southern R. Co. v. Bailey, 220 Ala. 385, 125 S 403.

Ga.—Lee v. Newton, 36 Ga. A. 254, 136 SE 103; Lee v. Wilmington Sav. Bank, 29 Ga. A. 306, 114 SE 918.

La.—Fox v. Corry, 149 La. 445, 89 S 410.

Mass.—Bryan v. Richardson, 153 Mass. 157, 26 NE 435 [writ of error dism 145 U. S. 651, 12 SCt 987, 36 L. ed. 853].

Pa.—Rowland v. Bondholders' Committee, 41 Pa. Co. 637.

Tex.—Jackson v. McKinsey, (Civ. A.) 12 SW (2d) 1044.

[a] **In Porto Rico** (1) under an early statute a like rule was applied in respect of a removal from an insular to the federal district court. Wenar v. Pohl, 1 Porto Rico Fed. 37. (2) The present statute (Act March 2, 1917 [39 U. S. St. at L. p 951 § 41]), confers original jurisdiction on the federal district court where all the parties on either side of the controversy are citizens or subjects of a foreign state or states, or citizens of a state, territory, and district of the United States, not domiciled in Porto Rico, and in construing the provisions for removal from the insular court to the federal district court the foregoing clause, including the phrase "not domiciled in Porto Rico," has been read into the provision of the General Removal Act which contains the phrase "being nonresidents of that state." See Porto Rico v. Fortuna Estates, 279 Fed. 500 [certiorari den 259 U. S. 587 mem, 42 SCt 590 mem, 66 L. ed. 1077 mem].

[b] **Facts showing residence in state where suit brought.**—Reckling v. McKinstry, 185 Fed. 842.

[c] **Facts insufficient to show residence in state where suit brought.**—Willingham v. Swift, 165 Fed. 223; Brisenden v. Chamberlain, 53 Fed. 307.

[24] See supra § 193.

[25] Lafayette County Road Impr. Dist. No. 2 v. St. Louis Southwestern R. Co., 257 U. S. 547, 42 SCt 250, 66 L. ed. 364; McCaffrey v. Wilson, 10 F.(2d) 368; McLaughlin v. Western Union Tel. Co., 7 F. (2d) 177; Wilson v. Western Union Tel. Co., 34 Fed. 561; Eaton v. Walker, 244 Mass. 23, 138 NE 798; Duff v. Hildreth, 183 Mass. 440, 67 NE 356. Contra Yuba County v. Pioneer Gold Min. Co., 32 Fed. 183.

defendant,[26] or all defendants[27] may remove if such defendant or defendants are nonresidents of the state where the suit is brought.

Construction of statute in general. There appears to be some conflict as to the meaning of the phrase "being nonresidents" of the state in which the action is brought, as used in the removal act.[28] The view has been expressed that, in order to be a nonresident, defendant must be a citizen of another state or a corporation created by the laws of another state,[29] and there is authority for the view that where plaintiff and defendant are citizens of the same state the fact of residence of defendant outside such state does not give the right to remove.[30] In some cases, however, the courts have apparently recognized a distinction between "nonresidence" and "noncitizenship," in the case of a natural person, in holding that such a person, although apparently recognized as a citizen of one state, may be regarded as a resident of the state in which suit is brought against him so as to prevent removal by him for diversity.[31] The court has granted a motion to remand an action by a citizen of one state against a citizen of another state brought in such other state where both were residing abroad and neither had a residence in the United States, on the ground that the jurisdiction of the federal court on removal for diversity was doubtful.[32]

Citizen defendants considered collectively. Where the right to remove a suit against several citizen defendants depends on residence outside the state in which the suit is brought, defendants must be taken collectively or as an entity,[33] and a nonresident defendant cannot remove where another defendant is a resident,[34] notwithstanding there is diversity of citizenship between all plaintiffs and all defendants.[35]

Alien a party. Under the statutory provision preventing removal by a resident defendant of the state in which the suit is brought, the view has been taken that a resident alien cannot remove a suit against him by a citizen;[36] but there is authority to the contrary.[37] The statutory provision in question prevents the removal of a suit by an alien against a citizen who is a resident of the state in which the suit is brought,[38] removal by an alien joined as defendant with a resident citizen,[39] and removal by a nonresident citizen joined as defendant with resident citizens in a suit by an alien.[40] An alien corporation is not prevented from removing, as defendant, a suit by a citizen on the ground that it is not a nonresident merely because it has an office, and engages in business, in the state where suit is brought.[41]

Corporation organized under state law. In determining the question as to removability by a defendant corporation where diversity of citizenship exists, in general the corporation is regarded as a resident of the state by which it is incorporated,[42] and where the suit is brought in such state it cannot remove;[43] and a corporation incorporated in one state does not become a resident of another state in which suit is brought so as to prevent removal on the ground of diversity of citizenship merely because it does business in such other state,[44] notwithstanding it was organized to do business in such other state.[45]

[§ 226] **D. Right of Added Party in General.**[46] In general a party who is substituted for another party,[47] or who is otherwise brought into the suit,[48] and a purchaser pendente lite of property involved in the suit who is brought in,[49] or who intervenes,[50] is subject to all the disabilities of the party whose place he takes or under whom he claims, in respect of removal. It has been held, moreover, that a person who intervenes merely to assist in the defense of the suit and to protect himself against liability for indemnifying the original defendant, is subject to the disabilities of such defendant,[51] and that an intervener who is a proper but not a necessary party to the suit cannot remove;[52] of course, where removal is sought on the ground of diversity of citizenship, the intervener cannot remove where the necessary diversity does not exist.[53] It has been held or recognized, however, that a party, not chargeable as a purchaser or assignee pendente lite, who intervenes,[54] or who is brought in,[55] and who is the real party defendant, may remove where all the jurisdictional requisites are present. By special statute,[56] where the United States has appeared in a suit to which a restricted member of the Five Civilized Tribes in Oklahoma, or a restricted heir or grantee of such Indian, is a party, the United States may remove such suit to the federal district court.[57] There is authority for the view that a person who has been wrongfully denied the right to intervene should be regarded as a party in respect of the question as to removal by him,[58] but a person not a party to the record[59] who has not been permitted to intervene and has not applied to intervene cannot remove;[60] and where there was no impropriety in a refusal to substitute or bring in as a party a person not originally named, such person cannot remove.[61]

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[26] Dunbar v. Rosenbloom, 230 Mass. 176, 119 NE 829.

Disregarding parties as affecting removal for diversity of citizenship in general see infra §§ 148–176.

[27] Willingham v. Swift, 165 Fed. 223; Pitkin County Min. Co. v. Markell, 33 Fed. 386.

[28] See cases infra notes 29–32.

[29] Martin v. Baltimore, etc., R. Co., 151 U. S. 673, 14 SCt 533, 38 L. ed. 311.

[30] Guarantee Co. of North America v. Lynchburg First Nat. Bank, 95 Va. 480, 28 SE 909.

[31] Davidson v. Montana-Dakota Power Co., 22 F. (2d) 688; Rich v. Corno Mills Co., 300 Fed. 236. See Reckling v. McKinstry, 185 Fed. 842 (where suit was remanded). But see Best v. Great Northern R. Co., 243 Fed. 789 (where the word "nonresidents" was construed to mean "noncitizens").

[32] Jackson v. Hooper, 188 Fed. 509.

[33] Rich v. Corno Mills Co., 300 Fed. 236; Pringle v. Storrow, 256 Mass. 561, 153 NE 26, 49 ALR 1222.

Removability where plaintiff and resident defendant citizens of same state see supra § 145.

[34] Rand v. Hercules Powder Co., 28 F. (2d) 131; McCaffrey v. Wilson, 10 F. (2d) 368; Mogg v. Farley, 205 Ky. 25, 265 S.W. 449; Illinois Cent. R. Co. v. Coley, 121 Ky. 385, 89 SW 234, 28 KyL 336, 1 LRANS 370; McCabe v. Maysville, etc., R. Co., 112 Ky. 861, 66 SW 1054, 23 KyL 2328; Cincinnati, etc., R. Co. v. Finnell, 108 Ky. 135, 55 SW 902, 22 KyL 86, 57 LRA 266; Sears v. Atchison, etc., R. Co., 163 Mo. A. 711, 147 SW 860 (recognizing rule); National Bank of Commerce v. Galland, 14 Wash. 502, 45 P 35.

[35] Rich v. Corno Mills Co., 300 Fed. 236; Parkinson v. Barr, 105 Fed. 81; Southern R. Co. v. Bailey, 220 Ala. 385, 125 S 403.

[36] Eddy v. Casás, 118 Fed. 363; Walker v. O'Neill, 38 Fed. 374; Cudahy v. McGeoch, 37 Fed. 1.

[37] Best v. Great Northern R. Co., 243 Fed. 789.

[38] Decker v. Southern R. Co., 189 Fed. 224; Long v. Quinn Bros., 215 Mass. 85, 102 NE 348.

[39] Hackett v. Kuhne, 157 Fed. 317.

[40] Pringle v. Storrow, 256 Mass. 561, 153 NE 26, 49 ALR 1222. See Bagenas v. Southern Pac. Co., 180 Fed. 887 (apparently recognizing the rule).

[41] Baumgarten v. Alliance Assur. Co., 153 Fed. 301; Howard v. Gold Reefs of Georgia, 102 Fed. 657; Purcell v. British Land, etc., Co., 42 Fed. 465. See Shattuck v. North British, etc., Co., 58 Fed. 609, 7 CCA 386 (where right to remove was upheld). But see Guarantee Co. of North America v. Lynchburg First Nat. Bank, 95 Va. 480, 28 SE 909 (where, however, the case was nonremovable on other grounds). Contra Scott v. Texas Land, etc., Co., 41 Fed. 225.

[42] Patch v. Wabash R. Co., 207 U. S. 277, 28 SCt 80, 52 L. ed. 204.

[a] **"Residence" and "citizenship" or "nonresidence" and "noncitizenship"** have been regarded as substantially synonymous in construing the provision of the removal act in question when applied to a defendant corporation. Baugman v. National Water-Works Co., 46 Fed. 4, 5; Purcell v. British Land, etc., Co., 42 Fed. 465, 467; Fales v. Chicago, etc., R. Co., 32 Fed. 673.

Citizenship of corporation for purpose of removal on the ground of diversity in general see supra §§ 129, 138.

[43] Patch v. Wabash R. Co., 207 U. S. 277, 28 SCt 80, 52 L. ed. 204; Wasley v. Chicago, etc., R. Co., 147 Fed. 608.

[a] **National banking association,** by virtue of statute, is for jurisdictional purposes, regarded as a citizen and resident of the state in which it is located and may not remove a suit against it brought in such state by a citizen of another state. Wichita Nat. Bank v. Smith, 72 Fed. 568, 19 CCA 42.

[44] Conn v. Chicago, etc., R. Co., 48 Fed. 177; Baughman v. National Water-Works Co., 46 Fed. 4; Fales v. Chicago, etc., R. Co., 32 Fed. 673.

[45] Baughman v. National Water-Works Co., 46 Fed. 4.

[46] **Cross references:**

Effect of delay by original parties on rights of parties subsequently added see passim supra § 205.

Intervener as defendant see supra § 217.

Right of intervener to remove separable controversy see supra § 192.

[47] Houston, etc., R. Co. v. Shirley, 111 U. S. 358, 4 SCt 472, 28 L. ed. 455; Burnham v. Leoti First Nat. Bank, 53 Fed. 163, 3 CCA 486; Goodnow v. Dolliver, 26 Fed. 469; Ohlquist v. Farwell, 13 Fed. 305, 4 McCrary 401; Howard v. Stewart, 34 Nebr. 765, 52 NW 714. But see Beecher v. Gillett, 3 F. Cas. No. 1,225, 1 Dill. 308

[§ 227] **E. Joinder of Parties in Removal—1. Proceedings against Revenue or Prohibition Officers or Persons Acting under Such Officers, and against Officers of Court and of Either House of Congress.** It seems that a civil suit or criminal prosecution, removable under special statute,[62] against a revenue or prohibition officer, or a person acting under the authority of such officer,[63] against an officer of a court of the United States,[64] or against an officer of either house of congress,[65] may be removed by such defendant acting alone.

[§ 228] **2. Proceedings against Persons Denied Rights Secured by, or Having Defenses under, Civil Rights Laws.** It seems that civil suits or criminal prosecutions where any defendant is denied or cannot enforce his rights, secured by the civil rights laws, or where any defendant has a defense under the civil rights laws,[66] may be removed by such defendant acting alone.[67]

[§ 229] **3. Suit between Citizens of Same State Claiming Land under Grants of Different States.** Suits between citizens of the same state claiming land under grants of different states may be removed by any one or more of the plaintiffs or defendants.[68]

[§ 230] **4. Suit Arising under Constitution or Law or Treaties of United States.** Suits arising under the constitution or laws or treaties of the United States, subject to removal under the general statute providing for the removal of such suits,[69] cannot be removed as a suit so arising unless all defendants join in seeking removal,[70] except, perhaps, where certain parties defendant may be disregarded because they

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(where motion to remand was overruled).

[a] **Death of original party.**—A party who has been substituted for an original defendant because of the latter's death cannot remove if the original party would not have the right. Grand Trunk R. Co. v. Twitchell, 59 Fed. 727, 8 CCA 237; Goodnow v. Dolliver, 26 Fed. 469.

[b] **Receiver of national bank** cannot intervene or be substituted as a party and remove a suit instituted against the bank before his appointment, unless the bank might have removed the suit. Barons v. Plainville First Nat. Bank, 28 F. (2d) 615; Speckart v. German Nat. Bank, 98 Fed. 151, 38 CCA 682 [rev 85 Fed. 12]; Wichita Nat. Bank v. Smith, 72 Fed. 568, 19 CCA 42 [aff 18 SCt 946, 42 L. ed. 1214].

[48] Nash v. McNamara, 145 Fed. 541.

[49] Jefferson v. Driver, 117 U. S. 272, 6 SCt 729, 29 L. ed. 897; Farmers', etc., Nat. Bank v. Schuster, 86 Fed. 161, 29 CCA 649.

[a] **Illustration.**—Purchaser pendente lite brought in as defendant by proceeding ancillary to main suit. Jefferson v. Driver, 117 U. S. 272, 6 SCt 729, 29 L. ed. 897.

[50] Cable v. Ellis, 110 U. S. 389, 4 SCt 85, 28 L. ed. 186 [aff 11 Fed. 353, 11 Biss. 187]. See Richmond, etc., R. Co. v. Findley, 32 Fed. 641 (where remand of a suit to enjoin the prosecution of an action in the state court was directed).

[51] Olds Wagon Works v. Benedict, 67 Fed. 1, 14 CCA 285.

[52] Speckart v. German Nat. Bank, 98 Fed. 151, 38 CCA 682; Jeffery v. Osborne, 145 Wis. 351, 129 NW 931.

[a] **Rule applied** (1) where a receiver of a national bank, appointed pending suit against the bank, intervened (Speckart v. German Nat. Bank, 98 Fed. 151, 38 CCA 682), (2) and where the receiver of a railroad company, appointed by a federal court, intervened (Jeffery v. Osborne, 145 Wis. 351, 129 NW 931).

[53] Baltimore, etc., Tel. Co. v. Morgan's Louisiana, etc., R., etc., Co., 37 La. Ann. 883.

[54] Deepwater R. Co. v. Western Pocahontas Coal, etc., Co., 152 Fed. 824; Chase v. Beech Creek R. Co., 144 Fed. 571; American Nat. Bank v. National Ben., etc., Co., 70 Fed. 420; Hack v. Chicago, etc., R. Co., 23 Fed. 356; Greene v. Klingler, 10 F. Cas. No. 5,767; Howard v. Stewart, 34 Nebr. 765, 52 NW 714. See Boatner v. American Express Co., 122 Fed. 714 (see, however, supra § 142 as to intervening officer's representing a joint stock company where removal for diversity involved).

[a] **Rule applied:** (1) Where in a suit against a railroad company to compel the granting of switch connections the lessee of the railroad intervened as defendant. Chase v. Beech Creek R. Co., 144 Fed. 571. (2) Where the receiver of a corporation who had title to the corporate property intervened in a suit against the corporation commenced after he was appointed. American Nat. Bank v. National Ben. etc., Co., 70 Fed. 420. (3) Where the party defendant whose place an intervener took might still remove the case if he had remained in the suit. Howard v. Stewart, 34 Nebr. 765, 52 NW 714.

[b] **In Porto Rico** an intervener who is the real party defendant may remove where the original defendant was made such merely to prevent removal. Alonso v. Oben, 13 Porto Rico Fed. 237.

[55] Jackson, etc., Co. v. Pearson, 60 Fed. 113.

[56] Act April 10, 1926 (14 U. S. St. at L. p 239 c 115 § 3).

[57] See Fish v. Kennamer, 37 F. (2d) 243 (where a suit had been removed).

[58] Hack v. Chicago, etc., R. Co., 23 Fed. 356.

[59] See supra § 212.

[60] State v. Barnes, 5 N. D. 350, 65 NW 688.

[61] Bertha Zinc, etc., Co. v. Carico, 61 Fed. 132.

[62] See supra §§ 90–101.

[63] USCA tit 28 § 76.

[64] USCA tit 28 § 76.

[65] USCA tit 28 § 76.

[66] **Removability in general** see supra § 111.

[67] USCA tit 28 § 74.

[68] USCA tit 28 § 73.

Removability in general see supra § 118.

[69] See supra §§ 46–89.

[70] Gableman v. Peoria, etc., R. Co., 179 U. S. 335, 21 SCt 171, 45 L. ed. 220 (recognizing rule); Chicago, etc., R. Co. v. Martin, 178 U. S. 245, 20 SCt 854, 44 L. ed. 1055; Buffalo Cons. Independent School Dist. v. Cross, 7 F. (2d) 491; Heffelfinger v. Choctaw, etc., R. Co., 140 Fed. 75; Scott v. Choctaw, etc., R. Co., 112 Fed. 180; Yarnell v. Felton, 104 Fed. 161; Chicago, etc., R. Co. v. Martin, 59 Kan. 437, 53 P 461; Texas, etc., R. Co. v. Young, (Tex. Civ. A.) 27 SW 145. See Whitcomb v. Smithson, 175 U. S. 635, 2 SCt 248, 44 L. ed. 303 (where the right to remove was denied).

[a] **Parties not nominal parties.**—Where a draft on a county treasurer, forwarded by a school district for collection, was paid by the county treasurer by check on a national bank which later suspended, the dis-

are merely nominal defendants.[71]

[§ 231] **5. Diversity of Citizenship or Allegiance—a. In General.** Aside from any question as to separable controversy[72] and removal for prejudice or local influence,[73] and subject to the rules as to disregarding parties under certain circumstances[74] and to rules hereinafter stated,[75] where the sole ground of the removal is that the only controversy in the suit is between citizens of different states, the preponderance of authority supports the proposition that all the parties named in plaintiff's pleading, who are on the opposite side of the controversy to him, must join in the application.[76]

[§ 232] **b. Suits in Which Aliens Are Parties in General.** Under the present removal act it seems that suits to which an alien is a party cannot be removed, unless all the parties on the opposite side of the controversy to that of plaintiff join in the application.[77]

[§ 233] **c. Party Not Served with Process and Not Brought into Court.**[78] Where one or more of several defendants sued on a joint cause of action which is removable,[79] have been served with process or otherwise brought into court, the defendant or defendants so served or brought in may remove even though the other defendant or defendants who were not served or brought in do not join,[80] and, according to some cases, after such other defendant or defendants have been served, he or they may elect whether the case shall remain in the federal court or shall be remanded.[81]

[§ 234] **d. Nominal or Formal, Improper, and Unknown Parties.**[82] It has been held or recognized that failure to join in the application to remove, on the part of nominal or formal,[83] or unnecessary and improper[84] parties, or on the part of defendants who are described in plaintiff's pleading as unknown,[85] is not of itself sufficient to prevent removal.

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trict could join the county treasurer, receiver of the suspended bank, and the collecting banks in one suit by reason of the common interest in the questions of law and fact, and such receiver could not remove the cause as arising under the laws of the United States on the theory that other defendants were mere nominal defendants and need not join in the petition to remove. Buffalo Cons. Independent School Dist. v. Cross, 7 F. (2d) 491.

71. See Buffalo Cons. Independent School Dist. v. Cross, 7 F. (2d) 491 (where court did not make such statement, but considered record and decided that certain defendants were not merely nominal parties).

72. See supra § 192.

73. See supra § 204.

74. See supra §§ 148–176.

75. See infra §§ 232–234.

76. U. S.—Chicago, etc., R. Co. v. Martin, 178 U. S. 245, 20 SCt 854, 44 L. ed. 1055; Fletcher v. Hamlet, 116 U. S. 408, 6 SCt 426, 29 L. ed. 679; Houston, etc., R. Co. v. Shirley, 111 U. S. 358, 4 SCt 472, 28 L. ed. 455; Highway Constr. Co. v. McClelland, 14 F. (2d) 406; McCaffrey v. Wilson, 10 F. (2d) 368; Consolidated Independent School Dist. v. Cross, 7 F. (2d) 491; Gjerde v. Thelander, 294 Fed. 292; Casey v. Baker, 212 Fed. 247; Richardson v. Southern Idaho Water Power Co., 209 Fed. 949; West Side R. Co. v. California Pac. R. Co., 202 Fed. 331; Bowles v. H. J. Heinz Co., 188 Fed. 937; McNaul v. West Indian Securities Corp., 178 Fed. 308; International, etc., R. Co. v. Hoyle, 149 Fed. 180, 79 CCA 128; Blackburn v. Blackburn, 142 Fed. 901; Miller v. Clifford, 133 Fed. 880, 67 CCA 52, 5 LRANS 49; Huntington v. Pinney, 126 Fed. 237; Yarnell v. Felton, 102 Fed. 369; Thompson v. Chicago, etc., R. Co., 60 Fed. 773; Arkansas Valley Smelting Co. v. Cowenhoven, 41 Fed. 450; Chicago, etc., R. Co. v. McComb, 5 F. Cas. No. 2,670, 17 Blatchf. 371 (recognizing rule). See Whitcomb v. Smithson, 175 U. S. 635, 2 SCt 248, 44 L. ed. 303 (where the right to remove was denied). But see Munford Rubber Tire Co. v. Consolidated Rubber Tire Co., 130 Fed. 496; Hunter v. Conrad, 85 Fed. 803; Boston Safe-Deposit, etc., Co. v. Mackay, 70 Fed. 801; Garner v. Providence Second Nat. Bank, 66 Fed. 369; Mutual L. Ins. Co. v. Champlin, 21 Fed. 85 (in all of which cases the right to remove was recognized). Compare Consolidated Textile Corp. v. Iserson, 294 Fed. 289 (where the court said that "one defendant cannot, by consenting to the jurisdiction, prevent another defendant from removing the case").

Ala.—Southern R. Co. v. Bailey, 220 Ala. 385, 125 S 403.

Ga.—Caro Realty Co. v. Blumenthal, 166 Ga. 51, 142 SE 539. Compare Carswell v. Schley, 59 Ga. 17 (where under the Removal Act of 1875 it apparently was recognized that all plaintiffs need not join in a petition for removal).

Mo.—Rodgers v. Gaines Bros. Co., 220 Mo. A. 876, 295 SW 492.

N. Y.—Alps Drug Co. v. Heilbron, 120 Misc. 114, 198 NYS 678.

S. C.—Powell v. Southern R. Co., 110 S. C. 70, 96 SE 292; Baber v. Southern R. Co., 76 S. C. 4, 56 SE 540, 11 AnnCas 960.

[a] **Under Judiciary Act of 1879** it was necessary that all defendants who were nonresidents of the state in which action was brought should join. Bliss v. Rawson, 43 Ga. 181, 19 AmR 164.

77. USCA tit 28 §§ 41, 71.

And see Compania Minera v. American Metal Co., 262 Fed. 183 (in a suit by an alien plaintiff against an alien defendant and a citizen defendant, the failure of the alien defendant to join in the citizen defendant's petition for removal would necessitate remanding the case to the state court, even if it were otherwise removable); Guarantee Co. of North American v. Lynchburg First Nat. Bank, 95 Va. 480, 28 SE 909 (where, however, the cause was not removable in any event).

[a] **In a case arising under Judiciary Act of 1789** (1) the view was expressed that where all defendants in a suit in which the judgment or decree must be joint, were aliens, one defendant who had entered an appearance could not remove the cause and thereby give the federal court jurisdiction on the merits (Ward v. Arredondo, 29 F. Cas. No. 17,148, 1 Paine 410), (2) but the application to remove need not have been made by all defendants at the same time, in view of the statutory provision requiring that the application to remove must be made at the time of entering appearance in the state court (Ward v. Arredondo, 29 F. Cas. No. 17,148, 1 Paine 410).

78. Failure to serve as ground for disregarding party whose presence prevents removal see supra § 175.

79. Removability of joint cause of action in general see supra §§ 167, 168.

80. Kelly v. Alabama Quenelda Graphite Co., 34 F. (2d) 790; Keenan v. Gladys Belle Oil Co., 11 F. (2d) 418; Community Bldg. Co. v. Maryland Casualty Co., 8 F. (2d) 678; Hunt v. Pearce, 284 Fed. 321 [aff 271 Fed. 498]; Bowles v. H. J. Heinz Co., 188 Fed. 937; Tremper v. Schwabacher, 84 Fed. 413; Fallis v. McArthur, 8 F. Cas. No. 4,627, 1 Bond 100. See Garner v. Providence Second Nat. Bank, 66 Fed. 369 (where there was service by publication and personal service outside the state and the right to remove was recognized).

[a] "**The reason for this rule** is that in such a case the defendant served is the sole defendant subject to the general jurisdiction of the state court. The defendant not served may never be served, or may be served after the time has expired for the defendant served to apply for a removal, and unless the latter can make an effective application alone his right to the removal might be lost." Hunt v. Pearce, 284 Fed. 321, 324.

[b] **Party not before court.**—In a suit in equity service of notice by registered mail on nonresident citizens and residents of the state other than that in which suit brought, having no property within such state, did not warrant delaying proceedings for removal. Kelly v. Alabama-Quenelda Graphite Co., 34 F. (2d) 790.

81. See supra § 120.

82. Disregarding formal, unnecessary or improper parties in general see supra §§ 148–176.

83. Shattuck v. North British, etc., Ins. Co., 58 Fed. 609, 7 CCA 386; Henderson v. Cabell, 43 Fed. 257.

[a] **Joinder of husband** was not necessary where he was made a party to the suit merely because he was the husband of the party who sought to remove. First Nat. Bank v. Bridgeport Trust Co., 117 Fed. 969.

84. Cooke v. Seligman, 7 Fed. 263, 17 Blatchf. 452. See West Side R. Co. v. California Pac. R. Co., 202 Fed. 331 (apparently recognizing rule).

85. Walker v. Richards, 55 Fed. 129.

XIII. PROCEDURE FOR REMOVAL

[By Eustace W. Tomlinson]

[§ 235] **A. In General.** Inasmuch as the right to remove a cause from a state court to a federal court is purely statutory,[86] in order to effect a transfer of jurisdiction all the requirements of the statute prescribing the procedure therefor must be complied with;[87] and the necessity of such compliance cannot be obviated by stipulation or consent of the parties.[88] Where no objection to the proceedings is made by a party, however, the federal court will not of its own motion inquire as to the regularity of the means by which the removal was effectuated.[89]

Second application.[90] Where an application for removal has been made and denied, no second application can be made on the same ground.[91] Where an application for removal is made while a former application is pending and not yet acted upon, a removal may be had, if at all, only upon the second application.[92]

[§ 236] **B. Causes Removable on Application to State Court—1. Mode of Making Application—a. Suits Arising under Federal Constitution, Laws, or Treaties, or Involving Diversity of Citizenship—(1) In General.** It is provided by statute that a party entitled to remove a cause from a state court to a federal court on the ground that it arises under the federal constitution, laws, or treaties, or because of diversity of citizenship, but not on account of prejudice or local influence,[93] may do so by filing in the suit in the state court a petition and bond for removal, giving written notice thereof before filing the same.[94] The method of removal so prescribed is exclusive,[95] and a removal on such ground cannot be granted on a petition to the federal court to which the cause is sought to be removed.[96]

[§ 237] **(2) Petition—(a) In General.** The petition, required by statute,[97] for the removal from a state court to a federal court of a suit arising under the constitution, laws, or treaties of the United States, or in which there is diversity of citizenship, is indispensable to proceedings to effect a removal of such a suit,[98] and a mere motion to remove is not sufficient.[99] Moreover, a petition showing a right of removal on one ground will not justify removal on another.[1] The petition cannot usurp the function of a demurrer,[2] and does not have the effect thereof, as searching the record.[3]

Form and sufficiency. The petition for removal, being in essence a written application addressed to the state court for the removal of the cause to the federal court,[4] should state facts which justify a removal and give jurisdiction to the federal court to which the removal is sought,[5] at least in so far as such facts do not already appear in the record,[6] and should specify the ground relied upon for removal;[7] but it need not show that the time for removal has not expired.[8] The facts should be stated specifically and positively,[9] and not left to inference,[10] nor should they be stated merely upon information and belief[11] or by way of conclusion;[12] but no precise or technical form is required.[13] A general allegation in the language of the statute is insufficient.[14] The petition must aver that the suit was duly commenced in the state court,[15] and should state specifically that a controversy exists between the parties,[16] but it need not allege that the petitioning party has a just cause or defense.[17] It seems that the petition should allege that proper notice of its filing has been given,[18] but the omission of such allegation does not invalidate the petition.[19] A petition by a foreign corporation need not allege that it has a permit to do business in the state.[20] The petition may assail, as false and fraudulent, allegations of plaintiff's bill or complaint which prima facie would prevent removal;[21] but allegations which amount merely to a traverse of the facts alleged in plaintiff's pleadings are not sufficient.[22]

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[86] See supra § 2.

[87] Babbitt v. Clark, 103 U. S. 606, 26 L. ed. 507; In re Vadner, 259 Fed. 614; Thomas v. Delta Land, etc., Co., 258 Fed. 758; Miller v. Soule, 221 Fed. 493; Johnson v. Butte Alex Scott Copper Co., 213 Fed. 910; U. S. v. Sessions, 205 Fed. 502, 123 CCA 570; Graves v. Colquitt County, 34 Ga. A. 271, 129 SE 166.

[88] Parkersburg First Nat. Bank v. Prager, 91 Fed. 689, 34 CCA 51; Kingsbury v. Kingsbury, 14 F. Cas. No. 7,817, 3 Biss. 60.

Consent of parties as creating right of removal see supra § 2.

[89] Mackay v. Uinta Development Co., 229 U. S. 173, 33 SCt 638, 57 L. ed. 1138.

[90] **Second removal** see supra § 8.

[91] Powell v. Watkins, 172 N. C. 244, 90 SE 207.

[92] St. Louis, etc., R. Co. v. West Bros., (Tex. Civ. A.) 159 SW 142.

[93] **Removal on account of prejudice or local influence** see infra §§ 256–260.

[94] USCA tit 28 § 72.

[95] Thomas v. Delta Land, etc., Co., 258 Fed. 758.

Procedure for removal as dependent on statutes in general see supra § 235.

[96] Higson v. North River Ins. Co., 184 Fed. 165; Higson v. North River Ins. Co., 153 N. C. 35, 68 SE 920.

[97] USCA tit 28 § 72.

[98] Herbert v. Roxana Petroleum Corp., 12 F. (2d) 81; Key v. West Kentucky Coal Co., 237 Fed. 258. See Ohio v. Swift, 260 U. S. 146, 43 SCt 22, 67 L. ed. 176 [dism app 270 Fed. 141] (to same effect).

Necessity of compliance with statutory requirements as to procedure in general see supra § 235.

[99] Nelson v. Black Diamond Mining Co., 237 Fed. 264; Key v. West Kentucky Coal Co., 237 Fed. 258.

[1] Wallenburg v. Missouri Pac. R. Co., 159 Fed. 217; Peo. v. St. Louis, 297 Ill. 199, 130 NE 366.

[2] Reese v. Southern R. Co., 26 F. (2d) 367.

[3] Erskine Motors Co. v. Chevrolet Motor Co., 180 N. C. 619, 105 SE 420.

[4] Lee v. Continental Ins. Co., 292 Fed. 408.

[5] U. S.—Grace v. American Cent. Ins. Co., 109 U. S. 278, 3 SCt 207, 27 L. ed. 932; Pittsburgh, etc., R. Co. v. Ramsey, 22 Wall. 322, 22 L. ed. 823; New York v. Walsh, 40 F. (2d) 58; State Bank v. Chicago, etc., R. Co., 281 Fed. 345; Nickels v. Pullman Co., 268 Fed. 610; Gruetter v. Cumberland Tel., etc., Co., 181 Fed. 248; Donovan v. Wells, 169 Fed. 363, 94 CCA 609, 22 LRANS 1250; People's U. S. Bank v. Goodwin, 160 Fed. 727; Offner v. Chicago, etc., R. Co., 148 Fed. 201, 78 CCA 359; Fife v. Whittell, 102 Fed. 537.

Ky.—Roach v. Ohio Nat. L. Ins. Co., 201 Ky. 713, 258 SW 300.

Mo.—McNulty v. Atlas Portland Cement Co., (A.) 249 SW 730.

N. C.—Townsend v. Holderby, 195 N. C. 854, 141 SE 749; Cogdill v. Clayton, 170 N. C. 526, 87 SE 338.

Tex.—Missouri, etc., R. Co. v. Hollan, 49 Tex. Civ. A. 55, 107 SW 642 [writ of error dism 216 U. S. 615 mem, 30 SCt 576 mem, 54 L. ed. 639 mem].

Utah.—Neesley v. Southern Pac. Co., 35 Utah 259, 99 P 1067.

Curing omission of jurisdictional facts see infra text and notes 23–32.

[6] Gruetter v. Cumberland Tel., etc., Co., 181 Fed. 248; Miller v. Buyer, 82 Colo. 474, 261 P 659. Compare Goddard v. Bosson, 21 Kan. 139 (where it was said that where the removability of the suit does not appear on the face of the pleadings the petition for removal should show the facts, but that where the pleadings disclose the removability of the suit a petition merely requesting a removal may be sufficient, the statute not requiring the petition to contain a full showing of the facts entitling the petitioner to a removal).

[7] Neesley v. Southern Pac. Co., 35 Utah 259, 99 P 1067.

[8] Ritchey Lith. Corp. v. Robertson-Cole Distributing Corp., 199 App. Div. 362, 191 NYS 870. But see Mannion v. U. S. Shipping Bd. Emergency Fleet Corp., 9 F. (2d) 894 (contrary dictum).

Time for removal see supra §§ 205–211.

[9] Grace v. American Cent. Ins. Co., 109 U. S. 278, 3 SCt 207, 27 L. ed. 932; Little York Gold Washing, etc., Co. v. Keyes, 96 U. S. 199, 24 L. ed. 656; Gruetter v. Cumberland Tel., etc., Co., 181 Fed. 248; Jennes v. Landes, 84 Fed. 73. Compare Missouri, etc., R. Co. v. Chappell, 206 Fed. 688 (holding that an allegation in the petition that plaintiff, "as appears from her petition," was a citizen of a designated state is sufficiently positive, and the parenthetical reference does not destroy the effect of the allegation).

[10] Rife v. Lumber Underwriters, 204 Fed. 32, 122 CCA 346 [rev on other grounds 237 U. S. 605 mem, 35 SCt 717 mem, 59 L. ed. 1140 mem]; Dodd v. Louisville Bridge Co., 130 Fed. 186; Carswell v. Schley, 59 Ga. 17.

Defects and omissions. A petition for the removal of a cause which in substance shows good ground for removal is not to be denied merely because it imperfectly alleges a jurisdictional fact,[23] and a petition which alleges facts from which the removability of the cause appears is not fatally defective merely because it is based upon an erroneous ground,[24] or the prayer refers to a wrong statute,[25] or asks removal to a division of the federal district which does not exist, but correctly designates the city where the court in one of the divisions is held,[26] or omits proper punctuation, where the meaning is nevertheless clear.[27] Similarly, a petition showing the existence of a separable controversy which renders the cause removable is not bad because it prays only for removal as to the petitioners instead of for the removal of the whole cause.[28] An omission from the petition of a jurisdictional fact will be cured, if such fact appears in an accompanying affidavit,[29] or on the face of the record of the state court;[30] but where a cause is remanded to the state court on account of a defect in the petition for removal, an allegation in an amended bill or complaint, subsequently filed, does not cure such defect.[31] A petition for removal by fewer than the whole number of defendants is fatally defective, in the absence of any showing of a separable controversy or that the other defendants are merely formal or nominal parties.[32]

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[11] Wolff v. Archibald, 14 Fed. 369, 4 McCrary 581; New York, etc., Land Co. v. Martin, (Tex. Civ. A.) 25 SW 475. But see Carlisle v. Sunset Tel., etc., Co., 116 Fed. 896 (holding that allegations stated to be made on information and belief are not for that reason insufficient where by their nature they would necessarily be founded on information and belief rather than on personal knowledge, whether expressly so stated or not).

[12] Jennes v. Landes, 84 Fed. 73; Aldrich v. Crouch, 10 Fed. 305, 11 Biss. 180; Cogdill v. Clayton, 170 N. C. 526, 87 SE 338. But see Remington v. Central Pac. R. Co., 198 U. S. 95, 25 SCt 577, 49 L. ed. 959 (holding that the fact that the time for removal has not expired may ordinarily be stated as a conclusion, in order to avoid undue prolixity in a matter not likely to be controverted).

[13] Gruetter v. Cumberland Tel., etc., Co., 181 Fed. 248.

[14] Cameron v. Hodges, 127 U. S. 322, 8 SCt 1154, 32 L. ed. 132; Carson v. Dunham, 121 U. S. 421, 7 SCt 1030, 30 L. ed. 992; Grace v. American Cent. Ins. Co., 109 U. S. 278, 3 SCt 207, 27 L. ed. 932; Little York Gold-Washing, etc., Co. v. Keyes, 96 U. S. 199, 24 L. ed. 656; Jones v. Adams Express Co., 129 Fed. 618; Smith v. Horton, 7 Fed. 270; Lalor v. Dunning, 56 HowPr (N. Y.) 209; Pacific Express Co. v. Needham, (Tex. Civ. A.) 94 SW 1070.

[15] Wilson v. Giberson, 124 Fed. 701.

[16] Wilcoxen v. Chicago, etc., R. Co., 116 Fed. 444. See Egan v. Chicago, etc., R. Co., 53 Fed. 675 (holding that an averment in the petition that the matter and amount in dispute exceeded two thousand dollars is sufficient to show that a controversy exists).

[17] Chase v. Erhardt, 198 Fed. 305.

[18] See Booki v. Pullman Co., 220 Mass. 71, 107 NE 418 (holding that a failure so to allege is a matter of defense to be asserted or waived by plaintiff).

Notice of petition and bond see infra § 249.

[19] Ritchey Lith. Corp. v. Robertson-Cole Distributing Corp., 199 App. Div. 362, 191 NYS 870.

[20] Kruegel v. Standard Sav., etc., Assoc., (Tex. Civ. A.) 196 SW 283.

[21] Scoggins v. Union Pac. R. Co., 292 Fed. 162.

[22] Southern R. Co. v. Lloyd, 239 U. S. 496, 36 SCt 210, 60 L. ed. 402 [aff 166 N. C. 24, 81 SE 1003]; Sanders v. Atlantic Coast Line R. Co., 33 F. (2d) 1010; Farmers' Bank, etc., Co. v. Atchison, etc., R. Co., 25 F. (2d) 23 [rev 11 F. (2d) 993]; Kraus v. Chicago, etc., R. Co., 16 F. (2d) 79 [rev 3 F. (2d) 277]; Thresher v. Western Union Tel. Co., 148 Fed. 649; West Kentucky Coal Co. v. Key, 178 Ky. 220, 198 SW 724; Frizzell v. Southern Mica Co., 198 N. C. 128, 150 SE 715; Hart v. Savona Mfg. Co., 198 N. C. 1, 150 SE 632; Crisp v. Champion Fibre Co., 193 N. C. 77, 136 SE 238; Patton v. Champion Fibre Co., 192 N. C. 48, 133 SE 174; Johnson v. Blackwood Lumber Co., 189 N. C. 81, 126 SE 165; Cogdill v. Clayton, 170 N. C. 526, 87 SE 338; Towill v. Southern R. Co., 121 S. C. 447, 114 SE 416.

[23] La Belle Box Co. v. Stricklin, 218 Fed. 529, 134 CCA 257.

[24] Canal, etc., Sts. R. Co. v. Hart, 114 U. S. 654, 5 SCt 1127, 29 L. ed. 226; Meyer v. Delaware R. Constr. Co., 100 U. S. 457, 25 L. ed. 593; Northern Pac. Terminal Co. v. Lowenberg, 18 Fed. 339, 9 Sawy. 348; Norris v. Mineral Point Tunnel, 7 Fed. 272, 19 Blatchf. 201; Merchants' Nat. Bank v. Thompson, 4 Fed. 876. See Bryant Bros. Co. v. Robinson, 149 Fed. 321, 79 CCA 259 (holding that, where no petition or bond was filed in the state court, but the formal papers for a removal of a suit against a revenue officer were filed in the federal court, and the state court entered an order for a removal, there should be no remand where plaintiff's pleading showed that the cause arose under the constitution and laws of the United States, although it was doubtful whether a removal could be sustained upon the former ground). But see Woolridge v. McKenna, 8 Fed. 650 (holding that a petition alleging a right to removal on the ground of diversity of citizenship is not sufficient to give jurisdiction to the federal court to retain the cause when the transcript shows that the suit was removable only because arising under the constitution and laws of the United States, since the allegata and probata must correspond).

[25] Canal, etc., Sts. R. Co. v. Hart, 114 U. S. 654, 5 SCt 1127, 29 L. ed. 226; Meyer v. Delaware R. Constr. Co., 100 U. S. 457, 25 L. ed. 593; Norris v. Mineral Point Tunnel, 7 Fed. 272, 19 Blatchf. 201; Stanley v. Chicago, etc., R. Co., 62 Mo. 508; Dart v. Walker, 4 Daly (N. Y.) 188.

[26] Hodge v. Chicago, etc., R. Co., 121 Fed. 48, 57 CCA 388.

[27] Gruetter v. Cumberland Tel., etc., Co., 181 Fed. 248.

[28] Northern Pac. Terminal Co. v. Lowenberg, 18 Fed. 339, 9 Sawy. 348.

Removal where separable controversy exists see supra § 180.

[29] Yulee v. Vose, 99 U. S. 539, 25 L. ed. 355; Bixby v. Blair, 56 Iowa 416, 9 NW 318.

[30] U. S.—Remington v. Central Pac. R. Co., 198 U. S. 95, 25 SCt 577, 49 L. ed. 959; Powers v. Chesapeake, etc., R. Co., 169 U. S. 92, 18 SCt 264, 42 L. ed. 673; Jumeau v. Brooks, 109 Fed. 353, 48 CCA 397; Shattuck v. North British, etc., Ins. Co., 58 Fed. 609, 7 CCA 386; Chambers v. McDougal, 42 Fed. 694. See Hoge v. Canton Ins. Office, 103 Fed. 513 (holding that, where the record contains a reference to a person with the same name as plaintiff, it will be presumed that plaintiff is thereby intended, although there is no statement in the record to that effect). Compare Sherman v. Windsor Mfg. Co., 11 Fed. 852, 19 Blatchf. 314 (holding that the mere description of defendant, in the original bill, as a citizen of a designated foreign state is not sufficient to show diversity of citizenship where the petition for removal is silent on the point).

Colo.—Stratton's Independence v. Sterrett, 51 Colo. 17, 117 P 351.

Fla.—Hayes v. Todd, 34 Fla. 233, 15 S 752.

Miss.—Goodsell v. Delta, etc., Pine Land Co., 72 Miss. 580, 18 S 452.

W. Va.—Baltimore, etc., R. Co. v. Pittsburg, etc., R. Co., 17 W. Va. 812.

Filing transcript of record see infra §§ 270–274.

[31] Jones v. Mosher, 107 Fed. 561, 46 CCA 471.

[32] Santa Clara County v. Goldy Mach. Co., 159 Fed. 750.

Execution. A petition for removal may be signed either by the petitioner or by his attorney in fact or in law;[33] and where the petitioner is a corporation, execution of the petition in its behalf by one upon whom original process in the cause was served as the duly authorized agent of the corporation is sufficient.[34]

Verification. Under the express requirements of the statute,[35] the petition for removal must be verified;[36] and a petition which is not verified is properly denied.[37] The necessity for verification applies, of course, only to statements of fact.[38] An affidavit that the allegations of the petition are true to affiant's own knowledge, except such as are therein stated on information and belief, and as to such matters that he believes them to be true, is a sufficient verification,[39] even though neither the petition nor the verification shows which matters are stated on personal knowledge and which, if any, are upon information and belief;[40] and a verification stating merely that the affiant "verily believes" the matters stated in the petition to be true has been held sufficient.[41] Verification by the attorney for the petitioner is ordinarily sufficient,[42] especially where the petitioner is a corporation.[43] A defective verification may be ordinarily corrected by filing an amended affidavit.[44]

Mode of attacking petition.[45] Objection to a defective or insufficient petition for removal may be made orally, and need not be in writing.[46] A petition which is insufficient on account of the failure to allege an essential fact may be attacked by demurrer;[47] but it is equally proper for the party resisting removal merely to submit the application on the defective petition.[48] The want of a proper verification cannot, however, be raised by a general demurrer.[49]

Waiver of objection. Merely formal and modal defects in a petition for removal are waived by failing to object thereto.[50] Thus the omission to sign the petition is waived unless objection on the ground thereof is made in the state court.[51]

Conditional petition. A petition requesting a removal of the cause upon a particular contingency, as in case a pending motion shall be denied or a plea in abatement not sustained, is bad.[52]

Second removal. When a cause has been removed and remanded, the original petition for removal is functus officio and so cannot be used as the basis of a second removal when plaintiff's pleadings are so amended that a right to remove the cause appears,[53] but a new petition, addressed to the amended pleading, is necessary.[54]

[§ 238] **(b) Allegations as to Particular Matters—aa. Difference of Citizenship—(aa) In General.** When the removal of a cause from a state court to a federal court is sought by a nonresident defendant on account of difference of citizenship,[55] the petition for removal must show both that such nonresidence and difference of citizenship existed at the commencement of the suit,[56] and that they still exist at the time when the petition is filed,[57] unless such facts appear in the pleadings or elsewhere on the record of the state court;[58] but nonresidence and citizenship may ordinarily be stated as conclusions, without setting forth the facts upon which they depend.[59] It has been held sufficient to allege merely that defendant is, and at the commencement of the suit was, an alien or a citizen of another state than that in which the suit was brought, without also alleging that he is a nonresident of the latter state;[60] but there is authority to the contrary.[61] A showing that the citizenship was diverse at a time prior to the commencement of the suit is not sufficient, although it is also shown to be diverse at the time of filing the petition;[62] but a petition for removal filed by an intervener simultaneously with his petition of intervention is sufficient when it alleges a difference of citizenship in the present tense.[63] The citizenship of each defendant should be separately alleged.[64] It is not sufficient to allege that a copartnership[65] or the board of trustees of a state institution[66] is a citizen of a designated state, without naming the members individually, or that a party suing or sued in a representative capacity is in such capacity a citizen of a specified state.[67]

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[33] Cooke v. Seligman, 7 Fed. 263, 17 Blatchf. 452; Dennis v. Alachua County, 7 F. Cas. No. 3,791, 3 Woods 683; Wormser v. Dahlman, 30 F. Cas. No. 18,048, 16 Blatchf. 319, 57 HowPr (N. Y.) 286; Guinault v. Louisville, etc., R. Co., 42 La. Ann. 52, 7 S 62; Fisk v. Fisk, 4 Mart. N. S. (La.) 676; Shaft v. Phœnix Mut. L. Ins. Co., 67 N. Y. 544, 23 AmR 138; Vandevoort v. Palmer, 11 N. Y. Super. 677.

[34] Fayette Title, etc., Co. v. Maryland, etc., Tel., etc., Co., 180 Fed. 928.

[35] USCA tit 28 § 72.

[36] Wilson v. Republic Iron, etc., Co., 257 U. S. 92, 42 SCt 35, 66 L. ed. 144; Sanders v. Atlantic Coast Line R. Co., 33 F. (2d) 1010; Lynes v. Standard Oil Co., 300 Fed. 812; Pearson v. Zacher, 177 Minn. 182, 225 NW 9; Johnson v. Blackwood Lumber Co., 189 N. C. 81, 126 SE 165; Towill v. Southern R. Co., 121 S. C. 447, 114 SE 416.

[a] **Under former statute** (Judiciciary Act March 3, 1875 c 137 § 2, as amended by Act Aug. 13, 1888, c 866 § 1) (1) not expressly requiring the petition to be verified, such verification was usually held not to be essential (Hunter v. Illinois Cent. R. Co., 188 Fed. 645, 110 CCA 459; Donovan v. Wells, 169 Fed. 363, 94 CCA 609, 22 LRANS 1250; Porter v. Northern Pac. R. Co., 161 Fed. 773; Harley v. Home Ins. Co., 125 Fed. 792; Connor v. Scott, 6 F. Cas. No. 3,119, 4 Dill. 242; Houser v. Clayton, 12 F. Cas. No. 6,739, 3 Woods 273; Osgood v. Chicago, etc., R. Co., 18 F. Cas. No. 10,604, 6 Biss. 330; Sweeney v. Coffin, 23 F. Cas. No. 13,686, 1 Dill. 73; Western Coal, etc., Co. v. Osborne, 30 Okl. 235, 119 P 973; Southern Pac. R. Co. v. Harrison, 73 Tex. 103, 11 SW 168; Bilby v. Hancock, 58 Tex. Civ. A. 365, 125 SW 370. But see Goddard v. Bosson, 21 Kan. 139 [holding that no ground for removal was shown where the removability of the suit did not appear on the face of the record and the petition was not verified]. Compare Union Pac. R. Co. v. Myers, 115 U. S. 1, 5 SCt 1113, 29 L. ed. 319; Canal, etc., St. R. Co. v. Hart, 114 U. S. 654, 5 SCt 1127, 29 L. ed. 226 [both holding that the want of verification is waived by failing to object to the petition on that ground]), (2) and so defects in an affidavit of verification, where one was attached to the petition, were immaterial (Western Coal, etc., Co. v. Osborne, supra; Bilby v. Hancock, 58 Tex. Civ. A. 365, 125 SW 370). (3) The better practice, however, required that the petition be verified (Kansas City, etc., R. Co. v. Daughtry, 138 U. S. 298, 11 SCt 306, 34 L. ed. 963; Porter v. Northern Pac. R. Co., 161 Fed. 773; Offner v. Chicago, etc., R. Co., 148 Fed. 201, 78 CCA 359; Houser v. Clayton, 12 F. Cas. No. 6,739, 3 Woods 273; Western Coal, etc., Co. v. Osborne, 30 Okl. 235, 119 P 973); (4) and where the petition alleged fraudulent misjoinder of defendants to prevent removal, verification was held to be required by the nature of the case (Rea v. Standard Mirror Co., 158 N. C. 24, 73 SE 116).

[37] Gregory v. Suburban Realty Co., 292 Ill. 568, 127 NE 119.

[38] Duvall v. Wabash R. Co., 9 F. (2d) 83; Murray v. Southern Bell Tel., etc., Co., 210 Fed. 925.

[39] S. B. McMaster, Inc. v. Chevrolet Motor Co., 3 F. (2d) 469; Murray v. Southern Bell Tel., etc., Co., 210 Fed. 925.

[40] S. B. McMaster, Inc. v. Chevrolet Motor Co., 3 F. (2d) 469.

[41] Duvall v. Wabash R. Co., 9 F. (2d) 83.

[42] Duvall v. Wabash R. Co., supra; S. B. McMaster, Inc. v. Chevrolet Motor Co., 3 F. (2d) 469; Porter v. Coble, 246 Fed. 244, 158 CCA 404; Berry v. Mobile, etc., R. Co., 228 Fed. 395; Porter v. Northern Pac. R. Co., 161 Fed. 773.

[43] Porter v. Northern Pac. R. Co., supra.

[44] Zumbrunn v. Schwartz, 17 F. (2d) 609; S. B. McMaster, Inc. v. Chevrolet Motor Co., 3 F. (2d) 469; Berry v. Mobile, etc., R. Co., 228 Fed. 395; Murray v. Southern Bell Tel., etc., Co., 210 Fed. 925.

Amendment of removal petition see infra § 244.

[45] **By motion to remand or by plea or answer in support of such motion** see infra §§ 324-336.

[46] Graves v. Colquitt County, 34 Ga. A. 271, 129 SE 166.

[47] Roach v. Ohio Nat. L. Ins. Co., 201 Ky. 713, 258 SW 300.

[48] Roach v. Ohio Nat. L. Ins. Co., supra.

[49] Herron v. Bates, etc., Constr. Co., 180 Ky. 851, 203 SW 719.

[50] White v. Chase, 201 Fed. 896, 120 CCA 194; Herron v. Bates, etc., Constr. Co., 180 Ky. 851, 203 SW 719.

[51] Meyer v. Delaware R. Constr. Co., 100 U. S. 457, 25 L. ed. 593; Cooke v. Seligman, 7 Fed. 263, 17 Blatchf. 452.

[52] Manning v. Amy, 140 U. S. 137, 11 SCt 707, 35 L. ed. 386.

[53] Jones v. Mosher, 107 Fed. 561, 46 CCA 471.

Right to second removal after remand see supra § 8.

[54] Jones v. Mosher, 107 Fed. 561, 46 CCA 471.

[55] **Removal for difference of citizenship in general** see supra §§ 120-179.

[56] U. S.—Mattingly v. Northwestern Virginia R. Co., 158 U. S. 53, 15 SCt 725, 39 L. ed. 894; Kellam v. Keith, 144 U. S. 568, 12 SCt 922, 36 L. ed. 544; La Confiance Compagnie D'Assurance Contre L'Incendie v. Hall, 137 U. S. 61, 11 SCt 5, 34 L. ed. 573; Jackson v. Allen, 132 U. S. 27, 10 SCt 9, 33 L. ed. 249; Stevens v. Nichols, 130 U. S. 230, 9 SCt 518, 32 L. ed. 914; Smith v. Akers, 117 U. S.

Mere description of a party as a citizen of a designated state, without alleging that he is such citizen, is not sufficient;[68] nor is a designation or description of him as "of" a specified state or place,[69] since such description at the most amounts to no more than a statement of his residence.[70]

Allegation of residence. An allegation, in a petition for removal, of a party's residence in a designated state, without an allegation of his citizenship,[71] or an allegation that he "lives" or "lived" in a specified city and state,[72] is insufficient unless it is also alleged that he is a citizen of the United States, in which case it will be presumed that he is also a citizen of the state of his residence, in view of the Fourteenth Amendment to the federal constitution.[73] An allegation that the state of which a party is a resident is unknown is insufficient to show that his citizenship is different from that of another party.[74]

Alienage. The alienage of a party is not sufficiently shown by an allegation merely that he is an alien,[75] but the petition should show that he is a citizen or subject of a specified foreign state or ruler.[76]

97, 6 SCt 669, 29 L. ed. 888; Mansfield, etc., R. Co. v. Swan, 111 U. S. 379, 4 SCt 510, 28 L. ed. 462; Houston, etc., R. Co. v. Shirley, 111 U. S. 358, 4 SCt 472, 28 L. ed. 455; Gibson v. Bruce, 108 U. S. 561, 2 SCt 878, 27 L. ed. 825; Phœnix Ins. Co. v. Pechner, 95 U. S. 183, 24 L. ed. 427; La Belle Box Co. v. Stricklin, 218 Fed. 529, 134 CCA 257; Dalton v. Germania Ins. Co., 118 Fed. 936; Foster v. Paragould, etc., R. Co., 74 Fed. 273; Grand Trunk R. Co. v. Twitchell, 59 Fed. 727, 8 CCA 237; Laskey v. Newton Min. Co., 56 Fed. 628; Craswell v. Belanger, 56 Fed. 529, 6 CCA 1; Camprelle v. Balbach, 46 Fed. 81; Seddon v. Virginia, etc., Steel, etc., Co., 36 Fed. 6, 1 LRA 108; Hone v. Dillon, 29 Fed. 465; Endy v. Commercial F. Ins. Co., 24 Fed. 657; Carrick v. Landman, 20 Fed. 209; MacNaughton v. South Pac. R. Co., 19 Fed. 881; Ferry v. Merrimack, 18 Fed. 657; Brinkerhoff v. Morris Canal, etc., Co., 18 Fed. 97; Kaeiser v. Illinois Cent. R. Co., 6 Fed. 1, 2 McCrary 187; Beede v. Cheeney, 5 Fed. 388; Rawle v. Phelps, 20 F. Cas. No. 11,588, 2 Flipp. 471.

Ill.—Peo. v. Chicago Super. Ct., **34** Ill. 356.

Ky.—Chesapeake, etc., R. Co. v. Banks, 142 Ky. 746, 135 SW 285.

N. H.—Laird v. Connecticut, etc., R. Co., 55 N. H. 375, 20 AmR 215.

N. Y.—Tugman v. National Steamship Co., 76 N. Y. 207 [aff 13 Hun 332]; Holden v. Putnam F. Ins. Co., 46 N. Y. 1, 7 AmR 287; Pechner v. Phœnix Ins. Co., 6 Lans. 411 [aff 65 N. Y. 195].

N. C.—Herndon v. Ætna Ins. Co., 107 N. C. 194, 12 SE 240, 10 LRA 53.

Necessity that difference of citizenship exist at time suit commenced as well as at time of removal see supra § 177.

57. Gibson v. Bruce, 108 U. S. 561, 2 SCt 873, 27 L. ed. 825 [aff 9 Fed. 540]; Foster v. Paragould South Eastern R. Co., 74 Fed. 273; Grand Trunk R. Co. v. Twitchell, 59 Fed. 727, 8 CCA 237; Freeman v. Butler, 39 Fed. 1; Correa v. Kramer, 13 Porto Rico Fed. 350. But see Houser v. Clayton, 12 F. Cas. No. 6,739, 3 Woods 273 (holding that a difference of citizenship at the time of filing the petition need not be alleged therein).

58. National SS. Co. v. Tugman, 106 U. S. 118, 1 SCt 58, 27 L. ed. 87; Bondurant v. Wilson, 103 U. S. 281, 26 L. ed. 447; Ohio v. Swift, 270 Fed. 141 [certiorari den 257 U. S. 633 mem, 42 SCt 47 mem, 66 L. ed. 407 mem, app dism 260 U. S. 146, 43 SCt 22, 67 L. ed. 176]; Vestal v. Ducktown Sulphur, etc., Co., 210 Fed. 375; Wells v. Russellville Anthracite Coal Min. Co., 206 Fed. 528.

Record in state court as curing omissions in petition for removal in general see supra § 237.

59. Hercules Powder Co. v. Nix, 144 Miss. 113, 109 S 862.

Allegations of alienage see infra text and notes 75–78.

60. Queensboro Nat. Bank v. Kelly, 15 F. (2d) 395; Miller v. Soule, 221 Fed. 493; Lawrence v. Southern Pac. Co., 165 Fed. 241; Zebert v. Hunt, 108 Fed. 449; Guarantee Co. of North America v. Lynchburg First Nat. Bank, 95 Va. 480, 28 SE 909.

61. Mayer v. Karaghuesian, 169 Fed. 736; De la Montanya v. De la Montanya, 158 Fed. 117; Fife v. Whittell, 102 Fed. 537; Heath v. Santa Lucia Co., 196 App. Div. 446, 188 NYS 218; Guarantee Co. of North America v. Lynchburg First Nat. Bank, 95 Va. 480, 28 SE 909.

Necessity that defendant be nonresident of state see supra § 225.

62. Craswell v. Belanger, 56 Fed. 529, 6 CCA 1.

63. Burdick v. Peterson, 6 Fed. 840, 2 McCrary 135.

64. Thomas v. Ohio State Univ., 195 U. S. 207, 25 SCt 24, 49 L. ed. 160; Grace v. American Cent. Ins. Co., 109 U. S. 278, 3 SCt 207, 27 L. ed. 932; Laden v. Meck, 130 Fed. 877, 65 CCA 361.

65. Fred Macey Co. v. Macey, 135 Fed. 725, 68 CCA 363; Van Horn v. Kittitas County, 112 Fed. 1; Adams v. May, 27 Fed. 907.

66. Thomas v. Ohio State University, 195 U. S. 207, 25 SCt 24, 49 L. ed. 160.

[a] **Even though state constitution prohibits any but citizens of state from holding office,** such allegation is not sufficient. Thomas v. Ohio State Univ., 195 U. S. 207, 25 SCt 24, 49 L. ed. 160.

67. Amory v. Amory, 95 U. S. 186, 24 L. ed. 428. But see Cooke v. Seligman, 7 Fed. 263, 17 Blatchf. 452.

68. Stuart v. Easton, 156 U. S. 46, 15 SCt 268, 39 L. ed. 341.

69. Grand Trunk R. Co. v. Twitchell, 59 Fed. 727, 8 CCA 237; Carswell v. Schley, 59 Ga. 17.

70. Carswell v. Sibley, supra.

Sufficiency of allegation of residence to show citizenship see infra text and notes 71–74.

71. Neel v. Pennsylvania Co., 157 U. S. 153, 15 SCt 589, 39 L. ed. 654; Pennsylvania Co. v. Bender, 148 U. S. 255, 13 SCt 591, 37 L. ed. 441; Grace v. American Cent. Ins. Co., 109 U. S. 278, 3 SCt 207, 27 L. ed. 932; Parker v. Overman, 18 How. (U. S.) 137, 15 L. ed. 318; Hinman v. Barrett, 244 Fed. 621; Harding v. Standard Oil Co., 182 Fed. 421; Mohican Tp. v. Johnson, 133 Fed. 524, 66 CCA 592; Laden v. Meck, 130 Fed. 877, 65 CCA 361; Dinet v. Delavan, 117 Fed. 978; Gale v. Southern Bldg., etc., Assoc., 117 Fed. 732 [app dism 130 Fed. 1021, 63 CCA 684]; Thomas v. D. O. Mills Nat. Bank, 106 Fed. 438, 45 CCA 407; Grand Trunk R. Co. v. Twitchell, 59 Fed. 727, 8 CCA 237; Craswell v. Belanger, 56 Fed. 529, 6 CCA 1; Southwestern Tel., etc., Co. v. Robinson, 48 Fed. 769, 1 CCA 91; Kelly v. Houghton, 23 Fed. 417; Merchants' Nat. Bank v. Brown, 17 Fed. 161, 4 Woods 263; Overman v. Parker, 18 F. Cas. No. 10,623, Hempst. 692; O'Conner v. Chicago, etc., R. Co., 144 Iowa 289, 122 NW 947 [rev on reh 117 NW 979]; Pechner v. Phœnix Ins. Co., 6 Lans. 411 [aff 65 N. Y. 195]; Herndon v. Ætna Ins. Co., 107 N. C. 194, 12 SE 240, 10 LRA 53. Compare Vestal v. Ducktown Sulphur, etc., Co., 210 Fed. 375 (recognizing the rule as applied to natural persons, but holding the contrary in the case of a corporation).

72. Gale v. Southern Bldg., etc., Assoc., 117 Fed. 732 [app dism 130 Fed. 1021, 63 CCA 684].

73. Clausen v. American Ice Co., 144 Fed. 723.

74. Tracy v. Morel, 88 Fed. 801; Tug River Coal, etc., Co. v. Brigel, 67 Fed. 625, 14 CCA 577.

75. Wilson v. City Bank, 30 F. Cas. No. 17,797, 3 Sumn. 422.

76. Wilson v. City Bank, supra.

An allegation in the latter form is ordinarily sufficient;[77] but if the facts shown cast doubt upon his alienage, such allegation, being a mere conclusion, is insufficient.[78]

Suit by assignee. A petition for the removal, on the ground that the citizenship is diverse, of a suit brought by the assignee of a cause of action must allege a diversity of citizenship between defendant and the assignor.[79]

[§ 239] **(bb) Citizenship of Corporation.**[80] Where a suit to which a corporation is a party is sought to be removed from a state court to a federal court on the ground of difference of citizenship,[81] the petition for removal should state that such corporation was organized or created by, or under, the laws of a specified state or foreign government,[82] such an averment being ordinarily a sufficient showing of its citizenship;[83] and an allegation merely that it is a citizen of,[84] or is located[85] or has its principal place of business[86] in, a designated state, is insufficient. Similarly, it is not sufficient to allege merely the residence of the corporation,[87] especially in view of the rule that an allegation of residence is not a sufficient allegation of citizenship.[88] On the other hand, where the creation of a corporation by, or its organization under, the laws of a designated state or country is sufficiently pleaded, it is unnecessary to allege specifically its citizenship,[89] or that it had the same citizenship at the time of the commencement of the suit as when the petition is filed;[90] and where it is alleged to have been created by or under the laws of another state or of a foreign country, it is unnecessary to aver that it is not a resident of the state in which the suit is brought.[91]

Where corporation is chartered in two or more states[92] the facts showing the diversity of citizenship between it and the adverse party must be specifically alleged.[93]

Municipal corporation. Where a party to the suit is a city or incorporated town of the state in the courts of which the suit is pending, a petition for removal describing it as such, without alleging that it was incorporated under the laws of the state, has been held sufficient to show its citizenship,[94] since the court will take judicial notice of the facts.[95] It is, however, preferable that the citizenship be specifically alleged.[96]

[§ 240] **(cc) Fraudulent Joinder.** Where a nonresident defendant seeks the removal from a state court to a federal court, on the ground of diversity of citizenship, of a suit which in form is jointly against such nonresident and one or more resident defendants, but in which such residents are claimed to have been fraudulently and improperly joined for the purpose of preventing removal of the suit,[97] the petition for removal must set forth affirmatively and by specific allegation facts sufficient to show that the joinder was made fraudulently or in bad faith,[98] or, as has been said, which compel that conclusion,[99] apart from petitioner's deductions,[1] at least unless the fraudulent character of the joinder is apparent upon the face of the bill or complaint.[2] It is not sufficient to charge generally, or by indefinite averments, that the joinder is fraudulent or for the wrongful purpose of preventing removal,[3] or to aver in terms that the case is removable or belongs to one of the classes of causes enumerated by the removal statute,[4] or to allege that the resident defendants were joined under a conspiracy to prevent a removal, without a statement of facts showing the existence of such a conspiracy.[5] Similarly, an allegation in the petition that the resident defendant has no interest in the controversy,[6] or, where the action is one for damages for negligence, a mere denial of the joint negligence,[7] or an averment that the resident defendant was not a party to the alleged negligence,[8] or that he is financially irresponsible,[9] or, in an action against a master and his servant, a denial that the resident servant was acting within the scope of his employment,[10] is insufficient to raise the issue of fraudulent joinder. But an allegation that the statements of plaintiff's petition charging joint or concurring negligence on the part of defendants were untrue, and that their untruth was known to plaintiff, is a sufficient allegation that the joinder was fraudulent.[11]

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[77] C. H. Nichols Lumber Co. v. Franson, 203 U. S. 278, 27 SCt 102, 51 L. ed. 181; Hennessy v. Moise, 189 U. S. 35, 23 SCt 534, 47 L. ed. 698; Hennessy v. Richardson Drug Co., 189 U. S. 25, 23 SCt 532, 47 L. ed. 697. Compare Von Voight v. Michigan Cent. R. Co., 130 Fed. 398 (holding that an allegation that a party is a citizen of the British Empire is not a sufficient allegation that he is an alien and a subject or citizen of some one foreign power).

[78] Jennes v. Landes, 84 Fed. 73.

Petition alleging mere conclusions in general see supra § 237.

[79] Hall v. Tevis, 177 Fed. 600. See Flynn v. Fidelity, etc., Co., 145 Fed. 268 (recognizing the rule).

Removal of suit by assignee on ground of difference of citizenship see supra § 176.

[80] **In general** see supra § 138.

[81] **Removal on account of difference of citizenship in general** see supra §§ 120–179.

[82] Sun Printing, etc., Assoc. v. Edwards, 194 U. S. 377, 24 SCt 696, 48 L. ed. 1027; Alexandria Nat. Bank v. Bates, 160 Fed. 839, 87 CCA 643; Mathieson Alkali Works v. Mathieson, 150 Fed. 241, 80 CCA 129 [certiorari den 204 U. S. 674 mem, 27 SCt 787 mem, 51 L. ed. 674 mem]; Knight v. Lutcher, etc., Lumber Co., 136 Fed. 404, 69 CCA 248; Dalton v. Milwaukee Mechanics' Ins. Co., 118 Fed. 876; Winkler v. Chicago, etc., R. Co., 108 Fed. 305; Continental Wall-Paper Co. v. Voight, 106 Fed. 550; Robertson v. Scottish Union, etc., Ins. Co., 68 Fed. 173; De Loy v. Travelers' Ins. Co., 59 Fed. 319; Shattuck v. North British, etc., Ins. Co., 58 Fed. 609, 7 CCA 386; Frisbie v. Chesapeake, etc., R. Co., 57 Fed. 1; Ward v. Blake Mfg. Co., 56 Fed. 437, 5 CCA 538; Lonergan v. Illinois Cent. R. Co., 55 Fed. 550. Compare Lownsdale v. Gray's Harbor Boom Co., 117 Fed. 983 (holding that an allegation that a party "claims to be" a corporation organized and existing under the laws of a specified state is not sufficient, especially where petitioner also denies the valid organization and corporate character of such party).

[83] Herbert v. Roxana Petroleum Corp., 12 F. (2d) 81; Adams Express Co. v. Adams, 159 Fed. 62, 86 CCA 252.

[84] Thomas v. Ohio State Univ., 195 U. S. 207, 25 SCt 24, 49 L. ed. 160; Fentress Coal, etc., Co. v. Elmore, 240 Fed. 328, 153 CCA 254; Wells v. Russellville Anthracite Coal Min. Co., 206 Fed. 528; Rife v. Lumber Underwriters, 204 Fed. 32, 122 CCA 346 [rev on other grounds 237 U. S. 605, 35 SCt 717, 59 L. ed. 1140]; Knight v. Lutcher, etc., Lumber Co., 136 Fed. 404; Dalton v. Milwaukee Mechanics' Ins. Co., 118 Fed. 876; Winkler v. Chicago, etc., R. Co., 108 Fed. 305; American Sugar Refining Co. v. Johnson, 60 Fed. 503, 9 CCA 110; De Loy v. Travelers' Ins. Co., 59 Fed. 319; Frisbie v. Chesapeake, etc., R. Co., 57 Fed. 1; Lonergan v. Illinois Cent. R. Co., 55 Fed. 550.

[85] Germania F. Ins. Co. v. Francis, 11 Wall. (U. S.) 210, 20 L. ed. 77.

[86] New York, etc., R. Co. v. Hyde, 56 Fed. 188, 5 CCA 461.

[87] Wells v. Russelville Coal Min. Co., 206 Fed. 528; Winkler v. Chicago, etc., R. Co., 108 Fed. 305; Thomas v. D. O. Mills Nat. Bank, 106 Fed. 438, 45 CCA 407; Cleveland, etc., R. Co. v. Doerr, 41 Ill. A. 530. But see Vestal v. Ducktown Sulphur, etc., Co., 210 Fed. 375 (holding that an allegation that a corporation is a resident of a designated state is equivalent to an allegation that it is organized under the laws of such state and is a citizen thereof).

[88] See supra § 238.

[89] Lee v. Atlantic Coast Line R. Co., 150 Fed. 775; Continental Wall-Paper Co. v. Voight, 106 Fed. 550; Block v. Standard Distilling, etc., Co., 95 Fed. 978; Robertson v. Scottish Union, etc., Ins. Co., 68 Fed. 173; Shattuck v. North British, etc., Ins. Co., 58 Fed. 609, 7 CCA 386.

[90] National SS. Co. v. Tugman, 106 U. S. 118, 1 SCt 58, 27 L. ed. 87; Duvall v. Wabash R. Co., 9 F. (2d) 83; Continental Wall-Paper Co. v. Voight, 106 Fed. 550; Roberts v. Pacific, etc., R., etc., Co., 104 Fed. 577. But see Dalton v. Germania Ins. Co., 118 Fed. 936 (holding a petition defective for failing so to state).

Necessity of showing diversity of citizenship both at commencement of suit and at time of filing petition in general see supra § 238.

[91] Baltimore R. Co. v. Doty, 133 Fed. 866, 67 CCA 38; Roberts v. Pacific, etc., R., etc., Nav. Co., 104 Fed. 577; Howard v. Georgia Gold Reefs, 102 Fed. 657; Wilcox, etc., Guano Co. v. Phœnix Ins. Co., 60 Fed. 929 [aff 65 Fed. 628, 13 CCA 58]; Shattuck v. North British, etc., Ins. Co., 58 Fed. 609, 7 CCA 386; Myers v. Murray, 43 Fed. 695, 11 LRA 216; Koshland v. Hartford Nat. F. Ins. Co., 31 Or. 205, 59 P 845. But see Overman Wheel Co. v. Pope Mfg. Co., 46 Fed. 577; Hirschl v. J. I. Case Threshing Mach. Co., 42 Fed. 803; Guinault v. Louisville, etc., R. Co., 41 La. Ann. 571, 6 S 850 (all applying the contrary rule).

Necessity of express allegation of nonresidence in general see supra § 238.

[92] **Citizenship of such corporation** see supra §§ 138, 139.

[93] Dodd v. Louisville Bridge Co., 130 Fed. 186.

[94] Chicago, etc., R. Co. v. Spencer, 283 Fed. 824.

[95] See Evidence §§ 1868, 1869.

[96] Chicago, etc., R. Co. v. Spencer, 283 Fed. 824.

[97] See supra §§ 170, 171.

[98] U. S.—Wilson v. Republic Iron, etc., Co., 257 U. S. 92, 42 SCt 35, 66 L. ed. 144; Chesapeake, etc., R. Co. v. Cockrell, 232 U. S. 146, 34

[§ 241] **(dd) Separable Controversy.**[12] A petition for the removal of a suit, from a state court to a federal court, on account of the existence in such suit of a separable controversy between citizens of different states[13] should point out specifically the separable controversy[14] or set forth its nature,[15] and should name the parties thereto;[16] but it has been held that the existence of such controversy need not be specifically alleged if it appears from the record.[17]

[§ 242] **bb. Existence of Federal Question.** Where a removal of a suit from a state court to a

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SCt 278, 58 L. ed. 544 [aff 144 Ky. 139, 137 SW 1066]; Sanders v. Atlantic Coast Line R. Co., 33 F. (2d) 1010; Brunski v. Ford Motor Co., 299 Fed. 807; Martin v. Matson Nav. Co., 239 Fed. 188. See Savarin v. Union Pac. R. Co., 292 Fed. 157 (where particular allegations were held sufficient to show fraudulent misjoinder).

Ala.—Illinois Cent. R. Co. v. Robinson, 189 Ala. 523, 66 S 519.

Ark.—St. Louis-San Francisco R. Co. v. Britton, 163 Ark. 255, 259 SW 730.

Ky.—Carter Coal Co. v. Prichard, 166 Ky. 776, 179 SW 1038.

N. C.—Crisp v. Champion Fibre Co., 193 N. C. 77, 136 SE 238; Patton v. Champion Fibre Co., 192 N. C. 48, 133 SE 174; Fenner v. Richmond Cedar Works, 191 N. C. 207, 131 SE 625; Swain v. Interstate Cooperage Co., 189 N. C. 528, 127 SE 538; Johnson v. Blackwood Lumber Co., 189 N. C. 81, 126 SE 165; Fore v. Sylva Tanning Co., 175 N. C. 583, 96 SE 48; Patterson v. Champion Lumber Co., 175 N. C. 90, 94 SE 692; Hollifield v. Southern Bell Tel., etc., Co., 172 N. C. 714, 90 SE 996; Lloyd v. Southern R. Co., 166 N. C. 24, 81 SE 1003 [aff 239 U. S. 496, 36 SCt 210, 60 L. ed. 402]; Pruitt v. Charlotte Power Co., 165 N. C. 416, 81 SE 624; Smith v. Harris Granite Quarries Co., 164 N. C. 338, 80 SE 388; Lloyd v. North Carolina R. Co., 162 N. C. 485, 78 SE 489.

S. C.—Towill v. Southern R. Co., 121 S. C. 447, 114 SE 416.

Tex.—Eastin v. Texas, etc., R. Co., 99 Tex. 654, 92 SW 838 [rev (Civ. A.) 89 SW 440].

See Schwyhart v. Barrett, 145 Mo. A. 332, 130 SW 388 [aff sub nom. Chicago, etc., R. Co. v. Schwyhart, 227 U. S. 184, 33 SCt 250, 57 L. ed. 473] (recognizing the rule).

99. Russell v. Champion Fibre Co., 214 Fed. 963, 131 CCA 259 [certiorari den 235 U. S. 700, 35 SCt 200, 59 L. ed. 432]; Postal Telegraph-Cable Co. v. Puckett, 24 Ga. A. 458, 101 SE 397; Givens v. Savona Mfg. Co., 196 N. C. 377, 145 SE 681 [foll Walters v. Phœnix Utility Co., 196 N. C. 817, 145 SE 926]; Cowart v. Suncrest Lumber Co., 194 N. C. 787, 140 SE 736; Crisp v. Champion Fibre Co., 193 N. C. 77, 136 SE 238; Fenner v. Richmond Cedar Works, 191 N. C. 207, 131 SE 625; Johnson v. Blackwood Lumber Co., 189 N. C. 81, 126 SE 165. See New Coronado Coal Co. v. Jasper, 144 Ark. 58, 222 SW 22 (where it was said that the removal petition must allege facts "conclusively showing" that the joinder was fraudulent).

1. Wilson v. Republic Iron, etc., Co., 257 U. S. 92, 42 SCt 35, 66 L. ed. 144; Sanders v. Atlantic Coast Line R. Co., 33 F. (2d) 1010; St. Louis-San Francisco R. Co. v. Britton, 163 Ark. 255, 259 SW 730; Cowart v. Suncrest Lumber Co., 194 N. C. 787, 140 SE 736; Patton v. Champion Fibre Co., 192 N. C. 48, 133 SE 174; Swain v. Interstate Cooperage Co., 189 N. C. 528, 127 SE 538; Johnson v. Blackwood Lumber Co., 189 N. C. 81, 126 SE 165; Smith v. Harris Granite Quarries Co., 164 N. C. 338, 80 SE 388; Towill v. Southern R. Co., 121 S. C. 447, 114 SE 416.

2. Martin v. Matson Nav. Co., 239 Fed. 188.

3. U. S.—Illinois Cent. R. Co. v. Sheegog, 215 U. S. 308, 30 SCt 101, 54 L. ed. 208 [aff 126 Ky. 252, 103 SW 323, 31 KyL 691]; Kraus v. Chicago, etc., R. Co., 16 F. (2d) 79 [rev 3 F. (2d) 277]; Brunski v. Ford Motor Co., 299 Fed. 807; Todd v. Chicago, etc., R. Co., 291 Fed. 910; Martin v. Matson Nav. Co., 239 Fed. 188; Willard v. Chicago, etc., R. Co., 165 Fed. 181, 91 CCA 215 [aff 220 U. S. 413, 31 SCt 460, 55 L. ed. 521]; Offner v. Chicago, etc., R. Co., 148 Fed. 201, 78 CCA 359; Gustafson v. Chicago, etc., R. Co., 128 Fed. 85. But see Donovan v. Wells, 169 Fed. 363, 94 CCA 609, 22 LRANS 1250 (holding such allegations sufficient where not denied).

Ga.—Postal Telegraph-Cable Co. v. Puckett, 24 Ga. A. 458, 101 SE 397.

Ky.—West Kentucky Coal Co. v. Key, 178 Ky. 220, 198 SW 724; Broadway Coal Min. Co. v. Robinson, 150 Ky. 707, 150 SW 1000; Clinger v. Chesapeake, etc., R. Co., 109 SW 315, 33 KyL 86, 15 LRANS 998.

Mo.—Zumwalt v. Chicago, etc., Co., 266 SW 717; McNulty v. Atlas Portland Cement Co., (A.) 249 SW 730.

N. C.—Crisp v. Champion Fibre Co., 193 N. C. 77, 136 SE 238; Patton v. Champion Fibre Co., 192 N. C. 48, 133 SE 174; Johnson v. Blackwood Lumber Co., 189 N. C. 81, 126 SE 165; Fore v. Sylva Tanning Co., 175 N. C. 583, 96 SE 48; Patterson v. Champion Lumber Co., 175 N. C. 90, 94 SE 692; Hollifield v. Southern Bell Tel., etc., Co., 172 N. C. 714, 90 SE 996; Lloyd v. Southern R. Co., 166 N. C. 24, 81 SE 1003 [aff 239 U. S. 496, 36 SCt 210, 60 L. ed. 402]; Pruitt v. Charlotte Power Co., 165 N. C. 416, 81 SE 624; Smith v. Harris Granite Quarries Co., 164 N. C. 338, 80 SE 388; Rea v. Standard Mirror Co., 158 N. C. 24, 73 SE 116; Hough v. Southern R. Co., 144 N. C. 692, 57 SE 469; Tobacco Co. v. American Tobacco Co., 144 N. C. 352, 57 SE 5.

4. Chesapeake, etc., R. Co. v. Cockrell, 232 U. S. 146, 34 SCt 278, 58 L. ed. 544 [aff sub nom Chesapeake, etc., R. Co. v. Banks, 144 Ky. 137, 137 SW 1066].

5. Hollifield v. Southern Bell Tel., etc., Co., 172 N. C. 714, 90 SE 996.

6. Union Terminal R. Co. v. Chicago, etc., R. Co., 119 Fed. 209.

7. Chicago, etc., R. Co. v. Whiteaker, 239 U. S. 421, 36 SCt 152, 60 L. ed. 360 [aff 252 Mo. 438, 160 SW 1009]; Shane v. Butte Electric R. Co., 150 Fed. 801; Union Terminal R. Co. v. Chicago, etc., R. Co., 119 Fed. 209; West Kentucky Coal Co. v. Key, 178 Ky. 220, 198 SW 724.

Sufficiency of allegations merely traversing plaintiff's pleadings in general see supra § 237.

8. Offner v. Chicago, etc., R. Co., 148 Fed. 201, 78 CCA 359.

9. Shane v. Butte Electric R. Co., 150 Fed. 801.

10. Sanders v. Atlantic Coast Line R. Co., 33 F. (2d) 1010.

11. Gibson v. Chesapeake, etc., R. Co., 215 Fed. 24, 131 CCA 332; Hunter v. Illinois Cent. R. Co., 188 Fed. 645, 110 CCA 459. See Todd v. Chicago, etc., R. Co., 291 Fed. 910; Armstrong v. Kansas City Southern R. Co., 192 Fed. 608 (both recognizing the rule). But see Shane v. Butte Electric R. Co., 150 Fed. 801 (holding such an allegation insufficient).

12. **Allegations of petition for removal as immaterial to determination whether controversy is separable** see supra § 182.

13. **Removability of suit in which separable controversy exists** see supra § 180.

14. Idaho v. American Surety Co., 218 Fed. 678; Gates Iron Works v. Pepper, 98 Fed. 449.

15. Harding v. Standard Oil Co., 170 Fed. 651; Sharkey v. Port Blakely Mill Co., 92 Fed. 425.

16. Idaho v. American Surety Co., 218 Fed. 678; Gates Iron Works v. Pepper, 98 Fed. 449.

17. Idaho v. American Surety Co., 218 Fed. 678; Harding v. Standard Oil Co., 170 Fed. 651. But see Gates Iron Works v. Pepper, 98 Fed. 449 (where the court said it should not be compelled to search through the record to discover whether a separable controversy exists).

federal court is sought upon the ground that the suit arises under the constitution, laws, or treaties of the United States,[18] the petition for removal should state the facts showing that it does arise thereunder;[19] and a petition stating merely the conclusion that the suit is one so arising is insufficient.[20]

[§ 243] **cc. Amount or Value in Controversy.** Where the removability of a suit from a court of a state to a federal court is in part dependent upon the amount or value in controversy,[21] the petition for the removal of such suit should show that such amount or value exceeds the sum specified by the removal statutes,[22] and that it exceeded such sum at the time the suit was commenced.[23] Allegations only as to such amount or value at the time the petition is filed are insufficient to entitle defendant to a removal.[24] The existence of a controversy involving the requisite amount or value may ordinarily be alleged in general terms, in the absence of any showing in the record to the contrary,[25] and in a suit for an injunction, a general averment that the value of the right sought to be protected exceeds the sum specified by the statute is ordinarily sufficient;[26] but where it appears from the face of the bill or complaint that the sum or value in controversy is less than or does not exceed that specified by the statute, the petition for removal must set up facts showing that it exceeds such amount, and a general allegation is not sufficient.[27] In a suit involving a matter as to which the federal court's jurisdiction is also subject to a maximum limitation, the petition should show that the sum in controversy does not exceed the amount to which the jurisdiction is so limited.[28] A statement of the value or amount in controversy on information and belief does not make the petition defective;[29] and it has been held that the failure of the petition to allege expressly that the amount or value stated to be in controversy is exclusive of interest is not a fatal defect, where no question of interest is or can be involved in the suit.[30]

[§ 244] **(c) Amendment of Petition.**[31] Where, upon the face of a petition for the removal of a suit from a state court to a federal court and of the whole record, sufficient grounds for removal are shown, the petition may be amended in the state or federal court to correct a defective or informal statement of the jurisdictional facts,[32] or to set forth expressly matters which in legal effect appear from the record,[33] or to make the petition conform to facts newly discovered;[34] but no amendment may be made, at least after the time for effecting a removal has expired,[35] for the purpose of supplying jurisdictional facts which have been wholly omitted and which do not appear from the face of the record,[36] or for the purpose of setting up another and different ground of removal, founded upon different facts.[37] Thus an amendment has been held permissible to correct defects and irregularities in allegations relating to diversity of citizenship,[38] or nonresidence,[39] or an inadvertent failure to show the dismissal of the suit as to one of several defendants,[40] or where the petition stated in general terms that the cause arose under the constitution and laws of the United States, without specifying the facts showing that to be the case,[41] or where it prayed removal to the wrong court,[42] or asked removal only as to petitioner, who showed a separable controversy with plaintiff, and not the removal of the whole suit.[43] Similarly, an amendment has been allowed where the jurisdictional facts were stated in the petition informally[44] or in the form of conclusions of law,[45] and for the correction of similar defects in an accompanying affidavit[46] or in the record of the state court.[47] A petition cannot be amended, however, to supply an allegation of diversity of citizenship[48] or nonresidence[49] which has been wholly omitted from the petition and does not appear in the face of the record, where the ground upon which the removal is sought is difference of citizenship,[50] or to show that such diversity of citizenship[51] or nonresidence[52] existed at the time when the action was begun, although its existence at the date of petition for removal was properly alleged;[53] and a petition based upon such ground which alleges, as to a corporation, merely that it is a citizen of a designated state, without alleging that it was organized by or under the laws thereof, cannot be corrected by amendment.[54] Similarly, where the amount or value in controversy is material to the removability of the suit,[55] a petition failing to show that such amount or value exceeds the jurisdictional sum cannot be amended to supply such averment.[56]

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[18] **Generally** see supra §§ 46–89.

[19] Carson v. Dunham, 121 U. S. 421, 7 SCt 1030, 30 L. ed. 992; Little York Gold Washing, etc., Co. v. Keyes, 96 U. S. 199, 24 L. ed. 656; Rural Home Tel. Co. v. Powers, 176 Fed. 986; Trafton v. Nougues, 24 F. Cas. No. 14,134, 4 Sawy. 178.

[20] Carson v. Durham, 121 U. S. 421, 7 SCt 1030, 30 L. ed. 992; Little York Gold Washing, etc., Co. v. Keyes, 96 U. S. 199, 24 L. ed. 656; Dale v. Smith, 182 Fed. 360. See New Castle v. Postal Tel.-Cable Co., 152 Fed. 572 (applying the rule to an answer to a rule to show cause why the suit should not be remanded).

[a] **Under an earlier statute** (Act of July 27, 1868), however, permitting removal by a corporation, other than a banking corporation, organized under the laws of the United States and having a defense under the federal constitution, laws, or treaties, a petition in general language stating merely defendant's conclusion was sufficient in such case. Kain v. Texas Pac. R. Co., 14 F. Cas. No. 7,596; Reding v. Texas, etc., R. Co., 20 F. Cas. No. 11,630a.

[21] See supra §§ 28–45.

[22] Banigan v. Worcester, 30 Fed. 392; Keith v. Levi, 2 Fed. 743, 1 McCrary 343.

[23] Huntington v. Pinney, 126 Fed. 237.

[24] Back v. Sierra Nevada Cons. Min. Co., 46 Fed. 673; Kenyon v. Knipe, 46 Fed. 309; Strasburger v. Beecher, 44 Fed. 209.

[25] Blackburn v. Portland Gold-Min. Co., 175 U. S. 571, 20 SCt 222, 44 L. ed. 276; Chambers v. McDougal, 42 Fed. 694; State v. Frost, 113 Wis. 623, 88 NW 912, 89 NW 915.

[26] Evenson v. Spaulding, 150 Fed. 517, 82 CCA 263, 9 LRANS 904 [aff 149 Fed. 913]; Butchers', etc., Stock Yards Co. v. Louisville, etc., R. Co., 67 Fed. 35, 14 CCA 290; State v. Frost, 113 Wis. 623, 88 NW 912, 89 NW 915.

Amount or value in controversy in injunction suits in general see supra § 43.

[27] Gibbes Mach. Co. v. Santee River Cypress Lumber Co., 79 S. C. 201, 60 SE 689. See Cogdill v. Clayton, 170 N. C. 526, 87 SE 338 (holding that, where an action was brought for damages on a cause alleged to have arisen after the date on which an amendment to the statute took effect by which the jurisdictional amount was increased from a sum less than the amount of damages claimed to a sum greater than such amount, a petition for removal merely alleging that the cause arose prior to the effective date of such amendment, without setting forth facts showing fraud in plaintiff's allegations as to the time of accrual of the cause, is not sufficient).

[28] North Side Canal Co. v. Twin Falls Canal Co., 12 F. (2d) 311.

Removability as dependent upon original jurisdiction of federal court see supra § 10.

[29] New York, etc., Land Co. v. Martin, (Tex. Civ. A.) 25 SW 475.

[30] Weber v. Travelers' Ins. Co., 45 Fed. 657.

Interest as excluded from computation of amount or value in controversy see supra § 32.

[31] **Amendment of affidavit of verification of petition** see supra § 237 text and note 44.

[32] Kinney v. Columbia Sav., etc., Assoc., 191 U. S. 78, 24 SCt 30, 48 L. ed. 103; Powers v. Chesapeake, etc., R. Co., 169 U. S. 92, 18 SCt 264, 42 L. ed. 673; Hall v. Payne, 274 Fed. 237; Amerson v. Western Union Tel. Co., 265 Fed. 909; Frazier v. Hines, 260 Fed. 874; Brady v. J. B. McCrary Co., 244 Fed. 602; Miller v. Soule, 221 Fed. 493; Vestal v. Ducktown Sulphur, etc., Co., 210 Fed. 375; Missouri, etc., R. Co. v. Chappell, 206 Fed. 688; Donovan v. Wells, 169 Fed. 363, 94 CCA 609, 22 LRANS 1250; Santa Clara County v. Goldy Mach. Co., 159 Fed. 750; Overman Wheel Co. v. Pope Mfg. Co., 46 Fed. 577; Winnemans v. Edgington, 27 Fed. 324; Bacon v. Bank of Montreal, 219 Ill. A. 352; Garrosi v. Garrosi, 1 Porto Rico Fed. 228. And see cases infra notes 38–47.

Amendment of pleadings in cause after removal see infra § 290.

[33] Flynn v. Fidelity, etc., Co., 145 Fed. 265.

[34] Matarazzo v. Hustis, 256 Fed. 882.

[35] **Time for removal** see supra §§ 205–211.

[36] Powers v. Chesapeake, etc., R. Co., 169 U. S. 92, 18 SCt 264, 42 L. ed. 673; Jackson v. Allen, 132 U. S. 27, 10 SCt 9, 33 L. ed. 249; Crehore v. Ohio, etc., R. Co., 131 U. S. 240, 9 SCt 797, 33 L. ed. 144; Cameron v. Hodges, 127 U. S. 322, 8 SCt 1154, 32 L. ed. 132; Buena Vista County v. Title Guaranty, etc., Co., 267 Fed. 477; Missouri, etc., R. Co. v. Chappell, 206 Fed. 688; Santa Clara County v. Goldy Mach. Co., 159 Fed. 750; Wallenburg v. Missouri Pac. R. Co., 159 Fed. 217; Healy v. McCormick, 157 Fed. 318; Shane v. Butte Electric R. Co., 150 Fed. 801; Dalton v. Milwaukee Mechanics' Ins. Co., 118 Fed. 876; Dinet v. Delavan, 117 Fed. 978; Fife v. Whittell, 102 Fed. 537; Murphy v. Payette Alluvial Gold Co., 98 Fed. 321; Waite v. Phœnix Ins. Co., 62 Fed. 769; Frisbie v. Chesapeake, etc., R. Co., 59 Fed. 369, 57 Fed. 1; De Loy v. Traveler's Ins. Co., 59 Fed. 319; Brigham v. C. C. Thompson Lumber Co., 55 Fed. 881; Overman Wheel Co. v. Pope Mfg. Co., 46 Fed. 577; Fitzgerald v. Missouri Pac. R. Co., 45 Fed. 812; Winnemans v. Edgington, 27 Fed. 324; Security Co. v. Pratt, 65 Conn. 161, 32 A 396; Garrosi v. Garrosi, 1 Porto Rico Fed. 228. Compare Carr v. Fife, 45 Fed. 209 [aff 156 U. S. 494, 15 SCt 427, 39 L. ed. 508 (denying a motion to remand made on the ground that the record and petition for removal did not show that the amount or value in controversy exceeded the sum specified by statute, and permitting the filing of an affidavit showing such value, where the point was first raised and the motion made after final hearing and decree in the federal court, and where counsel for both sides had at numerous times stated to the court that the value in controversy far exceeded the jurisdictional amount, which was shown to be the fact). And see cases infra notes 48–56.

Necessity that petition set forth jurisdictional facts see supra § 237.

Consent of court to amendment. The consent of the court to the amendment of a petition for removal is not necessary and need not be procured.[57]

Time for amendment. An amendment to a petition for removal has been held too late when offered at the hearing on a motion to remand the cause;[58] but it has been held that a petition may be permitted by the federal court to be amended even after final judgment, if the court still has control of the record.[59] An amendment is clearly too late, however,

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37. Nelms v. Davis, 277 Fed. 982; Frazier v. Hines, 260 Fed. 874; Thompson v. Ward, 199 Fed. 861.

38. See cases infra this note.

[a] **Illustrations.**—(1) Where the petition for removal stated that the controversy was between citizens of different states, but alleged the residence and citizenship of defendant only. Kinney v. Columbia Sav., etc., Assoc., 191 U. S. 78, 24 SCt 30, 48 L. ed. 103; Stadlemann v. White Line Towing Co., 92 Fed. 209; Johnson v. F. C. Austin Mfg. Co., 76 Fed. 616; Woolridge v. McKenna, 8 Fed. 650. (2) Where the petition for removal alleged that defendants were residents and citizens of a designated city in a particular state, but did not allege expressly that they were residents and citizens of such state. Tremper v. Schwabacher, 84 Fed. 413. (3) Where the petition alleged that one party was an incorporated town, but failed to allege specifically its citizenship or that it was incorporated under the laws of the state. Chicago, etc., R. Co. v. Spencer, 283 Fed. 824. (4) Where the petition showed a diversity of citizenship, but, through misinformation, erroneously alleged the citizenship of plaintiff as of a different state from that where the suit was brought, he in fact being a citizen of that state and defendant a citizen of a third state. Wilbur v. Red Jacket Cons. Coal, etc., Co., 153 Fed. 662. (5) Where the removal petition was defective in alleging that, when the action was commenced and when petition was filed, petitioner was a resident of another designated state, instead of alleging that he was a nonresident of the state in which the action was brought, but alleging also that petitioner was a citizen of the republic of France. De la Montanya v. De la Montanya, 158 Fed. 117.

Allegations concerning difference of citizenship in general see supra §§ 238–241.

39. Garrosi v. Garrosi, 1 Porto Rico Fed. 228.

[a] **Thus,** where the petition for removal stated that defendant was a citizen of France, but not that he was a nonresident, the defect might be cured by amendment, since the averment of foreign citizenship implies that he is a resident of that country. Garrosi v. Garrosi, 1 Porto Rico Fed. 228.

40. Powers v. Chesapeake, etc., R. Co., 65 Fed. 129 [aff 169 U. S. 92, 18 SCt 264, 42 L. ed. 673].

41. Carson v. Dunham, 121 U. S. 421, 7 SCt 1030, 30 L. ed. 992.

Allegation showing that cause arose under federal constitution or laws in general see supra § 242.

42. Hadfield v. Northwestern L. Assur. Co., 105 Fed. 530 (petition praying removal to the district court of the United States instead of to the circuit court).

43. Northern Pac. Terminal Co. v. Lowenberg, 18 Fed. 339, 9 Sawy. 348.

Removal of suit in which separable controversy exists see supra §§ 180–193.

44. Gerling v. Baltimore, etc., R. Co., 151 U. S. 673, 14 SCt 533, 38 L. ed. 311; Ayers v. Watson, 113 U. S. 594, 5 SCt 641, 28 L. ed. 1093; Glover v. Shepperd, 15 Fed. 833, 11 Biss. 572. See Robertson v. Scottish Union, etc., Ins. Co., 68 Fed. 173 (dictum).

45. Kinney v. Columbia Sav., etc., Assoc., 191 U. S. 78, 24 SCt 30, 48 L. ed. 103; Stadlemann v. White Line Towing Co., 92 Fed. 29; Johnson v. F. C. Austin Mfg. Co., 76 Fed. 616. See also Tremper v. Schwabacher, 84 Fed. 413 (apparently applying the rule).

46. Hall v. Chattanooga Agricultural Works, 48 Fed. 599.

47. Kinney v. Columbia Sav., etc., Assoc., 191 U. S. 78, 24 SCt 30, 48 L. ed. 103; Powers v. Chesapeake, etc., R. Co., 169 U. S. 92, 18 SCt 264, 42 L. ed. 673; Flynn v. Fidelity, etc., Co., 145 Fed. 265; Kaeiser v. Illinois Cent. R. Co., 6 Fed. 1, 2 McCrary 187.

48. Buena Vista County v. Title Guaranty, etc., Co., 267 Fed. 477; Dinet v. Delavan, 117 Fed. 978; Brigham v. C. C. Thompson Lumber Co., 55 Fed. 881. See Kaeiser v. Illinois Cent. R. Co., 6 Fed. 1, 2 McCrary 187 (apparently recognizing the rule, but not deciding the point). Compare Hinman v. Barrett, 244 Fed. 621 (allowing a petition alleging merely a diversity of residence to be amended to show a diversity of citizenship, but expressly not passing upon the sufficiency of the petition or the effect of the amendment).

49. Fife v. Whittell, 102 Fed. 537; Townsend v. Holderby, 195 N. C. 854, 141 SE 749.

Allegations as to citizenship of corporation in general see supra § 239.

50. Difference of citizenship in general see supra §§ 120–179.

51. Jackson v. Allen, 132 U. S. 27, 10 SCt 9, 33 L. ed. 249; Crehore v. Ohio, etc., R. Co., 131 U. S. 240, 9 SCt 692, 33 L. ed. 144; Grand Trunk R. Co. v. Twitchell, 59 Fed. 727, 8 CCA 237; Endy v. Commercial F. Ins. Co., 24 Fed. 657; McNaughton v. South Pac. C. R. Co., 19 Fed. 881. But see Kyle v. Chicago, etc., R. Co., 173 Fed. 238 (holding that, where the removing defendant was a corporation, and alleged in its petition for removal that it is a citizen of another state, it is a reasonable inference that it was a citizen of such other state when the action was commenced, and so the petition can be amended to show such fact); Roberts v. Pacific, etc., R., etc., Co., 104 Fed. 577 (where an amendment for the purpose of showing citizenship at the date the action was begun was permitted).

52. Camprelle v. Balbach, 46 Fed. 81; Freeman v. Butler, 39 Fed. 1.

53. Necessity that petition show difference of citizenship and nonresidence both at commencement of suit and time of filing petition see supra § 238.

54. Dalton v. Milwaukee Mechanics' Ins. Co., 118 Fed. 876; De Loy v. Traveler's Ins. Co., 59 Fed. 319; Frisbie v. Chesapeake, etc., R. Co., 57 Fed. 1, 59 Fed. 369. But see Wells v. Russellville Anthracite Coal Min. Co., 206 Fed. 528 (where an amendment was allowed in such case).

55. Amount or value in controversy in general see supra §§ 28–45.

56. Alonso v. Oben, 13 Porto Rico Fed. 245.

57. Heath v. Santa Lucia Co., 196 App. Div. 446, 188 NYS 218.

58. Key v. West Kentucky Coal Co., 237 Fed. 258. But see Brady v. J. B. McCrary Co., 244 Fed. 602 (where an amendment was allowed after argument on the motion to remand had been concluded, but before a ruling had been made).

Remand see infra §§ 302–341.

59. Mexican Cent. R. Co. v. Duthie, 189 U. S. 76, 23 SCt 610, 47 L. ed. 715.

when made after remand of the suit to the state court,[60] or after a removal has been properly denied on account of the insufficiency of the petition, if the time for removal as prescribed by the statutes has expired,[61] except that where leave to amend is granted by the court in such case upon a motion made before the expiration of the time prescribed by statute for taking the removal, the amendment is to be treated as if filed on the date of the motion.[62] Where a removal has been wrongly denied, however, the fact that the state court proceeds to judgment in the suit does not prevent the federal court from permitting the amendment of the petition.[63] An amendment will not be allowed in the supreme court[64] or in the circuit court of appeals[65] of the United States, upon appeal thereto, except when the adverse parties consent to such amendment, in which case it may be permitted.[66]

Subsequent pleading as amendment. Inasmuch as defects in a petition for removal may be cured by the allegations of the pleadings showing the existence of the jurisdictional facts,[67] a pleading filed in the state court after the filing of the petition for removal may be treated as an amendment to such petition in so far as it alleges the facts upon which defective or informal averments of the petition rest.[68] But no amendment of the pleadings or rearrangement of the parties can give the federal court jurisdiction where the original petition and the record as it existed at the time of filing the petition did not show that the suit was removable.[69]

[§ 245] **(3) Bond—(a) In General.** Under the provisions of the statute relating to the removal of suits from a state court to a federal court on the ground of diversity of citizenship or because arising under the constitution, laws, or treaties of the United States, which requires the party seeking removal to file with his petition[70] a bond for his entering in the federal court within thirty days a transcript of the record, and for paying all costs that may be awarded by the federal court if it shall hold that the cause was wrongfully or improperly removed thereto, and also for his appearing and entering special bail in the suit if special bail was originally requisite therein,[71] the due filing of a proper bond is a condition precedent and essential to the right of removal,[72] and so the state court does not lose its jurisdiction, and is without power to order a removal, unless a proper bond is given.[73]

Provisions and conditions. The bond filed with a petition for removal must provide for the acts and matters specified by the statute,[74] including the payment of costs in case of a remand,[75] the entry in the federal court of a transcript of the record,[76] and the appearance of the petitioning party in such court;[77] but where special bail was not originally required in the state court the bond need contain no condition for the entry of such bail in the federal court.[78] Moreover, the statutory provision as to special bail does not refer to a delivery bond or bond for the forthcoming of property, but only to an undertaking for the personal appearance of a party.[79] It has been held that a general provision for the doing of such acts as are required by statute is not sufficient to cure an omission to provide expressly for a particular necessary act;[80] but there is authority to the contrary.[81] A bond is sufficient where its provisions and conditions follow substantially the language of the statute.[82] Where fewer than all the persons named in the suit as defendants have been served and have become parties, the bond need not be conditioned for the appearance of others than those served.[83] A bond is not fatally defective because it provides for the filing of the transcript in the wrong division of the federal court,[84] or because the day on which the transcript is required to be filed is improperly designated;[85] and a bond conditioned for defendant's appearance in the district court of the United States was held not defective although under the law as it then stood the removal was to the circuit court.[86] A bond conditioned for the entry of the transcript in the federal court of another district than that to which the cause is removable,[87] however, or for such entry at a time

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See Carr v. Fife, 45 Fed. 209 [aff 156 U. S. 494, 15 SCt 427, 39 L. ed. 508] (where an amendment was allowed after judgment).

[60] Frisbie v. Chesapeake, etc., R. Co., 59 Fed. 369, 57 Fed. 1; Brigham v. C. C. Thompson Lumber Co., 55 Fed. 881.

[61] Carson, etc., Lumber Co. v. Holtzclaw, 44 Fed. 785; Sabens v. Cochrum, (Tex. Civ. A.) 292 SW 281.

Time for removal see supra §§ 205–211.

[62] Newton v. Liggett, etc., Tobacco Co., 194 N. C. 816, 140 SE 742.

[63] Missouri, etc., R. Co. v. Chappell, 206 Fed. 688.

[64] Cameron v. Hodges, 127 U. S. 322, 8 SCt 1154, 32 L. ed. 132.

[65] Grand Trunk R. Co. v. Twitchell, 59 Fed. 727, 8 CCA 237.

[66] Kansas City Southern R. Co. v. Prunty, 133 Fed. 13, 66 CCA 163 [certiorari den 197 U. S. 623 mem, 25 SCt 799 mem, 49 L. ed. 911 mem].

[67] See supra § 237 text and note 30.

[68] Carson v. Dunham, 121 U. S. 421, 7 SCt 1030, 30 L. ed. 992.

[69] Walser v. Memphis, etc., R. Co., 19 Fed. 152.

[70] **Petition for removal** see supra §§ 237–244.

Presentment and filing of petition and bond see infra § 250.

[71] USCA tit 28 § 72.

[72] Thomas v. Delta Land, etc., Co., 258 Fed. 758; Duncan v. Griffy, 8 Ky. Op. 610; Mahoney v. U. S. Shipping Bd. Emergency Fleet Corp., 253 Mass. 234, 148 NE 454.

[73] Hayes v. Todd, 34 Fla. 233, 15 S 752; State v. Woodson, 164 Mo. 440, 64 SW 774; Paris, etc., R. Co. v. Boston, (Tex. Civ. A.) 142 SW 944.

[74] See cases infra notes 75–77.

[a] **Form of bond** held sufficient in form is set out in Meyer v. Delaware R. Constr. Co., 100 U. S. 457, 463, 25 L. ed. 593.

[75] Sheldrick v. Cockcroft, 27 Fed. 579; Webber v. Bishop, 13 Fed. 49; Torrey v. Grant Locomotive Works, 24 F. Cas. No. 14,105, 14 Blatchf. 269. Compare Dennis v. Alachua County, 7 F. Cas. No. 3,791, 3 Woods 683 (refusing to remand a suit on account of the failure of the bond to provide for the payment of costs, but directing the filing of a sufficient bond within a specified time).

[76] Hayes v. Todd, 34 Fla. 233, 15 S 752. See Burdick v. Hale, 4 F. Cas. No. 2,147, 7 Biss. 96 (holding that a bond conditioned simply that the petitioner should file in the circuit court "copies of all process" was insufficient).

Filing of transcript in general see infra §§ 270–274.

[77] Bell v. Bell, 3 W. Va. 183.

[78] Preston v. McNeil Lumber Co., 143 Fed. 555; Burck v. Taylor, 39 Fed. 581 [aff 152 U. S. 634, 14 SCt 696, 38 L. ed. 578].

[79] Ramsey v. Coolbaugh, 13 Iowa 164.

[80] Harrold v. Arrington, 64 Tex. 233.

[81] Cooke v. Seligman, 7 Fed. 263, 17 Blatchf. 452.

[82] Cooke v. Seligman, supra; Ellis v. Atlantic, etc., R. Co., 134 Mass. 338.

[83] Vandevoort v. Palmer, 11 N. Y. Super. 677.

[84] Hodge v. Chicago, etc., R. Co., 121 Fed. 48, 57 CCA 388.

[85] Ellis v. Atlantic, etc., R. Co., 134 Mass. 338.

[86] Hayes v. Todd, 34 Fla. 233, 15 S 752.

[87] In re Vadner, 259 Fed. 614; Webb v. Southern R. Co., 248 Fed. 618, 160 CCA 518 [rev 235 Fed. 578, and certiorari den 247 U. S. 518 mem, 38 SCt 582 mem, 62 L. ed. 1245 mem].

other than that prescribed by statute,[88] is not sufficient, nor is a bond conditioned that one not a party to the suit will perform the required acts to effect a removal.[89]

Penalty. It is proper practice to insert in the bond a provision for the payment of a specified sum as penalty for a failure to comply with the condition,[90] and where the sum so specified is clearly enough to cover all costs and damages that might in any event be awarded the bond is sufficient.[91] An undertaking to pay an indefinite amount satisfies the statute,[92] however, and the omission of a fixed penalty is not ground for remanding the suit,[93] although it may cause the state court to refuse its approval of the bond.[94] But where the tenor of the bond is merely an undertaking to pay a fixed sum and the amount thereof is left blank, no liability is created and the bond is therefore insufficient.[95]

Parties. It has been held that a removal bond need not be made by the petitioner, but may be executed by another as principal,[96] but there is authority for the contrary view.[97] The obligee of the bond should be plaintiff, and not the state or the people.[98] The bond must be joint and several,[99] and a bond which is merely joint is not sufficient.[1]

Surety and justification. A formal defendant, who is merely a nominal party to the suit and who does not join in the petition for removal, may be a surety upon a removal bond;[2] and an attorney at law is a sufficient surety if he is accepted as such by the state court, even though a rule of such court disqualifies him.[3] When the surety is a corporation organized under the laws of a state other than that in which the suit is pending, it need not be shown to have authority to do business in the latter state, at least where, under the state law, a corporation not having procured such authority can take no advantage of its failure so to do.[4] In view of the statutory requirement of good and sufficient surety, it is proper practice to add to the bond proof that the sureties are responsible and sufficient;[5] but it has been held that the sureties are not required to justify until a rule or order requiring them to do so has been made.[6]

Execution. When the petitioner for the removal is named as principal in the bond, it may be executed in his name by his attorney at law;[7] and a bond executed by such attorney without prior authorization by the client may be ratified by the latter at any time before an order for a remand.[8] The fact that the bond is executed in behalf of the surety by an agent or attorney in fact whose authority does not appear does not render the bond defective, in the absence of any showing of a want of authority on the part of the person so signing,[9] there being a presumption that he was duly authorized unless the contrary is shown;[10] but a bond executed in behalf of the corporation by its treasurer has been held to be invalid where the authority of such officer to act for the corporation is not shown and the corporate seal is not affixed.[11] The bond need not be acknowledged.[12]

Seals. The absence of a seal on a removal bond does not vitiate the bond where the state statute provides that the omission of a seal shall not affect the validity of any document,[13] or expressly makes a bond valid without a seal.[14] Otherwise, however, the bond must be sealed in order to be valid.[15] In accordance with the rules applicable to seals generally,[16] a scrawl, without wax, intended as a seal,[17] or an impression upon the paper,[18] is ordinarily a sufficient seal; and, where the state statute so provides, the letters "L. S." or the word "Seal" is sufficient.[19]

Federal court to which cause is removable see infra § 264.

[88] Missouri, etc., R. Co. v. Chappell, 206 Fed. 688; In re Vadner, 259 Fed. 614. Compare Chase v. Erhardt, 198 Fed. 305 (holding that, where the bond was conditional for the entry of the transcript within a time longer than that prescribed by the statute, but no delay resulted, and plaintiff appeared generally in the federal court, the defect was not fatal to the defendant's right to remove): State Impr.-Dev. Co. v. Leininger, 226 Fed. 884 (to the same effect, holding that, after the record was in fact in the federal court, the bond was functus officio so far as concerned the provision in question).

Time for entering or filing transcript see infra § 273.

[89] Clippinger v. Missouri Valley L. Ins. Co., 26 Oh. St. 404.

[90] Groton Bridge, etc., Co. v. American Bridge Co., 137 Fed. 284; Johnson v. F. C. Austin Mfg. Co., 76 Fed. 616; Kentucky v. Louisville Bridge Co., 42 Fed. 241; Quarrier v. Baltimore, etc., R. Co., 20 W. Va. 424.

[91] Groton Bridge, etc., Co. v. American Bridge Co., 137 Fed. 284; Kentucky v. Louisville Bridge Co., 42 Fed. 241; Blanchard v. Dwight, 12 Wend. (N. Y.) 192.

[a] **Amount held sufficient.**—(1) Five hundred dollars. Groton Bridge, etc., Co. v. American Bridge Co., 137 Fed, 284; Kentucky v. Louisville Bridge Co., 42 Fed. 241. (2) One thousand dollars. Blanchard v. Dwight, 12 Wend. (N. Y.) 192.

[92] Burdick v. Hale, 4 F. Cas. No. 2,147, 7 Biss. 96.

[93] Johnson v. F. C. Austin Mfg. Co., 76 Fed. 616.

[94] Quarrier v. Baltimore, etc., R. Co., 20 W. Va. 424.

Approval of bond in general see infra § 246.

[95] Austin v. Gagan, 39 Fed. 626, 5 LRA 476; Burdick v. Hale, 4 F. Cas. No. 2,147, 7 Biss. 96.

[96] Groton Bridge, etc., Co. v. American Bridge Co., 137 Fed. 284; People's Bank v. Ætna Ins. Co., 53 Fed. 161; Public Grain, etc., Exch. v. Western Union Tel. Co., 16 Fed. 289, 11 Biss. 568; Stevens v. Richardson, 9 Fed. 191, 20 Blatchf. 53.

[97] Rough v. Booth, 2 Cal. Unrep. Cas. 270, 3 P 91; Farmers' L. & T. Co. v. Lake St. El. R. Co., 173 Ill. 439, 51 NE 55 [aff 68 Ill. A. 666]; Weed Sewing Mach. Co. v. Smith, 71 Ill. 204.

[98] Grow v. Wiman, 3 NYSt 281.

[99] Roberts v. Carrington, 2 N. Y. Super. 694; Hazard v. Durant, 9 R. I. 602.

[1] Roberts v. Carrington, 2 N. Y. Super. 694.

[2] Steiner v. Mathewson, 77 Ga. 657.

[3] Probst v. Cowen, 91 Fed. 929.

[4] Brady v. J. B. McCrary Co., 244 Fed. 602.

[5] Farmers' L. & T. Co. v. Lake St. El. R. Co., 173 Ill. 439, 51 NE 55 [aff 68 Ill. A. 666]; Cleveland, etc., R. Co. v. Monaghan, 140 Ill. 474, 30 NE 869 [aff 41 Ill. A. 498]; Weed Sewing-Mach. Co. v. Smith, 71 Ill. 204; Goddard v. Bosson, 21 Kan. 139.

[6] Empire Transp. Co. v. Richards, 88 Ill. 404.

[7] Herbert v. Roxana Petroleum Corp., 12 F. (2d) 81; Dennis v. Alachua County, 7 F. Cas. No. 3,791, 3 Woods 683.

[8] Ashe v. Union Cent. L. Ins. Co., 115 Fed. 234.

[9] Brady v. J. B. McCrary Co., 244 Fed. 602; Fayette Title, etc., Co. v. Maryland, etc., Tel., etc., Co., 180 Fed. 928; New York Mut. L. Ins. Co. v. Langley, 145 Fed. 415.

[10] New York Mut. L. Ins. Co. v. Langley, supra.

[11] Alexandria Nat. Bank v. Willis C. Bates Co., 160 Fed. 839, 87 CCA 643.

[12] Herbert v. Roxana Petroleum Corp., 12 F. (2d) 81.

[13] Loop v. Winters, 115 Fed. 362.

[14] G. V. B. Min. Co. v. Hailey, First Nat. Bank, 95 Fed. 23, 36 CCA 633.

[15] Mahoney v. U. S. Shipping Bd. Emergency Fleet Corp., 253 Mass. 234, 148 NE 454.

[16] See Seals [35 Cyc 1169–1171].

[17] Loop v. Winters, 115 Fed. 362; U. S. v. Stephenson, 27 F. Cas. No. 16,386, 1 McLean 462.

[18] Loop v. Winters, 115 Fed. 362; U. S. v. Stephenson, 27 F. Cas. No. 16,386, 1 McLean 462.

[19] G. V. B. Min. Co. v. Hailey First Nat. Bank, 95 Fed. 23, 36 CCA 633.

Time for filing.[20] The removal bond must be given and filed at the time the petition for removal is presented,[21] and accordingly, at or before the time for removal expires;[22] and an order cannot be thereafter made allowing the bond to be filed nunc pro tunc as of the date of filing the petition.[23]

Mode of attacking sufficiency. The sufficiency of a removal bond cannot be questioned upon a general demurrer to the petition for removal,[24] but can be put into issue only by specific objections.[25]

Waiver of objections. Objections founded upon defects in the form of a removal bond[26] and objections to the sufficiency of the sureties[27] are waived by taking subsequent steps in the cause without moving to remand on account thereof; and the objection that the signatures to the bond are not properly acknowledged or proved,[28] that one by whom the bond is executed in behalf of the surety is not shown to be properly authorized,[29] or that the sureties have not justified,[30] is waived if not made in the state court at the time the bond is presented thereto.[31]

[§ 246] **(b) Determination of Sufficiency.** The state court in which a suit is pending has power to determine whether a bond for the removal of the cause to a federal court is sufficient, in substance and form, under the provisions of the statute providing for removal on the ground of diversity of citizenship or because arising under the federal constitution, laws, or treaties;[32] and the determination of the sufficiency of the sureties is also largely within the discretion of such court.[33] The approval of the state court is not, however, essential, in the sense that its failure or refusal to approve a bond which is in fact sufficient would deprive the petitioner of the right of removal;[34] and it cannot arbitrarily reject a bond tendered for its approval.[35]

Review of refusal. A refusal by the state court to receive or approve a bond may be reviewed, at least when not based upon the insufficiency of the sureties, by the federal court to which removal was sought, on the hearing of a motion to remand the cause,[36] or by the supreme court of the United States upon a writ of error to the final judgment of the state court of last resort.[37]

[§ 247] **(c) Amendment of Bond.** Mere formal or technical defects in a removal bond may ordinarily be cured by amendment of the bond, whether or not the time for removal has expired;[38] and it has been held that the state court should not reject a bond on account of such defects without giving the petitioning party opportunity so to correct them,[39] although it need not postpone the trial of the cause in order to allow time to amend the bond.[40] Thus the omission of a seal, where no seal is essential to the validity of the bond,[41] a mistake in the name of the obligee,[42] the omission of a penal clause,[43] or a failure to show the authority of the person to whom the bond was executed in behalf of a corporate surety, if such showing is required,[44] may be cured by amendment. The omission of an essential element of the bond,[45] however, such as the want of any provision for the payment of costs in case of remand,[46] the failure to attach a seal where that is required,[47] or, where the bond contains a penal clause, the omission of the amount of the penalty,[48] cannot be supplied or cured by amendment, after the time for removal has expired.

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[20] **Presentation and filing of bond in general** see supra § 250.

[21] Roberts v. Carrington, 2 N. Y. Super. 694; Howard v. Southern R. Co., 122 N. C. 944, 29 SE 778; Best v. New York L. Ins. Co., 2 Cinc. Super. (Oh.) 329; Kirkpatrick v. Hopkins, 2 Miles (Pa.) 277. But see Tunstall v. Madison Parish, 30 La. Ann. 471 (holding that the bond need not be filed until the surety has been approved by the court); Campbell v. Wallen, Mart. & Y. (Tenn.) 266 (holding that the bond need not be given until after it shall have been judicially decided that, upon the facts set out in the petition, the applicant is entitled to a removal).

[22] Austin v. Gagan, 39 Fed. 626, 5 LRA 476; Mahoney v. U. S. Shipping Bd. Emergency Fleet Corp., 253 Mass. 234, 148 NE 454. See also Wilcox, etc., Sewing-Mach. Co. v. Follett, 29 F. Cas. No. 17,643, 2 Flipp. 263 (recognizing the rule).

Time for removal see supra §§ 205–211.

[23] Austin v. Gagan, 39 Fed. 626, 5 LRA 476.

[24] Herron v. Bates, etc., Constr. Co., 180 Ky. 851, 203 SW 719.

[25] Herron v. Bates, etc., Constr. Co., supra.

[26] Hervey v. Illinois Midland R. Co., 3 Fed. 707; Grow v. Wiman, 3 N. Y. 281.

[27] Probst v. Cowen, 91 Fed. 929.

[28] Cooke v. Seligman, 7 Fed. 263, 17 Blatchf. 452.

[29] Herron v. Bates, etc., Constr. Co., 180 Ky. 851, 203 SW 719.

[30] Western Union Tel. Co. v. Horack, 9 Ill. A. 309; Terre Haute, etc., R. Co. v. Abend, 9 Ill. A. 304; Stone v. Sargent, 129 Mass. 503; Bates v. Baltimore, etc., R. Co., 39 Oh. St. 157.

Justification of sureties see supra text and notes 5, 6.

[31] **Presentation of bond to state court** see infra § 250.

[32] Mix v. Andes Ins. Co., 74 N. Y. 53, 30 AmR 260; Southern Pac. R. Co. v. Harrison, 73 Tex. 103, 11 SW 168; Henen v. Baltimore, etc., R. Co., 17 W. Va. 881.

[a] **It is duty of court, and not of clerk,** to determine the sufficiency of the bond. Southern Pac. R. Co. v. Harrison, 73 Tex. 103, 11 SW 168.

Necessity of giving bond for removal see supra § 245.

Right of state court to determine for itself whether right of removal exists on face of record see infra § 253.

[33] Fitz v. Hayden, 4 Mart. N. S. (La.) 653; Bell v. Lycoming Ins. Co., 3 Hun (N. Y.) 409, 6 Thomps. & C. 54; Henen v. Baltimore, etc., R. Co., 17 W. Va. 881.

[34] Osgood v. Chicago, etc., R. Co., 18 F. Cas. No. 10,604, 6 Biss. 330.

Filing of proper petition and bond as effectuating removal regardless of action of state court see infra §§ 254, 255.

[35] Taylor v. Shew, 54 N. Y. 75.

[36] New York Mut. L. Ins. Co. v. Langley, 145 Fed. 415; Groton Bridge, etc., Co. v. American Bridge Co., 137 Fed. 284; Dennis v. Alachua County, 7 F. Cas. No. 3,791, 3 Woods 683; Fiske v. Union Pac. R. Co., 9 F. Cas. No. 4,827, 6 Blatchf. 362.

Motion to remand in general see infra §§ 324–336.

[37] Meyer v. Delaware R. Constr. Co., 100 U. S. 457, 25 L. ed. 593.

[38] Gray v. Oregon Short Line R. Co., 37 F. (2d) 591; State Improvement-Dev. Co. v. Leininger, 226 Fed. 884; Chase v. Erhardt, 198 Fed. 305; Loop v. Winters, 115 Fed. 362; Overman Wheel Co. v. Pope Mfg. Co., 46 Fed. 577; Harris v. Delaware, etc., R. Co., 18 Fed. 833; Deford v. Mehaffy, 13 Fed. 481; Beede v. Cheeney, 5 Fed. 388; Mahoney v. U. S. Shipping Bd. Emergency Fleet Corp., 253 Mass. 234, 148 NE 454.

[39] Taylor v. Shew, 54 N. Y. 75; Grow v. Wiman, 3 NYSt 281.

[40] Harrold v. Arrington, 64 Tex. 233.

[41] Loop v. Winters, 115 Fed. 362; Overman Wheel Co. v. Pope Mfg. Co., 46 Fed. 577.

Necessity of seal see supra § 245.

[42] Harris v. Delaware, etc., R. Co., 18 Fed. 833.

[43] Johnson v. F. C. Austin Mfg. Co., 76 Fed. 616.

Necessity of penalty see supra § 245.

[44] Collins Mfg. Co. v. Wickwire Spencer Steel Co., 11 F. (2d) 196.

[45] Mahoney v. U. S. Shipping Bd. Emergency Fleet Corp., 253 Mass. 234, 148 NE 454. And see cases infra notes 46–48.

[46] Webber v. Bishop, 13 Fed. 49; Torrey v. Grant Locomotive Works, 24 F. Cas. No. 14,105, 14 Blatchf. 269. But see Deford v. Mehaffy, 13 Fed. 481 (permitting amendment in such case).

Necessity of provision for payment of costs see supra § 245.

[47] Mahoney v. U. S. Shipping Bd. Emergency Fleet Corp., 253 Mass. 234, 148 NE 454.

Necessity of seal see supra § 245.

[48] Austin v. Gagan, 39 Fed. 626, 5 LRA 476; Burdick v. Hale, 4 F. Cas. No. 2,147, 7 Biss. 96.

Necessity of specification of amount in penalty clause see supra § 245.

[§ 248] **(d) Liability on Bond.**[49] The amount specified in the penal clause, if any, of a bond given for the removal of a cause from a state court to a federal court, is merely a penalty and not liquidated damages for a breach of the condition of the bond;[50] and the amount for which the sureties on the bond are liable cannot exceed the costs awarded upon a remand.[51] A dismissal of the suit, after removal, for failure of the removing party to appear and put in special bail, where required, gives rise to no liability on the bond.[52]

Enforcement of liability. In the absence of any stipulation in a removal bond for the entry of judgment against the surety in case of a breach of the condition, his liability is enforceable only in an independent action on the bond.[53]

[§ 249] **(4) Notice.** The requirement of the statute relating to the removal, from a state court to a federal court, of suits arising under the federal constitution, laws, or treaties or involving diversity of citizenship, that written notice of the petition[54] and bond[55] for removal shall be given to the adverse party before filing the same[56] is mandatory,[57] and the federal court to which the cause is attempted to be removed ordinarily has no jurisdiction to receive or retain the suit where objection is made that such notice has not been given.[58] It has been held, however, that no notice is necessary where removability arises during the trial of the cause and the parties are all present in court when the application for removal is made;[59] but there is authority to the contrary.[60] Neither as a matter of law or of comity is it necessary that notice be given to the state court.[61]

Time of notice. The notice need not be given any particular length of time before presenting the petition and bond for removal, since it is notice of the petition and bond and not notice of any hearing that is required,[62] and so notice at any time, however short, is sufficient.[63]

Sufficiency of notice. The purpose of the notice required by statute being merely to advise plaintiff that the suit and all further proceedings therein are about to be transferred to another tribunal,[64] to submit to his scrutiny the sufficiency of the petition and bond,[65] and to enable him to speed proceedings if defendant delays therein,[66] a notice which recites that defendant will, on a specified day,[67] or on or before a designated date,[68] file in the state court a petition and bond for removal is sufficient, at least where copies of such petition and bond are served before filing.[69] It is not essential, however, that the time[70] or place[71] of presenting or filing the petition and bond be stated in the notice, since it is not for the purpose of enabling plaintiff to object to or resist the removal.[72] Presentation of a petition and bond to counsel for plaintiff, and his acceptance of service of a rule to show cause why the suit should not be removed, has been held sufficient notice within the statute.[73]

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[49] **Necessity that bond be joint and several** see supra § 245.

[50] Henry v. Louisville, etc., R. Co., 91 Ala. 585, 8 S 343.

[51] Hale v. Fallon, 4 N. J. L. J. 308.

[52] Welch v. Thorn, 16 La. 188.

[53] Colburn v. Hill, 103 Fed. 340, 43 CCA 253.

[54] **Petition in general** see supra §§ 237–244.

[55] **Bond in general** see supra §§ 245–248.

[56] USCA tit 28 § 72.

Presentment and filing of petition and bond see infra § 250.

[57] Tinker v. Kossuth County, 292 Fed. 863; In re Vadner, 259 Fed. 614; Arthur v. Maryland Casualty Co., 216 Fed. 386; Cropsey v. Sun Printing, etc., Assoc., 215 Fed. 132; Wanner v. Bissinger, 210 Fed. 96; Graves v. Colquitt County, 34 Ga. A. 271, 129 SE 166.

[a] **Prior to adoption of Judicial Code** (USCA tit 28) no notice was necessary of proceedings to obtain a removal of suits arising under the constitution, laws, or treaties of the United States, or involving diversity of citizenship. Cayce v. Southern R. Co., 195 Fed. 786; Crotts v. Southern R. Co., 90 Fed. 1; Creagh v. Equitable L. Assur. Soc., 83 Fed. 849; Chiatovich v. Hanchett, 78 Fed. 193; Stevens v. Richardson, 9 Fed. 191, 20 Blatchf. 53; Fisk v. Union Pac. R. Co., 9 F. Cas. No. 4,828, 8 Blatchf. 243, 3 AlbLJ (N. Y.) 156; Wehl v. Wald, 29 F. Cas. No. 17,356, 17 Blatchf. 342; Wormser v. Dahlman, 30 F. Cas. No. 18,048, 16 Blatchf. 319, 7 Reporter 740, 57 HowPr (N. Y.) 286; Southern R. Co. v. Hudgins, 107 Ga. 334, 33 SE 442; Ficklin v. Tarver, 59 Ga. 263; Louisiana State Bank v. Morgan, 4 Mart. N. S. (La.) 344.

[58] Tinker v. Kossuth County, 292 Fed. 863; Arthur v. Maryland Casualty Co., 216 Fed. 386; Warner v. Bissinger, etc., Co., 210 Fed. 96; Graves v. Colquitt County, 34 Ga. A. 271, 129 SE 166; Booki v. Pullman Co., 220 Mass. 71, 107 NE 418; Western Union Tel. Co. v. Oakley, (Tex. Civ. A.) 227 SW 211. See Cropsey v. Sun Printing, etc., Assoc., 215 Fed. 132, 133 (where it was said that the requirement of notice is "perhaps jurisdictional in a limited sense"); U. S. v. Sessions, 205 Fed. 502, 123 CCA 570 (dictum). Compare Goins v. Southern Pac. Co., 198 Fed. 432 (holding that while the requirement of notice is not jurisdictional in the sense that it is essential to the existence of a cognizable controversy and cannot be waived, and that such requirement does not impose any additional duty upon the state court to pass upon the sufficiency of the right to removal, yet where notice has not been given the federal court cannot ignore the omission and retain jurisdiction of the suit if objection is made).

Remand to state court see infra §§ 302–341.

Waiver of notice see infra text and notes 75, 76.

[59] Byrne v. Chesapeake, etc., R. Co., 151 Ky. 553, 152 SW 538.

Cause becoming removable at time subsequent to commencement see supra § 26.

[60] Chelan Electric Co. v. Wick, 148 Wash. 479, 269 P 827.

[61] Frazier v. Hines, 260 Fed. 874.

[62] Ritchey Lith. Corp. v. Robertson-Cole Distributing Corp., 199 App. Div. 362, 191 NYS 870.

Hearing on petition for removal see infra § 250 text and note 93.

[63] Miller v. Southern Bell Tel., etc., Co., 279 Fed. 806.

[64] Miller v. Southern Bell Tel., etc., Co., supra; Hansford v. Stone-Ordean-Wells Co., 201 Fed. 185.

[65] Cropsey v. Sun Printing, etc., Assoc., 215 Fed. 132 (semble); Hansford v. Stone-Ordean-Wells Co., 201 Fed. 185.

[66] Hansford v. Stone-Ordean-Wells Co., supra.

[67] Hansford v. Stone-Ordean-Wells Co., supra.

[68] Cropsey v. Sun Printing, etc., Assoc., 215 Fed. 132.

[69] Hansford v. Stone-Ordean-Wells Co., 201 Fed. 185; Chase v. Erhardt, 198 Fed. 305.

Presentment and filing of petition and bond see infra § 250.

[70] Hinman v. Barrett, 244 Fed. 621; Potter v. General Baking Co., 213 Fed. 697. But see Lee v. Continental Ins. Co., 292 Fed. 408 (holding that the statute necessarily implies that the time at which it is purposed to present and file the petition and bond will be stated).

[a] **Form of notice sufficient.**—A notice as follows: "To W H W, Attorney for the Plaintiff: You are hereby notified that the General Baking Company, defendant in the above entitled cause, is about to file in said superior court a petition that the above entitled cause be removed into the District Court of the United States for the District of Rhode Island, and also a bond on removal duly executed by said General Baking Company as principal and by the American Surety Company of New York as surety, and that said petition and bond will be presented to a justice of said superior court for action thereon immediately. G, P & T, Attys. for Deft.", is sufficient to comply with the requirement of the statute. Potter v. General Baking Co., 213 Fed. 697.

[71] Hinman v. Barrett, 244 Fed. 621; Potter v. General Baking Co., 213 Fed. 697.

[72] Williams v. New York, etc., R. Co., 11 F. (2d) 363, 45 ALR 437; Miller v. Southern Bell Tel., etc., Co., 279 Fed. 806; Potter v. General Baking Co., 213 Fed. 697.

Service. The requirement of the statute that notice shall be "given" requires it to be served upon the adverse party.[74]

Waiver of notice. The right to notice of the petition and bond for removal may be waived by the adverse party.[75] Where plaintiff appears before the state court and resists the removal, any failure to give notice is thereby waived.[76]

[§ 250] **(5) Presentment and Filing of Petition and Bond.**[77] Under the provision of the statute relating to the removal of causes from a state court to a federal court on the ground of diversity of citizenship or because arising under the constitution, laws, or treaties of the United States, requiring the petition[78] and bond[79] for removal to be filed in the suit in the state court,[80] it has been held by some authorities that the mere filing of a petition and bond in the office of the clerk of the state court in which the suit is pending is not sufficient, but that such petition and bond must be presented to such state court and its approval thereof obtained,[81] except that in a cause in which the clerk has jurisdiction, under the state statutes, to make orders and render final judgment, the petition and bond are properly presented to him;[82] and so where a petition and bond have been filed, but a presentment thereof and motion for removal are withdrawn, it is held that the state court does not have jurisdiction and no removal is effectuated.[83] According to other authorities, however, while such presentment for acceptance has been recognized as the proper and preferable practice,[84] it is not indispensable, but filing such petition and bond with the clerk is sufficient,[85] the papers, when filed, becoming part of the record of the suit in the state court.[86] Even though presentment to the court be regarded as necessary, the failure or refusal of the court to accept a petition and bond which are in fact sufficient to entitle the applicant to a removal does not deprive him of such right.[87]

Presentment to judge in chambers. The presentment of a petition and bond for removal to, and its approval by, a judge of the state court in which the cause is pending, in his chambers, is ordinarily regarded as a sufficient presentation and approval;[88] but there is authority for the contrary view.[89]

Manner of presentment. An oral statement to the court that a petition and bond for removal have been filed constitutes a sufficient presentation, without production of the petition and bond, where the court does not require or request such production.[90]

Ex parte presentment. A petition and bond for removal may be presented ex parte to the state court for its approval,[91] and the statutory provision requiring notice of the petition and bond to be given[92] does not impose upon the state court any duty to hold a hearing on the application.[93] It is not even necessary that the petitioner be personally present at the time of the presentment.[94]

Place of filing. A petition and bond for removal should be filed in the state court in which the suit is pending at the time of such filing,[95] even though it may originally have been brought in another court of the state.[96] Moreover, such papers must be filed in the clerk's office in the county in which the venue is laid and the suit is pending,[97] and no removal is effectuated by filing them in the office of the clerk in another county where the court is then sitting, although the approval of the court is there obtained.[98]

Filing in vacation. Where the view obtains that filing a petition and bond for removal with the clerk of the state court in which the suit is pending is sufficient, without presentation to the court,[99] filing such papers at a time when the state court is in vacation is sufficient;[1] but where the contrary rule is followed, that the approval of the court is requisite to entitle the petitioner to a removal,[2] the fact that the court is not in session or is in vacation at the time the petition and bond are filed does not obviate the necessity of such presentation,[3] although such filing during a vacation of the state court is sufficient if the petition and bond are presented to and approved by a judge in chambers, where such method of obtaining approval is recognized as sufficient.[4]

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[73] Lewis v. Erie R. Co., 257 Fed. 868.

[74] Tinker v. Kossuth County, 292 Fed. 863.

[75] Goins v. Southern Pac. Co., 198 Fed. 432.

[76] Apfelbaum v. Hartford F. Ins. Co., 29 F. (2d) 432.

[77] **As:**
Effectuating removal see infra § 254.
General appearance in state court see Appearances § 34.

Presentment after time for removal has expired as sufficient when filing was in time see supra § 205.

[78] **Petition for removal in general** see supra §§ 237-244.

[79] **Bond for removal in general** see supra §§ 245-248.

[80] USCA tit 28 § 72.

[81] Bahls v. La Fayette Welfare Loan Soc., 17 F. (2d) 379; Lee v. Continental Ins. Co., 292 Fed. 408; Higson v. North River Ins. Co., 184 Fed. 165; Mays v. Newlin, 143 Fed. 574; Coker v. Monaghan Mills, 110 Fed. 803; Fox v. Southern R. Co., 80 Fed. 945; La Page v. Day, 74 Fed. 977; Hall v. Chattanooga Agricultural Works, 48 Fed. 599; Roberts v. Chicago, etc., R. Co., 45 Fed. 433 [aff 141 U. S. 690, 12 SCt 123, 35 L. ed. 902]; Shedd v. Fuller, 36 Fed. 609; Scott v. Otis, 21 F. Cas. No. 12,543, 5 NY WklyDig 264; Bilecki v. Erie R. Co., (N. J. Sup.) 127 A 328; Rhode Island Horse Shoe Co. v. Goodenough Horse Shoe Co., 1 AbbNCas (N. Y.) 11, 52 HowPr 111; Morganton v. Hutton, etc., Co., 187 N. C. 736, 122 SE 842; Higson v. North River Ins. Co., 153 N. C. 35, 68 SE 920; Howard v. Southern R. Co., 122 N. C. 944, 29 SE 778. See Miller v. Tobin, 18 Fed. 609, 9 Sawy. 401 (apparently recognizing the rule).

[82] Sanderlin v. People's Bank, 140 Fed. 191.

[83] Mays v. Newlin, 143 Fed. 574.

[84] Williams v. New York, etc., R. Co., 11 F. (2d) 363, 45 ALR 437; Noble v. Massachusetts Ben. Assoc., 48 Fed. 337; South Carolina v. Coosaw Min. Co., 45 Fed. 804; Brown v. Murray, 43 Fed. 614; North American L. & T. Co. v. Colonial, etc., Mortg. Co., 3 S. D. 590, 54 NW 659.

[85] Williams v. New York, etc., R. Co., 11 F. (2d) 363, 45 ALR 437; Wills v. Baltimore, etc., Co., 65 Fed. 532; Noble v. Massachusetts Ben. Assoc., 48 Fed. 337; Brown v. Murray, 43 Fed. 614; Osgood v. Chicago, etc., R. Co., 18 F. Cas. No. 10,604, 6 Biss. 330; North American L. & T. Co. v. Colonial, etc., Mortg. Co., 3 S. D. 590, 54 NW 659.

Necessity of order by state court for removal see infra § 255.

[86] Donovan v. Wells, 169 Fed. 363, 94 CCA 609, 22 LRANS 1250; North American L. & T. Co. v. Colonial, etc., Mortg. Co., 3 S. D. 590, 54 NW 659.

[87] Osgood v. Chicago, etc., R. Co., 18 F. Cas. No. 10,604, 6 Biss. 330.

Order of court granting or refusing removal in general see infra § 255.

[88] Remington v. Central Pac. R. Co., 198 U. S. 95, 25 SCt 577, 49 L. ed. 959; Engstrom v. Canadian Northern R. Co., 291 Fed. 736; Johnson v. Computing Scale Co., 139 Fed. 339; Mecke v. Valleytown Mineral Co., 93 Fed. 697, 35 CCA 151; South Carolina v. Coosaw Min. Co., 45 Fed. 804.

[89] Williams v. Massachusetts Ben. Assoc., 47 Fed. 533.

[90] Monroe v. Williamson, 81 Fed. 977.

[91] Potter v. General Baking Co., 213 Fed. 697.

[92] See supra § 249.

[93] Potter v. General Baking Co., supra.

[94] Brown v. Crippin, 4 Hen. & M. (14 Va.) 173.

[95] American Finance Co. v. Bostwick, 151 Mass. 19, 23 NE 656.

[96] American Finance Co. v. Bostwick, supra.

[97] Remington v. Central Pac. R. Co., 198 U. S. 95, 25 SCt 577, 49 L. ed. 959; Johnson v. Computing Scale Co., 139 Fed. 339; Groton Bridge, etc., Co. v. American Bridge Co., 137 Fed. 284; Loop v. Winters, 115 Fed. 362; Noble v. Massachusetts Ben. Assoc., 48 Fed. 337.

[98] Noble v. Massachusetts Ben. Assoc., 48 Fed. 337.

[99] See supra text and notes 85, 86.

Indorsement of filing. It is not essential to the right of removal that the petition and bond shall be marked by the clerk as "filed," provided they are in fact filed in his office,[5] or are accepted by him, for filing, outside his office;[6] and so a failure to indorse the filing upon the petition or bond,[7] or the indorsement of an erroneous file mark thereon,[8] does not affect the validity of the removal proceedings.

[§ 251] **b. Suits and Prosecutions against Persons Asserting or Relying upon Civil Rights Laws.** The statute relating to the removal from a state court to a federal court of civil suits and criminal prosecutions against persons who are denied or cannot enforce in such state court any right secured by a civil rights law, or against officers or other persons for acts done or refused to be done by them under or on account of any such law,[9] provides for the removal of such a suit or prosecution upon the verified petition of defendant, stating the facts, and filed in the state court; whereupon, it is provided, further proceedings in the state court shall cease, but all bail and other security given shall continue with the same force and effect as if the suit or prosecution had continued to final judgment and execution in the state court. The statute further provides that it shall be the duty of the clerk of the state court to furnish petitioner with copies of the process and all papers and proceedings in the case, and that if such copies are filed in the federal court on the first day of its session, the cause shall proceed in the same manner as if originally brought therein. It is further provided that if the clerk of the state court refuses or neglects to furnish such copies, the petitioner may docket the cause in the federal court, which shall thereupon have jurisdiction thereof, and may, upon proof of the clerk's refusal or neglect and upon reasonable notice to plaintiff, require plaintiff to file a declaration, petition or complaint in the cause, and upon his default may dismiss the cause at his costs; but that if, without such refusal or neglect of the clerk, petitioner fails to file such copies in the federal court, such court shall give a certificate stating such failure, and upon production thereof in the state court the cause shall proceed therein as if no petition for removal had been filed.[10] The statute also provides that where all the acts necessary to effectuate a removal have been performed, if the petitioning defendant is in actual custody on process issued by the state court, it shall be the duty of the clerk of the federal court to issue a writ of habeas corpus cum causa, and of the marshal, acting under the writ, to take the body of defendant into his custody, to be dealt with according to the orders of the federal court or, if in vacation, of any judge thereof; and that the marshal shall file with or deliver to the clerk of the state court a duplicate copy of such writ.[11]

Petition. The petition for removal should specifically set forth the facts which bring the cause within the statute;[12] and a mere general allegation in the language of the statute that defendant is denied or cannot enforce a right secured by the laws providing for equal civil rights is insufficient to show a right of removal.[13]

Effectuation of removal by federal court.[14] If the state court refuses to recognize defendant's right to remove, the federal court may issue a writ of certiorari to effectuate the removal;[15] but if defendant is in actual custody and a writ of habeas corpus cum causa is issued,[16] it serves to remove both the cause and the person of defendant.[17] The course pointed out by other statutory provisions for the docketing of the case in the federal court by defendant if the clerk of the state court fails or refuses to furnish copies of the proceedings[18] is an additional and summary method of proceeding to effectuate a removal where only the clerk is delinquent.[19]

Issuance of writ. Under the provision of the statute making it the duty of the clerk of the federal court, upon the removal of a cause, to issue a writ of habeas corpus cum causa where the petitioning defendant is in actual custody,[20] it has been held that the writ should not be issued by the clerk without being allowed by a judge of the court.[21]

[§ 252] **c. Actions Concerning Land Claimed under Grants from Different States.** The statute relating to the removal from a state court to a federal court of actions in which the title to land is concerned[22] provides that if one or more of plaintiffs or defendants in such an action shall state to the court, and make affidavit if required, that he or they claim and will rely on a right or title to the land under a grant from a state, and shall produce the original grant or an exemplification of it, unless the loss of public records has made that impossible, and shall move that any one or more of the adverse party inform the court whether he or they claim a right or title to such land under a grant from some other state, the party or parties so required shall give such information, or otherwise not be allowed to plead such grant or give it in evidence at the trial; whereupon, it is provided, if such adverse party or parties inform the court that he or they do claim under a grant from another state, any one or more of the party moving for such information may then remove the cause on petition and bond as prescribed by the statute relating to the removal of causes arising under the federal constitution, laws or treaties or in which difference of citizenship exists.[23]

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[1] Brown v. Murray, 43 Fed. 614; Osgood v. Chicago, etc., R. Co., 18 F. Cas. No. 10,604, 6 Biss. 330.

[2] See supra text and note 81.

[3] Fox v. Southern R. Co., 80 Fed. 945; Scott v. Otis, 21 F. Cas. No. 12,543, 5 NYWklyDig 264; Morganton v. Hutton, etc., Co., 187 N. C. 736, 122 SE 842; Howard v. Southern R. Co., 122 N. C. 944, 29 SE 778.

[4] Mecke v. Valleytown Mineral Co., 93 Fed. 697, 35 CCA 151.

Presentment to judge in chambers see supra text and notes 88, 89.

[5] Waite v. Phœnix Ins. Co., 62 Fed. 769.

[6] Engstrom v. Canadian Northern R. Co., 291 Fed. 736.

[7] Engstrom v. Canadian Northern R. Co., supra; Brady v. J. B. McCrary Co., 244 Fed. 602; Waite v. Phœnix Ins. Co., 62 Fed. 769.

[8] Wills v. Baltimore, etc., R. Co., 65 Fed. 532.

[9] **Removal of such suits and prosecutions in general** see supra §§ 111-117.

[10] USCA tit 28 § 74.

[11] USCA tit 28 § 75.

[12] Ohio v. Swift, 270 Fed. 141 [certiorari den 257 U. S. 633 mem, 42 SCt 47 mem, 66 L. ed. 407 mem, app dism 260 U. S. 146, 43 SCt 22, 67 L. ed. 176]; State v. Smalls, 11 S. C. 262.

[13] State v. Smalls, supra.

[14] **Effectuation of removal in general** see infra §§ 254, 255.

[15] Ex p. Wells, 29 F. Cas. No. 17,386, 3 Woods 128.

Procedure when state court refuses to yield jurisdiction in general see Courts § 654.

[16] **Issuance of writ** see infra text and notes 20, 21.

[17] Ex p. Wells, 29 F. Cas. No. 17,386, 3 Woods 128.

[18] See supra text and note 10.

[19] Ex p. Wells, 29 F. Cas. No. 17,386, 3 Woods 128.

[20] See supra text and note 11.

[21] Ex p. Wells, 29 F. Cas. No. 17,386, 3 Woods 128.

[22] **Removal of such actions in general** see supra §§ 118, 119.

[§ 253] **2. Determination of Right To Remove.**[24] It being only upon the filing, in a state court in which is pending a suit of one of the classes removable upon application to such state court,[25] of a petition for removal which properly shows that the cause is removable,[26] accompanied, where required, by a sufficient bond,[27] that the removal of such cause to a federal court is effectuated,[28] the state court has the right and is under a duty to decide for itself, purely as a question of law, whether or not upon its face the petition, considered in connection with the rest of the record, presents a removable case and thereby has terminated the jurisdiction of such court.[29] For this purpose the allegations of fact in the petition for removal[30] and in plaintiff's pleadings in the suit,[31] except, as to the latter, where their averments are controverted by the removal petition,[32] must be taken by the state court as true; but mere conclusions need not be so treated,[33] and, of course, any allegations of law need not be accepted as sound or binding.[34] If, so regarding the removal petition and the record, the cause does not appear to be removable, the state court is not bound to[35] and should not[36] surrender jurisdiction, but may and should proceed as if no application for removal had been made,[37] although it is only where the nonremovability of the cause clearly appears on the face of the

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[23] USCA tit 28 § 73.

Procedure for removal of causes arising under federal constitution, laws, or treaties or in which difference of citizenship exists see supra §§ 236–250.

[24] **Removability of cause as dependent upon plaintiff's pleadings** see supra § 7.

[25] **Causes removable on application to state court** see supra §§ 236–252.

[26] **Necessity and sufficiency of petition for removal** see supra §§ 237–244.

[27] **Necessity and sufficiency of bond for removal of:**

Actions concerning land claimed under grant from different states see supra § 252.

Suits arising under federal constitution, laws, or treaties or involving difference of citizenship see supra §§ 245–248.

[28] See infra § 254.

[29] U. S.—Burlington R. Co. v. Dunn, 122 U. S. 513, 7 SCt 1262, 30 L. ed. 1159; Stone v. South Carolina, 117 U. S. 430, 6 SCt 799, 29 L. ed. 962; Queensboro Nat. Bank v. Kelly, 15 F. (2d) 395; Miller v. Soule, 221 Fed. 493; Missouri, etc., R. Co. v. Chappell, 206 Fed. 688; Springer v. Howes, 69 Fed. 849; Brown v. Murray, 43 Fed. 614; Ex p. Wells, 29 F. Cas. No. 17,386, 3 Woods 128.

Ala.—Ex p. State, 71 Ala. 363.

Ark.—Southwest Power Co. v. Price, 180 Ark. 567, 22 SW (2d) 373 [certiorari den 281 U. S. 753 mem, 50 SCt 353 mem, 74 L. ed. 1163 mem, and app dism 281 U. S. 703 mem, 50 SCt 407 mem, 74 L. ed. 1128 mem].

Cal.—Central Sav. Bank v. Lake, 201 Cal. 438, 257 P 521.

Colo.—Union Pac. R. Co. v. Sleeth, 79 Colo. 548, 246 P 1021.

Ga.—Graves v. Colquitt County, 34 Ga. A. 271, 129 SE 166.

Ida.—Morbeck v. Bradford-Kennedy Co., 19 Ida. 83, 113 P 89.

Iowa.—Emery v. Chicago, etc., R. Co., 186 Iowa 1156, 170 NW 540, 173 NW 12; Bacon v. Iowa Cent. R. Co., 157 Iowa 493, 137 NW 1011 [aff 236 U. S. 305, 35 SCt 357, 59 L. ed. 591]; Wilson v. Big Joe Block Coal Co., 135 Iowa 531, 113 NW 348, 14 AnnCas 266.

Kan.—Boatmen's Bank v. Fritzlen, 75 Kan. 479, 89 P 915, 22 LRANS 1235 [aff 212 U. S. 364, 29 SCt 366, 53 L. ed. 551].

Ky.—Illinois Cent. R. Co. v. Sheegog, 126 Ky. 252, 103 SW 323, 31 KyL 691 [aff 215 U. S. 308, 30 SCt 101, 54 L. ed. 208]. See Roach v. Ohio Nat. L. Ins. Co., 201 Ky. 713, 258 SW 300 (holding that the provisions of Judicial Code § 274c [USCA tit 28 § 399], permitting a removal petition to be amended in the federal court in certain cases, do not relieve the state court of the necessity of passing upon the sufficiency of the petition as presented).

La.—State v. Johnson, 29 La. Ann. 399.

Me.—Doherty v. McDowell, 120 Me. 384, 115 A 92.

Mass.—Mahoney v. U. S. Shipping Bd. Emergency Fleet Corp., 253 Mass. 234, 148 NE 454; Com. v. Norman, 249 Mass. 123, 144 NE 66; Eaton v. Walker, 244 Mass. 23, 138 NE 798; Dunbar v. Rosenbloom, 230 Mass. 176, 119 NE 829; Munnss v. American Agricultural Chemical Co., 216 Mass. 423, 103 NE 859; Long v. Quinn Bros., 215 Mass. 85, 102 NE 348. But see Pringle v. Storrow, 256 Mass. 561, 153 NE 26, 49 ALR 1222 (where the state court refused to pass upon the question whether separate petitions by the several parties defendant were sufficient, or whether a single petition in which all should join was required, saying that the federal court was the proper tribunal to pass upon the question).

Mich.—Dougherty v. Michigan Bell Tel. Co., 235 Mich. 416, 209 NW 200. Compare Forncrook Mfg. Co. v. Barnum Wire Works, 54 Mich. 552, 20 NW 582 (holding that it is for the federal court, rather than the state court, to say whether the petition is sufficient in form and strictness of allegations).

Minn.—Pearson v. Zacher, 177 Minn. 182, 225 NW 9.

Mo.—Zumwalt v. Chicago, etc., R. Co., 266 SW 717; State v. Johnston, 234 Mo. 338, 137 SW 595; State v. Mosman, 231 Mo. 474, 133 SW 38; State v. Kelley, 220 Mo. A. 413, 286 SW 724; McNulty v. Atlas Portland Cement Co., (A.) 249 SW 730; Sears v. Atchison, etc., R. Co., 163 Mo. A. 711, 147 SW 860; Schwyhart v. Barrett, 145 Mo. A. 332, 130 SW 388 [aff 227 U. S. 184, 33 SCt 250, 57 L. ed. 473].

Mont.—Golden v. Northern Pac. R. Co., 39 Mont. 435, 104 P 549, 34 LRANS 1154, 18 AnnCas 886.

N. Y.—Heath v. Santa Lucia Co., 196 App. Div. 446, 188 NYS 218; Orr v. Baltimore, etc., R. Co., 83 Misc. 221, 145 NYS 378.

N. C.—Cowart v. Suncrest Lumber Co., 194 N. C. 787, 140 SE 736; Fenner v. Richmond Cedar Works, 191 N. C. 207, 131 SE 625; Morganton v. Hutton, etc., Co., 187 N. C. 736, 122 SE 842; Patterson v. Champion Lumber Co., 175 N. C. 90, 94 SE 692; Cogdill v. Clayton, 170 N. C. 526, 87 SE 338; Cox v. Atlantic Coast Line R. Co., 166 N. C. 652, 82 SE 979; Lloyd v. Southern R. Co., 166 N. C. 24, 81 SE 1003 [aff 239 U. S. 496, 36 SCt 210, 60 L. ed. 402]; Smith v. Harris Granite Quarries Co., 164 N. C. 338, 80 SE 388; Hurst v. Southern R. Co., 162 N. C. 368, 78 SE 434; Herrick v. Norfolk-Southern R. Co., 158 N. C. 307, 73 SE 1008.

Okl.—St. Louis, etc., R. Co. v. Hodge, 53 Okl. 427, 157 P 60; Chicago, etc., R. Co. v. Brazzell, 33 Okl. 122, 124 P 40; Western Coal, etc., Co. v. Osborne, 30 Okl. 235, 119 P 973.

S. C.—Jennings v. Southern R. Co., 152 S. C. 322, 150 SE 309; Towill v. Southern R. Co., 121 S. C. 447, 114 SE 416; Stephens v. Ringling, 102 S. C. 333, 86 SE 683. Compare Brodhead v. Shoemaker, 85 Ga. 728, 11 SE 845; Robertson v. Kettell, 64 N. H. 430, 14 A 78 (both holding that, where the removability of the cause was doubtful, the state supreme court, on appeal, would not pass upon the question but would leave it to be decided by the federal court).

[a] **In Porto Rico** the rule is the same in the case of a removal from an insular court to the federal court. Wenar v. Pohl, 1 Porto Rico Fed. 37.

[b] **Question whether petition for removal was filed in time** (1) is one of law, for the state court to decide, and it is not made a question of fact by an allegation in the petition in terms that the time for removal had not expired. Southwest Power Co. v. Price, 180 Ark. 567, 22 SW (2d) 373 [certiorari den 281 U. S. 753 mem, 50 SCt 353 mem, 74 L. ed. 1163 mem, and app dism 281 U. S. 703 mem, 50 SCt 407 mem, 74 L. ed. 1128 mem]. (2) Time for removal see supra §§ 205–211.

Determination by state court of sufficiency of removal bond see supra § 246.

[30] U. S.—Wilson v. Republic Iron, etc., Co., 257 U. S. 92, 42 SCt 35, 66 L. ed. 144; Chesapeake, etc., R. Co. v. Cockrell, 232 U. S. 146, 34 SCt 278, 58 L. ed. 544 [aff 144 Ky. 137, 137 SW 1066]; Marshall v. Holmes, 141 U. S. 589, 12 SCt 62, 35 L. ed. 870; Kansas City, etc., R. Co. v. Daughtry, 138 U. S. 298, 11 SCt 306, 34 L. ed. 963 [aff 88 Tenn. 721, 13 SW 698; Burlington, etc., R. Co. v. Dunn, 122 U. S. 513, 7 SCt 1262, 30 L. ed. 1159; Sanders v. Atlantic Coast Line R. Co., 33 F. (2d) 1010; Farmers' Bank, etc., Co. v. Atchison, etc., R. Co., 25 F. (2d) 23 [rev 11 F. (2d) 993]; Queensboro Nat. Bank v. Kelly, 15 F. (2d) 395; Lynes v. Standard Oil Co., 300 Fed. 812; Frazier v. Hines, 260 Fed. 874; Buxton v. Pennsylvania Lumber Co., 221 Fed. 718; Donovan v. Wells, 169 Fed. 363,

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94 CCA 609, 22 LRANS 1250; Shane v. Butte Electric R. Co., 150 Fed. 801; Fidelity Trust, etc., Co. v. Newport News, etc., Co., 70 Fed. 403; Powers v. Chesapeake, etc., R. Co., 65 Fed. 129 [aff 169 U. S. 92, 18 SCt 264, 42 L. ed. 673]; Sinclair v. Pierce, 50 Fed. 851.

Ala.—Stix v. Keith, 90 Ala. 121, 7 S 423.

Ark.—St. Louis Southwestern R. Co. v. Adams, 87 Ark. 136, 112 SW 186.

Colo.—Union Pac. R. Co. v. Sleeth, 79 Colo. 548, 246 P 1021.

Ga.—Lane Bros. Co. v. Rickard, 135 Ga. 650, 70 SE 565, AnnCas1912A 234; Southern R. Co. v. Hudgins, 107 Ga. 334, 33 SE 442; Horan v. Strachan, 82 Ga. 566, 9 SE 429.

Ill.—Western Union Tel. Co. v. Horack, 9 Ill. A. 309.

Iowa.—Bacon v. Iowa Cent. R. Co., 157 Iowa 493, 137 NW 1011 [aff 236 U. S. 305, 35 SCt 357, 59 L. ed. 591]; Wilson v. Big Joe Block Coal Co., 135 Iowa 531, 113 NW 348, 14 Ann Cas 266; Byson v. McPherson, 71 Iowa 437, 32 NW 418; Van Horn v. Litchfield, 70 Iowa 11, 29 NW 783. But see Burch v. Davenport, etc., R. Co., 46 Iowa 449, 26 AmR 150; Delaware R. Constr. Co. v. Davenport, etc., R. Co., 46 Iowa 406 [rev on other grounds 100 U. S. 457, 25 L. ed. 593] (both holding that the state court could inquire into the truth of the facts alleged in the petition for removal).

Kan.—Boatmen's Bank v. Fritzlen, 75 Kan. 479, 89 P 915, 22 LRANS 1235 [aff 212 U. S. 364, 29 SCt 366, 53 L. ed. 551].

Ky.—Little Sandy Cooperage Co. v. Chesapeake, etc., R. Co., 185 Ky. 161, 214 SW 912; Hardwick v. Kean, 95 Ky. 563, 26 SW 589, 16 KyL 110.

La.—Guinault v. Louisville, etc., R. Co., 42 La. Ann. 52, 7 S 62.

Me.—Doherty v. McDowell, 120 Me. 384, 115 A 92; Craven v. Turner, 82 Me. 383, 19 A 864.

Mass.—Pringle v. Storrow, 256 Mass. 561, 153 NE 26, 49 ALR 1222; Com. v. Norman, 249 Mass. 123, 144 NE 66.

Mich.—Atty. Gen. v. Michigan Bell Tel. Co., 235 Mich. 416, 209 NW 200.

Minn.—Pearson v. Zacher, 177 Minn. 182, 225 NW 9; Roberts v. Chicago, etc., R. Co., 48 Minn. 521, 51 NW 478.

Miss.—Hercules Powder Co. v. Sistrunk, 145 Miss. 299, 110 S 674; Hercules Powder Co. v. Nix, 144 Miss. 113, 109 S 862.

Mo.—State v. Mosman, 231 Mo. 474, 133 SW 38.

N. H.—Monroe v. Connecticut River Lumber Co., 66 N. H. 628, 32 A 152.

N. J.—Dover Nat. Union Bank v. Dodge, 42 N. J. L. 316.

N. Y.—Miller v. Kent, 60 HowPr 451. But see Clark v. Opdyke, 10 Hun 383 (holding that the state court may ascertain the truth of the allegations of the removal petition). Compare New England Tire, etc., Co. v. Kelly-Springfield Tire Co., 214 App. Div. 58, 210 NYS 243 (where it was said that the state court is not concluded by the averments of the petition for removal, but should consider the entire record).

N. C.—Cowart v. Suncrest Lumber Co., 194 N. C. 787, 140 SE 736; Crisp v. Champion Fibre Co., 193 N. C. 77, 136 SE 238; Fenner v. Richmond Cedar Works, 191 N. C. 207, 131 SE 625; Johnson v. Blackwood Lumber Co., 189 N. C. 81, 126 SE 165; Stevens v. Blackwood Lumber Co., 186 N. C. 749, 120 SE 329; Hill v. Director-Gen. of Railroads, 178 N. C. 607, 101 SE 376; Cogdill v. Clayton, 170 N. C. 526, 87 SE 338.

S. C.—Towill v. Southern R. Co., 121 S. C. 447, 114 SE 416.

But see Orosco v. Gagliardo, 22 Cal. 83 (holding that the state court may inquire into the truth of the facts set forth in the removal petition).

[a] **State supreme court, on appeal** from a denial by the trial court of an application for removal, must assume the allegations of the removal petition to be true. Ferris v. Southern R. Co., 194 N. C. 653, 140 SE 607.

31. Boatmen's Bank v. Fritzlen, 75 Kan. 479, 89 P 915, 22 LRANS 1235 [aff 212 U. S. 364, 29 SCt 366, 53 L. ed. 551]; Pringle v. Storrow, 256 Mass. 561, 153 NE 26, 49 ALR 1222; North Carolina Public Serv. Co. v. Southern Power Co., 180 N. C. 335, 104 SE 872; Powell v. Southern R. Co., 110 S. C. 70, 96 SE 292.

32. Little Sandy Cooperage Co. v. Chesapeake, etc., R. Co., 185 Ky. 161, 214 SW 912.

33. Hill v. Director-Gen. of Railroads, 178 N. C. 607, 101 SE 376.

34. Com. v. Norman, 249 Mass. 123, 144 NE 66; Levy v. O'Neil, 14 Abb Pr (N. Y.) 63.

35. U. S.—Madisonville Tract. Co. v. St. Bernard Min. Co., 196 U. S. 239, 25 SCt 251, 49 L. ed. 462; Southern Pac. Co. v. Waite, 279 Fed. 171; Miller v. Soule, 221 Fed. 493; Missouri, etc., R. Co. v. Chappell, 206 Fed. 688; Donovan v. Wells, 169 Fed. 363, 94 CCA 609, 22 LRANS 1250; Taylor v. Rockefeller, 23 F. Cas. No. 13,802, 7 NYWklyDig 3, 6 WklyNC (Pa.) 283.

Ark.—Steed v. Henry, 120 Ark. 583, 180 SW 508.

Mo.—Schwyhart v. Barrett, 145 Mo. A. 332, 130 SW 388 [aff 227 U. S. 184, 33 SCt 250, 57 L. ed. 473].

Mont.—State v. Wibaux County Bank, 85 Mont. 532, 281 P 341.

S. C.—Jennings v. Southern R. Co., 152 S. C. 322, 150 SE 309.

See Graves v. Colquitt County, 34 Ga. A. 271, 129 SE 166 (holding that, where it is conceded by petitioner that the requisite notice of the petition was not given, so that there is no issue of fact, the state court is not precluded from continuing to hold jurisdiction of the cause).

36. U. S.—Moulton v. National Farmers' Bank, 27 F. (2d) 403; Lee v. Continental Ins. Co., 292 Fed. 408.

Ky.—Landers v. Tracy, 171 Ky. 657, 188 SW 763.

Mo.—State v. Mosman, 231 Mo. 474, 133 SW 38.

N. C.—Pruitt v. Charlotte Power Co., 165 N. C. 416, 81 SE 624.

Okl.—United Brothers of Friendship, etc. v. Delancy, 59 Okl. 125, 157 P 1150.

Tex.—Sabens v. Cochrum, (Civ. A.) 292 SW 281.

Va.—Maryland Casualty Co. v. Clintwood Bank, Inc., 154 SE 492.

37. U. S.—Iowa Cent. R. Co. v. Bacon, 236 U. S. 305, 35 SCt 357, 59 L. ed. 591 [aff 157 Iowa 493, 137 NW 1011]; Madisonville Tract. Co. v. St. Bernard Min. Co., 196 U. S. 239, 25 SCt 251, 49 L. ed. 462; Tennessee v. Bank of Commerce, 152 U. S. 454, 14 SCt 654, 38 L. ed. 511; Stone v. South Carolina, 117 U. S. 430, 6 SCt 799, 29 L. ed. 962; Gregory v. Hartley, 113 U. S. 742, 5 SCt 743, 28 L. ed. 1150; Meyer v. Delaware R. Constr. Co., 100 U. S. 457, 25 L. ed. 593; Yulee v. Vose, 99 U. S. 539, 25 L. ed. 355; Amory v. Amory, 95 U. S. 186, 24 L. ed. 428; Queensboro Nat. Bank v. Kelly, 15 F. (2d) 395; Southern Pac. Co. v. Waite, 279 Fed. 171; Missouri, etc., R. Co. v. Chappell, 206 Fed. 688; Taylor v. Rockefeller, 23 F. Cas. No. 13,802, 7 NYWklyDig 3, 6 WklyNC (Pa.) 283.

Ala.—Ex p. Mobile, etc., R. Co., 63 Ala. 349; Ex p. Grimball, 61 Ala. 598.

Colo.—Colorado Fuel, etc., Co. v. Four Mile R. Co., 29 Colo. 90, 66 P 902.

Ga.—Carswell v. Schley, 59 Ga. 17.

Ind.—McWhinney v. Brinker, 64 Ind. 360; Indianapolis, etc., R. Co. v. Risley, 50 Ind. 60.

Iowa.—Bacon v. Iowa Cent. R. Co., 157 Iowa 493, 137 NW 1011 [aff 236 U. S. 305, 35 SCt 357, 59 L. ed. 591]; Delaware R. Constr. Co. v. Davenport, etc., R. Co., 46 Iowa 406 [rev on other grounds 100 U. S. 457, 25 L. ed. 593].

La.—State v. Murray, 47 La. Ann. 1424, 17 S 832; State v. Johnson, 29 La. Ann. 399.

Minn.—Pearson v. Zacher, 177 Minn. 182, 225 NW 9.

Miss.—Jackson v. Alabama Great Southern R. Co., 58 Miss. 648.

Mo.—Hickman v. Missouri, etc., R. Co., 151 Mo. 644, 52 SW 351; State v. Kelley, 220 Mo. A. 413, 286 SW 724.

Mont.—State v. Wibaux County Bank, 85 Mont. 532, 281 P 341.

Nebr.—Stuart v. Staplehurst Bank, 57 Nebr. 569, 78 NW 298; Trester v. Missouri Pac. R. Co., 23 Nebr. 242, 36 NW 502; Blair v. West Point Mfg. Co., 7 Nebr. 146.

N. J.—National Docks, etc., Connecting R. Co. v. Pennsylvania R. Co., 52 N. J. Eq. 58, 28 A 71.

N. Y.—Heath v. Santa Lucia Co., 196 App. Div. 446, 188 NYS 218; Tierney v. Helvetia Swiss F. Ins. Co., 126 App. Div. 446, 110 NYS 613.

N. C.—Lloyd v. Southern R. Co., 166 N. C. 24, 81 SE 1003 [aff 239 U. S. 496, 36 SCt 210, 60 L. ed. 402]; Debnam v. Southern Bell Tel., etc., Co., 126 N. C. 831, 36 SE 269, 65 LRA 915; Howard v. Southern R. Co., 122 N. C. 944, 29 SE 778; Bradley v. Ohio River, etc., R. Co., 119 N. C. 744, 26 SE 169; Lawson v. Richmond, etc., R. Co., 112 N. C. 390, 17 SE 169.

Or.—State v. Southern Pac. Co., 23 Or. 424, 31 P 960.

S. C.—Jennings v. Southern R. Co., 152 S. C. 322, 150 SE 309.

Tenn.—Williams v. Adkins, 6

petition that a state court is at liberty to deny a removal,[38] and in determining that no removal has been effectuated the court acts at its peril as to the efficacy and validity of its subsequent proceedings.[39] If, on the other hand, upon the face of the petition for removal and the record the cause appears to be removable, and a sufficient bond is filed, where that is requisite, it is the duty of the state court to recognize the removal and proceed no further;[40] and it should not resume consideration of the cause unless and until it shall finally be decided in the courts of the United States that the cause was not removable.[41] No issue of fact arising upon the petition for removal or the record as to the removability of the cause can be tried in the state court,[42] but any such issue may be determined only by the federal courts to which the cause is sought to be removed;[43] and so if it is desired to controvert the allegations

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Coldw. 615.

Tex.—Texas, etc., R. Co. v. McAllister, 59 Tex. 349.

W. Va.—White v. Holt, 20 W. Va. 792.

38. Gopcevic v. California Packing Corp., 272 Fed. 994.

39. State Impr.-Dev. Co. v. Leininger, 226 Fed. 884; Brown v. Murray, 43 Fed. 614.

Review of order refusing removal on appeal from final judgment see Appeal and Error § 2582.

Ultimate decision for federal courts see infra text and notes 45–49.

40. U. S.—Great Northern R. Co. v. Galbreath Cattle Co., 271 U. S. 99, 46 SCt 439, 70 L. ed. 854 [rev sub nom. Phelps v. Great Northern R. Co., 66 Mont. 198, 213 P 610, 71 Mont. 56, 227 P 65]; Meyer v. Delaware R. Constr. Co., 100 U. S. 457, 25 L. ed. 593 [rev 46 Iowa 406]; Queensboro Nat. Bank v. Kelly, 15 F. (2d) 395; Lee v. Continental Ins. Co., 292 Fed. 408; Mannington v. Hocking Valley R. Co., 183 Fed. 133; Donovan v. Wells, 169 Fed. 363, 94 CCA 609, 22 LRANS 1250.

Ala.—Ex p. Consolidated Graphite Corp., 129 S 262.

Ark.—St. Louis, etc., R. Co. v. Kitchen, 98 Ark. 507, 136 SW 970, 50 LRANS 828.

Colo.—Union Pac. R. Co. v. Sleeth, 79 Colo. 548, 246 P 1021.

Iowa.—Emery v. Chicago, etc., R. Co., 186 Iowa 1156, 170 NW 540, 173 NW 12.

Ky.—Little Sandy Cooperage Co. v. Chesapeake, etc., R. Co., 185 Ky. 161, 214 SW 912; Illinois Cent. R. Co. v. Sheegog, 126 Ky. 252, 103 SW 323, 31 KyL 691 [aff 215 U. S. 308, 30 SCt 101, 54 L. ed. 208].

La.—State v. Johnson, 29 La. Ann. 399.

Minn.—Pearson v. Zacher, 177 Minn. 182, 225 NW 9.

Miss.—Hercules Powder Co. v. Nix, 144 Miss. 113, 109 S 862.

N. C.—Ferris v. Atlantic, etc., R. Co., 194 N. C. 653, 140 SE 607; Crisp v. Champion Fibre Co., 193 N. C. 77, 136 SE 238; Cogdill v. Clayton, 170 N. C. 526, 87 SE 338.

Oh.—Anderson v. United Realty Co., 79 Oh. St. 23, 86 NE 644, 51 LRANS 477 [aff 222 U. S. 164, 32 SCt 50, 56 L. ed. 144].

Okl.—Chicago, etc., R. Co. v. Witt, 291 P 59; Chicago, etc., R. Co. v. Bond, 254 P 18.

Tex.—Sabens v. Cochrum, (Civ. A.) 292 SW 281; Bilby v. Hancock, 58 Tex. Civ. A. 365, 125 SW 370.

[a] **In Porto Rico** the rule is the same in the case of a removal from an insular court to the federal court. Yglesias v. Marr, 1 Porto Rico Fed. 434; Wenar v. Pohl, 1 Porto Rico Fed. 37.

[b] **If any ground for removal is well taken,** as shown by the petition for removal, it is error for the state court to deny the petition or proceed further with the case. Great Northern R. Co. v. Galbreath Cattle Co., 271 U. S. 99, 46 SCt 439, 70 L. ed. 854 [rev sub nom. Phelps v. Great Northern R. Co., 66 Mont. 198, 213 P 610, 71 Mont. 56, 227 P 65].

Operation and effect of removal as depriving state courts of jurisdiction to proceed see infra §§ 265–267.

Right of federal court to restrain further proceedings in state court see Courts § 654.

41. Bruce v. Gibson, 8 Oh. Dec. (Reprint) 319, 7 CincLBul 94.

Proceedings in state court after remand see infra § 343.

42. U. S.—Queensboro Nat. Bank v. Kelly, 15 F. (2d) 395; Williams v. Delaware, etc., R. Co., 266 Fed. 1003; Phillips v. Western Terra Cotta Co., 174 Fed. 873.

Colo.—Union Pac. R. Co. v. Sleeth, 79 Colo. 548, 246 P 1021.

Ga.—Lane Bros. Co. v. Rickard, 135 Ga. 650, 70 SE 565, AnnCas1912A 234.

Iowa.—Wilson v. Big Joe Block Coal Co., 135 Iowa 531, 113 NW 348, 14 AnnCas 266. But see Corbin v. Pike, 37 Iowa 637 (where an issue of fact was made and tried in the state court).

Mass.—Mahoney v. U. S. Shipping Bd. Emergency Fleet Corp., 253 Mass. 234, 148 NE 454; Com. v. Norman, 249 Mass. 123, 144 NE 66; Dunbar v. Rosenbloom, 230 Mass. 176, 119 NE 829; Munnss v. American Agricultural Chemical Co., 216 Mass. 423, 103 NE 859; Long v. Quinn Bros., 215 Mass. 85, 102 NE 348.

Mich.—Atty. Gen. v. Michigan Bell Tel. Co., 235 Mich. 416, 209 NW 200.

Mo.—State v. Mosman, 231 Mo. 474, 133 SW 38.

N. Y.—Follett v. Seneca Falls Water Works Co., 123 Misc. 823, 206 NYS 468. But see Clark v. Opdyke, 10 Hun 383 (holding that the adverse party may controvert the allegations of the removal petition and offer proof in the state court).

N. C.—Crisp v. Champion Fibre Co., 193 N. C. 77, 136 SE 238; Hollifield v. Southern Bell Tel., etc., Co., 172 N. C. 714, 90 SE 996; Smith v. Harris Granite Quarries Co., 164 N. C. 338, 80 SE 388; Herrick v. Norfolk-Southern R. Co., 158 N. C. 307, 73 SE 1008.

Okl.—Chicago, etc., R. Co. v. Brazzell, 33 Okl. 122, 124 P 40; Western Coal, etc., Co. v. Osborne, 30 Okl. 235, 119 P 973.

But see Carland v. Burke, 197 Ala. 435, 73 S 10 (wherein it appears that a question of fact was considered one triable by the state court); Southern Pac. Co. v. Harrison, 73 Tex. 103, 11 SW 168 (holding that it is the right and duty of the state court to inquire into and determine issues of fact).

And see cases infra note 43.

[a] **In Porto Rico** the rule is the same as to the insular courts, in the case of a removal to the federal court. Wenar v. Pohl, 1 Porto Rico Fed. 37.

[b] **Under an earlier statute,** not providing for the filing of a removal petition, but authorizing removal when the jurisdictional facts should "be made to appear to the satisfaction of the court," it was proper and requisite for the state court to receive proof of the existence of such facts. Louisiana State Bank v. Morgan, 4 Mart. N. S. (La.) 344; Disbrow v. Driggs, 8 AbbPr (N. Y.) 305 note, 16 HowPr 346.

43. U. S.—Wilson v. Republic Iron, etc., Co., 257 U. S. 92, 42 SCt 35, 66 L. ed. 144; Chesapeake, etc., R. Co. v. Cockrell, 232 U. S. 146, 34 SCt 278, 58 L. ed. 544 [disappr Chesapeake, etc., R. Co. v. Banks, 144 Ky. 137, 137 SW 1066]; Texas, etc., R. Co. v. Eastin, 214 U. S. 153, 29 SCt 564, 53 L. ed. 946 [aff 100 Tex. 556, 102 SW 105]; Chesapeake, etc., R. Co. v. McCabe, 213 U. S. 207, 29 SCt 430, 53 L. ed. 765; Burlington, etc., R. Co. v. Dunn, 122 U. S. 513, 7 SCt 1262, 30 L. ed. 1159 [rev 35 Minn. 73, 27 NW 448]; Stone v. South Carolina, 117 U. S. 430, 6 SCt 799, 29 L. ed. 962; Boyle v. Chicago, etc., R. Co., 42 F. (2d) 633; Sanders v. Atlantic Coast Line R. Co., 33 F. (2d) 1010; Farmers' Bank, etc., Co. v. Atchison, etc., R. Co., 25 F. (2d) 23 [rev 11 F. (2d) 993]; Henderlong v. Standard Oil Co., 17 F. (2d) 184; Queensboro Nat. Bank v. Kelly, 15 F. (2d) 395; Kraus v. Chicago, etc., R. Co., 3 F. (2d) 277; Lynes v. Standard Oil Co., 300 Fed. 812; Frazier v. Hines, 260 Fed. 874; Hough v. Société Electrique Westinghouse, 231 Fed. 341; Trana v. Chicago, etc., R. Co., 228 Fed. 824; Bradshaw v. Bowden, 226 Fed. 323; Buxton v. Pennsylvania Lumber Co., 221 Fed. 718; Miller v. Soule, 221 Fed. 493; Lewis v. Cincinnati, etc., R. Co., 192 Fed. 654; Atlantic Coast Line R. Co. v. Bailey, 181 Fed. 891; Phillips v. Western Terra Cotta Co., 174 Fed. 873; Donovan v. Wells, 169 Fed. 363, 94 CCA 609, 22 LRANS 1250; Postal Telegraph Cable Co. v. Southern R. Co., 88 Fed. 803; Walker v. O'Neill, 38 Fed. 374.

Ala.—Ex p. Consolidated Graphite Corp., 129 S 262; Ex p. State, 71 Ala. 363.

Ark.—St. Louis-San Francisco R. Co. v. Britton, 163 Ark. 255, 259 SW 730; Steed v. Henry, 120 Ark. 583, 180 SW 508.

Colo.—Union Pac. R. Co. v. Sleeth, 79 Colo. 548, 246 P 1021.

Ga.—Lane Bros. Co. v. Rickard, 135 Ga. 650, 70 SE 565, AnnCas1912A 234; Graves v. Colquitt County, 34 Ga. A. 271, 129 SE 166.

Kan.—Boatmen's Bank v. Fritzlen, 75 Kan. 479, 89 P 915, 22 LRANS 1235 [aff 212 U. S. 364, 29 SCt 366, 53 L. ed. 551].

Ky.—Little Sandy Cooperage Co. v. Chesapeake, etc., R. Co., 185 Ky. 161, 214 SW 912; Illinois Cent. R. Co. v. Sheegog, 126 Ky. 252, 103 SW 323, 31 KyL 691 [aff 215 U. S. 308, 30 SCt 101, 54 L. ed. 208].

Me.—Doherty v. McDowel, 120 Me. 384, 115 A 92.

Mass.—Mahoney v. U. S. Shipping Bd. Emergency Fleet Corp., 253 Mass. 234, 148 NE 454; Com. v. Norman, 249 Mass. 123, 144 NE 66; Eaton v. Walker, 244 Mass. 23, 138 NE 798; Dunbar v. Rosenbloom, 230 Mass. 176, 119 NE 829; Munnss v. American Agricultural Chemical Co., 216 Mass. 423, 103 NE 859; Long v. Quinn Bros., 215 Mass. 85, 102 NE 348.

Miss.—Hercules Powder Co. v. Sistrunk, 145 Miss. 299, 110 S 674; Hercules Powder Co. v. Nix, 144 Miss. 113, 109 S 862.

Mo.—McNulty v. Atlas Portland Cement Co., (A.) 249 SW 730; Sears v. Atchison, etc., R. Co., 163 Mo. A.

of the petition, plaintiff must make an issue with respect to them in the federal court.[44]

Ultimate decision as to the removability of a cause is for the courts of the United States.[45] So, regardless of the decision of the state court, it is for the federal district court to determine for itself whether or not the cause was rightfully removed and its jurisdiction has attached,[46] and its finding is final and binding upon the state court until reversed.[47] The federal district court, however, like the state court,[48] in assuming and retaining jurisdiction acts at its peril as to the validity of its subsequent proceedings, as determined upon final appeal.[49]

[§ 254] 3. **Effectuation of Removal**[50]—**a. In General.** Upon the filing in a state court of a proper petition for removal[51] and, where required, a removal bond,[52] in a cause pending in such court which such petition and the record show to be removable upon application made to the state court,[53] the jurisdiction of such state court ceases eo instante and that of the federal court attaches,[54] without regard to or the necessity of any further action by the state

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711, 187 SW 860.

N. Y.—Pioneer SS. Co. v. Sanday, 210 App. Div. 318, 206 NYS 338; Follett v. Seneca Falls Waterworks Co., 123 Misc. 823, 206 NYS 468.

N. C.—Ferris v. Southern R. Co., 194 N. C. 653, 140 SE 607; Crisp v. Champion Fibre Co., 193 N. C. 77, 136 SE 238; Cox v. Whitmer-Parsons Pulp, etc., Co., 193 N. C. 28, 136 SE 254; Stevens v. Blackwood Lumber Co., 186 N. C. 749, 120 SE 329; Patterson v. Champion Lumber Co., 175 N. C. 90, 94 SE 692; Cogdill v. Clayton, 170 N. C. 526, 87 SE 338; Hyder v. Southern R. Co., 167 N. C. 584, 83 SE 689; Pruitt v. Charlotte Power Co., 165 N. C. 416, 81 SE 624; Hurst v. Southern R. Co., 162 N. C. 368, 78 SE 434; Rea v. Standard Mirror Co., 158 N. C. 24, 73 SE 116.

Okl.—St. Louis, etc., R. Co. v. Hodge, 53 Okl. 427, 157 P 60; Chicago, etc., R. Co. v. Brazzell, 33 Okl. 122, 124 P 40; Western Coal, etc., Co. v. Osborne, 30 Okl. 235, 119 P 973.

S. C.—Jennings v. Southern R. Co., 152 S. C. 322, 150 SE 309; Towill v. Southern R. Co., 121 S. C. 447, 114 SE 416.

Tex.—Sabens v. Cochrum, (Civ. A.) 292 SW 281; Kruegel v. Standard Sav., etc., Assoc., (Civ. A.) 196 SW 283.

Presentation and trial of issues of fact as to removability of cause see infra §§ 328–332.

44. Donovan v. Wells, 169 Fed. 363, 94 CCA 609, 22 LRANS 1250; Little Sandy Cooperage Co. v. Chesapeake, etc., R. Co., 185 Ky. 161, 214 SW 912; State v. Mosman, 231 Mo. 474, 133 SW 38; Ferris v. Southern R. Co., 194 N. C. 653, 140 SE 607; Crisp v. Champion Fibre Co., 193 N. C. 77, 136 SE 238; Stevens v. Blackwood Lumber Co., 186 N. C. 749, 120 SE 329; Rea v. Standard Mirror Co., 158 N. C. 24, 73 SE 116.

45. Cropsey v. Sun Printing, etc., Assoc., 215 Fed. 132; Springer v. Howes, 69 Fed. 849; Jackson v. Alabama Great Southern R. Co., 58 Miss. 648; National Union Bank v. Dodge, 42 N. J. L. 316.

Review of decision of state court by United States supreme court see Federal Courts § 292.

46. Chesapeake, etc., R. Co. v. McCabe, 213 U. S. 207, 29 SCt 430, 53 L. ed. 765 [rev sub nom. Maysville, etc., R. Co. v. McCabe, 100 SW 219, 30 KyL 1009]; Dillinger v. Chicago, etc., R. Co., 19 F. (2d) 196; North Carolina Public Serv. Co. v. Southern Power Co., 282 Fed. 837 [certiorari granted 260 U. S. 716 mem, 43 SCt 94 mem, 67 L. ed. 478 mem, certiorari dism 263 U. S. 508, 44 SCt 164, 68 L. ed. 413]; Williams v. Delaware, etc., R. Co., 266 Fed. 1003; Atlantic Coast Line R. Co. v. Bailey, 151 Fed. 891; Springer v. Howes, 69 Fed. 849; Brown v. Murray, 43 Fed. 614; Walker v. O'Neill, 38 Fed. 374; Traders' Bank v. Tallmadge, 9 Fed. 363, 20 Blatchf. 39; Field v. Lownsdale, 9 F. Cas. No. 4,769, Deady 288; Taylor v. Rockefeller, 23 F. Cas. No. 13,802, 7 NYWklyDig 3, 6 WklyNC (Pa.) 283; Ex p. Consolidated Graphite Corp., (Ala.) 129 S 262; Brodhead v. Shoemaker, 85 Ga. 728, 11 SE 845; Bell v. Dix, 49 N. Y. 232. But see Springer v. Howes, 69 Fed. 849 (holding that, where the state court refused to permit or authorize the removal, and on appeal to the state supreme court its decision was affirmed, the federal court would not permit the removal or proceed in the cause, but would leave defendants to their appeal from the state court decisions to the United States supreme court); Beadleston v. Harpending, 32 Fed. 644 (holding that, where the state court had decided that no separable controversy existed, and accordingly that petitioner was not entitled to remove the cause, he could not contend for a contrary decision by the federal court).

[a] **Decision of state supreme court,** made on appeal taken to it, as to the removability of the case is not binding upon the federal court or res adjudicata as to the parties. North Carolina Public Serv. Co. v. Southern Power Co., 282 Fed. 837 [certiorari den 260 U. S. 716 mem, 43 SCt 94 mem, 67 L. ed. 478 mem, certiorari dism 263 U. S. 508, 44 SCt 164, 68 L. ed. 413].

[b] **In Porto Rico** the rule is the same in the case of a removal from an insular court to the federal court. Gerardino v. Home Ins. Co., 12 Porto Rico Fed. 374; Peo. v. Russell, 12 Porto Rico Fed. 309.

Certiorari to compel certification of record to federal court for determination of removability of cause see infra § 274.

Motion to remand as proper mode of testing removability of cause see infra § 324.

47. U. S.—Chesapeake, etc., R. Co. v. McCabe, 213 U. S. 207, 29 SCt 430, 53 L. ed. 765. See Iowa Cent. R. Co. v. Bacon, 236 U. S. 305, 35 SCt 357, 59 L. ed. 591 [aff 157 Iowa 493, 137 NW 1011] (recognizing the rule, but holding that orders of the federal court continuing the cause from time to time, and finally dismissing it for want of prosecution, without at any time passing upon the question of the authority of such court to take jurisdiction, were not binding upon the state court).

Ala.—Ex p. State, 71 Ala. 363.

Ark.—Kansas City Southern R. Co. v. Cockrell, 169 Ark. 698, 277 SW 7.

Iowa.—Emery v. Chicago, etc., R. Co., 186 Iowa 1156, 170 NW 540, 173 NW 12.

Wis.—Northern Pac. R. Co. v. McMullen, 86 Wis. 501, 56 NW 629.

[a] **Thus,** where the federal court denied a motion for a remand and entered final judgment, that judgment until reversed was binding upon the courts of the state; and a subsequent judgment of the state court to the contrary, which was affirmed by the highest court of the state that has jurisdiction to review the same, will be reversed by the supreme court of the United States, irrespective of the validity of the removal. Chesapeake, etc., R. Co. v. McCabe, 213 U. S. 207, 29 SCt 430, 53 L. ed. 765.

48. See supra text and note 39.

49. Brown v. Murray, 43 Fed. 614.

50. **By federal court where applicant asserts or relies upon civil rights laws** see supra § 251.

51. **Petition for removal** see supra §§ 237–244.

52. **Removal bond in:**

Actions concerning land claimed under grants from different states see supra § 252.

Suits arising under federal constitution, laws, or treaties, or involving difference of citizenship see supra §§ 245–248.

53. **Causes removable on application to state court** see supra §§ 236–252.

54. U. S.—Madisonville Tract. Co. v. St. Bernard Min. Co., 196 U. S. 239, 25 SCt 251, 49 L. ed. 462; Missouri Pac. R. Co. v. Fitzgerald, 160 U. S. 556, 16 SCt 389, 40 L. ed. 536; Marshall v. Holmes, 141 U. S. 589, 12 SCt 62, 35 L. ed. 870; Stone v. South Carolina, 117 U. S. 430, 6 SCt 799, 29 L. ed. 962; National Steamship Co. v. Tugman, 106 U. S. 118, 1 SCt 58, 27 L. ed. 87; Kern v. Huidekoper, 103 U. S. 485, 26 L. ed. 354; Fielding v. Toledo, etc., R. Co., 33 F. (2d) 994; Bon v. Midwest Refining Co., 30 F. (2d) 410; Henderlong v. Standard Oil Co., 17 F. (2d) 184; King v. Beaumont, 296 Fed. 531; Williams v. Delaware, etc., R. Co., 266 Fed. 1003; Frazier v. Hines, 260 Fed. 874; In re Vadner, 259 Fed. 614; Muir v. Louisville, etc., R. Co., 247 Fed. 888; Waverly Stone, etc., Co. v. Waterloo, etc., R. Co., 239 Fed. 561; Nelson v. Black Diamond Min. Co., 237 Fed. 264; Webb v. Southern R. Co., 235 Fed. 578 [rev on other grounds 248 Fed. 618, 160 CCA 518 (certiorari den 247 U. S. 518 mem, 38 SCt 582 mem, 62 L. ed. 1245 mem]; Miller v. Soule, 221 Fed. 493; Montgomery v. Postal Tel.-Cable Co., 218 Fed. 471; Anderson v. Western Union Tel. Co., 218 Fed. 78; Johnson v. Butte Alex Scott Copper Co., 213 Fed. 910; Williston v. Raymond, 213 Fed. 527; Missouri, etc., R. Co. v. Chappell, 206 Fed. 688; Hansford v. Stone-Ordean-Wells Co., 201 Fed. 185; Hubbard v. Chicago, etc., R. Co., 176 Fed. 994; Flint v. Coffin, 176 Fed. 872, 100 CCA 342 [certiorari den 217 U. S. 602, 30 SCt 693, 54 L. ed. 898]; Phillips v. Western Terra Cotta Co., 174 Fed. 873; Atlantic Coast Line R. Co. v. Bailey, 151 Fed. 891; Boatmen's Bank v. Fritzlen, 135 Fed. 650, 68 CCA 288 [rev 128 Fed. 608, and certiorari den 198 U. S. 586, 25 SCt 803, 49 L. ed. 1174]; Postal Telegraph Cable Co. v. Southern R. Co., 88 Fed. 803; Hamilton v. Fowler, 83 Fed. 321; Monroe v. Williamson, 81 Fed. 977; Wills v. Baltimore, etc., R. Co., 65 Fed. 532; Shepherd v. Bradstreet Co., 65 Fed. 142; North Carolina v. Sullivan, 50 Fed. 593; Brown v. Murray, 43 Fed. 614; McCullough v. Large, 20 Fed. 309; Wellman v. Howland Coal, etc., Works, 19 Fed. 51; Mis-

court.[55] It is only where the petition is in proper form, however, and on its face shows a case within the removal statutes, that it becomes the duty of the state court to yield jurisdiction of a proceeding pending before it;[56] and so the mere presentation or filing of an application for removal under color of the statute,[57] or even docketing the cause in the federal court and filing therein a transcript of the record,[58] does not effectuate a removal where the face of the application and of the record do not show the cause to be removable, or the application is not made in the prescribed mode.[59]

[§ 255] **b. Order Granting or Refusing Application.**[60] Where a right to remove a cause from a state court to a federal court is shown to such state court to exist,[61] it is proper,[62] and has been said to

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souri v. Tiedermann, 10 Fed. 20, 3 McCrary 399; Ellerman v. New Orleans, etc., R. Co., 8 F. Cas. No. 4,382, 2 Woods 120; Matthews v. Lyall, 16 F. Cas. No. 9,285, 6 McLean 13; Taylor v. Rockefeller, 23 F. Cas. No. 13,802, 7 NYWklyDig 3, 6 WklyNC (Pa.) 283; U. S. v. Judges, 26 F. Cas. No. 15,501. See Mower v. Bond, 6 F. (2d) 890, 892 (holding that "constructive removal" is immediately effected by the filing of the petition and bond, and becomes "actual and complete" upon the filing of the record in the federal court).

Ala.—Ex p. Consolidated Graphite Corp., 129 S 262.

Cal.—Francisco v. Manhattan Ins. Co., 36 Cal. 283.

Colo.—Miller v. Buyer, 82 Colo. 474, 261 P 659; Union Pac. R. Co. v. Sleeth, 79 Colo. 548, 246 P 1021; Stratton's Independence v. Sterrett, 51 Colo. 17, 117 P 351.

Ga.—Graves v. Colquitt County, 34 Ga. A. 271, 129 SE 166; Chattanooga Boiler, etc., Co. v. Robinson, 14 Ga. A. 73, 80 SE 299; Southern R. Co. v. Dukes, 7 Ga. A. 784, 68 SE 332.

Ida.—Morbeck v. Bradford-Kennedy Co., 19 Ida. 83, 113 P 89.

Ind.—Risley v. Indianapolis, etc., R. Co., Wils. 572.

Ky.—Chesapeake, etc., R. Co. v. Banks, 144 Ky. 137, 137 SW 1066 [aff sub nom. Chesapeake, etc., R. Co. v. Cockrell, 232 U. S. 146, 34 SCt 278, 58 L. ed. 544].

La.—Rosenfield v. Adams Express Co., 21 La. Ann. 233.

Mich.—Dougherty v. Michigan Bell Tel. Co., 235 Mich. 416, 209 NW 200.

Minn.—Kowalski v. Chicago, etc., R. Co., 159 Minn. 388, 199 NW 178.

Mo.—State v. Johnston, 234 Mo. 338, 137 SW 595; State v. Mosman, 231 Mo. 474, 133 SW 38; Chastain v. Missouri, etc., R. Co., 226 Mo. 94, 125 SW 1099; Shohoney v. Quincy, etc., R. Co., 223 Mo. 649, 122 SW 1025; Powell v. Chicago, etc., R. Co., 64 Mo. 544; Beery v. Chicago, etc., R. Co., 64 Mo. 533; Stanley v. Chicago, etc., R. Co., 62 Mo. 508; Chastain v. Missouri, etc., R. Co., 152 Mo. A. 478, 133 SW 853.

Nebr.—Blair v. West Point Mfg. Co., 7 Nebr. 146.

N. J.—National Union Bank v. Dodge, 42 N. J. L. 316.

N. Y.—Shaft v. Phœnix Mut. L. Ins. Co., 67 N. Y. 544, 23 AmR 138; Shaft v. Phœnix Mut. L. Ins. Co., 67 N. Y. 544, 23 AmR 138; Bell v. Dix, 49 N. Y. 232; Stevens v. Phœnix Ins. Co., 41 N. Y. 149; Rosenbaum v. Manson, 206 App. Div. 384, 201 NYS 426; Tierney v. Helvetia Swiss F. Ins. Co., 126 App. Div. 446, 110 NYS 613; Chamberlain v. American Nat. L., etc., Co., 11 Hun 370; Benedict v. Dixon, 47 N. Y. Super. 477; Bushnell v. Parker, 12 NYS 695; Erisman v. Pidcock, 62 HowPr 327.

N. C.—Huntley v. Southeastern Express Co., 191 N. C. 696, 132 SE 786; Pruitt v. Charlotte Power Co., 165 N. C. 416, 81 SE 624; Smith v. Harris Granite Quarries Co., 164 N. C. 338, 80 SE 388; Rea v. Standard Mirror Co., 158 N. C. 24, 73 SE 116; Tucker v. Inter-States L. Assoc., 112 N. C. 796, 17 SE 532; Winslow v. Collins, 110 N. C. 119, 14 SE 512; State v. Dunlap, 65 N. C. 491, 6 AmR 746.

Oh.—Richardson v. Jenks, 56 Oh. St. 422, 47 NE 49; Shelby v. Hoffman, 7 Oh. St. 450.

Okl.—New England Oil, etc., Co. v. Broyles, 87 Okl. 55, 209 P 312; Ft. Smith, etc., R. Co. v. Blevins, 35 Okl. 378, 130 P 525.

Or.—Hall v. Stevenson, 19 Or. 153, 23 P 887, 20 AmSR 803.

Pa.—Fox v. American Casualty Ins., etc., Co., 2 Pa. Dist. 158, 12 Pa. Co. 207.

S. C.—Osteen v. Atlantic Coast Line R. Co., 119 S. C. 438, 112 SE 352; Pelzer Mfg. Co. v. Sun Fire Office, 36 S. C. 213, 15 SE 562.

Tenn.—Williams v. Adkins, 6 Coldw. 615.

Tex.—Southern Pac. R. Co. v. Harrison, 73 Tex. 103, 11 SW 168; Llanez v. Chisos Min. Co., (Civ. A.) 285 SW 646; Weller v. Guajardo, (Civ. A.) 174 SW 673.

Wis.—Ashland v. Whitcomb, 120 Wis. 549, 98 NW 531.

[a] **In Porto Rico** the rule is the same in the case of a removal from an insular court to the federal court. Yglesias v. Marr, 1 Porto Rico Fed. 434; Wenar v. Pohl, 1 Porto Rico Fed. 37; South Porto Rico Sugar Co. v. Sepúlveda, 27 Porto Rico 310.

Determination of right to remove see supra § 253.

Operation and effect of removal in general see infra §§ 265–269.

[55] See cases supra note 54.

Necessity and effect of order by state court granting or refusing removal see infra § 255.

[56] U. S.—Stone v. South Carolina, 117 U. S. 430, 6 SCt 799, 29 L. ed. 962; Meyer v. Delaware R. Constr. Co., 100 U. S. 457, 25 L. ed. 593 [rev 46 Iowa 406]; Atlantic Coast Line R. Co. v. Bailey, 151 Fed. 891.

Ala.—Ex p. State, 71 Ala. 363.

Cal.—Central Sav. Bank v. Lake, 201 Cal. 438, 257 P 521.

Iowa.—Bacon v. Iowa Cent. R. Co., 157 Iowa 493, 137 NW 1011 [aff 236 U. S. 305, 35 SCt 357, 59 L. ed. 591]; Wilson v. Big Joe Block Coal Co., 135 Iowa 531, 113 NW 348; Stommel v. Timbrel, 84 Iowa 336, 51 NW 159.

N. J.—Dover Nat. Union Bank v. Dodge, 42 N. J. L. 316.

N. Y.—Vose v. Yulee, 64 N. Y. 449 [rev on other grounds 99 U. S. 539, 25 L. ed. 355]; Heath v. Santa Lucia Co., 196 App. Div. 446, 188 NYS 218; Schwarzler v. Great American Ins. Co., 135 Misc. 913, 239 NYS 684. See Masters v. Traders' Nat. Bank, 129 Misc. 133, 220 NYS 499 [aff 223 NYS 889] (apparently recognizing the rule).

N. C.—Herrick v. Norfolk-Southern R. Co., 158 N. C. 307, 73 SE 1008; Higson v. North River Ins. Co., 153 N. C. 35, 68 SE 920.

Okl.—New England Oil, etc., Co. v. Broyles, 87 Okl. 55, 209 P 312; St. Louis, etc., R. Co. v. Hodge, 53 Okl. 427, 157 P 60.

Tex.—Andrews v. Rice, (Civ. A.) 198 SW 666.

[57] U. S.—Iowa Cent. R. Co. v. Bacon, 236 U. S. 305, 35 SCt 357, 59 L. ed. 591 [aff 157 Iowa 593, 137 NW 1011]; Crehore v. Ohio, etc., R. Co., 131 U. S. 240, 9 SCt 692, 33 L. ed. 144; Stone v. South Carolina, 117 U. S. 430, 6 SCt 799, 29 L. ed. 962; Southern Pac. Co. v. Waite, 279 Fed. 171; Montgomery v. Postal Tel.-Cable Co., 218 Fed. 471; Hubbard v. Chicago, etc., R. Co., 176 Fed. 994; Ex p. Wells, 29 F. Cas. No. 17,386, 3 Woods 128.

Ala.—Ex p. State, 71 Ala. 363.

Cal.—Central Sav. Bank v. Lake, 201 Cal. 438, 257 P 521.

Iowa.—Stommel v. Timbrel, 84 Iowa 336, 51 NW 159.

Minn.—Pearson v. Zacher, 177 Minn. 182, 225 NW 9.

Mo.—State v. Kelley, 220 Mo. A. 413, 286 SW 724; Schwyhart v. Barrett, 145 Mo. A. 332, 130 SW 388 [aff 227 U. S. 184, 33 SCt 250, 57 L. ed. 473].

Mont.—State v. Wibaux County Bank, 85 Mont. 532, 281 P 341.

N. Y.—Schwarzler v. Great American Ins. Co., 135 Misc. 913, 239 NYS 684.

N. C.—Pruitt v. Charlotte Power Co., 165 N. C. 416, 81 SE 624; Smith v. Harris Granite Quarries Co., 164 N. C. 338, 80 SE 388; Herrick v. Norfolk-Southern R. Co., 158 N. C. 307, 73 SE 1008; North Carolina Corp. Commn. v. Southern R. Co., 151 N. C. 447, 66 SE 427.

Tex.—Missouri, etc., R. Co. v. Smith, (Civ. A.) 164 SW 885.

And see cases supra note 56.

[a] **When defect of jurisdiction appears on face of removal petition** the state court is clearly not ousted of its jurisdiction, for it is not bound to surrender it until a case has been made which on its face shows that the petitioner has a right to the transfer of the cause to the federal court. North Carolina Corp. Commn. v. Southern R. Co., 151 N. C. 447, 66 SE 427.

[58] Bacon v. Iowa Cent. R. Co., 157 Iowa 493, 137 NW 1011 [aff 236 U. S. 305, 35 SCt 357, 59 L. ed. 591].

[59] **Remand of cause not removable or not properly removed** see infra §§ 303–307.

[60] **Order of federal court for removal:**

Of suit or prosecution against revenue officer or others see infra § 261.

On account of prejudice or local influence see supra § 260.

[61] **Mode of applying for removal** see supra §§ 236–252.

[62] State Imp.-Dev. Co. v. Leininger, 226 Fed. 884; Hansford v. Stone-Ordean-Wells Co., 201 Fed. 185; Goins v. Southern Pac. Co., 198 Fed. 432; State v. Johnston, 234 Mo. 338, 137 SW 595; Baird v. Richmond, etc., R. Co., 113 N. C. 603, 18 SE 698. See Lee v. Continental Ins. Co., 292 Fed. 408 (where it was said that it is the duty of the state court, under the removal statutes, to make such order in a case proper to be removed).

[a] **In Porto Rico** the rule is the same in the case of a removal from an insular court to the federal court.

be the usual practice in some jurisdictions,[63] for the state court to enter a formal order granting the application, or directing the removal. It is, however, not any such order, but rather the filing of a proper petition for removal, and a bond, where required, which terminates the jurisdiction of the state court and causes that of the federal court to attach:[64] so no order of the state court is necessary to effect a removal,[65] and an order for removal is, strictly speaking, of no effect,[66] but is at most merely a convenient mode of manifesting the court's acceptance of the application.[67] Accordingly, if a cause is removable, and the method prescribed by statute for procuring its removal has been pursued, it stands removed to the federal court without regard to what action the state court may take,[68] or even if it fails or refuses to take any action whatever;[69] and an order expressly denying a removal will not prevent the jurisdiction of the federal court from attaching.[70] So, either without any action on the part of the court, or after its refusal to grant a removal, the applicant has the right to enter a copy of the record in the federal court to which he seeks the removal of the cause, and to have the cause docketed there,[71] whereupon the federal court will proceed with the cause as if removal had expressly been granted by the state court,[72] and it is

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Yglesias v. Marr, 1 Porto Rico Fed. 434; Wenar v. Pohl, 1 Porto Rico Fed. 37.

[b] **Reason for rule.**—When a removal has been properly effectuated it is the proper practice for the state court to enter a formal order that it will proceed no further, in order that the parties and witnesses may understand that they will not be required to attend in that court unless upon notice that the cause has been remanded. Baird v. Richmond, etc., R. Co., 113 N. C. 603, 18 SE 698.

63. U. S.—Mannington v. Hocking Valley R. Co., 183 Fed. 133.

Minn.—Kowalski v. Chicago, etc., R. Co., 159 Minn. 388, 199 NW 178.

Mo.—State v. Johnston, 234 Mo. 338, 137 SW 595.

N. C.—Baird v. Richmond, etc., R. Co., 113 N. C. 603, 18 SE 698.

N. Y.—Heath v. Santa Lucia Co., 196 App. Div. 446, 188 NYS 218.

64. Miller v. Tobin, 18 Fed. 609, 9 Sawy. 401; Shohoney v. Quincy, etc., R. Co., 223 Mo. 649, 122 SW 1025. But see Lee v. Continental Ins. Co., 292 Fed. 408 (dictum, that if the court enters its order removing the cause the removal is effectuated thereby).

Filing petition and bond as effectuating removal see supra § 254.

65. U. S.—Kern v. Huidekoper, 103 U. S. 485, 26 L. ed. 354; Home L. Ins. Co. v. Dunn, 19 Wall. 214, 22 L. ed. 68; Bon v. Midwest Refining Co., 30 F. (2d) 410; Nelson v. Black Diamond Min. Co., 237 Fed. 264; Buxton v. Pennsylvania Lumber Co., 221 Fed. 718; Montgomery v. Postal Tel.-Cable Co., 218 Fed. 471; Hansford v. Stone-Ordean-Wells Co., 201 Fed. 185; Mannington v. Hocking Valley R. Co., 183 Fed. 133; Fayette Title, etc., Co. v. Maryland, etc., Tel., etc., Co., 180 Fed. 928; Hubbard v. Chicago, etc., R. Co., 176 Fed. 994; New York Mut. L. Ins. Co. v. Langley, 145 Fed. 415; Eisenmann v. Delemar's Nevada Gold-Min. Co., 87 Fed. 248; La Page v. Day, 74 Fed. 977; Springer v. Howes, 69 Fed. 849; Wilson v. Western Union Tel. Co., 34 Fed. 561; Commercial, etc., Bank v. Corbett, 6 F. Cas. No. 3,057, 5 Sawy. 172; Ellerman v. New Orleans, etc., R. Co., 8 F. Cas. No. 4,382, 2 Woods 120; Fisk v. Union Pac. R. Co., 9 F. Cas. No. 4,827, 6 Blatchf. 362; Hatch v. Chicago, etc., R. Co., 11 F. Cas. No. 6,204, 6 Blatchf. 105; Petrie v. Pennsylvania R. Co., 19 F. Cas. No. 11,040a; Taylor v. Rockefeller, 23 F. Cas. No. 13,802, 7 NYWklyDig 3, 6 WklyNC (Pa.) 283. See Frazier v. Hines, 260 Fed. 874 (where it was said that the ordinary practice in that court is that an application must be made to the state court for an order of removal before the federal court will consider any motion in the case, but that such requirement is a matter merely of comity or courtesy, and that if a case is one in which some action should be taken and in the opinion of the federal court it has been properly removed, it is the duty of the federal court to take action, upon application therefor, whether or not any application for an order of removal has been made to the state court or whether it has granted or refused the removal).

Ga.—Southern R. Co. v. Dukes, 7 Ga. A. 784, 68 SE 332.

Mass.—Duff v. Hildreth, 183 Mass. 440, 67 NE 356.

Mich.—Le Roux v. Judge, Bay Cir. Ct., 46 Mich. 189, 9 NW 154.

Minn.—Kowalski v. Chicago, etc., R. Co., 159 Minn. 388, 199 NW 178; Scheffer v. National L. Ins. Co., 25 Minn. 534; St. Anthony Falls Water Power Co. v. King Wrought Iron Bridge Co., 23 Minn. 186, 23 AmR 682.

Mo.—State v. Mosman, 231 Mo. 474, 133 SW 38; State v. Kelley, 220 Mo. A. 413, 286 SW 724.

N. Y.—Ritchey Lith. Corp. v. Robertson-Cole Distributing Corp., 199 App. Div. 362, 191 NYS 870; Heath v. Santa Lucia Co., 196 App. Div. 446, 188 NYS 218.

S. D.—Richardson v. Modern Woodmen of America, 14 S. D. 440, 85 NW 999.

[a] **In Porto Rico** the rule is the same in the case of a removal from an insular court to the federal court. Yglesias v. Marr, 1 Porto Rico Fed. 434; Wenar v. Pohl, 1 Porto Rico Fed. 37.

66. Williams v. Delaware, etc., R. Co., 266 Fed. 1003; Penrose v. Penrose, 1 Fed. 479.

67. Miller v. Tobin, 18 Fed. 609, 9 Sawy. 401.

68. Queensboro Nat. Bank v. Kelly, 15 F. (2d) 395; Williams v. New York, etc., R. Co., 11 F. (2d) 363, 45 ALR 437; Frazier v. Hines, 260 Fed. 874; Atlantic Coast Line R. Co. v. Bailey, 151 Fed. 891; Brigham v. C. C. Thompson Lumber Co., 55 Fed. 881; State v. Johnston, 234 Mo. 338, 137 SW 595; Shohoney v. Quincy, etc., R. Co., 223 Mo. 649, 122 SW 1025; New England Oil, etc., Co. v. Broyles, 87 Okl. 55, 209 P 312; Ft. Smith, etc., R. Co. v. Blevins, 35 Okl. 378, 130 P 525; Osteen v. Atlantic Coast Line R. Co., 119 S. C. 438, 112 SE 352. And see cases infra notes 69, 70.

[a] **In Porto Rico** the rule is the same in the case of a removal from an insular court to the federal court. Russell v. Goico, 12 Porto Rico Fed. 99.

69. Williams v. New York, etc., R. Co., 11 F. (2d) 363, 45 ALR 437; Lee v. Continental Ins. Co., 292 Fed. 408; Muir v. Louisville, etc., R. Co., 247 Fed. 888; Webb v. Southern R. Co., 235 Fed. 578 [rev on other grounds 248 Fed. 618, 160 CCA 518 (certiorari den 247 U. S. 518 mem, 38 SCt 582 mem, 62 L. ed. 1245 mem)]; Cropsey v. Sun Printing, etc., Assoc., 215 Fed. 132; Goins v. Southern Pac. R. Co., 198 Fed. 432; Mannington v. Hocking Valley R. Co., 183 Fed. 133; State v. Johnston, 234 Mo. 338, 137 SW 595; Shohoney v. Quincy, etc., R. Co., 223 Mo. 649, 122 SW 1025; Missouri, etc., R. Co. v. Smith, (Tex. Civ. A.) 164 SW 885.

70. Marshall v. Holmes, 141 U. S. 589, 12 SCt 62, 35 L. ed. 870; Kern v. Huidekoper, 103 U. S. 485, 26 L. ed. 354; Queensboro Nat. Bank v. Kelly, 15 F. (2d) 395; Williams v. New York, etc., R. Co., 11 F. (2d) 363, 45 ALR 437; Commodores Point Terminal Co. v. Hudnall, 279 Fed. 606; Frazier v. Hines, 260 Fed. 874; Brady v. J. B. McCrary Co., 244 Fed. 602; State Impr.-Dev. Co. v. Leininger, 226 Fed. 884; Stevenson v. Illinois Cent. R. Co., 192 Fed. 956; Atlantic Coast Line R. Co. v. Bailey, 151 Fed. 891; Springer v. Howes, 69 Fed. 849; Chambers v. McDougal, 42 Fed. 694; Penrose v. Penrose, 1 Fed. 479; Crenshaw v. Southern Power Co., 124 S. C. 143, 117 SE 364; Llanez v. Chisos Min. Co., (Tex. Civ. A.) 285 SW 646; Weller v. Guajardo, (Tex. Civ. A.) 174 SW 673. See U. S. v. Judges, 26 F. Cas. No. 15,501 (applying the rule).

"It is true that a plaintiff who has brought what he believes to be a nonremovable action may naturally wish to avoid the trouble of going to the United States court and there seeking for a remand, but he cannot escape therefrom by getting the state judge to agree that the case is one which cannot be removed. He must do more; he must convince his adversary as well, and that is usually a more difficult task, for, unless he does, the latter will take the case to the federal court and in self-defense he must follow, even if all that he there seeks to do is to show that in a legal sense it 'has never left the state tribunal." Williams v. New York, etc., R. Co., 11 F. (2d) 363, 365.

[a] **In Porto Rico** the rule is the same in the case of a removal from an insular court to the federal court. Wenar v. Pohl, 1 Porto Rico Fed. 37.

71. Burlington, etc., R. Co. v. Dunn, 122 U. S. 513, 7 SCt 1262, 30 L. ed. 1159 [rev 35 Minn. 73, 27 NW 448]; Donovan v. Wells, 169 Fed. 363, 94 CCA 609, 22 LRANS 1250; Springer v. Howes, 69 Fed. 849; Union Pac. R. Co. v. Sleeth, 79 Colo. 548, 246 P 1021; Towill v. Southern R. Co., 121 S. C. 447, 114 SE 416.

Filing transcript of record in federal court see infra §§ 270–274.

72. Donovan v. Wells, 169 Fed. 363, 94 CCA 609, 22 LRANS 1250; Towill v. Southern R. Co., 121 S. C. 447, 114 SE 416.

Proceedings in federal court after removal see infra §§ 275–301.

the duty of the state court to withhold further proceedings, upon the facts being brought to its attention.[73] If, on the other hand, a cause is not removable, an order of the state court in terms granting or directing a removal confers no jurisdiction on the federal court.[74] In the case of a cause removable upon application to the federal court rather than to the state court,[75] an order for removal made by the state court is unauthorized and void.[76]

Appeal from order of removal.[77] The proper mode of reviewing the removal of a cause is not by appeal from an order of the state court authorizing or directing the removal, but by motion in the federal court to remand the cause.[78] It would seem to be the proper rule that an appeal to the state appellate court from an order of the state court granting or directing the removal of a cause does not stay or prevent the removal, notwithstanding a state statute providing that such appeal shall stay further proceedings on the judgment appealed from;[79] but the contrary has been stated.[80]

[§ 256] **C. Causes Removable on Application to Federal Court—1. Suits Subject to Prejudice or Local Influence—a. In General.** Under the provisions of the statute permitting the removal from a state court to a federal court, in certain cases, of suits between citizens of different states in which it shall be made to appear to the federal court that from prejudice or local influence a party defendant will not be able to obtain justice in the state court in which the suit is pending or in any other court of the state to which he may have the right, on account thereof, to remove the same,[81] removal to the federal court is to be procured upon an application or petition addressed to the court to which the cause is sought to be removed,[82] which court receives and entertains the application, and acquires jurisdiction of the suit, if at all, by its own machinery.[83]

Petition.[84] The petition or application for removal must allege, as matter of fact, the existence of prejudice or local influence,[85] and, as a consequence thereof, an inability to obtain justice in the state courts.[86] As a general rule, the petition must show that defendant cannot obtain justice either in the court in which the suit was originally brought or in any other court or county of the state to which he may have a right to have a change of venue;[87] but when the grant or refusal of such a change of venue is wholly within the discretion of the trial judge, such showing is unnecessary.[88] In accordance with the general rule applicable to petitions for removal on account of diversity of citizenship,[89] it should be shown that the requisite difference of citizenship existed both at the time the suit was commenced[90] and at the time the application for removal is made.[91] The prejudice or local influence upon which the application is founded should be shown to exist practically contemporaneously with the presentation of such application;[92] and where the petition relates to facts or circumstances existing at a time unreasonably long before its presentment, it cannot be assumed that the prejudice or influence continues to exist, and the showing of a right to remove is therefore insufficient.[93] The petition need not be verified, if it is supported by proper affidavit or other proof;[94] and so verification by the applicant's agent or attorney in fact is sufficient.[95]

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[73] Bolen-Darnell Coal Co. v. Kirk, 25 Okl. 273, 106 P 813, 26 LRANS 270.

Duty of court to recognize removal in general see supra § 253.

[74] U. S. v. Haviland, 297 Fed. 431; Deuel v. Chicago, etc., R. Co., 253 Fed. 857; Hubbard v. Chicago, etc., R. Co., 176 Fed. 994; St. Louis, etc., R. Co. v. Kirk, 136 Miss. 608, 101 S 377; State v. Johnston, 234 Mo. 338, 137 SW 595; State v. Mosman, 231 Mo. 474, 133 SW 38.

[a] **In Porto Rico** the rule is the same in the case of a removal from an insular court to the federal court. Wenar v. Pohl, 1 Porto Rico Fed. 37.

[b] **Order as void or merely erroneous.**—(1) It has been held that an order by a state court for the removal of a cause which is not removable is void, and that it may be rescinded by such court at the same term by entering an order denying removal. St. Louis, etc., R. Co. v. Kirk, 136 Miss. 608, 101 S 377. See U. S. v. Haviland, 297 Fed. 431, 434 (where such an order was referred to as "a mere nullity"). (2) According to other authority, however, such an order is merely erroneous, and is effective until reversed or until the cause is remanded by the federal court. Abbitt v. Gregory, 195 N. C. 203, 141 SE 587.

[75] See infra §§ 256–263.

[76] Tod v. Cleveland, etc., R. Co., 65 Fed. 145, 12 CCA 521.

[77] **Appealability of order** see Appeal and Error § 300.

Appeal as affecting right or duty of federal court to remand cause see infra § 311.

[78] Pioneer SS. Co. v. Sanday, 210 App. Div. 318, 206 NYS 338.

Motion to remand as mode of testing removability of cause see infra § 324.

Remand as vacating order of removal see infra § 338.

[79] Ellerman v. New Orleans, etc., R. Co., 8 F. Cas. No. 4,382, 2 Woods 120.

Appeal as stay of further proceedings in general see Appeal and Error §§ 1392–1396.

[80] Burson v. New York Nat. Park Bank, 40 Ind. 173, 13 AmR 285.

[81] USCA tit 28 § 71.

Removal on account of prejudice or local influence in general see supra §§ 194–204.

[82] Bonner v. Meikle, 77 Fed. 485; Schwenk v. Strang, 59 Fed. 209, 8 CCA 92; Hall v. Chattanooga Agricultural Works, 48 Fed. 599; Minnick v. Union Ins. Co., 40 Fed. 369; Kaitel v. Wylie, 38 Fed. 865; Whelan v. New York, etc., R. Co., 35 Fed. 849, 1 LRA 65; Rome, etc., Constr. Co. v. Smith, 84 Ga. 238, 10 SE 728; Williams v. Southern Bell Tel., etc., Co., 116 N. C. 558, 21 SE 298; Blackwell v. Lynchburg, etc., R. Co., 107 N. C. 217, 12 SE 133.

[a] **Application to state court improper.**—(1) An application to the state court for removal of a cause on the ground of prejudice or local influence is improper and inefficacious. Rome, etc., Constr. Co. v. Smith, 84 Ga. 238, 10 SE 728; Blackwell v. Lynchburg, etc., R. Co., 107 N. C. 217, 12 SE 133. (2) The state court has no right to entertain or consider a petition based upon such ground. Williams v. Southern Bell Tel., etc., Co., 116 N. C. 558, 21 SE 298. (3) An order of the state court for the removal of a cause on such ground, not made in response to or compliance with an order of the federal court granting removal, is unauthorized and void. Tod v. Cleveland, etc., R. Co., 65 Fed. 145, 12 CCA 521.

Presentation and filing of petition see infra § 258.

[83] Minnick v. Union Ins. Co., 40 Fed. 369.

Hearing on petition in federal court and order for removal see infra §§ 259, 260.

[84] **Petition for removal on account of difference of citizenship in general** see supra §§ 237–244.

[85] Collins v. Campbell, 62 Fed. 850; Goldsworthy v. Chicago, etc., R. Co., 38 Fed. 769.

[86] Goldsworthy v. Chicago, etc., R. Co., supra.

[87] Parker v. Vanderbilt, 136 Fed. 246; New London Water Com'rs v. Robbins, 125 Fed. 656; Robison v. Hardy, 38 Fed. 49; Southworth v. Reid, 36 Fed. 451.

Removability as dependent upon existence of prejudice or influence in county to which venue may be changed see supra § 198.

[88] Parker v. Vanderbilt, 136 Fed. 246.

[89] See supra § 238.

Removal for prejudice or local influence as special case of removal for difference of citizenship see supra § 194.

[90] Young v. Ewart, 132 U. S. 267, 10 SCt 75, 33 L. ed. 352; Adelbert College v. Toledo, etc., R. Co., 47 Fed. 836; Schnadig v. Flescher, 29 Fed. 465; Frelinghuysen v. Baldwin, 19 Fed. 49; Miller v. Chicago, etc., R. Co., 17 Fed. 97, 3 McCrary 460; Martin v. Coons, 24 La. Ann. 169.

[91] Cochran v. Montgomery County, 199 U. S. 260, 273 [rev 116 Fed. 985]; Weldon v. Fritzlen, 128 Fed. 608 [rev on other grounds 135 Fed. 650, 68 CCA 288 (certiorari den 198 U. S. 586 mem, 25 SCt 803 mem, 49 L. ed. 1174 mem)]; Campbell v. Milliken, 119 Fed. 982; Terre Haute v. Evansville, etc., R. Co., 106 Fed. 545; Wilder v. Virginia, etc., Steel, etc., Co., 46 Fed. 676; Anderson v. Bowers, 43 Fed. 321; Rike v. Floyd, 42 Fed. 247.

[92] Metropolitan L. Ins. Co. v. Ethier, 44 Mich. 144, 6 NW 201.

Filing and presentment of petition and proof see infra § 258.

Bond. The statute relating to the removal of causes on the ground of prejudice or local influence apparently does not require any bond or security to be furnished by the petitioner or to accompany the petition for removal,[96] but expressly excepts suits removable on such ground from the provision requiring a bond in the ordinary case of removal for difference of citizenship;[97] and under an earlier statute,[98] which required the giving of a bond of a particular character upon removal on account of prejudice or local influence, it was held that the bond of a different character required in other cases of difference of citizenship was not necessary.[99]

Proof.[1] It is competent for the federal court to receive evidence of the existence of prejudice or local influence by affidavits,[2] or by depositions,[3] or by means of oral examination of witnesses in its presence.[4] The proof must be suitable to the nature of the case,[5] and such as legally, and not merely morally, to satisfy the federal court of the truth of the allegation that, from prejudice or local influence, defendant will not be able to obtain justice in the state court;[6] and accordingly, the amount and manner of proof required in each case must be left to the discretion of the court to which the application is addressed.[7] The affidavit of a credible person, who need not be the petitioner,[8] may be regarded by the court as sufficient proof,[9] and is ordinarily the least which will satisfy the requirements of the statute,[10] although if the petition for removal states the facts upon which the allegation is founded, and is verified by a credible person, it may be regarded as prima facie proof sufficient to satisfy the conscience of the court.[11] An affidavit must state facts which sufficiently evince the truth of the allegations of prejudice or influence,[12] and a mere general statement in the language of the statute or similar form,[13] or a formal statement of mere belief in the existence of such prejudice or influence,[14] is not sufficient; but an allegation of the facts upon information and belief is valid proof thereof.[15] An affidavit made prior to the commencement of the suit may be sufficient where the suit is sufficiently identified therein.[16] If more proof than that offered by the petitioner is required by the court it should be presented.[17]

[§ 257] **b. Notice of Application.** While there is nothing in the statute relating to the removal of causes from a state court to a federal court on account of prejudice or local influence[18] expressly requiring the party applying for such removal to give notice to the adverse party of his petition or application, and such notice accordingly is not mandatory,[19] proper practice demands that such notice be given before the matter is acted upon by the federal court to which the petition is addressed,[20] and in at least one instance the court has declined to hear the application until suitable notice should be given.[21] A reasonable time should be allowed between the service of the notice and the date fixed for the presentation of the application to the federal court, to enable the opposing party to file counter-affidavits if he so desires;[22] and it seems that if a reasonable time is not so allowed the court may grant additional time.[23] It has been held that the notice should specify upon what proofs the petitioner will rely,[24] and that if he intends to rely upon affidavits, copies of them should be attached to the notice.[25]

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[93] Metropolitan L. Ins. Co. v. Ethier, 44 Mich. 144, 6 NW 201.

[94] Parker v. Vanderbilt, 136 Fed. 246.

Proof see infra text and notes 1–17.

[95] Parker v. Vanderbilt, 136 Fed. 246; Bonner v. Meikle, 77 Fed. 485.

[96] See USCA tit 28 § 71.

[97] USCA tit 28 § 72.

Bond for removal on account of difference of citizenship in general see supra §§ 245–248.

Removal for prejudice or local influence as special case of removal for difference of citizenship see supra § 194.

[98] U. S. Rev. St. § 639 subd 3.

[99] Baltimore, etc., R. Co. v. Bates, 119 U. S. 464, 7 SCt 285, 30 L. ed. 436 [rev 39 Oh. St. 157]; Gutwillig v. Zuberbier, 28 Fed. 721.

[1] **Right of opposing party to submit counterproof** see infra § 259.

[2] Golightly v. Massachusetts Bonding, etc., Co., 295 Fed. 153; Malone v. Richmond, etc., R. Co., 35 Fed. 625.

[3] Malone v. Richmond, etc., R. Co., supra.

[4] Golightly v. Massachusetts Bonding, etc., Co., 295 Fed. 153; Malone v. Richmond, etc., R. Co., 35 Fed. 625.

[5] Ex p. Pennsylvania Co., 137 U. S. 451, 11 SCt 141, 34 L. ed. 738; Golightly v. Massachusetts Bonding, etc., Co., 295 Fed. 153.

[6] Bellaire v. Baltimore, etc., R. Co., 146 U. S. 117, 13 SCt 16, 36 L. ed. 910; Ex p. Pennsylvania Co., 137 U. S. 451, 11 SCt 141, 34 L. ed. 738; In re Vadner, 259 Fed. 614; Tacoma v. Wright, 84 Fed. 836; Reeves v. Corning, 51 Fed. 774; Amy v. Manning, 38 Fed. 536, 38 Fed. 868.

[7] Ex p. Pennsylvania Co., 137 U. S. 451, 11 SCt 141, 34 L. ed. 738; Bonner v. Meikle, 77 Fed. 485.

[8] Bonner v. Meikle, supra; Dennis v. Alachua County, 7 F. Cas. No. 3,791, 3 Woods 683. But see Cooke v. Boston State Nat. Bank, 52 N. Y. 96, 11 AmR 667 (holding that the party petitioning for the removal must himself make the affidavit); Quigley v. Central Pac. R. Co., 11 Nev. 350, 21 AmR 757 (recognizing the same rule, but saying that the requirement would be sufficiently complied with in the case of a corporation by an affidavit made by its president or other officer under a resolution of the directors declaring that local prejudice or influence exists and authorizing such officer to make affidavit to that effect in behalf of the corporation); Farmers' L. & T. Co. v. Maquillan, 8 F. Cas. No. 4,668, 3 Dill. 379; Mix v. Andes Ins. Co., 74 N. Y. 53, 30 AmR 260 (both to same effect).

[9] Detroit v. Detroit City R. Co., 54 Fed. 1.

[10] Ex p. Pennsylvania Co., 137 U. S. 451, 11 SCt 141, 34 L. ed. 738.

[11] Ex p. Pennsylvania Co., supra.

[a] **Form of verified petition** is set out in Montgomery County v. Cochran, 116 Fed. 985, 986 [rev on other grounds 199 U. S. 260, 26 SCt 58, 50 L. ed. 182, 4 AnnCas 451].

[12] Ex p. Pennsylvania Co., 137 U. S. 451, 11 SCt 141, 34 L. ed. 738; In re Vadner, 259 Fed. 614; Schwenk v. Strang, 59 Fed. 209, 8 CCA 92; Hall v. Chattanooga Agricultural Works, 48 Fed. 599; Goldworthy v. Chicago, etc., R. Co., 38 Fed. 769; Amy v. Manning, 38 Fed. 536, 38 Fed. 868. But see Collins v. Campbell, 62 Fed. 850; Short v. Chicago, etc., R. Co., 33 Fed. 114, 34 Fed. 225 (contrary dicta).

[13] Schwenk v. Strang, 59 Fed. 209, 8 CCA 92; Niblock v. Alexander, 44 Fed. 306; Carson, etc., Lumber Co. v. Holtzclaw, 39 Fed. 885; Goldworthy v. Chicago, etc., R. Co., 38 Fed. 769; Amy v. Manning, 38 Fed. 536, 38 Fed. 868; Malone v. Richmond, etc., R. Co., 35 Fed. 625; Short v. Chicago, etc., R. Co., 33 Fed. 114. But see Adelbert College v. Toledo, etc., R. Co., 47 Fed. 836 [app dism 146 U. S. 355, 13 SCt 186, 36 L. ed. 1003]; Cooper v. Richmond, etc., R. Co., 42 Fed. 697, 8 LRA 366; Whelan v. New York, etc., R. Co., 35 Fed. 849, 1 LRA 65 (in all of which allegations in the language if the statute were treated as sufficient).

[14] Ex p. Pennsylvania Co., 137 U. S. 451, 11 SCt 141, 34 L. ed. 738; Collins v. Campbell, 62 Fed. 850; Minnick v. Union Ins. Co., 40 Fed. 369; Hakes v. Burns, 40 Fed. 33; Amy v. Manning, 38 Fed. 536; Short v. Chicago, etc., R. Co., 33 Fed. 114, 34 Fed. 225.

[15] Detroit v. Detroit City R. Co., 54 Fed. 1.

[16] Canal, etc., Sts. R. Co. v. Hart, 114 U. S. 654, 5 SCt 1127, 29 L. ed. 226.

[17] Ex p. Pennsylvania Co., 137 U. S. 451, 11 SCt 141, 34 L. ed. 738.

[18] USCA tit 28 § 71.

[19] Montgomery County v. Cochran, 116 Fed. 985 [rev on other grounds 199 U. S. 260, 26 SCt 58, 50 L. ed. 182]; Crotts v. Southern R. Co., 90 Fed. 1; Reeves v. Corning, 51 Fed. 774; Adelbert College v. Toledo, etc., R. Co., 47 Fed. 836 [app dism 146 U. S. 355, 13 SCt 186, 36 L. ed. 1003]; Carpenter v. Chicago, etc., R. Co., 47 Fed. 535; Amy v. Manning, 38 Fed. 868; Whelan v. New York, etc., R. Co., 35 Fed. 849, 1 LRA 65; Malone v. Richmond, etc., R. Co., 35 Fed. 625.

Petition for removal on account of prejudice or local influence see supra § 256.

[20] Bonner v. Meikle, 77 Fed. 485;

[§ 258] **c. Filing and Presentment of Petition and Proof.**[26] Inasmuch as the removal of a cause from a state court to a federal court on the ground of prejudice or local influence is to be procured upon a petition addressed to the federal court to which removal is sought,[27] such petition should be filed in the federal court,[28] and filing it in the state court is inefficacious to remove the cause or terminate the jurisdiction of the state court.[29] It has been said, however, to be the better practice to file in the state court a certified copy of the petition presented to the federal court, with the proceedings had thereon, after a removal has been granted.[30]

[§ 259] **d. Hearing and Determination.** While the statute relating to the removal of causes from a state court to a federal court on the ground of prejudice or local influence, does not expressly require the federal court to which the application for removal is addressed to hold a hearing thereon,[31] it has been held that the language of the statute imports a duty on the part of the court to investigate or examine into the facts upon which the alleged inability to obtain justice in the state court rests,[32] and that it is accordingly the proper practice to allow a hearing to both sides,[33] even though such hearing is not essential to the validity of the order of removal.[34] The party opposing the removal should be allowed to present counter-affidavits to show that the alleged prejudice or local influence does not exist;[35] but a plea merely denying that the petitioner believes or has reason to believe that he will not be able to obtain justice in the state court, without affirming the absence of any adverse prejudice or influence, raises no issue.[36] The question whether the alleged prejudice or local influence exists is one of fact to be determined by the federal court,[37] and it must find the existence thereof as a fact before it can order a removal.[38] Where, however, the federal court is satisfied by the proof presented that prejudice or local influence adverse to the petitioner exists in the state court, it should grant an order for the removal of the cause.[39] It has been held that positive testimony of witnesses that they know of the existence of prejudice must be accepted as outweighing negative testimony of other witnesses that, although they have equal opportunity of knowing the facts, they do not know of such prejudice or believe it exists.[40]

Review. A finding or decision of a federal court to which a petition for removal has been addressed that prejudice and local influence adverse to the petitioner exist in the state court is not reviewable.[41]

[§ 260] **e. Order for Removal.** In order to effectuate the removal of a cause from a state court to a federal court on the ground of prejudice or local influence, an order for such removal must be made by the federal court,[42] and filed in the state court in which the suit is pending;[43] and the state court does not lose jurisdiction until that is done.[44] A mere finding that a right to remove exists, without an order that the cause be removed, is not sufficient to work a removal.[45]

Order by state court for the removal of the cause is ineffectual and void, when not made in response to any order of the federal court granting removal.[46]

Herndon v. Southern R. Co., 73 Fed. 307; Schwenk v. Strang, 59 Fed. 209, 8 CCA 92; Reeves v. Corning, 51 Fed. 774; Malone v. Richmond, etc., R. Co., 35 Fed. 625. See Adelbert College v. Toledo, etc., R. Co., 47 Fed. 836, 843 (where the court said that "it would, perhaps, be the better practice" to give such notice).

Hearing on application see infra § 259.

[21] Herndon v. Southern R. Co., 73 Fed. 307. See Reeves v. Corning, 51 Fed. 774, 776 (where it was said: "The better, as well as the safer, practice would ordinarily be for the court to decline to hear the application until proper notice of the hearing had been given").

[22] Bonner v. Meikle, 77 Fed. 435; Carson, etc., Lumber Co. v. Holtzclaw, 39 Fed. 578.

[a] **Three days' time** for filing affidavits in opposition to the petition for removal has been held to be insufficient. Carson, etc., Lumber Co. v. Holtzclaw, 39 Fed. 578.

Counter-affidavit in general see infra § 259.

[23] See Carson, etc., Lumber Co. v. Holtzclaw, 39 Fed. 578 (where two weeks' time was allowed by the court before any order should be made, and in the meantime the application was held in suspension).

[24] Bonner v. Meikle, 77 Fed. 485.

Proof of prejudice or local influence see supra § 256.

[25] Bonner v. Meikle, 77 Fed. 485.

[26] **Presentation of counter-proof at hearing** see infra § 259.

[27] See supra § 256.

[28] In re Vadner, 259 Fed. 614; Mason v. Interstate Consol. St. R. Co., 170 Mass. 382, 49 NE 645. Compare Short v. Chicago, etc., R. Co., 33 Fed. 114, 34 Fed. 225 (holding that the petition may be filed in the state court and a certified copy in the circuit court of the United States).

[29] Rome, etc., Constr. Co. v. Smith, 84 Ga. 238, 10 SE 728; Blackwell v. Lynchburg, etc., R. Co., 107 N. C. 217, 12 SE 133.

[30] Baird v. Richmond, etc., R. Co., 113 N. C. 603, 18 SE 698.

[31] See Adelbert College v. Toledo, etc., R. Co., 47 Fed. 836 (so stating).

[32] Schwenk v. Strang, 59 Fed. 209, 8 CCA 92; Dennison v. Brown, 38 Fed. 535; Malone v. Richmond, etc., R. Co., 35 Fed. 625.

[33] Schwenk v. Strang, 59 Fed. 209, 8 CCA 92. See Herndon v. Southern R. Co., 73 Fed. 307 (where the court refused to grant an application for removal ex parte and without a hearing).

Necessity and propriety of notice to adverse party see supra § 257.

[34] Reeves v. Corning, 51 Fed. 774. See Herndon v. Southern R. Co., 73 Fed. 307 (recognizing the rule).

Order of federal court for removal see infra § 260.

[35] Maher v. Tower Hotel Co., 94 Fed. 225.

[36] Taylor County Ct. v. Baltimore, etc., R. Co., 35 Fed. 161.

[37] Dennison v. Brown, 38 Fed. 535; Short v. Chicago, etc., R. Co., 33 Fed. 114, 34 Fed. 225.

[38] Kaitel v. Wylie, 38 Fed. 865; Malone v. Richmond, etc., R. Co., 35 Fed. 625.

[39] Baird v. Richmond, etc., R. Co., 113 N. C. 603, 18 SE 698.

Order for removal see infra § 260.

[40] Golightly v. Massachusetts Bonding, etc., Co., 295 Fed. 153; Herndon v. Southern R. Co., 76 Fed. 398.

[41] Baird v. Richmond, etc., R. Co., 113 N. C. 603, 18 SE 698.

Reviewability of:

Order granting or refusing removal in general see Appeal and Error § 300.

Refusal to remand cause after removal see infra § 340.

[42] Pennsylvania Co. v. Bender, 148 U. S. 255, 13 SCt 591, 37 L. ed. 441; Tod v. Cleveland, etc., R. Co., 65 Fed. 145, 12 CCA 521; Sparkman v. Supreme Council A. L. H., 57 S. C. 16, 35 SE 391.

[43] Pennsylvania Co. v. Bender, 148 U. S. 255, 13 SCt 591, 37 L. ed. 441; Sparkman v. Supreme Council A. L. R., 57 S. C. 16, 35 SE 391.

[44] In re Vadner, 259 Fed. 614; Sparkman v. Supreme Council A. L. R., 57 S. C. 16, 35 SE 391.

[45] Pennsylvania Co. v. Bender, 148 U. S. 255, 13 SCt 591, 37 L. ed. 441; Tod v. Cleveland, etc., R. Co., 65 Fed. 145, 12 CCA 521.

[46] Tod v. Cleveland, etc., R. Co., supra.

[§ 261] **2. Suits and Prosecutions against Revenue Officers and Others.** The statute relating to the removal from a state court to a federal court of civil suits and criminal prosecutions against revenue officers of the United States, or persons acting under or by the authority of such officer or holding property by title derived from such officer, or against officers of the courts of the United States or officers of either house of congress,[47] provides for the removal of such suits or prosecutions upon a verified petition of defendant, setting forth the nature of the proceeding, and which, together with a certificate of the attorney for the petitioner that he believes the matters set forth in the petition to be true, is required to be presented to the federal court to which removal is sought, if in session, and if such court is not in session to be presented to and filed in the office of the clerk thereof; whereupon, it is provided, the cause shall be docketed in the federal court and shall proceed as a cause originally commenced in that court, but all bail or other security given shall continue with the same force and effect as though the cause had proceeded to final judgment and execution in the state court. It is further provided by the statute that the clerk of the federal court shall issue a writ of certiorari to the state court requiring it to send to the federal court its record, except where the proceeding was commenced by capias or similar proceeding for a personal arrest, in which case the clerk shall issue a writ of habeas corpus cum causa, a duplicate of which shall be delivered to the clerk of the state court or left at his office by the marshal or his deputy or other authorized person, whereupon it shall be the duty of the state court to stay all further proceedings in the cause, and the suit shall be held to be removed to the federal court, and any further proceedings in the state court shall be void. If defendant in the suit or prosecution be in actual custody, the statute provides that it shall be the duty of the marshal of the federal court, by virtue of the writ of habeas corpus, to take defendant into his custody, to be dealt with according to the order of the court or, in vacation, of a judge thereof. It is further provided that if, upon the removal of such suit or prosecution, it is made to appear that no copy of the record in the state court can be obtained, the federal court may require plaintiff to proceed de novo and to file a declaration of his cause of action, and the parties may then proceed as in actions originally brought in the federal court; and that on failure of plaintiff so to proceed a judgment of non prosequitur may be rendered against him, with costs for defendant.[48]

Petition. No removal of a suit or prosecution against a revenue officer or other officer or person specified in the statute can be had under the provisions thereof except upon the presentment or filing of a proper petition[49] and the certificate of an attorney,[50] as therein prescribed.[51] Although there is authority for the view that a petition by an officer of a character mentioned in the statute is sufficient when it avers in general language that he is being sued for and on account of acts done by him by virtue or under color of his office, without setting forth the particular nature of the cause of action[52] or describing the circumstances under which the act forming the basis of the proceeding was committed,[53] it would seem to be the better rule that, under the statutory requirement that the petition shall set forth the nature of the case,[54] facts, as contradistinguished from mere opinions and conclusions of law, should be stated which show that the suit or proceeding is one comprehended within the statute,[55] and that it must be made to appear in and by the petition that the acts which gave rise to the cause of action were in fact connected with the official duties of the officer being sued or whose acts are in question.[56] The petition of an officer mentioned in the statute must positively aver or admit the commission of the act upon which the suit or prosecution is based,[57] or of some act which was done under color of his office or of the law and upon which the proceeding is founded,[58] since the statute refers only to acts done;[59] but it need not show the commission of the precise act charged against the petitioner,[60] and, of course, it need not admit, but may deny, that the act was criminal in character or such as to impose liability upon him.[61] On the other hand, it need not be shown that no criminality attached to the acts done by such officer or that no liability on his part arose therefrom.[62] The petition should clearly show that the officer's relation to the transaction on which the prosecution is based was confined to his official acts, and negative the possibility that he did other than official acts in connection therewith;[63] and where the petition on its face shows that the acts done by the officer were not within his official authority, removal will be denied.[64] An allegation or showing

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Order of state court upon removal see supra § 255.

[47] **Removal of such suits and prosecutions in general** see supra §§ 90–110.

[48] USCA tit 28 § 76.

Proceedings after removal in:
Federal court see infra §§ 275–301.
State court see infra §§ 265–267.

[49] Virginia v. Paul, 148 U. S. 107, 13 SCt 536, 37 L. ed. 386; Ford Motor Co. v. Automobile Ins. Co., 13 F. (2d) 415; Oregon v. Wood, 268 Fed. 975.

[50] Ford Motor Co. v. Automobile Ins. Co., 13 F. (2d) 415.

[51] See supra text and note 48.

[52] Abranches v. Schell, 1 F. Cas. No. 21, 4 Blatchf. 256.

[53] Illinois v. Fletcher, 22 Fed. 776.

[54] See supra text and note 48.

[55] Oregon v. Wood, 268 Fed. 975; Salem, etc., R. Co. v. Boston, etc., R. Co., 21 F. Cas. No. 12,249. Compare Skeen v. Huntington, 25 Ind. 510 (holding that, under an earlier statute, since repealed, providing for the removal of suits or prosecutions against any civil or military officer or other person for any arrest or trespass made during the Civil War by or under authority derived from the president of the United States, a petition which failed to show that the act in question was done under or by virtue of such authority, was insufficient).

[56] Chock Sing v. Breckons, 3 Hawaii Fed. 630.

[57] Illinois v. Fletcher, 22 Fed. 776.

[58] Maryland v. Soper, 270 U. S. 9, 46 SCt 185, 70 L. ed. 449; Alabama v. Peak, 252 Fed. 306.

[a] **Waiver of constitutional privilege against self-crimination.**—By petitioning for the removal of a prosecution against him an officer abandons his right to refuse to testify because accused of crime, at least to the extent that he must disclose in his application all the circumstances known to him out of which the prosecution arose. Maryland v. Soper, 270 U. S. 9, 46 SCt 185, 70 L. ed. 449.

[59] See USCA tit 28 § 76.

[60] Maryland v. Soper, 270 U. S. 9, 46 SCt 185, 70 L. ed. 449; Alabama v. Peak, 252 Fed. 306. See Cleveland, etc., R. Co. v. McClung, 119 U. S. 454, 7 SCt 262, 30 L. ed. 465 (to same effect).

[61] Alabama v. Peak, 252 Fed. 306.

[62] Maryland v. Ford, 12 F. (2d) 289.

[63] Maryland v. Soper, 270 U. S. 9, 46 SCt 185, 70 L. ed. 449. See Maryland v. Ford, 12 F. (2d) 289 (recognizing the rule).

[64] Ex p. Huston, 282 Fed. 723.

that the act was done by the officer under and by right of his office, and in the discharge of his official duty,[65] or that as such officer he was performing specified acts which were a part of his official duties at the time the cause of action arose,[66] is a sufficient claim of right and authority under the law to show that the case is within the statute, without showing more fully the capacity in which he was acting,[67] or under what laws the acts in question were performed.[68] The petition need not contain any allegation of local prejudice against defendant.[69] Where the United States district attorney appears for the removing defendant a petition signed by him and designating such defendant is within the statute.[70] Where two or more defendants apply for removal, verification of the petition by any one of them is sufficient.[71]

Amendment of petition. Leave to amend a petition for removal filed by a revenue or other officer charged in the state court with the commission of a crime is not to be denied merely because the original petition was lacking in candor.[72]

Presentment or filing. Two conflicting views have been advanced by the courts as to the purpose and sufficiency of presenting the removal papers to the federal court or filing them with the clerk, as required by statute.[73] On the one hand, it has been held by a state court that such presentment or filing is for the purpose of permitting the court or clerk to determine whether or not the papers are sufficient upon their face to entitle defendant to remove the cause,[74] and that such determination is judicial in its nature and requires the exercise of an official judgment and discretion,[75] and, accordingly, that a deputy clerk, having authority to act for his principal only in ministerial matters, is without authority to pass upon the petition.[76] In the same case, however, the federal court laid down the rule that the presentment or filing is merely to enable the court or its clerk to see that the formal requirements of the law have been complied with,[77] and that such function may validly be performed by the deputy clerk, in the absence of his superior.[78] Where the federal court to which removal is sought is not in session, and sessions of such court are held at two or more places in the district, the removal papers should be filed in the office of the clerk at the place where the next session is to be held;[79] but filing at another place is not ground for remanding the cause,[80] since it may, upon motion, be transferred to a place where a session is sooner to be held or where the court is in session.[81]

Effectuation of removal. It has been held that the state court in which is pending a suit or prosecution of the character mentioned in the statute[82] does not lose its jurisdiction thereof, and a removal to the federal court is not effectuated until a writ of certiorari or habeas corpus, as provided for by the statute,[83] has been delivered to the clerk of the state court,[84] and that the federal court has authority to hear the facts and determine whether or not a right of removal exists, before issuing the writ.[85] On the other hand, there is authority for the view that where a duly verified petition for the removal of a suit or prosecution comprehended within the terms of the statute is presented to or filed in the federal court, together with a proper certificate of counsel, in accordance with the statutory requirements, and the petition on its face shows sufficient grounds for removal, its allegations must be taken as true,[86] and the cause is ipso facto removed to the federal court,[87] it having been said that the purpose of the writ is not to oust the state court of jurisdiction, and that it is not essential to the removal,[88] but is merely required in order to notify the state court that jurisdiction has been assumed by the federal court,[89] and to require a return to the latter court of the record of the state court[90] or the delivery of the person of defendant.[91] No order of the federal court[92] or of the state court[93] is necessary to effectuate the removal. While it has been held that, from the nature of the matter, the state court has authority to pass upon the sufficiency of the writ to oust its jurisdiction,[94] the better rule would seem to be that when a writ sufficient on its face is delivered to the state court, it has no authority to decide whether the cause is a reasonable one, but must accept the statements and command of the writ and proceed no further.[95]

Writ.[96] Where the allegations of the petition for removal are controverted or denied, it is the better practice not to issue the writ of certiorari or habeas corpus, as provided for by the removal statute,[97] until after the removability of the suit or proceeding has been determined,[98] unless such an emergency exists that, in order to protect the petitioner's rights, the writ should issue at once.[99] While it has been held by a state court that the writ must show that the federal court to which the cause is sought to be removed, or its clerk, has allowed the petition for removal, and that it has been filed and the cause entered upon the docket of such court,[1] the federal court in the same case was of opinion that such a requirement would introduce a new feature into the writ as known to the common law, and that no such showing need be made therein.[2] It has been held by a federal court that the address of a writ of certiorari to the United States marshal of the district, commanding him to make known to the clerk of the state court the removal of the case and that such court is required to send a transcript of the record to the federal court, is equivalent to the address of the writ to the state court;[3] but the state court in the same case announced a contrary opinion.[4] Since the statute makes no provision for any other writ than that of habeas corpus cum causa in the case of a prosecution which was commenced by a capias or other process of arrest, it has been held that such writ is proper whether the petitioner is in actual custody or is out on bail.[5] It has been pointed out, however, that in the latter case such writ is not well adapted to the purpose in view,[6] and that the difficulty is sometimes solved in such circumstances by addressing the writ to the United States marshal of the district and causing a duplicate to be delivered to the clerk of the state court;[7] and there is authority for the view that when the petitioner is so in bail and not in custody, no writ of habeas corpus is necessary.[8] Ordinarily the writ of habeas corpus cum causa serves to cause the record to be transmitted to the federal court, as part of the clerk's obedience to the command that cause be shown for the petitioner's detention.[9]

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[65] Tennessee v. Davis, 100 U. S. 257, 25 L. ed. 648; Oregon v. Wood, 268 Fed. 975.

[66] New York v. Walsh, 40 F. (2d) 58; Maryland v. Ford, 12 F. (2d) 289; Alabama v. Peak, 252 Fed. 306.

[67] Oregon v. Wood, 268 Fed. 975.

[68] Oregon v. Wood, supra.

[69] Virginia v. Felts, 133 Fed. 85.

Removal on account of prejudice or influence in general see supra §§ 194–204.

[70] Oregon v. Wood, 268 Fed. 975.

[71] Oregon v. Wood, supra.

[72] Maryland v. Ford, 12 F. (2d) 289.

[73] See cases infra notes 74–78.

[74] State v. Sullivan, 110 N. C. 513, 14 SE 796.

[75] State v. Sullivan, supra.

[76] State v. Sullivan, supra.

[77] North Carolina v. Sullivan, 50 Fed. 593.

[78] North Carolina v. Sullivan, supra.

[79] Virginia v. Felts, 133 Fed. 85.

[80] Virginia v. Felts, supra.

[81] Virginia v. Felts, supra.

[82] See supra text and note 48.

[83] **Writ in general** see infra text and notes 96–9.

[84] Virginia v. Paul, 148 U. S. 107, 13 SCt 536, 37 L. ed. 386; Oregon v. Wood, 268 Fed. 975; State v. Sullivan, 110 N. C. 513, 14 SE 796.

[85] In re Duane, 261 Fed. 242.

[86] North Carolina v. Sullivan, 50 Fed. 593.

[87] North Carolina v. Sullivan, supra.

[88] North Carolina v. Sullivan, supra.

[89] North Carolina v. Sullivan, supra.

[90] North Carolina v. Sullivan, supra.

[91] State v. Davis, 12 S. C. 528 [rev on other grounds 107 U. S. 597, 2 SCt 636, 27 L. ed. 574].

[92] Virginia v. Paul, 148 U. S. 107, 13 SCt 536, 37 L. ed. 386; Hayes v. Smith, 5 F. (2d) 684.

[93] Virginia v. Paul, 148 U. S. 107, 13 SCt 536, 37 L. ed. 386.

Necessity of order by state court for removal in general see infra § 255.

[94] State v. Sullivan, 110 N. C. 513, 14 SE 796.

[95] State v. Circuit Judge, 33 Wis. 127.

Effect of removal on further proceedings in state court see infra §§ 265–267.

[96] **Of certiorari to compel clerk of state court to certify transcript of record in general** see infra § 274.

[97] see supra text and note 48.

[§ 262] **3. Actions by Aliens against Civil Officers of United States.** The statute relating to the removal from a state court to a federal court of a personal action brought by an alien against one who is, or at the time the cause of action accrued was, a civil officer of the United States, being a nonresident of the state where the action is brought, provides for the removal of such actions in the same manner as is prescribed by the statute relating to the removal of suits and prosecutions against revenue officers and other officers and persons mentioned therein.[10–11]

[§ 263] **4. Proceedings against Persons in Military Service.** The statute authorizing the removal to the federal courts of certain civil and criminal prosecutions commenced in any court of a state against any officer, soldier, or other person in the military service of the United States[12] provides that such suit or prosecution may be removed for trial into the district court of the United States in the manner prescribed in section 33 of the Act of March 3, 1911, for the codification, revision and amendment of the laws relating to the judiciary,[13] which section relates to the removal of suits and prosecutions against certain federal officers and others.[14]

[§ 264] **D. Federal Court to Which Cause Removed.**[15] It is the generally recognized rule that the proper and only court of the United States to which a cause is removable, if at all, from a court of a state is the district court of the district within the boundaries of which is situate the state court in which the cause is pending, at the time of removal,[16] without regard to where it originated,[17] and that removal cannot be had to the district of defendant's residence, where that is different from the district within which the suit is pending in the state court,[18] the rights of a plaintiff to bring in a federal court, and of a defendant to remove to such court, a cause over which the state and federal courts have concurrent jurisdiction not being reciprocal.[19] There is authority, however, for the view that the court to which removal may properly be had is the district court of the district in which defendant resides;[20] and it has even been held that the district in which plaintiff resides is the proper district to which to remove the cause.[21]

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[98] In re Duane, 261 Fed. 242.

[99] In re Duane, supra.

[1] State v. Sullivan, 110 N. C. 513, 14 SE 796.

[2] North Carolina v. Sullivan, 50 Fed. 593.

[3] North Carolina v. Sullivan, supra.

[4] State v. Sullivan, 110 N. C. 513, 14 SE 796.

[5] Oregon v. Wood, 268 Fed. 975.

[6] Virginia v. Felts, 133 Fed. 85.

[7] Virginia v. Felts, supra.

[8] North Carolina v. Sullivan, 50 Fed. 593.

[9] Virginia v. Felts, 133 Fed. 85.

Procurement and filing of transcript in general see infra §§ 270–274.

[10–11] USCA tit 28 § 77.

Procedure for removal of suits or prosecutions against revenue officers, etc. see supra § 261.

[12] **Removal of such proceedings generally** see supra § 110.

[13] Act June 4, 1920, c 227 subch II § 1 art 117 [41 St. at L. 811]. Compare USCA tit 10 § 1589, codifying such article, in which the reference is apparently erroneously given.

[14] See USCA tit 28 § 76.

Procedure for removal of causes against federal officers and others see supra § 261.

[15] **Decision confusing venue and jurisdiction of federal courts** see supra § 10.

[16] U. S.—Lee v. Chesapeake, etc., R. Co., 260 U. S. 653, 43 SCt 230, 67 L. ed. 443; General Inv. Co. v. Lake Shore, etc., R. Co., 260 U. S. 261, 43 SCt 106, 67 L. ed. 244; Hess v. Reynolds, 113 U. S. 73, 5 SCt 377, 28 L. ed. 927; Ex p. State Ins. Co., 18 Wall. 417, 21 L. ed. 904; Lockport Glass Co. v. H. L. Dixon Co., 262 Fed. 976; In re Vadner, 259 Fed. 614; Thomas v. Delta Land, etc., Co., 258 Fed. 758; Fairview Fluorspar, etc., Co. v. Bethlehem Steel Co., 258 Fed. 681; Matarazzo v. Hustis, 256 Fed. 882; Ostrom v. Edison, 244 Fed. 228; New York Coal Co. v. Sunday Creek Co., 230 Fed. 295; Eddy v. Chicago, etc., R. Co., 226 Fed. 120; Pavick v. Chicago, etc., R. Co., 225 Fed. 395; St. John v. Taintor, 220 Fed. 457; Cincinnati, etc., R. Co. v. Orr, 215 Fed. 261; St. John v. U. S. Fidelity, etc., Co., 213 Fed. 685; Rubber, etc., Harness Trimming Co. v. John L. Whiting-J. J. Adams Co., 210 Fed. 393; Manufacturers' Commercial Co. v. Brown Alaska Co., 148 Fed. 308; Cobb v. Globe Mut. L. Ins. Co., 5 F. Cas. No. 2,921, 3 Hughes 452; Knowlton v. Congress, etc., Spring Co., 14 F. Cas. No. 7,902, 13 Blatchf. 170.

Ala.—Ex p. Groom, 40 Ala. 731.

Me.—Doherty v. McDowell, 120 Me. 384, 115 A 92.

Miss.—Louisville, etc., R. Co. v. Garnett, 132 Miss. 468, 96 S 519.

N. Y.—Suydam v. Smith, 1 Den. 263.

Okl.—Chicago, etc., R. Co. v. Bond, 254 P 18.

Tex.—Southwestern Gas, etc., Co. v. Raines, (Commn. A.) 238 SW 904 [rev (Civ. A.) 218 SW 545]. See Llanez v. Chisos Min. Co., (Civ. A.) 285 SW 646 (recognizing the rule).

[a] **In Hawaii** the rule is the same in the case of a removal from a territorial court to the federal court. Corn v. Wardell, 4 Hawaii Fed. 605.

[17] Hess v. Reynolds, 113 U. S. 73 5 SCt 377, 28 L. ed. 927.

[18] Lockport Glass Co. v. H. L. Dixon Co., 262 Fed. 976; New York Coal Co. v. Sunday Creek Co., 230 Fed. 295; Eddy v. Chicago, etc., R. Co., 226 Fed. 120; Pavick v. Chicago, etc., R. Co., 225 Fed. 395; St. John v. U. S. Fidelity, etc., Co., 213 Fed. 685; Murdock v. Martin, 178 Fed. 307; Doherty v. McDowell, 120 Me. 384, 115 A 92.

[19] Thomas v. Delta Land, etc., Co., 258 Fed. 758; Ostrom v. Edison, 244 Fed. 228.

Where original suit in federal court may be brought see Federal Courts §§

As between different divisions of same district, it is provided by statute that the removal shall be to the district court in the division in which is situate the county from which the cause is removed.[22] A removal to any other division is, accordingly, improper.[23]

[§ 265] **E. Operation and Effect of Removal—1. As to State Court—a. In General.** Where a cause has been removed from a state court to a federal court, the operation and effect of such removal upon the jurisdiction of the state court and upon the validity of its further proceedings depend upon whether or not a right to remove in fact existed.[24] The question arises particularly in those classes of cases in which the application for removal is made to the state court,[25] since such court has no power to determine the merits of the application,[26] but a removal is effectuated by the mere fact of filing an application showing on its face an apparent right to remove.[27]

[§ 266] **b. Cause Properly Removed.** Where a right to remove a cause from a state court to a federal court exists, and a removal is properly effectuated,[28] the state court is thereby divested of jurisdiction;[29] and it has no power to proceed further,[30] save to enter an order of removal,[31] unless and until the cause is thereafter remanded by the federal court.[32] Pending any such remand, therefore, or if the cause is not remanded, any further proceedings had or orders made there by such state court are not merely erroneous,[33] but coram non judice[34] and

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17–22.

[20] Park Square Auto. Station v. American Locomotive Co., 222 Fed. 979; Stewart v. Cybur Lumber Co., 211 Fed. 343. Compare Hill v. U. S. Shipping Bd. Emergency Fleet Corp., 284 Fed. 398 (holding that the district of defendant's residence is ordinarily the only proper one for removal, but that such rule cannot annul the right of removal where defendant is a resident of the District of Columbia, which is not in any judicial district, and in such circumstances the cause may be removed to the district court of the district within which suit was brought in the state court).

[21] Hill v. Woodland Amusement Co., 158 Fed. 530.

[22] USCA tit 28 § 114.

[a] **Prior to enactment of such provision** (1) it was held in some cases that a cause should upon removal be entered in the division in which the next ensuing session of the court would be held (Virginia v. Felts, 133 Fed. 85; Hatcher v. Wadley, 84 Fed. 913), (2) although it might afterwards be transferred for trial to such other division as should be most convenient for the parties (Hatcher v. Wadley, 84 Fed. 913); (3) but in other cases it was held that where sessions of the court were held at the place where the suit was pending in the state court, removal should be taken to that division even though a session of the court would sooner be held in another division (Cobb v. Globe Mut. L. Ins. Co., 5 F. Cas. No. 2,921, 3 Hughes 452. See Henderson v. Cabell, 43 Fed. 257 [where, without passing upon the propriety of such removal, the defect, if any, was held not jurisdictional]).

[23] Gopcevic v. California Packing Corp., 272 Fed. 994.

Remand of cause removed to wrong division see infra § 306.

[24] See cases infra §§ 266, 267.

[25] **Causes removable on application to state court** see supra §§ 236–255.

[26] See supra § 253.

[27] See supra § 254.

[28] **Application for and effectuation of removal** see supra §§ 235–263.

[29] U. S.—Colleton Mercantile, etc., Co. v. Savannah River Lumber Co., 280 Fed. 358; In re Vadner, 259 Fed. 614; Williston v. Raymond, 213 Fed. 527; Mannington v. Hocking Valley R. Co., 183 Fed. 133; Phillips v. Western Terra Cotta Co., 174 Fed. 873; Lawton v. Blitch, 30 Fed. 641.

Ala.—Ex p. Consolidated Graphite Corp., 129 S 262. See Ex p. City Bank, etc., Co., 200 Ala. 440, 76 S 372 (dictum).

Ariz.—Western Indemn. Co. v. Kendall, 27 Ariz. 342, 233 P 583.

Colo.—Miller v. Buyer, 82 Colo. 474, 261 P 659.

Ky.—Little Sandy Cooperage Co. v. Chesapeake, etc., R. Co., 185 Ky. 161, 214 SW 912.

Mo.—State v. Kelley, 220 Mo. A. 413, 286 SW 724.

N. Y.—Chamberlain v. American Nat. L. & T. Co., 11 Hun 370.

N. C.—Huntley v. Southeastern Express Co., 191 N. C. 696, 132 SE 786; Harbison v. Allen, 152 N. C. 720, 68 SE 207.

Oh.—Anderson v. United Realty Co., 79 Oh. St. 23, 86 NE 644, 51 LRANS 477 [aff 222 U. S. 164, 32 SCt 50, 56 L. ed. 144]; Baltimore, etc., R. Co. v. Fulton, 59 Oh. St. 575, 53 NE 265, 44 LRA 520.

Okl.—New England Oil, etc., Co. v. Broyles, 87 Okl. 55, 209 P 312.

Tex.—Werner v. Needham, (Civ. A.) 201 SW 213; Wells Express v. Hale, (Civ. A.) 175 SW 469.

Vt.—Holbrook v. Quinlan, 84 Vt. 411, 80 A 339.

Filing application to state court for removal as transferring jurisdiction to federal court see supra § 254.

[30] U. S.—Madisonville Tract. Co. v. St. Bernard Min. Co., 196 U. S. 239, 25 SCt 251, 49 L. ed. 462; Oregon v. Wood, 268 Fed. 975; Missouri, etc., R. Co. v. Chappell, 206 Fed. 688; Mannington v. Hocking Valley R. Co., 183 Fed. 133; Penrose v. Penrose, 1 Fed. 479.

Ala.—Ex p. Consolidated Graphite Corp., 129 S 262.

Ark.—Missouri Pac. R. Co. v. Tompkins, 157 Ark. 16, 247 SW 54.

Colo.—Stratton's Independence v. Sterrett, 51 Colo. 17, 117 P 351.

Ga.—Southern R. Co. v. Dukes, 7 Ga. A. 784, 68 SE 332.

Mich.—Atty. Gen. v. Michigan Bell Tel. Co., 235 Mich. 416, 209 NW 200.

Mont.—Murphy v. Stone, etc., Engineering Corp., 44 Mont. 146, 119 P 717, AnnCas1913A 1334.

N. C.—Huntley v. Southeastern Express Co., 191 N. C. 696, 132 SE 786. See State v. Dunlap, 65 N. C. 491, 6 AmR 746 (where the state supreme court directed the lower court to enter an order that the cause should proceed no further until the action taken by the federal court should be certified to it).

Oh.—Baltimore, etc., R. Co. v. Fulton, 59 Oh. St. 575, 53 NE 265, 44 LRA 520.

Tex.—Hare & Chase, Inc. v. Dunton, (Civ. A.) 8 SW (2d) 315; Bishop-Babcock Sales Co. v. Lackman, (Civ. A.) 4 SW (2d) 109; Werner v. Needham, (Civ. A.) 201 SW 213; Kruegel v. Standard Sav., etc., Assoc., (Civ. A.) 196 SW 283; Wells Express v. Hale, (Civ. A.) 175 SW 469.

Wash.—State v. King County Super. Ct., 74 Wash. 559, 134 P 172.

[a] **In Porto Rico** the rule is the same in the case of a removal from an insular court to the federal court. Yglesias v. Marr, 1 Porto Rico Fed. 434; South Porto Rico Sugar Co. v. Sepúlveda, 27 Porto Rico 310.

Duty of state court to recognize removal when proper and sufficient application is made see supra § 253.

Restraining further proceedings in state court after removal see Courts § 654.

[31] U. S.—Phillips v. Western Terra Cotta Co., 174 Fed. 873.

Colo.—Stratton's Independence v. Sterrett, 51 Colo. 17, 117 P 351.

Mich.—Atty. Gen. v. Michigan Bell Tel. Co., 235 Mich. 416, 209 NW 200.

N. C.—Huntley v. Southeastern Express Co., 191 N. C. 696, 132 SE 786; Hyder v. Southern R. Co., 167 N. C. 584, 83 SE 689.

Tex.—Kruegel v. Standard Sav., etc., Assoc., (Civ. A.) 196 SW 283.

Order of state court granting or directing removal see supra § 255.

[32] **Remand of cause properly removed on account of acts or proceedings after removal** see infra §§ 308–318.

[33] Kern v. Huidekoper, 103 U. S. 485, 26 L. ed. 354; Buxton v. Pennsylvania Lumber Co., 221 Fed. 718.

[34] U. S.—Davis v. South Carolina, 107 U. S. 597, 2 SCt 636, 27 L. ed. 574 [rev 12 S. C. 528]; Montgomery v. Postal Tel.-Cable Co., 218 Fed. 471; Anderson v. Western Union Tel. Co., 218 Fed. 78; Mannington v. Hocking Valley R. Co., 183 Fed. 133; Flint v. Coffin, 176 Fed. 872, 100 CCA 342 [certiorari den 217 U. S. 602 mem, 30 SCt 693 mem, 54 L. ed. 898 mem]; North Carolina v. Kirkpatrick, 42 Fed. 689; Lawton v. Blitch, 30 Fed. 641.

Colo.—Stratton's Independence v. Sterrett, 51 Colo. 17, 117 P 351.

La.—State v. Johnson, 29 La. Ann. 399.

Mo.—State v. Kelley, 220 Mo. A.

absolutely void.[35] So the state court cannot allow plaintiff to dismiss the action[36] or to submit to a voluntary nonsuit,[37] nor enter an order of dismissal,[38] even, it has been held, when a motion to dismiss is already pending at the time the application for removal is made,[39] although upon this latter point there is authority to the contrary;[40] nor has such court power to take a default,[41] to hear exceptions,[42] to appoint a receiver,[43] to forfeit a bond,[44] or to permit plaintiff to amend his pleadings,[45] nor even, it has been held, to grant a stay of proceedings.[46] The irregularity, however, in making a motion in the state court after a removal of the cause had been effected is waived by the adverse party by seeking a postponement of the hearing on the motion in the federal court without objection to its validity or propriety.[47] If, notwithstanding the removal, the state court proceeds with the case, defendant may by answer raise the question of jurisdiction;[48] if a judgment is rendered it should be reversed on appeal;[49] and upon final decision by the state court of last resort, if it be adverse to him, defendant may have the decision reviewed and reversed by the supreme court of the United States.[50] So the proper rule would seem to be that the state court is without jurisdiction, after the cause has been removed, to enter a judgment for costs, and that an attempt to do so is a nullity;[51] but there is authority for the view that such a judgment may validly be rendered, even though a part or all of the costs have accrued in proceedings improperly had in such court after removal had been effectuated,[52] provided that judgment should not be entered until after the determination of the case by the federal court, but should abide its decision.[53] The publication, however, after removal has been effectuated, of a notice of an attachment theretofore levied, under a statute requiring such publication for a prescribed time, is not ineffective or invalid, such publication being not a proceeding in the state court but an extrajudicial act.[54]

413, 286 SW 724; Schwyhart v. Barrett, 145 Mo. A. 332, 130 SW 388 [aff 227 U. S. 184, 33 SCt 250, 57 L. ed. 473].

N. Y.—Shaft v. Phœnix Mut. L. Ins. Co., 67 N. Y. 544, 23 AmR 138; Bell v. Dix, 49 N. Y. 232.

Oh.—Anderson v. United Realty Co., 79 Oh. St. 23, 86 NE 644, 51 LRANS 477 [aff 222 U. S. 164, 32 SCt 50, 56 L. ed. 144]; Baltimore, etc., R. Co. v. Fulton, 59 Oh. St. 575, 53 NE 265, 44 LRA 520.

Okl.—Chicago, etc., R. Co. v. Bond, 254 P 18; New England Oil, etc., Co. v. Broyles, 87 Okl. 55, 209 P 312; Ft. Smith, etc., R. Co. v. Blevins, 35 Okl. 378, 130 P 525.

See Ex p. City Bank, etc., Co., 200 Ala. 440, 76 S 372 (dictum).

[a] **In Porto Rico** the rule is the same in the case of a removal from an insular court to the federal court. Wenar v. Pohl, 1 Porto Rico Fed. 37.

35. U. S.—Madisonville Tract. Co. v. St. Bernard Min. Co., 196 U. S. 239, 25 SCt 251, 49 L. ed. 462; Davis v. South Carolina, 107 U. S. 597, 2 SCt 636, 27 L. ed. 574 [rev 12 S. C. 528]; Kern v. Huidekoper, 103 U. S. 485, 26 L. ed. 354; Ohio v. Swift, 270 Fed. 141 [certiorari den 257 U. S. 633 mem, 42 SCt 47 mem, 66 L. ed. 407 mem, app dism 260 U. S. 146, 43 SCt 22, 67 L. ed. 176]; Williams v. Delaware, etc., R. Co., 266 Fed. 1003; Buxton v. Pennsylvania Lumber Co., 221 Fed. 718; Miller v. Soule, 221 Fed. 493; Anderson v. Western Union Tel. Co., 218 Fed. 78; Missouri, etc., R. Co. v. Chappell, 206 Fed. 688; Mannington v. Hocking Valley R. Co., 183 Fed. 133; Flint v. Coffin, 176 Fed. 872, 100 CCA 342 [certiorari den 217 U. S. 602, 30 SCt 693, 54 L. ed. 898, 219 U. S. 589, 31 SCt 472, 55 L. ed. 348]; North Carolina v. Kirkpatrick, 42 Fed. 689; U. S. v. Judges, 26 F. Cas. No. 15,501.

Ariz.—Western Indemn. Co. v. Kendall, 27 Ariz. 342, 233 P 583.

La.—State v. Johnson, 29 La. Ann. 399.

Mich.—Atty. Gen. v. Michigan Bell Tel. Co., 235 Mich. 416, 209 NW 200.

Mont.—Golden v. Northern Pac. R. Co., 39 Mont. 435, 104 P 549, 34 LRA NS 1154, 18 AnnCas 886.

N. Y.—Shaft v. Phœnix Mut. L. Ins. Co., 67 N. Y. 544, 23 AmR 138; Bell v. Dix, 49 N. Y. 232.

N. C.—Tucker v. Inter-States L. Assoc., 112 N. C. 796, 17 SE 532.

Oh.—Baltimore, etc., R. Co. v. Fulton, 59 Oh. St. 575, 53 NE 265, 44 LRA 520.

Okl.—Chicago, etc., R. Co. v. Bond, 254 P 18; New England Oil, etc., Co. v. Broyles, 87 Okl. 55, 209 P 312; Ft. Smith, etc., R. Co. v. Blevins, 35 Okl. 378, 130 P 525.

36. Louisville, etc., R. Co. v. Newman, 132 Ga. 523, 64 SE 541, 26 LRA NS 969; Southern R. Co. v. Dukes, 7 Ga. A. 784, 68 SE 332.

[a] **Dismissal for purpose of defeating removal.**—Where the removal of a cause has been effected by filing a proper petition for removal, plaintiff cannot defeat or prevent the removal by dismissing the suit in the state court. Louisville, etc., R. Co. v. Newman, 132 Ga. 523, 64 SE 541, 26 LRANS 969.

Dismissal by plaintiff in federal court see infra § 294.

37. Huntley v. Southeastern Express Co., 191 N. C. 696, 132 SE 786.

38. Ohio v. Swift, 270 Fed. 141 [certiorari den 257 U. S. 633 mem, 42 SCt 47 mem, 66 L. ed. 407 mem, app dism 260 U. S. 146, 43 SCt 22, 67 L. ed. 176]; Bragg v. Tibbs, 44 Ga. 294; Chambers v. Illinois Cent. R. Co., 104 Iowa 238, 73 NW 593.

39. Chambers v. Illinois Cent. R. Co., 104 Iowa 238, 73 NW 593.

Hearing and determination by federal court of motion pending at time of removal see infra § 287.

40. Edgarton v. Webb, 41 Ga. 417.

41. Mattoon v. Hinkley, 33 Ill. 208; Stoker v. Leavenworth, 7 La. 390.

42. Fox v. American Casualty Ins., etc., Co., 2 Pa. Dist. 158, 12 Pa. Co. 207.

43. Mannington v. Hocking Valley R. Co., 183 Fed. 133; Fayette Title, etc., Co. v. Maryland, etc., Tel., etc., Co., 180 Fed. 928.

44. Davis v. South Carolina, 107 U. S. 597, 2 SCt 636, 27 L. ed. 574.

45. Powell v. Watkins, 172 N. C. 244, 90 SE 207.

[a] **In Porto Rico** the rule is the same in the case of a removal from an insular court to the federal court. South Porto Rico Sugar Co. v. Sepúlveda, 27 Porto Rico 310.

46. Bell v. Dix, 49 N. Y. 232.

47. Kinne v. Lant, 68 Fed. 436.

Hearing and determination by federal court of motion pending in state court at time of removal see infra § 287.

48. Shaft v. Phœnix Mut. L. Ins. Co., 67 N. Y. 544, 23 AmR 138.

Further proceeding in trial and interposition of defense as waiver of right to remove see supra §§ 5, 6.

49. Murphy v. Stone, etc., Engineering Corp., 44 Mont. 146, 119 P 717, AnnCas1913A 1334.

50. Cincinnati, etc., R. Co. v. Bohon, 200 U. S. 221, 26 SCt 166, 50 L. ed. 448; Southern R. Co. v. Allison, 190 U. S. 326, 23 SCt 713, 47 L. ed. 1078; Missouri, etc., R. Co. v. Hickman, 183 U. S. 53, 22 SCt 18, 46 L. ed. 78; Missouri Pac. R. Co. v. Fitzgerald, 160 U. S. 556, 16 SCt 389, 40 L. ed. 536; Burlington, etc., R. Co. v. Dunn, 121 U. S. 182, 7 SCt 1114, 30 L. ed. 885; Oakley v. Goodnow, 118 U. S. 43, 6 SCt 944, 30 L. ed. 61; Stone v. South Carolina, 117 U. S. 430, 6 SCt 799, 29 L. ed. 962; Bush v. Kentucky, 107 U. S. 110, 1 SCt 625, 27 L. ed. 354; Kimball v. Evans, 93 U. S. 320, 23 L. ed. 920; Kanouse v. Martin, 14 How. (U. S.) 23, 14 L. ed. 310, 15 How. 198, 14 L. ed. 660; Gordon v. Longest, 16 Pet. (U. S.) 97, 10 L. ed. 900; State v. Johnson, 29 La. Ann. 399; Golden v. Northern Pac. R. Co., 39 Mont. 435, 104 P 549, 34 LRANS 1154, 18 AnnCas 886. See Miller v. Soule, 221 Fed. 493 (pointing out that where the state court proceeds with a case notwithstanding a proper application for removal, and the federal court also proceeds with the case as properly removed, both cases may reach the supreme court of the United States, which will then determine the question of jurisdiction).

Ultimate decision of removability for federal courts see supra § 253.

51. National SS. Co. v. Tugman, 82 Fed. 246, 27 CCA 116 [mod 67 Fed. 16]; Sawyer v. Williams, 72 Fed. 296; Penrose v. Penrose, 1 Fed. 479; Williams v. Adkins, 6 Coldw. (Tenn.) 615.

Taxation of costs by federal court see infra § 301.

52. Wisecarver v. Chicago, etc., R. Co., 145 Iowa 281, 122 NW 909, 30 LRANS 1059, AnnCas1912A 1277.

53. Wisecarver v. Chicago, etc., R. Co., supra.

54. Lowitz v. Kimmerle, 221 Fed. 857, 137 CCA 415 [certiorari den 238 U. S. 639, 35 SCt 941, 59 L. ed. 1501].

Second action on same cause. Where an action has been removed from a state court to a federal court and while it is pending therein, the state court cannot take jurisdiction of a second action, commenced after such removal, on the same cause between the same parties.[55]

Retaking jurisdiction.[56] Where the jurisdiction of the state court has been lost by reason of proper proceedings for a removal of the cause,[57] such court cannot retake or regain jurisdiction by setting aside its acceptance or approval of the application,[58] nor is its jurisdiction restored even though the state appellate court holds that the removal was irregular or improper,[59] it being for the federal court to pass upon the question of removability and to remand the cause if it should not have been removed.[60]

Withdrawal of application for removal.[61] It has been held that one by whom a petition for the removal of a cause has been filed has the right, before the transfer to the federal court has been perfected by filing a transcript of the record to the state court,[62] to withdraw his petition and waive his right to remove,[63] and that by such withdrawal the jurisdiction of the state court is restored.[64] Similarly, it has been held that where plaintiff procures the withdrawal of an application for removal, founded upon the existence of a separable controversy, before any action thereon has been taken in either court, and dismisses his suit as to the removing defendant, the jurisdiction of the state court is restored as to the other parties defendant.[65]

[§ 267] **c. Cause Subsequently Remanded for Want of Jurisdiction.**[66] Where the right to remove a cause from a state court to a federal court does not in fact exist, and after an attempted or colorable removal the cause is remanded by the federal court for want of jurisdiction,[67] the jurisdiction of the state court is not to be regarded as ever having been lost,[68] and so proceedings had in the state court after the attempted removal and pending the remand are generally held to be valid and effectual,[69] except, perhaps, where such proceedings were in violation of an injunction lawfully issued by the federal court;[70] but there is some authority to the contrary.[71] It has been held that during the time the cause is pending in the federal court, defendant is not required to answer or plead in the state court,[72] and that his failure to do so does not constitute a waiver of his right to interpose a plea or defense after the cause has been remanded;[73] but the contrary has also been held.[74] However, so long as the cause remains in the federal court the state court is powerless to give effect to a judgment rendered therein.[75]

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[55] Palmer v. Delaware, etc., R. Co., 222 Fed. 461. See Hollingsworth v. Southern R. Co., 57 S. C. 453, 35 SE 739 (holding that in such case a plea of lis pendens should be sustained).

Proceedings in state court after discontinuance of suit in federal court see infra § 342.

[56] **Remand of cause as restoring jurisdiction to state court** see supra § 338.

[57] **Effectuation of removal as divesting jurisdiction** see supra text and note 29.

[58] Rosenbaum v. Manson, 206 App. Div. 384, 201 NYS 426.

[a] **In Porto Rico** the rule is the same in the case of a removal from an insular court to the federal court. South Porto Rico Sugar Co. v. Sepúlveda, 27 Porto Rico 310.

Causes removable on application to state court see supra §§ 236–255.

[59] Chamberlain v. American Nat. Life, etc., Co., 11 Hun (N. Y.) 370.

Applicability of order granting or refusing removal see Appeal and Error § 300.

[60] See cases supra notes 58, 59.

Remand see infra §§ 302–341.

[61] **Consent of parties as authorizing remand after removal** see infra § 319.

[62] **Perfection of removal by filing transcript of record** see supra § 270.

[63] Wadleigh v. Standard L., etc., Ins. Co., 76 Wis. 439, 45 NW 109.

Waiver of right of removal in general see supra § 5.

[64] Anderson v. United Realty Co., 222 U. S. 164, 32 SCt 50, 56 L. ed. 144 [aff 79 Oh. St. 23, 86 NE 644, 51 LRA NS 477].

[65] Anderson v. United Realty Co., 79 Oh. St. 23, 86 NE 644, 51 LRANS 477 [aff 222 U. S. 164, 32 SCt 50, 56 L. ed. 144].

Separable controversies see supra §§ 180–193.

[66] **Proceedings in state court after remand** see infra § 343.

[67] **Remand for want of jurisdiction at time of removal in general** see infra §§ 303–307.

[68] Ex p. State, 71 Ala. 363; Hunter v. Colquitt, 73 Ga. 44; Queen Ins. Co. v. Peters, 10 Ga. A. 289, 73 SE 536; Stommel v. Timbrel, 84 Iowa 336, 51 NW 159. See Germania F. Ins. Co. v. Francis, 52 Miss. 457, 467, 24 AmR 674 (where the court said that an order for the removal of a cause which is not properly removable "has no effect in legal contemplation, and although its practical effect may be an interruption improperly, of the prosecution of the cause in the state court, the cause is to be considered as having been all the time pending in the state court"); Patten v. Cilley, 67 N. H. 520, 42 A 47 (applying the rule); Seeligson v. Texas Transp. Co., 70 Tex. 198, 7 SW 708, 709 (holding that, where no cause for removal existed, "jurisdiction of the cause remained in the [state] district court, save as in fact suspended by the attempted removal").

[69] U. S.—Johnson v. Wells, 91 Fed. 1; Manhattan First Nat. Bank v. King Wrought Iron Bridge Co., 9 F. Cas. No. 4,803. See Southern Pac. Co. v. Waite, 279 Fed. 171 (supporting the rule stated in the text, and further holding that after remand, the federal court has no authority to enjoin the state court from enforcing a judgment rendered by it during the time the cause was pending in the federal court).

Ariz.—Western Indemn. Co. v. Kendall, 27 Ariz. 342, 233 P 583.

Conn.—Darton v. Sperry, 71 Conn. 339, 41 A 1052; Winchell v. Coney, 54 Conn. 24, 5 A 354.

Ga.—Dahlonega Co. v. Frank W. Hall Merchandise Co., 88 Ga. 339, 14 SE 473; Hunter v. Colquitt, 73 Ga. 44; Edgarton v. Webb, 41 Ga. 417.

Ky.—Union Gas, etc., Co. v. Indian-Tex Petroleum Co., 203 Ky. 521, 263 SW 1.

Minn.—Pearson v. Zacher, 177 Minn. 182, 225 NW 9; Roberts v. Chicago, etc., R. Co., 48 Minn. 521, 51 NW 478.

Mont.—Golden v. Northern Pac. R. Co., 39 Mont. 435, 104 P 549, 34 LRA NS 1154, 18 AnnCas 886.

N. J.—National Union Bank v. Dodge, 42 N. J. L. 316; Johnson v. Gelston, 3 N. J. L. 668.

Oh.—Hadley v. Dunlap, 10 Oh. St. 1.

S. C.—State v. Port Royal, etc., R. Co., 45 S. C. 413, 23 SE 363.

Tenn.—Greenlaw v. Williams, 2 Lea 533.

W. Va.—White v. Holt, 20 W. Va. 792.

Remand as restoring jurisdiction of state court see infra § 338.

[70] See Union Gas, etc., Co. v. Indian-Tex Petroleum Co., 203 Ky. 521, 263 SW 1 (dictum).

Right of federal court to enjoin proceedings in state court after removal see Courts § 654.

[71] Texas, etc., R. Co. v. Davis, 93 Tex. 378, 54 SW 381, 55 SW 562. See Llanez v. Chisos Min. Co., (Tex. Civ. A.) 285 SW 646; Parker v. Clarkson, 39 W. Va. 184, 19 SE 431 (dicta).

[72] Bishop-Babcock Sales Co. v. Lackman, (Tex. Civ. A.) 4 SW (2d) 109.

[73] Bishop-Babcock Sales Co. v. Lackman, supra.

Proceedings in state court after remand see infra § 343.

[74] State v. American Surety Co., 26 Ida. 652, 145 P 1097, AnnCas1916E 209; Morbeck v. Bradford-Kennedy Co., 19 Ida. 83, 113 P 89; Citizens' Light, etc., Co. v. Usnik, 26 N. M. 494, 194 P 862.

[75] Emery v. Chicago, etc., R. Co., 186 Iowa 1156, 170 NW 540, 173 NW 12.

Failure of state court to proceed with the cause after the attempted removal and pending the remand does not work a discontinuance.[76]

[§ 268] **2. As to Federal Court.** Proceedings for the removal of a cause from a state court to a federal court, when regular in form and good upon their face,[77] give such federal court a prima facie right to proceed to try the cause upon its merits,[78] which right is exclusive[79] and complete,[80] extending to auxiliary or incidental matters as well as to the main suit,[81] and continues until it is finally established that the court is without jurisdiction;[82] but if its jurisdiction was in fact lacking at the time of removal, and no right of removal existed, any action or proceedings by such court looking toward a determination of the controversy are of no force or effect,[83] and any findings[84] or orders[85] made by it, other than an order of remand,[86] are null and void.[87]

[§ 269] **3. As Abandonment of Appeal from Interlocutory Orders.**[88] The removal of a cause from a state court to a federal court operates as an abandonment of an appeal previously taken from an interlocutory order of the state court, at least where such appeal has not been perfected, by entering or docketing the appeal in the appellate court.[89]

XIV. TRANSCRIPT OF RECORD OF STATE COURT

[By Eustace W. Tomlinson]

[§ 270] **A. In General.** The statutes of the United States providing for the removal of causes from a state court to a federal court require a transcript of the record and proceedings in the state court to be filed in the federal court to which the cause has been removed, in the case of causes removable on the ground of difference of citizenship, but not involving prejudice or local influence, or because arising under the federal constitution, laws or treaties,[90] suits or prosecutions against persons asserting or relying upon civil rights laws,[91] actions concerning land claimed under grants from different states,[92] suits or prosecutions against revenue officers and others,[93] and actions by aliens against civil officers of the United States;[94] and although the statute prescribing the procedure for removal in other cases of diversity of citizenship expressly excludes from its provisions causes removable on the ground of prejudice or local influence, and does not in terms require a transcript to be filed in the federal court,[95] such filing is appropriate and necessary, in the orderly administration of affairs, to the transfer of the cause.[96] In those classes of cases in which the application to remove is made to the state court rather than to the federal court,[97] the filing of the transcript is sufficient to enter the cause in the latter court,[98] and no formal motion to docket it is necessary.[99] The attachment of the federal jurisdiction does not, however, await the filing of the transcript;[1] but until it has been filed the federal court can take no proceedings in the cause.[2]

Failure to file transcript. Where the removing party fails to file a transcript and docket the cause in the federal court, the remedy of the opposite party is to make a showing in the state court that the removal has been abandoned, and proceed on the removal bond.[3]

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[76] Ex p. State, 71 Ala. 363; Germania F. Ins. Co. v. Francis, 52 Miss. 457, 24 AmR 674.

[77] **Form and sufficiency of removal proceedings** see supra §§ 235–263.

Presentation to state court of application for removal as transferring jurisdiction to federal court see supra § 254.

[78] Pacific SS. Co. v. Sutton, 7 F. (2d) 579 [aff 3 F. (2d) 72, 75 (certiorari den 269 U. S. 586 mem, 46 SCt 202 mem, 70 L. ed. 425 mem)]; Virginia v. Felts, 133 Fed. 85.

Proceedings in federal court after removal see infra §§ 275–301.

[79] Ex p. Consolidated Graphite Corp., (Ala.) 129 S 262.

Removal as divesting jurisdiction of state court see supra § 266.

[80] Texas Pipe Line Co. v. Ware, 15 F. (2d) 171.

[81] Hare & Chase, Inc. v. Dunton, (Tex. Civ. A.) 8 SW (2d) 315.

[82] Pacific SS. Co. v. Sutton, 7 F. (2d) 579 [aff 3 F. (2d) 72, 75 (certiorari den 269 U. S. 586 mem, 46 SCt 202 mem, 70 L. ed. 425 mem)].

Motion to remand as proper mode of testing or attacking jurisdiction see infra § 324.

[83] Citizens' Light, etc., Co. v. Usnik, 26 N. M. 494, 194 P 862; Tucker v. Inter-States L. Assoc., 112 N. C. 796, 17 SE 532.

Remand of cause where jurisdiction was lacking at time of removal see infra §§ 303–307.

[84] Doane v. Corbin, 44 Ill. A. 463.

[85] Doane v. Corbin, supra; Floody v. Chicago, etc., R. Co., 104 Minn. 132, 116 NW 111. See Early v. Beecher, 7 Lea (Tenn.) 256 (applying the rule); Seeligson v. Texas Transp. Co., 70 Tex. 198, 7 SW 708 (dictum).

[86] Floody v. Chicago, etc., R. Co., 104 Minn. 132, 116 NW 111.

Order of remand see infra §§ 334, 335.

[87] See cases supra notes 84, 85.

Orders as binding on parties or state court after remand of cause for want of jurisdiction at time of removal see supra § 343.

[88] **Abandonment of appeal in general** see Appeal and Error §§ 2437–2439.

[89] Freeman v. Butler, 39 Fed. 1.

Necessity for entering or docketing appeal see Appeal and Error § 1348.

[90] USCA tit 28 § 72.

Removal of such causes in general see supra §§ 46–89, 120–179.

[91] USCA tit 28 § 74.

Removal of such suits and prosecutions in general see supra §§ 111–117.

[92] USCA tit 28 § 73.

Removal of such actions in general see supra §§ 118, 119.

[93] USCA tit 28 § 76.

Removal of such suits and prosecutions in general see supra §§ 90–110.

[94] USCA tit 28 § 77.

[95] USCA tit 28 § 72.

Removal of such causes in general see supra §§ 194–204.

[96] Pennsylvania Co. v. Bender, 148 Fed. 255, 13 SCt 591, 37 L. ed. 441.

[97] **Causes removable on application to state court** see supra §§ 236–255.

[98] Baltimore, etc., R. Co. v. Koontz, 104 U. S. 5, 26 L. ed. 643; Glover v. Shepperd, 15 Fed. 833, 11 Biss. 572.

[99] Glover v. Shepperd, supra.

[1] Baltimore, etc., R. Co. v. Koontz, 104 U. S. 5, 26 L. ed. 643; Hamilton v. Fowler, 83 Fed. 321; Pelzer Mfg. Co. v. St. Paul F. & M. Ins. Co., 40 Fed. 185; Torrent v. S. K. Martin Lumber Co., 37 Fed. 727; Texas, etc., R. Co. v. Rust, 17 Fed. 275, 5 McCrary, 348.

Effectuation of removal upon application to state court see supra §§ 254, 255.

[2] Baltimore, etc., R. Co. v. Koontz, 104 U. S. 5, 26 L. ed. 643; North American Transp., etc., Co. v. Howells, 121 Fed. 694, 58 CCA 442; Coeur d'Alene R., etc., Co. v. Spalding, 93 Fed. 280, 35 CCA 295; Pelzer Mfg. Co. v. St. Paul F. & M. Ins. Co., 40 Fed. 185; Texas, etc., R. Co. v. Rust, 17 Fed. 275, 5 McCrary 348.

Proceedings in federal court after removal see infra §§ 275–301.

[§ 271] **B. Form and Contents.**[4] Upon the removal of a cause from a state court to a federal court, all papers filed and proceedings had in the cause in the state court are properly a part of the record to be transmitted to the federal court.[5] Accordingly, the transcript should contain or set forth the pleadings,[6] all depositions on file in the state court,[7] all ancillary proceedings,[8] such as garnishee proceedings in another county in the state,[9] and all entries in the journals of the state court.[10] Testimony taken after the removal had been effected by a referee theretofore appointed is not a part of the record.[11] In the case of the removal of a criminal prosecution, the indictment is ordinarily the only record which the transcript need contain or comprise.[12] An omission of a small part of the record is ordinarily not fatal, but may be cured upon a suggestion of a diminution of the record.[13]

Original papers or certified copies. It has been said to be immaterial whether the original papers or a certified copy of them be transmitted to the federal court;[14] but it has been held that where the state court refuses to grant a removal, certified copies must be procured and filed in the federal court, and that the original papers must remain in the state court.[15]

Legibility. It has been said that the federal court is warranted in striking from its files any portions of a transcript which are illegible or very indistinct.[16]

[§ 272] **C. By Whom Transcript Should Be Filed.** The transcript of the record and proceedings had in a cause in a state court should ordinarily be filed in the federal court, upon the removal of the cause thereto, by the petitioner for removal.[17] Any other party, however, may file the transcript, upon leave obtained from the federal court to which the cause has been removed,[18] or even without such leave if immediate action in the case is required for the protection of his interests.[19] It is not the duty of the clerk of the state court to file the transcript,[20] although it is by statute expressly made his duty to prepare and furnish it.[21]

[§ 273] **D. Time for Filing.** The statute relating to the removal, from a state court to a federal court, of causes arising under the constitution, laws, or treaties of the United States, or involving difference of citizenship, except suits removable on the ground of prejudice or local influence, provides for the entry in the federal court of a certified copy of the record of the suit within thirty days from the date of filing the petition for removal.[22] The statutes relating to the removal of suits and prosecutions against persons asserting or relying on civil rights laws,[23] actions concerning land claimed under grants from different states,[24] suits and prosecutions against revenue officers and others,[25] and actions by aliens against civil officers of the United States,[26] while not expressly prescribing the time at or within which the transcript shall be filed, do provide for the removal of such causes for trial in the district court next to be held in the district, which requirement, it is further provided, shall be deemed to refer to the terms of the district court in the division in which is situate the county from which the removal is taken,[27] and from which it would seem clear that the transcript should be filed not later than the commencement of such next term.[28] There appears to be no provision of the statute prescribing the time for filing the transcript or the time for trial in the case of suits removed on account of prejudice or local influence.[29] Unless such filing is rendered impossible by failure or refusal of the clerk of the state court to furnish a transcript,[30] the right to perfect the removal is lost if the transcript is not filed by or within the time fixed by statute,[31] except as delay beyond such time may be excused by the federal court[32] or waived by the adverse party,[33] and except, it has been held, that in those classes of cases in which application for removal must be made to the state court,[34] the applicant may postpone the filing until such court has acted upon his petition;[35] but on the point last stated there is authority to the contrary.[36] The provisions fixing the time by or within which the transcript must be filed do not prevent it from being filed before the prescribed time or the expiration of the prescribed period.[37]

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[3] Diaz v. San Juan Light, etc., Co., 4 Porto Rico Fed. 513.

Removal bond see supra §§ 245–248.

[4] **Proof of inaccuracy or incorrectness of transcript** see infra § 331.

[5] Commodores Point Terminal Co. v. Hudnall, 279 Fed. 606.

[6] McBratney v. Usher, 15 F. Cas. No. 8,661, 1 Dill. 367.

[7] Miller v. Tobin, 18 Fed. 609, 9 Sawy. 401.

[8] Woodward Lumber Co. v. Vizard, 144 Fed. 982.

[9] Woodward Lumber Co. v. Vizard, supra.

[10] Probst v. Cowen, 91 Fed. 929.

[11] Miller v. Tobin, 18 Fed. 609, 9 Sawy. 401.

[12] Virginia v. Felts, 133 Fed. 85.

[13] Miller v. Soule, 221 Fed. 493; Probst v. Cowen, 91 Fed. 929; Cook v. Whitney, 6 F. Cas. No. 3,166, 3 Woods 715; Dennis v. Alachua County, 7 F. Cas. No. 3,791, 3 Woods 683.

Defect in or omission from transcript as ground for remand see infra § 304.

[14] Virginia v. Felts, 133 Fed. 85.

[15] Lawson v. Guthrie, 40 Okl. 598, 137 P 1186.

[16] Mace v. Mayfield, 10 F. (2d) 231.

[17] Mower v. Bond, 6 F. (2d) 890; Virginia v. Felts, 133 Fed. 85; Hatcher v. Wadley, 84 Fed. 913.

[18] Hartford, etc., R. Co. v. Montague, 94 Fed. 227; Commercial, etc., Bank v. Corbett, 6 F. Cas. No. 3,057, 5 Sawy. 172; Mahony Min. Co. v. Bennett, 16 F. Cas. No. 8,969, 5 Sawy. 141. See Delbanco v. Singletary, 40 Fed. 177 (where a rule of court permitted either party to file the transcript).

[19] Coeur d'Alene R., etc., Co. v. Spalding, 93 Fed. 280, 35 CCA 295; Hamilton v. Fowler, 83 Fed. 321; Thompson v. Chicago, etc., R. Co., 60 Fed. 773; Mills v. Newell, 41 Fed. 529; Anderson v. Appleton, 32 Fed. 855.

[20] Hatcher v. Wadley, 84 Fed. 913.

[21] USCA tit 28 §§ 74, 82.

[22] USCA tit 28 § 72.

[a] **Former statute.**—Under Act March 3, 1875, § 3, providing for the entry of the transcript at the next session of the federal court, and § 7, providing that if the term of such court to which the cause is removable shall commence within twenty days after the filing of the removal petition the applicant shall have twenty days from such application to file the transcript, it was held that where a term of the federal court was in session at the time the application for removal was filed, the applicant was not obliged to file the transcript within twenty days, but might wait until the next term. Goldberg v. German Ins. Co., 152 Fed. 831.

Removal of such causes in general see supra §§ 46–89, 120–179.

[23] USCA tit 28 § 74.

Removal of such suits and prosecutions in general see supra §§ 111–117.

[24] USCA tit 28 § 73.

Removal of such actions in general see supra §§ 118, 119.

[25] USCA tit 28 § 76.

Removal of such suits and prosecutions in general see supra §§ 90–110.

[26] USCA tit 28 § 77.

[27] USCA tit 28 § 114.

Division containing county from which cause is removed as one to which removal should be taken see supra § 264.

[28] Torrent v. S. K. Martin Lumber Co., 37 Fed. 727.

[29] See USCA tit 28 §§ 71, 72.

Necessity of filing transcript of record of suit removed on such ground see supra § 270 text and note 96.

Removal of such suits in general see supra §§ 194–204.

Excusing lateness. The federal court may and ordinarily will grant leave to file a transcript after the statutory time, where good cause is shown,[38] as where the applicant was misinformed by the clerk of such court concerning the date of the commencement of its next term;[39] but a failure to file the transcript at the proper time through mere inadvertence is not excusable,[40] and where the applicant has been guilty of laches he cannot be permitted to file the transcript after the expiration of the statutory time.[41]

Waiver of delay. The failure of an applicant for removal to file the transcript within the time fixed by statute may be waived by the adverse party.[42] Thus it has been held that where the applicant's adversary forces him, after the state court has denied removal, to proceed with the cause in such court, he thereby waives the requirement of the statute as to time until the state court lets go its jurisdiction.[43]

[§ 274] **E. Proceedings To Compel Furnishing of Transcript or To Supply Record.**[44] A party or person having a right to remove a cause from a state court to a federal court is entitled, upon complying with the formalities requisite to procure or effectuate a removal, to demand from the clerk of the state court a certified copy of the record of the cause therein;[45] but the clerk may rightfully refuse to furnish it until his proper fees have been paid or tendered unto him.[46] It is provided by statute that, in any removable cause, if such clerk shall refuse to any party or person applying for removal a copy of the record therein, after tender of legal fees, the federal court to which the cause is removable may issue a writ of certiorari to such state court commanding it to make return of the record of the cause, and may enforce such writ according to law;[47] and it is also provided that if the clerk of the state court, upon demand and the payment or tender of the legal fees, refuses or neglects to deliver to a party certified copies of the records and proceedings in such court, the federal court, on proof by affidavit of such refusal or neglect, may direct such record to be supplied by affidavit or otherwise, as the circumstances of the case may require and allow, whereupon the case shall proceed in the federal court as if certified copies were regularly before it.[48] The statute further provides that if it shall be impossible for the party or person removing a cause to obtain a copy of the record of the cause in the state court, on account of the refusal of its clerk to furnish such copy on payment of legal fees, or for any other reason, the federal court shall make an order requiring the filing of a copy of the paper or proceeding by which the suit was commenced, and in default of compliance therewith shall dismiss the case, but if such order is complied with, shall require the other party to plead, and the cause shall then proceed to final judgment; or the federal court may require the parties to plead de novo, in which case the bond, if any was given, is discharged so far as it requires a copy of the record to be entered in the federal court.[49] While there would seem to be no necessary conflict between the various parts of the statute, it has been held, in a case in which it would seem the removing party was attempting to proceed under the provisions relating to supplying the record by affidavit, although without expressly referring to the statute, that the procedure adopted was in flat violation of the provisions authorizing the issuance of the writ of certiorari.[50]

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[30] **Supplying record by affidavit** see infra § 274.

[31] Baltimore, etc., R. Co. v. Koontz, 104 U. S. 5, 26 L. ed. 643; Speers Sand, etc., Works v. Pratt, 37 F. (2d) 571; In re Vadner, 259 Fed. 614; Waverly Stone, etc., Co. v. Waterloo, etc., R. Co., 239 Fed. 561; Hatcher v. Wadley, 84 Fed. 913; Bright v. Milwaukee, etc., R. Co., 4 F. Cas. No. 1,877, 14 Blatchf. 214; McLean v. St. Paul, etc., R. Co., 16 F. Cas. No. 8,892, 16 Blatchf. 309, 20 AlbLJ (N. Y.) 78 [aff 108 U. S. 212, 2 SCt 498, 27 L. ed. 703]. See Cobb v. Globe Mut. L. Ins. Co., 5 F. Cas. No. 2,921, 3 Hughes 452 (where it was said that, the transcript not having been filed within the time allowed by law, the suit "has not been removed" to the federal court).

Failure to file transcript in time as ground for remand see infra § 305.

[32] See infra text and notes 38-41.

[33] See infra text and notes 42, 43.

[34] **Causes removable on application to state court** see supra §§ 236-255.

[35] Collins Mfg. Co. v. Wickwire Spencer Steel Co., 11 F. (2d) 196; Kelly v. Chicago, etc., R. Co., 122 Fed. 286. See Lewis v. Erie R. Co., 257 Fed. 808 (supporting the rule stated in the text, and holding further that the applicant had thirty days after the court had acted on his application in which to file a transcript).

Order of state court granting or refusing removal see supra § 255.

[36] Waverly Stone, etc., Co. v. Waterloo, etc., R. Co., 239 Fed. 561. See Gjerde v. Thelander, 294 Fed. 292 (holding that a transcript filed more than thirty days after the filing in the state court of a petition for removal on account of diversity of citizenship was too late, although filed within thirty days after the entry of an order granting the removal, it being not the date of the making of such an order but the date of filing the petition for removal that controls).

Removal as effectuated immediately upon filing petition see supra § 254.

[37] Kansas City, etc., R. Co. v. Interstate Lumber Co., 36 Fed. 9.

Proceedings in federal court prior to time by which removal is required to be perfected see infra § 276.

[38] St. Paul, etc., R. Co. v. McLean, 108 U. S. 212, 2 SCt 498, 27 L. ed. 703; Baltimore, etc., R. Co. v. Koontz, 104 U. S. 5, 26 L. ed. 643; Meyer v. Delaware R. Constr. Co., 100 U. S. 457, 25 L. ed. 593; Collins Mfg. Co. v. Wickwire Spencer Steel Co., 11 F. (2d) 196; Nelson v. Black Diamond Min. Co., 237 Fed. 264; Chase v. Erhardt, 198 Fed. 305; Lucker v. Phœnix Assur. Co., 66 Fed. 161; McGregor v. McGillis, 30 Fed. 388; Rowell v. Hill, 28 Fed. 433; Winchell v. Coney, 27 Fed. 482; Hall v. Brooks, 14 Fed. 113, 21 Blatchf. 167; Woolridge v. McKenna, 8 Fed. 650; Kidder v. Featteau, 2 Fed. 616, 1 McCrary 323; Bright v. Milwaukee, etc., R. Co., 4 F. Cas. No. 1,877, 14 Blatchf. 214. See Gjerde v. Thelander, 294 Fed. 292 (recognizing the rule).

Failure to file transcript in time as ground for remanding cause see infra § 305.

[39] Burgunder v. Browne, 59 Fed. 497.

[40] McLean v. St. Paul, etc., R. Co., 16 F. Cas. No. 8,892, 16 Blatchf. 309, 20 AlbLJ (N. Y.) 78 [aff 108 U. S. 212, 2 SCt 498, 27 L. ed. 703].

[41] Hatcher v. Wadley, 84 Fed. 913; Broadnax v. Eisner, 4 F. Cas. No. 1,909, 13 Blatchf. 366.

[42] Baltimore, etc., R. Co. v. Koontz, 104 U. S. 5, 26 L. ed. 643.

[43] Baltimore, etc., R. Co. v. Koontz, supra; Nelson v. Black Diamond Min. Co., 237 Fed. 264; Kelly v. Chicago, etc., R. Co., 122 Fed. 286. Compare Cobb v. Globe Mut. L. Ins. Co., 5 F. Cas. No. 2,921, 3 Hughes 452 (where applicant, by proceeding in the state court after it had denied removal of a cause rightfully removable, was held to have lost his right to perfect the removal by filing the transcript in the federal court; but it does not appear that the question of waiver was raised).

[44] **In suits or prosecutions against revenue officers and others** see supra § 261.

[45] Baird v. Richmond, etc., R. Co., 113 N. C. 603, 18 SE 698.

[46] Virginia v. Felts, 133 Fed. 85.

[47] USCA tit 28 § 78.

[48] USCA tit 28 § 82.

Certiorari.[51] A petition for a writ of certiorari to compel the return to the federal court of the record of the cause in the state court must show that the removal was applied for or taken at or within the time prescribed by statute,[52] and must be presented to the federal court within the time allowed by statute for filing the transcript.[53] The writ may be issued to compel the certification of the record in order that the federal court may pass upon the removability of a cause, where the state court has refused to grant or recognize a removal.[54] No order of the state court is necessary to authorize or require its clerk to certify the record to the federal court in obedience to the writ.[55]

Supplying record. It has been suggested that it would be proper to permit the record of the cause to be supplied by affidavit, where the petitioner is a pauper and unable to pay the fees of the clerk of the state court for a transcript.[56]

XV. PROCEEDINGS IN, AND DISPOSITION OF, CAUSE AFTER REMOVAL[57]

[By Eustace W. Tomlinson]

[§ 275] **A. In General.** In view of the provision of the statute that a federal court to which a cause shall have been removed from a state court shall proceed in such cause as if it had been originally commenced therein and the same proceedings had been taken in the federal court as shall have been had in the cause in the state court prior to the removal,[58] and the further provision that all bonds, undertakings, or security given by either party to the cause prior to its removal shall remain valid and effectual notwithstanding the removal, and that all injunctions, orders, and other proceedings had in the cause prior to its removal shall remain in full force and effect until dissolved or modified by the federal court to which the cause is removed,[59] the mode of procedure in a cause after its removal must be substantially in accordance with the practice in the federal courts in causes originally commenced therein,[60] and the case must go on as if originally commenced in the court to which it is removed,[61] the proceedings already had in the state court standing as if had in the federal court,[62] and the federal court taking the cause at the point where the state court left off.[63] For the purpose of further proceedings, therefore, a removal is analogous to a change of venue,[64] not to an appeal;[65] and for the purpose of ascertaining the time at which the suit was commenced the jurisdiction of the federal court will be deemed to relate back to the time jurisdiction was originally acquired by the state court.[66]

[49] USCA tit 28 § 82. See USCA tit 28 §§ 74, 76 (containing similar provisions for pleading de novo).

Bond for removal see supra §§ 245–248.

[50] U. S. v. Haviland, 297 Fed. 431.

[51] **In general** see Certiorari 11 C. J. p 80.

Certiorari to effectuate removal of suit or prosecution against revenue officers or others see supra § 261.

[52] Speers Sand, etc., Works v. Pratt, 37 F. (2d) 571.

Time for removal see supra §§ 205–211.

[53] Speers Sand, etc., Works v. Pratt, 37 F. (2d) 571.

Time for filing transcript see supra § 273.

[54] Union Pac. R. Co. v. Sleeth, 79 Colo. 548, 246 P 1021.

Final determination of removability for federal court see supra § 253.

Order of state court refusing removal see supra § 255.

[55] Baird v. Richmond, etc., R. Co., 113 N. C. 603, 18 SE 698.

[56] Virginia v. Felts, 133 Fed. 85.

[57] **Operation and effect of removal as to jurisdiction of, and proceeding in, federal court** see supra § 268.

Proceedings after removal as ground for remanding cause see infra §§ 308–318.

[58] USCA tit 28 § 81. See USCA tit 10 § 1589; ibid tit 28 §§ 72, 74, 76 (all containing similar provisions).

[a] **Provision as relating to procedure rather than jurisdiction.**—The general words of USCA tit 28 § 72, that a cause after removal shall "proceed in the same manner as if it had been originally commenced in" the federal court must, from their context, be taken to have reference to pleading and practice rather than to jurisdiction. Hoffman v. Lynch, 23 F. (2d) 518.

[59] USCA tit 28 § 79.

Previous proceedings in state court:
Attachment see infra § 282.
Injunction see infra § 283.
Orders and decisions see infra § 281.
Receiverships see infra § 284.

[60] Fugitt v. Lake Erie, etc., R. Co., 287 Fed. 556; Hitchings v. Cobalt Central Mines Co., 189 Fed. 241; Henning v. Western Union Tel. Co., 40 Fed. 658; Toucey v. Bowen, 24 F. Cas. No. 14,107, 1 Biss. 81. But see Commonwealth Trust Co. v. Frick, 120 Fed. 688 (holding that where a suit in equity had been begun by a writ of foreign attachment in a state court, after a removal the state practice should be followed, which authorized a rule directing plaintiffs to show cause of action, and why the attachment should not be dissolved).

Practice and procedure in causes brought in federal courts see Federal Courts §§ 108–162, 346.

[61] Bushnell v. Kennedy, 9 Wall. (U. S.) 387, 19 L. ed. 736; Commodores Point Terminal Co. v. Hudnall, 283 Fed. 150; Kirk v. Milwaukee Dust Collector Mfg. Co., 26 Fed. 501; Judge v. Anderson, 19 Fed. 885. See Fish v. Kennamer, 37 F. (2d) 243 [certiorari den 281 U. S. 744 mem, 50 SCt 350 mem, 74 L. ed. 1157 mem] (applying the rule).

[62] Commodores Point Terminal Co. v. Hudnall, 283 Fed. 150; Kirk v. Milwaukee Dust Collector Mfg. Co., 26 Fed. 501. See Bills v. New Orleans, etc., R. Co., 3 F. Cas. No. 1,409, 13 Blatchf. 227; Kelly v. Virginia Protection Ins. Co., 14 F. Cas. No. 7,677, 3 Hughes 449 (both applying the rule).

[63] General Inv. Co. v. Lake Shore, etc., R. Co., 260 U. S. 261, 43 SCt 106, 67 L. ed. 244 [mod 269 Fed. 235]; Duncan v. Gegan, 101 U. S. 810, 25 L. ed. 875; Allmark v. Platte SS. Co., 76 Fed. 615; Pelzer Mfg. Co. v. St. Paul F. & M. Ins. Co., 40 Fed. 185; Sutro v. Simpson, 14 Fed. 370, 4 McCrary 276; Hare & Chase, Inc. v. Dunton, (Tex. Civ. A.) 8 SW (2d) 315.

Previous orders and decisions of state court as remaining in force see infra § 281.

[64] Davis v. St. Louis, etc., R. Co., 25 Fed. 786.

Jurisdiction and proceedings after change of venue see Venue [40 Cyc 176].

[65] Bushnell v. Kennedy, 9 Wall. (U. S.) 387, 19 L. ed. 736; Davis v. St. Louis, etc., R. Co., 25 Fed. 786.

[66] Owens v. Ohio Cent. R. Co., 20 Fed. 10.

[§ 276] **B. Proceedings pending Expiration of Time for Perfecting Removal.** In view of the provisions of the statute relating to the filing in a federal court, to which a cause has been removed from a state court, of a transcript of the record of the cause in the state court,[67] that upon the transcript being so filed the cause shall then proceed in the same manner as if it had been originally commenced in the federal court,[68] it is ordinarily improper for such court to proceed in the cause until the expiration of the time within which the transcript is required to be filed and at which the parties are required to proceed.[69] Since, however, the effectuation of the removal and the attachment of the federal court's jurisdiction do not depend upon or await such filing,[70] the court may, upon actual presentation of the transcript,[71] and upon such notice as may be prescribed by rule or otherwise,[72] make provisional or interlocutory orders necessary to protect the rights of the parties and preserve the status quo, notwithstanding the fact that the time within which the transcript must necessarily be filed or the parties must proceed has not yet expired.[73]

[§ 277] **C. Time To Plead and Proceed.**[74] Under the statute relating to the removal, from a state court to a federal court, of causes arising under the constitution, laws, or treaties of the United States, or involving difference of citizenship, except suits removed on the ground of prejudice or local influence,[75] the removing defendant has thirty days after filing in the federal court a transcript of the record of the state court within which to plead, answer or demur to plaintiff's declaration or complaint;[76] and the timely filing of such demurrer, answer, or plea, while not mandatory or jurisdictional in the sense that the time so prescribed may not be waived by the parties or extended by the court,[77] is an essential step necessary to be taken by defendant before the cause can proceed.[78] Such provision applies, however, only to defendants who have been served with process;[79] and where a defendant has not been served but appeared only to remove the cause he is not bound to answer until process has been issued by the federal court and served upon him.[80] The statutes providing for the removal of other classes of causes than those involving diversity of citizenship or a federal question do not expressly prescribe the time at or within which defendant must plead or proceed, except as they require removal to be taken to the term of the federal court next ensuing,[81] on or before the first day of which the transcript of the record of the state court must be filed;[82] and in such causes the rule appears to be that unless an extension of time is obtained from the federal court, as has been said to be the usual practice,[83] or unless a different time is fixed by rule of such court,[84] defendant must plead, according to some authorities, within such time after the plaintiff's pleading was filed in the state court as is prescribed by the state law,[85] or, according to others, at the next rule day after the injunction of such prescribed time,[86] except as the time for pleading had been extended by the state court before the removal,[87] omitting, however, from the computation the period between the initiation of proceedings for removal and the date upon which the transcript of the record is required to be filed in the federal court.[88] Until the time required by statute the parties need not appear or proceed in the federal court.[89] The statutory provisions with respect to the time of pleading apply to pleas to the jurisdiction, founded on want of service in the state court, as well as to pleadings going to the merits.[90]

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[67] **Transcript of record in general** see supra §§ 270-274.

[68] USCA tit 28 §§ 72, 74, 76, 81.

[69] Mower v. Bond, 6 F. (2d) 890; North American Transp., etc., Co. v. Howells, 121 Fed. 694, 58 CCA 442; Hamilton v. Fowler, 83 Fed. 321; Kansas City, etc., R. Co. v. Interstate Lumber Co., 36 Fed. 9.

[a] **Effect of change in statute as to time of filing and proceeding.**—The adoption of the present statutory provision (USCA tit 28 § 72), requiring the transcript in cases arising under the federal constitution, laws, or treaties, or involving diversity of citizenship, to be filed and the parties to proceed within thirty days after removal, instead of on the first day of the next ensuing term of the federal court, as was required by the former statute, did not enlarge or diminish the power of the federal court to proceed before the time at which the transcript is required to be filed. Mower v. Bond, 6 F. (2d) 890.

Time for:
Filing transcript see supra § 273.
Proceeding in federal court see infra § 277.

[70] See supra § 270.

[71] Cœur D'Alene R., etc., Co. v. Spalding, 93 Fed. 280, 35 CCA 295 (holding that the federal court can make no order where, although proceedings for removal have been taken, no copy of the record has been entered in such court). To same effect North American Transp., etc., Co. v. Howells, 121 Fed. 694, 58 CCA 442.

Necessity of filing transcript before court can proceed in general see supra § 270.

[72] Hamilton v. Fowler, 83 Fed. 321.

[73] Mower v. Bond, 6 F. (2d) 890; Champlain Constr. Co. v. O'Brien, 104 Fed. 930; Hamilton v. Fowler, 83 Fed. 321; Delbanco v. Singletary, 40 Fed. 177; Kansas City, etc., R. Co. v. Interstate Lumber Co., 36 Fed. 9; Texas, etc., R. Co. v. Rust, 17 Fed. 275, 5 McCrary 348; Commercial, etc., Bank v. Corbett, 6 F. Cas. No. 3,057, 5 Sawy. 172; Mahony Min. Co. v. Bennett, 16 F. Cas. No. 8,969, 5 Sawy. 141. See Judge v. Anderson, 19 Fed. 885, 886 (where it was said that "if, before the statutory time when the removing party is required to enter a copy of the record and his appearance in the United States . . . court, either party procures a transcript and files it in the clerk's office, the jurisdiction then appears of record, and all proceedings necessary to prepare the cause for trial at the next session of the court can be taken by either party," and that the court could grant provisional remedies and entertain motions to make up the issues).

"As jurisdiction over the case itself is not to be left in absolute suspense between its cessation in the state court and the next session of the United States . . . court, the very necessities of justice, and the preservation of the rights of the plaintiff, would demand that the latter court should exert its jurisdictional power, under certain contingencies, ad interim. This, it has been held, it may do on presentation of the record and notice to the adverse party, in the instance of issuing the writ of injunction, or some restraining order to preserve the status of the case, or to appoint a receiver, and to issue the writ of attachment in aid of the suit. . . . These are in the nature of provisional remedies and orders, designed to preserve the essential rights of the parties, in preventing a failure of justice. In other words, they are agencies to preserve the statu quo of the parties prior to the act of removal." Kansas City, etc., R. Co. v. Interstate Lumber Co., 36 Fed. 9, 11.

[a] **Rule stated.**—It has been said to be the result of all the authorities: First, that the federal court during the intermediate time between the effectuation of the removal and the time at which the transcript is required to be filed has the most plenary jurisdiction over the cause, and may do with it anything which it could do with a cause originally brought in the court or that any court may do with any case of which it has acquired rightful jurisdiction; but in the doing of those things it must be governed, as in all cases, by the rules of practice and procedure applicable to the particular class of cases to which the one in hand belongs. Second, that in cases removed from a state court the acts of congress regulating removal have prescribed the day on which the parties to the suit are required to appear in the federal court so that the cause may proceed in the ordinary way to a final hearing in due course of proper practice and procedure, and until that time they are not required to appear and proceed; but, upon due notice, if any extraordinary procedure be necessary to preserve the property in litigation or the rights of the litigants, either party may be required to appear for such extraordinary purpose. So, while the court has jurisdiction to proceed even erroneously, it has no rightful authority to proceed before the statutory time, and it is error to hear, before that time, any application not falling within the limits above indicated. Hamilton v. Fowler, 83 Fed. 321.

[b] **What orders may be made** and proceedings taken by the court, intermediate the effectuation of the removal and the time for filing the transcript, depends upon the circumstances of each case. Hamilton v. Fowler, 83 Fed. 321.

Remand before expiration of time for filing transcript see infra § 326.

[74] **Failure to plead or proceed in time as ground for:**
Dismissal see infra § 295.
Remand see infra § 313.

In suits originally brought in federal courts see Federal Courts § 138.

Time for trial see infra § 298.

[75] USCA tit 28 § 72.

[76] Eakin v. Scottish Union, etc., Ins. Co., 17 F. (2d) 105.

Transcript of record of state court see supra §§ 270-274.

[77] Egger v. Julian Petroleum Corp., 22 F. (2d) 714; Wena Lumber Co. v. Continental Lumber Co., 270 Fed. 795.

Extension of time see infra text and notes 91-93.

[78] Virginia Bridge, etc., Co. v. U. S. Shipping Bd. Emergency Fleet Corp., 300 Fed. 249.

Remand for failure of defendant to answer or plead see infra § 313.

[79] Dallas Oil, etc., Co. v. Washington Cotton Oil Co., 298 Fed. 949.

[80] Dallas Oil, etc., Co. v. Washington Cotton Oil Co., 298 Fed. 949.

Extension of time. Whether or not to allow a defendant to plead after the expiration of the time prescribed by statute is a matter in the sound legal discretion of the federal court,[91] and should not be permitted if prejudice to plaintiff may result therefrom.[92] It has been held that a motion to remand extends the time for pleading to the next rule day after its determination.[93]

[§ 278] **D. Proceeding on Law or Equity Side of Court.** Proceedings in a federal court to which a cause has been removed from a state court should be had on either the law or the equity side of the court as the essential nature of the cause and the relief demanded make necessary and proper,[94] regardless of state legislation permitting the cause to be maintained upon the other side in the state courts;[95] and no stipulation of the parties can make a suit cognizable on the side of the court to which it does not properly belong.[96] Where plaintiff proceeds after removal on the wrong side of the court, the proper practice ordinarily is to sustain a demurrer to his pleading, without prejudice to his right to replead on the other side,[97] or to dismiss his action or suit without prejudice if he fails to show a right to relief on the side of the court to which he has removed the cause,[98] and if judgment is given in his favor in proceedings upon the wrong side, the circuit court of appeals, in reversing the judgment on that ground, may grant leave to apply for permission to amend and to proceed in equity[99] or at common law,[1] as may be proper, unless objection was made and sustained in the lower court and plaintiff refused to amend;[2] but where a suit re-

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Petition to remove as general appearance see Appearances § 34.

[81] See USCA tit 28 §§ 73, 74, 76, 77.

[82] See supra § 273.

[83] Heidecker v. Red Star SS. Co., 32 Fed. 706.

Extension of time see infra text and notes 91–93.

[84] Judge v. Anderson, 19 Fed. 885 (where a rule of the court provided that if a cause was not at issue when removed, the parties should have until the fifth day of the next ensuing term to make up the issues).

[85] Heidecker v. Red Star Line SS. Co., 32 Fed. 706; Dunn v. Duncan, 8 F. Cas. No. 4,175, 2 WklyNCas (Pa.) 480. See Wilcox, etc., Guano Co. v. Phœnix Ins. Co., 60 Fed. 929 (applying the rule).

[86] Bryce v. Southern R. Co., 129 Fed. 966; Pelzer Mfg. Co. v. St. Paul F. & M. Ins. Co., 40 Fed. 185. But see Webster v. Crothers, 29 F. Cas. No. 17,334, 1 Dill. 301 (holding that, where defendant filed a petition for removal on the day on which he was required by the state law to plead, he was not in default for failing to plead in the federal court on the first day of its next ensuing term, and had until the next rule day to plead to the merits; but the court ordered him, if he desired to demur, to do so at that term).

[87] Wilcox, etc., Guano Co. v. Phœnix Ins. Co., 60 Fed. 929. Compare Phenix Ins. Co. v. Charleston Bridge Co., 65 Fed. 628, 13 CCA 58 (holding that where, before removal, the time to plead has been extended to a fixed day, rather than for a specified period or number of days, which occurs previous to the filing of the record, defendant should plead on the day when he files the record).

[88] Bryce v. Southern R. Co., 129 Fed. 966; Wilcox, etc., Guano Co. v. Phœnix Ins. Co., 60 Fed. 929; Pelzer Mfg. Co. v. St. Paul F. & M. Ins. Co., 40 Fed. 185; Torrent v. S. K. Martin Lumber Co., 37 Fed. 727; Heidecker v. Red Star SS. Co., 32 Fed. 706.

[89] Hamilton v. Fowler, 83 Fed. 321.

[90] Egger v. Julian Petroleum Corp., 22 F. (2d) 714; Garvey v. Compania Metalurgica Mexicana, 222 Fed. 732.

[91] Wena Lumber Co. v. Continental Lumber Co., 270 Fed. 795. See Wilcox, etc., Guano Co. v. Phœnix Ins. Co., 60 Fed. 929 (where defendant was permitted, after expiration of the proper time, to put in his answer, on terms).

[92] Wena Lumber Co. v. Continental Lumber Co., 270 Fed. 795.

[93] Bryce v. Southern R. Co., 129 Fed. 966. See Brown v. Empire Gas, etc., Co., 26 F. (2d) 100, 102 (where it was said that "it is quite unnecessary for defendant to plead to the merits of the cause while a motion to remand is pending and undecided, for, until it is determined in what court the further proceedings will be had, any other pleading simply serves to incumber the record").

Remand in general see infra §§ 302–341.

[94] Thompson v. Central Ohio R. Co., 6 Wall. (U. S.) 134, 18 L. ed. 765; Fish v. Kennamer, 37 F. (2d) 243 [certiorari den 281 U. S. 744 mem, 50 SCt 350 mem, 74 L. ed. 1157 mem]; Highland Park Mfg. Co. v. Steele, 232 Fed. 10, 146 CCA 202, 235 Fed. 465, 149 CCA 11 [aff 212 Fed. 972, and certiorari den 242 U. S. 640 mem, 37 SCt 113 mem, 61 L. ed. 541 mem]; Knoxville v. Southern Pav. Constr. Co., 220 Fed. 236; Goodyear Shoe Mach. Co. v. Dancel, 119 Fed. 692, 56 CCA 300; Hooven v. Featherstone, 99 Fed. 180 [rev on other grounds 111 Fed. 81, 49 CCA 229]; North Alabama Dev. Co. v. Orman, 55 Fed. 18, 5 CCA 22 [aff 53 Fed. 469]; Benedict v. Williams, 10 Fed. 208, 20 Blatchf. 276.

[a] **Cross bill for equitable relief in law action.**—Where an action in ejectment was removed to a federal court, cross bills therefore filed therein seeking to quiet title were properly transferred to the equity docket for trial before the law issues. Fish v. Kennamer, 37 F. (2d) 243 [certiorari den 281 U. S. 744 mem, 50 SCt 350 mem, 74 L. ed. 1157 mem].

[95] Thompson v. Central Ohio R. Co., 6 Wall. (U. S.) 134, 18 L. ed. 765; Knoxville v. Southern Pav. Constr. Co., 220 Fed. 236; Hooven v. Featherstone, 99 Fed. 180.

[96] North Alabama Dev. Co. v. Orman, 55 Fed. 18, 5 CCA 22 [aff 53 Fed. 469].

[97] Bacon v. Felt, 38 Fed. 870; Pilla v. German School Assoc., 23 Fed. 700 [aff 131 U. S. 443, 9 SCt 801, 33 L. ed. 216]; Perkins v. Hendryx, 23 Fed. 418. But see Dancel v. United Shoe Mach. Co., 120 Fed. 839 (where a demurrer was overruled and the cause was ordered transferred to the other side of the docket).

Repleader see infra § 279.

[98] Union Stockyards Co. v. Nashville Packing Co., 140 Fed. 701, 72 CCA 195.

[99] Dancel v. Goodyear Shoe Mach. Co., 137 Fed. 157 [aff 144 Fed. 679, 75 CCA 373 (certiorari den 202 U. S. 619, 26 SCt 765, 50 L. ed. 1174)]; Goodyear Shoe Mach. Co. v. Dancel, 119 Feb. 692, 56 CCA 300.

[1] McConnell v. Provident Sav. L. Assur. Soc., 69 Fed. 113, 16 CCA 172; Bacon v. Felt, 38 Fed. 870.

[2] Fletcher v. Burt, 126 Fed. 619, 63 CCA 201.

moved to the equity side of the docket cannot be maintained there merely because plaintiff has an adequate remedy at law, the cause should not be dismissed[3] or remanded,[4] but should be transferred to the law side of the court.[5]

[§ 279] **E. Repleader and Recasting of Cause.**[6] When an ordinary action at law is removed from a state court to a federal court, no other or different pleadings are required in the federal court than in the state court, and repleading is unnecessary;[7] but where the cause, although cognizable at law, was brought in an equity court of the state, under legislation permitting such practice, plaintiff must replead, after removal, according to the forms of a court of law.[8] Similarly, in an equitable suit, if plaintiff's pleading is in the usual form of a bill in equity, even though not in strict accordance with the federal equity rules, a repleader is not necessary,[9] although it has been said to be the better practice;[10] but if the pleading is not in form a proper bill in equity, and relief cannot be afforded except upon the equity side of the federal court, a repleader is required.[11] Where legal and equitable grounds of relief were united in one suit in the state court, it should be recast, after removal, into two causes, and a repleader is accordingly necessary,[12] since in the federal courts the joinder of legal and equitable causes is prohibited.[13] When a cause is so recast and divided into two causes, neither of them will be deemed to constitute a new suit, but each is treated as a continuation of that which was removed;[14] and neither of such causes is abandoned by the severance, but both remain on their respective sides of the docket.[15]

Mode of procuring repleader. The necessity of a repleader may be raised by a motion for a repleader,[16] or by a demurrer,[17] but not, it seems, by a motion to remand.[18]

If repleader is not had, where it is necessary or proper, so much of the pleadings as present matters not cognizable on that side of the federal court to which the cause has been removed will be stricken out or disregarded, without prejudice to its presentation in a new action or suit.[19] If, however, the court proceeds with the cause without any repleader or recasting of the cause being had and without objection, a judgment rendered by it is not void or subject to collateral attack.[20]

[§ 280] **F. Waiver of Objection to Service of Process of State Court.**[21] While the mere act of removing a cause from a state court to a federal court, or the fact of its effectuation, does not of itself deprive the removing party of the right to make objection in the federal court of the sufficiency of the original process in the suit or of its service upon him,[22] the provision of the statutes that after removal "the cause shall proceed" in the federal court[23] not affecting his rights in that respect,[24] a general appearance in the federal court after the cause has been removed thereto,[25] or the filing of an answer or otherwise pleading to the merits,[26] constitutes a waiver of any objections to the jurisdiction of the state court, over the person of defendant, founded upon defects in its process or in the service thereof, and consequently the removing party cannot object on any such ground to the right of the federal court to proceed with the cause.[27]

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[3] **Dismissal in general** see infra §§ 294, 295.

[4] **Remand in general** see infra §§ 302-341.

[5] Kellogg v. Schaueble, 273 Fed. 1012; Knoxville v. Southern Pav. Constr. Co., 220 Fed. 236. See Baum v. Longwell, 200 Fed. 450 (apparently recognizing the rule).

[6] **Pleading de novo where transcript of record is not filed** see supra § 274.

[7] Bills v. New Orleans, etc., R. Co., 3 F. Cas. No. 1,409, 13 Blatchf. 227; Dart v. McKinney, 7 F. Cas. No. 3,583, 9 Blatchf. 359; Merchants' etc., Nat. Bank v. Wheeler, 17 F. Cas. No. 9,439, 13 Blatchf. 218. But see Brownell v. Gordon, 4 F. Cas. No. 2,039, McAllister 207; Martin v. Kanouse, 16 F. Cas. No. 9,162, 1 Blatchf. 149 (both holding that plaintiff must file a new declaration according to the practice of the federal court).

[8] Whittenton Mfg. Co. v. Memphis, etc., Packet Co., 19 Fed. 273.

[9] Gridley v. Westbrook, 23 How. (U. S.) 503, 16 L. ed. 412; Dancel v. United Shoe Mach. Co., 120 Fed. 839; Durgan v. Redding, 103 Fed. 914; Phelps v. Elliott, 26 Fed. 881, 23 Blatchf. 470; Leo v. Union Pac. R. Co., 17 Fed. 273; Akerly v. Vilas, 1 F. Cas. No. 120, 3 Biss. 332; Toucey v. Bowen, 24 F. Cas. No. 14,107, 1 Biss. 81.

[a] **Cross bill.**—Where the state practice permits affirmative relief by an answer without a cross bill, an answer seeking affirmative relief, filed before a removal, will be sufficient, and a cross bill need not then be filed in the federal court. Detroit v. Detroit City R. Co., 55 Fed. 569.

[10] Dancel v. United Shoe Mach. Co., 120 Fed. 839.

[11] Benedict v. Hall, 267 Fed. 1013; Stockton v. Oregon Short Line R. Co., 170 Fed. 627; Thornton N. Motley Co. v. Detroit Steel, etc., Co., 130 Fed. 396; Fletcher v. Burt, 126 Fed. 619, 63 CCA 201; Perkins v. Hendryx, 23 Fed. 418; Whittenton Mfg. Co. v. Memphis, etc., Packet Co., 19 Fed. 273; Boston Belting Co. v. Judson, 3 F. Cas. No. 1,674.

[12] Twist v. Prairie Oil, etc., Co., 274 U. S. 684, 47 SCt 755, 71 L. ed. 1297 [rev 6 F. (2d) 347]; Hurt v. Hollingsworth, 100 U. S. 100, 25 L. ed. 569; Harrison v. Harrison, 5 F. (2d) 1001; Knoxville v. Southern Pav. Constr. Co., 220 Fed. 236; Hatcher v. Hendrie, etc., Mfg., etc., Co., 133 Fed. 267, 68 CCA 19; Schneider v. Foote, 27 Fed. 581, 23 Blatchf. 511; Lecroix v. Lyons, 27 Fed. 403; Phelps v. Elliott, 26 Fed. 881, 23 Blatchf. 470; Pilla v. German School Assoc., 23 Fed. 700 [aff 131 U. S. 443, 9 SCt 801, 33 L. ed. 216]; Perkins v. Hendryx, 23 Fed. 418; Whittenton Mfg. Co. v. Memphis, etc., Packet Co., 19 Fed. 273; Fisk v. Union Pac. R. Co., 9 F. Cas. No. 4,829, 8 Blatchf. 299; La Mothe Mfg. Co. v. National Tube Works Co., 14 F. Cas. No. 8,033, 15 Blatchf. 432.

[a] **Repeal of former statute.**—The provision of Rev. St. § 639 that the copies of the pleadings in the state court shall, in every respect and for every purpose, have the same force and effect in the federal court as in the state court, was not carried forward into the act of March 3, 1875, §§ 3, 6 [now USCA tit 28 §§ 72, 81], and is clearly repealed by the repealing clause of that act; and so it does not obviate the necessity of recasting a cause uniting legal and equitable grounds for relief. Whittenton Mfg. Co. v. Memphis, etc., Packet Co., 19 Fed. 273.

[13] See Actions § 245.

[14] Utah-Nevada Co. v. De Lamar, 145 Fed. 505, 75 CCA 1. See Rosenbaum v. Council Bluffs Ins. Co., 37 Fed. 7, 3 LRA 189 (applying the rule).

[15] Schneider v. Foote, 27 Fed. 581, 23 Blatchf. 511; Fisk v. Union Pac. R. Co., 9 F. Cas. No. 4,829, 8 Blatchf. 299.

[a] **Plaintiff cannot be compelled to elect** whether to proceed at law or in equity, but may proceed on both sides of the docket at the same time. Fisk v. Union Pac. R. Co., 9 F. Cas. No. 4,829, 8 Blatchf. 299.

[16] Whittenton Mfg. Co. v. Memphis, etc., Packet Co., 19 Fed. 273.

[17] Perkins v. Hendryx, 23 Fed. 418; Benedict v. Williams, 11 Fed. 547.

Demurrer as mode of attacking proceedings on wrong side of docket see supra § 278.

[18] Ladd v. West, 55 Fed. 353.

Motion to remand in general see infra § 324.

[19] Northern Pac. R. Co. v. Paine, 119 U. S. 561, 7 SCt 323, 30 L. ed. 513; Lacroix v. Lyons, 27 Fed. 403; Phelps v. Elliott, 26 Fed. 881, 23 Blatchf. 470; Perkins v. Hendryx, 23 Fed. 418; La Mothe Mfg. Co. v. National Tube Works Co., 14 F. Cas. No. 8,033, 15 Blatchf. 432.

[20] Hatcher v. Hendrie, etc., Mfg. etc., Co., 133 Fed. 267, 68 CCA 19.

[21] **Waiver of:**
Grounds for remand see infra § 320.
Objection to process or service in general see Process §§ 336, 337.

[22] See Appearances § 34.

[23] USCA tit 28 §§ 72, 74, 76.

[24] Cain v. Commercial Pub. Co., 232 U. S. 124, 34 SCt 284, 58 L. ed.

[§ 281] **G. Effect of Acts of, and Proceedings in, State Court before Removal—1. Orders and Decisions.** The removal of a cause from a state court to a federal court does not vacate any orders or decisions previously made in the cause by the state court, but, under the express provisions of the statute,[28] they remain in force,[29] and the federal court will ordinarily treat such an order or decision as conclusive upon itself and upon the parties to the same extent that it would have concluded the parties and the state court if the cause had remained therein.[30] Upon the same principle, however, the federal court may permit a question upon which the state court has theretofore ruled to be reopened, and may modify or set aside the order made, if it is satisfied that such court was mistaken in its ruling or decision;[31] and where the matter relates to the service of the original process of the state court and, consequently, affects the jurisdiction of the federal court, it may determine the question for itself, regardless of the decision of the state court,[32] although in so doing it must apply the provisions of the state statutes, rather than those of the act of congress or the practice of the federal courts,[33] unless such state statutes authorize service in a mode or under circumstances not consonant with the provisions of the federal constitution relating to due process of law.[34]

Renewal of motion denied by state court. Where a motion was denied by a state court previous to the removal of the cause, leave to renew such motion should be procured from the federal court, after removal, before so doing.[35] Such leave should not be granted except upon such a showing as would justify a rehearing or reargument under the practice of the state court from which the cause was removed.[36]

Setting aside order. An order entered irregularly, as prematurely or without proper notice, by a state court before the removal of the cause may be

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534; Sutro v. Simpson, 14 Fed. 370, 4 McCrary 276.

25. Texas, etc., R. Co. v. Hill, 237 U. S. 208, 35 SCt 575, 59 L. ed. 918.

26. Texas, etc., R. Co. v. Bigger, 239 U. S. 330, 36 SCt 127, 60 L. ed. 310 [aff 218 Fed. 990, 133 CCA 673]; Texas, etc., R. Co. v. Hill, 237 U. S. 208, 35 SCt 575, 59 L. ed. 918; Huff v. Ford, 289 Fed. 858; Roman v. Lehigh Valley Coal Co., 241 Fed. 595; Callahan v. Hicks, 90 Fed. 539.

27. See cases supra notes 25, 26.

28. USCA tit 28 § 79.

29. Duncan v. Gegan, 101 U. S. 810, 25 L. ed. 875; Hare & Chase, Inc. v. Dunton, (Tex. Civ. A.) 8 SW (2d) 315. And see cases infra note 30.

30. Duncan v. Gegan, 101 U. S. 810, 25 L. ed. 875; Gibson Coal, etc., Co. v. Allen, 280 Fed. 28; Hoyt v. Ogden Portland Cement Co., 185 Fed. 889; Guernsey v. Cross, 153 Fed. 827; Lathrop, etc., Co. v. Interior Constr., etc., Co., 150 Fed. 666 [rev on other grounds 215 U. S. 246, 30 SCt 76, 54 L. ed. 177]; Dodd v. Louisville Bridge Co., 130 Fed. 186; Denison v. Shawmut Min. Co., 124 Fed. 860; Bragdon v. Perkins-Campbell Co., 82 Fed. 338; Allmark v. Platte SS. Co., 76 Fed. 615; Lookout Mountain R. Co. v. Houston, 44 Fed. 449; Cleaver v. Traders' Ins. Co., 40 Fed. 711; Bryant v. Thompson, 27 Fed. 881; Davis v. St. Louis, etc., R. Co., 25 Fed. 786; Phelps v. Canada Cent. R. Co., 19 Fed. 801, 20 Blatchf. 450; Loomis v. Carrington, 18 Fed. 97; Milligan v. Lalance, etc., Mfg. Co., 17 Fed. 465, 21 Blatchf. 407; Sutro v. Simpson, 14 Fed. 370, 4 McCrary 276; Brooks v. Farwell, 4 Fed. 166, 2 McCrary 220. See Bell v. Viavi Co., 35 F. (2d) 1005 (applying the rule).

Conclusiveness of rulings in same cause in general see Judgments § 1178; Motions and Orders § 276.

31. Remington v. Central Pac. R. Co., 198 U. S. 95, 100, 25 SCt 577, 49 L. ed. 959; Dicks-David Co. v. Edward Maurer Co., 279 Fed. 281; Buxton v. Pennsylvania Lumber Co., 221 Fed. 718; Bryant v. Thompson, 27 Fed. 881, 882. And see cases infra note 32.

"However stringent may be the practice in refusing to reconsider what has been done, it still is but practice, not want of jurisdiction, that makes the rule." Remington v. Central Pac. R. Co., supra.

"All orders and rulings in the state court remain in full force until they are changed or set aside in the . . . [federal] court. But the . . . [federal] court, certainly, has the same power over them—the same jurisdiction to modify them or set them aside—that the state court would have had if the cause had not been removed." Bryant v. Thompson, supra.

32. General Inv. Co. v. Lake Shore, etc., R. Co., 260 U. S. 261, 43 SCt 106, 67 L. ed. 244 [mod 269 Fed. 235]; Remington v. Central Pac. R. Co., 198 U. S. 95, 35 SCt 577, 49 L. ed. 959; Bramwell v. Owen, 276 Fed. 36; Hudson Nav. Co. v. Murray, 236 Fed. 419; Feister v. Hulick, 228 Fed. 821; Flint v. Coffin, 176 Fed. 872, 100 CCA 342 [certiorari den 217 U. S. 602, 30 SCt 693, 54 L. ed. 898]; West v. Cincinnati, etc., R. Co., 170 Fed. 349; Lathrop-Shea, etc., Co. v. Interior Constr. etc., Co., 150 Fed. 666 [rev on other grounds 215 U. S. 246, 30 SCt 76, 54 L. ed. 177]; Cady v. Associated Colonies, 119 Fed. 420. See Brooks v. Farwell, 4 Fed. 166, 2 McCrary 220 (apparently applying the rule). But see Bragdon v. Perkins-Campbell Co., 82 Fed. 338; Allmark v. Platte SS. Co., 76 Fed. 615 (both holding the decision of the state court on a motion to set aside the service of the summons conclusive on the federal court). Compare Bell v. Vlavi Co., 35 F. (2d) 1005 (recognizing the general rule, but holding that a stipulation that the state court's decision with respect to the validity of the process should be final was binding after removal to the federal court).

Authority of federal court to determine removability of cause see supra § 253.

Removal as general appearance and waiver of objections to jurisdiction and service of process see Appearances § 34.

33. Paragon Coal, etc., Co. v. J. W. Kirby, etc., Coal Co., 9 F. (2d) 686; Griffin White Shoe Co. v. O'Connor, 277 Fed. 1012 [refusing to follow Wange v. Public Serv. R. Co., 159 Fed. 189]; Centaur Motor Co. v. Eccleston, 264 Fed. 852; Hudson Nav. Co. v. Murray, 236 Fed. 419; Sleicher v. Pullman Co., 170 Fed. 365; Friezen v. Allemania F. Ins. Co., 30 Fed. 349.

[a] **Service in different federal district of same state.**—Where process, in a cause removed from a state court to a federal court, was served upon defendant within the state but in a federal district other than that to which the cause was removed, such service will not be set aside or quashed by the federal court after removal, even though it could not have been so made in a cause originally commenced in the federal court. Griffin White Shoe Co. v. O'Connor, 277 Fed. 1012; Centaur Motor Co. v. Eccleston, 264 Fed. 852; Friezen v. Allemania F. Ins. Co., 30 Fed. 349.

34. Goldey v. Morning News, 156 U. S. 518, 15 SCt 559, 39 L. ed. 517; Sleicher v. Pullman Co., 170 Fed. 365. Compare Vitkus v. Clyde SS. Co., 232 Fed. 288; Case v. Smith, 152 Fed. 730 (both apparently applying the exception stated in the text, but in both of which it was said that the sufficiency of the service is to be tested by the federal law, and not the state statutes).

Guaranty of due process of law as affecting service of process see Constitutional Law §§ 1004, 1005.

35. Guernsey v. Cross, 153 Fed. 827; Denison v. Shawmut Min. Co., 124 Fed. 860; Allmark v. Platte SS. Co., 76 Fed. 615; Bryant v. Thompson, 27 Fed. 881; Loomis v. Carrington, 18 Fed. 97; New Orleans, etc., R. Co. v. New Orleans, 14 Fed. 373; Carrington v. Florida R. Co., 5 F. Cas. No. 2,448, 9 Blatchf. 468. See Remington v. Central Pac. R. Co., 198 U. S. 95, 25 SCt 577, 49 L. ed. 959; Carrington v. Florida R. Co., 5 F. Cas. No. 2,448, 9 Blatchf. 468 (both recognizing the rule).

Renewal of motion in general see Motions and Orders §§ 175–200.

36. Denison v. Shawmut Min. Co., 124 Fed. 860.

set aside by the federal court on motion of a party prejudiced thereby.[37]

On appeal to the circuit court of appeals or the supreme court of the United States from a judgment or decree of the federal district court, an order made by a state court in the cause before removal stands no higher than if the same order had been made by such district court.[38]

[§ 282] **2. Attachments, Delivery Bonds, and Security Given or Taken.** Under the express provisions of the statutes relating to the removal of causes from a state court to a federal court,[39] all attachments and sequestrations levied or effected, and all bonds, undertakings, and security given or taken in the state court before the removal remain in force and effectual unless and until they are set aside, dissolved, or modified by the federal court,[40] even though, in the case of an attachment, the federal court could not originally have issued the writ;[41] and the federal court may authorize its marshal to take into his custody property held by the sheriff under process issued from the state court before the remand.[42] Where the jurisdiction of the state court was validly acquired, under the state laws and practice, by attachment, without personal service,[43] the jurisdiction of the federal court to which the cause has been properly removed is likewise valid,[44] even though the federal court could not originally have acquired jurisdiction in such manner;[45] and in such case the federal court may cause process to be served by publication in accordance with a state statute providing therefor.[46]

Sureties on a delivery bond or other forthcoming bond given or taken in the state court remain liable thereon, notwithstanding the removal.[47]

Abatement or dissolution of attachment.[48] A party prejudiced by an unauthorized or improper attachment issued by a state court may procure its abatement or dissolution upon motion to the federal court after the removal of the cause.[49]

[§ 283] **3. Injunctions.**[50] Under the express provisions of the statutes relating to the removal of causes from a state court to a federal court,[51] a valid injunction granted by the state court before the removal remains in force thereafter until it is dissolved,[52] even though it is one which the federal court could not originally have granted,[53] except, it has been held, an injunction granted before the filing of the bill in the state court.[54]

Dissolution of injunction. The federal court, after removal, may dissolve an injunction previously granted by the state court, in a case where such dissolution is proper,[55] and a motion in the federal court for a dissolution is the proper remedy in such case.[56] An injunction will not be dissolved, however, merely because the bill was not verified, in accordance with the practice in the federal court, if it was sufficient under the state practice,[57] nor because plaintiff failed to prosecute his application to continue the injunction on the day fixed by the state court;[58] and the question of dissolving or continuing the injunction is not affected by the fact that it is one which could not originally have been granted by the federal court.[59] The hearing of a motion to dissolve an injunction should not be postponed because of the pendency of a motion to remand the cause.[60]

[§ 284] **4. Receiverships.** A receiver appointed by a state court remains in possession and in office after the removal of the cause to a federal court,[61] and may be required to account in the federal court,[62] whose officer he becomes by the removal.[63] The federal court may remove or discharge a receiver appointed by the state court before removal;[64] but where a motion for a discharge had been made to and denied by the state court prior to the removal, the federal court should not thereafter grant a similar application without any additional evidence or showing,[65] in view of the rule that orders and decisions of the state court will be treated by the federal court as conclusive to the same extent as if the cause had remained in the state court.[66]

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[37] Hare & Chase, Inc. v. Dunton, (Tex. Civ. A.) 8 SW (2d) 315.

[38] Remington v. Central Pac. R. Co., 198 U. S. 95, 25 SCt 577, 49 L. ed. 959.

[39] USCA tit 28 § 79.

[40] Clark v. Wells, 203 U. S. 164, 27 SCt 43, 51 L. ed. 138; Caldwell v. Morfa, 24 F. (2d) 106; Hatcher v. Hendrie, etc., Mfg., etc., Co., 133 Fed. 267, 269, 68 CCA 19; Vermilya v. Brown, 65 Fed. 149; Crocker Nat. Bank v. Pagenstecher, 44 Fed. 705; Barney v. Globe Bank, 2 F. Cas. No. 1,031, 5 Blatchf. 107; Clarke v. Chase, 5 F. Cas. No. 2,845, Brunn. Col. Cas. 638; New England Screw Co. v. Bliven, 18 F. Cas. No. 10,156, 3 Blatchf. 240; Carpenter v. New York, etc., R. Co., 11 HowPr (N. Y.) 481; Martin v. Thompson, 14 S. C. L. 167.

[41] Clark v. Wells, 203 U. S. 164, 27 SCt 43, 51 L. ed. 138; Vermilya v. Brown, 65 Fed. 149; Crocker Nat. Bank v. Pagenstecher, 44 Fed. 705.

[42] Friedman v. Israel, 26 Fed. 801. See Dennistoun v. Draper, 7 F. Cas. No. 3,804, 5 Blatchf. 336 (recognizing the rule).

[43] **Attachment as original process for commencement of suit** see Attachment § 4.

[44] Purdy v. Muller, 81 Fed. 513.

[45] Purdy v. Muller, supra.

[46] Clark v. Wells, 203 U. S. 164, 27 SCt 43, 51 L. ed. 138; Friedman Bros., etc., Neckwear Co. v. Greaney, 297 Fed. 478.

[a] **No personal judgment can be entered,** however, against a defendant so served who fails to appear, but a judgment may be referred only against the property attached. Clark v. Wells, 203 U. S. 164, 27 SCt 43, 51 L. ed. 138.

Service or perfection of process after removal in general see infra § 288.

[47] Ramsey v. Coolbaugh, 13 Iowa 164; State v. Peck, 32 W. Va. 606, 9 SE 919.

[48] **In general** see Attachment §§ 980–1104.

[49] Corbitt v. Farmers' Bank, 114 Fed. 602.

[50] **Power of federal court to grant injunction after removal** see infra § 293.

[51] USCA tit 28 § 79.

[52] Trautwein v. Moreno Mut. Irr. Co., 22 F. (2d) 374; Eureka, etc., R. Co. v. California, etc., R. Co., 103 Fed. 897 [aff 109 Fed. 509, 48 CCA 517]; Fogg v. Fisk, 19 Fed. 235; Perry v. Sharpe, 8 Fed. 15; Smith v. Schwed, 6 Fed. 455, 2 McCrary 441. See Hunt v. Fisher, 29 Fed. 801 (apparently recognizing the rule).

[53] Eureka, etc., R. Co. v. California, etc., R. Co., 103 Fed. 897 [aff 109 Fed. 509, 48 CCA 517]; Perry v. Sharpe, 8 Fed. 15. See Hunt v. Fisher, 29 Fed. 801 (apparently recognizing the rule).

[54] McLeod v. Duncan, 16 F. Cas. No. 8,898, 5 McLean 342.

[55] Arkansas v. Kansas, etc., Coal Co., 96 Fed. 353 [rev on other grounds 183 U. S. 185, 22 SCt 47, 46 L. ed. 144]; Sharp v. Whiteside, 19 Fed. 156; Carrington v. Florida R. Co., 5 F. Cas. No. 2,448, 9 Blatchf. 468.

Dissolution of injunction in general see Injunctions §§ 670–736.

[56] Harbison v. Allen, 152 N. C. 720, 68 SE 207.

[57] Smith v. Schwed, 6 Fed. 455, 2 McCrary 441.

[58] Hamilton v. Fowler, 83 Fed. 321.

[59] Perry v. Sharpe, 8 Fed. 15.

[60] Coburn v. Cedar Valley Land, etc., Co., 25 Fed. 791.

Remand in general see infra §§ 302–341.

[61] Finney v. Continental Baking, etc., Corp., 17 F. (2d) 107; Mack v. Jones, 31 Fed. 189. See McLeod v. Hayward, 17 F. (2d) 900 (holding it proper, under the facts of the particular case, to continue a receivership created by the state court).

[62] Hinckley v. Gilman, etc., R. Co., 100 U. S. 153, 25 L. ed. 591; Finney v. Continental Baking, etc., Corp., 17 F. (2d) 107. See Mack v. Jones,

[§ 285] **5. Contempt Proceedings.** While the pendency in a state court of contempt proceedings founded upon the violation of an order of such court, in a cause pending therein, does not preclude or delay the removal of the cause to a federal court,[67] the court to which the cause is removed has no authority to hear or determine such proceedings or to punish a party for such contempt committed before the removal,[68] and the state court retains jurisdiction for such purpose.[69] Where, however, prior to the removal the state court has determined contempt proceedings and entered an order therein, the federal court to which the principal cause is thereafter removed will recognize and enforce such order,[70] except that where an appeal from such order has been taken to the state supreme court, the federal court will hold proceedings for the enforcement of the order in abeyance pending the disposition of the appeal.[71]

[§ 286] **6. Depositions.** A federal court to which a cause has been removed from a state court is without power to compel a witness to sign a deposition recording testimony given by him before the removal,[72] or to compel a defendant to file answers to interrogatories annexed to the petition or complaint,[73] or to submit to examination before trial,[74] under the state practice. Depositions which have been duly taken and signed before removal, however, under the state law or an order of the state court, and which would have been admissible in the state court if the cause had remained there, may be used as evidence in the federal court after the removal.[75]

[§ 287] **7. Motions pending and Undetermined.** Where a cause is removed from a state court to a federal court while a motion theretofore made is pending, such motion is transferred with the record to the federal court, to be there determined;[76] and where a referee has been directed to hear and report evidence, and has made his report before the removal, such report is before the federal court for consideration in passing upon the motion.[77]

[§ 288] **H. Service or Perfection of Process or Notices[78]—1. In General.** It is provided by statute that in cases removed from a state court to a federal court in which any defendant has not been served with process or in which service has not been perfected prior to removal, or in which the process served proves to be defective, such process may be completed by the federal court through its officers, or new process as to defendants upon whom service has not been completed may be issued out of such court, or service may be perfected in such court in the same manner as in cases which are originally brought in the federal courts; but it is further provided that nothing in such provisions shall be construed to deprive any defendant upon whom process is so served after removal of his right to move to remand the cause to the state court, the same as if process had been served upon him before removal.[79] Accordingly, a cause should not be dismissed because the service upon a defendant was ineffective, but new process should be issued and the cause retained by the federal court.[80]

[§ 289] **2. Reservice or Refiling.** Where substituted service of process in a cause commenced in a state court was made before removal, plaintiff is not required to obtain from the federal court to which the cause is subsequently removed an order authorizing such mode of service,[81] and a notice served or filed while the cause was pending in the state court is not required, after the removal, to be re-served or refiled in the cause,[82] in view of the rule that the federal court takes up the case at the point at which the state court leaves off.[83]

[§ 290] **I. Amendment of Pleadings or Process.**[84]

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31 Fed. 189 (applying the rule).

Accounting by receiver in general see Receivers §§ 593–606.

[63] Mack v. Jones, 31 Fed. 189.

Receiver as officer of court see Receivers § 163.

[64] Bryant v. Thompson, 27 Fed. 881; Texas, etc., R. Co. v. Rust, 17 Fed. 275, 5 McCrary 348.

Removal or discharge of receivers in general see Receivers §§ 112–114.

[65] Bryant v. Thompson, 27 Fed. 881.

[66] See supra § 281.

[67] Voorhees v. Albright, 28 F. Cas. No. 16,999.

[68] Kirk v. Milwaukee Dust Collector Mfg. Co., 26 Fed. 501.

Remand of contempt proceedings pending at time of removal of cause see infra § 303.

[69] Kirk v. Milwaukee Dust Collector Mfg. Co., 26 Fed. 501.

[70] Williams Mower, etc., Co. v. Raynor, 30 F. Cas. No. 17,748, 7 Biss. 245.

[71] Williams Mower, etc., Co. v. Raynor, supra.

[72] Arnold v. Kearney, 29 Fed. 820.

[73] Pierce v. Union Pac. R. Co., 47 Fed. 709.

[74] Ex p. Fisk, 113 U. S. 713, 5 SCt 724, 28 L. ed. 1117; Kornblum v. Southern Pac. R. Co., 34 F. (2d) 828.

[75] Gravelle v. Minneapolis, etc., R. Co., 16 Fed. 435, 3 McCrary 385.

[76] Mannington v. Hocking Valley R. Co., 183 Fed. 133; Bryce v. Southern R. Co., 129 Fed. 966; Milligan v. Lalance, etc., Mfg. Co., 17 Fed. 465, 21 Blatchf. 407; Sutro v. Simpson, 14 Fed. 370, 4 McCrary 276.

[77] Day v. Schiff, 278 Fed. 533.

Reference to report evidence on questions of fact arising on motions in general see References § 38.

[78] **Amendment of process** see infra § 290.

Service by publication in action commenced in state court by attachment see supra § 282.

[79] USCA tit 28 § 83.

Remand see infra §§ 302–341.

[80] Maichok v. Bertha-Consumers Co., 25 F. (2d) 257.

[a] **Prior to enactment of present statute** providing for service or perfection of process after removal, it was held that where defendant, not having made a general appearance, procured the service of process upon him to be set aside, the cause should be dismissed for that reason. National Acc. Soc. v. Spiro, 164 U. S. 281, 17 SCt 996, 41 L. ed. 435; Wabash Western R. Co. v. Brow, 164 U. S. 271, 17 SCt 126, 41 L. ed. 431; Goldey v. Morning News, 156 U. S. 518, 15 SCt 559, 39 L. ed. 517; Cady v. Associated Colonies, 119 Fed. 420.

Dismissal in general see infra §§ 294, 295.

[81] Hudson Nav. Co. v. Murray, 236 Fed. 419.

[82] Johnson v. Bridgeport Deoxidized Bronze, etc., Co., 125 Fed. 631. See Waldman v. Pennsylvania R. Co., 13 Fed. 801, 64 HowPr (N. Y.) 198 (apparently applying the rule).

[83] See supra § 275.

[84] **Amendment of removal papers:**
Bond see supra § 247.
Petition see supra § 244.

A federal court to which a cause has been removed from a state court has the power and is under a duty to permit such amendments of the process and pleadings in the cause as would be permissible under the state statutes, provided they do not offend the federal laws or the rules established by decisions of the federal courts;[85] and it is no ground for refusing an amendment that if it had been made in the state court it would have prevented the removal of the cause.[86] So plaintiff may be permitted to amend his declaration or complaint by adding new counts for the same cause of action as that set out in the original counts,[87] and an action at law may be changed into a suit in equity upon the same cause, or vice versa.[88] Similarly, a bill or complaint not stating facts sufficient to constitute a cause of action may be amended by setting out such facts;[89] but if it did not state a case within the jurisdiction of the state court it cannot be amended after removal.[90] Where the facts necessary to confer jurisdiction upon the federal court appear in the removal papers, the pleadings in the cause may be amended to make such facts appear upon their face.[91]

[§ 291] **J. Counterclaims, Set-Offs, and Cross Bills.**[92] Where defendant has the right, under the laws of the state from the courts of which a cause has been removed to a federal court, to plead a counterclaim or set-off in the same action, he may do so in the federal court to which the cause has been removed.[93] The filing of a cross bill after removal is not precluded by the fact that the cause therein set up could not have been begun in the federal court as an original suit.[94] A cross bill or cross complaint setting up a cause which is properly within the jurisdiction of the federal court cures any defect in its jurisdiction as based upon plaintiff's bill or complaint.[95]

[§ 292] **K. Security for Costs.**[96] In view of the general rule that a cause removed from a state court to a federal court shall proceed in the latter court in the same manner as if it had originally been commenced therein,[97] a cause so removed is subject to a rule of the federal court requiring plaintiff in every case brought in such court, to give security for costs if demand therefor is made, even though if the cause had remained in the state court such security would not have been required.[98]

[§ 293] **L. Granting or Continuing Injunction.**[99] A federal court to which a cause has been removed from a state court has power to grant an injunction in a proper case;[1] and so it may continue an injunction granted by the state court before removal.[2] An order of the federal court granting or continuing an injunction is equivalent to a denial of a motion to vacate the injunction granted by the state court.[3]

[§ 294] **M. Dismissal or Discontinuance[4]—1. On Motion of Plaintiff.** Plaintiff in a cause removed from a state court to a federal court ordinarily may discontinue or dismiss his action at any time while the cause is pending in the federal court,[5] upon application made to such court,[6] and defendant cannot prevent a dismissal by applying for leave to file a plea of set-off after the motion to dismiss has been made;[7] but under the rule that a plaintiff's right so to do is not absolute but is within the court's discretion,[8] it has been held that he should not be allowed to dismiss or discontinue his action without prejudice merely in order that he may bring in the state court another action against defendant on the same cause but for an amount insufficient to render the action removable.[9] An attempted dismissal or discontinuance by plaintiff is ineffectual, however, where it is subsequently determined that the federal court was without jurisdiction at the time of the removal,[10] and the cause remains pending in the state court notwithstanding the attempt to dismiss or discontinue it.[11]

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[85] Stone v. Speare, 175 Fed. 584 [aff 193 Fed. 375, 113 CCA 301]. See Maichok v. Bertha Consumers Co., 25 F. (2d) 257; Texas Pipe Line Co. v. Ware, 15 F. (2d) 171; Ford v. Huff, 296 Fed. 652 [rev 289 Fed. 858]; Sandusky Cement Co. v. Hamilton, 273 Fed. 596; Richmond v. Brookings, 48 Fed. 241 (all holding particular amendments proper).

[a] **Sheriff's return of service** of process, made to the state court before removal, may be amended in the federal court in a proper case. Maichok v. Bertha Consumers Co., 25 F. (2d) 257; Richmond v. Brookings, 48 Fed. 241. But see Tallman v. Baltimore, etc., R. Co., 45 Fed. 156 (holding that the federal court cannot order or authorize the sheriff, a state officer, to amend his return).

[86] Green v. Custard, 23 How. (U. S.) 484, 16 L. ed. 471; Newberry v. Central of Georgia R. Co., 276 Fed. 337 [rev 271 Fed. 117, and certiorari den 257 U. S. 662 mem, 42 SCt 270 mem, 66 L. ed. 423 mem)]. But see Taylor v. Weir, 162 Fed. 585 [rev on other grounds 171 Fed. 636, 96 CCA 438] (refusing to allow an amendment for the sole purpose of defeating the jurisdiction of the federal court).

Amendment of pleadings as justifying remand because of:
Discontinuing cause as to removing defendants see infra § 309.
Joinder of new or additional parties see infra § 312.
Reduction of amount in controversy see infra § 310.

[87] West v. Smith, 101 U. S. 263, 25 L. ed. 809.

[88] Dancel v. Goodyear Shoe Mach. Co., 137 Fed. 157 [aff 144 Fed. 679, 75 CCA 481 (certiorari den 202 U. S. 619, 26 SCt 765, 50 L. ed. 1174)]; Goodyear Shoe Mach. Co. v. Dancel, 119 Fed. 692, 56 CCA 300. See Blalock v. Equitable L. Assur. Soc., 75 Fed. 43, 21 CCA 208 [rev 73 Fed. 655] (apparently recognizing the rule).

[a] **Rule applied.**—An action at law to recover the arrears of an annuity that had previously accrued may be changed by amendment into a suit in equity to compel specific performance by one who has assumed a contract to pay such annuity, with a decree for the payment of the arrears that accrued prior to its entry, and a direction that the installments subsequently accruing shall also be paid and enforced by periodical judgments at the foot of such decree. Dancel v. Goodyear Shoe Mach. Co., 137 Fed. 157 [aff 144 Fed. 679, 75 CCA 481 (certiorari den 202 U. S. 619 mem, 26 SCt 765 mem, 50 L. ed. 1174 mem]; Goodyear Shoe Mach. Co. v. Dancel, 119 Fed. 692, 56 CCA 300.

[89] U. S. Fidelity, etc., Co. v. Woodson County, 145 Fed. 144, 76 CCA 114.

[90] Adams v. Heckscher, 80 Fed. 742.

Removal of cause of which state court is without jurisdiction see supra § 27.

[91] Ostrander v. Blandin, 211 Fed. 733; Rife v. Lumber Underwriters, 204 Fed. 32, 122 CCA 346 [rev on other grounds 237 U. S. 605 mem, 35 SCt 717 mem, 59 L. ed. 1140 mem].

[92] **Original jurisdiction of federal courts as extending to counterclaims and cross bills** see Federal Courts § 13.

[93] Partridge v. Phœnix Mut. L. Ins. Co., 15 Wall. (U. S.) 573, 21 L. ed. 229; Frank v. Chetwood, 9 F. Cas. No. 5,051.

[94] Brooks v. Laurent, 98 Fed. 647, 39 CCA 201.

Removability of cause as dependent upon original jurisdiction of federal courts see supra § 10.

[95] Kline v. Murray, 7 F. (2d) 404.

[96] **Costs in general** see infra § 301.

[97] See supra § 275.

[98] Henning v. Western Union Tel. Co., 40 Fed. 658.

[99] **Effect of valid injunction granted by state court before removal** see supra § 283.

[1] Hower v. Weiss Malting, etc., Co., 55 Fed. 356, 5 CCA 129. See McLeod v. Duncan, 16 F. Cas. No. 8,898, 5 McLean 342 (recognizing the rule).

Power of federal district courts to issue writs of injunction in general see Federal Courts § 351.

[2] Hower v. Weiss Malting, etc., Co., 55 Fed. 356, 5 CCA 129.

[3] Trautwein v. Moreno Mut. Irr. Co., 22 F. (2d) 374.

Vacation and dissolution of injunction granted by state court see supra § 283.

[4] **Remand upon dismissal or discontinuance as to removing defendant** see infra § 309.

[5] El Paso, etc., R. Co. v. Riddle, 287 Fed. 173; Palmer v. Delaware, etc., R. Co., 222 Fed. 461; Youtsey v. Hoffman, 108 Fed. 699.

Attempt to dismiss in federal court after remand see infra § 338.

[6] Southern R. Co. v. Dukes, 7 Ga. A. 784, 68 SE 332.

Dismissal in state court after removal see supra § 266.

[§ 295] **2. Involuntary Dismissal.**[12] A cause previously removed from a state court to a federal court should not be dismissed by such court because its jurisdiction is lacking or has ceased to exist,[13] but should be remanded to the state court,[14] unless it also is without jurisdiction of the cause, in which case the suit should be dismissed[15] without prejudice.[16] A contention that the controversy has become moot will not be determined upon a motion by defendant to dismiss the cause.[17] A cause may be dismissed if plaintiff fails to prosecute it or proceed with it after removal;[18] and, especially in view of the statute so providing,[19] where the federal court has entered an order requiring plaintiff to plead or file a copy of the paper or pleading by which the suit or proceeding was commenced, it may dismiss such suit or proceeding if he fails to comply with such order.[20]

[§ 296] **N. Consolidation of Causes.** Subject to the usual rules governing the consolidation of actions,[21] a cause removed from a state court to a federal court may be consolidated, in the latter court, with a cause originally brought and pending therein.[22]

[§ 297] **O. Evidence Admissible under Pleadings.** All evidence is admissible under the pleadings in a cause removed from a state court to a federal court which would have been admissible in the state court under the same pleadings if the cause had not been removed.[23]

[§ 298] **P. Trial and Determination.** All questions arising in a cause after its removal from a state court to a federal court are to be tried and determined by the federal court according to its own modes of proceeding;[24] but all substantial rights of the parties must be given full recognition.[25]

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[7] Youtsey v. Hoffman, 108 Fed. 699.

[8] See Dismissal and Nonsuit § 7.

[9] Young v. Southern Pac. Co., 25 F. (2d) 630; Palmer v. Delaware, etc., R. Co., 222 Fed. 461. But see El Paso, etc., R. Co. v. Riddle, 287 Fed. 173 (where the fact that plaintiff had filed a new suit in the state court, claiming less than the jurisdictional amount, was held no reason for denying him from discontinuing the removed suit in the federal court). Compare Fugitt v. Lake Erie, etc., R. Co., 287 Fed. 556 (where, after trial and judgment of a cause in the federal court, plaintiff commenced another action on the same cause in a state court, and defendant by suit in equity in the federal court enjoined the proceedings in the state court, and removed the cause to the federal court; and a motion to remand was denied, in view of the injunction in force against plaintiff restraining him from proceeding in the state court, even though the cause was held not properly removable, the federal court suggesting that the removed cause be dismissed).

Commencement of new suit in state court after dismissal or discontinuance in federal court see infra 342.

[10] Nichols v. Chesapeake, etc., R. Co., 195 Fed. 913, 115 CCA 601.

Remand for want of jurisdiction at time of removal see infra §§ 303-307.

[11] Nichols v. Chesapeake, etc., R. Co., 195 Fed. 913, 115 CCA 601.

Effect of removal where cause is subsequently remanded for want of jurisdiction at time of removal see supra § 267.

[12] **Ineffective service of process as ground for dismissal** see supra § 288.

[13] Twist v. Prairie Oil, etc., Co., 274 U. S. 684, 47 SCt 755, 71 L. ed. 1297 [rev 6 F. (2d) 347]; Cates v. Allen, 149 U. S. 451, 13 SCt 883, 977, 37 L. ed. 804; Knoxville v. Southern Pav. Constr. Co., 220 Fed. 236; Anderson v. Sharp, 189 Fed. 247; Gombert v. Lyon, 80 Fed. 305; Richmond v. Brookings, 48 Fed. 241; Northern Pac. Terminal Co. v. Lowenberg, 18 Fed. 339, 9 Sawy. 348. But see Lawrence v. Southern Pac. Co., 180 Fed. 822 [app dism 228 U. S. 137, 33 SCt 497, 57 L. ed. 768] (where a dismissal, and not a remand, was held proper); Cassidy v. Atlanta, etc., R. Co., 109 Fed. 673 (holding that, where, after a removal by a nonresident defendant, plaintiff entered a nonsuit as to him, leaving the only defendant a resident of the same state with plaintiff, and then moved to remand the cause, the order should be for a dismissal and not for a remand in view of the statutory provision that cases removed shall be proceeded with in the same manner as if originally brought in the federal court, since if a suit were originally brought in the federal court, and afterward the jurisdictional elements disappeared, a dismissal would follow); Merchants' Nat. Bank v. Brown, 17 Fed. 161, 4 Woods 263 (holding that, where the proceedings for removal were insufficient to divest the jurisdiction of the state court or confer jurisdiction upon the federal court, the cause has in law never been removed, and therefore the federal court cannot remand it, but can only dismiss all proceedings had therein).

[a] **Construction of statutory provision for dismissal or remand.**—In the Act of 1875 [USCA tit 28 § 80], providing that if, in any suit commenced in the federal court or removed thereto from a state court, it shall appear that such suit does not involve a dispute or controversy properly within the jurisdiction of the federal court or that the parties have been improperly or collusively made or joined for the purpose of creating a cause cognizable by or removable to the federal court, such court shall dismiss the suit or remand it as justice may require, the words "dismiss" and "remand" are not used interchangeably or indiscriminately, but the former has reference only to suits brought in the federal court, and the latter to those removed thereto from a state court. Northern Pac. Terminal Co. v. Lowenberg, 18 Fed. 339, 9 Sawy. 348.

Dismissal of suit brought in federal court where jurisdiction is lacking see Federal Courts § 106.

[14] See infra §§ 302-323.

[15] General Inv. Co. v. Lake Shore, etc., R. Co., 260 U. S. 261, 43 SCt 106, 67 L. ed. 244 [mod 269 Fed. 235]; Brashear v. Louisville, etc., R. Co., 32 F. (2d) 373; Lorang v. Alaska SS. Co., 8 F. (2d) 206. See Knoxville v. Southern Pav. Constr. Co., 220 Fed. 236 (apparently recognizing the rule). But see Thacker Coal, etc., Co. v. Norfolk, etc., R. Co., 171 Fed. 271 (holding that a remand is proper in such case, in order that the state court may determine for itself the question of its jurisdiction). Compare Hoyt v. Bates, 81 Fed. 641, 644 (dictum, that if the state court had been without jurisdiction, "all we [the federal court] could do would be to dismiss the suit, or remand it, and leave the respondents to their writ of error if the state court persisted in assuming jurisdiction").

Removal of cause of which state court is without jurisdiction see supra § 27.

[16] General Inv. Co. v. Lake Shore, etc., R. Co., 260 U. S. 261, 43 SCt 106, 67 L. ed. 244 [mod 269 Fed. 235]. See Lorang v. Alaska SS. Co., 8 F. (2d) 206 (where the cause was dismissed without prejudice).

[17] Vonherberg v. Seattle, 20 F. (2d) 247.

[18] McMullen v. Northern Pac. R. Co., 57 Fed. 16.

[19] USCA tit 28 § 82.

[20] Abranches v. Schell, 1 F. Cas. No. 21, 4 Blatchf. 256.

Power of federal court to compel pleading de novo or production of copies of record see supra § 274.

Remand for failure of defendant to plead or answer see infra § 313.

[21] See Actions §§ 308-367.

[22] Wabash, etc., R. Co. v. Central Trust Co., 23 Fed. 513.

Consolidation as affecting right to remand removed cause see infra § 302.

[23] Atlantic Coast Line R. Co. v. Woods, 238 Fed. 917, 151 CCA 651.

[24] Carter v. Tennessee, 18 F. (2d) 850; Sutro v. Simpson, 14 Fed. 370, 4 McCrary 276.

Procedure after removal in general see supra § 275.

Time for trial. The time for the trial of a cause removed from a state court to a federal court is, as nearly as may be, the same as that established by the state law and practice in causes tried in the state courts,[26] in view of the statutes providing for conformity of proceedings in the federal court with the state practice[27] and the rule requiring a cause after removal to proceed in the federal court as if originally commenced therein.[28] Subject to the principle stated, the term at which a cause so removed should stand for trial depends upon the rules[29] or practice[30] of the particular district court to which removal is taken.[31]

Trial by jury. Plaintiff is entitled to a trial of his cause by jury, after removal to the federal court, if he would have been so entitled in the state court;[32] and a failure, within the time required by the state statute, to demand a jury trial before the removal, which delay by the state law amounts to a waiver of the right to trial by jury, does not affect the right to trial by jury in the federal court.[33]

Determination and disposition. A federal court in a cause removed thereto, as well as in a cause originally brought therein,[34] is under a duty to enforce rights conferred by a state statute;[35] but in the absence of statute a federal court of equity is ordinarily at full liberty to exercise its independent judgment, uncontrolled by decisions of the state courts.[36] Where a matter of fact, although vital to the merits of the cause, was necessarily determined by the court before trial in passing upon its own jurisdiction, it is determined for all the purposes of the case and is not open for redetermination.[37] The removal cannot deprive a party of any substantial right;[38] so the rights of the parties must be adjudicated in accordance with the same law which would have determined them in the state court,[39] and the federal court is in duty bound to administer the same relief that could properly have been granted in the state court if the cause had remained there.[40]

In criminal prosecution removed to a federal court,[41] the state prosecuting officer is the proper person to prosecute the case,[42] and where defendant is a federal officer the United States district attorney may properly act as counsel for him,[43] although that is not obligatory[44] except where made so by statute.[45] The accused is called upon to answer to the offense as defined by the laws of the state by which the prosecution was instituted, and not as defined by a federal statute,[46] and in substantive matters the state practice should be followed, at least in felony cases.[47] If the state fails or refuses to prosecute the cause after removal, the federal court should impanel a jury and direct a verdict of not guilty.[48] If the indictment is quashed in the federal court, it has no jurisdiction to find a new indictment against defendant,[49] but it may remand him to the custody of the state court for further proceedings against him.[50] In case of conviction, it seems clear that the sentence pronounced or punishment inflicted should be that prescribed by the state law.[51]

[§ 299] **Q. Judgment and Execution.** A judgment rendered by a federal court in a cause previously removed thereto from a state court is not absolutely void merely because of an insufficiency of the allegations of the petition for removal, so long as it is not reversed, set aside, or otherwise impugned by competent judicial authority.[52] Interest on a judgment is properly allowed for the period during which its enforcement is stayed pending a motion for new trial.[53] In a suit commenced by attachment against a nonresident defendant, the federal court's judgment may be enforced against the attached property in the same manner as if the cause had remained in the state court;[54] but the time at which execution can issue depends upon the law of the United States and not that of the state from the courts of which the cause was removed.[55]

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[25] Sutro v. Simpson, 14 Fed. 370, 4 McCrary 276.

[26] Eakin v. Scottish Union, etc., Ins. Co., 17 F. (2d) 105.

[27] See Federal Courts §§ 108–117.

[28] See, supra § 275.

[29] Judge v. Anderson, 19 Fed. 885.

[30] Knoblock v. Southern R. Co., 112 Fed. 926.

[31] **Time for trial as dependent on rules or discretion of court in general** see Trial [38 Cyc 1279].

[32] Vany v. Toledo, etc., R. Co., 67 Fed. 379; Bryant v. Thompson, 27 Fed. 881.

[33] Montgomery County v. Cochran, 116 Fed. 985 [rev on other grounds 199 U. S. 260, 26 SCt 58, 50 L. ed. 182].

[34] See Federal Courts §§ 163–190.

[35] Pere Marquette R. Co. v. Western Heater Dispatch, 284 Fed. 574; Williams v. Provident L., etc., Co., 242 Fed. 417, 155 CCA 193; Sutro v. Simpson, 14 Fed. 370, 4 McCrary 276; Second Nat. Bank v. New York Silk Mfg. Co., 21 F. Cas. No. 12,601a, 13 Reporter 355.

[a] **Rule applied.**—Where the state statutes required, as an essential requisite to the commencement of an action, that a bond for costs be filed, a motion to dismiss the cause, after removal, for failure of plaintiff to furnish such bond must be sustained, although in a cause brought in the federal court such a bond would not be necessary and such a motion would be overruled. Sutro v. Simpson, 14 Fed. 370, 4 McCrary 276.

[36] Williams v. Provident L., etc., Co., 242 Fed. 417, 155 CCA 193.

Decisions of state court as authority binding federal court in equity cases see Federal Courts § 181.

[37] Boyle v. Chicago, etc., R. Co., 42 F. (2d) 633.

[a] **Rule applied.**—Where plaintiff alleged that his injury occurred in interstate commerce, which if true would prevent the removal of the cause, and the federal court in passing upon a motion to remand held that such allegation was fraudulent, and refused to remand the cause, it was error to submit to the jury, at a trial on the merits, the question whether plaintiff was engaged in interstate commerce at the time he was injured. Boyle v. Chicago, etc., R. Co., 42 F. (2d) 633.

[38] Great Southern L. Ins. Co. v. Burwell, 12 F. (2d) 244 [certiorari den 271 U. S. 683, 46 SCt 633, 70 L. ed. 1150]; Miller v. Williams, 258 Fed. 216.

Substantial rights to be fully recognized on trial of cause see supra text and note 25.

[39] Whittemore v. Ætna Ins. Co., 296 Fed. 238.

[40] Bull v. Adams, 17 F. (2d) 906.

[41] **Removal of criminal prosecutions:**

In general see supra § 12.

Against revenue officers and others see supra §§ 90–110.

When defendant asserts or relies upon civil rights laws see supra §§ 111–117.

[42] Delaware v. Emerson, 8 Fed. 411.

[43] Delaware v. Emerson, supra.

[44] Carter v. Tennessee, 18 F. (2d) 850.

[45] See statutory provisions.

[a] **Proceedings against officers of congress.**—The statute provides that in any action brought against any person for or on account of anything done by him while an officer of either house of congress in the discharge of his official duty in executing any order of such house, the district attorney for the district within which the action is brought, on being thereto requested by the officer sued, shall enter an appearance in behalf of such officer, and all the provisions of the Act of 1866 for the protection of the revenue, and all provisions of former acts therein referred to, so far as they relate to the removal of causes, etc., shall become applicable to such action, and the defense of such action shall thenceforth be conducted under the supervision and direction of the attorney-general. USCA tit 2 § 118.

[46] North Carolina v. Gosnell, 74 Fed. 734; Georgia v. O'Grady, 10 F. Cas. No. 5,352, 3 Woods 496.

[47] Virginia v. Felts, 133 Fed. 85.

Conformity of procedure of federal courts in criminal cases to state practice in general see Federal Courts § 119.

[48] Virginia v. Felts, 133 Fed. 85. See Delaware v. Emerson, 8 Fed. 411 (where such procedure was followed).

[49] Bush v. Kentucky, 107 U. S. 110, 1 SCt 625, 27 L. ed. 354.

[50] Bush v. Kentucky, supra.

Power of state court to find new indictment after remand see infra § 343.

Remand of criminal prosecution upon quashal of indictment see infra § 315.

[51] See Virginia v. Felts, 133 Fed.

[§ 300] **R. Enforcement of Sentence in Criminal Prosecution.**[56] Where defendant in a criminal prosecution removed from a state court to a federal court[57] is convicted therein, it has been held that the state from the courts of which the cause was removed, rather than the federal government, should execute the sentence, inasmuch as the conviction is of an offense against the state law.[58] If the sentence be that defendant be executed, the court should direct that he be delivered to the sheriff of the county from whence the case came, for enforcement of the sentence;[59] and if the sentence be imprisonment the marshal of the court should be directed to deliver defendant to the sheriff for transportation to jail or to the state penitentiary, as the case may be.[60] Where a fine is imposed and is not paid, defendant should be delivered to the sheriff of the proper county for imprisonment;[61] but if the fine is paid forthwith, the clerk of the federal court should receive it and pay it over to the clerk of the state court from which the prosecution was removed,[62] reserving, however, so much of the sum paid as represents the costs in the federal court, if costs have been adjudged against defendant.[63] If the state authorities should decline to receive a convict directed by the federal court to be delivered to them, the marshal should be ordered to liberate him.[64]

[§ 301] **S. Costs.**[65] In accordance with the general rules governing the award of costs in suits in the federal courts,[66] the right to costs upon the final determination by a federal court of a cause previously removed thereto from a state court depends upon the state statutes and practice, unless a federal statute is applicable.[67] Thus where plaintiff's recovery is so small that under the law of the state he is not entitled to have costs awarded to him, they will not be taxed in his favor by the federal court;[68] and on the other hand costs will not be awarded in such case to defendant, since the statutes of the United States do not recognize, but by implication deny, the right of the losing party to costs.[69] E converso, although plaintiff recovers a sum so small that in an action originally brought in the federal court he would not be entitled to costs, they should nevertheless be awarded to him if, in the state court, had the cause remained there, he would have been entitled thereto.[70]

Costs accrued prior to removal.[71] It appears to be the more generally accepted rule that, if costs are awarded by the federal court, all costs accrued in the state court and under the state law before the removal of the cause to the federal court should be included in the award,[72] the acts of congress prescribing what costs may or may not be taxed being deemed to apply only to such costs as accrue in the federal court after removal;[73] but there is some authority, to the contrary, that items of costs accrued in the state courts are not to be taxed by the federal court unless they are such as would be taxable by it had they accrued therein.[74]

Costs accruing in state court after removal, in proceedings improperly taken therein,[75] will not be taxed by the federal court.[76]

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85 (applying the rule).

Enforcement of sentence see infra § 300.

[52] Illinois Cent. R. Co. v. Sheegog, 177 Fed. 756 [aff 217 U. S. 599, 30 SCt 696, 54 L. ed. 897].

Failure of removal papers to show jurisdiction on removal as ground for remand see infra § 303.

[53] Gunther v. Liverpool, etc., Ins. Co., 10 Fed. 830, 20 Blatchf. 390.

Interest on judgments in general see Damages §§ 136-149; Interest §§ 78-89; Judgments § 137.

[54] Missouri v. Taylor, 266 U. S. 200, 45 SCt 47, 69 L. ed. 247, 42 ALR 1232 [aff (Mo.) 251 SW 383].

[55] Nims v. Spurr, 138 Mass. 209.

Conformity of proceedings in federal court after judgment to state practice in general see Federal Courts § 155.

[56] **In general** see Criminal Law §§ 3119-3149.

[57] **Removal of criminal prosecutions:**
In general see supra § 12.
Against revenue officers and others see supra §§ 90-110.
Where defendant asserts or relies upon civil rights laws see supra §§ 111-117.

[58] Virginia v. Felts, 133 Fed. 85.

[59] Virginia v. Felts, supra.

[60] Virginia v. Felts, supra.

[61] Virginia v. Felts, supra.

[62] Virginia v. Felts, supra.

[63] Virginia v. Felts, supra.

Costs see infra § 301.

[64] Virginia v. Felts, 133 Fed. 85.

[65] **Cross references:**
Generally see Costs 15 C. J. p 1.
Conformity by federal court to state practice in matter of costs in general see Federal Courts § 157.
Costs on remand see infra § 336.
Security for costs see supra § 292.

[66] See Federal Courts § 157.

[67] See cases infra notes 68-70.

[68] Richter v. Magone, 47 Fed. 192. But compare Merritt v. Merritt, 20 F. (2d) 541 (holding that, although the state statute provided that plaintiff should not recover more costs than damages unless the damages recovered exceed a specified sum, and plaintiff's recovery was in an amount less than the sum so specified, he was nevertheless entitled to his costs, without limitation by the amount of his recovery).

[69] Richter v. Magone, 47 Fed. 192.

[70] Merritt v. Merritt, 20 F. (2d) 541; Kreager v. Judd, 5 Fed. 27; Field v. Schell, 9 F. Cas. No. 4,771, 4 Blatchf. 435.

[71] **Power of state court after removal to tax costs previously accrued** see supra § 266.

[72] Sawyer v. Williams, 72 Fed. 296; Cleaver v. Traders' Ins. Co., 40 Fed. 863; Wolf v. Connecticut Mut. L. Ins. Co., 30 F. Cas. No. 17,924, 1 Flipp. 377. See Pullman's Palace-Car Co. v. Washburn, 66 Fed. 790 [aff 76 Fed. 1005, 21 CCA 598] (holding that one who, under the state statute, became surety for the costs was liable for those accrued in the state court before removal and in the federal court after removal); Trinidad Asphalt Pav. Co. v. Robinson, 52 Fed. 347 (dictum); Young v. Merchants' Ins. Co., 29 Fed. 273 (applying the rule). Compare The Garden City, 27 Fed. 234 (to same effect as the rule stated in the text).

[73] Wolf v. Connecticut Mut. L. Ins. Co., 30 F. Cas. No. 17,924, 1 Flipp. 377.

[74] Chadbourne v. German-American Ins. Co., 31 Fed. 625, 24 Blatchf. 539; Clare v. National City Bank, 5 F. Cas. No. 2,793, 14 Blatchf. 445.

[75] **Effect of removal on further proceedings in state court** see supra § 266.

[76] Young v. Merchants' Ins. Co., 29 Fed. 273.

XVI. REMAND

[By Eustace W. Tomlinson]

[§ 302] **A. Necessity or Propriety.**[77]**—1. Remand of Entire Cause—a. In General.** Under the provision of the statute that if, in any suit removed from a state court to a federal court, it shall appear to the satisfaction of the federal court at any time after the removal that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of such court, or that the parties to the suit have been improperly joined, either as plaintiffs or defendants, for the purpose of creating a removable cause, the federal court shall proceed no further but shall dismiss the suit or remand it to the court from which it was removed, as justice may require,[78] a remand is necessary and proper where the jurisdiction of the federal court was wanting at the time of the removal,[79] or where, in consequence of proceedings had in the federal court after the removal, its jurisdiction has ceased to exist.[80]

Effect of consolidation with pending suit. The consolidation of a suit, after its removal, with another suit pending in the federal court does not affect the power and duty of such court to remand the removed cause upon determining that a remand is necessary or proper.[81]

Appeal from ruling on application to restrain further proceedings in state court does not affect the right of the federal court to remand the cause.[82]

[§ 303] **b. Want of Jurisdiction at Time of Removal**[83]**—(1) Cause Not within Removal Statutes.**[84] A cause removed from a state court to a federal court should be remanded to the court from whence it came if the facts of the cause do not bring it within the provisions of the statutes authorizing removal,[85] or if the jurisdictional facts do not appear from the removal papers and the record of the cause as it was at the time the removal was effected.[86]

Suit partially unremovable. Where a suit in which are joined prayers for an injunction and for a judgment for damages is not removable as to the former because the relief sought is merely ancillary to a prior action which was not removable,[87] the whole cause must be remanded even though as to the action for damages it would have been removable.[88] However, where proceedings to punish a party for contempt of the state court had been instituted therein before the removal, the federal court may retain the principal cause, if proper, but should remand the contempt proceedings to the state court, which alone has power to dispose of them.[89]

Existence of different ground for removal. While a petition for removal which on its face fails to show a right to remove the cause on the ground therein specified will not support a removal on another and different ground,[90] where the petition, considered with the record, is sufficient on its face to show a right to remove on the ground assigned, a subsequent showing or determination that such ground does not in fact exist will not necessitate the remand of the cause if on the face of the record or from the evidence adduced it appears that another ground of federal jurisdiction, on account of which the cause

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77. **Duty of court to remand sua sponte** see infra § 323.

78. USCA tit 28 § 80. See also USCA tit 28 § 71 (providing specifically for the remand of causes removed on allegations of prejudice or local influence).

[a] **Constitutionality of statute as to pending cases.**—Act of March 3, 1887, providing for the remand of suits pending in the federal court at the time of its enactment, was not unconstitutional, although a party had expended considerable sums of money in procuring evidence which would not be admissible in the state court after the remand, since the inferior federal courts owe their power and existence entirely to acts of congress and that body has full powers over them. Birdseye v. Shaeffer, 37 Fed. 821.

Dismissal for want of jurisdiction see supra § 295.

79. See infra §§ 303-307.

80. See infra §§ 308-318.

81. Colburn v. Hill, 101 Fed. 500, 41 CCA 467.

Consolidation of removed cause with cause originally brought in federal court see supra § 296.

82. National Farmers' Bank v. Moulton, 32 F. (2d) 78 [dism app 27 F. (2d) 403].

Restraining further proceedings in state court after removal see Courts § 654.

83. **Dismissal for want of jurisdiction** see supra § 295.

84. **Amendment of removal statutes rendering cause unremovable as necessitating remand** see infra § 318.

85. Minnesota v. Northern Securities Co., 194 U. S. 48, 24 SCt 593, 48 L. ed. 870; Ayers v. Wiswall, 112 U. S. 187, 5 SCt 90, 28 L. ed. 693; Mansfield, etc., R. Co. v. Swan, 111 U. S. 379, 4 SCt 510, 28 L. ed. 462; Wabash R. Co. v. Lindley, 29 F. (2d) 829; Dickinson Tire, etc., Co. v. Dickinson, 29 F. (2d) 493; Pacific Tel., etc., Co. v. Agnew, 2 F. (2d) 155; Charroin v. Romort Mfg. Co., 236 Fed. 1011; Jones v. Western Union Tel. Co., 233 Fed. 301; Miller v. Soule, 221 Fed. 493; Patton v. Cincinnati, etc., R. Co., 208 Fed. 29; Anderson v. Sharp, 189 Fed. 247; Katalla Co. v. Rones, 186 Fed. 30, 108 CCA 132 [aff 182 Fed. 946]; Thacker Coal, etc., Co. v. Norfolk, etc., R. Co., 171 Fed. 271; Yellow Aster Min., etc., Co. v. Crane Co., 150 Fed. 580, 80 CCA 566; Weldon v. Fritzlen, 128 Fed. 608 [rev on other grounds 135 Fed. 650, 68 CCA 288 (certiorari den 198 U. S. 586, 25 SCt 803, 49 L. ed. 1174)]; Broadway Ins. Co. v. Chicago Great Western R. Co., 101 Fed. 507; Barth v. Coler, 60 Fed. 466, 9 CCA 81; Indiana v. Chicago Tolleston Club, 53 Fed. 18; Imperial Refining Co. v. Wyman, 38 Fed. 574, 3 LRA 503; Gribble v. Pioneer Press Co., 15 Fed. 689, 5 McCrary 73; Teas v. Albright, 13 Fed. 406; Johnson v. Johnson, 13 Fed. 193; Emery v. Chicago, etc., R. Co., 186 Iowa 1156, 170 NW 540, 173 NW 12; Little Sandy Cooperage Co. v. Chesapeake, etc., R. Co., 185 Ky. 161, 214 SW 912.

[a] **In causes removed on account of prejudice or local influence** (1) the statute specifically provides that unless it shall appear to the satisfaction of the federal court that the removing party will not be able to obtain justice in the state court, the cause shall be remanded thereto. USCA tit 28 § 71. (2) Removal on account of prejudice or local influence see supra §§ 194-204.

Remand by court sua sponte where jurisdiction does not exist see infra § 323.

What causes are removable see supra §§ 9-204.

86. Anderson v. Trotter, 32 F. (2d) 389; Consolidated Independent School Dist. v. Cross, 7 F. (2d) 491; Miller v. Soule, 221 Fed. 493; Mills v. Newell, 41 Fed. 529; Emery v. Chicago, etc., R. Co., 186 Iowa 1156, 170 NW 540, 173 NW 12.

Remand of cause not removed in proper mode see infra § 304.

Removability as dependent upon state of record at time of proceedings to remove see supra § 7.

87. See supra § 25.

88. Ladd v. West, 55 Fed. 353.

89. Voorhees v. Albright, 28 F. Cas. No. 16,999.

Power of federal court to punish for contempt of state court see supra § 285.

Severance of cause and remand of part see infra §§ 321, 322.

90. See supra § 237.

might have been removed, does exist;[91] but a removing defendant cannot be permitted to abandon the ground upon which he relied for removal and assert an inconsitent case, as against a motion to remand the cause.[92]

[§ 304] **(2) Failure To Comply with Statutory Procedure for Removal.**[93] Since the removal of a cause from a state court to a federal court can be effected only by compliance with the procedure prescribed by statute,[94] a failure to comply therewith in a material respect necessitates the remand of a cause colorably removed.[95] Where there are no jurisdictional objections, however, to the removal and retention of the cause,[96] a remand is not made necessary by mere irregularities in the removal proceedings which can be remedied or which have worked no hardship upon the adverse party,[97] as by the fact that the petition for removal was not verified[98] or its verification is insufficient,[99] or that the removal bond is defectively executed,[1] or the sureties on the bond are insufficient,[2] or by a defect in the form of the bond,[3] or by an omission from, or defect in, the transcript of the record of the state court.[4]

[§ 305] **(3) Late Removal or Filing of Transcript.**[5] Where proceedings to effect the removal of a cause from a state court to a federal court were not taken at or within the time prescribed by statute,[6] the cause should be remanded.[7] The remand of a cause, however, on account of a failure to perfect the removal by filing a transcript of the record of the state court at the proper time[8] is a matter within the discretion of the court,[9] and it may refuse to remand the cause on that ground,[10] since it has power to excuse the delay or to permit the transcript to be filed at a later time.[11]

[§ 306] **(4) Removal to Improper District or Division.**[12] When a cause commenced in a state court has been removed therefrom to a federal court of an improper district,[13] or to an improper division of the proper district court,[14] it should be remanded.

[§ 307] **(5) Removal after Waiver of Right.** Where the right of a party to remove a cause from a state court to a federal court had been waived by him prior to the time he undertook to effect the removal,[15] the cause should be remanded.[16]

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[91] General Inv. Co. v. Lake Shore, etc., R. Co., 269 Fed. 235 [mod on other grounds 260 U. S. 261, 43 SCt 106, 67 L. ed. 244]; Rones v. Katalla Co., 182 Fed. 946 [aff 186 Fed. 30, 108 CCA 132]; Colasurdo v. New Jersey Cent. R. Co., 180 Fed. 832 [aff 192 Fed. 901, 113 CCA 379]; Neale v. Foster, 31 Fed. 53, 12 Sawy. 424. See to same effect Sutton v. Pacific SS. Co., 3 F. (2d) 72. But see People's U. S. Bank v. Goodwin, 160 Fed. 727 (holding that a cause removed under a petition alleging that it arose under the constitution or laws of the United States could not be retained by the federal court on the ground that it was a suit against revenue officers).

[a] **Thus** (1) where in a cause removed to a federal court on the ground of diversity of citizenship, it is shown by the record that the cause arises under a statute of the United States, the fact that the citizenship is not diverse will not necessitate a remand, but the court may retain the suit, in view of the federal question. Colasurdo v. New Jersey Cent. R. Co., 180 Fed. 832 [aff 192 Fed. 901, 113 CCA 379]. (2) Although the petition for the removal of a cause alleged that plaintiff was a citizen of a different state from that of which defendant is a citizen, the fact that evidence produced in the federal court shows that plaintiff is an alien does not compel the remand of the cause, since the federal court has jurisdiction under either circumstance. Rones v. Katalla Co., 182 Fed. 946 [aff 186 Fed. 30, 108 CCA 132].

Issues of fact on allegations of removal petition see infra §§ 328-332.

[92] Mayer v. Denver, etc., R. Co., 41 Fed. 723.

[93] **Late effectuation or perfection of removal** see infra § 305.

[94] See supra § 235.

Proceedings for removal in general see supra §§ 236-269.

[95] Waverly Stone, etc., Co. v. Waterloo, etc., R. Co., 239 Fed. 561; Loland v. Northwest Stevedore Co., 209 Fed. 626; Goins v. Southern Pac. Co., 198 Fed. 432. But see Higson v. North River Ins. Co., 184 Fed. 165 (dictum, in a cause conceded to be within the removal statutes but where the statutory procedure for effecting the removal had not been complied with, that the statute providing for a remand had no application, since the cause was never removed to or brought within the jurisdiction of the federal court).

Remand by court sua sponte of cause not properly removed see supra § 323.

[96] **Remand of cause not within removal statutes** see supra § 303.

[97] Kidd v. National F. Ins. Co., 32 F. (2d) 935; Cropsey v. Sun Printing, etc., Assoc., 215 Fed. 132; Northern Pac. Terminal Co. v. Lowenberg, 18 Fed. 339, 9 Sawy. 348; Woolridge v. McKenna, 8 Fed. 650. And see cases infra notes 98-4.

Remand for lateness of filing of transcript see infra § 305.

[98] Allen v. Ryerson, 1 F. Cas. No. 235, 2 Dill. 501.

Verification of removal petition see supra § 237.

[99] Zumbrunn v. Schwartz, 17 F. (2d) 609; Floyd v. Floyd, 11 F. (2d) 841; McMaster v. Chevrolet Motor Co., 3 F. (2d) 469.

[1] Chambers v. McDougal, 42 Fed. 694; Kain v. Texas Pac. R. Co., 2 F. Cas. No. 7,596.

Bond for removal in general see supra §§ 245-248.

[2] Chambers v. McDougal, 42 Fed. 694; Van Allen v. Atchison, etc., R. Co., 3 Fed. 545, 1 McCrary 598; Dennis v. Alachua County, 7 F. Cas. No. 3,791, 3 Woods 683.

[3] Miller v. Soule, 221 Fed. 493; Baker v. Peterson, 2 F. Cas. No. 776, 4 Dill. 562 note; Dennis v. Alachua County, 7 F. Cas. No. 3,791, 3 Woods 683.

[4] Miller v. Soule, 221 Fed. 493; Cook v. Whitney, 6 F. Cas. No. 3,166, 3 Woods 715; Dennis v. Alachua County, 7 F. Cas. No. 3,791, 3 Woods 683.

Remedy for defect in transcript see supra § 271.

[5] **Remand for failure to comply with statutory procedure in general** see supra § 304.

[6] **Time for removal** see supra §§ 205-211.

[7] Ford v. Roxana Petroleum Corp., 31 F. (2d) 765; Bowers v. Supreme Council A. L. H., 45 Fed. 81; Keeney v. Roberts, 39 Fed. 629, 12 Sawy. 39.

Remand by court sua sponte for late removal see infra § 323.

[8] **Time for filing transcript** see supra § 273.

[9] St. Paul, etc., R. Co v. McLean, 108 U. S. 212, 2 SCt 498, 27 L. ed. 703 [aff 16 F. Cas. No. 8,892, 16 Blatchf. 309]; McGregor v. McGillis, 30 Fed. 388; Hall v. Brooks, 14 Fed. 113, 21 Blatchf. 167; Kidder v. Featteau, 2 Fed. 616, 1 McCrary 323; Bright v. Milwaukee, etc., R. Co., 4 F. Cas. No. 1,877, 14 Blatchf. 214; Jackson v. Mutual L. Ins. Co., 13 F. Cas. No. 7,141, 3 Woods 413.

[10] St. Paul, etc., R. Co. v. McLean, 108 U. S. 212, 2 SCt 498, 27 L. ed. 703; Baltimore, etc., R. Co. v. Koontz, 104 U. S. 5, 26 L. ed. 643; Lucker v. Phœnix Assur. Co., 66 Fed. 161; McGregor v. McGillis, 30 Fed. 388; Rowell v. Hill, 28 Fed. 433; Winchell v. Coney, 27 Fed. 482; Hall v. Brooks, 14 Fed. 113, 21 Blatchf. 167; Woolridge v. McKenna, 8 Fed. 650; Kidder v. Featteau, 2 Fed. 616, 1 McCrary 323; Bright v. Milwaukee, etc., R. Co., 4 F. Cas. No. 1,877, 14 Blatchf. 214.

[11] See supra § 273.

[12] **To what district and division of the federal court cause should be removed** see supra § 264.

[13] Lockport Glass Co. v. H. L. Dixon Co., 262 Fed. 976; New York Coal Co. v. Sunday Creek Co., 230 Fed. 295; Eddy v. Chicago, etc., R. Co., 226 Fed. 120; Pavick v. Chicago, etc., R. Co., 225 Fed. 395; St. John v. U. S. Fidelity, etc., Co., 213 Fed. 685.

[14] Gopcevic v. California Packing Corp., 272 Fed. 994.

[§ 308] **c. Acts and Proceedings after Removal**[17]**—(1) Disposition of Federal Question.** A cause removed from a state court to a federal court because it arose under the constitution or a law or treaty of the United States should be remanded when the only federal question has been separately disposed of upon a demurrer[18] or eliminated by amendment of the pleadings,[19] and other questions remain in the case for decision.

[§ 309] **(2) Dismissal or Discontinuance as To Removing Defendant.** When a cause has been removed from a state court to a federal court by less than the whole number of defendants, as on account of local prejudice or influence affecting the removing defendants[20] or the existence of a separable controversy as to them,[21] a dismissal,[22] settlement,[23] or discontinuance[24] of the cause in the federal court as to such removing defendants, or an amendment of plaintiff's pleadings which leaves nothing in the suit affecting their rights,[25] renders a remand necessary and proper, since the cause is no longer one properly within the jurisdiction of the federal court.

[§ 310] **(3) Reduction of Amount in Controversy.** Although a cause removed from a state court to a federal court is one in which the sum or value in controversy is material to the right of removal,[26] a reduction of such sum or value, after the removal, to an amount not exceeding that specified by the statute will not justify a remand,[27] unless it is clearly shown that the amount shown by the pleadings to be in controversy before such reduction was excessive as the result of fraud or mistake.[28] So, an adjudication sustaining a set-off, counterclaim, or partial defense, so as to reduce the sum recoverable below the statutory amount, is no reason for remanding the cause, provided it does not appear that the original demand was exaggerated in bad faith.[29] Similarly, in a suit praying damages in a sum less than the jurisdictional amount and an injunction, the dismissal of the cause of action for injunction has been held not to justify a remand, in the absence of bad faith in the joinder;[30] but it has been held that where a cause of action for an amount in excess of that specified by statute has been joined in the same suit with another cause involving an amount less than that so specified, and a demurrer to the former cause is sustained, the suit must be remanded.[31]

[§ 311] **(4) Appeal from Order of Removal.**[32] The taking or perfection of an appeal from the order of a state court authorizing or directing the removal of a cause from such court to a federal court does not make the remand of such cause by the federal court necessary or proper.[33]

[§ 312] **(5) Joinder of New Parties.** After the removal of a cause from a state court to a federal court, the induction into the suit, whether by amendment of the pleadings,[34] by the filing of a cross bill,[35] or by intervention,[36] of new and additional parties, either plaintiffs or defendants, ordinarily does not necessitate or justify a remand of the cause, even though the citizenship of such new parties is the same as that of an adverse party, in a cause removed on the ground of difference of citizenship,[37] or their claims do not exceed the jurisdictional sum, in a cause in which the amount or value in controversy is material,[38] and even though they file cross bills against others of the parties and strangers to the suit, necessitating bringing in the latter also as parties.[39] Where, however, such new and additional parties were indispensable to the suit as originally commenced, and were not joined thereon, it should be remanded after they have been brought in if, with them as parties, the jurisdiction of the federal court does not then properly exist.[40]

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[15] **Waiver of right to remove** see supra §§ 5, 6.

[16] In re Seattle, 237 Fed. 100; American Bonding Co. v. Mills, 152 Fed. 107, 81 CCA 325; West Virginia v. King, 112 Fed. 369; Case v. Olney, 106 Fed. 433.

[17] **Proceedings in federal court after removal in general** see supra §§ 275-301.

[18] Hamblin v. Chicago, etc., R. Co., 43 Fed. 401. See Lowry v. Chicago, etc., R. Co., 46 Fed. 83 (apparently recognizing the rule).

[19] Fischer v. Star Co., 227 Fed. 955.

[20] **Removal on account of local prejudice or influence** see supra §§ 194-204.

[21] **Removal where separable controversy exists** see supra §§ 180-193.

[22] Texas Transp. Co. v. Seelingson, 122 U. S. 519, 7 SCt 1261, 30 L. ed. 1150; Youtsey v. Hoffman, 108 Fed. 699. Compare Anderson v. United Realty Co., 222 U. S. 164, 32 SCt 50, 56 L. ed. 144 [aff 79 Oh. St. 23, 86 NE 644, 51 LRANS 477] (holding that such dismissal, when accompanied by the withdrawal of the removal petition by the removing defendant, was the equivalent of a remand and restored the jurisdiction of the state court).

Dismissal by plaintiff after filing of counterclaim by defendant as compelling remand on account of reduction of amount in controversy see infra § 310 text and note 27 [b].

[23] Torrence v. Shedd, 144 U. S. 527, 12 SCt 726, 36 L. ed. 528.

Removal after disposition by federal court of:

Separable controversy see infra § 322.

Suit as to defendants affected by prejudice or local influence see infra § 321.

[24] Texas Transp. Co. v. Seelingson, 122 U. S. 519, 7 SCt 1261, 30 L. ed. 1150; Bane v. Keefer, 66 Fed. 610; Bacon v. Felt, 38 Fed. 870; Ryan v. Young, 21 F. Cas. No. 12,188, 9 Biss. 63.

[25] Highway Constr. Co. v. McClelland, 15 F. (2d) 187 [den reh 14 F. (2d) 406]; Iowa Homestead Co. v. Des Moines Nav., etc., Co., 8 Fed. 97, 3 McCrary 95.

[26] See supra § 28.

[27] U. S.—Kirby v. American Soda Fountain Co., 194 U. S. 141, 24 SCt 619, 48 L. ed. 911; Kanouse v. Martin, 15 How. 198, 14 L. ed. 660; Twin Hills Gasoline Co. v. Bradford Oil Corp., 264 Fed. 440; Palmer v. Delaware, etc., R. Co., 222 Fed. 461; Donovan v. Dixieland Amusement Co., 152 Fed. 661; Peterson v. Chicago, etc., R. Co., 108 Fed. 561; Hayward v. Nordberg Mfg. Co., 85 Fed. 4, 29 CCA 438; Riggs v. Clark, 71 Fed. 560, 18 CCA 242; Waite v. Phœnix Ins. Co., 62 Fed. 769; Maine v. Gilman, 11 Fed. 214; Ladd v. Tudor, 14 F. Cas. No. 7,975, 3 Woodb. & M. 325; McGinnity v. White, 16 F. Cas. No. 8,802, 3 Dill. 350; Roberts v. Nelson, 20 F. Cas. No. 11,907, 8 Blatchf. 74, 40 HowPr (N. Y.) 387; Wright v. Wells, 30 F. Cas. No. 18,101, Pet. C. C. 220; Zinkeisen v. Hufschmidt, 30 F. Cas. No. 18,214.

Ga.—Cumberland Gap Bldg., etc., Assoc. v. Wells, 99 Ga. 228, 25 SE 246; Chattanooga Boiler, etc., Co. v. Robinson, 14 Ga. A. 73, 80 SE 299.

Ill.—Louisville, etc., R. Co. v. Roehling, 11 Ill. A. 264.

Kan.—Chicago, etc., R. Co. v. Stone, 70 Kan. 708, 79 P 655.

N. Y.—Geiger v. Union Mut. L. Ins. Co., 1 NYCityCt 237.

S. C.—Ray v. Southern R. Co., 77 S. C. 103, 57 SE 636.

Compare Spiers v. Halsted, 74 N. C. 620 (holding it proper to permit plaintiff to amend his pleadings in the state court by reducing the sum prayed to an amount less than that specified by statute, although defendant had already filed a petition for removal; but the effect of such petition was not considered by the court).

And see cases infra notes 29, 30.

[a] **In Porto Rico** the rule is the same in a cause removed from an insular court to the federal court. Guasp v. Construction Supplies Corp., 12 Porto Rico Fed. 549.

[b] **Rule applied.**—Where, after the removal of a cause, defendant filed a counterclaim, the subsequent dismissal by plaintiff of his complaint did not compel the remand of the cause although the amount in controversy under defendant's counterclaim was less than the amount specified by statute. Kirby v. American Soda Fountain Co., 194 U. S. 141, 24 SCt 619, 48 L. ed. 911.

Necessity that amount in controversy exceed that specified by statute see supra § 28.

[28] Burmon v. Luckenbach SS. Co., 39 F. (2d) 619; Hughes v. Peper Tobacco Warehouse Co., 126 Fed. 687.

[29] Washington County v. Williams, 111 Fed. 801, 49 CCA 621; Stillwell-Bierce, etc., Co. v. Williamston Oil, etc., Co., 80 Fed. 68; Wheeler Bliss Mfg. Co. v. Pickham, 69 Fed. 419 [aff 77 Fed. 663, 23 CCA 391 (certiorari den 168 U. S. 708 mem, 18 SCt 945 mem, 42 L. ed. 1211 mem)]; Peeler v. Lathrop, 48 Fed. 780, 1 CCA 93; Lozano v. Wehmer, 22 Fed. 755.

[30] Jellison v. Krell Piano Co., 246 Fed. 509.

[31] Jones v. Western Union Tel. Co., 233 Fed. 301.

[32] **Appealability of order of state court authorizing or directing removal** see Appeal and Error § 300.

[33] Remsen v. C. F. Blanke Tea, etc., Co., 189 Fed. 418.

Order of state court authorizing or directing removal see supra § 255.

[§ 313] **(6) Failure of Defendant To Plead or Answer.**[41] It has been held that where a defendant by whom a cause has been removed from a state court to a federal court fails to plead or answer, where such pleading is due from him, at or within the proper time,[42] the cause should be remanded,[43] provided that, at the time the motion to remand is made, the time for pleading has expired[44] and no pleading, whether timely or not, is on file;[45] but there is authority to the contrary.[46]

[§ 314] **(7) Interposition of Defense Not Cognizable in State Court.** While a federal court cannot acquire jurisdiction, by removal from a state court, of a cause not within the jurisdiction of the court from which it was removed,[47] and must dismiss it if removal is effectuated,[48] the fact that, after the removal of a cause which was within the jurisdiction of the state court, defendant interposes a defense of which such state court could not have taken cognizance does not prevent the retention of the cause by the federal court.[49]

[§ 315] **(8) Quashal of Indictment in Criminal Prosecution.** If the indictment in a criminal prosecution removed from a state court to a federal court[50] is quashed by the federal court after the removal,[51] the prosecution should be remanded.[52]

[§ 316] **(9) Change of Citizenship.** Where a cause has been removed from a state court to a federal court on the ground of a difference of citizenship between the parties,[53] a subsequent change of citizenship so that the requisite difference no longer exists,[54] including the change effected by the consolidation of a foreign corporation with a domestic one,[55] does not render the remand of the cause necessary or proper.

[§ 317] **(10) Receivership of Defendant's Property.** It has been held that where, after the remov-

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34. Phelps v. Oaks, 117 U. S. 236, 6 SCt 714, 29 L. ed. 888; Stewart v. Dunham, 115 U. S. 61, 5 SCt 1163, 29 L. ed. 329; Kelly v. Alabama Quenelda Graphite Co., 34 F. (2d), 790; Porto Rico v. Fortuna Estates, 279 Fed. 500 [certiorari den 259 U. S. 587 mem, 42 SCt 590 mem, 66 L. ed. 1077 mem]; Probst v. Cowen, 91 Fed. 929. But see Fisk v. Union Pac. R. Co., 9 F. Cas. No. 4,829, 8 Blatchf. 299 (holding that a cause cannot be treated as removed as to one who was not a party at the time of removal and who has never petitioned for removal, and therefore must be remanded when an additional party is brought in by a change in the pleadings). Compare Gainesville v. Brown-Crummer Inv. Co., 20 F. (2d) 497 [rev on other grounds 277 U. S. 54, 48 SCt 454, 72 L. ed. 781] (holding that, the federal court was without jurisdiction of parties added, under the circumstances of the case, but that its jurisdiction as to the removing party was not affected by their joinder).

35. Jackson v. Pearson, 60 Fed. 113.

36. Stewart v. Dunham, 115 U. S. 61, 5 SCt 1163, 29 L. ed. 329; Clarke v. Eureka County Bank, 116 Fed. 534; Graham v. Boston, etc., R. Co., 14 Fed. 753 [aff 118 U. S. 161, 6 SCt 837, 29 L. ed. 934].

37. Phelps v. Oaks, 117 U. S. 236, 6 SCt 714, 29 L. ed. 888; Stewart v. Dunham, 115 U. S. 61. 5 SCt 1163, 29 L. ed. 329; Clarke v. Eureka County Bank, 116 Fed. 534; Probst v. Cowen, 91 Fed. 929; Graham v. Boston, etc., R. Co., 14 Fed. 753 [aff 118 U. S. 161, 6 SCt 837, 29 L. ed. 934]. Contra Forest Oil Co. v. Crawford, 101 Fed. 849, 42 CCA 54.

Removal on account of difference of citizenship see supra §§ 120–179.

38. Handley v. Stutz, 137 U. S. 366, 11 SCt 117, 34 L. ed. 706; Clarke v. Eureka County Bank, 116 Fed. 534; Bidwell v. Huff, 103 Fed. 362; National Bank of Commerce v. Allen, 90 Fed. 545, 33 CCA 169; New York Silk Mfg. Co. v. Paterson Second Nat. Bank, 10 Fed. 204.

Amount or value in controversy as material to right to remove see supra §§ 28–45.

39. Lilienthal v. McCormack, 117 Fed. 89, 54 CCA 475; Iowa Homestead Co. v. Des Moines Nav., etc., R. Co., 8 Fed. 97, 3 McCrary 95.

40. Perry v. Clift, 32 Fed. 801.

[a] **Thus,** where a bill in equity showed on its face that the heirs of a designated person were necessary parties, and they were made defendants only by description as such heirs, without any allegation that effort had been made to ascertain their names or residences, and after removal of the cause on account of diversity of citizenship founded upon the insufficiency of the joinder, was sustained with leave to amend, an amendment making such heirs parties by name and showing that their citizenship and residence was the same as that of plaintiff necessitates the remand of the cause, the amendment being compulsory and showing that the court had no jurisdiction of the suit at the time of the removal; thus distinguishing the cause from one which was properly removed and into which additional parties are afterward brought. Perry v. Clift, 32 Fed. 801.

41. Failure of plaintiff to plead or file copy of pleadings as ground for dismissal see supra § 295.

42. Time to proceed and plead in federal court see supra § 277.

43. Egger v. Julian Petroleum Corp., 22 F. (2d) 714; Virginia Bridge, etc., Co. v. U. S. Shipping Bd. Emergency Fleet Corp., 300 Fed. 249. See Wena Lumber Co. v. Continental Lumber Co., 270 Fed. 795 (holding that the court, in the exercise of a legal discretion, may remand the cause in such case).

44. Brown v. Empire Gas, etc., Co., 26 F. (2d) 100.

Extension of time to plead see supra § 277.

45. Brown v. Empire Gas. etc., Co., 26 F. (2d) 100.

46. Kidd v. National F. Ins. Co., 32 F. (2d) 935.

47. See supra § 27.

48. See supra § 295.

49. Lehigh Valley R. Co. v. Rainey, 99 Fed. 596.

50. Removal of criminal prosecutions:
In general see supra § 12.
Against revenue officers and others see supra §§ 90–110.
Where defendant asserts or relies upon civil rights laws see supra §§ 111–117.

51. Quashal of indictments in general see Indictments and Informations §§ 367–396.

52. Bush v. Kentucky, 107 U. S. 110, 1 SCt 625, 27 L. ed. 354.

[a] **Thus,** after circuit court of the United States, to which a prosecution has been removed, has quashed the indictment it has no jurisdiction to find a new indictment; but it may remand the prisoner to the custody of the state court. Bush v. Kentucky, 107 U. S. 110, 1 SCt 625, 27 L. ed. 354.

53. Difference of citizenship as ground for remand see supra §§ 120–179.

54. Haracovic v. Standard Oil Co., 105 Fed. 785; Chicago, etc., R. Co. v. Minnesota, etc., R. Co., 29 Fed. 337.

Time as of which difference of citizenship must exist to authorize removal see supra § 177.

55. Chicago, etc., R. Co. v. Minnesota, etc., R. Co., 29 Fed. 337.

Receivership pending at time of removal see supra § 284.

al of a cause from a state court to a federal court, all the property of defendant is placed in the hands of a receiver appointed by the state court in a proceeding brought for that purpose, so that any judgment rendered in the federal court would have to be referred to the state court for payment and a conflict of jurisdiction might arise from the retention of the cause by the federal court, it should be remanded.[56]

[§ 318] **(11) Amendment of Removal Statutes.** Where a cause duly removed from a state court to a federal court was within the jurisdiction of the federal court under the removal statutes as they stood at the time of the removal, a remand is not necessitated by a change in the statutes, subsequently effective, under which the cause would not be removable.[57]

[§ 319] **d. Consent of Parties as Authorizing Remand.** After the removal of a cause from a state court to a federal court, and the divestment of the state court's jurisdiction,[58] a remand of the cause cannot be necessitated or justified by the mere consent or agreement of the parties,[59] and their joinder in a motion for a remand will not authorize the court to order it.[60]

[§ 320] **e. Waiver of Grounds for Remand.** Since the right to remove a cause from a state court to a federal court, and the jurisdiction of the federal court on such removal, cannot be created or conferred by consent,[61] the right to have a remand of a cause on the ground that it was not removable and that the federal jurisdiction thereof is wanting cannot be waived,[62] although acquiescence in the removal may strengthen inferences from the record of the existence of the facts necessary to confer jurisdiction.[63] So an appearance in or other apparent submission or consent to the jurisdiction of the federal court,[64] or failure to appeal from an order refusing a remand,[65] does not waive the right to have the cause remanded if the jurisdiction of the court is lacking. Where there is no jurisdictional objection, however, to the removal of the cause, the right to move to remand it because of irregularities in the removal proceedings may be lost by waiver, acquiescence, or consent.[66] Thus the interposition of a motion to remand merely on jurisdictional grounds,[67] or delay or laches in moving to remand,[68] provided it is such as might reasonably be said to estop plaintiff from denying that he has consented to the federal jurisdiction,[69] or other acts inconsistent with an intention to object to the removal or to move for a remand,[70] such as answering,[71] joining in making up issues,[72] or other further proceedings[73] in the cause on its merits, noting it for trial,[74] or engaging in a trial,[75] constitute a waiver of irregularities in the removal proceedings not amounting to a defect in the jurisdiction, and bar the right to move thereafter for a remand on account thereof,[76] unless such acts are done under an express agreement or stipulation that they shall not effect such waiver.[77] A special appearance in the federal court for the sole purpose of moving for a remand is not, however, a waiver of any of plaintiff's rights;[78] and a failure to object in the state court to the regularity of the removal proceedings does not waive the right to move in the federal court to remand the cause.[79]

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[56] Goldberg v. German Ins. Co., 152 Fed. 831.

[57] Lincoln v. Robinson, 194 Fed. 571.

[a] **Rule applied.**—Where a cause involving the sum of $2376.12 had been removed from a state court to a federal court, and thereafter the Judicial Code became effective, under § 24 of which the federal district court was given jurisdiction of those suits only in which the amount in controversy exceeds $3000.00, and by § 28 the removal of suits of which the court would have had original jurisdiction was authorized, such cause so removed was not required to be remanded because of such provisions, especially in view of Judicial Code § 299, providing that the repeal or amendment of existing laws by the Code should not affect any suit pending at the time it took effect, and notwithstanding Judicial Code § 37, providing for a remand whenever it shall appear to the federal court that the suit does not involve a dispute or controversy within its jurisdiction. Lincoln v. Robinson, 194 Fed. 571.

Remand of cause not within removal statutes at time of removal see supra § 303.

[58] **Removal as divesting jurisdiction of state court** see supra § 266.

[59] Lawton v. Blitch, 30 Fed. 641. But see Anderson v. United Realty Co., 222 U. S. 164, 32 SCt 50, 56 L. ed. 144 [aff 79 Oh. St. 23, 86 NE 644, 51 LRANS 477] (holding that where one of several defendants had filed a petition for removal on the ground of the existence of a separable controversy, his consent to the withdrawal of such petition, as recited in a formal order dismissing the cause as to such defendant at the instance of plaintiff in consideration of such withdrawal, amounted to a waiver of a former remand by the federal court and the state court recovered jurisdiction over the suit as to the remaining parties).

Withdrawal of petition for removal as restoring jurisdiction of state court see supra § 266.

[60] Lawton v. Blitch, 30 Fed. 641.

[61] See supra § 2.

[62] In re Winn, 213 U. S. 458, 29 SCt 515; 53 L. ed. 873. And see cases infra notes 64, 65.

Want of jurisdiction as necessitating remand see supra §§ 303-307.

[63] Gainesville v. Brown-Crummer Inv. Co., 277 U. S. 54, 48 SCt 454, 72 L. ed. 781 [rev 20 F. (2d) 497].

[64] Gainesville v. Brown-Crummer Inv. Co., 277 U. S. 54, 48 SCt 454, 72 L. ed. 781 [rev 20 F. (2d) 497]; In re Winn, 213 U. S. 458, 29 SCt 515, 53 L. ed. 873; Mullendore v. American Surety Co., 27 F. (2d) 572; Guaranty Trust Co. v. McCabe, 250 Fed. 699 [certiorari den 247 U. S. 505 mem, 38 SCt 427 mem, 62 L. ed. 1240 mem]; Burnett v. Spokane, etc., R. Co., 210 Fed. 94; Hubbard v. Chicago, etc., R. Co., 176 Fed. 994; Lomax v. Foster Lumber Co., 174 Fed. 959, 99 CCA 463; State v. Risjord, 177 Wis. 290, 188 NW 495. But see Fienup v. Kleinman, 5 F. (2d) 137 (holding that, by applying for and obtaining an interlocutory order in the cause, and by taking no action looking toward a remand for eight months after removal, plaintiff waived his right to move to remand the cause).

[65] Shohoney v. Quincy, etc., R. Co., 223 Mo. 649, 122 SW 1025.

Appeal from, and review of, refusal to remand see infra §§ 340, 341.

[66] Noethe v. Mann, 27 F. (2d) 451. And see cases infra notes 67-75.

[67] Burke v. Monumental Div. No. 52 B. L. E., 273 Fed. 707.

[68] French v. Hay, 22 Wall. (U. S.) 238, 22 L. ed. 854; Guarantee Co. of North Dakota v. Hanway, 104 Fed. 369, 44 CCA 312; Wyly v. Richmond, etc., R. Co., 63 Fed. 487; Baltimore, etc., R. Co. v. Ford, 35 Fed. 170; Miller v. Kent, 18 Fed. 561, 20 Blatchf. 508; Hervey v. Illinois Midland R. Co., 3 Fed. 707.

[69] Noethe v. Mann, 27 F. (2d) 451. See McGregor v. McGillis, 30 Fed. 388 (holding that a delay of fifteen months by plaintiff before moving to remand a cause on the ground that defendant had not filed a transcript of the record could not be held to constitute a waiver of the right to a remand, since defendant should not be allowed to escape the effect of his own laches by urging that plaintiff should have sooner complained of them).

[a] **Ignorance of construction of statute as to time for removal.**—Where plaintiff, in ignorance of the construction given by the supreme court to a statutory provision relative to the time for removal of a cause, delayed filing a motion to remand the same on the ground that it had not been removed in time, he should not be deemed to have waived the right to move for a remand by such delay. Collins v. Stott, 76 Fed. 613.

[70] Mellon v. International Shoe Co., 32 F. (2d) 390; General Inv. Co. v. Lake Shore, etc., R. Co., 250 F. 160, 162 CCA 296 [aff 226 Fed. 976]. And see cases infra notes 71-75.

[71] Roman v. Lehigh Valley Coal Co., 241 Fed. 595.

[72] Kreigh v. Westinghouse, 214 U. S. 249, 29 SCt 619, 53 L. ed. 984 [rev 152 Fed. 120, 81 CCA 338, 11 LRANS 684].

[73] Hagerla v. Mississippi River Power Co., 202 Fed. 776; Enders v. Supreme Lodge K. & L. of H., 176 Fed. 832; Wyly v. Richmond, etc., R. Co., 63 Fed. 487; Abranches v. Schell, 1 F. Cas. No. 21, 4 Blatchf. 256.

[74] Mellon v. International Shoe Co., 32 F. (2d) 390; Baltimore, etc., R. Co. v. Ford, 35 Fed. 170.

[75] Toledo, etc., R. Co. v. Perenchio, 205 Fed. 472, 123 CCA 540; Guar-

[§ 321] **2. Severance of Cause and Remand of Part[80]—a. Cause Removed on Account of Prejudice or Local Influence.[81]** Under the express provisions of the statute permitting the removal of a cause from a state court to a federal court by any defendant when it shall be made to appear that on account of prejudice or local influence he will not be able to obtain justice in the state court,[82] a cause so removed may be severed, and remanded so far as it relates to the defendant or defendants other than the one by whom the removal was effected, if it further appears that the suit can be fully and justly determined as to them in the state court, without being affected by such prejudice or local influence, and that no party will be prejudiced by a separation of the parties.[83] The cause cannot be remanded as to such other defendants, however, if a trial as to them will be affected by such prejudice or local influence against the removing defendant;[84] and so if it cannot be tried without involving his acts or liability a remand is not justified.[85]

[§ 322] **b. Cause Involving Separable Controversies.[86]** While the removal of a cause from a state court to a federal court on account of the existence in such cause of a separable controversy transfers the entire suit,[87] if such separable controversy is not so intimately related to the other controversy or controversies in the cause and the parties interested therein as to make it necessary or desirable under general legal principles to try them together, a severance, may and should be had, and such other controversy or controversies remanded to the state court,[88] in the same manner as is authorized to be done in causes removed on account of local prejudice.[89] The federal court has power, however, to retain the whole suit if full, fair, and complete trial of the removable controversy makes it necessary,[90] and the provisions of state statutes and the state constitution for a local trial must yield so far as necessary, the federal jurisdiction as established by the federal constitution taking precedence, in view of the principle that the constitution is the supreme law of the land.[91]

[§ 323] **B. Remand by Court Sua Sponte.** Where a cause removed from a state court to a federal court is proper to be remanded, as being a cause not within the removal statutes or not properly removed,[92] the district court to which the cause was removed,[93] or an appellate federal court to which an appeal is taken from a judgment or decree rendered in the cause by the district court,[94] has the power and is

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antee Co. of North Dakota v. Hanway, 104 Fed. 369, 44 CCA 312; Guarantee Co. of North America v. Mechanics Sav. Bank, etc., Co., 80 Fed. 766, 26 CCA 146 [rev on other grounds 173 U. S. 582, 19 SCt 551, 43 L. ed. 818]; Neale v. Foster, 31 Fed. 53, 12 Sawy. 424.

[76] **Procedural irregularities as necessitating remand** see supra § 304.

[77] Rubber, etc., Harness Trimming Co. v. John L. Whiting-J. J. Adams Co., 210 Fed. 393.

[78] Higson v. North River Ins. Co., 184 Fed. 165.

[79] Gopcevic v. California Packing Corporation, 272 Fed. 994.

[80] **Remand of contempt proceedings and retention of principal suit** see supra § 303 text and note 89.

[81] **Effect of dismissal or discontinuance as to or settlement with defendant affected by prejudice or influence** see supra § 309.

[82] USCA tit 28 § 71.

Removal on account of prejudice or local influence see supra §§ 194–204.

[83] Whelan v. New York, etc., R. Co., 35 Fed. 849, 1 LRA 65.

[84] Haire v. Rome R. Co., 57 Fed. 321.

[85] Haire v. Rome R. Co., supra.

[86] **Effect of dismissal or discontinuance as to or settlement with defendant in separable controversy** see supra § 309.

[87] See supra § 180.

[88] Hoffman v. Lynch, 23 F. (2d) 518; Idaho v. American Surety Co., 218 Fed. 678; Chicago Great Western R. Co. v. Hulbert, 205 Fed. 248, 125 CCA 98. But see Iowa Homestead Co. v. Des Moines Nav., etc., Co., 8 Fed. 97, 102, 3 McCrary 95 (dictum, that, where there are two separate and distinct controversies, one between citizens of same state and one between citizens of different states, the court "clearly . . . cannot split up the suit and remand it as to the controversy between the citizens of the same state, retaining it as to what remains"). Compare Guarantee Co. of North America v. Mechanics' Sav. Bank, etc., Co., 80 Fed. 766, 26 CCA 146 [rev on other grounds 173 U. S. 582, 19 SCt 551, 43 L. ed. 818] (holding that, where one of two defendants, sued in a joint and several action, removed the case, and plaintiff, without protest, proceeded to trial and took judgment against him, plaintiff will be deemed to have consented to a severance of the joint action into two several actions).

[89] Hoffman v. Lynch, 23 F. (2d) 518.

Remand as to parties not affected by prejudice or local influence see supra § 321.

[90] Hoffman v. Lynch, 23 F. (2d) 518.

[91] Hoffman v. Lynch, supra.

Federal constitution as supreme law of land see Constitutional Law § 158.

[92] **Necessity and propriety of remanding cause not within removal statutes or not properly removed** see supra §§ 303–307.

[93] Chicago, etc., R. Co. v. Willard, 220 U. S. 413, 31 SCt 460, 55 L. ed. 521; Mansfield, etc., R. Co. v. Swan, 111 U. S. 379, 4 SCt 510, 28 L. ed. 462; Wabash R. Co. v. Lindley, 29 F. (2d) 829; Pacific Tel., etc., Co. v. Agnew, 2 F. (2d) 155; Katalla Co. v. Rones, 186 Fed. 30, 108 CCA 132 [aff 182 Fed. 946]; Weldon v. Fritzlen, 128 Fed. 608 [rev on other grounds 135 Fed. 650, 68 CCA 288 (certiorari den 198 U. S. 586, 25 SCt 803, 49 L. ed. 1174)]; Harley v. Firemen's Fund Ins. Co., 245 Fed. 471; Waverly Stone, etc., Co. v. Waterloo, etc., R. Co., 239 Fed. 561; Charroin v. Romort Mfg. Co., 236 Fed. 1011; Jones v. Western Union Tel. Co., 233 Fed. 301; Indiana v. Chicago Tolleston Club, 53 Fed. 18; Imperial Refining Co. v. Wyman, 38 Fed. 574, 3 LRA 503; Gribble v. Pioneer Press Co., 15 Fed. 689, 5 McCrary 73; Teas v. Albright, 13 Fed. 406; Johnson v. Johnson, 13 Fed. 193. See Highway Constr. Co. v. McClelland, 15 F. (2d) 187 [den reh 14 F. (2d) 406] (recognizing the rule). Compare Handley-Mack Co. v. Godchaux Sugar Co., 2 F. (2d) 435 (recognizing the rule, but holding that where a resident defendant had removed the suit, brought against him by a citizen of another state, on the ground of diversity of citizenship, and plaintiff did not object to the jurisdiction, a remand was not necessary, since under the constitution the federal courts are given jurisdiction of suits between citizens of different states and the suit was one which, under the statutes, could originally have been brought in the federal court).

[94] Chicago, etc., R. Co. v. Willard, 220 U. S. 413, 31 SCt 460, 55 L. ed. 521; Minnesota v. Northern Securities Co., 194 U. S. 48, 24 SCt 598, 48 L. ed. 870; Mansfield, etc., R. Co. v. Swan, 111 U. S. 379, 4 SCt 510, 28 L. ed. 462; Dickinson Tire, etc., Co. v. Dickinson, 29 F. (2d) 493; Rife v. Lumber Underwriters, 204 Fed. 32, 122 CCA 346 [rev on other grounds 237 U. S. 605, 35 SCt 717, 59 L. ed. 1140]; Willard v. Chicago, etc., R. Co., 165 Fed. 181, 91 CCA 215 [certiorari granted 212 U. S. 578, 29 SCt 688, 53 L. ed. 658, and aff 220 U. S. 413, 31 SCt 460, 55 L. ed. 521]; Yellow Aster Min., etc., Co. v. Crane Co., 150 Fed. 580, 80 CCA 566; Fred Macey Co. v. Macey, 135 Fed. 725, 68 CCA 363; Barth v. Coler, 60 Fed. 466, 9 CCA 81. See Highway Constr. Co. v. McClelland, 14 F. (2d)

under a duty to remand the cause, on its own motion, although no motion for a remand is made by a party,[95] or even where a motion founded upon the same ground has theretofore been denied,[96] or been withdrawn by the maker;[97] and to the end that it may determine its own jurisdiction, if it has reason to doubt the existence of the necessary facts, the court may examine the parties,[98] or direct a plea in abatement to be filed and heard.[99] Similarly, the trial court may, on its own motion, remand a cause which was removed too late.[1] The court will not, however, without a motion by a party, remand a cause on account of a defect or irregularity which is nonjurisdictional, or is capable of being or has been waived.[2]

[§ 324] **C. Procedure To Procure Remand—1. By Motion—a. In General.** The ordinary and proper mode of procuring the remand of a cause previously removed from a state court to a federal court, or testing the propriety of the removal and the jurisdiction of the court, is by motion to remand,[3] which in the usual case is an adequate remedy and so precludes the issuance of a writ of mandamus to compel the remand.[4] A plea to the jurisdiction may be treated as a motion to remand,[5] in view of the rule necessitating a remand whenever a want of jurisdiction appears.[6]

Sufficiency of motion. A motion to remand is not insufficient because it fails to state specifically the grounds upon which it is made, if it clearly raises the question of the jurisdiction of the federal court and signifies the unwillingness of the movant to submit thereto.[7]

[§ 325] **b. Who May Move for Remand.** Inasmuch as a federal court to which a cause has been removed from a state court has the power and is under a duty to remand the cause on its own motion when it appears that its jurisdiction thereof is lacking,[8] it has been held that even the defendant at whose instance a suit was removed may move to remand it for want of jurisdiction,[9] or on appeal or by writ of error may procure a reversal on account thereof;[10] but there is authority, to the contrary, that a defendant who by seeking removal has asserted or consented to the federal court's jurisdiction cannot be heard, by motion to remand, to say that the action is one of which such court has no jurisdiction,[11] unless the court from which it was removed was also without jurisdiction.[12] A motion to remand on the ground that the cause was not removed at or within the time prescribed by statute[13] cannot be made by the defendant who effected the removal.[14] A trustee in bankruptcy appointed by the same court to which a cause is removed is not for that reason precluded from moving to remand the cause.[15]

[§ 326] **c. Time of Motion.** As a general rule, where a cause has been removed from a state court to a federal court, a motion to remand it on account of want of jurisdiction[16] may be made at any time during the pendency of the cause,[17] and the adverse party to the suit cannot complain of mere delay in

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406 [reh den 15 F. (2d) 187]; Juillard v. Barr, 177 Fed. 921, 101 CCA 201 (both applying the rule).

[a] **Leading case** is Mansfield, etc., R. Co. v. Swan, 111 U. S. 379, 4 SCt 510, 28 L. ed. 462, in which the earlier cases are fully reviewed. Chicago, etc., R. Co. v. Willard, 220 U. S. 413, 31 SCt 460, 55 L. ed. 521 (so stating).

[95] **Procedure by party to cause to obtain a remand** see infra §§ 324-327.

[96] Weldon v. Fritzlen, 128 Fed. 608 [rev on other grounds 135 Fed. 650, 68 CCA 288 (certiorari den 198 U. S. 586, 25 SCt 803, 49 L. ed. 1174)].

[97] Willard v. Chicago, etc., R. Co., 165 Fed. 181, 91 CCA 215 [certiorari granted 212 U. S. 578, 29 SCt 688, 53 L. ed. 658, and aff 220 U. S. 413, 31 SCt 460, 55 L. ed. 521].

Consent as conferring jurisdiction on removal see supra § 2.

[98] Gribble v. Pioneer Press Co., 15 Fed. 689, 5 McCrary 73.

[99] Gribble v. Pioneer Press Co., supra.

Necessity of plea or answer to raise issue of fact as to removability in general see infra § 328.

[1] Bowers v. Supreme Council, A. L. H., 45 Fed. 81; Keeney v. Roberts, 39 Fed. 629, 12 Sawy. 39.

Late removal as ground for remand see supra § 305.

[2] Fitzhugh v. Reid, 252 Fed. 234.

Irregularities in removal proceedings as ground for remand see supra § 304.

Waiver of grounds for remand see supra § 320.

[3] La Flower v. Merrill, 28 F. (2d) 784; Connolly v. Chicago, etc., R. Co., 3 F. (2d) 818; Gopcevic v. California Packing Corp., 272 Fed. 994; Commonwealth Finance Corp. v. Landis, 261 Fed. 440; Virginia v. Felts, 133 Fed. 85; State v. Risjord, 177 Wis. 290, 188 NW 495.

[4] State v. Risjord, supra.

Writ of mandamus to compel remand see infra § 337.

[5] Poorman v. Cleveland, etc., R. Co., 255 Fed. 987.

Plea to jurisdiction as mode of raising issue of fact as to removability of cause see infra § 328.

[6] See supra § 302.

Remand by court sua sponte where jurisdiction is lacking see infra § 323.

[7] Idaho v. American Surety Co., 218 Fed. 678.

[8] See supra § 323.

[9] Mansfield, etc., R. Co. v. Swan, 111 U. S. 379, 4 SCt 510, 28 L. ed. 462; Wabash R. Co. v. Barbour, 73 Fed. 513, 19 CCA 546; Ferguson v. Ross, 38 Fed. 161, 3 LRA 322. See Rones v. Katalla Co., 182 Fed. 946 [aff 186 Fed. 30, 108 CCA 132] (recognizing the rule stated in the text, but holding that defendant cannot move for a remand on the ground that the facts are different from those set forth in its petition for removal, where under either set of facts the cause would be removable); Lazensky v. Supreme Lodge K. H., 32 Fed. 417 (where the cause was remanded on application of the defendant by whom it had been removed to the federal court).

Want of jurisdiction as necessitating remand see supra § 302.

[10] Mansfield, etc., R. Co. v. Swan, 111 U. S. 379, 4 SCt 510, 28 L. ed. 462; Wabash R. Co. v. Barbour, 73 Fed. 513, 19 CCA 546.

[11] Bushnell v. Kennedy, 9 Wall. (U. S.) 387, 19 L. ed. 736; Closser v. Strawn, 227 Fed. 139; Mastin v. Chicago, etc., R. Co., 123 Fed. 827; Tootle v. Coleman, 107 Fed. 41, 45, 46 CCA 132, 57 LRA 120; Eustis v. Henrietta, 74 Fed. 577, 20 CCA 537; Davies v. Lathrop, 13 Fed. 565, 21 Blatchf. 164.

[12] Tootle v. Coleman, 107 Fed. 41, 46 CCA 132, 57 LRA 120 [certiorari den 183 U. S. 695, 22 SCt 932, 46 L. ed. 394].

Removability of cause of which state court is without jurisdiction see supra § 27.

[13] See supra §§ 205-211.

Late removal as ground for remanding see supra § 305.

[14] Connell v. Smiley, 156 U. S. 335, 341, 15 SCt 353, 39 L. ed. 443; Ayers v. Watson, 113 U. S. 594, 5 SCt 641, 28 L. ed. 1093.

[15] In re Vadner, 259 Fed. 614.

[16] **Remand for want of jurisdiction in general** see supra § 302.

[17] Gainesville v. Brown-Crummer Inv. Co., 277 U. S. 54, 48 SCt 454, 72 L. ed. 781 [rev 20 F. (2d) 497]; Jackson v. Allen, 132 U. S. 27, 10 SCt 9, 33 L. ed. 249; Ayers v. Wiswall, 112 U. S. 187, 5 SCt 90, 28 L. ed. 693; Parkinson v. Barr, 105 Fed. 81; Broadway Ins. Co. v. Chicago, etc., R. Co., 101 Fed. 507; Indiana v. Lake Erie, etc., R. Co., 85 Fed. 1; Wabash R. Co. v. Barbour, 73 Fed. 513, 19 CCA 546; Ferguson v. Ross, 38 Fed. 161, 3 LRA 322; Southworth v. Reid, 36 Fed. 451; Bronson v. St. Croix Lumber Co., 35 Fed. 634; Lazensky v. Supreme Lodge K. H., 32 Fed. 417; Kain v. Texas Pac. R. Co., 14 F. Cas. No. 7,596.

moving for a remand on any ground without showing that prejudice to him has resulted therefrom.[18] It has been held that where a transcript of the record of the state court has been filed in the federal court,[19] the fact that the day by which it was required to be filed therein has not arrived, or the time within which such filing might have been made has not expired, does not prevent a party from moving to remand on the ground that the cause was not one authorized by statute to be removed;[20] but there is some authority to the contrary.[21]

Where suit has abated, as by reason of the death of a party, a motion to remand cannot be made so long as it continues in abatement.[22]

After verdict or judgment. In several cases motions to remand made after verdict[23] or after judgment[24] have been sustained; but the propriety of moving at such times was not discussed therein, and the point seems never to have been expressly decided.

Upon appeal from a judgment rendered by the federal district court, it is too late to move for the first time to remand the cause on a ground not involving entire want of jurisdiction.[25]

[§ 327] **d. Second Motion To Remand.**[26] Although a motion to remand a cause from a federal court to the state court from which it had theretofore been removed has once been made and denied, a second motion to remand may be made when founded upon facts which have arisen or appeared since the previous motion was made,[27] or facts which were not presented by or in connection with the previous motion,[28] or, it seems, where the previous motion was denied as premature,[29] provided the ground on which the motion is based has not been waived.[30] Moreover, a motion to remand on account of a want of jurisdiction appearing on the face of the record may be made at any time notwithstanding the fact that a previous motion on the same ground has been overruled,[31] since the court's jurisdiction is always open to challenge[32] and a remand would be ordered by the court sua sponte whenever a want of jurisdiction should appear even though neither party applied therefor;[33] and the order denying the previous motion is not to be regarded as the law of the case so as to prevent the court from reconsidering the question.[34]

[§ 328] **e. Issues of Fact[35]—(1) In General.** No issue of fact upon a petition for the removal of a cause from a state court to a federal court or upon the record of such cause is raised by a motion to remand it to the state court,[36] since such motion is in effect a demurrer to the removal petition,[37] admitting the truth of its allegations for the purpose of the motion,[38] and only challenging the face of the record.[39] Plaintiff is, however, entitled to put in issue the allegations upon which the removal was effected, for the purpose of showing that by reason of their untruth or the nonexistence of jurisdictional facts the cause should be remanded;[40] and the proper mode of raising such an issue is by a plea to the jurisdiction of the federal court,[41] or by an answer to the petition for removal,[42] although it has been said to be the practice in at least one district to treat an allegation, in a petition for removal, of fraudulent misjoinder of parties for the purpose of preventing removal[43] as traversed, without express denial, when a motion to remand the cause is made.[44]

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[18] Noethe v. Mann, 27 F. (2d) 451.

Waiver of right to move for remand by delay or laches see supra § 320.

[19] **Transcript of record of state court** see supra §§ 270–274.

[20] Harrington v. Great Northern R. Co., 169 Fed. 714; Ryder v. Bateman, 93 Fed. 16; Thompson v. Chicago, etc., R. Co., 60 Fed. 773; Mills v. Newell, 41 Fed. 529; Delbanco v. Singletary, 40 Fed. 177; Anderson v. Appleton, 32 Fed. 855.

Cross references:
Proceedings pending expiration of time for filing transcript in general see supra § 276.
Remand of cause not removable see supra § 303.
Time for filing transcript see supra § 273.

[21] Kansas City, etc., R. Co. v. Interstate Lumber Co., 36 Fed. 9. See Kansas City, etc., R. Co. v. Interstate Lumber Co., 37 Fed. 3 (recognizing the rule).

[22] Wright v. Phipps, 58 Fed. 552.

[23] Ferguson v. Ross, 38 Fed. 161, 3 LRA 322 (where a motion to remand, made during the trial, was denied with leave to renew it after verdict, and upon being then renewed was sustained). Compare Mulcahey v, Lake Erie, etc., R. Co., 79 Fed. 999, 24 CCA 685 [rev 69 Fed. 172) (where the lower court denied a new trial, sought in order that a motion might be made to remand on the ground of want of jurisdiction; and the appellate court ordered a reversal, with directions to remand the cause to the state court, but without opinion).

[24] Wabash R. Co. v. Barbour, 73 Fed. 513, 19 CCA 546 (where a motion to remand was made and denied before trial, and after judgment had been entered another motion to vacate the judgment and remand the cause was made and denied; and on appeal from such rulings the cause was reversed with directions to remand it to the state court); Lazensky v. Supreme Lodge K. H., 32 Fed. 417.

[25] Knight v. International, etc., R. Co., 61 Fed. 87, 9 CCA 376 (late removal).

Remand by appellate court sua sponte where jurisdiction is lacking see supra § 323.

[26] **Second removal after remand** see supra § 8.

[27] Hamblin v. Chicago, etc., R. Co., 43 Fed. 401. See New York v. New Jersey SS. Transp. Co., 24 Fed. 817 (dictum).

[a] **Disposition of federal question.**—(1) Where, after a motion to remand a cause removed because it arose under the laws of the United States has been overruled, the question arising under those laws was disposed of by demurrer, there was no longer any federal question in the case, and a second motion to remand was proper. Hamblin v. Chicago, etc., R. Co., 43 Fed. 401. (2) Necessity and propriety of remand where federal question upon which cause was removed has been disposed of see supra § 308.

[28] Pennsylvania R. Co. v. Allegheny Valley R. Co., 25 Fed. 113.

[29] See Kansas City, etc., R. Co. v. Interstate Lumber Co., 37 Fed. 3 (where a second motion to remand was entertained under such circumstances).

Time for moving to remand see supra § 326.

[30] **Waiver of grounds for remand** see supra § 320.

[31] Gaugler v. Chicago, etc., R. Co., 197 Fed. 79; Weldon v. Fritzlen, 128 Fed. 608 [rev on other grounds 135 Fed. 650, 68 CCA 288. Compare Ferguson v. Ross, 38 Fed. 161, 3 LRA 322 (where it appears that the courts, in denying the motion, expressly granted leave to renew it at a later time, and when it was so renewed, remanded the cause).

[32] Gaugler v. Chicago, etc., R. Co., 197 Fed. 79.

[33] See supra § 323.

[34] Weldon v. Fritzlen, 128 Fed. 608 [rev on other grounds 135 Fed. 650, 68 CCA 288 (certiorari den 198 U. S. 586, 25 SCt 803, 49 L. ed. 1174)]. See Shohoney v. Quincy, etc., R. Co., 223 Mo. 649, 122 SW 1025 (holding that a refusal to remand a cause for want of jurisdiction does not render the matter res judicata or establish the jurisdiction of the court).

[35] **As triable by federal court and not state court** see supra § 253.

[36] Peo. v. Moody, 9 F. (2d) 628; Kraus v. Chicago, etc., R. Co., 3 F. (2d) 277; Phillips v. Western Terra Cotta Co., 174 Fed. 873; Carlisle v. Sunset Tel., etc., Co., 116 Fed. 896; Filer v. Levy, 17 Fed. 609; Dennistoun v. Draper, 7 F. Cas. No. 3,804, 5 Blatchf. 336. See West Side R. Co. v. California Pac. R. Co., 202 Fed. 331 (apparently applying the rule); Johnson v. Accident Ins. Co., 35 Fed. 374 (recognizing the rule); Central Eureka, Inc. v. Guanica Centrale, 10 Porto Rico Fed. 358 (holding that a motion to remand a cause which was in form one of ejectment, on the ground that it was in fact one of unlawful detainer for the recovery merely of the material possession of the land, in which case the federal court would have had no jurisdiction because the annual rental was agreed to be less than the amount necessary to render the cause removable, could not be sustained where no demurrer or answer had been filed or any other step taken to question the form in which the suit was brought). But see Jones v. Casey-Hedges Co., 213 Fed. 43 (where it was said that if the motion to remand does not expressly or by necessary inference raise an issue upon the jurisdictional facts, as where it is a general motion without any statement of grounds or where the ground on which it is based is in effect merely a demurrer to the petition for removal, such motion is not sufficient to raise an issue of fact; but that if the motion expressly denies the averments of the removal petition, or is based on a ground which in effect traverses or negatives such averments, or is supported by an affidavit which constitutes a denial of such averments, the motion is sufficient to

Form and sufficiency of pleading. A formal plea or answer is not indispensable, in order to raise an issue of fact as to the jurisdiction of the federal court, provided a traverse in some form is made,[45] and even a denial embodied in a motion to remand has been treated as a traverse of the allegation in the removal petition so denied.[46] So a plea or answer is not to be tested by technical rules,[47] but ordinarily is sufficient if it sets out fairly and with reasonable certainty matters of fact which, if true, negative the jurisdiction of the federal court.[48] But a petition for removal founded upon prejudice or local influence is not sufficiently traversed by a mere denial of the pleader's belief in the existence of such prejudice or influence;[49] and a plea alleging that if the federal court has jurisdiction it ought not to exercise it because the cause could be tried with greater convenience in the state court is insufficient.[50] An averment in the plea that a party is a citizen of a specified state is not neutralized by the admission therein that such party resides abroad.[51]

Time of filing. The ordinary rules as to the time at or before which a plea in abatement must be filed[52]

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put the facts in issue). Compare Curnow v. Phœnix Ins. Co., 44 Fed. 305 (where plaintiff embodied a denial of a jurisdictional fact and a motion to remand in the same pleading).

[37] Farmers' Bank, etc., Co. v. Atchison, etc., R. Co., 25 F. (2d) 23 [rev 11 F. (2d) 993]; Peo. v. Moody, 9 F. (2d) 628; Connolly v. Chicago, etc., R. Co., 3 F. (2d) 818; Bradshaw v. Bowden, 226 Fed. 323; Armstrong v. Kansas City Southern R. Co., 192 Fed. 608; Phillips v. Western Terra Cotta Co., 174 Fed. 873. See Berry v. Mobile, etc., R. Co., 228 Fed. 395 (applying the analogy). And see cases infra notes 38, 39.

[38] Fielding v. Toledo, etc., R. Co., 33 F. (2d) 994; Connolly v. Chicago, etc., R. Co., 3 F. (2d) 818; Bradshaw v. Bowden, 226 Fed. 323; Gibson v. Chesapeake, etc., R. Co., 215 Fed. 24, 131 CCA 332. See Woodall v. Clark, 254 Fed. 526, 166 CCA 84 (apparently applying the rule).

[39] Wilson v. Republic Iron, etc., Co., 257 U. S. 92, 42 SCt 35, 66 L. ed. 144; Fielding v. Toledo, etc., R. Co., 33 F. (2d) 994; Kraus v. Chicago, etc., R. Co., 3 F. (2d) 277; Evans v. Sioux City Serv. Co., 206 Fed. 841; Phillips v. Western Terra Cotta Co., 174 Fed. 873; Harrington v. Great Northern R. Co., 169 Fed. 714; Dishon v. Cincinnati, etc., R. Co., 133 Fed. 471, 66 CCA 345; Carlisle v. Sunset Tel., etc., Co., 116 Fed. 896.

Motion to remand as proper mode of raising objection appearing on face of removal papers see supra § 324.

Questions to be determined in passing upon motion see infra § 333.

[40] Wilson v. Republic Iron, etc., Co., 257 U. S. 92, 42 SCt 35, 66 L. ed. 144; Sanders v. Atlantic Coast Line R. Co., 33 F. (2d) 1010; Farmers' Bank, etc., Co. v. Atchison, etc., R. Co., 25 F. (2d) 23 [rev 11 F. (2d) 993]; Henly v. Community Natural Gas Co., 24 F. (2d) 252; Lynes v. Standard Oil Co., 300 Fed. 812; Carlisle v. Sunset Tel., etc., Co., 116 Fed. 896; Emery v. Chicago, etc., R. Co., 186 Iowa 1156, 170 NW 540, 173 NW 12; Johnson v. Blackwood Lumber Co., 189 N. C. 81, 126 SE 165; Towill v. Southern R. Co., 121 S. C. 447, 114 SE 416. And see cases infra this note; and infra notes 41, 42.

[a] **In causes removed on account of prejudice or local influence** (1) it appears now to be settled that the allegations and proof upon which the removal was granted may be controverted by plaintiff, in support of a motion to remand, as in other cases when an issue has been properly raised. Ellison v. Louisville, etc., R. Co., 112 Fed. 805, 50 CCA 530 [certiorari den 186 U. S. 485, 22 SCt 942, 46 L. ed. 1260, and disappr Adelbert College v. Toledo, etc., R. Co., 47 Fed. 836; Huskins v. Cincinnati, etc., R. Co., 37 Fed. 504, 3 LRA 545; Whelan v. New York, etc., R. Co., 35 Fed. 849, 1 LRA 65]; Short v. Chicago, etc., R. Co., 34 Fed. 225. (2) Formerly, however, the contrary rule was applied in such cases. Reeves v. Corning, 51 Fed. 774; Adelbert College v. Toledo, etc., R. Co., 47 Fed. 836 [app dism 146 U. S. 355, 13 SCt 186, 36 L. ed. 1003]; Carpenter v. Chicago, etc., R. Co., 47 Fed. 535; Brodhead v. Shoemaker, 44 Fed. 518, 11 LRA 567; Cooper v. Richmond, etc., R. Co., 42 Fed. 697, 8 LRA 366; Huskins v. Cincinnati, etc., R. Co., 37 Fed. 504, 3 LRA 545; Whelan v. New York, etc., R. Co., 35 Fed. 849, 1 LRA 65. (3) Proceedings and proof to obtain removal on ground of prejudice or local influence see supra §§ 256–260.

[41] Woodall v. Clark, 254 Fed. 526, 166 CCA 84; Jones v. Casey-Hedges Co., 213 Fed. 43; Harrington v. Great Northern R. Co., 169 Fed. 714; Donovan v. Wells, 169 Fed. 363, 94 CCA 609, 22 LRANS 1250; Carlisle v. Sunset Tel., etc., Co., 116 Fed. 896; Imperial Refining Co. v. Wyman, 38 Fed. 574, 3 LRA 503; McDonald v. Salem Capital Flour-Mills Co., 31 Fed. 577, 12 Sawy. 492; Smith v. Chicago, etc., R. Co., 30 Fed. 722; Lacroix v. Lyons, 27 Fed. 403; Clarkhuff v. Wisconsin, etc., R. Co., 26 Fed. 465; Filer v. Levy, 17 Fed. 609; Emery v. Chicago, etc., R. Co., 186 Iowa 1156, 170 NW 540, 173 NW 12. See Virginia v. Felts, 133 Fed. 85 (where it was said that such plea is not necessary, since the court will sua sponte remand the cause if on the evidence it appears that jurisdiction is lacking, but that the better practice is to file such plea); Short v. Chicago, etc., R. Co., 34 Fed. 225 (recognizing such procedure as proper in the usual case, but saying that in removing a cause on account of prejudice or local influence no petition is required, and therefore that to put the facts in issue in such case no plea in abatement is necessary, but that the issue may be raised by affidavit or in such other mode as the court may prescribe in the particular case).

[a] **Verification.**—The plea should be duly sworn as required by the federal Equity Rules. Lacroix v. Lyons, 27 Fed. 403; Filer v. Levy, 17 Fed. 609.

Plea to jurisdiction as motion to remand see supra § 324.

[42] Woodall v. Clark, 254 Fed. 526, 166 CCA 84; Jones v. Casey-Hedges Co., 213 Fed. 43; Carlisle v. Sunset Tel., etc., Co., 116 Fed. 896.

[43] **Allegations in removal petition as to fraudulent joinder** see supra § 240.

[44] Boatner v. American Express Co., 122 Fed. 714.

[45] Morris v. Gilmer, 129 U. S. 315, 9 SCt 289, 32 L. ed. 690; Curnow v. Phœnix Ins. Co., 44 Fed. 305; Anderson v. Appleton, 32 Fed. 855; Beadleston v. Harpending, 32 Fed. 644.

[46] Breymann v. Pennsylvania, etc., R. Co., 38 F. (2d) 209; Harrington v. Great Northern R. Co., 169 Fed. 714; Curnow v. Phœnix Ins. Co., 44 Fed. 305. See Jones v. Casey-Hedges Co., 213 Fed. 43 (dictum, that a denial may be embodied or inhere in a motion to remand). But see Berry v. Mobile, etc., R. Co., 228 Fed. 395 (where such a motion was disapproved, the court saying that a "speaking" motion to remand is as indefensible as a "speaking" demurrer).

[47] Johnson v. Accident Ins. Co. of North America, 35 Fed. 374.

[48] Johnson v. Accident Ins. Co. of North America, supra.

[49] Taylor County Court v. Baltimore, etc., R. Co., 35 Fed. 161.

[50] Spies v. Chicago, etc., R. Co., 32 Fed. 713.

[51] Carson v. Dunham, 121 U. S. 421, 7 SCt 1030, 30 L. ed. 992; Woaner v. Northern Pac. R. Co., 125 Fed. 155; Imperial Refining Co. v. Wyman, 38 Fed. 574, 3 LRA 503; Johnson v. Accident Ins. Co. of North America, 35 Fed. 374; Salem First Nat. Bank v. Salem Capital Flour Mills Co., 31 Fed. 580, 12 Sawy. 485, 496; McDonald v. Salem Capital Flour-Mills Co., 31 Fed. 577, 12 Sawy. 492; Rumsey v. Call, 28 Fed. 769; Lacroix v. Lyons, 27 Fed. 403; Clarkhuff v. Wisconsin, etc., R. Co., 26 Fed. 465; Filer v. Levy, 17 Fed. 609; Hoyt v. Wright, 4 Fed. 168, 2 McCrary 222.

[52] See Abatement and Revival §§ 574–594.

do not apply in removal cases,[53] but, in harmony with the rule that a cause may be remanded at any time when want of jurisdiction appears,[54] the plea may ordinarily be filed at any stage of the proceedings.[55] It is, however, within the discretion of the court whether or not to permit the filing of a plea or answer to a petition for removal when a considerable time has elapsed since the removal and the cause is ready for trial on the merits.[56]

[§ 329] **(2) Trial.**[57] The issue of fact raised by a plea or answer controverting the allegations of a petition for the removal of a cause from a state court to a federal court[58] is, broadly speaking, to be tried and heard in such manner as the court may direct,[59] and proper practice requires that preliminary application be made to the court to fix the procedure to be followed.[60] Ordinarily, the issue should be tried by a jury,[61] subject to the right of the court to direct a verdict where proper;[62] but if the issue is not raised until too late to have it tried by the jury, the court can pass upon the evidence.[63] It has been held that the issue as to jurisdiction should be tried in advance of the trial upon the merits;[64] but, especially in view of practical considerations respecting two trials in the same cause, other authorities have held that both issues may be tried at the same time.[65]

[§ 330] **(3) Evidence—(a) In General.** In the trial of an issue of fact arising upon plea or answer to a petition for the removal of a cause from a state court to a federal court, filed for the sake of showing the untruth of its allegations or the nonexistence of the facts necessary to render the cause removable and to confer jurisdiction on the federal court, the usual rules of evidence ordinarily apply.[66] No evidence is admissible in behalf of the removing party for which a proper foundation has not been laid by proper allegations in the petition for removal.[67]

Burden of proof.[68] Where the allegations of a petition for removal are denied or put in issue, the burden is upon petitioner to prove them;[69] and it has accordingly been said that doubts are to be resolved in favor of plaintiff.[70] So, mere inference from the evidence offered is not sufficient to overcome positive allegations of plaintiff's bill or complaint.[71] Defendant may, however, be given the opportunity to present additional proof where that originally adduced is not sufficient to sustain the burden upon him.[72]

Affidavits or oral testimony. Oral testimony may be taken by the court on the facts in issue,[73] or affidavits may be received as evidence of the facts,[74] except in controversion of the showing made by the transcript of the record of the state court.[75] Positive averments of fact made by an affidavit, when it is so received as evidence, are sufficient to support a finding;[76] but an affidavit made merely on information and belief, which fails to disclose the source of the information and states mere general conclusions, cannot overcome positive allegations of a petition for removal.[77]

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[53] Virginia v. Felts, 133 Fed. 85.

[54] See supra § 326.

[55] Virginia v. Felts, supra.

[56] Gibson v. Chesapeake, etc., R. Co., 215 Fed. 24, 131 CCA 332; Hunter v. Illinois Cent. R. Co., 188 Fed. 645, 110 CCA 459.

[57] **Trial of cause on the merits** see supra § 298.

[58] **Raising issue of fact by plea or answer to petition for removal** see supra § 328.

[59] Harrington v. Great Northern R. Co., 169 Fed. 714.

Form of evidence see infra § 330.

[60] Jones v. Casey-Hedges Co., 213 Fed. 43.

[61] Virginia v. Felts, 133 Fed. 85. See Chicago, etc., R. Co. v. Ohle, 117 U. S. 123, 6 SCt 632, 29 L. ed. 837 (in which, it appears, the issue was tried to a jury). Compare Gribble v. Pioneer Press Co., 15 Fed. 689, 5 McCrary 73 (where a jury trial was waived and trial had to the court).

[a] **In Porto Rico,** in a cause removed from an insular court to the federal court, the issue may be submitted to the court if the parties consent, but if either party so desires it will be submitted to a jury. Correa v. Kramer, 13 Porto Rico Fed. 375.

[62] Virginia v. Felts, 133 Fed. 85.

[63] Virginia v. Felts, supra.

Time for raising issue of fact see supra § 328.

[64] Clarkhuff v. Wisconsin, etc., R. Co., 26 Fed. 465; Jones v. Oceanic Steam Nav. Co., 13 F. Cas. No. 7,485, 11 Blatchf. 406. See Chicago, etc., R. Co. v. Ohle, 117 U. S. 123, 6 SCt 632, 29 L. ed. 837 (in which, it appears, such issue was tried separately); Mackaye v. Mallory, 6 Fed. 743, 19 Blatchf. 165 (where such was said to be the practice).

Trial on merits in federal court in general see supra § 298.

[65] Virginia v. Felts, 133 Fed. 85. See Imperial Refining Co. v. Wyman, 38 Fed. 574, 3 LRA 503 (where the court directed the trial of both issues to be had together); Dennistoun v. Draper, 7 F. Cas. No. 3,804, 5 Blatchf. 336 (holding that the issue should be decided at the trial of the cause, and that an earlier and separate trial is improper).

[66] See cases infra notes 67–85.

Evidence generally see Evidence 22 C. J. p 1.

[67] Reindahl v. Chicago, etc., R. Co., 291 Fed. 924.

[68] **In presenting plea in abatement generally** see Abatement and Revival § 603.

[69] Wilson v. Republic Iron, etc., Co., 257 U. S. 92, 42 SCt 35, 66 L. ed. 144; Carson v. Dunham, 121 U. S. 421, 7 SCt 1030, 30 L. ed. 992; Plymouth Cons. Gold Min. Co. v. Amador, etc., Canal Co., 118 U. S. 264, 6 SCt 1034, 30 L. ed. 232; Boyle v. Chicago, etc., R. Co., 42 F. (2d) 633; Sanders v. Atlantic Coast Line R. Co., 33 F. (2d) 1010; Fidler v. Western Coal, etc., Co., 33 F. (2d) 158; Geffers v. Chicago, etc., R. Co., 25 F. (2d) 774; Farmers' Bank, etc., Co. v. Atchison, etc., R. Co., 25 F. (2d) 23 [rev 11 F. (2d) 993]; Lynes v. Standard Oil Co., 300 Fed. 812; Mull v. Parrott Bros. Co., 218 Fed. 713; Gibson v. Chesapeake, etc., R. Co., 215 Fed. 24, 131 CCA 332; Trivette v. Chesapeake, etc., R. Co., 212 Fed. 641, 129 CCA 177; Evans v. Sioux City Serv. Co., 206 Fed. 841; Thompson v. Ward, 199 Fed. 861; Clark v. Chicago, etc., R. Co., 194 Fed. 505; Stevenson v. Illinois Cent. R. Co., 192 Fed. 956; Armstrong v. Kansas City Southern R. Co., 192 Fed. 608; Enos v. Kentucky Distilleries, etc., Co., 189 Fed. 342, 111 CCA 74; Fishblatt v. Atlantic City, 174 Fed. 196; Donovan v. Wells, 169 Fed. 363, 94 CCA 609, 22 LRANS 1250; New Castle v. Postal Tel. Cable Co., 152 Fed. 572; New Castle v. Western Union Tel. Co., 152 Fed. 569; Davies v. Wells, 134 Fed. 139; Swann v. Mutual Reserve Fund L. Assoc., 116 Fed. 232; Landers v. Felton, 73 Fed. 311; Copeland v. Memphis, etc., R. Co., 6 F. Cas. No. 3,209, 3 Woods 651; Heath v. Austin, 11 F. Cas. No. 6,305, 12 Blatchf. 320; Johnson v. Blackwood Lumber Co., 189 N. C. 81, 126 SE 165; Towill v. Southern R. Co., 121 S. C. 447, 114 SE 416. See Foster v. Coos Bay Gas, etc., Co., 185 Fed. 979; Southern R. Co. v. Arnold, 162 Ala. 570, 50 S 293 (both applying the rule); Southern Pac. R. Co. v. Harrison, 73 Tex. 103, 11 SW 168 (dictum). But see Martin v. Chillicothe City Water Co., 197 Fed. 462 (holding that the burden is upon plaintiff). Compare Woodall v. Clark, 254 Fed. 526, 530, 166 CCA 84 (dictum, that "even the filing of the plea in abatement, answer, or denial in the nature of a plea to jurisdiction will not avail plaintiff, unless he supports the issue thus raised by evidence").

[70] Boyle v. Chicago, etc., R. Co., 42 F. (2d) 633. But see Harvey v. Illinois Midland R. Co., 3 Fed. 707 (denying a motion to remand, made on the ground of a defect of citizenship of defendants, where the evidence of the improper citizenship of the defendant in question was weak, and his interest in or connection with the controversy was not definitely made to appear, and the cause had been pending in the federal court for some eighteen months without objection).

Resolving doubt in favor of or against remand in passing upon motion see infra § 333.

[71] Sutton v. Pacific SS. Co., 3 F. (2d) 72.

[72] Jones v. Casey-Hedges Co., 213 Fed. 43.

[73] Farmers' Bank, etc., Co. v. Atchison, etc., R. Co., 25 F. (2d) 23 [rev 11 F. (2d) 993]; Martin v. New York, etc., R. Co., 241 Fed. 696.

[a] **In Porto Rico,** in a cause removed from an insular court to the federal court, the rule is the same. Correa v. Kramer, 13 Porto Rico Fed. 375.

[74] Wecker v. National Enameling, etc., Co., 204 U. S. 176, 27 SCt 184, 51 L. ed. 430, 9 AnnCas 757; Farmers' Bank, etc., Co. v. Atchison, etc., R. Co., 25 F. (2d) 23 [rev 11 F. (2d) 993]; Paragon Coal, etc., Co. v. J. W. Kirby, etc., Coal Co., 9 F. (2d) 686; Martin v. New York, etc.,

Admissions made by a party in prior proceedings in the cause may be given in evidence by the other party in support of or opposition to the motion to remand;[78] but such admissions, or statements contrary to the position assumed by the party at the time of the motion to remand, do not work an estoppel against him.[79]

Pleadings in state court. Where the issue is as to the propriety of the time at which the removal was effected, pleadings filed in the state court may be used as evidence of the state of the proceedings in such court at the time of removal,[80] even though such pleadings had been withdrawn by stipulation.[81]

Judicial notice. In the trial of an issue of fact in connection with a motion to remand, the usual rules as to judicial notice apply.[82] Thus the court will take judicial notice that one of the parties is a receiver appointed by it;[83] and it will judicially notice state statutes,[84] but not rules of the state court.[85]

[§ 331] **(b) As to Inaccuracy or Incorrectness of Transcript.** Parol evidence is admissible, on the trial of an issue of fact duly raised by plea or answer to a petition for the removal of a cause from a state court to a federal court, to show that the transcript of the record of the cause in such state court is inaccurate or erroneous;[86] but such transcript cannot be controverted by mere ex parte affidavits.[87]

[§ 332] **(4) Finding or Verdict.**[88] If, upon the trial of an issue of fact as to the jurisdiction of the federal court in a cause removed thereto from a state court, or as to the removability of such cause, it is found from the evidence that the cause is not such as properly to be cognizable by the federal court under the removal statutes, it becomes the duty of such court to remand it to the state court.[89]

[§ 333] **f. Hearing and Determination of Motion.**[90] When the allegations of a petition for the removal of a cause from a state court to a federal court, or of affidavits filed therewith and in support thereof, have not been challenged or put in issue, in connection with, or for the purposes of, a motion to remand the cause,[91] the only question for determination is whether, as a matter of law, upon the facts stated, taken in connection with the record of the cause, the federal court has jurisdiction,[92] which question includes the determination of the sufficiency of the petition for removal[93] and of the timeliness of the removal proceedings.[94] The petitioner need not adduce any evidence to sustain such allegations,[95] and they must be taken by the court as true,[96] except where the petitioning defendant admits the falsity or incorrectness of an allegation,

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R. Co., 241 Fed. 696; Seattle v. Great Northern R. Co., 239 Fed. 1009; Lewis v. Cincinnati, etc., R. Co., 192 Fed. 654; Smith v. Crosby Lumber Co., 46 Fed. 819. See Amy v. Manning, 38 Fed. 536 (recognizing the rule).

[a] **In Porto Rico,** in a cause removed from an insular court to the federal court, the rule is the same. Correa v. Kramer, 13 Porto Rico Fed. 375.

75. See infra § 331.

76. La Page v. Day, 74 Fed. 977.

77. Scoggins v. Union Pac. R. Co., 292 Fed. 162; Zigich v. Tuolumne Copper Min. Co., 260 Fed. 1014.

78. Chicago, etc., R. Co. v. Ohle, 117 U. S. 123, 6 SCt 632, 29 L. ed. 837.

79. Reynolds v. Adden, 136 U. S. 348, 10 SCt 843, 34 L. ed. 360; Egerton v. Starin, 91 Fed. 932.

80. Wilkinson v. Delaware, etc., R. Co., 23 Fed. 562.

81. Wilkinson v. Delaware, etc., R. Co., supra.

82. See cases infra notes 83–85.

Judicial notice in general see Evidence §§ 1807–2008.

83. Pitkin v. Cowen, 91 Fed. 599.

84. Randall v. New England O. P., 118 Fed. 782; South Carolina v. Coosaw Min. Co., 45 Fed. 804 [aff 144 U. S. 550, 12 SCt 689, 36 L. ed. 537].

85. Randall v. New England Order of Protection, 118 Fed. 782.

86. Stephens v. St. Louis, etc., R. Co., 47 Fed. 530, 14 LRA 184.

87. Smith v. Western Union Tel. Co., 79 Fed. 132.

Affidavits as evidence on trial of issues of fact raised by plea to removal petition in general see supra § 330.

88. Hearing and determination of motion to remand see infra § 333.

89. Rumsey v. Call, 28 Fed. 769; New York v. New Jersey Steamboat Transp. Co., 24 Fed. 817; Dennistoun v. Draper, 7 F. Cas. No. 3,804, 5 Blatchf. 336.

[a] **Thus,** (1) where a cause is removed on the ground that the necessary parties are citizens of different states, and that a party who is a citizen of the same state as an adverse party is merely a nominal party, but upon the trial of the issue it is found that such person is a necessary party, it is within the power of the federal court, and is its duty, to remand the cause. New York v. New Jersey SS. Transp. Co., 24 Fed. 817. (2) Removability of cause where adverse parties are citizens of same state see supra §§ 120, 145.

Order of remand see infra §§ 334, 335.

90. Finding or verdict upon issue of fact see supra § 332.

91. Issues of fact in general see supra §§ 328–332.

92. Jones v. Casey-Hedges Co., 213 Fed. 43.

Motion to remand as demurrer and challenging only face of record see supra § 328.

93. New York v. Walsh, 40 F. (2d) 58.

94. Bon v. Midwest Refining Co., 30 F. (2d) 410.

95. Wilson v. Republic Iron, etc., Co., 257 U. S. 92, 42 SCt 35, 66 L. ed. 144; Sanders v. Atlantic Coast Line R. Co., 33 F. (2d) 1010; Farmers' Bank, etc., Co. v. Atchison, etc., R. Co., 25 F. (2d) 23 [rev 11 F. (2d) 993]; Donovan v. Wells, 169 Fed. 363, 94 CCA 609, 22 LRANS 1250; Johnson v. Blackwood Lumber Co., 189 N. C. 81, 126 SE 165.

96. Sanders v. Atlantic Coast Line R. Co., 33 F. (2d) 1010; Bon v. Midwest Refining Co., 30 F. (2d) 410; Schotis v. North Coast Stevedoring Co., 24 F. (2d) 591 [motion to retax den 24 F. (2d) 592]; Feaster v. Southern R. Co., 15 F. (2d) 540; Highway Constr. Co. v. McClelland, 14 F. (2d) 406 [reh den 15 F. (2d) 187]; Brown v. Davis, 13 F. (2d) 256; Savarin v. Union Pac. R. Co., 292 Fed. 157; Todd v. Chicago, etc., R. Co., 291 Fed. 910; Woodall v. Clark, 254 Fed. 526, 166 CCA 84; Port of Seattle v. Oregon, etc., R. Co., 242 Fed. 986; Nelson v. Black Diamond Min. Co., 237 Fed. 264; Trana v. Chicago, etc., R. Co., 228 Fed. 824; Martin v. Chillicothe City Water Co., 197 Fed. 462; Camp v. Field, 189 Fed. 285; Harrington v. Great Northern R. Co., 169 Fed. 714; Waha-Lewiston Land, etc., Co. v. Lewiston-Sweetwater Irr. Co., 158 Fed. 137; Atlanta, etc., R. Co. v. Southern R. Co., 153 Fed. 122, 82 CCA 309; Chicago, etc., R. Co. v. Stepp, 151 Fed. 908 [aff 164 Fed. 785, 90 CCA 431]; Dishon v. Cincinnati, etc., R. Co., 133 Fed. 471, 66 CCA 345; Bryce v. Southern R. Co., 122 Fed. 709; Free v. Western Union Tel. Co., 122 Fed. 309; Kelly v. Chicago, etc., R. Co., 122 Fed. 286; Carlisle v. Sunset Tel., etc., Co., 116 Fed. 896; Durkee v. Illinois Cent. R. Co., 81 Fed. 1; Goodnow v. Litchfield, 47 Fed. 753; Langdon v. Hillside Coal,

in which case his petition may be treated as amended accordingly.[97] Mere conclusions of law, however, embodied in the removal petition are not to be regarded as true and, of course, are not conclusive upon the court.[98] In considering the motion to remand, the court will not pass upon the merits of the cause of action[99] or the sufficiency of the pleadings;[1] but for the purpose of determining its own jurisdiction, and the necessity or propriety of remanding the cause, the court may examine and consider the entire record,[2] including the presence vel non of particular parties in the cause as of the time the removal was effected,[3] and so when fraudulent joinder of a party to prevent removal,[4] or the existence of a federal question,[5] was alleged by the removal petition, or when such petition denied, in an action by an employee against a common carrier for personal injuries, that plaintiff was engaged in interstate commerce,[6] the court will examine the merits sufficiently to determine the question, so that it may pass upon the motion. Where the removal was effected before plaintiff's declaration or complaint had been filed in the state court,[7] plaintiff may, for the purpose of enabling the court to pass upon his motion to remand, exhibit a copy of the declaration or complaint filed, properly authenticated by affidavit.[8]

Presumptions. In passing upon a motion to remand, the nonresidence of a party, once shown to exist, will be presumed to have continued at the time of the application to remove the cause, in the absence of any showing to the contrary;[9] and one shown to be a citizen of a designated foreign country will be presumed to be a resident thereof.[10] It will be presumed, in the absence of any contrary showing, that the petition for removal was filed within the proper time.[11]

Grant or denial of motion. It has been laid down or regarded as a general rule that, in passing upon a motion to remand, all doubts should be resolved against the jurisdiction of the federal court;[12] but

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etc., Co., 41 Fed. 609; Mackaye v. Mallory, 6 Fed. 743, 19 Blatchf. 165. See Scherrer v. Foster, 5 F. (2d) 236 (applying the rule); Probst v. Cowen, 91 Fed. 929 (holding that although the removal bond did not show the residence or sufficiency of the surety, and although it did not appear that the state court had accepted the surety, but the petition stated that the petitioners "have made and herewith file a bond with good and sufficient surety," such statement must be accepted by the federal court as true, until the contrary was shown).

97. Koshland v. Home Mut. Ins Co., 31 Or. 321, 49 P 864, 50 P 567.

98. Anderson v. Appleton, 32 Fed. 855. See Boyle v. Chicago, etc., R. Co., 42 F. (2d) 633 (applying the rule).

[a] **Allegation in terms that cause is removable** does not make it so, or prevent the federal court from determining whether or not it should be remanded. Anderson v. Appleton, 32 Fed. 855.

99. Nashville v. Cooper, 6 Wall. (U. S.) 247, 18 L. ed. 851; New York v. Walsh, 40 F. (2d) 58; Sanders v. Atlantic Coast Line R. Co., 33 F. (2d) 1010; Farmers' Bank, etc., Co. v. Atchison, etc., R. Co., 25 F. (2d) 23 [rev 11 F. (2d) 993]; Aldredge v. Baltimore, etc., R. Co., 20 F. (2d) 655 [certiorari den 275 U. S. 550, 48 SCt 114, 72 L. ed. 420]; Gulledge v. Director Gen. of Railroads, 270 Fed. 276; Clark v. Chicago, etc., R. Co., 194 Fed. 505; Hax v. Caspar, 31 Fed. 499. See Evans v. Sioux City Serv. Co., 206 Fed. 841 (apparently recognizing the rule).

1. Marshall v. Holmes, 141 U. S. 589, 12 SCt 62, 35 L. ed. 870; Brown v. House, 20 F. (2d) 142; Smith v. Camas Prarie R. Co., 216 Fed. 799; McGuire v. Great Northern R. Co., 153 Fed. 434; Fogarty v. Southern Pac. Co., 123 Fed. 973; Broadway Ins. Co. v. Chicago Great Western R. Co., 101 Fed. 507; Hax v. Caspar, 31 Fed. 499.

[a] **Misjoinder of causes of action.**—The question whether there is a misjoinder of causes of action in the complaint is not one for consideration upon a motion for remand. Fogarty v. Southern Pac. Co., 123 Fed. 973.

2. Ellis v. Davis, 4 F. (2d) 323; Kyle v. Chicago, etc., R. Co., 173 Fed. 238; Diday v. New York, etc., R. Co., 107 Fed. 565. Compare Key v. West Kentucky Coal Co., 237 Fed. 258 (holding that the federal court cannot act upon testimony taken in the state court, even if it should be sufficient to establish the ground relied upon for removal).

3. Diday v. New York, etc., R. Co., 107 Fed. 565.

4. Martin v. New York, etc., R. Co., 241 Fed. 696; Clark v. Chicago, etc., R. Co., 194 Fed. 505. See Gulledge v. Director Gen. of Railroads, 270 Fed. 276 (pointing out that in such case the function of the court is not to determine whether or not the defendant alleged to have been fraudulently joined is in fact liable to plaintiff, but merely whether the joinder was made in good faith, and in the honest belief that such defendant is liable).

Fraudulent joinder of parties for purpose of preventing removal see supra §§ 170, 171.

5. Southern Pac. R. Co. v. California, 118 U. S. 109, 6 SCt 993, 30 L. ed. 103; Starin v. New York, 115 U. S. 248, 6 SCt 28, 29 L. ed. 388; Lowry v. Chicago, etc., R. Co., 46 Fed. 83; Kessinger v. Vannatta, 27 Fed. 890; Wood v. Matthews, 30 F. Cas. No. 17,955, 2 Blatchf. 370, 23 Vt. 735.

Removal of cause arising under federal constitution, laws, or treaties see supra §§ 46–89.

6. Farmers' Bank, etc., Co. v. Atchison, etc., R. Co., 25 F. (2d) 23 [rev 11 F. (2d) 993]; Aldredge v. Baltimore, etc., R. Co., 20 F. (2d) 655 [certiorari den 275 U. S. 550, 48 SCt 114, 72 L. ed. 420].

Nonremovability of action against carrier arising under Federal Employers' Liability Act see supra §§ 20, 21.

7. **Propriety of removal at such time** see supra § 205.

8. Jones v. Casey-Hedges Co., 213 Fed. 43.

9. Heath v. Austin, 11 F. Cas. No. 6,305, 12 Blatchf. 320; Nadal v. Ramos, 1 Porto Rico Fed. 363; Garrosi v. Garrosi, 1 Porto Rico Fed. 228.

10. Nadal v. Ramos, 1 Porto Rico Fed. 363; Garrosi v. Garrosi, 1 Porto Rico Fed. 228.

11. In re Utah Constr. Co.'s Water Right, 30 F. (2d) 436.

12. Breymann v. Pennsylvania, etc., R. Co., 38 F. (2d) 209; Chunes v. Duluth, etc., R. Co., 292 Fed. 153; Farmers,' etc., Bank v. Federal Reserve Bank, 274 Fed. 235; Demer v. Pacific SS. Co., 273 Fed. 567; Thomas v. Delta Land, etc., Co., 258 Fed. 758; Boykin v. Morris Fertilizer Co., 257 Fed. 827; Georgia v. Southern R. Co., 255 Fed. 369; Harley v. Firemen's Fund Ins. Co., 245 Fed. 471; Ostrom v. Edison, 244 Fed. 228; Hansen v. Pacific Coast Asphalt Cement Co., 243 Fed. 283; Orr v. Baltimore, etc., R. Co., 242 Fed. 608; Sullivan v. Lloyd, 213 Fed. 275; Patton v. Cincinnati, etc., R. Co., 208 Fed. 29; Kelly v. Virginia Bridge, etc., Co., 203 Fed. 566; Western Union Tel. Co. v. Louisville, etc., R. Co., 201 Fed. 932; Goins v. Southern Pac. Co., 198 Fed. 432; Vanderbilt v. Kerr, 188 Fed. 537; Jackson v. Hooper, 188 Fed. 509; Kamenicky v. Catterall Printing Co., 188 Fed. 400; Wrightsville Hardware Co. v. Colwell, 180 Fed. 589; Wrightsville Hardware Co. v. Hardware, etc., Mfg. Co., 180 Fed. 586; Morris v. Louisville, etc., R. Co., 175 Fed. 491; Thacker Coal, etc., Co. v. Norfolk, etc., R. Co., 171 Fed. 271; Shane v. Butte Electric R. Co., 150 Fed. 801; Mathews Slate Co. v. Mathews, 148 Fed. 490; Nash v. McNamara, 145 Fed. 541; Ernst v. American Spirits Mfg. Co., 114 Fed. 981; McKown v. Kansas, etc., Coal Co., 105 Fed. 657; Plant v. Harrison, 101 Fed. 307; Johnson v. Wells, etc., Co., 91 Fed. 1; Concord Coal Co. v. Haley, 76 Fed. 882; Hutcheson v. Bigbee, 56 Fed. 329; Largey v. Blue Bird Min. Co., 49 Fed. 292; Blue Bird Min. Co. v. Largey, 49 Fed. 289; Fitzgerald v. Missouri Pac. R. Co., 45 Fed. 812; Kessinger v. Vannatta, 27 Fed. 890; Kansas v. Bradley, 26 Fed. 289; Levy v. Laclede Bank, 18 Fed. 193; Wolff v. Archibald, 14 Fed. 369, 4 McCrary 581; Evans v. Faxon, 10 Fed. 312, 11 Biss. 175; Deakin v. Lea, 7 F. Cas. No. 3,695, 11 Biss. 271; Heath v. Austin, 11 F. Cas. No. 6,305, 12 Blatchf. 320.

[a] **In Hawaii** the rule is the same in the case of a motion to remand a cause removed from a territorial court to the federal court. Chock Sing v. Breckons, 3 Hawaii Fed. 630.

[b] **In Porto Rico** the rule is the same in the case of a motion to remand a cause removed from an insular court to the federal court. Alonso v. Oben, 13 Porto Rico Fed. 237; Wenar v. Pohl, 1 Porto Rico Fed. 37. But see Valdes v. Pettingill, 4

such rule is not universally recognized or followed,[13] and the view of the courts at the present time appears rather to be that any such doubt should be resolved in favor of the right to remove, and against a remand, inasmuch as a party has no remedy by way of appeal if the cause is remanded.[14] The true rule, however, would seem to be that the motion shall be decided not by the existence of doubts, but by the preponderance of the facts and law and the reasons which condition them.[15] The fact that a substantial recovery could not be had, on the facts alleged, in the federal court, under the rules as to measure of damages prevailing therein, but could be had in the state court from which the cause was removed,[16] or, on the other hand, that a more liberal rule as to the measure of damages prevails in the federal court than in the state court,[17] is not material to the determination of the motion; nor is the fact that testimony taken in the federal court will be unavailing and inadmissible, as of right, in the state court if the cause is remanded.[18] Similarly, the fact that the removal was effected for purposes of delay has no bearing upon whether or not jurisdiction of the cause should be retained.[19] If, on the face of the record, facts appear which give rise to a right of removal or bring the cause within the removal statutes, the motion must be denied.[20]

Finality of ruling. A refusal by the federal court to sustain a motion to remand does not render the question of its jurisdiction res judicata so far as concerns the right and duty of the court to reëxamine the question if subsequently raised in a proper manner or to remand the cause if a want of jurisdiction subsequently appears or is found to exist;[21] but, otherwise, a decision on a motion to remand is final in the sense that it cannot be questioned collaterally, but only by appeal or writ of error.[22]

[§ 334] **g. Order of Remand—(1) In General.** Where a cause theretofore removed from a state court to a federal court is remanded by the latter, the proper practice is for it to enter a formal order of remand,[23] and to make return to the state court of the proceedings had in the cause in the federal court.[24] Such an order is not indispensable, however, where the remand is made on account of want of jurisdiction existing at the time of the removal,[25] since in such case the jurisdiction of the state court is to be regarded as never having been interrupted or terminated.[26] If the state court has been enjoined by the federal court from proceeding further with the cause,[27] it is proper for the court to set aside or dissolve the restraining order in connection with the remand.[28]

[§ 335] **(2) Setting Aside or Vacation of Or-**

Porto Rico Fed. 518 (apparently applying the contrary rule).

[13] See Clark v. Chicago, etc., R. Co., 194 Fed. 505 (where the court said that the rule does not obtain in its jurisdiction); Heath v. Austin, 11 F. Cas. No. 6,305, 12 Blatchf. 320 (holding that, where a mere doubt was raised by plaintiff as to the existence of the jurisdictional facts, the case should not be remanded). And cases infra note 14. Compare Chesbrough v. Woodworth, 251 Fed. 881, 164 CCA 97 [aff 252 U. S. 83, 40 SCt 237, 64 L. ed. 470] (holding that where both parties by their respective pleadings agreed that the amount in controversy was more than that specified by the statute, and as a result of that and of the removal eight years' delay in obtaining final decision and disposition of the case followed, it would not be remanded to the state court unless it is certain that the maximum amount which might have been recovered under any theory of the case was less than the jurisdictional amount); New York v. New Jersey Steam-Boat Transp. Co., 24 Fed. 817 (holding that where the averments of the complaint are so ambiguous as to make it doubtful whether certain defendants are necessary parties, and there are indications of a design to obstruct a removal by their joinder, the averments of the complaint will be rigidly scrutinized, the whole record, including plaintiff's affidavits therein, will be examined, and if it appears probable that those defendants are not necessary parties, the motion for a remand will be denied, but without prejudice to its subsequent renewal should they afterward appear to be necessary parties).

[14] Bon v. Midwest Refining Co., 30 F. (2d) 410; Farmers' Bank, etc., Co. v. Atchison, etc., R. Co., 25 F. (2d) 23 [rev 11 F. (2d) 993]; Niccum v. Northern Assur. Co., 17 F. (2d) 160; McLaughlin v. Western Union Tel. Co., 7 F. (2d) 177; In re Mississippi River Power Co., 241 Fed. 194; Strother v. Union Pac. R. Co., 220 Fed. 731; Caldwell County Drain. Dist. No. 19 v. Chicago, etc., R. Co., 198 Fed. 253. See Boatmen's Bank v. Fritzlen, 135 Fed. 650, 68 CCA 288 [rev 128 Fed. 608, and certiorari den 198 U. S. 586, 25 SCt 803, 49 L. ed. 1174] (discussing the rule). But see Pabst v. Roxana Petroleum Co., 30 F. (2d) 953 (refusing to follow such rule).

Appeal from, or review of, order remanding cause see infra §§ 339, 341.

[15] Pabst v. Roxana Petroleum Co., 30 F. (2d) 953; Pierce v. Desmond, 11 F. (2d) 327; Boatmen's Bank v. Fritzlen, 135 Fed. 650, 68 CCA 288 [rev 128 Fed. 608, and certiorari den 198 U. S. 586, 25 SCt 803, 49 L. ed. 1174].

[16] Free v. Western Union Tel. Co., 122 Fed. 309.

[a] **Thus,** where plaintiff's cause of action was founded upon mental anguish resulting from the nondelivery of a telegram, he could not prevent the removal of the cause or procure its remand merely because under the decisions of the state court substantial damages could be recovered in such a cause, while under the decisions of the federal courts the rule was otherwise. Free v. Western Union Tel. Co., 122 Fed. 309.

[17] In re Bensel, 206 Fed. 369, 124 CCA 251 [aff 190 Fed. 413, and rev on other grounds 239 U. S. 57, 36 SCt 25, 60 L. ed. 143].

[18] Birdseye v. Schaeffer, 37 Fed. 821 [aff 140 U. S. 672, 11 SCt 1017, 35 L. ed. 403].

State court after remand to determine effect to be given to testimony taken in federal court see infra § 343.

[19] Wilson v. Republic Iron, etc., Co., 257 U. S. 92, 42 SCt 35, 66 L. ed. 144.

[20] Jennings v. Southern R. Co., 40 F. (2d) 951; Bradshaw v. Bowden, 226 Fed. 323.

[21] Weldon v. Fritzlen, 128 Fed. 608 [rev on other grounds 135 Fed. 650, 68 CCA 288]; Shohoney v. Quincy, etc., R. Co., 223 Mo. 649, 122 SW 1025.

Second motion to remand see supra § 327.

[22] Dillinger v. Chicago, etc., R. Co., 19 F. (2d) 196; Dexter v. Sayward, 84 Fed. 296.

[a] **In Porto Rico** the rule is the same upon refusal to remand a cause removed from an insular court to the federal court. Russell v. Mestre, 12 Porto Rico Fed. 338.

[b] **Thus,** where plaintiff in an action removed to the federal court threatened to proceed further in the state court, and the removing defendant brought a suit in equity against him for an injunction, which was granted, plaintiff in the original action (being defendant in the injunction suit), could not by motion to dissolve the injunction in such suit, attack an order of the federal court refusing to remand the original action. Dillinger v. Chicago, etc., R. Co., 19 F. (2d) 196.

Review of order remanding or refusing to remand cause see infra §§ 339–341.

[23] Brown v. Fletcher, 206 Fed. 461, 124 CCA 367 [mod 203 Fed. 70, and rev on other grounds 237 U. S. 583 mem, 35 SCt 750 mem, 59 L. ed. 1128 mem].

[24] Brown v. Fletcher, supra.

State court after remand to determine effect of pleadings and proceedings in federal court see infra § 343.

[25] Patten v. Cilley, 67 N. H. 520, 42 A 47.

[26] See supra § 267.

[27] **Restraining state court from further proceedings in general** see Courts § 654.

[28] Wabash R. Co. v. Lindley, 29

der.[29] Since an order of a federal court remanding a cause to the state court from which it had therefore been removed terminates the jurisdiction of such federal court in the premises,[30] it is without authority to vacate or set aside the order of remand, even during the term at which it was made.[31]

[§ 336] **h. Costs.**[32] The statute relating to the remand to a state court of causes theretofore removed therefrom to a federal court expressly provides that, upon remand, the federal court shall make such order as to costs as shall be just.[33]

Party liable. The party who effected the removal is liable for the costs awarded when the cause is remanded,[34] except, it would seem, where the remand is ordered on his motion;[35] and so where, on appeal from a judgment or decree rendered by the federal court, the cause is directed to be remanded to the state court on account of want of jurisdiction on the part of the trial court, the costs are properly directed to be awarded by such court against the removing party, whether he is appellant or respondent in the appellate court.[36] When less than all the defendants applied for and obtained the removal over the objection or without the consent of the others, the latter are not liable for costs.[37]

Causes heard together. Where two or more causes having different plaintiffs are heard together, and remanded, plaintiff in each case is entitled to his costs.[38]

Amount and items allowable. The costs to be awarded upon a remand are within the discretion of the federal court.[39] Statutory fees for any services performed by the clerk at the instance of plaintiff should be included.[40] The court may direct or permit the taxation of fees for plaintiff's attorney,[41] under the general statute providing therefor in causes pending in the federal courts,[42] the amount to be taxed ordinarily being held to be that taxable upon the rendition of a judgment without a jury,[43] although there is some authority for the view that the amount taxable upon the final disposition of a cause may be taxed upon remand.[44] Where two or more cases are heard together on motion to remand, and the parties plaintiff in each are different and are represented by different attorneys, the court may award the statutory fees in each case.[45]

[§ 337] **2. By Writ of Mandamus.** In accordance with the general rule that judicial discretion cannot be controlled by mandamus,[46] such writ cannot properly issue to compel a federal court to which a cause has been removed from a state court to remand such cause thereto,[47] except when it clearly appears as a matter of law on the face of the record that such federal court has no jurisdiction of the cause and no other remedy is adequate.[48]

F. (2d) 829.

Remand as ipso facto vacation of restraining order see infra § 338.

[29] **As divesting jurisdiction of state court restored by the remand** see infra § 343.

[30] See infra § 338.

[31] Ausbrooks v. Western Union Tel. Co., 282 Fed. 733, 734 [cit Cyc]; Empire Min. Co. v. Propeller Towboat Co., 59 S. C. 549, 38 SE 156. But see Gerardino v. Home Ins. Co., 12 Porto Rico Fed. 374 (where the court granted a rehearing upon the order of remand, although the question of its right so to do appears not to have been raised). Compare Empire Min. Co. v. Propeller Tow-Boat Co., 108 Fed. 900 (where the federal court, after making an order remanding the cause, and after further proceedings had been had in the state court and judgment rendered in reliance thereon, set aside its order of remand at the same term; and, on motion to strike the cause from its docket, the federal court, although recognizing the force of the rule stated in the text, refused to comply with the motion until the question of jurisdiction should have been decided upon final appeal).

[32] **Costs of trial on merits** see supra § 301.

Liability of surety on removal bond conditioned for payment of costs see supra § 248.

[33] USCA tit 28 § 80.

[a] **Under former statutes,** not expressly providing for costs, it was held that the federal court had no power to render a judgment for costs when it remanded a cause for want of jurisdiction appearing on the face of the record. Nashville v. Cooper, 6 Wall. (U. S.) 247, 18 L. ed. 851; Josslyn v. Phillips, 27 Fed. 481 (so stating).

[34] Tod v. Cleveland, etc., R. Co., 65 Fed. 145, 12 CCA 521; Whilt v. Chester Tract. Co., 7 Pa. Dist. 693, 7 Del. Co. 194. And see cases infra note 36.

[35] Ferguson v. Ross, 38 Fed. 161, 3 LRA 322 (where no costs were awarded in such case).

Right of removing party to move for remand see supra § 325.

[36] Walker v. Collins, 167 U. S. 57, 17 SCt 738, 42 L. ed. 76; Postal Tel. Cable Co. v. Alabama, 155 U. S. 482, 15 SCt 192, 39 L. ed. 231; Cates v. Allen, 149 U. S. 451, 13 SCt 883, 977, 37 L. ed. 804; Martin v. Snyder, 148 U. S. 663, 13 SCt 706, 37 L. ed. 602; Torrence v. Shedd, 144 U. S. 527, 12 SCt 726, 36 L. ed. 528; Graves v. Corbin, 132 U. S. 571, 10 SCt 196, 33 L. ed. 462; Mansfield, etc., R. Co. v. Swan, 111 U. S. 379, 4 SCt 510, 28 L. ed. 462; Grand Trunk R. Co. v. Twitchell, 59 Fed. 727, 8 CCA 237. Compare Peper v. Fordyce, 119 U. S. 469, 7 SCt 287, 30 L. ed. 435 (where plaintiff brought suit in the federal court, and then without discontinuing it brought another suit on the same cause against the same parties in a state court, and defendants caused the latter suit to be removed to the federal court, where it was consolidated with the suit originally brought therein; and, upon appeal, it being held that the federal court was without jurisdiction either originally or on removal, the remand of the suit commenced in the state court was ordered, and the costs were directed to be divided equally between the parties).

[37] Whilt v. Chester Tract. Co., 7 Pa. Dist. 693, 7 Del. Co. 194.

[38] Jones v. Delta Land, etc., Co., 258 Fed. 761.

[39] Walsh v. Joplin, etc., R. Co., 219 Fed. 345.

[40] Pellett v. Great Northern R. Co., 105 Fed. 194.

[41] See cases infra notes 43, 44. Compare Smith v. Western Union Tel. Co., 81 Fed. 242 (where the court refused to allow the taxation of such a fee).

[42] USCA tit 28 § 572.

[43] Jones v. Delta Land, etc., Co., 258 Fed. 761; Walsh v. Joplin, etc., R. Co., 219 Fed. 345; Western Union Tel. Co. v. Louisville, etc., R. Co., 208 Fed. 581; Acker v. Charleston, etc., R. Co., 190 Fed. 288; Riser v. Southern R. Co., 116 Fed. 1014; Pellett v. Great Northern R. Co., 105 Fed. 194.

[44] Josslyn v. Phillips, 27 Fed. 481.

[45] Jones v. Delta Land, etc., Co., 258 Fed. 761.

[46] See Mandamus §§ 84-90.

[47] Ex p. Harding, 219 U. S. 363, 31 SCt 324, 55 L. ed. 252 [disappr In re Winn, 213 U. S. 458, 29 SCt 515, 53 L. ed. 873; Re Moore, 209 U. S. 490, 28 SCt 585, 706, 52 L. ed. 904; Ex p. Wisner, 203 U. S. 449, 27 SCt 150, 51 L. ed. 264, and foll Ex p. Capo, 231 U. S. 739, 34 SCt 317, 58 L. ed. 461]; Ex p. Gruetter, 217 U. S. 586, 30 SCt 690, 54 L. ed. 892; Ex p. Nebraska, 209 U. S. 436, 28 SCt 581, 52 L. ed. 876; In re Pollitz, 206 U. S. 323, 27 SCt 729, 51 L. ed. 1081; Re Hoard, 105 U. S. 578, 26 L. ed. 1176; State v. Risjord, 177 Wis. 290, 188 NW 495. Compare Chicago, etc., R. Co. v. Wiswall, 23 Wall. (U. S.) 507, 23 L. ed. 103 (dictum, on appeal under a former statute from an order remanding a cause, that the proper remedy was by mandamus).

[a] **For full discussion of principle** and harmonization of apparent conflicts among preceding decisions see Ex p. Harding, 219 U. S. 363, 31 SCt 324, 55 L. ed. 252.

[48] Kentucky v. Powers, 201 U. S. 1, 26 SCt 387, 50 L. ed. 633; Virginia v. Paul, 148 U. S. 107, 13 SCt 536, 37 L. ed. 386; Virginia v. Rives, 100 U. S. 313, 25 L. ed. 667.

Motion to remand as adequate remedy see supra § 324.

[§ 338] **D. Operation and Effect of Remand.**[49] Where a federal court to which a cause has previously been removed from a state court remands the cause, its order of remand ipso facto terminates its own jurisdiction,[50] so that such court can take no further proceedings in the cause,[51] and ex proprio vigore restores jurisdiction of the cause to the state court,[52] if that jurisdiction has ever been lost.[53] An injunction theretofore granted by the federal court to restrain proceedings in the cause in the state court after removal is vacated by the remand;[54] and if an order authorizing or directing the removal of the cause was made by the state court,[55] it is vacated by the remand, and the consequent reinstatement of the cause upon the docket of the state court.[56]

[§ 339] **E. Review of Order Remanding or Refusing To Remand Cause**[57]**—1. By Federal Courts—a. Order Remanding Cause.** Under the express provisions of the removal statute that, whenever a federal court to which a cause has been removed from a state court shall decide that such cause was improperly removed, and order it to be remanded, no appeal or writ of error from the decision remanding the cause shall be allowed,[58] and also in view of the fact that it is not final, as distinguished from interlocutory, in character,[59] an order remanding a cause is conclusive and not reviewable in any court.[60] So a circuit court of appeals has no jurisdiction to review such an order of a district court;[61] and the supreme court of the United States is without jurisdiction to review immediately any such order made either by a district court[62] or by a circuit court of appeals;[63] nor can it, in reviewing the final judgment of the state court to which the cause was remanded, review the order of remand.[64] Similarly, the supreme court has no power by writ of mandamus to compel the retention or reinstatement of a cause by the district court and thereby, in effect, to review an order remanding the cause.[65]

[§ 340] **b. Order Denying Motion To Remand.**[66] While an order of a federal court refusing to remand to a state court a cause theretofore removed therefrom cannot be reviewed immediately by appeal or writ of error, because it is not a final order,[67] it may be reviewed by the supreme court of the United States[68] or by a circuit court of appeals[69] in connection with review of the final judgment or decree rendered in the cause. The petition for removal is an essential part of the record on such an appeal;[70] and when the denial of the motion to remand depended upon the determination of an issue of fact, it will not be reviewed unless the evidence submitted is included in the record.[71] On such review the appellate court will reverse the judgment and direct a remand if the federal jurisdiction does not appear from the record.[72]

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[49] **Second removal after remand** see supra § 8.

[50] Hammond Hotel, etc., Co. v. Finlayson, 6 F. (2d) 446; Ausbrooks v. Western Union Tel. Co., 282 Fed. 733.

[51] Ayres v. Wiswall, 112 U. S. 187, 5 SCt 90, 28 L. ed. 693; Bryan v. Barriger, 251 Fed. 328; Colburn v. Hill, 103 Fed. 340, 43 CCA 253. See Marchant v. Mead-Morrison Mfg. Co., 11 F. (2d) 368 [aff 7 F. (2d) 511] (applying the rule).

[a] **Confirmation of sale.**—After remand a federal court cannot confirm a sale previously made. Colburn v. Hill, 103 Fed. 340, 43 CCA 253.

[b] **Rulings on other motions submitted with motion to remand.**—If the federal court was without jurisdiction at the time of removal, so that a motion to remand the cause must be and is sustained, the court cannot act upon other motions made and argued at the same time. Bryan v. Barriger, 251 Fed. 328.

[52] U. S.—Ausbrooks v. Western Union Tel. Co., 282 Fed. 733.

Iowa.—Stommel v. Timbrel, 84 Iowa 336, 51 NW 159.

Oh.—Anderson v. United Realty Co., 79 Oh. St. 28, 86 NE 644, 51 LRA NS 477 [aff 222 U. S. 164, 32 SCt 50, 56 L. ed. 144].

S. C.—Empire Min. Co. v. Propeller Towboat Co., 59 S. C. 549, 38 SE 156.

Tex.—Texas, etc., R. Co. v. Davis, 93 Tex. 378, 54 SW 381, 55 SW 562; Seeligson v. Texas Transp. Co., 70 Tex. 198, 7 SW 708.

Vt.—Holbrook v. Quinlan, 84 Vt. 411, 80 A 339.

[a] **No express relinquishment of jurisdiction by federal court,** beyond the order of remand, is necessary to enable the state court to resume its proceedings. Seeligson v. Texas Transp. Co., 70 Tex. 198, 7 SW 708.

Proceedings in state court after remand see infra § 343.

[53] **Removal as divesting jurisdiction of state court** see supra §§ 265–267.

[54] Hammond Hotel, etc., Co. v. Finlayson, 6 F. (2d) 446.

Express vacation of restraining order in connection with remand see supra § 334.

Injunction to restrain further proceedings in state court see Courts § 654.

[55] **Order of state court for removal** see supra § 255.

[56] Bird v. Cockrem, 28 La. Ann. 70.

[57] **Vacation or setting aside of order of remand by court which made it** see supra § 335.

[58] USCA tit 28 § 71.

[59] See Appeal and Error § 301; Federal Courts § 211.

[60] Pacific Live Stock Co. v. Lewis, 241 U. S. 440, 36 SCt 637, 60 L. ed. 1084 [aff 217 Fed. 95]; Wabash R. Co. v. Lindley, 29 F. (2d) 829; Young v. Southern Pac. Co., 15 F. (2d) 280; Empire Min. Co. v. Propeller Tow-Boat Co., 108 Fed. 900; Tosh v. Illinois Cent. R. Co., 203 Ky. 30, 261 SW 839 [foll Turner v. Illinois Cent. R. Co., 203 Ky. 31, 261 SW 839]; McNulty v. Atlas Portland Cement Co., (Mo. A.) 249 SW 730; Osteen v. Atlantic Coast Line R. Co., 119 S. C. 438, 112 SE 352. See National Farmers' Bank v. Moulton, 32 F. (2d) 78 [dism app 27 F. (2d) 403] (holding that an appeal from an order refusing to restrain further proceedings in the state court would be "almost a direct and certainly . . . an indirect review of the right of the trial court to remand the cause" and so is prohibited by the statute). And see cases infra notes 61–65.

[61] Marchant v. Mead-Morrison Mfg. Co., 29 F. (2d) 40 [certiorari den 278 U. S. 655, 49 SCt 179, 73 L. ed. 565]; Chicago, etc., R. Co. v. Hensley, 25 F. (2d) 861; Klein v. Wilson, 7 F. (2d) 777 [aff 7 F. (2d) 769, 772]; Hammond Hotel, etc., Co. v. Finlayson, 6 F. (2d) 446; Cole v. Garland, 107 Fed. 759, 46 CCA 626 [writ of error dism 183 U. S. 693, 21 SCt 933, 46 L. ed. 393]; In re Coe, 49 Fed. 481, 1 CCA 326.

[62] Powers v. Chesapeake, etc., R. Co., 169 U. S. 92, 18 SCt 264, 42 L. ed. 673; Missouri Pac. R. Co. v. Fitzgerald, 160 U. S. 556, 16 SCt 389, 40 L. ed. 536; Illinois Cent. R. Co. v. Brown, 156 U. S. 386, 15 SCt 656, 39 L. ed. 461; Joy v. Adelbert College, 146 U. S. 355, 13 SCt 186, 36 L. ed. 1003; Chicago, etc., R. Co. v. Roberts, 141 U. S. 690, 12 SCt 123, 35 L. ed. 902; Birdseye v. Shaeffer, 140 U. S. 117, 11 SCt 885, 35 L. ed. 402; Texas Land, etc., Co. v. Scott, 137 U. S. 436, 11 SCt 140, 34 L. ed. 730; Gurnee v. Patrick County, 137 U. S. 141, 11 SCt 34, 34 L. ed. 601; Richmond, etc., R. Co. v. Thouron, 134 U. S. 45, 10 SCt 517, 33 L. ed. 871; Morey v. Lockhart, 123 U. S. 56, 8 SCt 65, 31 L. ed. 68. See Chesapeake, etc., R. Co. v. McCabe, 213 U. S. 207, 29 SCt 430 (recognizing the rule).

[a] **Effect of statute permitting appeals where jurisdiction of court is in issue.**—The statutory provision, as enacted by act of March 3, 1887, which was corrected by act of Aug. 13, 1888, prohibiting review by appeal or writ of error of a decision of the federal court remanding a cause on the ground that it was improperly removed, was not repealed by implication by the provisions of act of March 3, 1891, §§ 4, 5, providing that appeals or writs of error may be taken from the district courts direct to the supreme court in any case in which the jurisdiction of the court is in issue. Chicago, etc., R. Co. v. Roberts, 141 U. S. 690, 12 SCt 123, 35 L. ed. 905.

[b] **Under former statute** (act [1875] § 5), it was provided that such an order remanding a cause was reviewable by the supreme court of the United States on writ of error or appeal as the case might be. Babbitt v. Clark, 103 U. S. 606, 26 L. ed. 507.

[63] German Nat. Bank v. Speckert, 181 U. S. 405, 21 SCt 688, 45 L. ed. 926.

[64] Nelson v. Moloney, 174 U. S. 164, 19 SCt 622, 43 L. ed. 934 [dism writ of error 158 N. Y. 351, 53 NE 31]; Missouri Pac. R. Co. v. Fitzgerald, 160 U. S. 556, 16 SCt 389, 40 L. ed. 536; Osteen v. Atlantic Coast Line R. Co., 119 S. C. 438, 112 SE 352.

Nonreviewability of final judgment in such case as not involving ruling on federal jurisdiction see Federal Courts § 292 text and note 58.

[65] Ex p. Pennsylvania Co., 137 U. S. 451, 11 SCt 141, 34 L. ed. 738; In re Sherman, 124 U. S. 364, 8 SCt 505, 31 L. ed. 423.

[66] **Mandamus to compel remand** see supra § 337.

[§ 341] **2. By State Courts.** Where a federal court has remanded or refused to remand to the state court a cause theretofore removed therefrom, no state court has power, on appeal or otherwise, to review the order of the federal court as to the removability of the cause.[73]

XVII. PROCEEDINGS IN STATE COURT AFTER DISCONTINUANCE IN, OR REMAND BY, FEDERAL COURT

[By Eustace W. Tomlinson]

[§ 342] **A. Discontinuance or Dismissal.** Where a civil suit or action, after having been removed from a state court to a federal court, is therein voluntarily discontinued or dismissed by plaintiff,[74] or other final disposition thereof is made which is not upon the merits,[75] another suit or action between the same parties and upon the same cause may be begun in the state court from which the former action was removed, or any other court, subject, of course, to the ordinary rules as to jurisdiction of the subject-matter and of the parties,[76] and subject to statutory limitations as to time;[77] and this is true even where the amount claimed in the new action is less than that which under the statutes must be in controversy in order that a cause may be removable.[78] Similarly, where a civil prosecution has been removed to a federal court, and thereafter the indictment is quashed by such court, the state may indict defendant again for the same offense.[79] It is clear, however, that the same suit or action cannot be revived or prosecuted in the state court, since it was taken from the state court by the removal and has ceased to exist by the dismissal or discontinuance.[80]

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[67] See Appeal and Error § 301; Federal Courts § 211.

[68] Ex p. Roe, 234 U. S. 70, 34 SCt 722, 58 L. ed. 1217; Powers v. Chesapeake, etc., R. Co., 169 U. S. 92, 18 SCt 264, 42 L. ed. 673; Missouri Pac. R. Co. v. Fitzgerald, 160 U. S. 556, 16 SCt 389, 40 L. ed. 536; Cates v. Allen, 149 U. S. 451, 13 SCt 883, 977, 37 L. ed. 804; Edrington v. Jefferson, 111 U. S. 770, 4 SCt 683, 28 L. ed. 594. See Re Hoard, 105 U. S. 578, 26 L. ed. 1176 (dictum).

[69] Marchant v. Mead-Morrison Mfg. Co., 29 F. (2d) 40 [certiorari den 278 U. S. 655 mem, 49 SCt 179 mem, 73 L. ed. 565 mem]; Wabash R. Co. v. Barbour, 73 Fed. 513, 19 CCA 546; Barth v. Coler, 60 Fed. 466, 9 CCA 81.

[70] Larned v. Jenkins, 109 Fed. 100, 48 CCA 252.

[71] Wirgman v. Persons, 126 Fed. 449, 62 CCA 63 [app dism 196 U. S. 636, 25 SCt 795, 49 L. ed. 629].

[72] Jackson v. Allen, 132 U. S. 27, 10 SCt 9, 33 L. ed. 249; Crehore v. Ohio, etc., R. Co., 131 U. S. 240, 9 SCt 692, 33 L. ed. 144; Hegler v. Faulkner, 127 U. S. 482, 8 SCt 1203, 32 L. ed. 210; Cameron v. Hodges, 127 U. S. 322, 8 SCt 1154, 32 L. ed. 132; Hancock v. Holbrook, 112 U. S. 229, 5 SCt 115, 28 L. ed. 714 [rev 9 Fed. 353, 4 Woods 52]; Southwestern Tel., etc., Co. v. Robinson, 48 Fed. 769, 1 CCA 91. Compare Turner v. Farmers' L. & T. Co., 106 U. S. 552, 1 SCt 519, 27 L. ed. 273 (holding that where, in a foreclosure suit, appeal was taken not from the decree foreclosing the mortgage and directing sale, but merely from the order confirming the sale, the appellate court cannot determine the question of the removability of the cause, since the final decree on the merits necessarily involved the jurisdiction of the court and was itself a determination of the question, and was not appealed from).

[73] U. S.—Missouri Pac. R. Co. v. Fitzgerald, 160 U. S. 556, 16 SCt 389, 40 L. ed. 536.

Ark.—Kansas City Southern R. Co. v. Wade, 132 Ark. 551, 201 SW 787; St. Louis, etc., R. Co. v. Neal, 83 Ark. 591, 98 SW 958 [rev on other grounds 210 U. S. 281, 28 SCt 616, 52 L. ed. 1061]; May v. State Nat. Bank, 59 Ark. 614, 28 SW 431.

Ida.—Cœur D'Alene R., etc., Co. v. Spalding, 6 Ida. 97, 53 P 107.

Iowa.—Ryan v. Mathews, 64 Iowa 250, 20 NW 174.

Mich.—Lewis v. Weidenfeld, 114 Mich. 581, 72 NW 604.

Minn.—Smithson v. Chicago Great Western R. Co., 71 Minn. 216, 73 NW 853.

Mo.—Hartman v. Fleming, 264 SW 873; McNulty v. Atlas Portland Cement Co., (A.) 249 SW 730.

Nebr.—Gerner v. Mosher, 58 Nebr. 135, 78 NW 384, 46 LRA 244; Fitzgerald v. Fitzgerald, etc., Constr. Co., 44 Nebr. 463, 62 NW 899.

Pa.—Jifkins v. Sweetzer, 2 WklyNC 591.

S. C.—Osteen v. Atlantic Coast Line R. Co., 119 S. C. 438, 112 SE 352.

Tex.—Western Union Tel. Co. v. Wichita County Water Impr. Dist. No. 1, (Civ. A.) 19 SW (2d) 186; Texas, etc., R. Co. v. Conway, (Civ. A.) 182 SW 52; Michigan Stove Co. v. Waco Hardware Co., 22 Tex. Civ. A. 293, 54 SW 357; Pioneer Sav., etc., Co. v. Peck, 20 Tex. Civ. A. 111, 49 SW 160; Talbott v. Planters Oil Co., 12 Tex. Civ. A. 49, 33 SW 745.

Utah.—Rio Grande Western R. Co. v. Telluride Power Transmission Co., 23 Utah 22, 63 P 995.

Conclusiveness upon state court of federal court's determination as to removability of cause see supra § 253.

[74] U. S.—Southern R. Co. v. Miller, 217 U. S. 209, 30 SCt 450, 54 L. ed. 732 [aff 3 Ga. A. 410, 59 SE 1115]; Gassman v. Jarvis, 100 Fed. 146; El Paso, etc., Co. v. Riddle, 294 Fed. 892 [aff 287 Fed. 173]; El Paso, etc., Co. v. Riddle, 287 Fed. 173; Texas Cotton Products Co. v. Starnes, 128 Fed. 183 [aff 133 Fed. 1022, 66 CCA 673].

Ga.—McIver v. Florida Cent., etc., R. Co., 110 Ga. 223, 36 SE 775, 65 LRA 437 [disappr Cox v. East Tennessee, etc., R. Co., 68 Ga. 446].

Ill.—Cleveland, etc., R. Co. v. Reese, 93 Ill. A. 657.

Kan.—Behan v. Metropolitan St. R. Co., 85 Kan. 491, 118 P 73, AnnCas 1913A 328; Rodman v. Missouri Pac. R. Co., 65 Kan. 645, 70 P 642, 59 LRA 704; Swift v. Hoblawetz, 10 Kan. A. 48, 61 P 969.

Ky.—Stephenson v. Illinois Cent. R. Co., 75 SW 260, 25 KyL 442.

Mo.—Krueger v. Chicago, etc., R. Co., 84 Mo. A. 358.

Oh.—Baltimore, etc., R. Co. v. Larwill, 83 Oh. St. 108, 93 NE 619, 34 LRANS 1195 [overr Baltimore, etc., R. Co. v. Fulton, 59 Oh. St. 575, 53 NE 265, 44 LRA 520].

S. D.—McPherson v. Swift, 27 S. D. 296, 130 NW 768 [aff 232 U. S. 51, 34 SCt 239, 58 L. ed. 499, and cit Cyc].

Tenn.—Hooper v. Atlanta, etc., R. Co., 106 Tenn. 28, 60 SW 607, 53 LRA 931.

Tex.—Texas, etc., R. Co. v. Maddox, 26 Tex. Civ. A. 297, 63 SW 134.

Vt.—Holbrook v. Quinlan, 84 Vt. 411, 80 A 339.

Cross references:

- Dismissal or discontinuance of cause after removal:
  - In general see supra §§ 294, 295.
  - As ground for abatement of subsequent action in state court see Abatement and Revival § 130.
- Effect of voluntary dismissal in general see Dismissal and Nonsuit §§ 59–66.
- Second action on same cause while original action is pending in federal court see supra § 266.

[75] Bacon v. Iowa Cent. R. Co., 157 Iowa 493, 137 NW 1011 [aff 236 U. S. 305, 35 SCt 357, 59 L. ed. 591; Swift v. Hoblawetz, 10 Kan. A. 48, 61 P 969; Young v. Southern Bell Tel., etc., Co., 75 S. C. 326, 55 SE 765, 7 LRANS 501, 9 AnnCas 940; Holbrook v. Quinlan, 84 Vt. 411, 80 A 339.

[76] See Courts §§ 35–89.

[77] **Limitations of actions in general** see Limitations of Actions 37 C. J. p 666.

[78] U. S.—El Paso, etc., Co. v. Riddle, 294 Fed. 892 [aff 287 Fed. 173]; Texas Cotton Products Co. v. Starnes, 128 Fed. 183 [aff 133 Fed. 1022, 66 CCA 673].

Ga.—McIver v. Florida Cent., etc., R. Co., 110 Ga. 223, 36 SE 775, 65 LRA 437.

S. C.—Young v. Southern Bell Tel., etc., Co., 75 S. C. 326, 55 SE 765, 7 LRA NS 501.

[§ 343] **B. Remand.**[81] Where a cause which has been removed from a state court to a federal court is remanded by the latter,[82] the order of remand should, under the express provisions of the statute,[83] be carried into effect immediately.[84] Upon remand the state court regains, if it has ever lost,[85] complete jurisdiction of the cause,[86] and it devolves upon such court to proceed with it in the ordinary course,[87] the order of remand being conclusive on the state court.[88] A certified copy of a mandate of an appellate court affirming the federal trial court's order remanding the cause was held competent evidence in the state court of the remand.[89] It is the duty of a defendant who knows that a motion to remand the cause has previously been made to inform himself that a remand has been ordered,[90] and so his failure to plead in the state court within a proper time after the remand of the cause cannot be excused by failure of the clerk to notify him of the remand.[91]

Where remand is based upon want of jurisdiction on the part of the federal court at the time of the removal,[92] any findings and orders made by such court pending the remand are not binding, either upon the state court[93] or upon the parties to litigation,[94] except, perhaps, in so far as parties by consenting to such orders may have become bound as by contract;[95] nor, on the other hand, can any advantage of such orders be taken in the state court.[96] It is for the state court to determine what effect shall be given to pleadings filed[97] or testimony taken[98] in the federal court while the cause was pending there.[99] It has been held, however, that where plaintiff procures a remand by showing that the amount in controversy is less than the jurisdictional minimum, he is bound in all future proceedings in the cause by the limitation so placed upon his claim.[1]

Revocation of remand. It has been held by a state court that where a cause has been remanded, and the remand executed by filing the order in the state court, a revocation of such order, although made in the same term of the federal court, does not divest the jurisdiction of the state court;[2] but in the same case the federal court refused to strike the cause from its docket until the question should be finally determined by the supreme court of the United States.[3]

Tenn.—Hooper v. Atlanta, etc., R. Co., 106 Tenn. 28, 60 SW 607.

Vt.—Holbrook v. Quinlan, 84 Vt. 411, 80 A 339.

Amount or value in controversy as affecting right to remove see supra §§ 28–45.

[79] Bush v. Kentucky, 107 U. S. 110, 1 SCt 625, 27 L. ed. 354.

Quashing indictment in general see Indictments and Informations §§ 367–396.

[80] Goodwin v. Chesapeake, etc., R. Co., 149 Ky. 806, 149 SW 1125; Clinger v. Chesapeake, etc., R. Co., 138 Ky. 615, 128 SW 1055; Stephenson v. Illinois Cent. R. Co., 75 SW 260, 25 KyL 442; Texas, etc., R. Co. v. Huber, (Tex. Civ. A.) 95 SW 568. Compare Seeligson v. Texas Transp. Co., 70 Tex. 198, 7 SW 708 (apparently contrary to the rule stated in the text; but it appears from a decision in the same case on a former appeal [Texas Transp. Co. v. Seeligson, 122 U. S. 519, 7 SCt 1261, 30 L. ed. 1150] that the cause was remanded by the federal court, and not dismissed or discontinued therein).

[81] **Second removal after remand** see supra § 8.

Validity and effect of proceedings in state court after removal where cause subsequently remanded see supra §§ 266, 267.

[82] **Remand in general** see supra §§ 302–341.

[83] USCA tit 28 § 71.

[84] Empire Min. Co. v. Propeller Tow-Boat Co., 108 Fed. 900.

[85] **Removal as divesting jurisdiction of state court** see supra §§ 265–267.

[86] U. S.—Birdseye v. Shaeffer, 37 Fed. 821 [aff 140 U. S. 672, 11 SCt 1017, 35 L. ed. 403].

Ga.—Thatcher v. McWilliams, 47 Ga. 306.

Minn.—Floody v. Chicago, etc., R. Co., 104 Minn. 132, 116 NW 111.

Miss.—Jackson v. Alabama Great Southern R. Co., 58 Miss. 648; Germania F. Ins. Co. v. Francis, 52 Miss. 457, 24 AmR 674.

Mo.—Des Moines, etc., Levee Dist. No. 1 v. Chicago, etc., R. Co., 240 Mo. 614, 145 SW 35, 39 LRANS 543.

N. J.—Johnson v. Gelston, 3 N. J. L. 668.

Or.—Knahtla v. Oregon Short Line, etc., R. Co., 21 Or. 136, 27 P 91.

Tex.—Kleiber v. McManus, 66 Tex. 48, 17 SW 249; Wright v. Giles, 60 Tex. Civ. A. 550, 129 SW 1163.

Remand as restoring jurisdiction to state court see supra § 338.

[87] Ex p. State, 71 Ala. 363; Queen Ins. Co. v. Peters, 10 Ga. A. 289, 73 SE 536; State v. Columbia R., etc., Co., 112 S. C. 528, 100 SE 355; Empire Min. Co. v. Propeller Towboat Co., 59 S. C. 549, 38 SE 156; Seeligson v. Texas Transp. Co., 70 Tex. 198, 7 SW 708.

[a] **Appeal as suspending right to proceed.**—(1) Prior to the enactment of the statutory provision prohibiting appeals from orders remanding a cause, it was held that such appeal did not deprive the state court of the right to proceed, where no supersedeas had been granted. Stommel v. Timbrel, 84 Iowa 336, 51 NW 159. (2) Appeal from, and review of, order granting remand in general see supra §§ 339, 341.

Right of defendant to delay filing plea or answer in state court pending remand see supra § 267.

[88] Tosk v. Illinois Cent. R. Co., 203 Ky. 30, 261 SW 839 [foll Turner v. Illinois Cent. R. Co., 203 Ky. 31, 261 SW 839].

[89] Seeligson v. Texas Transp. Co., 70 Tex. 198, 7 SW 708.

[90] Western Coal, etc., Co. v. Green, 64 Okl. 53, 166 P 154.

[91] Western Coal, etc., Co. v. Green, supra.

[92] **Remand for want of jurisdiction at time of removal** see supra §§ 303–307.

[93] Doane v. Corbin, 44 Ill. A. 463; Seeligson v. Texas Transp. Co., 70 Tex. 198, 7 SW 708.

Invalidity of orders of federal court where cause improperly removed see supra § 268.

[94] Doane v. Corbin, 44 Ill. A. 463.

[95] Doane v. Corbin, supra.

[96] See case infra this note.

[a] **Thus,** where the federal court appointed a receiver, after the removal, and directed him to give bond, and the cause was subsequently remanded for want of jurisdiction, the liability of the sureties on the receiver's bond could not be enforced in the state court, since such bond was taken in a court having no power or rightful authority over the case, and the bond had no validity as a bond taken in the course of judicial proceedings. Early v. Beecher, 7 Lea (Tenn.) 256.

[97] Ayres v. Wiswall, 112 U. S. 187, 5 SCt 90, 28 L. ed. 693; Broadway Ins. Co. v. Chicago Great Western R. Co., 101 Fed. 507.

[98] Ayres v. Wiswall, 112 U. S. 187, 5 SCt 90, 28 L. ed. 693; Broadway Ins. Co. v. Chicago Great Western R. Co., 101 Fed. 507.

[99] **Proceedings in federal court after removal** see supra §§ 275–301.

[1] Mull v. Parrott Bros. Co., 218 Fed. 713.

Amount or value in controversy as affecting right to remove see supra §§ 28–45.

[2] Empire Min. Co. v. Propeller Towboat Co., 59 S. C. 549, 38 SE 156.

Power of federal court to vacate or set aside order of remand see supra § 335.

[3] Empire Min. Co. v. Propeller Tow-Boat Co., 108 Fed. 900.

***REMOVAL OF CLOUD.**[1]

REMOVE.[2] To cause to change place;[3] to change in any manner;[4] to change place[5] in any manner;[6] to change the location;[7] to displace;[8] to make a change in place;[9] to move away from,[10] or to move away from the position occupied;[11] to move from a position occupied;[12] to move or cause to be moved out of a place;[13] to put away,[14] or take away[15] from a person or thing; to put from its place in any manner;[16] to shift a thing from one location to another;[17] to transfer from one place to another;[18] to transfer from one point[19] or place to another;[20] to translate from;[21] to transport;[22] also to cause to leave;[23] to force [one] to leave a place or go away;[24] to run;[25] also to move[26] or go from one place to another,[27] as to change the place of residence;[28] also to dismiss from office.[29] Further, the word may be used as meaning to cause [a thing] to cease to exist[30] or cease to be;[31] sometimes, to kill or cause to die;[32] but not synonymous with "demolish."[33]

Phrases: "Actually removing out of the county,"[34] "removed by certiorari,"[35] "removed, deposited, or concealed,"[36] "removed himself out of the state,"[37] "removing buildings,"[38] "restrictions removed from land,"[39] "sold but not removed,"[40] "the apology removed the grievance,"[41] "to remove a building,"[42] and "to remove a cause from one court to another."[43]

REMUNERATION.[44] A return for services;[45] something paid for services rendered;[46] a quid pro quo.[47]

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[1] See Quieting Title 51 C. J. p 125.

[2] See Removal ante.

[3] Century D. [quot U. S. v. One Buick Auto, 300 Fed. 584]; Webster New Int. D. [quot Louisville Chair, etc., Co. v. Otter, 219 Ky. 757, 294 SW 483].

[a] **Similar definition.**—"To cause a thing to change place." U. S. v. Peace, 48 Fed. 714.

[4] Bouvier L. D. [quot State v. Bosworth, 170 Iowa 329, 152 NW 581].

[5] U. S. v. One Chevrolet Coupé, 9 F. (2d) 85.

[6] Bouvier L. D. [quot U. S. v. One Ford Auto Truck, 286 Fed. 204, 210]; Webster D. [quot Parker v. State, 18 Tex. A. 72]; Waterbury First Soc. v. Platt, 12 Conn. 181.

[7] Harris v. Terhune, 148 Ark. 445, 230 SW 555.

[8] Bouvier L. D. [quot State v. Bosworth, 170 Iowa 329, 152 NW 581]; Webster New Int. D. [quot Louisville Chair, etc., Co. v. Otter, 219 Ky. 757, 294 SW 483]; Webster D. [quot South v. Sinking Fund Comrs., 86 Ky. 186, 5 SW 567, 9 KyL 478].

[9] Webster D. [quot Parker v. State, 18 Tex. A. 72].

[10] Bouvier L. D. [quot State v. Bosworth, 170 Iowa 329, 152 NW 581].

[11] Webster D. [quot State v. Bosworth, 170 Iowa 329, 152 NW 581]; Webster New Int. D. [quot Louisville Chair, etc., Co. v. Otter, 219 Ky. 757, 294 SW 483]; U. S. v. One Ford Auto Truck, 286 Fed. 204, 205; South v. Sinking Fund Comrs., 86 Ky. 186, 190, 5 SW 567, 9 KyL 478.

[12] Century D. [quot U. S. v. One Buick Auto, 300 Fed. 584].

[13] Standard D. [quot U. S. v. One Buick Auto, supra].

[14] Webster New Int. D. [quot Louisville Chair, etc., Co. v. Otter, 219 Ky. 757, 294 SW 483].

[15] Harris v. Terhune, 148 Ark. 445, 230 SW 555.

[16] Standard D. [quot U. S. v. One Buick Auto, 300 Fed. 584].

[17] U. S. v. One Chevrolet Coupé, 9 F. (2d) 85.

[a] **Connotes** the status existing after the shifting of location. U. S. v. One Chevrolet Coupé, 9 F. (2d) 85.

[18] Standard D. [quot U. S. v. One Buick Auto, 300 Fed. 584]; Harris v. Terhune, 148 Ark. 445, 230 SW 555. See U. S. v. Mangano, 299 Fed. 492.

[a] **Synonymous with "transfer,"** possibly more comprehensive. Scherrer v. Caneza, 33 La. Ann. 314, 316.

[19] Century D. [quot U. S. v. One Buick Auto, 300 Fed. 584].

[20] Standard D. [quot U. S. v. One Buick Auto, supra]; Harris v. Terhune, 148 Ark. 445, 230 SW 555.

[21] Durrett v. Woods, 155 La. 533, 99 S 430, 431.

[22] See cases infra this note.

[a] **"Removed" as used in Rev. St. § 3450.**—(1) "Whenever goods . . . are removed . . . with intent to defraud the United States." "Removed" here means any transportation from a place at which it should be taxed. U. S. v. One Marmon Auto, 5 F. (2d) 113. (2) The word "transported" as used in the National Prohibition Act is broader, more comprehensive, more inclusive than the term "removed" in the Internal Revenue Act § 3450. U. S. v. One Buick Sedan Auto, 1 F. (2d) 997.

[b] **Some dictionaries do not include "transport"** as a synonym of "remove." U. S. v. One Chevrolet Coupé, 9 F. (2d) 85. See U. S. v. One Kissel Touring Auto, 289 Fed. 120.

[23] Webster New Int. D. [quot Louisville Chair, etc., Co. v. Otter, 219 Ky. 757, 294 SW 483].

[24] Webster New Int. D. [quot Louisville Chair, etc., Co. v. Otter, supra]. See also Leave § 2 text and note 3.

[25] Williams v. State, 27 Tex. A. 258, 11 SW 114 (as used in phrase "run it out of the state").

[26] Webster D. [quot Parker v. State, 18 Tex. A. 72].

"Move" 42 C. J. p 1410.

[a] **"Move" and "remove"** are equivalent in meaning. Davis v. State, 68 Ala. 58, 65, 44 AmR 128.

[27] Bouvier L. D. [quot U. S. v. One Ford Auto Truck, 286 Fed. 204, 210]; Webster D. [quot Parker v. State, 18 Tex. A. 72]; Waterbury First Soc. v. Platt, 12 Conn. 181.

[28] Waterbury First Soc. v. Platt, supra.

[29] Webster New Int. D. [quot Louisville Chair, etc., Co. v. Otter, 219 Ky. 757, 294 SW 483].

[30] U. S. v. Peace, 48 Fed. 714.

[31] Webster New Int. D. [quot Louisville Chair, etc., Co. v. Otter, 219 Ky. 757, 294 SW 483].

[32] Webster New Int. D. [quot Louisville Chair, etc., Co. v. Otter, supra].

[33] Durrett v. Woods, 155 La. 533, 99 S 430, 431.

"Demolish" 18 C. J. p 484.

[34] Johnson v. Lowry, 47 Ga. 560, 15 AmR 655.

[35] Rex v. Jackson, 40 Ont. L. 173, 12 OntWN 315, 29 CanCrCas 352 [aff 12 OntWN 191].

"Certiorari" 11 C. J. p 80.

[36] U. S. v. One 1920 Premier Auto, 297 Fed. 1007. And see Internal Revenue § 294.

[37] American Oil Co. v. H. Booth Lumber Co., 137 Miss. 404, 102 S 262.

[38] Winnipeg Electric R. Co. v. Delisle, (Man.) [1921] 3 WestWkly 845.

[39] U. S. v. Bartlett, 235 U. S. 72, 35 SCt 14, 59 L. ed. 137.

[40] Waring v. Indemnity F. Ins. Co., 45 N. Y. 606, 6 AmR 146. See Fire Insurance § 92.

[a] **"Sold but not delivered" distinguished.**—Lucas v. Liverpool, etc., Ins. Co., 23 W. Va. 258, 48 AmR 383.

[41] Webster New Int. D. [quot Louisville Chair, etc., Co. v. Otter, 219 Ky. 757, 294 SW 483].

[42] South v. Sinking Fund Comrs., 86 Ky. 186, 190, 5 SW 567, 9 KyL 478.

[43] See Removal of Causes ante.

[44] **"Compensation"** 12 C. J. p 229.

"Fee" § 2.

[45] Reg. v. Postmaster-Gen., 1 Q. B. D. 658, 663.

[a] **Consideration for services.**—"If a man gives his services, whatever consideration he gets for giving his services . . . [is] a remuneration for them." Reg. v. Postmaster Gen., 1 Q. B. D. 658, 663.

[b] **It does not mean profit.**—Reg. v. Postmaster Gen., 1 Q. B. D. 658, 663.

[46] Reg. v. Postmaster Gen., supra.

[a] **Relief from expenses.**—That he was relieved of expenses while attending the camp did not of itself constitute remuneration for his services. Stiles v. Boy Scouts, (Iowa) 229 NW 841.

[b] **Compared with "emolument," "salary," and "yearly salary."**—(1) "Emolument" is not a word of larger meaning than "salary" or "remuneration." Reg. v. Postmaster Gen., 1 Q. B. D. 658, 663. (2) Not the same as salary or cash payment by the employer. Skailes v. Blue Anchor Line, Ltd., [1911] 1 K. B. 360. (3) Is a wider term than "yearly salary." Reg. v. Postmaster Gen., supra.

*By CAROLAN JEFFERSON WALSH (Removal of Cloud—Renewable inclusive).

Phrases: "Remuneration by share in the profits or the gross earnings,"[48] and "just remuneration."[49]

REMUNERATIVE DONATION.[50] A gift,[51] the object of which is to recompense for services rendered.[52]

RENCOUNTER. A word, derived from the French word "recóntre," which means a meeting,[53] that has been defined as meaning a sudden hostile collision, as with an enemy;[54] a sudden meeting, as opposed to a duel which is deliberate;[55] an unexpected encounter or meeting, as of travelers;[56] also a contest or debate.[57]

RENDER.[58] [§ 1] **A. In General.** To bestow or provide;[59] to deliver;[60] to furnish;[61] to give;[62] to give in answer to requirement of duty or demand;[63] to present;[64] also to make up; to finish;[65] to state.[66]

Phrases: "Account render,"[67] "to render harmless and expel,"[68] "to render judgment,"[69] and "when they render a general verdict;"[70] also "rendering judgment,"[71] "rendering of such judgment,"[72] and "'rendering,' 'pronouncing,' or 'legal promulgation' of our judgments."[73]

[§ 2] **B. Rendered.** The past tense of render.[74]

As applied to judgments or decisions.[75] Given by judicial action;[76] an appropriate term to designate the action of a court when it reads and files its finding,[77] when the court makes an order for judgment,[78] or when the court announces or signs the judgment, as is the common practice, and returns the signed judgment to counsel;[79] and has reference to the time the judgment was in fact given and pronounced.[80]

Rendered by referee.[81] A term employed when a referee has actually decided the case, signed the record embodying such decision and notified the parties thereof.[82]

Other phrases: "If no decision is rendered within the time limited,"[83] "rendered at chambers,"[84] "rendered services,"[85] "services rendered,"[86] and "the verdict rendered by their foreman."[87]

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47. Reg. v. Postmaster Gen., 1 Q. B. D. 658, 663. See Quid Pro Quo 51 C. J. p 124.

48. Stephenson v. Rossall Steam Fishing Co., 84 L. J. K. B. 677.

49. See Just 35 C. J. p 434 note 82.

50. **Donation** 19 C. J. p 444. See also Gifts § 2.

51. **"Gift" defined** see Gifts § 1.

52. Ackerman v. Larner, 116 La. 101, 116, 40 S 581.

53. Mulligan v. State, 18 Ga. A. 464, 89 SE 541.

54. Standard D. [quot Mulligan v. State, supra].

55. Black L. D. [quot Mulligan v. State, supra].

56. Standard D. [quot Mulligan v. State, supra].

57. Standard D. [quot Mulligan v. State, supra].

58. See also Rendition post.

59. Standard D. [quot Dayton v. Ewart, 28 Mont. 153, 156, 72 P 420, 98 AmSR 549].

60. Webster D. [quot Ætna L. Ins. Co. v. Hesser, 77 Iowa 381, 387, 42 NW 325, 14 AmSR 297, 4 LRA 122; Peabody v. Satterlee, 166 N. Y. 174, 178, 59 NE 818, 52 LRA 956]; Manufacturers', etc., Mut. Ins. Co. v. Zeitinger, 168 Ill. 286, 292, 48 NE 179, 61 AmSR 105.

61. Century D.; Webster D. [both quot Peabody v. Satterlee, 166 N. Y. 174, 178, 59 NE 818, 52 LRA 956]; Standard D. [quot Dayton v. Ewart, 28 Mont. 153, 156, 72 P 420, 98 AmSR 549]; Manufacturers', etc., Mut. Ins. Co. v. Zeitinger, 168 Ill. 286, 292, 48 NE 179, 61 AmSR 105.

62. Century D. [quot Peabody v. Satterlee, 166 N. Y. 174, 178, 59 NE 818, 52 LRA 956].

63. Standard D. [quot Dayton v. Ewart, 28 Mont. 153, 156, 72 P 420, 98 AmSR 549].

64. Century D. [quot Peabody v. Satterlee, 166 N. Y. 174, 178, 59 NE 818, 52 LRA 956].

65. Webster D. [quot Ætna L. Ins. Co. v. Hesser, 77 Iowa 381, 387, 42 NW 325, 14 AmSR 297, 4 LRA 122].

66. Manufacturers', etc., Mut. Ins. Co. v. Zeitinger, 168 Ill. 286, 292, 48 NE 179, 61 AmSR 105; Webster D. [quot Ætna L. Ins. Co. v. Hesser, 77 Iowa 381, 387, 42 NW 325, 14 AmSR 297, 4 LRA 122; Peabody v. Satterlee, 166 N. Y. 174, 178, 59 NE 818, 52 LRA 956].

[a] **"Forward" and "mail" distinguished.**—Manufacturers', etc., Mut. Ins. Co. v. Zeitinger, 168 Ill. 286, 292, 48 NE 179, 61 AmSR 105.

67. See Accounts and Accounting § 12.

68. Gay v. Hocking Coal Co., 184 Iowa 949, 169 NW 360.

69. See infra notes 71–73. And see Judgments §§ 175–180; Rendition post.

70. Little Coal Co. v. O'Brien, 63 Ind. A. 504, 113 NE 465, 114 NE 96.

71. Moulton v. Smith, 23 Ariz. 319, 203 P 562.

72. California State Tel. Co. v. Patterson, 1 Nev. 150, 155; Fleet v. Youngs, 11 Wend. (N. Y.) 522, 527.

73. U. S. v. Beecham, 23 Philippine 258.

74. See also Rendition post.

Account rendered see Accounts and Accounting § 2.

75. **Judgment rendered** see Judgments §§ 175–180.

76. Dieffenbach v. Roch, 112 N. Y. 621, 20 NE 560, 2 LRA 829; Sklar, etc., Woodworking Co. v. Owen, 177 App. Div. 796, 165 NYS 13; Philadelphia First Bank v. National Park Bank, 100 Misc. 31, 165 NYS 15.

[a] **Distinguished from:** (1) "Given." Schuster v. Rader, 13 Colo. 329, 334, 22 P 505. (2) "Given or made." Harmon v. Comstock Horse, etc., Co., 9 Mont. 243, 248, 23 P 470. (3) "Duly made and given." Roys v. Lull, 9 Wis. 324.

77. Mayer v. Haggerty, 138 Ind. 628, 631, 38 NE 42.

[a] **"Rendered" refers to the making up and announcement** of the judgment, not the clerical act of reducing it to writing. Ryals v. McArthur, 92 Ga. 378, 17 SE 350; Constitution Pub. Co. v. Dean, 11 Ga. A. 361, 75 SE 335.

78. State v. Biesman, 12 Mont. 11, 16, 29 P 534.

[a] **Distinguished from "taken."**—"The word 'rendered' is appropriately used in reference to a judgment or decree, but not to a proceeding or order. . . . The word 'taken' was adopted as a term alike applicable to either or all of them." Brownell v. Yolo County Super. Ct., 157 Cal. 703, 109 P 91, 93.

79. State v. Brown, 31 Wash. 397, 401, 72 P 86, 62 LRA 974 [quot Quareles v. Seattle, 26 Wash. 226, 227, 66 P 389].

[a] **Distinguished from "docketed."**—Dieffenbach v. Roch, 112 N. Y. 621, 625, 20 NE 560, 2 LRA 829. See Docket 19 C. J. p 381.

[b] **Distinguished from "entered."**—The terms "render" and "enter" when used with respect to the order of a court or other tribunal are of course not strictly synonymous, although sometimes used interchangeably in a colloquial way. Wilson v. Kansas Soldiers' Compensation Bd., 118 Kan. 165, 233 P 1034. See Coe v. Erb, 59 Oh. St. 259, 262, 52 NE 640, 69 AmSR 764; State v. Brown, 31 Wash. 397, 401, 72 P 86, 62 LRA 974.

"Enter" 20 C. J. p 1265.

80. Farmers' State Bank v. Bales, 64 Nebr. 870, 871, 90 NW 945.

81. **Generally** see References.

82. Craig v. Craig, 66 Hun 452, 454, 21 NYS 241.

83. Austin v. Jobes, 112 Misc. 121, 182 NYS 777.

84. Appelby v. South Carolina, etc., R. Co., 58 S. C. 33, 36, 36 SE 109.

85. Amos v. Atlanta R. Co., 104 Ga. 809, 31 SE 42.

86. Gabb v. King, 38 Cal. 143, 144; Barker v. McLeod, 15 Nev. 148, 151.

[a] **"Services rendered":** (1) Importing that services had been rendered. Gabb v. King, 38 Cal. 143, 144. (2) In the sense of "to be rendered." Barker v. McLeod, 14 Nev. 148, 151.

87. Kramm v. Stockton Electric R. Co., 22 Cal. A. 737, 136 P 523.

RENDITION.[88] The act of rendering.[89]

Phrases: "Rendition of a criminal judgment,"[90] "rendition of a judgment,"[91] and "from the rendition of same without issue of execution."[92]

REND-ROCK. A kind of dynamite.[93]

RENEGADE. One who has changed his profession of faith or opinion; one who has deserted his church or party.[94]

RENEW.[95] [§ 1] **A. In General.** "Renew" is not a word of art and has no legal or technical significance.[96] It has been defined variously as meaning to make again;[97] to make new again;[98] to make over, to reëstablish, or to rebuild;[99] to reëstablish;[1] to refresh, revive, or rehabilitate an expiring or declining subject;[2] restore to freshness;[3] to restore to fullness or sufficiency;[4] to restore to vigor;[5] to revive or restore to existence.[6] It signifies to make over; to make anew; to give new life to; to restore; to recreate; to rebuild.[7] But it is not appropriate to describe the making of a new contract, or the creation of a new existence.[8] It may be employed as synonymous with "repair."[9] **Specifically,** to continue in force for a fresh period;[10] to grant or obtain an extension;[11] to substitute for an old obligation a new one of the same nature.[12]

Phrases: "Create, renew, or extend the charter,"[13] "privilege to renew,"[14] "renew a charter,"[15] "renew or repair any pavement,"[16] "renew policy,"[17] "renew the contract,"[18] "renew the same from time to time,"[19] and "repair and renew."[20]

[§ 2] **B. Renewed.** A term applied to an obligation on which the time of payment has been extended.[21] The term is used and employed as meaning or referring to the imparting continued or new force and effect.[22]

Phrases: "Issued or renewed,"[23] and "made or renewed."[24]

RENEWABLE. Capable of being renewed.[25]

Renewable forever. A phrase used in the habendum of a lease and said to confer a right to renew in perpetuity.[26]

***RENEWAL.**[27] [§ 1] **A. In General.** "Renewal" is not a word of art;[28] it has no legal or technical signification;[29] and the cases construing the proper meaning to be ascribed to the term are by no means uniform;[30] it may mean whatever the parties intended when contracting,[31] and the construction is controlled by the intention of the parties.[32]

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[88] See also Render ante.

Rendition of account see Accounts and Accounting §§ 250–253.

Rendition of judgment see Judgments §§ 175–180, 191–203. See also Appeal and Error §§ 1622–1626; Justices of the Peace §§ 296–301; Mandamus § 139; Mortgages §§ 1763, 1764.

Rendition of verdict:
In civil action see Trial [38 Cyc 1872–1876].
In criminal prosecution see Criminal Law §§ 2571–2579.

[89] Webster D. [quot Ætna L. Ins. Co. v. Hesser, 77 Iowa 381, 387, 42 NW 325, 14 AmSR 297, 4 LRA 122].

[90] See Criminal Law §§ 3000–3118.

[91] See Judgments §§ 175–203.

[92] Mobile Drug Co. v. McCullough, 215 Ala. 682, 112 S 238.

[93] Stewart v. New York, etc., R. Co., 5 Silv. Sup. 198, 203, 8 NYS 19.

"Dynamite" 19 C. J. p 849.

[94] Black L. D.

[95] See also Renewal post.

[96] Maryland Theatrical Corp. v. Manayunk Trust Co., 157 Md. 602, 146 A 805.

[a] **"To renew"** has not a definite and fixed legal significance. Orr v. Doubleday, 223 N. Y. 334, 119 NE 552.

[97] Bouvier L. D. [quot Kedey v. Petty, 153 Ind. 179, 184, 54 NE 798]; Daggett v. Daggett, 124 Mass. 149, 151.

[98] Webster New Int. D. [quot State v. Niehaus, (Iowa) 228 NW 308]; Sponhaur v. Malloy, 21 Ind. A. 287, 52 NE 245; Pennsylvania R. Co. v. Pennsylvania-Ohio Electric Co., 296 Pa. 40, 145 A 686.

[99] Whalen v. Manley, 68 W. Va. 328, 69 SE 843, 844; Kollock v. Scribner, 98 Wis. 104, 110, 73 NW 776.

[1] Sponhaur v. Malloy, 21 Ind. A. 287, 52 NE 245.

[2] Webster D.; Worcester D. [both quot Carter v. Brooklyn L. Ins. Co., 110 N. Y. 15, 21, 22, 17 NE 396]; State v. Niehaus, (Iowa) 228 NW 308.

"Revive" post.

[3] Webster New Int. D. [quot State v. Niehaus, (Iowa) 228 NW 308].

[4] Webster New Int. D. [quot State v. Niehaus, supra].

[5] Sponhaur v. Malloy, 21 Ind. A. 287, 52 NE 245.

[6] Webster New Int. D. [quot Aaron v. Woodcock, 283 Pa. 33, 128 A 665, 38 ALR 1251].

[7] West v. Mudd, 250 Ill. A. 258; Orton v. Noonan, 27 Wis. 272, 282.

[a] **The word renew etymologically contemplates** something more than passivity in suffering a state to continue as it was. Kentucky Lumber Co. v. Newell, 105 SW 972, 32 KyL 396. To same effect Klein v. Auto Parcel Delivery Co., 192 Ky. 583, 234 SW 213.

"Rebuild" 52 C. J. p 1189.

"Restore" post.

[8] State v. Niehaus, (Iowa) 228 NW 308; Carter v. Brooklyn L. Ins. Co., 110 N. Y. 15, 21, 22, 17 NE 396. And see Cousins v. Brotherhood Locomotive Engineers, 42 Que. 110, 6 Dom LR 26 (giving the same as definition of "renewal").

[9] Peo. v. Highway Comrs., 158 Ill. 197, 41 NE 1105.

"Repair" post.

[10] Webster New Int. D. [quot State v. Niehaus, (Iowa) 228 NW 308].

[11] Webster New Int. D. [quot State v. Niehaus, supra].

[a] **Distinguished from "extend."**—Quinn v. Valiquette, 80 Vt. 434, 68 A 515, 14 LRANS 962. And see Extend 25 C. J. p 226 note 6 [b].

[12] Webster D. [quot Tannenbaum v. Bloomingdale, 27 Misc. 532, 535, 58 NYS 235].

[13] Cooper v. Oriental Sav., etc., Assoc., 100 Pa. 402, 406.

[14] Kozy Theatre Co. v. Love, 191 Ky. 595, 231 SW 249.

[15] Moers v. Reading, 21 Pa. 188, 201.

Renewal of corporate charter see Corporations § 183.

[16] Wilkins v. Savannah, 152 Ga. 638, 111 SE 42.

[17] Martin v. American Ins. Co., 198 Wis. 214, 223 NW 437.

Renewal of insurance policy generally see Fire Insurance §§ 108–112; Insurance §§ 251–256; Life Insurance § 86; Marine Insurance § 58.

[18] Livingston Waterworks v. Livingston, 53 Mont. 1, 162 P 381.

Renewal of contract generally see Contracts § 692.

[19] Midland Special School Dist. v. Central Trust Co., 1 F. (2d) 124.

[20] Dwight v. Ludlow Mfg. Co., 128 Mass. 280, 281.

[21] English L. D. [quot Kedey v. Petty, 153 Ind. 179, 184, 54 NE 798].

[22] Anderson L. D. [quot Kedey v. Petty, supra].

[23] Carter v. Brooklyn L. Ins. Co., 110 N. Y. 15, 17 NE 396.

[24] Cousins v. Moore, 42 Que. Super. 156, 6 DomLR 35.

[25] Webster New Int. D.

[a] **The cases construing the proper meaning** to be ascribed to the term "renewal" or "renewable" are by no means uniform. King v. Kaiser, 126 Md. 213, 94 A 780.

[26] Clinch v. Pernette, 24 Can. S. C. 385, 400.

[27] **Renewal of:**
Action see Limitations of Actions §§ 526–558.
Application for:
  License see Intoxicating Liquors § 128.
  Patent see Patents §§ 189–191.
Execution see Executions §§ 165–176; Justices of the Peace § 349.
Lease or tenancy see Landlord and Tenant §§ 120–180; Mines and Minerals §§ 601, 673.
License see Intoxicating Liquors § 98; Licenses § 108; Mines and Minerals § 437.
Motion see Motions and Orders §§ 175–200.
Negotiable instrument see Bills and Notes §§ 626–665.

*By CARLOS M. SANDOVAL (Renewal—Renter inclusive).

[§ 2] **B. As Noun—1. In Broad Sense.** In its broadest sense,[33] that which is made anew,[34] or reëstablished;[35] a change of something old for something new[36] and in conjunction with,[37] or as distinguished from, "repair,"[38] it is but a replacement;[39] a reconstruction of the entirety.[40]

[§ 3] **2. In Commercial and Legal Parlance**[41] the term "renewal" means something more than the substitution of another obligation for the old one.[42] It has been defined variously as meaning a continuance of the old obligation;[43] the establishment,[44] extension,[45] or reëstablishment[46] of the particular contract for another period of time;[47] imparting continued or new force and effect;[48] the revival or rehabilitation of an expiring subject.[49] In law the term may be employed as referring to an extension of the time of payment;[50] an obligation on which time of payment is extended;[51] a reloan on a new note given;[52] but not a loan,[53] nor in the strict sense a discount.[54] However, while "renewal" has been construed as

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Patent see Patents §§ 304–306.
Period for filing mechanic's lien see Mechanics' Liens §§ 238–242.
Process see Process § 51.
Specific contract, instrument, or obligation see particular titles.

See also Renew ante; Renewable ante.

[28] Anderson L. D. [quot Sponhaur v. Malloy, 21 Ind. A. 287, 52 NE 245, 247; State v. Kiefer, 183 Iowa 319, 334, 163 NW 698; Guie v. Byers, 95 Wash. 492, 164 P 75, 77]; Lowry Nat. Bank v. Fickett, 122 Ga. 489, 492, 50 SE 396; Maryland Theatrical Corp. v. Manayunk Trust Co., 157 Md. 602, 146 A 805, 810; Gault v. McGrath, 32 Pa. 392, 398; Russell v. Phillips, 14 Q. B. 891, 900, 68 ECL 891, 117 Reprint 342. See City Nat. Bank v. Stoeckel, 103 Conn. 732, 132 A 20 ("it is not a term of art").

[29] Anderson L. D. [quot Lowry Nat. Bank v. Fickett, 122 Ga. 489, 492, 50 SE 396; Sponhaur v. Malloy, 21 Ind. A. 287, 52 NE 245, 247; State v. Kiefer, 183 Iowa 319, 334, 163 NW 698; Maryland Theatrical Corp. v. Manayunk Trust Co., 157 Md. 602, 146 A 805, 810; Gault v. McGrath, 32 Pa. 392, 398; Guie v. Byers, 95 Wash. 492, 164 P 75, 77; Russell v. Phillips, 14 Q. B. 891, 900, 68 ECL 891, 117 Reprint 342]. See Flanagin v. Hambleton, 54 Md. 222, 227; Orr v. Doubleday, 223 N. Y. 334, 119 NE 552, 554.

[a] **To similar effect.**—(1) "'Renewal' . . . [has] not a definite and fixed legal significance to which the parties are bound by the use of them." Orr v. Doubleday, 223 N. Y. 334, 119 NE 552, 554. (2) "The word 'renewal' has no legal or strictly technical signification." Flanagin v. Hambleton, 54 Md. 222, 227 [quot Maryland Theatrical Corp. v. Manayunk Trust Co., 157 Md. 602, 146 A 805, 810].

[30] King v. Kaiser, 126 Md. 213, 220, 94 A 780 [quot Maryland Theatrical Corp. v. Manayunk Trust Co., 157 Md. 602, 146 A 805, 808].

[31] Guie v. Byers, 95 Wash. 492, 164 P 75, 77.

[32] King v. Kaiser, 126 Md. 213, 220, 94 A 780, 782 [quot Maryland Theatrical Corp. v. Manayunk Trust Co., 157 Md. 602, 146 A 805, 808].

[33] Lowry Nat. Bank v. Fickett, 122 Ga. 489, 492, 50 SE 396.

[34] Lowry Nat. Bank v. Fickett, supra; American Surety Co. v. State, (Tex. Civ. A.) 277 SW 790, 793 [cit Cyc].

[35] Lowry Nat. Bank v. Fickett, 122 Ga. 489, 492, 50 SE 396.

[36] Bouvier L. D. [quot West Madison State Bank v. Mudd, 250 Ill. A. 258, 264; Sponhaur v. Malloy, 21 Ind. A. 287, 52 NE 245, 247 (quot King v. Kaiser, 126 Md. 213, 94 A 780, 783); State v. Kiefer, 183 Iowa 319, 334, 163 NW 698; Guie v. Byers, 95 Wash. 492, 164 P 75, 76]. See Lowry Nat. Bank v. Fickett, 122 Ga. 489, 492, 50 SE 396.

[a] **Similar definition.**—"A change of something old to something new." Lowry Nat. Bank v. Fickett, 122 Ga. 489, 492, 50 SE 396.

[37] Central of Georgia R. Co. v. Central Trust Co., 135 Ga. 472, 69 SE 708, 713.

[38] Walker v. Dwelle, 187 Iowa 1384, 175 NW 957, 961.

"Repair" post.

[39] Central of Georgia R. Co. v. Central Trust Co., 135 Ga. 472, 69 SE 708, 713.

"Replacement" post.

[40] Walker v. Dwelle, 187 Iowa 1384, 175 NW 957, 961.

"Reconstruction" ante.

[41] Kedey v. Petty, 153 Ind. 179, 184, 54 NE 798 [quot State v. Niehaus, (Iowa) 228 NW 308, 309]; Parchen v. Chessman, 53 Mont. 430, 164 P 531, 532.

[42] Kedey v. Petty, 153 Ind. 179, 184, 54 NE 798 [quot State v. Niehaus, (Iowa) 228 NW 308, 309]; Parchen v. Chessman, 53 Mont. 430, 164 P 531, 532. See Grace v. Strickland, 188 N. C. 369, 124 SE 856, 857, 35 ALR 1296.

"Signifies more than the substitution of one obligation for another." Grace v. Strickland, supra.

[43] Sproul v. Beskin, 179 App. Div. 275, 166 NYS 606. See Clifford v. U. S. Fidelity, etc., Co., 119 Okl. 133, 249 P 938, 941.

[a] **Similar definition.**—"The term 'renewal' simply means . . . [a] continuation of a former obligation." Clifford v. U. S. Fidelity, etc., Co., 119 Okl. 133, 249 P 938, 941.

[44] Lowry Nat. Bank v. Fickett, 122 Ga. 489, 492, 50 SE 396 [quot State v. Niehaus, (Iowa) 228 NW 308, 310].

"Establishment" 21 C. J. p 903.

[45] American Surety Co. v. State, (Tex. Civ. A.) 277 SW 790, 793 [cit Cyc].

"Extension" 25 C. J. p 227.

[46] Kedey v. Petty, 153 Ind. 179, 184, 54 NE 798 [quot State v. Niehaus, (Iowa) 228 NW 308, 310]; Parchen v. Chessman, 53 Mont. 430, 164 P 531, 532; Grace v. Strickland, 188 N. C. 369, 124 SE 856, 857, 35 ALR 1296. See Guie v. Byers, 95 Wash. 492, 164 P 75, 76 ("reëstablishing").

"Reëstablishment" ante.

[47] Kedey v. Petty, 153 Ind. 179, 184, 54 NE 798 [quot Lowry Nat. Bank v. Fickett, 122 Ga. 489, 492, 50 SE 396 (quot State v. Niehaus, (Iowa) 228 NW 308, 310)]; Parchen v. Chessman, 53 Mont. 430, 164 P 531, 532; Grace v. Strickland, 188 N. C. 369, 124 SE 856, 857, 35 ALR 1296; American Surety Co. v. State, (Tex. Civ. A.) 277 SW 790, 793 [cit Cyc].

[48] Anderson L. D. [quot Kedey v. Petty, 153 Ind. 179, 184, 54 NE 798 (quot State v. Niehaus, (Iowa) 228 NW 308, 310)].

[49] Hudson Nav. Co. v. Joyce, 238 Fed. 102, 104, 151 CCA 178 [quot Carter v. Brooklyn L. Ins. Co., 110 N. Y. 15, 22, 17 NE 396.

[a] **Similar definition.**—"The substitution in place of one engagement of a new obligation on the same terms and conditions." Grace v. Strickland, 188 N. C. 369, 124 SE 856, 857, 35 ALR 1296.

[50] McRoberts v. Spaulding, 32 F. (2d) 315, 318; Utica City Nat. Bank v. Gunn, 222 N. Y. 204, 118 NE 607, 608.

[51] English L. D. [quot Lowry Nat. Bank v. Fickett, 122 Ga. 489, 492, 50 SE 396; Kedey v. Petty, 153 Ind. 179, 184, 54 NE 798 (quot State v. Niehaus, (Iowa) 228 NW 308, 310)]; Parchen v. Chessman, 53 Mont. 430, 164 P 531, 532; Guie v. Byers, 95 Wash. 492, 164 P 75, 76.

[52] Webster D. [quot Gault v. McGrath, 32 Pa. 392, 398].

[53] McRoberts v. Spaulding, 32 F. (2d) 315, 318; Utica City Nat. Bank v. Gunn, 222 N. Y. 204, 118 NE 607, 608.

[a] **"Loan" distinguished.**—Utica City Nat. Bank v. Gunn, 222 N. Y. 204, 118 NE 607, 608.

"Loan" 38 C. J. p 125.

[54] Utica City Nat. Bank v. Gunn, 222 N. Y. 204, 118 NE 607, 608.

[a] **"Discount" distinguished.**—Utica City Nat. Bank v. Gunn, 222 N. Y. 204, 118 NE 607, 608.

[b] **Loans and discounts.**—(1) "In their proper legal meaning do not include renewals." Utica City Nat. Bank v. Gunn, 222 N. Y. 204, 118 NE 607, 608. (2) But these words "are not so clear and certain that circumstances may not broaden them to include renewals." Utica City Nat. Bank v. Gunn, supra.

"Discount" 18 C. J. p 1050.

equivalent to[55] or synonymous with[56] "extension," it has also been distinguished from "extension;"[57] and it has been held that a renewal, as distinguished from a mere extension, is a separate and distinct contract,[58] the substitution of a new right or obligation for another of the same nature,[59] and that the word contemplates,[60] implies,[61] imports,[62] or requires[63] the execution of a new instrument; although it has been said that whether it does or not is dependent upon the intention of the parties,[64] or that it may depend upon a reading of the whole instrument,[65] and upon the practical construction given to its provisions by the parties themselves.[66] Further, "renewal" may sometimes be used in the sense of adoption,[67] confirmation,[68] or ratification[69] of contracts of persons under disability.[70]

[§ 4] **3. Phrases.** "Any renewal or extension,"[71] "any renewal thereof,"[72] "legal renewal,"[73] "option of renewal,"[74] "renewal of a license,"[75] "renewal of another term,"[76] "renewal of bonds,"[77] "renewal or continuation,"[78] and "renewal or extension;"[79] also "renewals and duplications,"[80] and "renewals and replacements."[81]

[§ 5] **C. As Adjective.** "Renewal" is sometimes employed as an adjective.[82]

Phrases: "Renewal clause,"[83] "renewal license,"[84] and "renewal note."[85]

RENOUNCE.[86] To disclaim; disavow; to give up; forego; resign; relinquish.[87]

Phrase: "Waive and renounce."[88]

RENOVATE. To renew;[89] to repair.[90]

Applied to brick work, the word means to restore the ordinary appearance of new brick work.[91]

Renovated or process butter. Butter which has been subjected to any process by which it is melted, clarified, or refined, and made to resemble genuine butter, always excepting "adulterated butter;"[92] old, rancid, and putrid cow butter, which has been treated by a certain process, with heat and chemicals, by which the rancid taste and smell are removed therefrom, and the same is artificially colored so as to exactly resemble pure and fresh creamery butter.[93]

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[55] Kentucky Lumber Co. v. Newell, 105 SW 972, 974, 32 KyL 396; Insurance, etc., Co. v. Missouri Nat. Bank, 71 Mo. 58, 60 [cit and foll American Press v. St. Louis, 314 Mo. 288, 284 SW 482, 486 ("implies nothing more"); Blanchon v. Kellerstrass Distilling Corp., 200 Mo. A. 610, 208 SW 484, 485 ("no practical difference")]. See Pitts v. Hall, 19 F. Cas. No. 11,193, 3 Blatchf. 201, 204 (the term was proper and apt to refer to an extension of a patent); Manhattan Bridge Three-Cent Line v. New York, 204 App. Div. 89, 198 NYS 49, 54 ("refers to a renewal or extension beyond the terms of the original grant").

[a] **Simply "extension."**—(1) "The term 'renewal' simply means an extension . . . of a former obligation." Clifford v. U. S. Fidelity, etc., Co., 119 Okl. 133, 249 P 938, 941. (2) "The word 'renewal' was evidently used in the sense of extending." Kentucky Lumber Co. v. Newell, 105 SW 972, 974, 32 KyL 396.

[b] **"Extension" compared.**—Guie v. Byers, 95 Wash. 492, 164 P 75, 77.

[56] Wilson v. Rousseau, 4 How. (U. S.) 646, 697, 11 L. ed. 1141; Farmers' L. & T. Co. v. Central Park, etc., R. Co., 193 Fed. 963, 965, 113 CCA 591 [certiorari den 225 U. S. 712, 32 SCt 841, 56 L. ed. 1268]; Goodyear v. Cary, 10 F. Cas. No. 5,562, 4 Blatchf. 271, 304, 1 Fish. Pat. Cas. 424.

"Extension" 25 C. J. p 227.

[57] Wilson v. Rousseau, 30 F. Cas. No. 17,832, 1 Blatchf. 3, 19; West Madison State Bank v. Mudd, 250 Ill. A. 258, 264; Nenzel v. Rochester Silver Corp., 48 Nev. 41, 226 P 1102, 1105; Clifford v. U. S. Fidelity, etc., Co., 119 Okl. 133, 249 P 938, 941; Wilcox v. McCain Land, etc., Co., 37 S. D. 511, 514, 159 NW 49; Guie v. Byers, 95 Wash. 492, 164 P 75, 77. But see American Press v. St. Louis, 314 Mo. 288, 284 SW 482, 486 ("the courts of our state have declined to make such distinction"); Orr v. Doubleday, 172 App. Div. 96, 157 NYS 1009, 1012 ("such nicety in distinguishing legal terms, however, is not accepted"); and cases supra notes 55, 56.

[58] Proctor Coal Co. v. U. S. Fidelity, etc., Co., 124 Fed. 424, 427 [quot Clifford v. U. S. Fidelity, etc., Co., 119 Okl. 133, 249 P 938, 941]; American Surety Co. v. State, (Tex. Civ. A.) 277 SW 790, 793.

[59] Anderson L. D. [quot Sponhaur v. Malloy, 21 Ind. A. 287, 52 NE 245, 247 (quot King v. Kaiser, 126 Md. 213, 220, 94 A 780, 783); State v. Kiefer, 183 Iowa 319, 334, 163 NW 698; Guie v. Byers, 95 Wash. 492, 164 P 75, 77]; Lowry Nat. Bank v. Fickett, 122 Ga. 489, 492, 50 SE 396. See Grace v. Strickland, 188 N. C. 369, 124 SE 856, 857, 35 ALR 1296.

[60] Robertson v. Drew, 34 Cal. A. 143, 166 P 838, 839; Wilcox v. McCain Land, etc., Co., 37 S. D. 511, 514, 159 NW 49; United Woolen Mills Co. v. Honaker, 96 W. Va. 166, 122 SE 440, 444. See Hacquard v. Sweetwine, 92 W. Va. 681, 115 SE 797, 800. But see Kentucky Lumber Co. v. Newell, 105 SW 972, 974, 32 KyL 396.

[61] Clifford v. U. S. Fidelity, etc., Co., 119 Okl. 133, 249 P 938, 941.

[62] Robertson v. Drew, 34 Cal. A. 143, 166 P 838, 839; Clifford v. U. S. Fidelity, etc., Co., 119 Okl. 133, 249 P 938, 941.

[63] Clifford v. U. S. Fidelity, etc., Co., supra. See Whalen v. Manley, 68 W. Va. 328, 69 SE 843. But see Insurance, etc., Co. v. Missouri Nat. Bank, 71 Mo. 58, 61; Ranlet v. Cook, 44 N. H. 512, 517, 84 AmD 92.

[64] Maryland Theatrical Corp. v. Manayunk Trust Co., 157 Md. 602, 146 A 805, 810.

[65] Indian Terr. Illum. Oil Co. v. Bartlesville Zinc Co., 288 Fed. 273, 276; Robertson v. Drew, 34 Cal. A. 143, 166 P 838, 839.

[66] Indian Terr. Illum. Oil Co. v. Bartlesville Zinc Co., 288 Fed. 273, 276; Robertson v. Drew, 34 Cal. A. 143, 166 P 838, 839.

[67] **"Adoption"** 1 C. J. p 1365.

[68] **"Confirmation"** 12 C. J. p 425.

[69] **"Ratification"** 52 C. J. p 1144.

[70] Minnich v. Darling, 8 Ind. A. 539, 36 NE 173, 175. See also Contracts § 44; Drunkards §§ 114, 117; Infants §§ 148–161; Insane Persons §§ 518–521.

[a] **"'Renewal' is the proper designation** of the conduct of a party under such circumstances." Minnich v. Darling, 8 Ind. A. 539, 36 NE 173, 175.

[b] **Distinguished from "adoption" and "ratification."**—Minnich v. Darling, 8 Ind. A. 539, 36 NE 173, 175.

[71] Indian Terr. Illum. Oil Co. v. Bartlesville Zinc Co., 288 Fed. 273, 276, 278.

[72] Clifford v. U. S. Fidelity, etc., Co., 119 Okl. 133, 249 P 938, 941.

[73] Indian Terr. Illum. Oil Co. v. Bartlesville Zinc Co., 288 Fed. 273, 275.

[74] Nenzel v. Rochester Silver Corp., 48 Nev. 41, 226 P 1102, 1105. See also Landlord and Tenant §§ 121–157.

[a] **"Option of extension" distinguished.**—Nenzel v. Rochester Silver Corp., 48 Nev. 41, 226 P 1102, 1105.

"Option" 46 C. J. p 1122.

[75] Sharpe v. Wakefield, 21 L. R. Q. B. 66, 79. See also Intoxicating Liquors § 98.

[76] Feigenspan v. Popowska, 75 N. J. Eq. 342, 72 A 1003, 1005 (distinguished from "renewal of the lease"). See also Landlord and Tenant §§ 162–174.

[77] Farmers' L. & T. Co. v. Central Park, etc., R. Co., 193 Fed. 963, 113 CCA 591 [certiorari den 225 U. S. 712, 32 SCt 841, 56 L. ed. 1268].

[78] Arnprior v. U. S. Fidelity, etc., Co., 51 Can. S. C. 94, 21 DomLR 343, 345.

[79] Indian Terr. Illum. Oil Co. v. Bartlesville Zinc Co., 288 Fed. 273, 276.

[80] Page L'Hote Co. v. Munson SS. Line, 169 La. 724, 125 S 868, 869.

[a] **Held not to include:** Future contracts entered into between same parties. Page L'Hote Co. v. Munson SS. Line, 169 La. 724, 125 S 868, 869.

[81] Shrader v. Commercial Coal Min. Co., 260 Pa. 576, 104 A 151, 153.

[82] See cases infra note 83.

[83] Sloan v. Longcope, 288 Pa. 196, 135 A 717, 718. See also Landlord and Tenant §§ 162–165.

[84] See Stavolo's App., 81 Conn. 454, 71 A 549, 550. See also Intoxicating Liquors § 98.

[85] State v. Higgins, 148 Tenn. 609, 612, 256 SW 875.

[a] **"There is no such separate negotiable instrument** as a 'renewal note.' The term 'renewal' merely connotes the idea of an existing obligation evidenced by a prior note, for which, at maturity, the new note is to be substituted." State v. Higgins, 148 Tenn. 609, 612, 256 SW 875. See also Bills and Notes § 626.

[86] See Renunciation post.

[87] Anderson L. D.

"Relinquish" ante.

[88] Davis v. McGrew, 82 Cal. 135, 138, 23 P 41.

[89] Webster New Int. D.

"Renew" ante.

[90] Century D.; Standard D. [both quot Mozingo v. Wellsburg Electric Light, etc., Co., 101 W. Va. 79, 81, 131 SE 717.

"Repair" post.

[91] Finney v. Bennett, 49 Misc. 230,

Renovating butter. A radical method of cleansing filthy butter by melting, straining, and blowing it into a spray, when hot water is allowed to percolate through the butter oil and then drawn off, and an emulsion made with milk, cooled into crystals, salted, and packed.[94]

RENOVATIONS.[95] As applied to a building, means the making new after decay, destruction, or impairment;[96] the creating anew;[97] the renewing materially;[98] the restoring by replacing worn-out, unsafe, or damaged parts.[99]

Phrase: "Renovations and changes."[1]

RENT.[2] [§ 1] **A. Derivation.** The word "rent" is derived from the Latin "redditus" or "reditus,"[3] and may be employed as a noun[4] or as a verb.[5]

[§ 2] **B. As Noun—1. In General.** The word has a well defined significance[6] and may be generally defined as a compensation[7] or return.[8]

[§ 3] **2. Colloquial or Popular Sense.** In the broader, colloquial sense understood by laymen,[9] a reasonable return from real property;[10] in the popular sense,[11] the compensation paid for the use of any kind of property, movable, or fixed;[12] the payment by one for the temporary use of property;[13] and its usual and ordinary meaning[14] is the amount to be paid for the use and occupation of the premises.[15]

[§ 4] **3. Technical Sense.** Strictly the term "rent" refers to the compensation received by a landlord for the use of land leased;[16] and hence it is a

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232, 97 NYS 291.

[a] **In a contract** to "renovate the entire brickwork on a house, guaranteeing to make it look like new," without making any exception of magnesium stains, although plaintiff knew that they are a frequent, inherent, and ineradicable defect in bricks, and defendant did not know that fact, the text definition was given for the word "renovate" and was held no excuse for not complying with the terms of his contract by removing all the stains. Finney v. Bennett, 49 Misc. 230, 232, 97 NYS 291.

[92] U. S. Comp. St. Suppl. (1903) p 267. See U. S. v. Nine Barrels Butter, 241 Fed. 499, 501; Com. v. Seiler, 20 Pa. Super. 260, 262. See also Adulteration 2 C. J. p 1; Food § 4 note 27 [a]; § 19; Oleomargarine 46 C. J. p 1089.

[93] Hathaway v. McDonald, 27 Wash. 659, 663, 68 P 376, 91 AmSR 889.

"Butter" 9 C. J. p 1107.

[94] See U. S. v. Nine Barrels Butter, 241 Fed. 499, 501.

[a] **"Ladling" distinguished.**—U. S. v. Nine Barrels Butter, 241 Fed. 499, 500.

[95] See Renovate post. See also Renewal ante.

[96] William A. Doe Co. v. Boston, 262 Mass. 458, 160 NE 262, 263.

[97] William A. Doe Co. v. Boston, supra.

[98] William A. Doe Co. v. Boston, supra.

[99] William A. Doe Co. v. Boston, supra.

[1] William A. Doe Co. v. Boston, supra.

[a] **"Repairs" distinguished.**—William A. Doe Co. v. Boston, 262 Mass. 458, 160 NE 262, 263.

[2] **Rent:**
In general see Landlord and Tenant §§ 1037–1154.
Accounting for see Accounts and Accounting § 76; Cancellation of Instruments § 226; Executions § 736 text and notes 90–97; Mortgages §§ 2224–2230; Partition §§ 488–496.
As:
  Advancement see Descent and Distribution § 249.
  Community property see Husband and Wife § 1117.
  Damage under fire policy see Fire Insurance § 461.
  Family expense see Husband and Wife § 162 notes 8, 9.
  Liability provable in bankruptcy see Bankruptcy § 472.
  Mitigation of damages for breach of covenant see Covenants § 238.
  Preferred claim see Executions § 701.
  Royalty see Landlord and Tenant § 1050; Mines and Minerals § 632.
  Subject to:
    Creditor's bill see Creditors' Suits § 88.
    Execution see Executions § 78.
    Garnishment see Garnishment § 231 text and notes 46–48.
    Mechanic's lien see Mechanics' Liens § 345.
    Mortgage see Mortgages § 165.
Failure to pay as voiding gas or oil lease see Mines and Minerals § 698.
Installment of as distinct cause of action see Judgments § 1249.
Liability for of person in particular status or relation see specific titles.
Lien for see Landlord and Tenant §§ 1408–1575.
Of particular property see specific titles.
Reservation of as essential to create relation of landlord and tenant see Landlord and Tenant § 8.
Right to of person or corporation in particular status or relation see specific titles.
Rights and liabilities concerning, of:
  Life tenant see Estates §§ 82–85.
  Party to mortgage see Mortgages § 604.
  Purchaser at foreclosure sale see Mortgages §§ 1898–1904.
Securing portion of to widow in lieu of dower see Dower § 382.
Under lease of:
  Mine see Mines and Minerals §§ 632–650.
  Oil or gas well see Mines and Minerals §§ 728–736.
  Railroad see Railroads § 521.
Water see Waters [40 Cyc 796–807].

[3] Jacob L. D. [cit 1 Blackstone Inst. p 144, and quot Stephens v. Reynolds, 6 N. Y. 454, 458 (quot Wegner v. Lubenow, 14 N. D. 95, 102, 95 NW 442)]; Bruce v. Thompson, 26 Vt. 741, 747.

"Redditus" or "reditus" ante.

[4] See infra § 2.

[5] See infra § 7.

[6] Turner v. First Nat. Bank, (Tex. Civ. A.) 234 SW 928. See infra §§ 3–5.

[7] Jacob L. D. [cit 1 Blackstone Inst. p 144, and quot Stephens v. Reynolds, 6 N. Y. 454, 458 (quot Wegner v. Lubenow, 12 N. D. 95, 102, 95 NW 442)].

[8] Jacob L. D. [cit 1 Blackstone Inst. p 144, and quot Stephens v. Reynolds, supra (quot Wegner v. Lubenow, supra)]; Bruce v. Thompson, 26 Vt. 741, 747.

[9] Weil v. Lesser, 115 Misc. 241, 189 NYS 655, 656 [quot Kentucky Holding Co. v. Petry, 191 NYS 673, 675].

[10] Weil v. Lesser, supra [quot Kentucky Holding Co. v. Petry, supra].

[11] Standard D. [quot Davidge v. Simmons, 49 App. (D. C.) 398, 266 Fed. 1018, 1019].

[12] Standard D. [quot Davidge v. Simmons, supra].

[a] **Similar definitions.**—(1) "Compensation for the use of land or property." Com. v. Philadelphia Rapid Transit Co., 287 Pa. 190, 134 A 455, 458. (2) "A return or compensation for the use of the property." Bouvier L. D. [quot Havens v. Alameda County, 30 Cal. A. 206, 157 P 821, 822].

[13] See Keene v. Roxbury, 81 N. H. 332, 126 A 7, 11.

[14] Guild v. Sampson, 232 Mass. 509, 122 NE 712, 713.

[15] Guild v. Sampson, supra.

[a] **Where premises are withheld by a judgment debtor from a purchaser on execution,** and a statute as to an undertaking on appeal in summary proceedings provides "for the payment of all rent accruing or to accrue upon said premises" there is the same reason for securing to the purchaser the value of the occupation as where the possession is withheld from the landlord in the case of a tenancy, and accordingly in order to effectuate the intention of the legislature, the word "rent" will be given a sense somewhat different from its primary meaning, and will be held to mean compensation for use and occupation. Spraker v. Cook, 16 N. Y. 567.

[16] Providence v. Payne, 47 R. I. 444, 134 A 276, 282.

profit out of lands and tenements;[17] and in this connection, its definitions, classification, elements, essentials and nature, as well as the rights and remedies in connection therewith, are fully treated elsewhere in this work.[18] As the term is employed in the discussion of principles of economics generally,[19] rent is the periodic return for the privilege of use;[20] a fixed compensation for a vested interest;[21] and in determining whether a charge is rent within the meaning of a statute prohibiting the exaction of rent, the measure of the charge and the mode of computation are relevant considerations.[22]

"Rents," in the plural, is a term that has been defined as meaning certain profits, not necessarily money, issuing yearly out of land and tenements corporeal;[23] although it has been held that the term is not confined to such as are annual.[24] While the term has been held equivalent to,[25] or synonymous with,[26] it also has been distinguished from,[27] "profits."

[§ 5] **4. Distinctions.** A distinction has been made between what is called "ordinary rent," namely, the compensation for the ordinary use of land and that which arises, is derived from, or represents, the corpus of the land,[28] although it is said no suitable terminology has been devised to distinguish the latter from ordinary rent.[29] The term has also been distinguished from "annuity,"[30] "dividend,"[31] "interest,"[32] "purchase money,"[33] "royalty,"[34] "service charge,"[35] and "value of the use and occupation;"[36] but it has also been said that it is often used interchangeably with "profit,"[37] and "royalty."[38] It has been held not to include costs of alterations and improvements,[39] or repairs;[40] nor insurance;[41] nor taxes,[42] unless made to do so by the terms of the contract.[43]

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[17] Cox v. Snyder, 241 Ill. A. 471, 474 [quot Cyc]; Saulsberry v. Saulsberry, 162 Ky. 486, 488, 172 SW 932 [cit Cyc]; Rouse v. Catskill, etc., Steamboat Co., 59 Hun 80, 83, 13 NYS 126.

[a] **Similar definition.**—"A profit issuing out of land." In re Receivership of Lightwell Steel Sash Co., 12 Del. Ch. 60, 105 A 376, 377.

[18] See Landlord and Tenant §§ 1037–1754.

[19] Seligman Principles of Economics pp 205, 206; 2 Taussig Principles of Economics pp 63, 124 [both cit Rochester v. Rochester Gas, etc., Corp., 233 N. Y. 39, 134 NE 828, 832].

[20] Seligman Principles of Economics pp 205, 206 [cit Rochester v. Rochester Gas, etc., Corp., supra].

[21] Sancourt Realty Corp. v. Dowling, 220 App. Div. 660, 222 NYS 288, 289.

[22] Rochester v. Rochester Gas, etc., Corp., 233 N. Y. 39, 134 NE 828, 833.

[23] In re Reel, 263 Pa. 248, 106 A 227, 229 [cit 2 Blackstone Comm. p 41].

[24] Fairchild v. Gray, 139 Misc. 704, 242 NYS 192, 197.

[a] **The term has been extended** beyond the prima facie meaning. Fairchild v. Gray, 136 Misc. 704, 242 NYS 192, 197.

[25] Peo. v. Van Rensselaer, 8 Barb. (N. Y.) 189, 200.

[26] Fairchild v. Gray, 136 Misc. 704, 242 NYS 192, 196; Matter of Vedder, 15 NYS 798, 805, 2 Conn. Surr. 548.

[a] **"Profits" synonymous.**—"It has been stated that the word 'profits' when applied to real estate, is synonymous with 'rents.'" Fairchild v. Gray, 136 Misc. 704, 242 NYS 192, 196 [cit Matter of Vedder, 15 NYS 798, 805, 2 Conn. Surr. 548].

[27] Taylor v. Harwell, 65 Ala. 1, 11 [cit Fairchild v. Gray, 136 Misc. 704, 242 NYS 192, 196].

[a] **"'Profits' . . . is a broader term** and includes rents." Fairchild v. Gray, 136 Misc. 704, 242 NYS 192, 196.

[b] **Profits "was never confounded** with rents." Taylor v. Harwell, 65 Ala. 1, 11 [quot Fairchild v. Gray, 136 Misc. 704, 242 NYS 192, 196].

"Profits" 50 C. J. pp 641–647.

[28] State v. Snyder, 29 Wyo. 163, 212 P 758, 760.

[29] State v. Snyder, supra.

[30] Cox v. Snyder, 241 Ill. A. 471, 474.

[a] **"Annuity" compared.**—"A rent somewhat resembles an annuity, their difference consists in the fact that the former issues out of lands and the latter is a mere personal charge." Bouvier L. D. [quot Cox v. Snyder, 241 Ill. A. 471, 474]. See also Annuities § 3.

"Annuity" defined see Annuities § 1.

[31] Bowers v. Interborough Rapid Transit Co., 121 Misc. 250, 201 NYS 198, 201; Com. v. Philadelphia Rapid Transit Co., 287 Pa. 190, 134 A. 455, 458.

[a] **Dividends as rent.**—"A payment cannot be both, for the two things are essentially different. Dividends come from earnings. The rent is not dependent on earnings." Bowers v. Interborough Rapid Transit Co., 121 Misc. 250, 201 NYS 198, 201.

"Dividend" 18 C. J. p 1406.

[32] In re Receivership of Lightwell Steel Sash Co., 12 Del. Ch. 60, 105 A 376, 377; Com. v. Philadelphia Rapid Transit Co., 287 Pa. 190, 134 A 455, 458. See Barfield v. Jefferson, 78 Ga. 220, 2 SE 554; Morrison v. Markham, 78 Ga. 161, 162, 1 SE 425.

[a] **Rent as disguise for usurious interest.**—(1) Where premises were conveyed as security for loan, the debtor remaining in possession and agreeing to pay, as rent, a sum equal to usurious percentage on amount loaned, the "rent" was held to be a mere device to evade usury law. Morrison v. Markham, 78 Ga. 161, 162, 1 SE 425. (2) But where the deed was an absolute conveyance in payment of a debt and a contract to reconvey was subsequently entered into, a note purporting to be for rent would not be avoided for usury. Barfield v. Jefferson, 78 Ga. 220, 221, 2 SE 554. See also Usury [39 Cyc 929, 930, 940].

[b] **"Interest" held to be "rent."**—Where a church sold its property but retained possession for a fixed time, agreeing to pay the vendee interest upon all sums paid as installments of the purchase price, the court said: "It must be held that the church's use and occupation of the property was in effect that of a tenant; and it is idle to argue that the interest which the church was required to pay upon the paid-up installments of the purchase price cannot be considered as rent." Havens v. Alameda County, 30 Cal. A. 206, 157 P 821, 822.

"Interest" defined see Interest §§ 1–6.

[33] Hays v. Jordan, 85 Ga. 741, 749, 11 SE 833, 9 LRA 373. See also Vendor and Purchaser [39 Cyc 1318–1325].

"Purchase money" see Purchase § 4 notes 9–14.

[34] Saulsberry v. Saulsberry, 162 Ky. 486, 488, 489, 172 SW 932; Aldridge v. Houston Oil Co., 116 Okl. 281, 244 P 782, 784.

[a] **"Rent" and "royalty" compared.**—(1) "Rent is the price paid for the use of a thing while royalty is a part of the thing itself." Saulsberry v. Saulsberry, 162 Ky. 486, 488, 172 SW 932. (2) "Rent is the term applied to the privilege given to bore for gas and oil and for delay in beginning operation; while royalty is a certain percentage of the oil after it is found, or so much per gas well developed." Thornton Law of Oil and Gas § 253 [quot Aldridge v. Houston Oil Co., 116 Okl. 281, 244 P 782, 784]. See also Landlord and Tenant § 1050 text and notes 72–74; Mines and Minerals § 632.

[35] Rochester v. Rochester Gas, etc., Corp., 233 N. Y. 39, 134 NE 828, 833.

[a] **In construing a statute,** [Transportation Corp. L. § 66 (Cons. L. c 63)], prohibiting gaslight corporations from directly or indirectly charging rent for their meters, the court in discussing a "service charge" said: "We are satisfied that it is not rent, within any fair construction of a penal statute." Rochester v. Rochester Gas, etc., Corp., 233 N. Y. 39, 134 NE 828, 833.

[36] Kuiper v. Miller, 53 N. D. 711, 207 NW 489, 490.

[a] **Not synonymous.**—"It [rent] is not, except perhaps in special circumstances, synonymous with 'value of the use and occupation.'" Kuiper v. Miller, 53 N. D. 711, 207 NW 489, 490.

[37] Crain v. West, 191 Ky. 1, 229 SW 51, 53.

[38] Crain v. West, supra; Saulsberry v. Saulsberry, 162 Ky. 486, 489, 172 SW 932.

"It cannot be doubted that the terms 'rent' and 'royalty,' as the result of usage and custom are often used interchangeably." Saulsberry v. Saulsberry, supra; Boeing v. Owsley, 122 Minn. 190, 142 NW 129 [cit and foll Minnesota Loan, etc., Co. v. Douglas, 135 Minn. 413, 161 NW 158, 161; State v. Royal Mineral Assoc., 132 Minn. 232, 234, 156 NW 128, AnnCas1918A 145]. See also Landlord and Tenant § 1050 note 75; Mines and Minerals § 632.

[§ 6] **5. In Phrases.** The noun occurs in numerous phrases.[44]

Net rent. An artificial expression[45] used in certain English war emergency statutes,[46] and defined therein as the standard rent less the amount of rates and taxes if paid by the landlord.[47]

Reasonable rent. A term used to designate a statutory charge for use and occupation, to be ascertained judicially through a method provided by the statute.[48]

Rent payable. The sum which the tenant is called upon to pay by way of rent;[49] the rent which the tenant has agreed to pay;[50] and not the net amount which remains in the landlord's pocket;[51] the sum payable between the parties, lessee and lessor,[52] and not that which might be payable by subtenants to the lessee.[53]

Rents and profits.[54] The term is well understood,[55] and generally it is equipollent with "profits and gains."[56] As applied to real estate,[57] the income[58] which does not impair or diminish the fee;[59] or the net income of it;[60] the sum annually yielded by the same.[61] Sometimes the words are used as referring to the rentable value;[62] and in a special sense, the materials derived from the ordinary and reasonable, or the usual, operation of opened mines, quarries, oil wells, and other property of this character constitute the "rents and profits" thereof;[63] and hence royalties under mining leases have been held to constitute rents and profits from land.[64]

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[39] Guild v. Sampson, 232 Mass. 509, 122 NE 712, 713.

[40] In re Receivership of Lightwell Steel Sash Co., 12 Del. Ch. 60, 105 A 376, 377; Simonelli v. Di Ericco, 59 Misc. 485, 487, 110 NYS 1044; Bien v. Bixby, 18 Misc. 415, 418, 41 NYS 433. Contra Knepper v. Rothbaum, 104 Misc. 554, 172 NYS 109, 110.

[41] Bien v. Bixby, 18 Misc. 415, 418, 41 NYS 433.

[42] Guild v. Sampson, 232 Mass. 509, 122 NE 712, 713; Bien v. Bixby, 18 Misc. 415, 418, 41 NYS 433. See Finch v. Gilray, 16 Ont. A. 484, 497. See also Landlord and Tenant § 1051.

[a] **Used in relation to summary proceedings,** the term "has a limited meaning and does not import the entire consideration which the tenant pays the landlord for the use of the demised premises, whether directly as rent proper, or indirectly for his benefit in the form of taxes and assessments." Bien v. Bixby, 18 Misc. 415, 418, 41 NYS 433.

[43] Knepper v. Rothbaum, 104 Misc. 554, 172 NYS 109, 110; Finch v. Gilray, 16 Ont. A. 484, 497. See Simonelli v. Di Ericco, 59 Misc. 485, 110 NYS 1044.

[44] See cases infra this section.

[45] Mackworth v. Hellard, [1921] 2 K. B. 755, 760.

[46] Increase of Rent and Mortgage Interest (Restrictions) Acts of 1915, 1917 and 1920.

[47] Mackworth v. Hellard, [1921] 2 K. B. 755, 760.

"Standard rent" see infra text and notes 77–79.

[48] Peo. v. La Fetra, 230 N. Y. 429, 438, 130 NE 601, 604 [quot Kentucky Holding Co. v. Petry, 191 NYS 673, 675].

[49] Mackworth v. Hellard, [1921] 2 K. B. 755, 760.

[50] Mackworth v. Hellard, supra. See Hancock v. Gillard, [1907] 1 K. B. 47, 51 (holding "rent payable" unaffected by payment of income tax by tenant on behalf of landlord).

[51] Mackworth v. Hellard, [1921] 2 K. B. 755, 760.

[52] Brown v. Cocking, L. R. 3 Q. B. 672, 676.

[53] Brown v. Cocking, supra.

[54] **Rents and profits:**
Accounting for by:
  Executor or administrator see Executors and Administrators §§ 2299–2303.
  Receiver see Receivers §§ 609, 610.
  Tenant in common see Tenancy in Common [38 Cyc 62–71].
  Trustee see Trusts [39 Cyc 478 notes 6–9].
As assets of decedent's estate see Executors and Administrators §§ 330–336.
Assignment of as creating equitable lien or mortgage see Mortgages § 37.
Right to, of property:
  Attached see Attachment § 467 note 10 [a], § 523 text and note 74.
  Mortgaged see Mortgages §§ 604–613, 723.
Sale of under execution see Executions § 572 note 89.

[55] Peo. v. Van Rensselaer, 8 Barb. (N. Y.) 189, 200. See Matter of Vedder, 15 NYS 798, 805, 2 Conn. Surr. 548 ("the meaning of these terms . . . is too clear to require construction").

[56] Thorn v. De Breteuil, 86 App. Div. 405, 415, 83 NYS 849.

[a] **"Profits and gains" synonymous.**—"There is no such technical or peculiar meaning to the phrase 'rents and profits' as to deny a synonym in 'profits and gains.'" Thorn v. De Breteuil, 86 App. Div. 405, 416, 83 NYS 489.

[57] Matter of Vedder, 15 NYS 798, 805, 2 Conn. Surr. 548 [cit Delaney v. Van Aulen, 84 N. Y. 16, 23].

[58] Andrews v. Boyd, 5 Me. 199, 203 [quot Peo. v. San Francisco Sav. Union, 72 Cal. 199, 203, 13 P 498]. See Rex v. Income Tax Comrs., 80 L. J. K. B. 1035, 1039 ("the words 'rents and profits' are . . . used . . . as words describing the subject matter of income-tax").

[59] Aldridge v. Houston Oil Co., 116 Okl. 281, 244 P 782, 784.

[a] **"Clearly 'rents and profits' comprehend** all income derived from any use of the premises which does not impair or diminish the fee." Aldridge v. Houston Oil Co., 116 Okl. 281, 244 P 782, 784.

[60] Andrews v. Boyd, 5 Me. 199, 203 [quot Peo. v. San Francisco Sav. Union, 72 Cal. 199, 203, 13 P 498]. See Worthington v. Hiss, 70 Md. 172, 185, 186, 16 A 534, 17 A 1026; McLaughlin v. Barnum, 31 Md. 425, 452; Pelham v. Middleborough, 4 Gray (Mass.) 57, 59.

[a] **Terms held equivalent.**—"The 'rents and profits' of an estate, the 'income' or the 'net income' of it, are all equivalent expressions." Andrews v. Boyd, 5 Me. 199, 203 [quot Peo. v. San Francisco Sav. Union, 72 Cal. 199, 203, 13 P 498.

[b] **Where there is occupation of a farm** or land used only for agricultural purposes, the term includes the proceeds of the crops and other products sold or raised thereon, deducting the expense of cultivation. But the proprietor of city lots with improvements upon them, can only derive therefrom, as owner, a fair occupation rent for the purposes for which the premises are adapted. This constitutes the "rents and profits" in the legal sense of the term, of such property. Worthington v. Hiss, 70 Md. 172, 185, 16 A 534, 17 A 1026 [cit and foll McLaughlin v. Barnum, 31 Md. 425, 452].

[c] **"Clear income" distinguished.**—"The words 'rents and profits' are superfluous, if they mean nothing different, in any case, from clear income." Pelham v. Middleborough, 4 Gray (Mass.) 57, 59.

[61] Matter of Vedder, 15 NYS 798, 805, 2 Conn. Surr. 548 [quot Smith v. Howell, 91 Or. 279, 176 P 805, 811]. See Delaney v. Van Aulen, 84 N. Y. 16, 23.

[62] Pelham v. Middleborough, 4 Gray (Mass.) 57, 59.

[a] **Rentable value compared and distinguished.**—(1) "If the estate were a building occupied by the owner, the clear yearly income and the yearly rents and profits would be the same sum, viz: the rentable value. Pelham v. Middleborough, 4 Gray (Mass.) 57, 59. (2) "But it would be otherwise if the estate were a small piece of land occupied by the owner. Its rentable value might be twenty dollars a year, and yet the clear yearly rents and profits, actually received, might not be one." Pelham v. Middleborough, supra.

[b] **Distinguished from "rental value."**—Jones v. Massey, 14 S. C. 292, 307.

"Rentable value" post.

"Rental value" post.

[63] Traer v. Fowler, 144 Fed. 810, 816, 75 CCA 540; State v. Evans, 99 Minn. 220, 227, 108 NW 958, 9 Ann Cas 520 [quot Minnesota Loan, etc., Co. v. Douglas, 135 Minn. 413, 161 NW 158, 161].

[64] Boeing v. Owsley, 122 Minn. 190, 205, 142 NW 129 [cit Minnesota Loan, etc., Co. v. Douglas, 135 Minn. 413, 161 NW 158, 161]. See also Land-

Rents, issues, and profits. The profits arising from property generally;[65] the yearly products of the land;[66] or from the use of realty.[67] The strict meaning of the words, as opposed to land, is the annual rents, issues and profits;[68] hence equivalent to "interest and income."[69] The phrase applies only to net profits,[70] and such as are of the nature of rent.[71] It includes the proceeds of the land whether in money or in kind;[72] and it has been held to include the increase of live stock,[73] although perhaps not in a strictly etymological sense;[74] and sometimes, particularly in construing trust instruments,[75] the phrase, unless restrained by the context, will be given a meaning broad enough to include the sale of the property itself.[76]

Standard rent. An artificial expression[77] used in the English Rent Restrictions Acts,[78] and defined, in the earlier ones, as the rent at which a house was let on Aug. 3, 1914.[79]

Other phrases: "Rent . . . accrued due,"[80] "rent accruing due,"[81] "rent due,"[82] "rent on a gas meter,"[83] "rent or other income derived from real estate,"[84] "rent or premium,"[85] "rent or right of way,"[86] "rent, profits, and income,"[87] "rent reserved,"[88] "rent reserved by the lease,"[89] "rents accrued,"[90] "rents and profits of the husband's dowable real estate,"[91] "rents and revenues,"[92] "rents, dividends, and interest and other produce,"[93] "rents from the wife's real estate,"[94] "rents, income, issues and profits,"[95] and "rents on coal mined;"[96] also "pew rent,"[97] and "royalty, rent, or profit."[98]

[§ 7] **6. As Verb.** According to its common and authorized use, the verb refers as well to the act of a lessee as to that of a lessor.[99] In the former connection, it means to take and hold for a consideration in the nature of rent;[1] while in the latter, it means to grant the possession and enjoyment of for a consideration in the nature of rent;[2] to grant

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lord and Tenant § 1052; Mines and Minerals § 632.

[65] 2 Bouvier L. D. (Rawles Rev.) 878 [quot Thorn v. De Breteuil, 86 App. Div. 405, 417, 83 NYS 849].

[66] Bruce v. Thompson, 26 Vt. 741, 747.

[67] Fifty-Ninth St. Real Est. Co. v. Murphy, 95 Misc. 191, 193, 159 NYS 203.

[a] **Sums received for electric current** furnished by a plant which was part of the realty held "rents, issues, and profits" of such realty. Fifty-Ninth St. Real Est. Co. v. Murphy, 95 Misc. 191, 193, 159 NYS 203.

[b] **Proceeds from telephone tolls** held not included as they were not earned by the real estate. Fifty-Ninth St. Real Est. Co. v. Murphy, 95 Misc. 191, 193, 159 NYS 203.

[68] Charter Oak L. Ins. Co. v. Gisborne, 5 Utah 319, 327, 15 P 253 [quot Connolly v. Bouck, 174 Fed. 312, 316, 98 CCA 184; Brickell v. Powell, 148 Miss. 491, 114 S 328, 331].

[69] Oram v. Peirce, 73 N. J. Eq. 391, 397, 67 A 1053.

[a] **Applied to realty.**—"What are called 'rents, issues and profits' in real estate are the same as what are naturally called 'interest and income' when we speak of personal property." Oram v. Peirce, 73 N. J. Eq. 391, 397, 67 A 1053, 1056.

[70] Bruce v. Thompson, 26 Vt. 741, 747 [quot Smith v. Howell, 91 Or. 279, 176 P 805, 811]. See Hopkins v. Remy, 64 N. J. Eq. 12, 15, 53 A 676.

[a] **"It does not admit of doubt** that the expression . . . means the sum of receipts from the land which remains—first, after maintaining the property by needed repairs and by protective insurance, and second, after payment of public charges." Hopkins v. Remy, 64 N. J. Eq. 12, 15, 53 A 676.

[71] Bruce v. Thompson, 26 Vt. 741, 747 [quot Smith v. Howell, 91 Or. 279, 176 P 805, 811].

[72] Eason v. Henderson, 12 Q. B. 986, 997, 64 ECL 986, 997, 116 Reprint 1140 [quot Early v. Friend, 16 Gratt (57 Va.) 21, 46, 78 AmD 649].

[73] Harris v. Van de Vanter, 17 Wash. 489, 492, 50 P 50.

[74] Harris v. Van de Vanter, supra.

[75] See Trusts [39 Cyc 194 et seq].

[76] Charter Oak L. Ins. Co. v. Gisborne, 5 Utah 319, 327, 15 P 253 [quot Connolly v. Bouck, 174 Fed. 312, 316, 98 CCA 184; Brickell v. Powell, 148 Miss. 491, 114 S 328, 331]. But see Hopkins v. Remy, 64 N. J. Eq. 12, 15, 53 A 676 ("no provision for such sale can be implied"). See also Annuities § 29.

[77] Mackworth v. Hellard, [1921] 2 K. B. 755, 760.

[78] See supra note 46.

[79] Mackworth v. Hellard, [1921] 2 K. B. 755, 760; Woods v. City, etc., Properties, Ltd., 38 T. L. R. 98.

[80] Brown v. Gallagher, 31 Ont. L. 323, 6 OntWN 296, 19 DomLR 682, 687.

[a] **"Is a mere chose in action"** and does not pass by conveyance of reversion. Brown v. Gallagher, 31 Ont. L. 323, 6 OntWN 296, 19 DomLR 682, 687.

[81] Brown v. Gallagher, supra.

[a] **"Is an incorporeal hereditament"** and passes by conveyance of the reversion. Brown v. Gallagher, 31 Ont. L. 323, 6 OntWN 296, 19 Dom LR 682, 687.

[82] Pfleiderer v. Brooks, 122 Kan. 647, 253 P 549, 551; Pitts v. Blair Milling Co., 117 Kan. 626, 233 P 114.

[a] **Not limited to rent in arrears.**—Pfleiderer v. Brooks, 122 Kan. 647, 253 P 549, 551; Pitts v. Blair Milling Co., 117 Kan. 626, 233 P 114.

[83] Rochester v. Rochester Gas, etc., Corp., 233 N. Y. 39, 134 NE 828, 832.

[84] Re Watkins, 54 Ont. L. 136, 137, 139, 24 OntWN 344; Alston's Est., 26 OntWN 217; Re Windsor, 20 OntWN 154, 156.

[85] King v. Cadogan, [1915] 3 K. B. 485, 492.

[a] **"Rent" distinguished from "premium."**—King v. Cadogan, [1915] 3 K. B. 485, 492.

[86] Tustin v. Philadelphia, etc., Coal, etc., Co., 250 Pa. 425, 95 A 595, 598.

[87] Providence v. Payne, 47 R. I. 444, 134 A 276, 282.

[88] Wegner v. Lubenow, 12 N. D. 95, 101, 95 NW 442.

[a] **Distinguished from** consideration paid for life estate. Wegner v. Lubenow, 12 N. D. 95, 101, 95 NW 442.

[89] Black v. Federal Land Tax Comr., 27 Austr. C. L. R. 483, 488.

[90] Tustin v. Philadelphia, etc., Coal, etc., Co., 250 Pa. 425, 95 A 595, 598.

[91] Crain v. West, 191 Ky. 1, 229 SW 51, 53.

[92] Grobe v. Buffalo, etc., Ferry, etc., Co., 38 Ont. L. 272, 276, 11 OntWN 265.

[93] In re Pyke, [1912] 1 Ch. 770, 775.

[94] Lewisville First Nat. Bank v. Davis, (Tex. Commn. A.) 5 SW (2d) 753, 754. See also Husband and Wife § 48.

[95] Matter of Stevens, 111 App. Div. 773, 98 NYS 28, 31; Stewart v. Phelps, 71 App. Div. 91, 95, 75 NYS 526.

[a] **Includes only annual income** and not increase in value of principal. Stewart v. Phelps, 71 App. Div. 91, 95, 97, 75 NYS 526 [cit and foll Matter of Stevens, 111 App. Div. 773, 98 NYS 28, 31].

[96] Tustin v. Philadelphia, etc., Coal, etc., Co., 250 Pa. 425, 95 A 595, 598.

[97] Church v. Wells, 24 Pa. 249, 251.

[a] **Not "rent" in usual sense.**—"A pew rent is not a rent in the usual legal application of the term, for it does not issue out of a corporeal hereditament, and it is therefore no charge upon the property, except by virtue of the very ordinary provision made by congregations in such cases." Church v. Wells, 24 Pa. 249, 251.

[98] Crain v. West, 191 Ky. 1, 229 SW 51, 53.

[99] Gray v. La Fayette County, 65 Wis. 567, 27 NW 311, 312.

[a] **Neither construction is forced or unnatural.**—"The lessor rents land to the lessee; the lessee rents land of the lessor." Gray v. La Fayette County, 65 Wis. 567, 569, 27 NW 311, 312.

[1] Century D. [quot Musewald v. Seeker, 51 Misc. 355, 357, 101 NYS 287].

[2] Century D. [quot Musewald v. Seeker, supra].

[a] **Implies covenant for quiet enjoyment.**—Daugherty v. Armaly, 49 Ont. L. 310, 19 OntWN 573, 58 DomLR 380, 382.

the right to occupy lands, paying a certain sum therefor;[3] to hire;[4] to lease;[5] to let;[6] to let out.[7]

Rented. A term which refers as well to the act of a lessee as to that of the lessor,[8] and which, aside from any qualification by the context, naturally means that the tenant has the exclusive possession for the time.[9] Phrases: "Rented for pasture,"[10] and "rented or leased."[11]

Renting. A word applied indiscriminately to both parties to the transaction;[12] and in a loose way,[13] the term may be used for "hiring."[14] Phrases: "Party renting,"[15] and "renting or leasing for carrying passengers."[16]

RENTABLE. Capable of being rented or let out for rent.[17]

Rentable value. The gross amount for which the land can be rented, without deducting therefrom the taxes;[18] the price or sum for which the land may be rented.[19]

Net rentable value. The amount for which the land can be rented less the taxes thereon.[20]

RENTAGE. Rent.[21]

RENTAL.[22] [§ 1] **A. As Noun—1. Special Sense.** In English law, a roll on which the rents of a manor are registered or set down, and by which the lord's bailiff collects the same.[23] It contains the lands and tenements let to each tenant, the names of the tenants and other particulars.[24]

[§ 2] **2. Ordinary Sense—a. In General.** A charge for the use of property;[25] a sum total of rents.[26] It has been said to be an equivalent of "hire,"[27] and "royalty;"[28] but distinguished from "tax."[29]

[§ 3] **b. Rentals.** The term has a clear and definite meaning,[30] signifying payments received periodically for the use of property,[31] especially real property;[32] and depends in no way on the particular use made of the property by the lessee,[33] nor on the amount or extent of such use.[34] In its ordinary sense, it must be taken as implying a fixed sum, or property amounting to a fixed sum, to be paid at stated times for the use of property[35] and used with reference to patented devices,[36] it is said that the word ordinarily means specific sums paid annually, or at other stated periods, for the right to use a patented device;[37] and in this connection it has been distinguished from "royalties."[38]

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[3] Cox v. Snyder, 241 Ill. A. 471, 474 [quot Cyc]; Rouse v. Catskill, etc., Steamboat Co., 59 Hun 80, 83, 13 NYS 126.

[4] See Rouse v. Catskill, etc., Steamboat Co., supra.

[a] **"Hire" distinguished.**—See Rouse v. Catskill, etc., Steamboat Co., 59 Hun 80, 83, 13 NYS 126.

"Hire" 29 C. J. p 756.

[5] Turner v. First Nat. Bank, (Tex. Civ. A.) 234 SW 928.

[a] **"Lease" or "leasing" distinguished.**—Gray v. La Fayette County, 65 Wis. 567, 27 NW 311, 312.

[b] **"Rent" broader than "lease."**—"It is hardly accurate to say that the act of leasing may be done by the lessee. So we find that 'rented' is, or at least may be, a word of broader signification than 'leasing.'" Gray v. La Fayette County, 65 Wis. 567, 570, 27 NW 311, 312.

"Lease" defined see Landlord and Tenant § 379.

[6] Daugherty v. Armaly, 49 Ont. L. 310, 19 OntWN 573, 58 DomLR 380, 382.

[a] **"Let" synonymous.**—Daugherty v. Armaly, 49 Ont. L. 310, 190 OntWN 573, 58 DomLR 380, 382.

"Let" 36 C. J. p 991.

[7] Turner v. First Nat. Bank, (Tex. Civ. A.) 234 SW 928.

[8] Gray v. La Fayette County, 65 Wis. 567, 569, 27 NW 311, 312. See Zink v. Grant, 25 Oh. St. 352, 354.

[9] Noyes v. Stillman, 24 Conn. 15, 24. See McClintic v. Brown, (Tex. Civ. A.) 212 SW 540, 541 [cit Cyc].

[10] Noyes v. Stillman, 24 Conn. 15, 24. See McClintic v. Brown, (Tex. Civ. A.) 212 SW 540, 541 ("rented pasture").

[a] **"Rather an equivocal phrase,** which may be open for explanation." Noyes v. Stillman, 24 Conn. 15, 24.

[11] Zink v. Grant, 25 Oh. St. 352, 354. See Gray v. La Fayette County, 65 Wis. 567, 569, 27 NW 311, 312.

[a] **May be used in two senses.**—It is said that a landlord rented or leased his lands to his tenants, and with almost equal propriety it may be said that the tenant rented or leased an estate from his landlord." Zink v. Grant, 25 Oh. St. 352, 354.

[12] Musewald v. Seeker, 51 Misc. 355, 356, 101 NYS 287.

[13] Rouse v. Catskill, etc., Steamboat Co., 59 Hun 80, 83, 13 NYS 126.

[14] Rouse v. Catskill, etc., Steamboat Co., supra.

[15] Musewald v. Seeker, 51 Misc. 355, 356, 101 NYS 287.

[a] **Construed as referring to lessor.**—Where a lease provided for rent in installments, the last installment being payable on a certain date or sooner when the "party renting" desired it, and there was a clause in the lease speaking of the landlord having "rented" the farm, it was held that the option to require the last installment sooner than the specified date was in the lessor. Musewald v. Seeker, 51 Misc. 355, 101 NYS 287.

[16] Leder v. Harnett, 227 App. Div. 794, 237 NYS 498, 499.

[17] Holmes v. Barnett, 27 Man. 558, [1917] 2 WestWkly 881, 885.

[18] Holmes v. Barnett, 27 Man. 558, [1917] 2 WestWkly 881, 885, 886.

[19] Holmes v. Barnett, supra.

[20] See Holmes v. Barnett, supra.

[21] Black L. D.

"Rent" ante.

[22] See generally Rent ante. See also Crescendo Rental 15 C. J. p 1453.

[23] Black L. D. [cit Holthouse].

[a] **Corrupted from "rent-roll."**—Jacob L. D.

[24] Burrill L. D. [cit Doe v. Thynne, 10 East 206, 209, 103 Reprint 753].

[25] St. Louis v. Western Union Tel. Co., 148 U. S. 92, 97, 13 SCt 485, 37 L. ed. 380.

[a] **The term is properly applied** to the charge imposed by a city on a telegraph company for the privilege of using the streets, alleys, and public places of the city, graduated by the amount of such use. St. Louis v. Western Union Tel. Co., 148 U. S. 92, 97, 13 SCt 485, 37 L. ed. 380. See also Telegraphs and Telephones [37 Cyc 1632, 1633].

[26] Webster D. [quot Fremont, etc., R. Co. v. Bates, 40 Nebr. 381, 393, 58 NW 959, 963].

[27] Union Indemn. Co. v. State, 218 Ala. 132, 118 S 148, 151. See Wood v. State, 66 Md. 61, 67, 5 A 476.

[28] Western Union Tel. Co. v. American Bell Tel. Co., 105 Fed. 684, 687. See Pfister Land Co. v. Milwaukee, 166 Wis. 223, 165 NW 23, 25. But see infra § 3 text and note 38.

[a] **"Royalty" used interchangeably.**—Western Union Tel. Co. v. American Bell Tel. Co., 105 Fed. 684, 687.

[b] **"Royalties" held "rentals."**—Pfister Land Co. v. Milwaukee, 166 Wis. 223, 165 NW 23, 25 (from mineral lease).

[29] St. Louis v. Western Union Tel. Co., 148 U. S. 92, 97, 98, 13 SCt 485, 37 L. ed. 380.

[30] Friedbar Realty Corp. v. Sanford, 119 Misc. 621, 198 NYS 38, 39.

[31] Friedbar Realty Corp. v. Sanford, supra.

[32] Friedbar Realty Corp. v. Sanford, supra.

[33] Friedbar Realty Corp. v. Sanford, supra.

[34] Western Union Tel. Co. v. American Bell Tel. Co., 125 Fed. 342, 349, 66 CCA 220.

[a] **"Whether it is used much** or little or not at all." Western Union Tel. Co. v. American Bell Tel. Co., 125 Fed. 342, 349, 60 CCA 220.

[35] Duffy v. New Jersey Cent. R. Co., 268 U. S. 55, 63, 45 SCt 429, 431, 69 L. ed. 846 [quot Frank, etc., Co. v. Internal Revenue Comr., 44 F. (2d) 147, 148].

[36] See Patents §§ 447–467.

[§ 4] **c. In Phrases.** "Rental of equipment,"[39] "rental of tools,"[40] "rentals or royalties,"[41] "rentals upon leased cars;"[42] also "additional rentals."[43]

[§ 5] **B. As Adjective—1. In General.** The word is also used as an adjective,[44] meaning derived from or pertaining to rents.[45]

[§ 6] **2. Rental Agent.** One who simply lets premises and collects rents thereon.[46]

[§ 7] **3. Rental Rights.** In English law, a species of lease usually granted for a low rental and for life.[47] Tenants under such leases were called "rentalers" or "kindly tenants."[48]

[§ 8] **4. Rental Value[49]—a. In General.** The words are said to be of very general and technical meaning.[50]

[§ 9] **b. Applied to Personalty.** As applied to personal property the phrase means the hire of,[51] the revenue from,[52] or the value of the use of the same.[53]

[§ 10] **c. Applied to Realty.** As applied to real estate, it is the value of the use[54] of the land for any purpose for which it is adapted in the hands of a prudent and discreet occupant upon a judicious system of husbandry;[55] that amount which, in the ordinary course of business, the premises would bring,[56] or for which they could be rented,[57] or the value, as ascertained by proof of what the premises would rent for;[58] and not the probable profit that might accrue,[59] although it is said that it must depend on and be measured by the extent of the profits.[60]

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[37] Western Union Tel. Co. v. American Bell Tel. Co., 125 Fed. 342, 347, 349, 66 CCA 220.

[38] Western Union Tel. Co. v. American Bell Tel. Co., supra.

[a] **"Rentals" and "royalties" compared and distinguished.**—(1) "Rentals in their ordinary signification are not limited as royalties in their ordinary signification; that is to something proportionate to the use of the patented device." Western Union Tel. Co. v. American Bell Tel. Co., 125 Fed. 342, 349, 60 CCA 220. (2) "In some of its uses it [royalties] is a broader word than 'rentals,' and yet in other aspects, 'rentals' is a broader word than 'royalties.'" Western Union Tel. Co. v. American Bell Tel. Co., supra. See also Patents § 447.

[39] Union Indemn. Co. v. State, 218 Ala. 132, 118 S 148, 149, 152.

[40] Union Indemn. Co. v. State, supra.

[41] Western Union Tel. Co. v. American Bell Tel. Co., 105 Fed. 684, 685, 687.

[42] Wabash R. Co. v. American Refrigerator Transit Co., 7 F. (2d) 335, 349.

[a] **"The words . . . do not include** installments of purchase price of cars purchased on conditional sales contracts commonly known as 'car trust agreements.'" Wabash R. Co. v. American Refrigerator Transit Co., 7 F. (2d) 335, 349.

[43] Duffy v. New Jersey Cent. R. Co., 268 U. S. 55, 63, 45 SCt 429, 69 L. ed. 846.

[44] See cases infra §§ 6–12.

[45] Encyclopedic L. D.

[46] St. Paul v. Clark, 84 Minn. 138, 140, 86 NW 893.

[a] **In the absence of definite proof** it cannot be said that such agent is in all respects, so far as the control of the property is concerned, the representative of the owner. St. Paul v. Clark, 84 Minn. 138, 140, 86 NW 893.

"Agent" see Agency §§ 4, 5.

[47] Black L. D.

[48] Wharton L. D.

[49] **Rental value:**
As element or measure of damage see Damages §§ 123, 187, 198.
As evidence of actual or real value of property see Evidence § 127.
Diminution of, as element of damage see Damages § 187 text and notes 63–67; Eminent Domain § 206.

[50] Lester v. Fox Film Corp., 114 S. C. 533, 104 SE 178.

[51] Wood v. State, 66 Md. 61, 67, 5 A 476.

[52] Lester v. Fox Film Corp., 114 S. C. 533, 104 SE 178, 179.

[a] **In determining damages** due to breach of a contract to supply certain motion picture films, the court said: "If the exhibition of them would have brought him [plaintiff] a certain revenue, then that revenue is called 'rental value.'" Lester v. Fox Film Corp., 114 S. C. 533, 104 SE 178, 179.

[53] Wood v. State, 66 Md. 61, 67, 5 A 476 [quot Maryland Ice Co. v. Arctic Ice Mach. Mfg. Co., 79 Md. 103, 106, 29 A 69].

[a] **Similar definition.**—"It is the commercial value of the use of a thing." Leick v. Tritz, 94 Iowa 322, 325, 62 NW 855.

[b] **Rental value may vary with demand.**—If the hire of an article depends not only upon its cost, but upon its capacity to supply an existing demand, it is not unreasonable to conclude that an ice machine in the city . . . [when there was an unusual shortage of natural ice] was more valuable than in an ordinary year, and its rental value correspondingly greater." Maryland Ice Co. v. Arctic Ice Mach. Mfg. Co., 79 Md. 103, 106, 29 A 69.

[54] Blunck v. Chicago, etc., R. Co., 142 Iowa 146, 157, 120 NW 737, 115 NW 1013, 19 ALR 495; Leick v. Tritz, 94 Iowa 322, 325, 62 NW 855; Willis v. Perry, 92 Iowa 297, 307, 60 NW 727, 26 LRA 124; Gibson v. Fischer, 68 Iowa 29, 32, 25 NW 914; Alexander v. Bishop, 59 Iowa 572, 578, 13 NW 714; Nelson v. Minneapolis, etc., R. Co., 41 Minn. 131, 132, 42 NW 788 [quot Ford Motor Co. v. Minneapolis, 147 Minn. 211, 215, 179 NW 907]; Williams v. Haile Gold Min. Co., 85 S. C. 1, 6, 66 SE 117, 1057. See Knight Bros. v. Chicago, etc., R. Co., 122 Mo. A. 38, 98 SW 81, 82 ("the use of the land . . . is the rental value").

[a] **"Value of the use" equivalent.**—(1) "'Rental value' is but another form of saying the 'value of the use.'" Nelson v. Minneapolis, etc., R. Co., 41 Minn. 131, 132, 42 NW 788. (2) "In some adjudged cases the expression 'value of the use' of the premises is employed instead of 'rental value,' but an attempt to make the one expression mean more than the other is a mere play upon words." Alexander v. Bishop, 59 Iowa 572, 578, 13 NW 714. (3) "They mean substantially the same thing." Alexander v. Bishop, supra [cit and foll Straight Bros. Co. v. Chicago, etc., R. Co., 183 Iowa 934, 167 NW 705, 709; Leick v. Tritz, 94 Iowa 322, 325, 62 NW 855]. (4) "There is practically no difference between the rental value of land and the value of the use of the land." Williams v. Haile Gold Min. Co., 85 S. C. 1, 6, 66 SE 117, 1057. To same effect Straight Bros. Co. v. Chicago, etc., R. Co., supra ("little, if any, difference").

[b] **"The 'usable value'** . . . if not synonymous with rental value, has, as a term, an equivalent sense." Reisert v. New York, 174 N. Y. 196, 211, 66 NE 731.

[55] Nelson v. Minneapolis, etc., R. Co., 41 Minn. 131, 132, 42 NW 788 [quot Ford Motor Co. v. Minneapolis, 147 Minn. 211, 215, 179 NW 907]. See Blunck v. Chicago, etc., R. Co., 142 Iowa 146, 157, 120 NW 737, 115 NW 1013, 19 ALR 495.

[a] **"As applied to land covered with a growing crop** [the term] means not what the lands may be rented for in the vicinity for ordinary purposes, but the value of the use of the lands for the purposes of maturing and harvesting the crops." Blunck v. Chicago, etc., R. Co., 142 Iowa 146, 157, 120 NW 737, 115 NW 1013, 19 ALR 495.

[56] Leick v. Tritz, 94 Iowa 322, 324, 62 NW 855.

[57] Leick v. Tritz, supra. See Goelet v. National Surety Co., 249 N. Y. 287, 295, 164 NE 101, 62 ALR 425. But see Blunck v. Chicago, etc., R. Co., 142 Iowa 146, 157, 120 NW 737, 115 NW 1013, 19 ALR 495.

[a] **Similar definition.**—"What they would have been worth in the market if the lessor had been free and able to rent them." Goelet v. National Surety Co., 249 N. Y. 287, 295, 164 NE 101.

[b] **"Rental value" of padlocked premises,** was held to be not necessarily the rent reserved in the lease of the premises but what the premises would have been worth in the market if the lessor had been free and able to rent them. Goelet v. National Surety Co., 249 N. Y. 287, 164 NE 101, 104.

[58] Reeves v. Romines, 132 Ark. 599, 201 SW 822; Herpolsheimer v. Christopher, 76 Nebr. 352, 107 NW 382, 111 NW 359, 361, 9 LRANS 1127, 14 AnnCas 399; Brewington v. Loughran, 183 N. C. 558, 112 SE 257, 260, 28 ALR 1543 (adding "in the open market"); Sloan v. Hart, 150 N. C. 269, 275, 63 SE 1037, 134 AmSR 911, 21 LRANS 239 [quot Martin v. Clegg, 163 N. C. 528, 530, 79 SE 1105].

[59] Reeves v. Romines, 132 Ark. 599, 201 SW 822; Brewington v. Loughran, 183 N. C. 558, 112 SE 257, 260, 28 ALR 1543; Sloan v. Hart, 21 LRANS 239, 150 N. C. 269, 275, 63 SE

[§ 11] **d. In Measuring Damages.** As used to measure damages,[61] it is deemed to be the equivalent of "actual damage," in its legal signification.[62]

[§ 12] **5. Other Phrases.** "Rental period then next ensuing,"[63] "rental value for the use and occupation of premises;"[64] also "actual rental value of the premises,"[65] "fair rental value,"[66] and "reasonable rental value."[67]

RENTALERS.[68]

RENT CHARGE.[69]

RENTE. In French law, the annual return which represents the revenue of a capital or of an immovable alienated.[70]

Rente constituèe. An annuity;[71] that which is due to him who has paid a sum of money for a lawful interest, to be paid by him who received the money.[72]

Rente foncière. The rent reserved on a lease.[73]

Rente viagère. An annuity for life;[74] that species of rente the duration of which depends upon the contingency of the death of one or more persons indicated in the contract.[75]

Rentes. The term applied to the French government funds.[76]

RENTER. A tenant.[77]

1037, 134 AmSR 911, [quot Martin v. Clegg, 163 N. C. 528, 530, 79 SE 1105]. See Herpolsheimer v. Christopher, 76 Nebr. 352, 107 NW 382, 111 NW 359, 361, 9 LRANS 1127, 14 AnnCas 399 ("not the probable loss of profits").

[a] **"Rents and profits" distinguished.**—Jones v. Massey, 14 S. C. 292, 307.

60. Gibson v. Fischer, 68 Iowa 29, 32, 25 NW 914 [quot Willis v. Perry, 92 Iowa 297, 307, 60 NW 727, 26 LRA 124 (quot Capital Garage Co. v. Powell, 98 Vt. 303, 127 A 375, 378)].

[a] **Dependent on use.**—"Rental value is of necessity dependent on what can be made out of the business or property for the uses for which it is devoted or adapted." Willis v. Perry, 92 Iowa 297, 307, 60 NW 727, 26 LRA 124 [quot Capital Garage Co. v. Powell, 98 Vt. 303, 127 A 375, 378].

61. Leick v. Tritz, 94 Iowa 322, 325, 62 NW 855. See also Damages §§ 123, 187, 198.

62. Leick v. Tritz, supra.

"Actual damages" defined see Damages § 3.

63. Dove v. Davis, 25 F. (2d) 967, 968.

64. Weil v. Lesser, 115 Misc. 241, 189 NYS 655, 656 [quot Kentucky Holding Co. v. Petry, 191 NYS 673, 675].

65. Leick v. Tritz, 94 Iowa 322, 325, 62 NW 855.

66. Ford Motor Co. v. Minneapolis, 147 Minn. 211, 216, 179 NW 907.

67. Kendall v. Uland, 83 Nebr. 527, 529, 120 NW 152, 153.

68. See Rental ante § 7.

69. See Ground Rents §§ **1**, **2**, **4**; Landlord and Tenant § 1046.

70. Black L. D.

71. New Orleans v. Duplessis, 5 Mart. (La.) 309, 312.

"Annuity" defined see Annuities § 1.

72. New Orleans v. Duplessis, 5 Mart. (La.) 309, 313.

[a] **Personal contract.**—It "is merely personal, and not due by the estate affected by or hypothecated for it." New Orleans v. Duplessis, 5 Mart. (La.) 309, 313. See Mailhot v. Brimbois, 32 Que. Super. 542, 544.

[b] **Assignee of "rent constituèe"** held without right to follow the debtors for its recovery unless he serves them with notice provided by the code. Mailhot v. Brimbois, 32 Que. Super. 542, 544.

[c] **"Rente fonciere" distinguished.**—New Orleans v. Duplessis, 5 Mart. (La.) 309, 313. See also Annuities § 3 note 16 [c].

73. New Orleans v. Duplessis, 5 Mart. (La.) 309, 313. See also Ground Rents § 12 note 53 [b].

[a] **"It is called 'fonciere'** because it is due by the estate, 'le fonds.'" New Orleans v. Duplessis, 5 Mart. (La.) 309, 313.

[b] **"Rente constituèe" distinguished.**—New Orleans v. Duplessis, 5 Mart. (La.) 309, 313. See also Annuities § 3 note 16 [c].

74. Black L. D.

75. Black L. D. [cit La. Civ. Code art 2764].

76. Black L. D.

77. Turner v. First Nat. Bank (Tex. Civ. A.) 234 SW 928.

"Tenant" see Landlord and Tenant § 1.

RENT INSURANCE

[Matters not in this Title, treated elsewhere in this Work, see Cross References infra this page]

ANALYSIS

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II. INSURABLE INTEREST [§ 2] p 389

III. THE CONTRACT [§ 3] p 390

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CROSS REFERENCES

Credit Insurance 15 C. J. p 1354.
Fire Insurance 26 C. J. p 1.
Guaranty Insurance 28 C. J. p 1041.
Insurance 32 C. J. p 950.
Liability Insurance 36 C. J. p 1053.
Loss of rent as element of liability under fire insurance policy see **Fire Insurance** § 461.

I. DEFINITION

[§ 1] In one sense rent insurance may be said to be an insurance contract[1] indemnifying insured against loss of rent under the circumstances specified in the policy.[2] And while loss of rent may be the only loss covered by a particular policy,[3] indemnities against rent losses very generally are incorporated as clauses in policies insuring against fire[4] or other destruction[5] of leased property.

As a species of guaranty insurance[6] rent insurance, sometimes called "realty revenue insurance,"[7] is an insurance contract[8] whereunder insured is guaranteed a certain rent[9] or rental[10] from lands and tenements.[11]

In the nature of liability insurance[12] the term "rent insurance" may, perhaps somewhat inappropriately, be applied to an insurance contract[13] indemnifying a tenant for any loss accruing to him by reason of having to pay rent for premises during such time as they may become untenantable for a cause specified in the contract.[14]

II. INSURABLE INTEREST

[§ 2] Rent constitutes an insurable interest in one who is entitled to receive it.[15] A tenant has an insurable interest in rent for which he may be liable.[16]

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[1] See Insurance § 1.

[2] U. S.—First Inv. Co. v. Vulcan Underwriters, etc., Ins. Co., 33 F. (2d) 785.

Ala.—American Ins. Co. v. Mattox, 219 Ala. 106, 120 S 912.

Ga.—Chronicle Bldg. Co. v. New Hampshire F. Ins. Co., 21 Ga. A. 687, 94 SE 1043.

Kan.—Amusement Syndicate Co. v. Prussian Nat. Ins. Co., 85 Kan. 367, 616, 116 P 620, 118 P 76.

Minn.—Van Nest v. Citizens' Ins. Co., 134 Minn. 94, 158 NW 725, LRA 1916F 693.

N. Y.—Lite v. Firemen's Ins. Co., 119 App. Div. 110, 104 NYS 434 [aff 193 N. Y. 639 mem, 86 NE 1127 mem].

Or.—First Inv. Co. v. Vulcan Underwriters, etc., 129 Or. 688, 278 P 967.

Tex.—Hartford F. Ins. Co. v. Pires, (Civ A.) 165 SW 565.

[3] See cases passim this title.

[4] See Fire Insurance § 461.

[5] See specific insurance titles.

[6] So said in State v. Hogan, 8 N. D. 301, 306, 78 NW 1051, 73 AmSR 759, 45 LRA 166.

It is a form of "guaranty insurance having for its object the prompt payment of rent to persons who may be entitled to receive it." May Ins. § 547.

"Guaranty insurance" defined see Guaranty Insurance § 1.

[7] See Realty Revenue Insurance 52 C. J. p 1180.

[8] See Insurance § 1.

[9] **"Rent"** ante.

[10] **"Rental"** ante.

[11] State v. Hogan, 8 N. D. 301, 306, 78 NW 1051, 73 AmSR 759, 45 LRA 166.

[12] See Liability Insurance § 1.

[13] See Insurance § 1.

[14] See Heller v. Royal Ins. Co., 177 Pa. 262, 35 A 726, 34 LRA 600; Heller v. Royal Ins. Co., 151 Pa. 101, 25 A 83; Heller v. Royal Ins. Co., 133 Pa. 152, 19 A 349, 7 LRA 411; Marshall v. Schofield, 48 L. T. Rep. N. S. 406.

[15] Hartford F. Ins. Co. v. Northern Trust Co., 127 Ill. A. 355; Leonarda v. Phœnix Assur. Co., 2 Rob. (La.) 131, 38 AmD 205; Carey v. London Provincial F. Ins. Co., 33 Hun (N. Y.) 315; Westminster F. Office v. Glasgow Provident Inv. Soc., 13 App. Cas. 699.

"Rent is itself a distinct insurable interest." May Ins. § 81 [cit Curry v. Commonwealth Ins. Co., 10 Pick. (Mass.) 535, 20 AmD 547].

[16] Marshall v. Schofield, 48 L. T. Rep. N. S. 406. But see Duff v. Fleming, 8 Ct. Sess. Cas. 769; Allen v. Markland, 20 Sc. L. Rep. 267 (in both of which the matter was controlled by provisions to the contrary in the contracts of insurance).

Extinction. General rules[17] govern as to effect of the loss or extinction of the insurable interest.[18] Thus a lessee's insurable interest may become extinguished by his subletting premises[19] or by the reëntry of the lessor,[20] but not by a reëntry for the purpose of rebuilding with the lessee's assent and not to his entire exclusion.[21]

III. THE CONTRACT

[§ 3] General rules controlling the construction of contracts,[22] including contracts of insurance generally,[23] govern the construction of an insurance policy covering a rent loss.[24]

IV. EXTENT OF LOSS AND LIABILITY

[§ 4] As in the case of other kinds of insurance,[25] the extent of loss and liability therefor under a rent insurance contract is fixed by the contract;[26] and particular provisions with respect thereto, including stipulations as to the method of computing the loss, must be followed.[27] Depending on the terms of the particular contract and the construction put thereon,[28] the amount recoverable under some policies is the full amount of the rents lost without deductions,[29] and under other policies will be recovered a less amount.[30] Money paid by an insurer of a lessor, indemnifying him against loss of rent, although such money was applied by the lessor to the rent in relief of the lessee, was held not to affect the lessee's right to recover on his insurance contract indemnifying him for loss by reason of having to pay rent while the premises were untenantable.[31]

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[17] See Insurance § 205. See also Fire Insurance § 23.

[18] See cases infra notes 19–21.

[19] Moving Picture Co. v. Scottish Union, etc., Ins. Co., 244 Pa. 358, 90 A 642.

[a] **Rule applied.**—Where defendant had insured plaintiff against loss of the rents of certain premises by fire and at the time plaintiff was a subtenant of the first floor at a yearly rental, and had sublet the premises with a provision terminating the lease on destruction of the building by fire, and the building was destroyed thereby, plaintiff was not entitled to judgment on the policy. Moving Picture Co. v. Scottish Union, etc., Ins. Co., 244 Pa. 358, 90 A 642.

[20] Heller v. Royal Ins. Co., 133 Pa. 152, 19 A 349, 7 LRA 411.

[21] Heller v. Royal Ins. Co., 177 Pa. 262, 35 A 726, 34 LRA 600; Heller v. Royal Ins. Co., 151 Pa. 101, 25 A 83 [dist Heller v. Royal Ins. Co., 133 Pa. 152, 19 A 349, 7 LRA 411].

[a] **Rule applied.**—Plaintiff, a tenant paying eight thousand five hundred dollars yearly rent, was insured by defendant for six thousand dollars, by a policy reciting: "It being understood that this policy is to indemnify the assured for any loss accruing to her by reason of having to pay rent for the within-described building . . . [while] untenantable by reason of fire; . . . it being understood that the sum insured is the annual rental of the property, and the amount of loss is to be computed on that basis." It was held that plaintiff, having paid rent for a year during which the premises were untenantable by reason of fire, could recover of defendant the full six thousand dollars, although six months after the fire the landlord went into possession of the lot to put up a larger building, extending onto other land, under an agreement with plaintiff that he might do so without affecting plaintiff's liability for the rent under the old lease till completion of the new building, which plaintiff agreed to rent, and although an insurance company in which the landlord had his rents insured, while denying liability, paid two thousand dollars to him for the benefit of plaintiff. Heller v. Royal Ins. Co., 177 Pa. 262, 35 A 726, 34 LRA 600.

[22] See Contracts §§ 481–592.

[23] See Insurance §§ 257–278.

[24] U. S.—First Inv. Co. v. Vulcan Underwriters, etc., Ins. Co., 33 F. (2d) 785.

Ala.—American Ins. Co. v. Mattox, 219 Ala. 106, 120 S 912.

Cal.—Whitney Est. Co. v. Northern Assur. Co., 155 Cal. 51, 101 P 911, 23 LRANS 123, 18 AnnCas 512.

Ga.—Chronicle Bldg. Co. v. New Hampshire F. Ins. Co., 21 Ga. A. 687, 94 SE 1043.

Kan.—Amusement Syndicate Co. v. Prussian Nat. Ins. Co., 85 Kan. 367, 116 P 620.

Md.—Palatine Ins. Co. v. O'Brien, 109 Md. 100, 71 A 775; Palatine Ins. Co. v. O'Brien, 107 Md. 341, 68 A 484, 16 LRANS 1055.

Minn.—Van Nest v. Citizens' Ins. Co., 134 Minn. 94, 158 NW 725, LRA 1916F 693.

Or.—First Inv. Co. v. Vulcan Underwriters, etc., 129 Or. 688, 278 P 967.

Pa.—Heller v. Royal Ins. Co., 177 Pa. 262, 55 A 726, 47 LRA 600. See German-American Title, etc., Co. v. Citizens' Trust, etc., Co., 190 Pa. 247, 42 A 682 (E agreed in writing with plaintiff to convey to it the ground rents on unimproved lands, to build on the ground so as to secure the rents, and to furnish the bond of a trust company guarantying the completion of the buildings in accordance with plans to be approved by plaintiff. In pursuance of such written agreement, E procured defendant's contract to insure the completion of the buildings, made the conveyances, and received the purchase money. It was held that the contract of insurance was binding on defendant, notwithstanding the original agreement was to convey real estate, and was not signed by plaintiff, or ratified in writing, since the insurance did not relate to the conveyance, but to what was to be done after the conveyance).

Tex.—Hartford F. Ins. Co. v. Pires, (Civ. A.) 165 SW 565.

Provisions as to extent of loss and liability see infra § 4.

[25] See specific insurance titles.

[26] See cases infra this section.

[a] **Measure of damages to grantee of ground rents,** under a contract insuring the completion of buildings agreed to be built thereon within a certain time after the sale of the ground rents, for the noncompletion of such buildings, is the difference in the market value of the ground rents if the buildings had been completed according to the agreement and their value with the buildings in the uncompleted state in which they were left, not to exceed the amount of the insurance. German-American Title, etc., Co. v. Citizens' Trust, etc., Co., 190 Pa. 247, 42 A 682.

[27] U. S.—First Inv. Co. v. Vulcan Underwriters, etc., Ins. Co., 33 F. (2d) 785.

Ala.—American Ins. Co. v. Mattox, 219 Ala. 106, 120 S 912.

Cal.—Whitney Est. Co. v. Northern Assur. Co., 155 Cal. 521, 101 P 911, 23 LRANS 123, 18 AnnCas 512.

Ga.—Chronicle Bldg. Co. v. New Hampshire F. Ins. Co., 21 Ga. A. 687, 93 SE 1043.

Kan.—Amusement Syndicate Co. v. Prussian Nat. Ins. Co., 85 Kan. 367, 116 P 620.

Md.—Palatine Ins. Co. v. O'Brien, 107 Md. 341, 68 A 484, 16 LRANS 1055.

Minn.—Van Nest v. Citizens' Ins. Co., 134 Minn. 94, 158 NW 725, LRA 1916F 693.

Or.—First Inv. Co. v. Vulcan Underwriters, etc., 129 Or. 688, 278 P 967.

Pa.—Heller v. Royal Ins. Co., 177 Pa. 262, 55 A 726, 47 LRA 600.

Tex.—Hartford F. Ins. Co. v. Pires, (Civ. A.) 165 SW 565.

[a] **Thus** a provision in a policy, covering loss of rental income by reason of fire, that loss should be computed on the basis of net income derived from rented portions from date of fire to end of period that would be required with due diligence to restore rented portion to same tenantable condition as at time of fire, constituted measure of insurer's liability, although, because of city ordinances prohibiting repair of second and third stories of insured wooden building which were practically destroyed by fire, insured was unable to obtain a permit to make such repairs, as against insured's contention that it was entitled to recover for loss of rents for unexpired portion of existing leases. First Inv. Co. v. Vulcan Underwriters, etc., Ins. Co., 33 F. (2d) 785.

[28] **Construction generally** see supra § 3.

[29] U. S.—First Inv. Co. v. Vulcan Underwriters, etc., Ins. Co., 33 F. (2d) 785.

Ala.—American Ins. Co. v. Mattox, 219 Ala. 106, 120 S 912.

Cal.—Whitney Est. Co. v. Northern Assur. Co., 155 Cal. 521, 101 P 911, 23 LRANS 123, 18 AnnCas 512.

Ga.—Chronicle Bldg. Co. v. New Hampshire F. Ins. Co., 21 Ga. A. 687, 94 SE 1043.

[a] **Rule was applied** notwithstanding a statutory provision that "the sole object of insurance is the

V. PAYMENT

[§ 5] General rules[32] apply to the discharge of insurer's liability under a rent insurance policy.[33]

Interest. Where a policy insuring rents provided that a loss thereunder should be payable after sixty days from the furnishing of proofs of loss, plaintiff was entitled to interest on the amount found due from the expiration of such time.[34]

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indemnity of the insured." Whitney Est. Co. v. Northern Assur. Co., 155 Cal. 521, 101 P 911, 23 LRANS 123, 18 AnnCas 512.

Pa.—Heller v. Royal Ins. Co., 177 Pa. 262, 35 A 726, 34 LRA 600.

[b] **Particular provisions.**—(1) Where the policy stipulated that in case the building "shall be rendered untenantable by fire, [insurer] shall be liable to assured for the actual loss of rent ensuing therefrom, based upon the rentals in force from the rented portions of the premises at the time of the fire, not exceeding the sum insured; [and] the loss to be computed from the date of the fire for the time it would require to put the premises in a tenantable condition, excluding from such time such portion thereof as may be consumed by a strike or by any other delay beyond the control of the assured," assured was held liable for such amount of rent, at the rate paid for the portions rented at the time of the fire, as would have become payable to assured during the period required to restore the premises to a tenantable condition, without deduction for any expenses connected with the renting. Whitney Est. Co. v. Northern Assur. Co., 155 Cal. 51, 101 P 911, 23 LRANS 123, 18 AnnCas 512. (2) Under fire policy insuring lessee against loss of rents "actually sustained" on subleased portions of premises rendered untenantable for time necessary to restore them, as ascertained by appraisement, if not agreed on, in amount not exceeding proportion of sum insured to actual annual rentals, insured was entitled to full amount of rents lost, without deduction for rental he was relieved from paying under terms of his lease; such recovery not impinging on principle that insurance policy is essentially a contract of indemnity only. American Ins. Co. v. Mattox, 219 Ala. 106, 120 S 912 [appr Whitney Est. Co. v. Northern Assur. Co., supra]. (3) An insurance policy, indemnifying against loss of rents caused by fire or lightning, actually sustained on rented premises, for such period as may be reasonably necessary to restore the premises to the same tenantable condition as before the fire, covers the period needed to place the contract for repairs, and was not limited to the time actually spent in the making of the repairs. Hartford F. Ins. Co. v. Pires, (Tex. Civ. A.) 165 SW 565.

[30] Palatine Ins. Co. v. O'Brien, 109 Md. 100, 71 A 775; Van Nest v. Citizens' Ins. Co., 134 Minn. 94, 158 NW 725, LRA1916F 693; Hartford F. Ins. Co. v. Pires, (Tex. Civ. A.) 165 SW 565.

[a] **Particular provisions.**—(1) A policy provided that "the intention of this insurance is to make good the loss of rents caused by fire or lightning actually sustained by the assured on occupied or rented portions of the premises which have become untenantable, for and during such time as may be necessary to restore the premises to the same tenantable condition as before the fire." Since under the terms of the policy, the indemnification is expressly limited to such actual loss as might be sustained during the necessary period of reconstruction its language cannot be construed to embrace losses which might accrue by reason of necessary delay attendant upon the retenanting of the building subsequently to such period and after its actual reconstruction. Chronicle Bldg. Co. v. New Hampshire F. Ins. Co., 21 Ga. A. 687, 94 SE 1043. (2) Under a policy insuring rents, but requiring insured to rebuild, and providing that insured should not be liable beyond the actual value destroyed by fire for loss caused by ordinance or law regulating construction or repair of buildings or by interruption of business or otherwise, insurer is not liable for loss of rent caused by the city authorities in delaying rebuilding, pending ordinance relocating street lines. Palatine Ins. Co. v. O'Brien, 109 Md. 100, 71 A 775. (3) A policy insuring rents declared that the loss should be computed from the date of the fire and cease on the premises again becoming tenantable, pursuant to assured's agreement to rebuild or repair in as short a time as the nature of the case should admit, and if assured elected not to rebuild or repair, then the loss should be determined by the time which would have been required therefor. It also provided that the company should not be liable for loss directly or indirectly caused by order of any civil authority. It was held that insurer was not liable for loss of rents during a period in which rebuilding was delayed because building permits were refused by the city authorities pending definite decision concerning certain street improvements. Palatine Ins. Co. v. O'Brien, 107 Md. 341, 68 A 484, 16 LRANS 1055. (4) Under a policy insuring rents, but requiring insured to rebuild as soon as the nature of the case would admit, and providing that insurer should not be liable for loss caused by "interruption of business," insurer is not liable for loss of rent from interruption of business caused by delays in rebuilding resulting from the fall of débris of the fire throughout the burnt district. Palatine Ins. Co. v. O'Brien, 109 Md. 100, 71 A 775. (5) A policy of insurance against loss of rent, due to a fire which rendered the insured property untenantable, provided for payment of the actual loss sustained, "not exceeding the sum insured, nor one-twelfth of that amount for any one month." A fire occurred rendering the company liable for the loss, and the same was amicably adjusted at an amount equal to one-half the face of the policy, which was paid. A second fire occurred some three months later, resulting in a further loss. It is held that the policy remained in force after the first loss at one-half the amount thereof, and that the monthly payments to be made in discharge of liability under the second loss are limited to one-twelfth of that amount, and not one-twelfth of the original sum insured. Van Nest v. Citizens' Ins. Co., 134 Minn. 94, 158 NW 725, LRA1916F 693.

[b] **Provisions of the valued policy law** making the amount named in an insurance policy covering improvements on real estate conclusive evidence of value in case of a total loss do not apply to a policy which insures against the loss in rents through the destruction of such improvements. Amusement Syndicate Co. v. Prussian Nat. Ins. Co., 85 Kan. 367, 116 P 620.

[31] Heller v. Royal Ins. Co., 177 Pa. 262, 35 A 726, 47 LRA 600.

[32] See Insurance § 710.

[33] See Palatine Ins. Co. v. O'Brien, 107 Md. 341, 68 A 484, 16 LRANS 1055.

[34] Palatine Ins. Co. v. O'Brien, supra. See Insurance § 886. See also Fire Insurance § 795.

VI. ACTIONS ON POLICIES

[§ 6] General rules[35] apply in actions on rent insurance policies,[36] such as the rules relating to defenses interposed,[37] to the pleadings,[38] to the evidence,[39] to the instructions of the court,[40] and to questions of fact for the jury.[41]

*RENT ROLL.[1]

RENT SECK.[2]

RENT SERVICE.[3]

RENUNCIATION.[4] In general, the act of giving up a right;[5] the act of renouncing or giving up some thing possessed;[6] the giving up of a right;[7] the legal act by which a person abandons a right acquired, but without transferring it to another.[8] The term imports a gratuitous abandonment or giving up of a right;[9] an express waiver without consideration;[10] and it is said not to import a release or discharge for a valuable consideration.[11]

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[35] See Insurance §§ 776–891. See also Fire Insurance § 661 et seq; Liability Insurance § 118 et seq.

[36] See cases infra this section.

[37] Palatine Ins. Co. v. O'Brien, 109 Md. 100, 71 A 775.

[a] **Insurer precluded itself** from claiming that no rent was due under the policies sued on by paying into court money claimed to cover its liability. Palatine Ins. Co. v. O'Brien, 109 Md. 100, 71 A 775.

[38] See cases infra this note.

[a] **Amendment of statement of facts.**—Heller v. Royal Ins. Co., 151 Pa. 101, 25 A 83.

[b] **Demurrer to complaint.**—Carey v. London Provincial F. Ins. Co., 33 Hun (N. Y.) 315 (where a demurrer on the ground that complaint did not state facts sufficient to constitute a cause of action was deemed frivolous, and judgment in favor of plaintiff was ordered).

[c] **Affidavit of defense.**—Heller v. Royal Ins. Co., 133 Pa. 153, 19 A 349, 7 LRA 411.

[d] **Affidavit of defense and demurrer.**—Defendant cannot first reply to plaintiff's statement of claim on the merits, and then, after his affidavit of defense has been held sufficient, demur to the statement of claim. Heller v. Royal Ins. Co., 151 Pa. 101, 25 A 83.

[39] See cases infra this note.

[a] **Presumptions.**—Under a policy insuring rents, but requiring insured to rebuild as soon as the case would admit, it must be presumed, in the absence of proof to the contrary, that insured took possession of the premises to rebuild as soon after the fire as possible. Palatine Ins. Co. v. O'Brien, 109 Md. 100, 71 A 775; Palatine Ins. Co. v. O'Brien, 107 Md. 341, 68 A 484, 16 LRANS 1055.

[b] **Sufficiency.**—In an action upon an insurance policy indemnifying insured against the loss of rents on property for the period reasonably necessary to restore the property to the same tenantable condition as before the fire, evidence was held to sustain a finding that the time consumed was reasonably necessary to restore the building. Hartford F. Ins. Co. v. Pires, (Tex. Civ. A.) 165 SW 565.

[40] See cases infra this note.

[a] **Proper instruction.**—In an action on a policy, indemnifying against the loss of rents on premises for such period as was reasonably necessary to restore the premises to the same tenantable condition as before the fire, the evidence being undisputed that from the date of the fire to the restoration of the building the rents were one hundred seventy five dollars, the insurance company contesting alone the amount of recovery, the court properly charged that, if the time actually spent was no more than was reasonably necessary, they should find for the insured for the sum of one hundred seventy five dollars. Hartford F. Ins. Co. v. Pires, (Tex. Civ. A.) 165 SW 565.

[b] **Improper instruction.**—In an action on a policy insuring rents, an instruction that there could be no recovery for loss of rents which accrued between the fire and the time when plaintiff entered into possession was unauthorized, there being no evidence that plaintiff delayed taking possession of the premises after the fire. Palatine Ins. Co. v. O'Brien, 107 Md. 341, 68 A 484, 16 LRANS 1055.

[41] Van Nest v. Citizens' Ins. Co., 134 Minn. 94, 158 NW 725, LRA 1916F 693; First Inv. Co. v. Vulcan Underwriters, etc., 129 Or. 688, 278 P 967.

[1] See Rental § 1.

[2] See Ground Rents §§ 1, 2, 4, 5; Landlord and Tenant § 1047.

[3] See Ground Rents §§ 1–3; Landlord and Tenant § 1045.

[4] **Renunciation:**

In general see Abandonment 1 C. J. p 4.

As affecting patent see Patents §§ 120–125.

As applied to negotiable instrument see Bills and Notes §§ 855–857.

By assignee for benefit of creditors see Assignments for Benefit of Creditors § 301.

Of:
  Agency §§ 169–171.
  Allegiance see International Law § 14.
  Appointment as executor see Executors and Administrators §§ 78–86.
  Community by heir see Husband and Wife § 1309.
  Community by surviving spouse see Husband and Wife § 1309.
  Contract:
    Before time for performance see Contracts §§ 723–732.
    By infant see Infants §§ 162–168½.
  Contract or lease of railroad by receiver see Railroads §§ 850, 851.
  Devise or legacy see Wills [40 Cyc 1898].
  Dower by infant see Infants [22 Cyc 553 note 50].
  Guardian's contract respecting ward's land see Guardian and Ward § 274.

Of:—Continued
  Inheritance by:
    Heir see Descent and Distribution §§ 117, 119, 120.
    Wife see Descent and Distribution §§ 117, 119, 120.
  Office as affecting right to execute power see Powers § 103.
  Right to administer decedent's estate see Executors and Administrators §§ 78–86.
  Title in ejectment see Ejectment § 130.
  Title or right as ground of estoppel see Estoppel § 153.
  Trust see Trusts [39 Cyc 250, 251, 254].
  Wife's privilege or mortgage on husband's property where community rights exist see Husband and Wife § 1184.

On dissolution of community see Husband and Wife §§ 1308–1315.

See also Renounce ante p 381.

[5] Bouvier L. D. [quot Whitcomb v. National Exch. Bank, 123 Md. 612, 91 A 689, 690].

[6] Webster Int. D. [quot Whitcomb v. National Exch. Bank, supra].

[7] Codding v. Newman, 3 Thomps. & C. (N. Y.) 364, 365.

[8] Century D. [quot Whitcomb v. National Exch. Bank, 123 Md. 612, 91 A 689, 690; In re Johnston, 186 Wis. 599, 603, 203 NW 376 (quot McCormick v. Engstrom, 119 Kan. 698, 703, 241 P 685)].

[a] **Renunciation in favor of another** held in legal effect to amount to an assignment. McCormick v. Engstrom, 119 Kan. 698, 703, 241 P 685; In re Johnston, 186 Wis. 599, 603, 203 NW 376.

[b] **Renunciation may constitute acceptance.**—Under Louisiana Civ. Code arts 1002, 1003, the renunciation of an inheritance by an heir in favor of any number less than all the coheirs, without consideration, or in favor of all coheirs, upon receipt of the price, is to be considered an acceptance and donation of the inheritance. Aurienne v. Mt. Olivet, Inc., 153 La. 451, 96 S 29, 30.

[9] Nelson v. Hudson, 221 Mo. A. 211, 299 SW 1111, 1113.

[10] McGlynn v. Granstrom, 169 Minn. 164, 210 NW 892, 893.

"The same concept of 'renunciation,' express waiver without consideration, is expressed by another English authority, Byles on Bills (18th Ed.) 233." McGlynn v. Granstrom, supra.

[11] Nelson v. Hudson, 221 Mo. A. 211, 299 SW 1111, 1113. But see Whitcomb v. National Exch. Bank, 123 Md. 612, 91 A 689, 690.

[a] **In construing Negotiable Instruments Act,** it was said: "The

*By CARLOS M. SANDOVAL (Rent Roll-Replenish inclusive).

As applied to a contract,[12] a total refusal to perform it by one party before the time for performance arrives.[13]

In connection with negotiable instruments,[14] the word is used in the sense of "release."[15]

With reference to executor of a will,[16] it is an act whereby a person, named in a will as executor, declines to take on himself the burden of that office.[17]

Sometimes said to be synonymous with "abdication,"[18] and "relinquishment."[19]

Phrase: "Absolute and unconditional renunciation."[20]

RENVOI.[21]

REO. In Spanish law, the defendant, either in a civil or criminal proceeding;[22] in contradistinction to the plaintiff or "actor."[23]

REO ABSENTE. In the absence of the defendant.[24]

REOPENING.[25]

REO PRÆSENTE. The defender [defendant] being present.[26]

REORGANIZATION.[27] A term employed with reference to corporations,[28] and has been defined as meaning the reconstruction or rehabilitation of a corporation, especially a railroad, usually effected compulsorily by a receivership and foreclosure.[29] The term in common use denotes the carrying out, by proper agreements and legal proceedings, of a business plan for winding up the affairs of, or foreclosing a mortgage or mortgages upon the property of, insolvent corporations.[30] It is commonly applied to the formation of a new corporation by the creditors and shareholders of a corporation which is in financial difficulties, for the purpose of purchasing the company's works and other property, after the foreclosure of a mortgage or judicial sale.[31]

REPAIR.[32] [§ 1] **A. In General.** It is not a

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word 'renunciation,' as used in the section quoted, appropriately describes the act of surrendering a right or claim without recompense, but it can be applied with equal propriety to the relinquishment of a demand upon an agreement supported by a consideration." Whitcomb v. National Exch. Bank, 123 Md. 612, 91 A 689, 690.

[12] See also Contracts §§ 723–732; Guardian and Ward § 274; Infants §§ 162–168½; Railroads §§ 850, 851.

[13] 3 Elliott Contr. § 2027 [quot Leonard v. Kendall, (Tex. Civ. A.) 190 SW 786, 788].

[a] **"Breach" distinguished.**—Leonard v. Kendall, (Tex. Civ. A.) 190 SW 786, 788.

[b] **"Rescission" distinguished.**—3 Elliott Contr. § 2027 [quot Leonard v. Kendall, (Tex. Civ. A.) 190 SW 786, 788].

[14] See also Bills and Notes §§ 855–857.

[15] North Pac. Mortg. Co. v. Krewson, 128 Wash. 239, 224 P 566, 567, 53 ALR 1416; Baldwin v. Daly, 41 Wash. 416, 419, 83 P 724 [quot Whitcomb v. National Exch. Bank, 123 Md. 612, 91 A 689, 690; Pitt v. Little, 58 Wash. 355, 359, 108 P 941].

[a] **Practically equivalent.**—"These definitions [quoting the dictionary definitions supra] are practically the same as those given in the same authorities for 'release.'" Whitcomb v. National Exch. Bank, 123 Md. 612, 91 A 689, 690.

"Release" defined see Release § 1.

[16] See also Executors and Administrators §§ 78–86.

[17] In re Maxwell, 3 N. J. Eq. 611, 614.

[18] Century D. [quot In re Johnston, 186 Wis. 599, 603, 203 NW 376 (quot McCormick v. Engstrom, 119 Kan. 698, 703, 241 P 685)].

"Abdication" 1 C. J. p 280.

[19] Whitcomb v. National Exch. Bank, 123 Md. 612, 91 A 689, 690.

"Relinquishment" ante.

[20] Davis v. Gutheil, 87 Wash. 596, 599, 152 P 14.

[21] See Conflict of Laws § 25.

[22] Escriche Diccionario.

"Defendant" 18 C. J. p 459.

[23] Escriche Diccionario.

"Actor" 1 C. J. p 1181.

"Plaintiff" 48 C. J. p 1218.

[24] Black L. D.

[25] See Equity §§ 772, 871–936; Judgments §§ 484–600. See also Rehearing ante.

[26] Trayner Leg. Max.

[27] **Reorganization of:**
Agricultural society see Agriculture § 26.
Bank see Banks and Banking §§ 28, 29, 854.
Corporations §§ 3603–3629.
Counties §§ 18–40.
Insurance company see Insurance § 69.
Municipal Corporations § 135 note 37 [a].
Street Railroads [36 Cyc 1370].
Towns [38 Cyc 604].
Mutual benefit company see Beneficial Associations § 9.
Railroad company:
  In general see Railroads §§ 806–822.
  By purchaser at sale under foreclosure see Railroads § 811.
Religious Societies 54 C. J. p 1.
Schools and School Districts [35 Cyc 833].
States [36 Cyc 837].

[28] See Corporations § 3603 et seq.

[29] Webster New Int. D. [quot De Blois v. Internal Revenue Comr., 36 F. (2d) 11, 12].

[30] Bouvier L. D. [quot De Blois v. Internal Revenue Comr., supra].

[31] Morawetz Corp. § 812 [quot Symmes v. Union Trust Co., 60 Fed. 830, 870]. See also Corporations §§ 3603–3617.

[32] See also Improvements 31 C. J. p 305.

Agreement to repair in lieu of rent see Landlord and Tenant § 1272.

Entry to make repairs as affecting liability for rent see Landlord and Tenant § 1120.

Evidence of:
Agreement for, to vary written lease see Evidence § 1506.
Failure of master to make, in action by servant for injuries see Master and Servant § 1239.
In action for injuries see Highways § 481 et seq; Municipal Corporations § 2024; Negligence §§ 791–796; Railroads §§ 1655, 1758, 1994, 2260.

Failure to repair:
In general see Landlord and Tenant §§ 208, 209, 956, 959.
Abandonment of premises for see Landlord and Tenant § 1128.
As contributory negligence see Master and Servant § 1070.
As ground for forfeiture of franchise see Corporations §§ 3704–3710.
By abutting owner see Municipal Corporations §§ 1864–1885.
By vessel owner see Shipping [36 Cyc 157].
Claim for or for damages arising from landlord's failure to make, as set-off in action for rent see Landlord and Tenant §§ 1329–1330.
Damages for breach of covenant see Landlord and Tenant § 801.
Eviction by failure to make or by entry of landlord to make see Landlord and Tenant §§ 998, 999.
Forfeiture of lease by breach of covenant see Landlord and Tenant § 234.
Rent on failure of landlord see Landlord and Tenant § 1128.
Untenantable condition of premises pending, or failure of landlord to make, as affecting liability for rent see Landlord and Tenant §§ 1128, 1138.

Lien for repairs see Maritime Liens §§ 31–34, 36; Mechanics' Liens § 42.

Liability:
For defect in street see Municipal Corporations §§ 1755–1885.
For injury:
  Caused by repairing party wall see Party Walls § 52.
  On bridge see Bridges §§ 62–114.
Of wife's separate estate for Husband and Wife §§ 615–620.

Mandamus to compel repair see Bridges § 58; Mandamus §§ 367, 383.

Option of insurer to repair see Fire Insurance §§ 601–609.

Payment of rent by making repair see Landlord and Tenant § 1272.

Performance of work as to repairs under contract for public improvements see Municipal Corporations §§ 2597, 2598.

Power of agent to make repair see Agency § 287.

Precautions against recurrence of injury as showing duty to make repairs see Negligence § 793.

Priority between repair lien and mortgage see Chattel Mortgages § 397; Mechanics' Liens § 396; Railroads § 719.

Reimbursement for repairs made by:
Defeated purchaser at judicial sale see Judicial Sales § 201.
Husband on wife's separate estate see Husband and Wife § 539.

Repair of particular kinds of property:
Bailed property see Bailments § 46.

technical word and should not be given a technical or strained interpretation;[33] although there are some varying shades of difference in the general definition of the term.[34]

[§ 2] **B. As Noun—1. As an Act.** The act of repairing;[35] maintenance;[36] mending;[37] mending of the waste or decay;[38] reparation;[39] replacing of injured or damaged parts;[40] restoration after decay,[41] dilapidation,[42] injury,[43] loss,[44] partial destruction,[45] or waste;[46] restoration by renewal or replacement of subsidiary parts of a whole;[47] restoration of something already defective from use and decay;[48] restoration to a former, more perfect condition,[49] or to the original state,[50] after a former improvement is completed;[51] restoration to a sound, good, or complete state after decay, injury, dilapidation, or partial destruction;[52] restoration,[53] or state

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Bridges §§ 46–58.
County building see Counties §§ 218, 219.
Dam see Navigable Waters § 85.
Drains §§ 191–193.
Easements §§ 228–231.
Highways § 308 et seq.
Insured vessel see Marine Insurance §§ 373–381, 459.
Joint property see Joint Tenancy §§ 14, 15.
Leased premises see Landlord and Tenant §§ 766–802; Railroads § 519.
Life estate see Estates § 90.
Mortgaged property see Mortgages §§ 628, 629.
Party Walls §§ 43–49.
Patented article as constituting infringement see Patents § 495.
Pent Roads § 6.
Private railroad crossing see Railroads § 414.
Private Roads §§ 82–84.
Property dedicated see Dedication § 81.
Railroads § 308.
Railroad fence or cattle guard see Railroads § 423.
Street:
  In general see Municipal Corporations §§ 3703–3707.
  Assessments and special taxes for see Municipal Corporations § 2825.
  By street railroad see Street Railroads [36 Cyc 1403].
  Criminal responsibility for failure to make see Municipal Corporations § 1243.
  Notice of defect in see Municipal Corporations §§ 1819–1832.
  Recognition of street by making see Municipal Corporations § 3601.
Turnpikes and Toll Roads [38 Cyc 378].
Vessel:
  Admiralty jurisdiction see Admiralty §§ 88, 89.
  Right of owner to cost of see Collision §§ 332–339.

Right of mortgagor to timber for repairs see Mortgages § 598.

Rights, duties, and liabilities of:
Cotenant see Tenancy in Common [38 Cyc 53].
Executors and Administrators § 528.
Guardian and Ward § 254.
Landlord and Tenant §§ 766–802.
Life tenant see Estates § 90.
Master and Servant § 534.
Receivers § 189.
Servant making, application of rule with regard to place of work, machinery, and appliances see Master and Servant § 557.
Tenant in dower see Dower § 416.
Trustee see Trusts [39 Cyc 334].
Vendor and Purchaser [39 Cyc 1638].

Stipulation for repairs in:
Contract for public improvements as to see Municipal Corporations § 2527.
Insurance policy see Fire Insurance §§ 244, 245.

Title to article repaired at expense of repairer see Accession § 5.

Underwriter's liability for repairs see Marine Insurance § 335.

Use of soil, timber, etc., for repair see Highways § 314.

Waiver of right to forfeit insurance implied from election to make repairs see Fire Insurance §§ 604, 605.

[33] Wattles v. South Omaha Ice, etc., Co., 50 Nebr. 251, 259, 69 NW 785, 61 AmSR 554, 36 LRA 424 [quot Saylor v. Brooks, 114 Kan. 493, 220 P 193, 194; Atty.-Gen. v. Montcalm County, 141 Mich. 590, 104 NW 792, 794].

[34] American Bonding Co. v. Ottumwa, 137 Fed. 572, 579. See also cases infra §§ 2–7.

[35] Webster New Int. D. [quot Garland v. Samson, 237 Fed. 31, 150 CCA 233, 237; Collison v. Curtner, 141 Ark. 122, 216 SW 1059, 1061, 8 ALR 760].

"Repairing" infra notes 58–63.

[36] U. S. v. Denver, etc., R. Co., 190 Fed. 825, 855 [quot Leek Impr. Comrs. v. Stafford, 20 Q. B. D. 794, 796]. See Ross v. Sheldon, 176 Iowa 618, 154 NW 499, 501. But see Seaboard Nat. Bank v. Woesten, 147 Mo. 467, 485, 48 SW 939, 48 LRA 279 ("maintenance . . . has not the same application").

[a] **"Maintenance" practically equivalent.**—U. S. v. Denver, etc., R. Co., 190 Fed. 825, 855 [quot Leek Impr. Comrs. v. Stafford, 20 Q. B. D. 794, 796].

[37] Webster New Int. D. [quot Garland v. Samson, 237 Fed. 31, 150 CCA 233, 237; Collison v. Curtner, 141 Ark. 122, 216 SW 1059, 1061, 8 ALR 760]; Lehigh Valley R. Co. v. Ruggles, 6 Pa. Dist. & Co. 53, 55.

[38] Perry v. J. L. Mott Iron Works Co., 207 Mass. 501, 93 NE 798, 799.

[a] **In construing lease covenant** to leave premises in as good repair as at beginning of term the court said: "Repair . . . naturally means a mending of the waste or decay incident to a removal rather than a restoration to an original state." Perry v. J. L. Mott Iron Works Co., 207 Mass. 501, 93 NE 798, 799.

[39] Century D. [quot Allen v. Oscar G. Murray R. Employés Ben. Fund, 182 NYS 369, 372]; New Standard D. [quot Hacken v. Isenberg, 288 Ill. 589, 124 NE 306, 309]; Walker D. [quot State v. Gibson County, 80 Ind. 478, 480, 41 AmR 821; Peo. v. Brooklyn, 21 Barb. (N. Y.) 484, 488]; Webster New Int. D. [quot Garland v. Samson, 237 Fed. 31, 150 CCA 233, 237; Collison v. Curtner, 141 Ark. 122, 216 SW 1059, 1061, 8 ALR 760]; Finding v. Ocean Acc., etc., Corp., 65 Colo. 332, 177 P 142, 144 [quot Cyc].

[40] The Harvard, 270 Fed. 668, 670.

[41] New Standard D. [quot Hacken v. Isenberg, 288 Ill. 589, 124 NE 306, 309]; Dougherty v. Taylor, etc., Co., 5 Ga. A. 773, 63 SE 928, 930.

[42] Walker D. [quot State v. Gibson County, 80 Ind. 478, 480, 41 AmR 821; Peo. v. Brooklyn, 21 Barb. (N. Y.) 484, 488]; Worcester D. [quot Grady v. National Conduit, etc., Co., 153 App. Div. 401, 138 NYS 549, 553]; Finding v. Ocean Acc., etc., Corp., 65 Colo. 332, 177 P 142, 144 [quot Cyc].

[43] New Standard D. [quot Hacken v. Isenberg, 288 Ill. 589, 124 NE 306, 309]; Worcester D. [quot Grady v. National Conduit, etc., Co., 153 App. Div. 401, 138 NYS 549, 553]; Dougherty v. Taylor, etc., Co., 5 Ga. A. 773, 63 SE 928, 930.

[44] Worcester D. [quot Grady v. National Conduit, etc., Co., 153 App. Div. 401, 138 NYS 549, 553].

[45] New Standard D. [quot Hacken v. Isenberg, 288 Ill. 589, 124 NE 306, 309]; Dougherty v. Taylor, etc., Co., 5 Ga. A. 773, 63 SE 928, 930.

[46] New Standard D. [quot Hacken v. Isenberg, 288 Ill. 589, 124 NE 306, 309].

[47] Lurcott v. Wakely, [1911] 1 K. B. 905, 923 [quot Woodbury Co. v. William Tackaberry Co., 166 Iowa 642, 148 NW 639, 641]. See Walker v. Dwelle, 187 Iowa 1384, 175 NW 957, 961 (substituting "the old" for "a whole").

[48] Seaboard Nat. Bank v. Woesten, 147 Mo. 467, 485, 48 SW 939, 48 LRA 279.

[49] Koepp v. National Enameling, etc., Co., 151 Wis. 302, 314, 139 NW 179.

[50] Higginbotham v. Lonoke County Road Impr. Dist. No. 3, 154 Ark. 112, 241 SW 866, 868 [quot Cowan v. Thompson, 178 Ark. 44, 9 SW (2d) 790, 792]. See Highland Park v. Dallas R. Co., (Tex. Civ. A.) 243 SW 674, 679 (not restricted to restoration to original condition). But see Perry v. J. L. Mott Iron Works Co., 207 Mass. 501, 93 NE 798, 799 (not necessarily to an original state).

[a] **"Not exact but substantial restoration."**—Higginbotham v. Lonoke County Road Impr. Dist. No. 3, 154 Ark. 112, 241 SW 866, 868 [quot Cowan v. Thompson, 178 Ark. 44, 9 SW (2d) 790, 792].

[51] Higginbotham v. Lonoke County Road Impr. Dist. No. 3, 154 Ark. 112, 241 SW 866, 868 [quot Cowan v. Thompson, 178 Ark. 44, 9 SW (2d) 790, 792].

[52] Century D.; Standard D. [both quot Grady v. National Conduit, etc., Co., 153 App. Div. 401, 138 NYS 549, 553]; Webster Int. D. [quot Ollinger, etc., Dry Dock Co. v. Gibbony, 202 Ala. 516, 81 S 18, 20; Duluth v. Duluth St. R. Co., 171 Minn. 187, 215 NW 69, 70]; Goodyear Shoe Mach. Co. v. Jackson, 112 Fed. 146, 150, 50 CCA 159, 55 LRA 692 [quot Miller Hatcheries v. Buckeye Incubator Co., 41 F. (2d) 619, 622; Ann Arbor R. Co. v. Toledo, 33 F. (2d) 939, 941; American Bonding Co. v. Ottumwa, 137 Fed. 572, 579]; Finding v. Ocean Acc., etc., Corp., 65 Colo. 332, 177 P 142, 143 [quot Cyc].

[53] Century D. [quot Allen v. Oscar G. Murray R. Employés Ben. Fund, 112 Misc. 156, 182 NYS 369, 372]; Webster New Int. D. [quot Garland v. Samson, 237 Fed. 31, 150 CCA 233, 237; Collison v. Curtner, 141 Ark. 122, 216 SW 1059, 1061, 8 ALR 760; Farraher v. Keokuk, 111 Iowa 310, 313, 82 NW 773; Duluth v. Duluth St. R. Co., 171 Minn. 187, 215

of being restored,[54] to a sound or good state after decay, waste, injury, or partial destruction;[55] restoration to a sound state of what had gone into partial decay or dilapidation, or bettering what had been destroyed in part;[56] supply of loss.[57]

Repairing. Any act of restoration to a former more perfect condition;[58] the restoring of a decayed, injured, dilapidated, or partially destroyed building to a more or less sound, substantial state.[59] In the language of street construction, the term has a clear and distinct meaning;[60] the restoration of the paved surface[61] or pavement to its former state of usefulness;[62] any act reasonably necessary to put or keep a street in good repair suitable for travel thereon.[63]

[§ 3] **2. In Another Sense.** An instance or result of such restoration;[64] any upkeep;[65] good or sound condition kept up by repairing as required;[66] although it is not equivalent to "condition."[67]

[§ 4] **3. What Term Implies.** It involves the idea of something preëxisting, the condition of which has been affected in one of the modes suggested;[68] and presupposes something in existence to be repaired,[69] or the existence of the thing to be repaired.[70]

[§ 5] **4. Distinctions.** The word has been distinguished from "alteration,"[71] "construction,"[72] "demolition and replacement,"[73] "enlargement,"[74] "improvement;"[75] it has also been distinguished

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NW 69, 70]; Finding v. Ocean Acc., etc., Corp., 65 Colo. 332, 177 P 142, 144 [quot Cyc]. See Matter of Board Public Works, 144 N. Y. 440, 444, 39 NE 387 ("restoration of existing condition").

54. Webster New Int. D. [quot Garland v. Samson, 237 Fed. 31, 150 CCA 233, 237; Collison v. Curtner, 141 Ark. 122, 216 SW 1059, 1061, 8 ALR 760].

55. Century D. [quot Allen v. Oscar G. Murray R. Employés Ben. Fund, 112 Misc. 156, 182 NYS 369, 372]; Webster D. [quot Garland v. Samson, 237 Fed. 31, 150 CCA 233, 237; Farraher v. Keokuk, 111 Iowa 310, 313, 82 NW 773; Duluth v. Duluth St. R. Co., 171 Minn. 187, 215 NW 69, 70]; Finding v. Ocean Acc., etc., Corp., 65 Colo. 332, 177 P 142, 144 [quot Cyc]; Harbor, etc., Bldg., etc., Assoc. v. Employers' Liability Assur. Corp., 79 Misc. 150, 140 NYS 717, 719 [cit Cyc]. See Collison v. Curtner, 141 Ark. 122, 216 SW 1059, 1061, 8 ALR 760; Seaboard Nat. Bank v. Woesten, 147 Mo. 467, 485, 48 SW 939, 48 LRA 279; Blount v. Janesville, 31 Wis. 648, 654.

[a] **Similar definition.**—"State of being restored to a sound or good state after decay, waste, loss." Webster New Int. D. [quot Collison v. Curtner, 141 Ark. 122, 216 SW 1059, 1061, 8 ALR 760].

56. Finding v. Ocean Acc., etc., Corp., 65 Colo. 332, 177 P 142, 143 [quot Cyc]; Cornell v. Vanartsdalen, 4 Pa. 364, 370 [quot State v. White, 16 R. I. 591, 594, 18 A 179, 1038].

57. Century D. [quot Allen v. Oscar G. Murray R. Employés Ben. Fund, 112 Misc. 156, 182 NYS 369, 372]; New Standard D. [quot Hacken v. Isenberg, 288 Ill. 589, 124 NE 306, 309; Walker D. [quot State v. Gibson County, 80 Ind. 478, 480, 41 AmR 821; Peo. v. Brooklyn, 21 Barb. (N. Y.) 484, 488]; Webster D. [quot Garland v. Samson, 237 Fed. 31, 150 CCA 233, 237; Farraher v. Keokuk, 111 Iowa 310, 313, 82 NW 773]; Finding v. Ocean Acc., etc., Corp., 65 Colo. 332, 177 P 142, 144 [quot Cyc].

58. Koepp v. National Enameling, etc., Co., 151 Wis. 302, 314, 139 NW 179.

[a] **"Doping a belt"** to increase friction to prevent slipping held not "repairing." Wahlman v. C. Becker Milling Co., 279 Ill. 612, 621, 117 NE 140.

[b] **Oiling machinery held not repairing.**—Wahlman v. C. Becker Milling Co., 279 Ill. 612, 621, 117 NE 140.

59. Hancock County Bd. of Education v. Moorehead, 105 Oh. St. 237, 242, 136 NE 913 [quot Ann Arbor R. Co. v. Toledo, 33 F. (2d) 939, 941].

[a] **"New building" distinguished.**—Mayville v. Rosing, 19 N. D. 98, 123 NW 393, 394, 26 LRANS 120.

[b] **"Rebuilding" distinguished.**—Hancock County Bd. of Education v. Moorehead, 105 Oh. St. 237, 242, 136 NE 913 [quot Ann Arbor R. Co. v. Toledo, 33 F. (2d) 939, 941].

[c] **"Remodeling" not synonymous.**—Mayville v. Rosing, 19 N. D. 98, 123 NW 393, 395, 26 LRANS 120.

60. Cleveland R. Co. v. Cleveland, 97 Oh. St. 122, 119 NE 202, 204.

61. Peo. v. Buffalo, 77 Misc. 532, 533, 137 NYS 464.

[a] **"Repaving" distinguished.**—Peo. v. Buffalo, 77 Misc. 532, 533, 137 NYS 464; Cleveland R. Co. v. Cleveland, 97 Oh. St. 122, 119 NE 202, 204.

[b] **"Reconstruction" held not "repairing."**—Ranney v. Cape Girardeau, 185 Mo. A. 229, 231, 233, 170 SW 342.

[c] **"Grading and paving" held not "repairing."**—Miners' Bank v. Clark, 216 Mo. A. 130, 257 SW 139, 141.

"Paving" see Pave 48 C. J. p 556.

"Repaving" see Repave post.

62. Cleveland R. Co. v. Cleveland, 97 Oh. St. 122, 119 NE 202, 204.

63. Rock Island v. State Industrial Commn., 287 Ill. 76, 122 NE 82, 83.

[a] **Sweeping or cleaning of streets held "repairing."**—Rock Island v. State Industrial Commn., 287 Ill. 76, 122 NE 82, 83.

64. Webster New Int. D. [quot Collison v. Curtner, 141 Ark. 122, 216 SW 1059, 1061, 8 ALR 760].

65. Bell House v. Wilkins, 34 Ga. A. 285, 129 SE 797.

66. Century D. [quot Allen v. Oscar G. Murray R. Employés Ben. Fund, 112 Misc. 156, 182 NYS 369, 372].

67. Perry v. J. L. Mott Iron Works Co., 207 Mass. 501, 93 NE 798, 799. See Mozingo v. Wellsburg Electric Light, etc., Co., 101 W. Va. 79, 81, 131 SE 717.

"Condition" 12 C. J. p 398.

68. Grady v. National Conduit, etc., Co., 153 App. Div. 401, 138 NYS 549, 553. See Gagnon v. U. S., 193 U. S. 451, 457, 24 SCt 510, 512, 48 L. ed. 745; Wattles v. South Omaha Ice, etc., R. Co., 50 Nebr. 251, 259, 69 NW 785, 61 AmSR 554, 36 LRA 424.

[a] **"Relates to the restoration** of an existing condition." Matter of board of Public Works, 144 N. Y. 440, 444, 39 NE 387.

[b] **It "contemplates an existing structure** which has become imperfect by reason of the action of the elements or otherwise." Gagnon v. U. S., 193 U. S. 451, 457, 24 SCt 510, 48 L. ed. 745 [cit Harbor, etc., Bldg., etc., Assoc. v. Employers' Liability Assur. Corp., 79 Misc. 150, 140 NYS 717, 719]; Fuchs v. Cedar Rapids, 158 Iowa 392, 397, 139 NW 903 [quot Walker v. Dwelle, 187 Iowa 1384, 175 NW 957, 961].

69. Wattles v. South Omaha Ice, etc., Co., 50 Nebr. 251, 260, 69 NW 785, 61 AmSR 554, 36 LRA 424 [quot Saylor v. Brooks, 114 Kan. 493, 220 P 193, 194; Atty.-Gen. v. Montcalm County, 141 Mich. 590, 104 NW 792, 794]. See Realty, etc., Co. v. Rea, 184 Cal. 565, 576, 194 P 1024 ("a thing" substituted for "something"); Shoner v. Frisbie, 94 Kan. 220, 224, 146 P 419 [cit Cyc]; Noel v. Lees Summit, 166 Mo. A. 114, 148 SW 194, 195 ("must have an original upon which to rest").

70. Fuchs v. Cedar Rapids, 158 Iowa 392, 396, 139 NW 903, 44 LRANS 590 [quot Walker v. Dwelle, 187 Iowa 1384, 175 NW 957, 961].

71. New York Cent., etc., R. Co. v. Middlesex County, 220 Mass. 569, 108 NE 506, 507; Boston, etc., R. Co. v. Hampden County, 164 Mass. 551, 42 NE 100, 101.

"Alteration" 2 C. J. p 1166.

72. Ross v. Sheldon, 176 Iowa 618, 154 NW 499, 501; Walker v. Detroit, 143 Mich. 427, 106 NW 1123, 1125; Lehigh Valley R. Co. v. Ruggles, 26 Pa. Dist. & Co. 53, 55.

"The distinction between 'repair' and 'construction' work must not be drawn too fine." Ross v. Sheldon, supra.

"Construction" 12 C. J. p 1297.

73. Matter of Repaving Fulton St., 29 HowPr (N. Y.) 429, 431.

[a] **"The demolition of a structure** and its replacement by one of a different character cannot be considered as a repair of that structure." Matter of Repaving Fulton St., 29 HowPr (N. Y.) 429, 431.

74. Weaver v. Templin, 113 Ind. 298, 303, 14 NE 600.

75. Garland v. Samson, 237 Fed. 31, 150 CCA 233, 238; Dougherty v. Taylor, etc., Co., 5 Ga. A. 773, 63 SE 928, 930; Weaver v. Templin, 113 Ind. 298, 303, 14 NE 600; Bloomquist v. Hardin County, 188 Iowa 994, 177 NW 95, 98; Baldwin v. Springfield, 10 OhNPNS 65, 72; Highland Park v. Dallas R. Co., (Tex. Civ. A.) 243 SW 674. See Kingsted v. Wright County Co.-Op. Co., 116 Minn. 131, 133, 133 NW 399 [cit Cyc]; Matter of Board of Public Works, 144 N. Y. 440, 444, 39 NE 387.

[a] **"Improvement" much broader.**—Garland v. Samson, 237 Fed. 31, 150 CCA 233, 237.

[b] **"Under authority to repair** there can be no enlargement and improvement, except in so far as the work of repairing necessarily enlarges and improves." Weaver v. Templin, 113 Ind. 298, 303, 14 NE 600 [cit Harbor, etc., Bldg., etc., Assoc. v. Employers' Liability Assur. Corp., 79 Misc. 150, 140 NYS 717, 719].

from "rebuilding,"[76] "reconstruction,"[77] "renewal,"[78] "repaving,"[79] and "reproduction."[80]

[§ 6] **5. What Term Includes.** In the subjoined notes, examples are given of what the term includes,[81] and does not include.[82]

[§ 7] **6. Repairs.** Often used in the plural,[83] the word is plain, unambiguous;[84] it is not a technical expression,[85] and must be taken as used in its ordinary sense[86] to mean articles used to replace others which are worn out or unsatisfactory;[87] also condition after repairing,[88] or after use, specially good condition.[89] The term has been held to embrace "rebuilding,"[90] and to include "improvements;"[91] al-

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[c] **"The distinction** between a new improvement and the mere repair of an old one is not always readily drawn." Bloomquist v. Hardin County, 188 Iowa 994, 177 NW 95, 98.

"Improvement" 31 C. J. p 262.

76. Fuchs v. Cedar Rapids, 158 Iowa 392, 397, 139 NW 903, 44 LRANS 590. See Realty, etc., Co. v. Rea, 184 Cal. 565, 576, 194 P 1024. But see Bellows v. Dewey, 9 N. H. 278, 281.

[a] **"Rebuilding" as "repair."**—"A rebuilding may, perhaps, under some circumstances, be considered a repair, within the meaning of the statute" [governing obligations of joint tenants]. Bellows v. Dewey, 9 N. H. 278, 281.

"Rebuild" 52 C. J. p 1189.

77. Gagnon v. U. S., 139 U. S. 451, 457, 24 SCt 510, 48 L. ed. 745; Miller Hatcheries v. Buckeye Incubator Co., 41 F. (2d) 619, 622; Ann Arbor R. Co. v. Toledo, 33 F. (2d) 939, 941; American Bonding Co. v. Ottumwa, 137 Fed. 572, 579; Goodyear Shoe Mach. Co. v. Jackson, 112 Fed. 146, 150, 50 CCA 159, 55 LRA 692; Bettenbrock v. Miller, 185 Ind. 600, 112 NE 771, 773; Walker v. Dwelle, 187 Iowa 1384, 175 NW 957, 961; Clark v. Martin, 182 Iowa 811, 166 NW 276, 278; Fuchs v. Cedar Rapids, 158 Iowa 392, 396, 139 NW 903, 44 LRANS 590; Covington v. Bullock, 126 Ky. 236, 103 SW 276, 277, 31 KyL 688; Levi v. Coyne, 57 SW 790, 791, 22 KyL 493; Walker v. Detroit, 143 Mich. 427, 106 NW 1123, 1125; Parker-Washington Co. v. Meriwether, 172 Mo. A. 344, 158 SW 74, 75.

[a] **Terms compared.**—(1) "In one sense, the term 'reconstruction' and the term 'repair' are so dissimilar as to render it difficult to make both terms applicable to the same work at the same time." Parker-Washington Co. v. Meriwether, 172 Mo. A. 344, 158 SW 74, 75. (2) "The word 'repair' is wholly inapplicable to subsequent reconstruction." Gagnon v. U. S., 139 U. S. 451, 457, 24 SCt 510, 48 L. ed. 745. (3) "Whether an improvement is a 'reconstruction' or merely 'repairs' depends upon the character and extent of the work itself, and not upon what it is called." Parker-Washington Co. v. Meriwether, supra. (4) "Resurfacing a highway with a different material is not a repair, but a reconstruction." Bettenbrock v. Miller, 185 Ind. 600, 112 NE 771, 773. (5) As used in patent law see Patents § 495.

"Reconstruction" 53 C. J. p 596.

78. Lurcott v. Wakely, [1911] 1 K. B. 905, 923 [quot Woodbury Co. v. William Tackaberry Co., 166 Iowa 642, 148 NW 639, 641 (quot Walker v. Dwelle, 187 Iowa 1384, 175 NW 957, 961)].

"Renewal" ante.

79. Duluth v. Duluth St. R. Co., 171 Minn. 187, 215 NW 69, 70; McCaffrey v. Omaha, 72 Nebr. 583, 101 NW 251, 253; Blount v. Janesville, 31 Wis. 648, 655.

"Repaving" see Repave post.

80. Miller Hatcheries v. Buckeye Incubator Co., 41 F. (2d) 619, 622; American Bonding Co. v. Ottumwa, 137 Fed. 572, 579; Goodyear Shoe Mach. Co. v. Jackson, 112 Fed. 146, 150, 50 CCA 159, 55 LRA 692.

"Reproduction" post.

81. [a] **Held to include:** (1) "Any act that is reasonably necessary to put or keep a street 'in good repair suitable for the travel thereon.'" Connor v. Manchester, 73 N. H. 233, 60 A 436, 437. (2) Labor and materials furnished in enlarging or extending the promenade of a steamer. Donnell v. The Starlight, 103 Mass. 227, 232. (3) Maintenance of gardens. Allen v. Oscar G. Murray R. Employés' Ben. Fund, 112 Misc. 156, 182 NYS 369, 372. (4) New roofing, new plumbing, and whatever is reasonably necessary to keep up the house. Stevens v. Milnor, 24 N. J. Eq. 358, 373 [quot Harbor, etc., Bldg., etc., Assoc. v. Employers' Liability Assur. Corp., 79 Misc. 150, 140 NYS 717, 719]. (5) Raising of sunken vessel under certain conditions. The Convoy, 257 Fed. 843, 845. (6) Regrading and widening highway. Hall v. Concord, 71 N. H. 367, 371, 52 A 864, 58 LRA 455 (within statute). (7) Removal of an obstruction in a street. Pittsburg, etc., Pass. R. Co. v. Pittsburg, 80 Pa. 72, 76. See Arthur v. Charleston, 51 W. Va. 132, 134, 41 SE 171; Gibson v. Huntington, 38 W. Va. 177, 179, 18 SE 447, 45 AmSR 853, 22 LRA 561. (8) Replacing a gate removed by another. Beach v. Crain, 2 N. Y. 86, 93, 49 AmD 369. (9) Replacing or rebuilding bridge where there was substantial destruction. State v. Gibson County, 80 Ind. 478, 481, 41 AmR 821 [cit Peo. v. Dover, 158 Ill. 197, 207, 41 NE 1105]. (10) Replacing rotten stones in a curb with new stones. Perkinson v. Schnaake, 108 Mo. A. 255, 83 SW 301, 302. (11) Resurfacing roads with gravel or other different materials. Cowan v. Thompson, 178 Ark. 44, 9 SW (2d) 790, 792; Higginbotham v. Lonoke County Road Impr. Distr. No. 3, 154 Ark. 112, 241 SW 866, 868. (12) The substitution of new curb-stones and gutters in streets for old ones. Peo. v. Brooklyn, 21 Barb. (N. Y.) 484, 488.

82. [a] **Held not to include:** (1) Alterations or additions. Hacken v. Isenberg, 288 Ill. 589, 124 NE 306, 309. (2) Building a new bridge. State v. White, 16 R. I. 591, 594, 18 A 179, 1038. (3) Building sewer connection. Kingsted v. Wright County Co-op. Co., 116 Minn. 131, 133, 133 NW 399 [cit Cyc]; Torreson v. Walla, 11 N. D. 481, 484, 92 NW 834. (4) Cleaning preparatory to painting. Finding v. Ocean Acc., etc., Corp., 65 Colo. 332, 177 P 142, 144. (5) The construction of a new ditch (Romack v. Hobbs, (Ind.) 32 NE 307), of new fire protection (Garland v. Samson, 237 Fed. 31, 150 CCA 233, 237), of new highway (Todd v. Rowley, 90 Mass. 51, 58), and of new plant in different location (Veatch v. Gibson, 29 Ida. 609, 615, 160 P 1112). See also supra § 5. (6) Enlargement of a public ditch. Weaver v. Templin, 113 Ind. 298, 303, 14 NE 600. (7) Enlarging or elevating building by raising it from one to two stories or extending its sides. Douglass v. Com., 2 Rawle (Pa.) 262, 264. (8) Entire replacement of component part of building necessary to a preservation of premises. Bell House v. Wilkins, 34 Ga. A. 285, 129 SE 797. (9) Erection or maintenance of guard rail, or other device. Reading v. Reiner, 167 Pa. 41, 42, 31 A 357. (10) Filling in vacant lot. Alburo v. Villanueva, 7 Philippine 277, 279. (11) Installing sprinkler system. Grady v. National Conduit, etc., Co., 153 App. Div. 401, 138 NYS 549, 553. (12) Labor performed in removal of building. Trask v. Searle, 121 Mass. 229, 230. (13) Laundering. State v. Frank, 114 Ark. 47, 169 SW 333, 336, 52 LRANS 1149, AnnCas 1916A 983. (14) New buildings. Cornell v. Vanartsdalen, 4 Pa. 364, 370 [quot State v. White, 16 R. I. 591, 594, 18 A 179, 1038]. (15) New construction. Grady v. National Conduit, etc., Co., 153 App. Div. 401, 138 NYS 549, 553. (16) Oiling machinery and "doping" belts. Wahlmann v. C. Becker Milling Co., 198 Ill. A. 608, 614. (17) Original improvement. Santa Cruz Rock Pav. Co. v. Broderick, 113 Cal. 628, 633, 45 P 863. (18) Paving street. Santa Cruz Rock Pavement Co. v. Broderick, 113 Cal. 628, 633, 45 P 863; Smith v. Kennedy, 89 Ill. 485, 487. (19) Putting in certain fixed machinery in building. Rose v. Persse, etc., Paper Works, 29 Conn. 256, 268. (20) Practical rebuilding of a courthouse. White County v. Gevin, 136 Ind. 562, 581, 36 NE 237, 22 LRA 402. (21) Raising old roadbed to higher level to prevent its being flooded. Goodspeed's App., 75 Conn. 271, 275, 53 A 728. (22) Reconstruction. See cases supra note 77; infra note 98. (23) Replacement of worn out furnace by new one. Bell House v. Wilkins, 34 Ga. A. 285, 129 SE 797. (24) Substitution of one heating system for another unless the old one was worn out. Gulliver v. Fowler, 64 Conn. 556, 566, 30 A 852.

83. Webster New Int. D. [quot Collison v. Curtner, 141 Ark. 122, 216 SW 1059, 1061, 8 ALR 760].

84. Woodbury Co. v. William Tackaberry Co., 166 Iowa 642, 148 NW 639, 641; Cornell v. Vanartsdalen, 4 Pa. St. 364, 370 [quot Atty.-Gen. v. Montcalm County, 141 Mich. 590, 104 NW 792, 795; State v. White, 16 R. I. 591, 594, 18 A 179, 1038].

85. Cornell v. Vanartsdalen, 4 Pa. St. 364, 370 [quot Atty.-Gen. v. Montcalm County, 141 Mich. 590, 104 NW 792, 794; State v. White, 16 R. I. 591, 594, 181 A 179, 1038].

86. Cornell v. Vanartsdalen, 4 Pa. St. 364, 370 [quot Atty.-Gen. v. Montcalm County, 141 Mich. 590, 104 NW 792, 794, 795; State v. White, 16 R. I. 591, 594, 181 A 179, 1038]. See also supra §§ 1, 2.

87. Elliott, etc., Engineering Co. v. Baker, 134 Mo. A. 95, 100.

88. New Standard D. [quot Collison v. Curtner, 141 Ark. 122, 216 SW 1059, 1061, 8 ALR 760].

89. New Standard D. [quot Collison v. Curtner, supra].

90. State v. Gibson County, 80 Ind. 478, 481, 41 AmR 821.

[a] **"From the earliest times** of the common law to the present the word has been deemed to embrace rebuilding." State v. Gibson County, 80 Ind. 478, 481, 41 AmR 821.

91. The Harvard, 270 Fed. 668,

though it does not extend to improvements of the soil.[92] It has been distinguished from "construction work,"[93] "improvements,"[94] "maintenance,"[95] "new construction,"[96] "reconditioning,"[97] and "reconstruction."[98]

[§ 8] **7. Phrases.** The word "repair" may be found in many phrases,[99] such as "repair and improvement,"[1] "good repair,"[2] "keep . . . in good repair,"[3] "keeping in proper repair,"[4] "keep . . . in repair,"[5] "ordinary repair,"[6] "out of repair,"[7] "putting . . . in perfectly good repair,"[8] "reconstruction and repair,"[9] "repair and maintenance,"[10] "repair of stationary engines,"[11] and "want of repair."[12] Similarly the word "repairs" has been used in a variety of phrases,[13] such as "extraordinary repairs,"[14] "furnish all repairs,"[15] "necessary repairs,"[16] "needful repairs,"[17] "ordinary repairs,"[18] "repairs and necessaries,"[19] "repairs or alterations,"[20] "repairs or improvements,"[21] and "repairs, supplies and necessaries."[22]

[§ 9] **C. As Verb—1. In General.** As it is ordinarily understood,[23] or used,[24] the verb "to repair" may mean to add to;[25] to amend;[26] to maintain;[27]

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670. But see infra note 94.

[a] **"'Repairs' always include** improvements as the work goes along." The Harvard, 270 Fed. 668, 670.

92. Cornell v. Vanartsdalen, 4 Pa. St. 364, 370 [quot Atty.-Gen. v. Montcalm County, 141 Mich. 590, 104 NW 792, 795; State v. White, 16 R. I. 591, 594, 181 A 179, 1038]. See Alburo v. Villanueva, 7 Philippine 277, 279.

[a] **Filling in and levelling lot** leased held not to constitute "repairs." Alburo v. Villanueva, 7 Philippine 277, 279.

93. Johnson County Sav. Bank v. Creston, (Iowa) 231 NW 705, 706.

94. Kritz v. Moon, 88 Ind. A. 5, 163 NE 112, 118; Northwestern Lumber, etc., Co. v. Parker, 125 Minn. 107, 145 NW 964, 966; Ætna El. Co. v. Deeves, 56 Misc. 565, 568, 107 NYS 63; Alburo v. Villanueva, 7 Philippine 277, 279; Highland Park v. Dallas R. Co., (Tex. Civ. A.) 243 SW 674, 679. See Bloomquist v. Hardin County, 188 Iowa 994, 177 NW 95, 98.

[a] **"There seems to be a sharp distinction** between 'improvements' and 'repairs.'" Ætna El. Co. v. Deeves, 56 Misc. 565, 568, 107 NYS 63.

[b] **Items held "improvements" and not "repairs."**—Northwestern Lumber, etc., Co. v. Parker, 125 Minn. 107, 145 NW 694, 696.

[c] **Items held "repairs" and not "improvements."**—Kritz v. Moon, 88 Ind. A. 5, 163 NE 112, 118.

95. Seaboard Nat. Bank v. Woesten, 147 Mo. 467, 485, 48 SW 939, 944, 48 LRA 279.

96. Platte County v. Butler County, 91 Nebr. 132, 135 NW 439, 440; Murphy v. Duffy, 46 R. I. 210, 124 A 103, 105.

[a] **Held not repairs.**—(1) Adding second story, providing two new school rooms in existing school building, held new construction and not repairs upon old building. Murphy v. Duffy, 46 R. I. 210, 124 A 103, 105. (2) "To build practically a new bridge is not repairs." Platte County v. Butler County, 91 Nebr. 132, 135 NW 439, 440.

97. Morse Dry Dock, etc., Co. v. U. S., 298 Fed. 153, 155 [aff 1 F. (2d) 233, 235].

[a] **"Reconditioning" not "repairs"** but reconstruction. Morse Dry Dock, etc., Co. v. U. S., 298 Fed. 153, 155 [aff 1 F. (2d) 233, 235].

98. Morse Dry Dock, etc., Co. v. U. S., 298 Fed. 153, 155; The Harvard, 270 Fed. 668, 671; Crane Co. v. Fidelity Trust Co., 238 Fed. 693, 698, 151 CCA 543; Rackliffe v. Duncan, 130 Mo. A. 695, 703, 108 SW 1110. But see Dehan v. Youree, 161 La. 806, 109 S 498, 501.

[a] **"Repairs" and "reconstructions"** have been said to run so closely into each other that there is some difficulty in drawing line which separates them. Dehan v. Youree, 161 La. 806, 109 S 498, 501.

99. See infra text and notes 1–12.

1. Nampa v. Nampa, etc., Irr. Dist., 19 Ida. 779, 115 P 979, 983.

2. Ollinger, etc., Dry Dock Co. v. Gibbony, 202 Ala. 516, 81 S 18, 20; Mozingo v. Wellsburg Electric Light, etc., Co., 101 W. Va. 79, 81, 131 SE 717.

[a] **"Does not necessarily mean 'good condition.'"**—Mozingo v. Wellsburg Electric Light, etc., Co., 101 W. Va. 79, 81, 131 SE 717.

3. Jersey City v. Public Service R. Co., 101 N. J. L. 341, 344, 129 A 482; Bales v. Cuyahoga County, 30 Oh. A. 249, 164 NE 791, 793.

4. Bales v. Cuyahoga County, supra.

5. Realty, etc., Co. v. Rea, 184 Cal. 565, 576, 194 P 1024; Mayer v. Morehead, 106 Ga. 434, 436, 32 SE 349.

6. McCaffery v. Omaha, 72 Nebr. 583, 101 NW 251, 252.

7. Wahlman v. C. Becker Milling Co., 279 Ill. 612, 622, 117 NE 140.

8. Ardesco Oil Co. v. Richardson, 63 Pa. 162, 166. See Gavan v. Norcross, 117 Ga. 356, 361, 43 SE 771; Atty.-Gen. v. Montcalm County, 141 Mich. 590, 597, 104 NW 792.

[a] **Putting oil tank in perfectly good repair** means to restore to its former condition, not to change either the form or the material. Ardesco Oil Co. v. Richardson, 63 Pa. 162, 166.

9. Parker-Washington Co. v. Meriwether, 172 Mo. A. 344, 158 SW 74, 75. See also Reconstruction ante.

10. Ross v. Sheldon, 176 Iowa 618, 154 NW 499, 501.

11. Tillburg v. McCarthy, 179 App. Div. 593, 595, 166 NYS 878.

12. Ringland v. Toronto, 23 U. C. C. P. (Ont.) 93, 98.

13. See infra text and notes 14–22.

14. Nixon v. Gammon, 191 Ky. 175, 229 SW 75, 77.

"Extraordinary" 25 C. J. p 296.

15. Collison v. Curtner, 141 Ark. 122, 216 SW 1059, 1061, 8 ALR 760.

16. Shoner v. Frisbie, 94 Kan. 220, 224, 146 P 419.

17. Platte County v. Butler County, 91 Nebr. 132, 135 NW 439, 440.

18. Phillips v. Baker, 173 Ark. 726, 290 SW 371, 372; Nixon v. Gammon, 191 Ky. 17, 229 SW 75, 77.

[a] **"Merely constitute maintenance."**—Phillips v. Baker, 173 Ark. 726, 290 SW 371, 372.

"Ordinary" 46 C. J. p 1132.

19. The Harvard, 270 Fed. 668, 671. See The Convoy, 257 Fed. 843, 845. See also Maritime Liens §§ 28–65.

20. Fehr Constr. Co. v. Postl System of Health Bldg., 288 Ill. 634, 124 NE 315, 318; Grantwood Lumber, etc., Co. v. Abbott, 80 N. J. L. 564, 78 A 1046.

21. Brown v. Smitt, 34 Austr. C. L. R. 160, 170, 171.

22. The Harvard, 270 Fed. 668, 670; The Dredge A, 217 Fed. 617, 628.

23. Walker v. Detroit, 143 Mich. 427, 106 NW 1123, 1125; Baldwin v. Springfield, 10 OhNPNS 65, 72.

24. Wattles v. South Omaha Ice, etc., R. Co., 50 Nebr. 251, 260, 69 NW 785, 61 AmSR 554, 36 LRA 424 [quot Saylor v. Brooks, 114 Kan. 493, 220 P 193, 194; Atty.-Gen. v. Montcalm County, 141 Mich. 590, 104 NW 792, 794].

25. Standard D. [quot Higginbotham v. Lonoke County Road Impr. Dist. No. 3, 154 Ark. 112, 241 SW 866, 868 (quot Cowan v. Thompson, 178 Ark. 44, 9 SW (2d) 790, 792); Farraher v. Keokuk, 111 Iowa 310, 313, 82 NW 773]; Finding v. Ocean Acc., etc., Corp., 65 Colo. 332, 177 P 142, 144; Walker v. Dwelle, 187 Iowa 1384, 175 NW 957, 960; Woodbury Co. v. William Tackaberry Co., 166 Iowa 642, 148 NW 639, 641.

26. Webster New Int. D. [quot Lehigh Valley R. Co. v. Ruggles, 6 Pa. Dist. & Co. 53, 55]; Walker v. Detroit, 143 Mich. 427, 106 NW 1123, 1125; Wattles v. South Omaha Ice, etc., Co., 50 Nebr. 251, 260, 69 NW 785, 61 AmSR 554, 36 LRA 424 [quot Saylor v. Brooks, 114 Kan. 493, 220 P 193, 194; Atty.-Gen. v. Montcalm County, 141 Mich. 590, 104 NW 792, 794]; Baldwin v. Springfield, 10 OhNPNS 65, 72. See State v. White, 16 R. I. 591, 594, 18 A 179, 1038.

[a] **"Amend" compared.**—State v. White, 16 R. I. 591, 594, 18 A 179, 1038.

[b] **"Amend" distinguished.**—Callender v. Marsh, 1 Pick. (Mass.) 418, 429; Atty.-Gen. v. Montcalm County, 141 Mich. 590, 104 NW 792, 794, 795.

"Amend" 2 C. J. p 1316.

27. Chambers v. North River Line, 179 N. C. 199, 102 SE 198, 199; Missouri, etc., R. Co. v. Bryan, (Tex. Civ. A.) 107 SW 572, 576. See Connor v. Manchester, 73 N. H. 233, 60 A 436, 437 ("maintaining" or "repairing"). But see Seaboard Nat. Bank v. Woesten, 147 Mo. 467, 485, 48 SW 939, 48 LRA 279.

[a] **"Maintain" as equivalent.**—"The word 'maintain' is practically the same think as 'repair.'" Missouri, etc., R. Co. v. Bryan, (Tex. Civ. A.) 107 SW 572, 576 [quot Chambers v. North River Line, 179 N. C. 199, 102 SE 198, 199].

[b] **Meaning practically the same thing as "maintain."**—Verdin v. St. Louis, 131 Mo. 26, 87, 123, 33 SW 480, 36 SW 52; Missouri, etc., R. Co. v. Bryan, (Tex. Civ. A.) 107 SW 572, 576. See Barber Asphalt Paving Co. v.

to make good,[28] refit,[29] renew,[30] or restore[31] an existing thing,[32] but not to make a new thing;[33] to make over;[34] to make whole;[35] making good defects, however caused, by something short of replacement or reconstruction;[36] to mend[37] any structure or thing which requires restoring or mending;[38] to remake;[39] to renovate;[40] to replace;[41] to restore[42] an article or thing to its completeness,[43] or to its former condition,[44] but not to change either the form or the

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Hezel, 155 Mo. 391, 399, 56 SW 449, 48 LRA 285.

[c] **"Maintain" distinguished.**—Seaboard Nat. Bank v. Woesten, 147 Mo. 467, 485, 48 SW 939, 944, 48 LRA 279.

"Maintain" 38 C. J. p 334.

28. Finding v. Ocean Acc., etc., Corp., 65 Colo. 332, 177 P 142, 144 [quot Cyc]; Mayer v. Morehead, 106 Ga. 434, 436, 32 SE 349; Dougherty v. Taylor, etc., Co., 5 Ga. A. 773, 63 SE 928, 930; Todd v. Rowley, 8 Allen (Mass.) 51, 58; Walker v. Detroit, 143 Mich. 427, 106 NW 1123, 1125; Wattles v. South Omaha Ice, etc., Co., 50 Nebr. 251, 260, 69 NW 785, 61 AmSR 554, 36 LRA 424 [quot Saylor v. Brooks, 114 Kan. 493, 220 P 193, 194; Atty.-Gen. v. Montcalm County, 141 Mich. 590, 104 NW 792, 794]; Baldwin v. Springfield, 10 OhNPNS 65, 72. See Veatch v. Gibson, 29 Ida. 609, 615, 160 P 1112 (defining "repairing").

29. Finding v. Ocean Acc., etc., Corp., 65 Colo. 332, 177 P 142, 144 [quot Cyc]; Todd v. Rowley, 8 Allen (Mass.) 51, 58; Walker v. Detroit, 143 Mich. 427, 106 NW 1123, 1125; Wattles v. South Omaha Ice, etc., Co., 50 Nebr. 251, 260, 69 NW 785, 61 Am SR 554, 36 LRA 424 [quot Saylor v. Brooks, 114 Kan. 493, 220 P 193, 194; Atty.-Gen. v. Montcalm County, 141 Mich. 590, 104 NW 792, 794]; Baldwin v. Springfield, 10 OhNPNS 65, 72; Cornell v. Vanartsdalen, 4 Pa. St. 364, 370 [quot State v. White, 16 R. I. 591, 594, 18 A 179, 1038]. See Veatch v. Gibson, 29 Ida. 609, 615, 160 P 1112 (defining "repairing").

30. Webster D. [quot Berry v. McConnell, 187 Mo. A. 673, 677, 173 SW 100]; Gavan v. Norcross, 117 Ga. 356, 361, 43 SE 771 [quot Saylor v. Brooks, 114 Kan. 493, 220 P 193, 194]; Peo. v. Dover, 158 Ill. 197, 206, 41 NE 1105 [quot Staley v. Enfield Tp., 214 Ill. A. 403, 409]. See Woodbury Co. v. William Tackaberry Co., 166 Iowa 642, 148 NW 639, 641. But see Pennsylvania R. Co. v. Pennsylvania-Ohio Electric Co., 296 Pa. 40, 145 A 686, 687.

[a] **"Renew" synonymous.**—Peo. v. Dover, 158 Ill. 197, 206, 41 NE 1105 [quot Staley v. Enfield Tp., 214 Ill. A. 403, 409].

[b] **"Renew" compared.**—" 'Repair' and 'renew' are not words expressive of a clear contrast. Repair always involves renewal; renewal of a part; of a subordinate part." Lurcott v. Wakely, [1911] 1 K. B. 905, 923 [quot Woodbury Co. v. William Tackaberry Co., 166 Iowa 642, 148 NW 639, 641].

[c] **"Renew" distinguished.**—Pennsylvania R. Co. v. Pennsylvania-Ohio Electric Co., 296 Pa. 40, 145 A 686, 687.

"Renew" ante.

31. Gavan v. Norcross, 117 Ga. 356, 361, 43 SE 771; Todd v. Rowley, 8 Allen (Mass.) 51, 58; Walker v. Detroit, 143 Mich. 427, 106 NW 1123, 1125; Wattles v. South Omaha Ice, etc., Co., 50 Nebr. 251, 260, 69 NW 785, 61 AmSR 554, 36 LRA 424 [quot Saylor v. Brooks, 114 Kan. 493, 220 P 193, 194; Atty.-Gen. v. Montcalm County, 141 Mich. 590, 104 NW 792, 794]; Baldwin v. Springfield, 10 Oh NPNS 65, 72. See Veatch v. Gibson, 29 Ida. 609, 614, 160 P 1112 (as definition of "repairing").

32. Finding v. Ocean Acc., etc., Corp., 65 Colo. 332, 177 P 142, 144 [quot Cyc]; Gavan v. Norcross, 117 Ga. 356, 361, 43 SE 771; Mayer v. Morehead, 106 Ga. 434, 436, 32 SE 349; Dougherty v. Taylor, etc., Co., 5 Ga. A. 773, 63 SE 928, 930; Todd v. Rowley, 8 Allen (Mass.) 51, 58; Walker v. Detroit, 143 Mich. 427, 106 NW 1123, 1125; Wattles v. South Omaha Ice, etc., Co., 50 Nebr. 251, 260, 69 NW 785, 61 AmSR 554, 36 LRA 424 [quot Saylor v. Brooks, 114 Kan. 493, 220 P 193, 194; Atty.-Gen. v. Montcalm County, 141 Mich. 590, 104 NW 792, 794]. See Veatch v. Gibson, 29 Ida. 609, 614, 160 P 1112 (defining "repairing").

[a] **Similar definition.**—"Making over of something which is in existence." Shoner v. Frisbie, 94 Kan. 220, 224, 146 P 419 [cit Cyc].

33. Realty, etc., Co. v. Rea, 184 Cal. 565, 576, 194 P 1024; Gavan v. Norcross, 117 Ga. 356, 361, 43 SE 771; Mayer v. Morehead, 106 Ga. 434, 436, 32 SE 349; Todd v. Rowley, 8 Allen (Mass.) 51, 58; Walker v. Detroit, 143 Mich. 427, 106 NW 1123, 1125; Wattles v. South Omaha Ice, etc., Co., 50 Nebr. 251, 260, 69 NW 785, 61 AmSR 554, 36 LRA 424 [quot Saylor v. Brooks, 114 Kan. 493, 220 P 193, 194; Atty.-Gen. v. Montcalm County, 141 Mich. 590, 104 NW 792, 794]; Baldwin v. Springfield, 10 OhNPNS 65, 72. See Veatch v. Gibson, 29 Ida. 609, 614, 615, 160 P 1112 (defining "repairing").

34. Standard D. [quot Higginbotham v. Lonoke County Road Impr. Dist. No. 3, 154 Ark. 112, 241 SW 866, 868 (quot Cowan v. Thompson, 178 Ark. 44, 9 SW (2d) 790, 792); Farraher v. Keokuk, 111 Iowa 310, 313, 82 NW 773]; Finding v. Ocean Acc., etc., Corp., 65 Colo. 332, 177 P 142, 144 [quot Cyc]; Walker v. Dwelle, 187 Iowa 1384, 175 NW 957, 960; Woodbury Co. v. William Tackaberry Co., 166 Iowa 642, 148 NW 639, 641.

35. State v. J. J. Newman Lumber Co., 102 Miss. 802, 825, 45 LRANS 851.

36. Duluth v. Duluth St. R. Co., 171 Minn. 187, 215 NW 69, 70.

37. Century D. [quot Mozingo v. Wellsburg Electric Light, etc., Co., 101 W. Va. 79, 81, 131 SE 717]; Standard D. [quot Higginbotham v. Lonoke County Road Impr. Dist. No. 3, 154 Ark. 112, 241 SW 866, 868 (quot Cowan v. Thompson, 178 Ark. 44, 9 SW (2d) 790, 792); Farraher v. Keokuk, 111 Iowa 310, 313, 82 NW 773]; Webster D. [quot Berry v. McConnell, 187 Mo. A. 673, 677, 173 SW 100]; Finding v. Ocean Acc., etc., Corp., 65 Colo. 332, 177 P 142, 144 [quot Cyc]; Mayer v. Morehead, 106 Ga. 434, 436, 32 SE 349; Dougherty v. Taylor, etc., Co., 5 Ga. A. 773, 63 SE 928, 930; Walker v. Dwelle, 187 Iowa 1384, 175 NW 957, 960; Woodbury Co. v. William Tackaberry Co., 166 Iowa 642, 148 NW 639, 641; Parker-Washington Co. v. Meriwether, 172 Mo. A. 344, 158 SW 74, 75; Milner v. County Comrs., 14 OhNPNS 141, 142 [quot Cyc]; Pennsylvania R. Co. v. Pennsylvania-Ohio Electric Co., 296 Pa. 40, 145 A 686, 687; Cornell v. Vanartsdalen, 4 Pa. 364, 370 [quot Atty.-Gen. v. Montcalm County, 141 Mich. 590, 104 NW 792, 795; State v. White, 16 R. I. 591, 594, 18 A 179, 1038].

[a] **"Mend" synonymous.**—Century D.; Standard D. [both quot Mozingo v. Wellsburg Electric Light, etc., Co., 101 W. Va. 79, 81, 131 SE 717].

38. Clark v. Martin, 182 Iowa 811, 166 NW 276, 278 [cit Cyc].

[a] **Similar definition.**—"To mend an old thing." Realty, etc., Co. v. Rea, 184 Cal. 565, 576, 194 P 1024.

39. Finding v. Ocean Acc., etc., Corp., 65 Colo. 332, 177 P 142, 144 [quot Cyc]; Callender v. Marsh, 1 Pick. (Mass.) 418, 429.

"Remake" ante.

40. Century D.; Standard D. [both quot Mozingo v. Wellsburg Electric Light, etc., Co., 101 W. Va. 79, 81, 131 SE 717].

[a] **"Renovate" synonymous.**—Century D.; Standard D. [both quot Mozingo v. Wellsburg Electric Light, etc., Co., 101 W. Va. 79, 81, 131 SE 717].

"Renovate" ante.

41. Finding v. Ocean Acc., etc., Corp., 65 Colo. 332, 177 P 142, 144 [quot Cyc]; Callender v. Marsh, 1 Pick. (Mass.) 418, 429; Fritsch v. Allegheny, 91 Pa. 226, 228. See David v. Ryan, 47 Iowa 642, 645; Lovell v. Mt. Vernon, 215 Ky. 143, 147, 284 SW 1025. But see Realty, etc., Co. v. Rea, 184 Cal. 565, 576, 194 P 1024; Mozingo v. Wellsburg Electric Light, etc., Co., 101 W. Va. 79, 81, 131 SE 717.

[a] **"To repair a building** is to replace it as it was." Lovell v. Mt. Vernon, 215 Ky. 143, 147, 284 SW 1025; Douglass v. Com., 2 Rawle (Pa.) 262, 264.

[b] **"Replace" compared.**—Automobile Underwriters v. Radford, (Tex. Civ. A.) 293 SW 869, 872.

[c] **As not meaning "replace."**—(1) "It has no such meaning in its normal sense." Realty, etc., Co. v. Rea, 184 Cal. 565, 576, 194 P 1024. (2) "Repair does not mean . . . replace with new or different material." Mozingo v. Wellsburg Electric Light, etc., Co., 101 W. Va. 79, 81, 131 SE 717.

"Replace" post.

42. Webster D. [quot Berry v. McConnell, 187 Mo. A. 673, 677, 173 SW 100]; Peo. v. Dover, 158 Ill. 197, 206, 41 NE 1105 [quot Staley v. Enfield Tp., 214 Ill. A. 403, 409]; State v. Gibson County, 80 Ind. 478, 481, 41 AmR 821. See David v. Ryan, 47 Iowa 642, 645.

[a] **"Restore" synonymous.**—Peo. v. Dover, 158 Ill. 197, 206, 41 NE 1105 [quot Staley v. Enfield Tp., 214 Ill. A. 403, 409]; State v. Gibson County, 80 Ind. 478, 481, 41 AmR 821.

43. State v. J. J. Newman Lumber Co., 102 Miss. 802, 825, 59 S 923, 45 LRANS 851.

44. Pittsburg, etc., Pass. R. Co. v. Pittsburg, 80 Pa. 72, 76 [quot Fritsch v. Allegheny, 91 Pa. 226, 228]; Ardesco Oil Co. v. Richardson, 63 Pa. 162, 166 [quot Atty.-Gen. v. Montcalm County, 141 Mich. 590, 104 NW 792, 794; State v. White, 16 R. I. 591, 594, 18 A 179, 1038; Mozingo v. Wellsburg Electric Light, etc., Co., 101 W. Va. 79, 81, 131 SE 717]. See

For later cases, developments and **changes** in the law see **Annotations,** same title and section number.

material;[45] to restore,[46] or to mend,[47] after decay or partial destruction,[48] or after injury or dilapidation;[49] to restore or reinstate as in former standing;[50] to restore to sound or good condition after injury or partial destruction;[51] to restore to a sound or good state[52] after decay, injury, dilapidation, or partial destruction;[53] to restore to a sound state,[54] or condition,[55] after injury or partial decay or destruction,[56] the existing structure or thing which needs to be restored to its original condition;[57] to restore to a sound state something which has become partially dilapidated,[58] but not to create something which has no existence;[59] to restore to a sound state what has been partially destroyed;[60] to restore what has been impaired or injured;[61] to substitute for something defaced or destroyed another thing substantially identical;[62] to supply that which is lost or destroyed.[63]

[§ 10] **2. Distinctions.** The verb has been dis-

Warren County v. Mankey, 29 Ind. A. 55, 63 NE 864, 865; Sharp v. Quincy, etc., R. Co., 139 Mo. A. 525, 531, 123 SW 507; Automobile Underwriters v. Radford, (Tex. Civ. A.) 293 SW 869, 872.

[a] **Similar definitions.**—(1) "To bring . . . back to its former state as nearly as practicable." Warren County v. Mankey, 29 Ind. A. 55, 63 NE 864, 865. (2) "To restore to original condition as near as may be." Sharp v. Quincy, etc., R. Co., 139 Mo. A. 525, 531, 123 SW 507. (3) "To restore to substantially as good condition as it was before the fire." Automobile Underwriters v. Radford, (Tex. Civ. A.) 293 SW 869, 872.

45. Ardesco Oil Co. v. Richardson, 63 Pa. 162, 166 [quot Atty.-Gen. v. Montcalm County, 141 Mich. 590, 104 NW 792, 794; State v. White, 16 R. I. 591, 594, 18 A 179, 1038; Mozingo v. Wellsburg Electric Light, etc., Co., 101 W. Va. 79, 81, 131 SE 717]. But see Cowan v. Thompson, 178 Ark. 44, 9 SW (2d) 790, 792; Higginbotham v. Lonoke County Road Impr. Distr. No. 3, 154 Ark. 112, 241 SW 866, 868.

[a] **Same material.**—(1) "If you are to repair a wooden building, you are not to make it brick, stone or iron, but you are to repair wood with wood." Ardesco Oil Co. v. Richardson, 63 Pa. 162, 166 [quot State v. White, 16 R. I. 591, 594, 18 A 179, 1038]. (2) If purpose were "to restore the road to its original grades and specifications by the use of the same material with which it was originally improved, the work . . . might be properly regarded as repair." Bettenbrock v. Miller, 185 Ind. 600, 112 NE 771, 773.

[b] **Different material.**—Use of different kind of material for resurfacing road held not to deprive work of its character of repair. Cowan v. Thompson, 178 Ark. 44, 9 SW (2d) 790, 792; Higginbotham v. Lonoke County Road Impr. Distr. No. 3, 154 Ark. 112, 241 SW 866, 868.

46. Lovell v. Mt. Vernon, 215 Ky. 143, 147, 284 SW 1025; Bales v. Cuyahoga County, 30 Oh. A. 249, 164 NE 791, 793; Douglass v. Com., 2 Rawle (Pa.) 262, 264.

47. Bales v. Cuyahoga County, 30 Oh. A. 249, 164 NE 791, 793.

48. Bales v. Cuyahoga County, supra.

49. Lovell v. Mt. Vernon, 215 Ky. 143, 147, 284 SW 1025; Douglass v. Com., 2 Rawle (Pa.) 262, 264.

[a] **"To repair a building** is to . . . restore it after injury or dilapidation, but not to enlarge or elevate it." Lovell v. Mt. Vernon, 215 Ky. 143, 147, 284 SW 1025; Douglass v. Com., 2 Rawle (Pa.) 262, 264.

50. Webster D. [quot Higginbotham v. Lonoke County Road Impr. Dist. No. 3, 154 Ark. 112, 241 SW 866, 868 (quot Cowan v. Thompson, 178 Ark. 44, 9 SW (2d) 790, 792)].

51. Finding v. Ocean Acc., etc., Corp., 65 Colo. 332, 177 P 142, 144 [quot Cyc]; Harbor, etc., Bldg., etc., Assoc. v. Employers' Liability Assur. Corp., 79 Misc. 150, 140 NYS 717, 720; Pittsburg, etc., Pass. R. Co. v. Pittsburg, 80 Pa. 72, 76 [quot Weaver v. Templin, 113 Ind. 298, 303, 14 NE 600; Atty.-Gen. v. Montcalm County, 141 Mich. 590, 104 NW 792, 795; Fritsch v. Allegheny, 91 Pa. 226, 228].

52. Standard D. [quot Higginbotham v. Lonoke County Road Impr. Dist. No. 3, 154 Ark. 112, 241 SW 866, 868 (quot Cowan v. Thompson, 178 Ark. 44, 9 SW (2d) 790, 792)].

53. Webster D. [quot Higginbotham v. Lonoke County Road Impr. Dist. No. 3, 154 Ark. 112, 241 SW 866, 868 (quot Cowan v. Thompson, 178 Ark. 44, 9 SW (2d) 790, 792); Finding v. Ocean Acc., etc., Corp., 65 Colo. 332, 177 P 142, 143; Wahlmann v. C. Becker Milling Co., 198 Ill. A. 608, 614; Warren County v. Mankey, 29 Ind. A. 55, 63 NE 864, 865; Covington v. Bullock, 126 Ky. 236, 103 SW 276, 31 KyL 688; Levi v. Coyne, 57 SW 790, 791, 22 KyL 493; Atty.-Gen. v. Montcalm County, 141 Mich. 590, 597, 104 NW 792; Barber Asphalt Pav. Co. v. Hezel, 155 Mo. 391, 399, 56 SW 449, 48 LRA 285; Verdin v. St. Louis, 131 Mo. 26, 87, 123, 33 SW 480, 36 SW 52; Berry v. McConnell, 187 Mo. A. 673, 677, 173 SW 100; Lehigh Valley R. Co. v. Ruggles, 6 Pa. Dist. & Co. 53, 55; State v. White, 16 R. I. 591, 594, 18 A 179, 1038; Martinez v. Thompson, 80 Tex. 568, 571, 16 SW 334; Gulf City St. R., etc., Co. v. Galveston, 69 Tex. 660, 663, 7 SW 520; Missouri, etc., R. Co. v. Bryan, (Tex. Civ. A.) 107 SW 572, 576 (quot Chambers v. North River Line, 179 N. C. 199, 102 SE 198, 199); Mozingo v. Wellsburg Electric Light, etc., Co., 101 W. Va. 79, 81, 131 SE 717, 718 [cit Cyc]; Wyoming Coal Min. Co. v. Stanko, 22 Wyo. 110, 138 P 182, 183]; American Bonding Co. v. Ottumwa, 137 Fed. 572, 579 [quot Walker v. Osceola, etc., Joint Drain. Dist. No. 2, 197 Iowa 351, 197 NW 72, 73]; Wahlman v. C. Becker Milling Co., 279 Ill. 612, 621, 117 NE 140; Sharp v. Quincy, etc., R. Co., 139 Mo. A. 525, 531, 123 SW 507; Brown County v. Keya Paha County, 88 Nebr. 117, 129 NW 250, 251, AnnCas1912B 790 [quot Platte County v. Butler County, 91 Nebr. 132, 135 NW 439, 440]; Com. v. Tobias, 26 Pa. Dist. 485, 486.

[a] **Similar definitions.**—(1) "To restore to a good state after decay, injury, dilapidation or partial destruction." David v. Ryan, 47 Iowa 642, 644. (2) "To restore to a sound, good, or complete state after decay, injury, dilapidation or partial destruction." Century D. [quot Automobile Underwriters of America v. Radford, (Tex. Civ. A.) 293 SW 869, 872]. (3) "To restore to a sound or good state, after decay, waste, injury, or partial destruction." Fuchs v. Cedar Rapids, 158 Iowa 392, 397, 139 NW 903, 44 LRANS 590 [quot Walker v. Dwelle, 187 Iowa 1384, 175 NW 957, 961]. (4) "To restore to a sound or good state after decay, injury or partial destruction." Baldwin v. Springfield, 10 OhNPNS 65, 72.

54. Finding v. Ocean Acc., etc., Corp., 65 Colo. 332, 177 P 142, 144 [quot Cyc]; State v. Corrigan Cons. St. R. Co., 85 Mo. 263, 277, 55 AmR 361 [quot U. S. v. Denver, etc., R. Co., 190 Fed. 825, 854; Berry v. McConnell, 187 Mo. A. 673, 677, 173 SW 100]; Buffalo v. International R. Co., 135 Misc. 497, 239 NYS 113, 119; Cornell v. Vanartsdalen, 4 Pa. 364, 370 [quot Atty.-Gen. v. Montcalm County, 141 Mich. 590, 104 NW 792, 795; State v. White, 16 R. I. 591, 594, 18 A 179, 1038].

55. Walker v. Dwelle, 187 Iowa 1384, 175 NW 957, 960; Clark v. Martin, 182 Iowa 811, 166 NW 276, 278 [cit Cyc]; Woodbury Co. v. William Tackaberry Co., 166 Iowa 642, 148 NW 639, 641.

56. Clark v. Martin, 182 Iowa 811, 166 NW 276, 278 [cit Cyc]; State v. Corrigan Cons. St. R. Co., 85 Mo. 263, 277, 55 AmR 361 [quot U. S. v. Denver, etc., R. Co., 190 Fed. 825, 854; Berry v. McConnell, 187 Mo. A. 673, 677, 173 SW 100].

[a] **Similar definitions.**—(1) "To restore to a sound state after decay, injury, dilapidation, or partial destruction." Parker-Washington Co. v. Meriwether, 172 Mo. A. 344, 158 SW 74, 75. (2) "To restore to a sound condition after decay, waste, injury, or partial destruction." Walker v. Dwelle, 187 Iowa 1384, 175 NW 957, 960; Woodbury Co. v. William Tackaberry Co., 166 Iowa 642, 148 NW 639, 641. (3) "To restore to a sound state after depreciation." Buffalo v. International R. Co., 135 Misc. 497, 239 NYS 113, 119.

57. Fuchs v. Cedar Rapids, 158 Iowa 392, 397, 139 NW 903, 44 LRANS 590 [quot Walker v. Dwelle, 187 Iowa 1384, 175 NW 957, 961].

58. Realty, etc., Co. v. Rea, 184 Cal. 565, 576, 194 P 1024.

59. Realty, etc., Co. v. Rea, supra.

"To repair is in no sense to create a distinct entity." Lehigh Valley R. Co. v. Ruggles, 6 Pa. Dist. & Co. 53, 55.

60. Finding v. Ocean Acc., etc., Corp., 65 Colo. 332, 177 P 142, 144 [quot Cyc]; Mayer v. Morehead, 106 Ga. 434, 436, 32 SE 349; Dougherty v. Taylor, etc., Co., 5 Ga. A. 773, 63 SE 928, 930; Milner v. County Comrs., 14 OhNPNS 141, 142 [quot Cyc].

61. Finding v. Ocean Acc., etc., Corp., 65 Colo. 332, 177 P 142, 144 [quot Cyc]; Callender v. Marsh, 1 Pick. (Mass.) 418, 429.

62. Leeds, etc., Co. v. Victor Talking Mach. Co., 154 Fed. 58, 60, 23 LRANS 1027 [quot Ann Arbor R. Co. v. Toledo, 33 F. (2d) 939, 941].

63. Fuchs v. Cedar Rapids, 158 Iowa 392, 397, 139 NW 903, 44 LRANS 590 [quot Walker v. Dwelle, 187 Iowa 1384, 175 NW 957, 961].

tinguished from "to build,"[64] "to construct,"[65] "to improve,"[66] "to manufacture,"[67] "to rebuild,"[68] "to reconstruct,"[69] "to remodel,"[70] and "to repave."[71]

[§ 11] **3. Phrases.** "Maintain and repair,"[72] "repair a building,"[73] "repair and renew,"[74] and "repair a structure;"[75] also "repaired building;"[76] and also "repairing and maintaining,"[77] "repairing or adjusting automobile,"[78] and "repairing or maintaining."[79]

[§ 12] **D. As Adjective.** The word is also used adjectively.[80]

Repair shop. One used in the making of repairs.[81]

Repair track. One upon which cars needing repairs are put, and upon which it is not customary for the shifting engine to come without notice to the overhaulers at work there.[82]

Repair work. That done in restoring something to first-class condition,[83] or so that it will adequately perform the function for which it was constructed.[84]

REPARATION.[85] Compensation for injuries or wrongs suffered.[86] As commonly understood, the term carries with it the idea of "making whole," or giving an equivalent or substitute of equal value.[87] It is also used in the sense of repair,[88] or restoration.[89]

REPARATIONE FACIENDA. Literally "For

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64. Atty.-Gen. v. Montcalm County, 141 Mich. 590, 104 NW 792, 794; Mayville v. Rosing, 19 N. D. 98, 123 NW 393, 395, 26 LRANS 120; State v. White, 16 R. I. 591, 594, 18 A 179, 1038.

65. Western Pav., etc., Co. v. Citizens' St. R. Co., 128 Ind. 525, 534, 26 NE 88, 28 NE 88, 25 AmSR 462, 10 LRA 770 [quot Atty.-Gen. v. Montcalm County, 141 Mich. 590, 104 NW 792, 795]; Berry v. McConnell, 187 Mo. A. 673, 677, 173 SW 100.

66. Truscott v. Diamond Rock-Boring Co., 51 L. J. Ch. 259, 261.

[a] **"Improve" not equivalent.**—Truscott v. Diamond Rock-Boring Co., 51 L. J. Ch. 259, 261.

67. State v. J. J. Newman Lumber Co., 102 Miss. 802, 59 S 923, 926, 45 LRANS 851; Lehigh Valley R. Co. v. Ruggles, 6 Pa. Dist. & Co. 53, 55.

68. Nixon v. Gammon, 191 Ky. 175, 229 SW 75, 77; Atty.-Gen. v. Montcalm County, 141 Mich. 590, 104 NW 792, 795; Blount v. Janesville, 31 Wis. 648, 654. See Fuchs v. Cedar Rapids, 158 Iowa 392, 396, 139 NW 903, 44 LRANS 590 [quot Walker v. Dwelle, 187 Iowa 1384, 175 NW 957, 961]. But see Gavan v. Norcross, 117 Ga. 356, 361, 43 SE 771; Saylor v. Brooks, 114 Kan. 493, 220 P 193, 194.

[a] **"Power to repair** does not carry with it or imply the power to rebuild or reconstruct." Atty.-Gen. v. Montcalm County, 141 Mich. 590, 104 NW 792, 795.

[b] **"'Repair' does not include** the word 'rebuild,' and the courts have never so held." Nixon v. Gammon, 191 Ky. 175, 229 SW 75, 77.

[c] **As meaning "rebuild."**—(1) "There are cases in which the word 'repair,' aided by the context, has been held to mean 'rebuild.'" Gavan v. Norcross, 117 Ga. 356, 361, 43 SE 771 [quot Saylor v. Brooks, 114 Kan. 493, 220 P 193, 194]. (2) In leases of property see Landlord and Tenant § 782. (3) In reference to bridges see Bridges § 54.

"Rebuild" 52 C. J. p 1189.

69. U. S. v. Denver, etc., R. Co., 190 Fed. 825, 854; Goodyear Shoe Mach. Co. v. Jackson, 112 Fed. 146, 150, 50 CCA 159, 55 LRA 692; St. Louis Car-Coupler Co. v. Shickle, etc., Iron Co., 70 Fed. 783, 785; Western Pav., etc., Co. v. Citizens' St. R. Co., 128 Ind. 525, 534, 26 NE 88, 25 AmSR 462, 10 LRA 770 [quot Atty.-Gen. v. Montcalm County, 141 Mich. 590, 104 NW 792, 795]; Farraher v. Keokuk, 111 Iowa 310, 313, 82 NW 773; Covington v. Bullock, 103 SW 276, 277, 31 KyL 688; Levi v. Coyne, 57 SW 790, 791, 22 KyL 493; Vincent v. Frelich, 50 La. Ann. 378, 382, 23 S 373, 69 AmSR 436; State v. Corrigan Cons. St. R. Co., 85 Mo. 263, 277, 55 AmR 361; Berry v. McConnell, 187 Mo. A. 673, 677, 173 SW 100; Parker-Washington Co. v. Meriwether, 172 Mo. A. 344, 158 SW 74, 75; Noel v. Lees Summit, 166 Mo. A. 114, 148 SW 194, 195. See Fuchs v. Cedar Rapids, 158 Iowa 392, 396, 139 NW 903, 44 LRANS 590 [quot Walker v. Dwelle, 187 Iowa 1384, 175 NW 957, 961].

"Reconstruct" ante.

70. Mayville v. Rosing, 19 N. D. 98, 123 NW 393, 395, 26 LRANS 120.

[a] **"Remodel" not synonymous.**—"The words 'repairing' and 'remodeling' are not synonymous or included within the meaning of the word 'building.'" Mayville v. Rosing, 19 N. D. 98, 123 NW 393, 395, 26 LRANS 120.

"Remodel" ante.

71. McCaffrey v. Omaha, 72 Nebr. 583, 101 NW 251, 253; Jersey City v. Public Service R. Co., 101 N. J. L. 341, 345, 129 A 482; Cleveland R. Co. v. Cleveland, 97 Oh. St. 122, 119 NE 202, 203. See Noel v. Lees Summit, 166 Mo. A. 114, 148 SW 194, 196.

[a] **Duty to repave** as comprised in street railway company's obligation to repair streets see Street Railroads [36 Cyc 1403].

"Repave" post.

72. Cowan v. Thompson, 178 Ark. 44, 9 SW (2d) 790, 792.

73. Lovell v. Mt. Vernon, 215 Ky. 143, 147, 284 SW 1025.

74. Dwight v. Ludlow Mfg. Co., 128 Mass. 280, 281.

[a] **Does not require new construction.**—A contract to "repair and renew" so far as necessary, the gutter of a building, meant that the contractor was to make such repairs and renewals that the existing gutter should do all that it was capable of doing, when in good condition according to its original construction and did not require the construction of a new gutter. Dwight v. Ludlow Mfg. Co., 128 Mass. 280, 281.

75. Albuquerque Fdy., etc., Works v. Stone, (N. M.) 286 P 157, 158.

76. See Home Bldg., etc., Assoc. v. White, 141 Okl. 240, 284 P 889, 893.

[a] **New building distinguished** from one altered or repaired. Home Bldg., etc., Assoc. v. White, 141 Okl. 240, 284 P 889, 893.

77. Veatch v. Gibson, 29 Ida. 609, 614, 160 P 1112.

[a] **Means "not to make a new thing,** but to refit, make good or restore an existing thing." Veatch v. Gibson, 29 Ida. 609, 615, 160 P 1112.

78. Kennedy v. Maryland Casualty Co., 26 F. (2d) 501, 502.

79. Rock Island v. State Industrial Commn., 287 Ill. 76, 122 NE 82, 83.

80. See cases infra this section.

[a] **"Repair job."**—Colfax County v. Butler County, 83 Nebr. 803, 809, 120 NW 444, 446.

81. Peo. v. New York Cent. R. Co., 211 App. Div. 195, 198, 199, 206 NYS 743 [rev 198 NYS 438]. See Peo. v. Transit Dev. Co., 178 App. Div. 288, 165 NYS 114, 116.

[a] **Repair shop as "factory."**—Peo. v. New York Cent. R. Co., 211 App. Div. 195, 198, 199, 206 NYS 743 [rev 198 NYS 438, 439 and dist Peo. v. Transit Dev. Co., 178 App. Div. 288, 165 NYS 114, 116 (both cases construing Labor L. § 2)].

82. Richmond, etc., R. Co. v. Norment, 84 Va. 167, 175, 4 SE 211, 10 Am SR 827.

[a] **As means of safety.**—"With such a track overhaulers can do their work without being subjected to unnecessary danger." Richmond, etc., R. Co. v. Norment, 84 Va. 167, 175, 4 SE 211, 10 AmSR 827.

83. The Harvard, 270 Fed. 668, 670.

84. Meyerholz v. Louisa County, 200 Iowa 237, 204 NW 452, 454.

[a] **"Change" distinguished.**—Meyerholz v. Louisa County, 200 Iowa 237, 204 NW 452, 455.

[b] **"New improvement" distinguished.**—Meyerholz v. Louisa County, 200 Iowa 237, 204 NW 452, 455.

[c] **"Original work" distinguished.**—Peo. v. Peeples, 291 Ill. 537, 126 NE 151, 152 [quot Schwartz v. Big Lake Special Drain. Dist., 307 Ill. 209, 138 NE 665, 668].

[d] **"Construction work" compared and distinguished.**—"The line of demarcation between repair work . . . and construction work . . . is not always easily discernible." Ross v. Sheldon, 176 Iowa 618, 154 NW 499, 501.

85. See also Damages § 68.

86. Arkansas, etc., R. Co. v. Harris, 62 Ark. 452, 457, 36 SW 186 (construing "proper reparation" employed in a statute requiring the posting of freight schedules). See Jablonowski v. Modern Cap Mfg. Co., 312 Mo. 173, 279 SW 89, 95.

"Compensation" 12 C. J. p 229.

87. Jablonowski v. Modern Cap Mfg. Co., 312 Mo. 173, 279 SW 89, 95.

88. See Atty.-Gen. v. Wax Chandlers' Co., 6 L. R. H. L. 1, 11, 17.

"Repair" ante.

89. Atty.-Gen. v. Wax Chandlers' Co., 6 L. R. H. L. 1, 17.

[a] **"Reparation of said houses and tenements"** used in a gift of those premises to a charity, "must be held to comprehend the restoration of the tenements in the event of any catastrophe befalling the buildings." Atty.-Gen. v. Wax Chandlers' Co., 6 L. R. H. L. 1, 17. See also Repair ante § 1.

"Restoration" post.

making repairs." The name of an old writ which lay in various cases; as if, for instance, there were three tenants in common of a mill or house which had fallen into decay, and one of the three was willing to repair it, and the other two not; in such case the party who was willing to repair might have this writ against the others.[90]

REPARTIMIENTO. In Spanish law, allotment;[91] distribution;[92] partition;[93] a proceeding in its nature judicial;[94] a partition of common property.[95]

REPATRIATION. Return or restoration to one's own country.[96]

Repatriation Act. An Australian act of parliament[97] whose purpose is the reëstablishment in civil life of persons, who have served in the defense forces of the commonwealth, when discharged from such service.[98]

REPAVE. To cover over with suitable material,[99] to floor with stone;[1] to lay or cover with material so as to make a firm, level surface for travel;[2] to lay with brick or stone;[3] to pave[4] again,[5] or resurface a street,[6] when the surface material as originally laid has become destroyed so that it is no longer usable;[7] to relay pavement;[8] to replace an old pavement by a new one.[9]

Phrase: "Repaving any street."[10]

REPAY.[11] To make return for;[12] to make return[13] or payment to;[14] to pay[15] anew,[16] or a second time;[17] to pay back[18] that which one has received either directly or indirectly;[19] to refund;[20] to restore;[21] to return.[22] The word does not necessarily mean,[23] or imply,[24] to repay money,[25] and certainly not the very same money which has been received.[26]

REPAYMENT.[27] The act of repaying or paying back.[28]

REPEAL.[29] [§ 1] **A. As Noun.** Abrogation;[30] rescission;[31] revocation.[32]

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90. Black L. D. [cit Cowell; Fitzherbert N. Br. p 127].

91. Century D. See also Encomienda 20 C. J. p 1248.

92. Webster New Int. D.

[a] **In Spanish America.**—"A grant of land in conquered territory, including the right to exploit the labor of the natives living on or near it, awarded as a fief to Spanish soldiers, etc." Webster New Int. D.

93. Century D. See Steinbach v. Moore, 30 Cal. 498, 505 (where word is given as "repartiamento").

94. Steinbach v. Moore, supra (giving the word as "repartiamento").

95. Steinbach v. Moore, supra (the word being spelled "repartiamento").

96. Century D.

97. Australian Soldiers' Repatriation Acts (1920) No. 6, (1918) No. 15, and (1917) No. 37.

98. Repatriation Commn. v. Kirkland, 32 Austr. C. L. R. 1, 7, 8; Atty.-Gen. v. Balding, 27 Austr. C. L. R. 395, 398.

99. McCaffrey v. Omaha, 72 Nebr. 583, 101 NW 251, 253.

1. City v. Empire Pass. R. Co., 7 Phila. (Pa.) 321, 323.

2. Buffalo v. International R. Co., 135 Misc. 497, 239 NYS 113, 118.

3. City v. Empire Pass. R. Co., 7 Phila. (Pa.) 321, 323.

4. See Pave 48 C. J. p 556.

5. McCaffrey v. Omaha, 72 Nebr. 583, 101 NW 251, 253.

6. McCaffrey v. Omaha, supra.

7. McCaffrey v. Omaha, supra.

8. McCaffrey v. Omaha, supra.

[a] **"Not necessarily the whole** of the pavement as originally constructed." McCaffrey v. Omaha, 72 Nebr. 583, 101 NW 251, 253.

"Pavement" 48 C. J. p 557.

9. Ten Eyck v. Albany, 65 Hun 194, 197, 20 NYS 157, 199; Peo. v. Buffalo, 77 Misc. 532, 137 NYS 464, 466.

[a] **"Replace pavement" distinguished.**—Buffalo v. International R. Co., 135 Misc. 497, 239 NYS 113, 118.

[b] **"Repair" distinguished.**—Cleveland R. Co. v. Cleveland, 97 Oh. St. 122, 119 NE 202, 203; State v. Milwaukee Electric R., etc., Co., 151 Wis. 520, 139 NW 396, 398, AnnCas1914B 123. See Buffalo v. International R. Co., 135 Misc. 497, 239 NYS 113, 119.

[c] **"Repairing" distinguished.**—McCaffrey v. Omaha, 72 Nebr. 583, 101 NW 251, 252; Peo. v. Buffalo, 77 Misc. 532, 137 NYS 464, 466; Cleveland R. Co. v. Cleveland, 97 Oh. St. 122, 119 NE 202, 204.

[d] **Flagging and reflagging of sidewalks** and the setting of curb and gutter stones not a repavement see In re Fay, 12 Hun (N. Y.) 490, 491.

[e] **Replacing of the flagging** and the curb and gutter stones not a repavement see In re Roberts, 25 Hun (N. Y.) 371, 375. But see In re Burmeister, 76 N. Y. 174, 180, 56 HowPr 416.

[f] **"Macadamizing" street,** formerly improved by graveling, constitutes repaving. Baldwin v. Springfield, 10 OhNPNS 65, 74 [quot Page v. Columbus, 15 Oh. Cir. Ct. N. S. 40, 47, 33 Oh. Cir. Ct. 202]. See also Macadamize 38 C. J. p 328.

10. In re Burmeister, 76 N. Y. 174, 181, 56 HowPr 416.

11. See also Repayment post.

12. Harlan Coal, etc., Co. v. King Harlan Min. Co., 192 Ky. 111, 232 SW 650, 653.

13. Century D. [quot Spelson v. Leiter, 254 Ill. A. 19, 27].

14. Century D. [quot Spelson v. Leiter, supra].

15. See Pay § 2.

16. Harlan Coal, etc., Co. v. King Harlan Min. Co., 192 Ky. 111, 232 SW 650, 653.

17. Harlan Coal, etc., Co. v. King Harlan Min. Co., supra.

18. Century D. [quot Spelson v. Leiter, 254 Ill. A. 19, 27]; Webster D. [quot Walker v. Wilmore, (Tex. Commn. A.) 212 SW 655]; Harlan Coal, etc., Co. v. King Harlan Min. Co., 192 Ky. 111, 232 SW 650, 653.

19. Harlan Coal, etc., Co. v. King Harlan Min. Co., supra.

20. Century D. [quot Spelson v. Leiter, 254 Ill. A. 19, 27]; Webster D. [quot Walker v. Wilmore (Tex. Commn. A.) 212 SW 655].

"Refund" ante.

21. Grant v. Dabney, 19 Kan. 388, 390, 27 AmR 125.

"Restore" post.

22. Grant v. Dabney, 19 Kan. 388, 390, 27 AmR 125.

"Return" post.

23. Grant v. Dabney, 19 Kan. 388, 390, 27 AmR 125.

24. Peo. v. Central Pac. R. Co., 76 Cal. 29, 33, 18 P 90, 93.

25. Peo. v. Central Pac. R. Co., supra; Grant v. Dabney, 19 Kan. 388, 390, 27 AmR 125.

26. Peo. v. Chicago, etc., R. Co., 331 Ill. 544, 163 NE 355, 356.

27. See also Repay ante.

28. Century D.

29. **By implication** see Constitutional Law § 97; Intoxicating Liquors § 291; Statutes [36 Cyc 1071 et seq].

By subsequent statute see Statutes [36 Cyc 1073].

Of covenant by statute see Contracts § 40 note 44 [a].

Of franchise or charter see Constitutional Law § 267.

Of letters patent see Patents § 283.

Of municipal charter see Municipal Corporations §§ 165, 166.

Of municipal ordinance see Municipal Corporations §§ 886–897.

Of statute:
In general see Statutes [36 Cyc 1068].
Particular statute see Corporations §§ 3690–3697; Criminal Law §§ 33–39; Fraudulent Conveyances § 10; Homesteads § 815; Internal Revenue § 35; Intoxicating Liquors §§ 262, 291, 293; Judgments § 815; Licenses §§ 67, 68; Mandamus § 571; Mechanics' Liens § 16.
Validating act see Interest § 92.

Reservation of power to repeal see Constitutional Law § 537; Corporations §§ 3691–3697.

Validity of legislative repeal see Corporations § 3695; Statutes [36 Cyc 1068 et seq].

30. Webster D. [quot St. Louis v. Kellman, 235 Mo. 687, 695, 139 SW 443].

"Abrogation" 1 C. J. p 340.

31. Webster D. [quot St. Louis v. Kellman, 235 Mo. 687, 695, 139 SW 443].

"Rescission" post.

32. Webster D. [quot St. Louis v. Kellman, 235 Mo. 687, 695, 139 SW 443].

"Revocation" post.

[§ 2] **B. As Verb.** To abolish;[33] to abrogate;[34] to annul;[35] to call back;[36] to cancel;[37] to dismiss;[38] to give up;[39] to recall;[40] to rescind[41] or abrogate[42] by authority,[43] or by the same power that made or enacted;[44] to retract;[45] to reverse;[46] to revoke.[47]

[§ 3] **C. As Adjective.** The word, particularly the present participle of the verb, may be used adjectively.[48]

Repealing act or ordinance. A total abrogation of the law repealed.[49]

Repealing clause. Such an express enactment as necessarily divests all inchoate rights which have arisen under the statute which it destroys.[50]

REPEATED MESSAGE.[51]

REPEATER.[52] A magazine gun;[53] a revolver;[54] a type of pistol which has been held to be a soldier's weapon;[55] a well-known army weapon.[56]

Army repeater. A firearm which, according to circumstances, may or may not be a "horseman's pistol" within an exception in a statute prohibiting carrying concealed weapons.[57]

REPEATING.[58]

REPELLITUR A SACRAMENTO INFAMIS.[59]

REPELLITUR EXCEPTIONE CEDENDARUM ACTIONUM.[60]

REPERTORY. In French law, a word used to denote the inventory or minutes which notaries[61] are required to make of all contracts which take place before them.[62]

REPERTUM AD UNIVERSOS QUOD PUBLICE FIT PER MAJOREM PARTEM. A rule of the Roman law, said to mean where no special provision is made by a charter, the whole are bound by the decision of the majority of the corporators present.[63]

REPETITION.[64] In the civil law, a demand or action for the restoration of money paid under mistake, or goods delivered by mistake or on an unperformed condition. In Scotch law, the act of reading over a witness' deposition, in order that he may adhere to it or correct it at his choice. The same as "Recolement" in the French law.[65]

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[33] Webster D. [quot Wilson v. Peo., 36 Colo. 418, 425, 85 P 187; St. Louis v. Kellman, 235 Mo. 687, 695, 139 SW 443].

[a] **"Abolish" synonymous.**—Webster D. [quot Wilson v. Peo., 36 Colo. 418, 425, 85 P 187; St. Louis v. Kellman, 235 Mo. 687, 695, 139 SW 443].

"Abolish" 1 C. J. p 305.

[34] Century D. [quot Wilson v. Peo., 36 Colo. 418, 425, 85 P 187]; St. Louis v. Kellman, 235 Mo. 687, 695, 139 SW 443; State v. Patrick, 65 Mo. A. 653, 661.

[a] **"Abrogate" synonymous.**—Webster D. [quot Wilson v. Peo., 36 Colo. 418, 425, 85 P 187].

"Abrogate" 1 C. J. p 340.

[35] Webster D. [quot Wilson v. Peo., 36 Colo. 418, 425, 85 P 187; St. Louis v. Kellman, 235 Mo. 687, 695, 139 SW 443]; State v. Patrick, 65 Mo. A. 653, 661.

[a] **"Annul" synonymous.**—Webster D. [quot St. Louis v. Kellman, 235 Mo. 687, 695, 139 SW 443].

"Annul" 3 C. J. p 222.

[36] Century D. [quot Wilson v. Peo., 36 Colo. 418, 425, 85 P 187]; State v. Patrick, 65 Mo. A. 653, 661.

[37] Webster D. [quot Wilson v. Peo., 36 Colo. 418, 425, 85 P 187; St. Louis v. Kellman, 235 Mo. 687, 695, 139 SW 443].

[a] **"Cancel" synonymous.**—Webster D. [quot Wilson v. Peo., 36 Colo. 418, 425, 85 P 187; St. Louis v. Kellman, 235 Mo. 687, 695, 139 SW 443].

"Cancel" 9 C. J. p 1153.

[38] Century D. [quot Wilson v. Peo., 36 Colo. 418, 425, 85 P 187].

"Dismiss" 18 C. J. p 1141.

[39] Century D. [quot Wilson v. Peo., 36 Colo. 418, 425, 85 P 187].

[40] Century D. [quot Wilson v. Peo., supra]; Webster D. [quot St. Louis v. Kellman, 235 Mo. 687, 695, 139 SW 443].

[a] **"Recall" synonymous.**—Webster D. [quot Wilson v. Peo., 36 Colo. 418, 425, 85 P 187].

"Recall" 52 C. J. p 1190.

[41] Webster D. [quot Wilson v. Peo., 36 Colo. 418, 425, 85 P 187; St. Louis v. Kellman, 235 Mo. 687, 695, 139 SW 443].

[a] **"Rescind" synonymous.**—Webster D. [quot Wilson v. Peo., 36 Colo. 418, 425, 85 P 187].

"Rescind" post.

[42] Webster D. [quot Wilson v. Peo., 36 Colo. 418, 425, 85 P 187; St. Louis v. Kellman, 235 Mo. 687, 695, 139 SW 443]; State v. Patrick, 65 Mo. A. 653, 661.

[43] Webster D. [quot Wilson v. Peo., 36 Colo. 418, 425, 85 P 187; St. Louis v. Kellman, 235 Mo. 687, 695, 139 SW 443].

[44] State v. Patrick, 65 Mo. A. 653, 661. See Wilson v. Peo., 36 Colo. 418, 425, 85 P 187.

[a] **"It usually implies a recalling** of the act by the power that made or enacted it." Century D. [quot Wilson v. Peo., 36 Colo. 418, 425, 85 P 187].

[45] Century D. [quot Wilson v. Peo., 36 Colo. 418, 425, 85 P 187].

"Retract" post.

[46] Webster D. [quot St. Louis v. Kellman, 235 Mo. 687, 695, 139 SW 443].

[a] **"Reverse" synonymous.**—Webster D. [quot St. Louis v. Kellman, 235 Mo. 687, 695, 139 SW 443].

"Reverse" post.

[47] Century D. [quot Wilson v. Peo., 36 Colo. 418, 425, 85 P 187]; Webster D. [quot St. Louis v. Kellman, 235 Mo. 687, 695, 139 SW 443].

[a] **"Revoke" synonymous.**—Webster D. [quot Wilson v. Peo., 36 Colo. 418, 425, 85 P 187].

"Revoke" post.

[48] See cases infra this section.

[49] Ashton v. Rochester, 60 Hun 372, 376, 14 NYS 855, 857. See also Statutes [36 Cyc 1069, 1169, 1224–1235].

[50] Butler v. Palmer, 1 Hill (N. Y.) 324, 334 ("These rights are but an incident to the statute, and fall with it, unless saved by express words in the repealing clause") [quot Duffus v. Howard Furnace Co., 8 App. Div. 567, 574, 46 NYS 925]. See also Statutes [36 Cyc 1069–1071, 1081].

[51] See Telegraphs and Telephones [37 Cyc 1684].

[52] **Repeater:**
At election see Elections § 439.
Of slander liability of see Libel and Slander § 191.

[53] Century D. See also Pump Gun 51 C. J. p 91.

[54] Century D.

[a] **As not applicable to "revolver."**—Fife v. State, 31 Ark. 455, 461, 25 AmR 556. See Andrews v. State, 3 Heisk. (Tenn.) 165, 187, 8 AmR 8.

"Revolver" post.

[55] Andrews v. State, 3 Heisk. (Tenn.) 165, 187, 8 AmR 8.

[a] **Included in term "lawful arms,"** that is such weapons as are adapted to the purpose of "common defense" within constitutional provisions, the keeping of which may not be infringed or forbidden. Andrews v. State, 3 Heisk. (Tenn.) 165, 179, 8 AmR 8.

"Pistol" 48 C. J. p 1210.

[56] State v. Wilburn, 7 Baxt. (Tenn.) 57, 60, 32 AmR 551.

[57] Puryear v. State, 44 Ga. 221, 222.

[a] **"Navy repeater"** similarly classed. Puryear v. State, 44 Ga. 221, 222.

[58] See Elections § 439; Libel and Slander §§ 187–191.

[59] A maxim meaning "An infamous person should not be allowed to take an oath." Morgan Leg. Max.

[60] A maxim meaning "He is defeated by the plea that the actions have been assigned." Bouvier L. D.

[a] **Applied in:** Cheesebrough v. Millard, 1 Johns. Ch. (N. Y.) 409, 414, 7 AmD 494.

[61] See Notaries 46 C. J. p 500.

[62] Cyclopedic L. D. [cit Dalloz].

[63] Sutter v. Dutch Church, 3 Grant (Pa.) 336, 343. See In re St. Mary's Church, 7 Serg. & R. (Pa.) 517, 541.

[64] **By witness** see Witnesses [40 Cyc 2443].

In pleading see Homicide § 326; Pleading § 95.

Of defamation see Libel and Slander §§ 187–191. See also Judgments § 1250.

Of instruction see Criminal Law § 2506; Trial [38 Cyc 1711].

Of objection to evidence see Criminal Law § 2201; Trial [38 Cyc 1399].

REPLACE.[66] An unambiguous word,[67] defined as meaning to be a substitute for;[68] to cause to supply the place of in any manner;[69] to fill or take the place of;[70] to fulfill the end or office of;[71] to make good;[72] to put a substitute in place of;[73] to repair;[74] to restore;[75] to return;[76] to substitute something competent in the place of,[77] as of something which has been displaced, or lost, or destroyed;[78] to supersede.[79] It does not necessarily mean to duplicate;[80] nor does it ordinarily mean the right to exchange or substitute.[81]

Phrases: "Replace and make good,"[82] "replace demised property,"[83] and "replacing property damaged or destroyed."[84]

REPLACEMENT.[85] Restoration[86] of worn-out parts;[87] restoration of property to its condition prior to injury.[88] The term is broader than "repairs;"[89] it contemplates the replacing of those portions and parts that have become destroyed;[90] but it does not ordinarily mean the right to exchange or substitute.[91]

As an adjective the term is sometimes employed,[92] as in the phrases "replacement cost,"[93] "replacement cost new,"[94] and "replacement value."[95]

REPLEADER.[96]

REPLEGIANDO, DE HOMINE.[97]

REPLEGIARE EST REM APUD ALIUM DETENTUM, CAUTIONE LEGITIMA INTERPOSITA, REDIMERE.[98]

REPLEGIARI FACIAS. Literally "You cause to be replevied."[99] In old English law, the original writ in the action of replevin, superseded by the statute of Marlbridge c 21.[1]

REPLENISH. To fill again; to fill up.[2]

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[65] Black L. D.

[66] See Replacement post.

[67] American Brake Shoe, etc., Co. v. New York R. Co., 293 Fed. 612, 621.

[68] Century D. [quot Automobile Underwriters v. Radford, (Tex. Civ. A.) 293 SW 869, 872].

[69] Standard D. [quot Lannom v. Tullahoma, 155 Tenn. 25, 290 SW 8, 10].

[70] Century D. [quot Automobile Underwriters v. Radford, (Tex. Civ. A.) 293 SW 869, 872].

[71] Century D. [quot Automobile Underwriters v. Radford, (Tex. Civ. A.) 293 SW 869, 873].

[72] Century D. [quot Automobile Underwriters v. Radford, supra].

[73] Standard D. [quot Lannom v. Tullahoma, 155 Tenn. 25, 290 SW 8, 10].

[74] Indemnity Ins. Co. v. Gardner, 214 Ala. 528, 529, 108 S 342 (used in connection with insurance policy).

[a] **"Repair" compared.**—Automobile Underwriters v. Radford, (Tex. Civ. A.) 293 SW 869, 872.

[b] **"Repair" distinguished** see Repair ante § 10.

[75] Century D. [quot Automobile Underwriters v. Radford, (Tex. Civ. A.) 293 SW 869, 872]; Indemnity Ins. Co. v. Gardner, 214 Ala. 528, 529, 108 S 342 (in connection with insurance policy).

"Restore" post.

[76] Century D. [quot Automobile Underwriters v. Radford, (Tex. Civ. A.) 293 SW 869, 873].

"Return" post.

[77] Century D. [quot Automobile Underwriters v. Radford, (Tex. Civ. A.) 293 SW 869, 873]. But see Indemnity Ins. Co. v. Gardner, 214 Ala. 528, 529, 108 S 342 (does not mean right to exchange cars or substitute new one for old one).

[78] Century D. [quot Automobile Underwriters v. Radford, (Tex. Civ. A.) 293 SW 869, 872].

[a] **Held to imply** the loss, destruction, or surrender of the thing replaced. Dig. Op. Judge Adv. Gen. Insignia of Merit I A 2 c, p 665.

[79] Century D. [quot Automobile Underwriters v. Radford, (Tex. Civ. A.) 293 SW 869, 872].

"Supersede" [37 Cyc 595].

[80] Lannom v. Tullahoma, 155 Tenn. 25, 290 SW 8, 10.

"Duplicate" 19 C. J. p 836.

[81] Indemnity Ins. Co. v. Gardner, 214 Ala. 528, 529, 108 S 342.

"Exchange" 23 C. J. p 181.

"Substitute" [37 Cyc 508].

[82] American Brake Shoe, etc., Co. v. New York R. Co., 293 Fed. 612, 621.

[83] American Brake Shoe, etc., Co. v. New York R. Co., supra.

[84] U. S. Mortgage, etc., Co. v. New York Dock Co., 177 NYS 455, 457.

[85] See Replace ante.

[86] Leeds, etc., Co. v. Victor Talking Mach. Co., 213 U. S. 325, 336, 29 SCt 503, 53 L. ed. 816; Rossier v. Union Auto. Ins. Co., (Or.) 291 P 498.

"Restoration" post.

[87] Leeds, etc., Co. v. Victor Talking Mach. Co., 213 U. S. 325, 336, 29 SCt 503, 53 L. ed. 816. See Marcy v. Syracuse, 199 App. Div. 246, 192 NYS 674, 679.

[88] Rossier v. Union Auto. Ins. Co., (Or.) 291 P 498, 500 (as used in insurance policy).

[a] **How accomplished.**—"Such restoration may or may not be accomplished by repair or replacement of broken or damaged parts." Rossier v. Union Auto. Ins. Co., (Or.) 291 P 498, 500.

[89] Marcy v. Syracuse, 199 App. Div. 246, 192 NYS 674, 679, 680. See also Repair §§ 6, 7, 11.

"Replacements has a broader and more important meaning." Marcy v. Syracuse, supra.

[90] Marcy v. Syracuse, supra.

[91] Indemnity Ins. Co. v. Gardner, 214 Ala. 528, 529, 108 S 342.

[92] See cases infra notes 93–95.

[93] Waltham Watch, etc., Co. v. Waltham, (Mass.) 172 NE 579, 584.

[94] Waltham Watch, etc., Co. v. Waltham, supra.

[95] New Orleans v. Orleans Levee Dist. Comrs., 164 La. 1020, 115 S 131, 133.

[a] **"'Assessed value' is** by no means 'replacement value' and may be in many instances far from it." New Orleans v. Orleans Levee Dist. Comrs., 164 La. 1020, 115 S 131, 133.

[96] See Judgments § 15; Pleading §§ 812–814.

[97] See Habeas Corpus § 3.

[98] A maxim meaning "To replevy, is to redeem a thing detained by another person, legal security being given." Tayler L. Gloss.

[99] Black L. D.

[1] Black L. D. See also Replevin post.

[2] Bynum v. Miller, 89 N. C. 393, 395.

[a] **"Derived from the Latin** words re, 'again,' and plenus, 'full.'" Bynum v. Miller, 89 N. C. 393, 395.

[b] **Implies exhaustion.**—"Nothing can be filled up that is already full. . . . To replenish a thing necessarily implies exhaustion, reduction, or diminution in the quantity of the commodity. . . . In common acceptation, when a merchant speaks of replenishing his stock of goods, it is understood that he means to fill up his stock that has been reduced by sales." Bynum v. Miller, 89 N. C. 393, 395.

REPLEVIN

[Matters not in this Title, treated elsewhere in this Work, see Cross References infra p 415]

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CROSS REFERENCES

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  - Mortgagee against:
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    - Purchaser at execution sale see **Chattel Mortgages** § 303.
    - Third person see **Chattel Mortgages** § 301.
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  - Property of municipal corporation see **Municipal Corporations** §§ 4653, 4654.
  - Property seized for taxes see **Taxation** [37 Cyc 672 et seq].
- **Sequestration** [35 Cyc 1381 et seq].
- **Trespass** [38 Cyc 985 et seq].
- **Trover and Conversion** [38 Cyc 1997 et seq].
- Writ de homine replegiando see **Habeas Corpus** § 3.

I. DEFINITIONS

[By Joseph W. Rouse]

[§ 1] Replevin is an action at law for the recovery of specific personal chattels, wrongfully taken and detained, or wrongfully detained, with damages which the wrongful taking or detention has occasioned.[1]

Claim and delivery. In some jurisdictions the statutory remedy given in lieu of the common-law action of replevin is styled claim and delivery.[2] Claim and delivery is an action to determine the right to possession of personal property.[3] For the purpose of uniformity, the term replevin will be used throughout this title.

The term "trial of right of property" is applied in some jurisdictions to a statutory remedy given for the determination of title to property seized under attachment,[4] execution,[5] sequestration,[6] or other like writ or process when it is claimed by a third person not a party to the writ.

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1. Fredericks v. Tracy, 98 Cal. 658, 33 P 750.

[a] **Other definitions.**—(1) The name of one of the common-law actions, the distinguishing features of which are that it is brought to obtain possession of specific chattel property, and is prosecuted by a provisional seizure and delivery to plaintiff of the thing in suit. Abbott L. D. (2) A personal action ex delicto brought to recover possession of goods unlawfully taken (generally, but not only applicable to the taking of goods distrained for rent), the validity of which taking it is the mode of contesting if the party from whom the goods were taken wishes to have them back in specie, whereas, if he prefer to have damages instead the validity may be contested by action of trespass or unlawful distress. The word means a redelivery to the owner of the pledge or thing taken in distress. Wharton L. Lex. (7th ed) p 712. (3) "A justicial writ to the sheriff, complaining of an unjust taking and detention of goods and chattels, commanding the sheriff to deliver back the same to the owner, upon security given to make out the injustice of such taking, or else to return the goods and chattels." Gilbert Replevin p 58 [cit Williamson v. Ringgold, 30 F. Cas. No. 17,755, 4 Cranch C. C. 39]. (4) "A form of action which is employed to recover possession of personal chattels that have been unlawfully taken or obtained from their owner." Hitch v. Riggin, 26 Del. 84, 80 A 975, 976. (5) "A possessory action for the recovery of specific personal property." Jones v. Keebey, 159 Ark. 586, 252 SW 591, 593. (6) "Merely an action for the possession of specific personal property in the possession of the defendant." In re Irwin, 320 Mo. 20, 6 SW (2d) 597, 601. (7) "The plain, simple, and speedy process by which one may get possession of personal property, to the possession of which he is entitled." Thompson-Starrett Co. v. Plunkett, 89 Vt. 177, 185, 94 A 845. (8) "An ordinary statutory proceeding to adjudicate rights to the title or possession of personal property." Palmer v. King, 41 App. (D. C.) 419, 425, LRA 1916D, 278, AnnCas1915C, 1139. (9) "A speedy statutory remedy to recover possession of property wrongfully taken and detained, together with damages incident merely to the detention." Wardman-Justice Motors v. Petrie, 39 F. (2d) 512, 515. (10) "An action which lies for the recovery of the special articles which have been taken or detained by a person whom claimant holds has no right to them." Maclary v. Turner, 14 Del. 281, 283, 32 A 325. (11) "An action for the recovery of chattels wrongfully taken and detained or wrongfully detained." Boswell v. Laramie First Nat. Bank, 16 Wyo. 161, 193, 92 P 624, 93 P 661. (12) "A form of action which lies to regain the possession of personal chattels which have been taken from the plaintiff unlawfully." 3 Bouvier L. D. p 289.

[b] **The term "replevy"** means "to redeliver goods which have been distrained, to the original possessor of them, on his giving pledges." 2 Bouvier L. D. p 450 [cit Kirk v. Morris, 40 Ala. 225, 229].

[c] **Replevin is a summary proceeding** whereby, on proper security the pledge is redelivered where property is pledged as security and the question of right is to be subsequently determined. Hewitson v. Hunt, 42 S. C. L. 106, 110.

Cross references:

Damages see infra §§ 359–393.
Defendant's taking, detention, and possession see infra §§ 55–66.
Plaintiff's title and right to possession see infra §§ 46–54.
Property subject see infra §§ 7–45.

2. Ariz.—Gila Valley, etc., R. Co. v. Gila County, 8 Ariz. 292, 71 P 913; Carroll v. Byers, 4 Ariz. 158, 36 P 499.

Cal.—Fredericks v. Tracy, 98 Cal. 658, 33 P 750.

Ida.—Hull v. Hull, 1 Ida. 361.

N. Y.—Manning v. Keenan, 73 N. Y. 45; Scofield v. Whitelegge, 49 N. Y. 259, 12 AbbPrNS 320 [aff 33 N. Y. Super. 179, 10 AbbPrNS 104]; Nichols v. Michael, 23 N. Y. 264, 80 AmD 259.

N. C.—Hooker v. Latham, 118 N. C. 179, 21 SE 1004.

3. Moore v. Sanders, 114 S. C. 350, 103 SE 589.

[a] **Other definitions.**—"An action at law for the recovery of personal chattels, wrongfully taken and detained, or wrongfully detained, with damages which the wrongful taking or detention has occasioned. Fredericks v. Tracy, 98 Cal. 658, 659, 33 P 750.

Nature and scope of remedy see infra § 2.

4. See Attachment §§ 831–979.

5. See Executions §§ 506–508.

6. See Sequestration [35 Cyc 1415 et seq].

II. NATURE AND SCOPE OF REMEDY

[By Joseph W. Rouse]

[§ 2] **A. In General.** Replevin originated in common law as a remedy against the wrongful exercise of the right of distress for rent,[7] and according to some authorities could only be maintained in such a case;[8] and under some statutes has been limited to such cases.[9] But by the great weight of authority the remedy is not and never was restricted to cases of wrongful distress in the absence of any statutes relating to the subject but is a proper remedy for any unlawful taking.[10]

Statutory provisions and modifications. In some jurisdictions the action of replevin is still controlled by the common law, subject to such modifications thereof as are made by the statutory provisions regulating the action,[11] and a statute which extends the application of the remedy to cases to which it did not extend at common law has been held not to repeal or supersede the common law remedy.[12] In other jurisdictions the common-law writ of replevin has been abolished, and the action cannot be maintained except under the statute;[13] and, generally, replevin proceedings are largely affected by statute.[14] It has been said that the action of replevin is not, strictly speaking, a common-law action, but mainly, if not entirely, of statutory origin and of a peculiar nature.[15] In its origin the allowance of the writ was confined to cases where there had been a tortious taking,[16] but by virtue of statutes the remedy has been extended to cases of unlawful detention, although the original taking was lawful.[17] While at common law the action tested only the right of possession at the time of the commencement of the action,[18] under the statutes the prevailing party may have alternative judgment for the value of the property as well as for possession, where the losing party retains possession.[19]

Claim and delivery. The statutory action of "claim and delivery" has been held to be only a modification of the common-law remedy of replevin,[20]

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7. Sinnott v. Feiock, 165 N. Y. 444, 59 NE 265, 80 AmSR 736, 53 LRA 565; Kurzweil v. Story, etc., Piano Co., 95 Misc. 484, 159 NYS 231; 3 Blackstone Comm. p 145; Coke Litt. p 145b; Martin Civ. Proc. § 506; 2 Roscoe Actions p 621.

8. Palmer v. King, 41 App. (D. C.) 419, LRA1916D 278, AnnCas1915C 1139; Wheelock v. Cozzens, 7 Miss. 279; Hewitson v. Hunt, 42 S. C. L. 106; 3 Blackstone Comm. p 145.

[a] **Where distress abolished by statute,** replevin will not lie. Smith v. Crockett, Minor (Ala.) 277.

9. See statutory provisions; and cases infra this note.

[a] **In Connecticut** it was held that both precedent and statute restricted the use of replevin to cases of distress. Watson v. Watson, 9 Conn. 140, 23 AmD 324 (this, however, is not the law under the present statutes of this state).

10. U. S.—Slocum v. Mayberry, 2 Wheat. 1, 4 L. ed. 169.

Ida.—Largilliere Co. v. Kunz, 41 Ida. 767, 244 P 404.

Ind.—Daggett v. Robins, 2 Blackf. 415, 21 AmD 752.

Ky.—Bouldin v. Alexander, 7 T. B. Mon. 424.

Mass.—Ilsley v. Stubbs, 5 Mass. 280.

N. H.—Dame v. Dame, 43 N. H. 37.

N. J.—Caldwell v. West, 21 N. J. L. 411; Bruen v. Ogden, 11 N. J. L. 370, 20 AmD 593.

N. Y.—Ely v. Ehle, 3 N. Y. 506; Clark v. Skinner, 20 Johns. 465, 11 AmD 302; Thompson v. Button, 14 Johns. 84; Pangburn v. Partridge, 7 Johns. 140, 5 AmD 250.

Pa.—McJunkin v. Mathers, 158 Pa. 137, 27 A 873; Boyle v. Rankin, 22 Pa. 168; Weaver v. Lawrence, 1 Dall. 156, 1 L. ed. 79.

Eng.—Farrell v. Beresford, 1 Ball & B. 328; George v. Chambers, 11 M. & W. 149, 159, 152 Reprint 752 (where it was said by Parke, B., "though in ordinary practice it is applied only to a distress for rent, yet a replevin is, at common law, a remedy applicable in all cases where goods are improperly taken"); Mellor v. Leather, 1 E. & B. 619, 72 ECL 619, 118 Reprint 569; Allen v. Sharp, 2 Exch. 352, 154 Reprint 529; Anonymous, 1 Moll. 390; Shannon v. Shannon, 1 Sch. & Lef. 324; Ex p. Chamberlain, 1 Sch. & Lef. 320; Dore v. Spurvey, 2 Stark. 287, 3 ECL 412, 171 Reprint 648; 1 Chitty Pl. 157.

11. Colwell v. Swick, 190 Ill. A. 369; Chadwick v. Miller, 6 Iowa 34, 39 ("The plaintiff misconceives, probably from regarding the statute provisions as the whole of the law of replevin, whilst, in truth, the body and substance of it lies in the common law, and the statute contains a few special provisions only, upon the subject, which are to be understood with a reference to the common law").

12. Duffy v. Murrill, 31 N. C. 46.

13. Delco Light Co. v. John Le Roy Hutchinson Properties, 99 Fla. 410, 128 S 831; Bates v. Capital State Bank, 21 Ida. 141, 121 P 561; Bennett v. Allen, 30 Vt. 684; Miller v. Warner, Brayt. (Vt.) 168.

[a] **Replevin is sui generis** and governed by its own provisions as found in the code. Ellison v. Lewis, 57 Miss. 588, 590.

[b] **In Virginia** (1) as early as 1823, the common-law form of action of replevin was abolished for all purposes except cases of distress for rent. Vaiden v. Bell, 3 Rand. (24 Va.) 448 (holding the statute not retrospective). (2) In 1849 it was abolished altogether, and for all purposes. Baltimore, etc., R. Co. v. Hamilton, 16 Fed. 181.

14. Chernick v. National Surety Co., (R. I.) 148 A 418.

15. Corbett v. Pond, 10 App. (D. C.) 17 [cit 3 Blackstone Comm. pp 146–151].

[a] **Historical note.**—(1) At common law a person claiming the right to possession of personalty could enforce his claim by no process other than the writ of replevin which issued out of chancery. Kurzweil v. Story, etc., Piano Co., 95 Misc. 484, 159 NYS 231; 3 Blackstone Comm. p 146. (2) This being a cumbersome method of procedure various statutes were passed facilitating the procedure and protecting the rights of the parties. See statutory provisions. (3) The statute of Marlbridge (52 Hen. III c 21) dispensed with the suing out of the writ; then the sheriff was allowed to appoint deputies (1 Philip & Mary 12) and the security to be given on procuring the return of the property was provided for by St. Westminster 2 (13 Edw. I c 2) and further by 11 Geo. II c 19. Kurzweil v. Story, etc., Piano Co., 95 Misc. 484, 159 NYS 231. (4) Some of these earlier statutes have been held to be a part of the common law of some jurisdictions. Rosenthal v. Lehman, 13 Phila. (Pa.) 1 (St. 17 Charles II c 12). (5) "The action of replevin formerly was said to be of two sorts, namely, "in the detinet" or "detinetis"—the former, where the goods are still detained by the person who took them, to recover the value thereof and damages, and the latter, as the word imports, where the goods have been delivered to the party. But the former law is now obsolete, and there does not appear in any of the books any proceeding in replevin which was not commenced by writ requiring the proper officer to cause the goods to be replevied to him or by plaint in the sheriff's court, the immediate process upon which is a precept to replevy the goods of the party levying the plaint, both of which proceedings are in rem —that is, to have the goods again." St. Martin v. Desnoyer, 1 Minn. 41, 43.

16. See infra § 55.

17. See infra § 56.

18. Wilson v. Fuller, 9 Kan. 176; Humphrey v. Baker, 71 Okl. 272, 176 P 896.

19. **Alternative judgment** see infra § 325.

20. Gila Valley, etc., R. Co. v. Gila County, 8 Ariz. 292, 71 P 913; Carroll v. Byers, 4 Ariz. 158, 36 P 499; Krebs Hop Co. v. Taylor, 52 Or. 627, 97 P 44, 98 P 464.

[a] **Effect of statutes.**—A statute abolishing replevin and substituting the action of claim and delivery before the circuit court supersedes a statute requiring proceedings in replevin before justices to be the same as proceedings before the circuit court. McKnight v. Crinnion, 22 Mo. 559.

and merely a substitute therefor,[21] and has been held to be substantially the same as that remedy.[22] However, it has been said that the remedy of claim and delivery is not an independent form of action,[23] but is merely an auxiliary remedy available in any action wherein plaintiff has a present right to possession of personal property.[24]

[§ 3] **B. Action at Law and Ex Delicto.** Replevin being strictly a proceeding at law, it cannot be invoked as in an equitable suit for rescission, modification, or cancellation of a contract.[25] It has been held, however, that a statutory action of replevin may be sufficiently flexible to allow determination of equitable rights when such rights relate to the property or rights arising out of the contract, and not to the rescission thereof.[26] It is an action ex delicto and not ex contractu,[27] and all persons who participate in the tort are liable either jointly or severally.[28]

[§ 4] **C. As Possessory Action.** Replevin is a possessory action.[29] The property is the subject of the action.[30] The gist of the action is plaintiff's right to immediate possession[31] and defendant's wrongful taking[32] or wrongful or unlawful detention.[33] The issues to be determined are plaintiff's present right to possession of the property[34] and defendant's unlawful detention or possession;[35] and the question of title is not necessarily involved in such an action,[36] although it may be put in issue.[37] The primary object of the action is the recovery of the property itself[38] with damages for the taking and detention,[39] and secondarily the recovery of a sum of money equivalent to the value of the property taken and detained, with interest thereon.[40] Being purely possessory, replevin is not a proper remedy for the collection of a debt,[41] nor for money due on account,[42] nor to enforce a mere contractual duty,[43] nor to enforce delivery of a deed,[44] nor to determine defendant's liability as indorser of a note,[45] and it cannot be sustained for the purpose of trying the right of property.[46] It affords no relief for the adjudication of successive liens.[46½] An action to be declared owner of an interest in a patent is not an action of replevin.[47] The right to hold office in a corporation cannot be determined in an action of replevin of corporation property appertaining to that office.[48]

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[21] Halcomb v. Phipps, 194 Ky. 648, 240 SW 363.

[22] Freeman v. Trummer, 50 Or. 287, 91 P 1077; Kimball Co. v. Redfield, 33 Or. 292, 54 P 216; Guille v. Fook, 13 Or. 577, 11 P 277; Surles v. Sweeny, 11 Or. 21, 4 P 469; Moser v. Jenkins, 5 Or. 447; Bush v. Bush, 55 Utah 237, 184 P 823.

"The ultimate issue or fact in such an action, as the name of the action plainly implies, involves the single question whether the plaintiff is entitled to the possession of the specific personal property or chattel concerned." Motor Inv. Co. v. Breslauer, 64 Cal. A. 230, 221 P 700, 704.

[23] Faulkner v. Santa Barbara First Nat. Bank, 130 Cal. 258, 62 P 463; Costello v. Bell, 27 Cal. A. 102, 148 P 948.

[24] Faulkner v. Santa Barbara First Nat. Bank, 130 Cal. 258, 62 P 463; Costello v. Bell, 27 Cal. A. 102, 148 P 948.

[25] Ariz.—Meyer v. Bigham, 16 Ariz. 212, 141 P 726.

Cal.—Fredericks v. Tracy, 98 Cal. 658, 33 P 750.

Ill.—Moriarty v. Stofferan, 89 Ill. 528.

Ind.—Thompson v. Peck, 115 Ind. 512, 18 NE 16, 1 LRA 201.

Mo.—Kingman-Moore Impl. Co. v. Ellis, 125 Mo. A. 692, 103 SW 127.

Okl.—Kansas City Hay Press Co. v. Williams, 51 Okl. 6, 151 P 570; Penton v. Hansen, 13 Okl. 450, 73 P 843.

[26] Kansas City Hay Press Co. v. Williams, 51 Okl. 6, 151 P 570.

[27] D. C.—Wall v. De Mitkiewicz, 9 App. 109.

Ill.—Christy v. Ashlock, 93 Ill. A. 651.

Miss.—Quarles v. Hucherson, 139 Miss. 356, 104 S 148.

Mo.—Hecht v. Heimann, 81 Mo. A. 370 (construing Rev. St. § 2925, relating to costs).

Or.—Freeman v. Trummer, 50 Or. 287, 91 P 1077.

[28] Christy v. Ashlock, 93 Ill. A. 651, 654.

[29] U. S.—Lummus Cotton Gin Co. v. Townsend, 36 F. (2d) 364; Southern Pac. Co. v. Bank of America, 29 F. (2d) 465 [aff 23 F. (2d) 939 (certiorari den 272 U. S. 847, 49 SCt 345, 73 L. ed. 991)]; Sloan v. Merchants' Sav., etc., Co., 160 Fed. 654, 88 CCA 20.

Ark.—Laughlin v. Tyler, 177 Ark. 1183, 9 SW (2d) 567; Jones v. Keebey, 159 Ark. 586, 252 SW 591; Bowser Furniture Co. v. Johnson, 117 Ark. 496, 175 SW 516; Spear v. Arkansas Nat. Bank, 111 Ark. 29, 163 SW 508, AnnCas1916A 735; Cannon v. Matthews, 75 Ark. 336, 87 SW 428, 112 AmSR 64, 69 LRA 827, 5 AnnCas 478.

Cal.—Riverside Portland Cement Co. v. Taft, 192 Cal. 643, 221 P 357.

Colo.—International Trust Co. v. Palisade Light, etc., Co., 60 Colo. 397, 153 P 1002; Kelly v. Lewis, 38 Colo. 18, 88 P 388, 389.

Dak.—Parliman v. Young, 2 Dak. 175, 4 NW 139, 711.

Del.—Bennett v. Brittingham, 33 Del. 519, 140 A 154; Maclary v. Turner, 14 Del. 281, 32 A 325.

Fla.—Delco Light Co. v. John Le Roy Hutchinson Properties, 99 Fla. 410, 128 S 831; Malsby v. Gamble, 61 Fla. 310, 327, 54 S 766; Covington v. Clemmons, 61 Fla. 151, 55 S 81; Bell v. Niles, 61 Fla. 114, 55 S 392; Johnson v. Clutter Music House, 55 Fla. 385, 46 S 1.

Ind.—Boruff v. Stipp, 126 Ind. 32, 25 NE 865; Ringgenberg v. Hartman, 124 Ind. 186, 24 NE 987; Hall v. Durham, 113 Ind. 327, 15 NE 529; Van Gorder v. Smith, 99 Ind. 404; Woods v. Shearer, 56 Ind. A. 650, 105 NE 917; Beatty v. Miller, 47 Ind. A. 494, 94 NE 897; Jarrett v. Cauldwell, 47 Ind. A. 478, 94 NE 790; Welker v. Appleman, 44 Ind. A. 699, 90 NE 35; Meiser v. Smith, 2 Ind. A. 37, 27 NE 871; Consolidated Tank Line Co. v. Bronson, 2 Ind. A. 1, 28 NE 155; Whitehead v. Coyle, 1 Ind. A. 450, 27 NE 716.

Ind. T.—Hancock v. Schockman, 4 Ind. T. 138, 69 SW 826.

Kan.—Johnson v. Boehme, 66 Kan. 72, 71 P 243, 97 AmSR 357.

Me.—Smith v. Grant, 56 Me. 255.

Mass.—Wheeler v. Train, 3 Pick. 255.

Mich.—Eldridge v. Sherman, 70 Mich. 266, 38 NW 255; Stevenson v. Taylor, 2 Mich. N. P. 95, 96.

Miss.—Jackson v. General Motors Acceptance Corp., 151 Miss. 890, 119 S 808; Scarborough v. Lucas, 119 Miss. 128, 80 S 521.

Mo.—Wilkison v. Grugett, (A.) 20 SW (2d) 936, 939 [cit Cyc]; Cook v. Wheeler, (Mo. A.) 218 SW 929; Mattison v. Hooberry, 104 Mo. A. 287, 78 SW 642.

Mont.—Stephenson v. Combination Leasing, etc., Co., 86 Mont. 322, 283 P 1110.

N. H.—Peirce v. Finerty, 76 N. H. 38, 76 A 194, 79 A 23, 29 LRANS 547; Mitchell v. Roberts, 50 N. H. 486.

N. J.—Auto Brokerage Co. v. Ullrich, 102 N. J. L. 341, 131 A 901.

N. M.—Hyde v. Elmer, 14 N. M. 39, 88 P 1132.

N. Y.—Scharfman v. May-Claire Costume Co., 133 Misc. 482, 232 NYS 516; Roach v. Curtis, 50 Misc. 122, 100 NYS 411 [aff 115 App. Div. 765, 101 NYS 333 (aff 191 N. Y. 387, 84 NE 283]); Fischer v. Cohen, 22 Misc. 117, 48 NYS 775; Sharp v. Whittenhall, 3 Hill 576.

Okl.—Wilson Motor Co. v. Dunn, 129 Okl. 211, 264 P 194, 57 ALR 17; Damerson v. McClaren, 29 Okl. 340, 116 P 792.

Or.—Finn v. Erickson, 127 Or. 107, 269 P 232, 270 P 767; Almada v. Vandecar, 94 Or. 515, 185 P 907; Reed v. Mills, 78 Or. 558, 154 P 113; Jenkins v. Ontario, 44 Or. 72, 74 P 466, 102 AmSR 625; La Vie v. Crosby, 43 Or. 612, 74 P 220.

Pa.—McJunkin v. Mathers, 158 Pa. 137, 27 A 873; Bower v. Tallman, 5 Watts & S. 556.

R. I.—Warren v. Leiter, 24 R. I. 36, 52 A 76.

Wis.—Commercial Inv. Trust v. Frankfurth Hardware Co., 179 Wis. 21, 190 NW 1004.

"The action is founded on the general or special property of plaintiff in a chattel, and his consequent right to its immediate and exclusive possession." Reynolds v. Donaway, 30 Del. 461, 108 A 139; Hitch v. Riggin, 26 Del. 84, 80 A 975, 976.

[a] **Thus** the person entitled to possession of personalty when the suit was instituted is generally entitled to prevail. Finn v. Erickson, 127 Or. 107, 269 P 232, 270 P 767.

[30] Clarke v. Johnson, 43 Nev. 359, 187 P 510.

[31] Minn.—Republic State Co. v. Brown, 158 Minn. 396, 197 NW 840 [foll Kurtz v. Republic State Co., 158 Minn. 401, 197 NW 842].

Mo.—Kerman v. Leeper, 172 Mo. A. 286, 157 SW 984; Shantz v. Shriner, 167 Mo. A. 635, 150 SW 727.

Nebr.—G. A. Crancer Co. v. Combs, 94 Nebr. 655, 144 NW 251 [rev on other grounds 95 Nebr. 403, 145 NW 863].

Okl.—Wilson Motor Co. v. Dunn, 129 Okl. 211, 264 P 194; Peterman v. Rothschild, 103 Okl. 273, 229 P 579; Chadwell v. Brown, 88 Okl. 44, 211 P 410; Williams v. Williams, 87 Okl. 195, 209 P 769; Wellston First Nat. Bank v. Kreuzberg, 75 Okl. 97, 181 P 717; Buffalo Bank v. Crouch, 73 Okl. 35, 174 P 764; Tulsa Rig, etc., Co. v. Arnold, 64 Okl. 160, 166 P 135; Robinson v. Stiner, 26 Okl. 272, 109 P 238.

Or.—Red Hawk v. Joines, 129 Or. 620, 278 P 572; Reed v. Mills, 78 Or. 558, 154 P 113.

Wis.—Commercial Inv. Trust v. Frankfurth Hardware Co., 179 Wis. 21, 190 NW 1004.

[§ 5] **D. As Mixed Action.** Replevin is not an action in rem,[49] although it is said to have been so originally,[50] but is what is usually called a mixed action,[51] being partly in rem and partly in personam;[52] in rem so far as specific recovery of the chattels is concerned,[53] and in personam as to the damages.[54]

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[32] Amos v. Sinnott, 5 Ill. 440; Walpole v. Smith, 4 Blackf. (Ind.) 304.

[33] Ill.—Amos v. Sinnott, 5 Ill. 440.

Ind.—Walpole v. Smith, 4 Blackf. 304.

Iowa.—Richards v. Hellen, 153 Iowa 66, 133 NW 393; Draper v. Ellis, 12 Iowa 316.

Kan.—Wilhite v. Williams, 41 Kan. 288, 21 P 256, 13 AmSR 281; Bailey v. Bayne, 20 Kan. 657; Wilson v. Fuller, 9 Kan. 176.

Mo.—Kerman v. Leeper, 172 Mo. A. 286, 157 SW 984.

Nebr.—Moore v. Kepner, 7 Nebr. 291.

N. M.—Hyde v. Elmer, 14 N. M. 39, 88 P 1132.

Oh.—Harrison v. Mack International Motor Truck Corp., 20 Oh. A. 256, 151 NE 797.

Okl.—Robb v. Dobrinski, 14 Okl. 563, 78 P 101, 1 AnnCas 981.

Or.—Reed v. Mills, 78 Or. 558, 154 P 113.

Wis.—Commercial Inv. Trust v. Frankfurth Hardware Co., 179 Wis. 21, 190 NW 1004.

Wyo.—Boswell v. Laramie First Nat. Bank, 16 Wyo. 161, 92 P 624, 632.

"The gist of the action is not the taking of the property, but rather the wrongful detention of it and the plaintiff's right to immediate possession." Delco Light Co. v. John Le Roy Hutchinson Properties, 99 Fla. 410, 128 S 831, 835.

[34] Colo.—Davis v. Brinkhouse Hotel Co., 74 Colo. 199, 219 P 1074.

Del.—Hitch v. Riggin, 26 Del. 84, 80 A 975.

Ida.—Webster v. McCullough, 45 Ida. 603, 264 P 384.

Iowa.—Brandenburg v. Carmichael, 192 Iowa 694, 185 NW 486; Carr v. King, 184 Iowa 734, 169 NW 133; Richards v. Hellen, 153 Iowa 66, 133 NW 393; Sylvester v. Ammons, 126 Iowa 140, 101 NW 782.

Kan.—Bartlett v. Ridgley Nat. Bank, 70 Kan. 126, 78 P 414.

Mo.—Blake v. Keiser, (A.) 267 SW 94; Cook v. Wheeler, (A.) 218 SW 929; Weber Impl. Co. v. Dunard, 140 Mo. A. 476, 120 SW 608.

N. J.—McDade v. Reilly, 102 N. J. L. 268, 132 A 247 [rev 3 N. J. Misc. 49, 129 A 408].

N. M.—Hyde v. Elmer, 14 N. M. 39, 88 P 1132.

N. Y.—Kurzweil v. Story, etc., Piano Co., 95 Misc. 484, 159 NYS 231.

Or.—McCargar v. Wiley, 112 Or. 215, 229 P 665; Reed v. Mills, 78 Or. 558, 154 P 113.

S. D.—Kimmitt v. Deitrich, 22 S. D. 590, 119 NW 986.

Tenn.—Buchanan v. Gower, 7 Tenn. Civ. A. 306.

Wyo.—Wiltrout v. Sprague, 40 Wyo. 215, 276 P 448; Schlessinger v. Cook, 9 Wyo. 256, 62 P 152.

"The issue of property in replevin is not whether it is that of plaintiff or defendant, but whether the property is in plaintiff, with a consequent right to immediate and exclusive possession." Reynolds v. Donaway, 30 Del. 461, 463, 108 A 139.

"The main issue in claim and delivery is the right to possession. Other issues are incidental and material only as they affect the ultimate right of possession." Aalseth v. Simpson, (S. D.) 231 NW 289, 291.

[a] **Rule applied.**—(1) In replevin against a hotel to recover property retained under claim of a lien for rent, the only question is the right of possession, and a question as to whether plaintiff was entitled to reimbursement for expenditures for room rent incurred elsewhere during the month for which he gave defendant a check for rent could not be determined. Davis v. Brinkhouse Hotel Co., 74 Colo. 199, 219 P 1074. (2) Replevin is a proper form of action to try the title between a corporation and purchasers of goods under a contract to which the corporation was not a party. Schmidt v. J. F. Schmidt Bros. Co., 272 Ill. 340, 111 NE 1025 [rev 192 Ill. A. 197]. (3) Court correctly eliminated issue as to fraudulent transfers. Collier v. Hopper, (Ark.) 202 SW 687.

[35] Florida Trust, etc., Co. v. Consolidated Title Co., 86 Fla. 317, 98 S 915; Cook v. Wheeler, (Mo. A.) 218 SW 929.

[36] Delco Light Co. v. John Le Roy Hutchinson Properties Co., 99 Fla. 410, 128 S 831; Covington v. Clemmons, 61 Fla. 151, 55 S 81; Scarborough v. Lucas, 119 Miss. 128, 80 S 521; Lebensfeld v. Budne, 6 N. J. Misc. 952, 143 A 144 [aff (Sup.) 147 A 910].

[37] Costikyan v. Sloan, 33 App. (D. C.) 420.

[38] Del.—Bennett v. Brittingham, 33 Del. 519, 140 A 154; Atlantic Refining Co. v. Feinberg, 31 Del. 183, 112 A 685; Frick v. Miller, 30 Del. 366, 107 A 391 [aff 30 Del. 374, 107 A 394]; Whiteman v. Whiteman, 30 Del. 273, 105 A 787; McClemy v. Brown, 29 Del. 253, 99 A 48; Stafford v. Williams, 24 Del. 288, 76 A 626.

Me.—Smith v. Grant, 56 Me. 255; Walker v. Osgood, 53 Me. 422.

Minn.—O'Brien v. Curry, 111 Minn. 533, 127 NW 411, 137 AmSR 563.

Mont.—Osmers v. Furey, 32 Mont. 581, 81 P 345.

N. J.—McDade v. Reilly, 102 N. J. L. 268, 132 A 247 [rev 3 N. J. Misc. 49, 129 A 408].

N. Y.—Scharfman v. May-Claire Costume Co., 133 Misc. 482, 232 NYS 516.

Or.—Casto v. Murray, 47 Or. 57, 81 P 388, 883; La Vie v. Crosby, 43 Or. 612, 74 P 220.

Pa.—Herdic v. Young, 55 Pa. 176, 93 AmD 739.

R. I.—Warren v. Leiter, 24 R. I. 36, 52 A 76.

Wis.—Commercial Inv. Trust v. Frankfurth Hardware Co., 179 Wis. 21, 190 NW 1004.

[39] Frick v. Miller, 30 Del. 366, 107 A 391 [aff 30 Del. 374, 107 A 394]; Whiteman v. Whiteman, 30 Del. 273, 105 A 787; McClemy v. Brown, 29 Del. 253, 99 A 48; Stafford v. Williams, 24 Del. 288, 76 A 626.

[40] Bennett v. Brittingham, 33 Del. 519, 140 A 154; Atlantic Refining Co. v. Feinberg, 31 Del. 183, 112 A 685; Frick v. Miller, 30 Del. 366, 107 A 391 [aff 30 Del. 374, 107 A 394]; Whiteman v. Whiteman, 30 Del. 273, 105 A 787; McClemy v. Brown, 29 Del. 253, 99 A 48; Stafford v. Williams, 24 Del. 288, 76 A 626; Scharfman v. May-Claire Costume Co., 133 Misc. 482, 232 NYS 516.

[41] Laughlin v. Tyler, 177 Ark. 1183, 9 SW (2d) 567; Jones v. Keebey, 159 Ark. 586, 252 SW 591; Spear v. Arkansas Nat. Bank, 111 Ark. 29, 163 SW 508, AnnCas1916A 735.

[42] Hewett v. Wester, 72 Fla. 26, 72 S 462; Malsby v. Gamble, 61 Fla. 310, 327, 54 S 766; Johnson v. Clutter Music House, 55 Fla. 385, 46 S 1

[a] **Accounting of stallion's earnings** does not enter into claim and delivery action. Drinkhouse v. Van Ness, 202 Cal. 359, 260 P 869.

[43] Auto Brokerage Co. v. Ullrich, 102 N. J. L. 341, 131 A 901.

[44] Holder v. Volusia County Bank, etc., Co., 95 Fla. 882, 116 S 861.

[45] Couch v. Starks, 120 Ark. 631, 179 SW 995.

[46] Wilkison v. Grugett, (Mo. A.) 20 SW (2d) 936, 939 [cit Cyc]; Taggart v. Hart, Brayt. (Vt.) 215.

[46½] Lummus Cotton Gin Co. v. Townsend, 36 F. (2d) 364.

[47] Geary v. Prudhomme, 117 Or. 165, 243 P 101.

[48] Standard Gold Min. Co. v. Byers, 31 Wash. 100, 71 P 766.

[49] Waite v. Triblecock, 28 F. Cas. No. 17,046, 5 Dill. 547.

[§ 6] **E. Compared with, and Distinguished from, Other Remedies.**[55] Replevin is analogous to an action of trespass,[56] or trover,[57] but being partly in rem[58] is therefore distinguishable from trespass and trover, in which action damages only are sought to be recovered.[59] However, in all cases where trespass or trover can be maintained for the unlawful conversion of goods, replevin will also lie.[60] In the choice of remedies, as between replevin and trover, or trespass, the preference is with the former, in that it restores the property itself.[61] The action of replevin is regarded as being the same as an action of trover and governed by the same rules when plaintiff seeks judgment for the value of the property and damages for its detention.[62] There is no necessity for a conversion of the property, as is necessary to maintain trover.[63] Failure to claim immediate delivery will not change the action into one for conversion.[64] In some jurisdictions the statutory action of replevin combines the features of the common-law actions of replevin and detinue.[65] The action of replevin is not an extraordinary remedy in derogation of the common law, like the proceeding in attachment.[66]

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[50] Hoyt v. Carson, 22 Pa. Dist. 1039.

[51] Olivier v. Mt. Union Tanning, etc., Co., 253 Fed. 593; Fredericks v. Tracy, 98 Cal. 658, 33 P 750; Krebs Hop Co. v. Taylor, 52 Or. 627, 97 P 44, 98 P 494; Fisher v. Whoollery, 25 Pa. 197; North v. Downing, 2 Pa. Co. 276.

"Mixed action" defined see Actions § 13.

[52] Cal.—Fredericks v. Tracy, 98 Cal. 658, 33 P 750.

N. Y.—Oswego First Nat. Bank v. Dunn, 97 N. Y. 149, 49 AmR 517 [rev 29 Hun 529]; Wood v. Orser, 25 N. Y. 348; Sharp v. Whittenhall, 3 Hill 576.

Or.—Red Hawk v. Joines, 129 Or. 620, 278 P 572; Krebs Hop Co. v. Taylor, 52 Or. 627, 97 P 44, 98 P 494.

Pa.—Bower v. Tallman, 5 Watts & S. 556; Todor v. Coatesville, 28 Pa. Dist. 168; Hoyt v. Carson, 22 Pa. Dist. 1039; Vansciver v. Churchill, 34 Pa. Co. 111; North v. Downing, 2 Pa. Co. 276.

Wis.—Commercial Inv. Trust v. Frankfurth Hardware Co., 179 Wis. 21, 190 NW 1004.

[a] **In Rhode Island** replevin is so far a proceeding in rem that unless the res has actually been taken possession of by the officer there is no case before the court and hence nothing to try. In re Alton Mfg. Co., 158 Fed. 367; Warren v. Leiter, 24 R. I. 36, 52 A 76.

[b] **Where the property is not seized upon the writ,** and plaintiff proceeds for its value, the suit becomes essentially a personal action and is governed by the same principles as an action for trover for conversion of the property. McArthur v. Oliver, 60 Mich. 605, 27 NW 689.

[53] Fredericks v. Tracy, 98 Cal. 658, 33 P 750; Halcomb v. Phipps, 194 Ky. 648, 240 SW 363; Mitchell v. White, 106 Okl. 218, 233 P 746; Commercial Inv. Trust v. Frankfurth Hardware Co., 179 Wis. 21, 190 NW 1004.

[54] Fredericks v. Tracy, 98 Cal. 658, 33 P 750; Halcomb v. Phipps, 194 Ky. 648, 240 SW 363; Commercial Inv. Trust v. Frankfurth Hardware Co., 179 Wis. 21, 190 NW 1004.

[55] **Distinguished from detinue** see Detinue § 3.

[56] Commercial Inv. Trust v. Frankfurth Hardware Co., 179 Wis. 21, 190 NW 1004.

[57] Burrage v. Melson, 48 Miss. 237.

Bail trover see Trover and Conversion.

[58] See supra § 5.

[59] Hughes Trust, etc., Co. v. Consolidated Title Co., 81 Fla. 568, 88 S 266; Sinnott v. Feiock, 165 N. Y. 444, 59 NE 265, 80 AmSR 736, 53 LRA 565; Kurzweil v. Story, etc., Piano Co., 95 Misc. 484, 159 NYS 231; Sharp v. Whittenhall, 3 Hill (N. Y.) 576.

[a] **Distinguished from trespass.**—The whole proceeding of replevin, at common law, is distinguished from that in trespass in this, among other things, that, while the latter is intended to procure a compensation in damages for goods wrongfully taken out of the actual or constructive possession of plaintiff, the object of the former is to procure the restitution of the goods themselves; and this it effects by a preliminary ex parte interference by the officer of the law with the possession. Mennie v. Blake, 6 E. & B. 842, 88 ECL 842, 119 Reprint 1078 (holding likewise that the action of replevin, apart from the replevin itself, is again distinguished from trespass by this, that, at the time of declaring, the supposed wrongful possession has been put an end to, and the litigation proceeds for the purpose of deciding whether he, who by the supposition was originally possessed, and out of whose possession the goods were taken, and to whom they have been restored, ought to retain that possession, or whether it ought to be restored to defendant).

[b] **Distinguished from trover.**—(1) "The essential distinction between trover and replevin as regards the rule of damages, aside from the element of willfulness in the taking or detention, is briefly this: In trover the title to the property is regarded as having passed to the defendant, who is therefore liable for its value, simply, with interest. In replevin the title is treated as still in the plaintiff, who is therefore to recover not only the chattel itself, or its value, but also damages for its detention, of which interest may be the measure, but is not in all cases the necessary limit." Sedgwick Dam. (8th ed) § 528 [quot La Vie v. Crosby, 43 Or. 612, 616, 74 P 220]. (2) Trover is an action to recover damages while "replevin" or detinue is primarily an action to recover the property, and a judgment is given only in the absence of ability to secure the specific articles claimed. Leeper Graves v. Hobart First Nat. Bank, 26 Okl. 707, 110 P 655, 660, 29 LRANS 747, AnnCas 1912B 302.

[60] U. S.—Williamson v. Ringgold, 30 F. Cas. No. 17,755, 4 Cranch C. C. 39.

Me.—Sawtelle v. Rollins, 23 Me. 196.

Mo.—Crocker v. Mann, 3 Mo. 472, 26 AmD 684.

N. J.—Bruen v. Ogden, 11 N. J. L. 370, 20 AmD 593.

N. Y.—Ely v. Ehle, 3 N. Y. 506; Wheeler v. McFarland, 10 Wend. 318 [rev on other grounds 26 Wend. 467]; Dunham v. Wyckoff, 3 Wend. 280, 20 AmD 695; Marshall v. Davis, 1 Wend. 109, 19 AmD 463; Clark v. Skinner, 20 Johns. 465, 11 AmD 302; Pangburn v. Patridge, 7 Johns. 140, 5 AmD 250. But see Sharp v. Whittenhall, 3 Hill 576 (where it was said that it is not universally true that replevin will lie where trespass de bonis may be brought).

Wis.—Lowe v. Wing, 56 Wis. 31, 13 NW 892.

N. S.—Gates v. Bent, 31 N. S. 544.

Ont.—Cook v. Fowler, 12 U. C. Q. B. 568.

[a] **"Replevin is a substitute** for trespass and trover, to maintain either of which, in addition to his qualified property in the goods, [plaintiff] must have shown either that he had or was entitled to the immediate possession of them." Frisbee v. Langworthy, 11 Wis. 375, 379.

[b] **Replevin in the cepit** will only lie where an action of trespass might have been maintained. Barrett v. Warren, 3 Hill (N. Y.) 348; Caron v. Graham, 18 U. C. Q. B. (Ont.) 315.

[c] **Trover or replevin in the detinet** will lie against a bona fide purchaser from one who had tortiously taken the goods. Neither trespass nor replevin in the cepit will lie in such case. Barrett v. Warren, 3 Hill (N. Y.) 348, 350 (Cowen, J., dis, and holding that trespass would lie against every possessor under the wrong-doer, except he be a bona fide purchaser for a valuable consideration).

[d] **Where there is not sufficient evidence of conversion** to support an action of trover, replevin will not lie. Smalley v. Gallagher, 26 U. C. C. P. (Ont.) 531.

[e] **Election of remedy.**—The owner of converted goods may in a proper case, either proceed in claim and delivery to recover them, or sue for damages for their conversion or he may waive the tort and sue on the implied promise to pay. Yancey v. Northern Pac. R. Co., 42 Mont. 342, 112 P 533.

[61] Burrage v. Melson, 48 Miss. 237.

[62] Parmalee v. Loomis, 24 Mich. 242; Brewster v. Carmichael, 39 Wis. 456; Bigelow v. Doolittle, 36 Wis. 115.

[63] Commercial, etc., Bank v. Foster, (Cal.) 290 P 583.

[64] Benjamin v. Smith, 43 Minn. 146, 44 NW 1083.

III. PROPERTY RECOVERABLE

[By Joseph W. Rouse]

[§ 7] **A. In General—1. Nature of Property Recoverable in General.**[67] The general rule is that a writ of replevin is effectual for the recovery of personal property only, and that it cannot be maintained to recover real property.[68] The general rule is that all personal property,[69] including animate as well as inanimate movable property,[70] unlawfully taken or retained from the owner thereof, is the subject of an action of replevin. Replevin will not lie for incorporeal personal property,[71] such as shares in a corporation, as distinguished from certificates of stock[72] nor will it lie for property destroyed and not in existence at the commencement of the action.[73] Replevin will not lie to recover property received in exchange for plaintiff's property.[74]

Enhancement of value.[75] Subject to rules hereinafter considered as to the right of defendant to elect to return the value of the property taken or the identical property,[76] replevin will lie so long as the identity of the property may be traced, notwithstanding it has greatly enhanced in value.[77]

[§ 8] **2. Records, Writings, and Documents.** While a valueless piece of paper is not the subject of replevin[78] the general rule is that replevin will lie for the recovery of records, documents, and writings in general, of value, unlawfully detained.[79] However, while a deed, as such, is recoverable in replevin where it is unlawfully detained and the controversy involves nothing else,[80] replevin will not lie to recover a deed where the title to land is involved in the action,[81] although the action has been held proper where the only fact to be determined, affecting the

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65. Dvorak v. Avery, 208 Iowa 509, 225 NW 947.

66. Martinez v. Martinez, 2 N. M. 464, 469.

67. **Property of municipal corporation** see Municipal Corporations § 4653.

68. Fla.—Richbourg v. Rose, 53 Fla. 173, 44 S 69, 125 AmSR 1061.

Ind.—Ricketts v. Dorrel, 55 Ind. 470.

Miss.—Hickingbottom v. Lehman, 124 Miss. 682, 87 S 149.

N. Y.—Walden v. Feller, 99 Misc. 576, 164 NYS 493.

N. D.—Gunderson v. Holland, 22 N. D. 258, 133 NW 546.

Pa.—Roberts v. Dauphin Deposit Bank, 19 Pa. 71.

S. C.—Vausse v. Russel, 13 S. C. L. 329.

[a] **For a freehold illegally distrained** replevin will not lie. Vausse v. Russel, 13 S. C. L. 329.

[b] **Leasehold interest.**—Nichols v. Mase, 94 N. Y. 160 [mod 25 Hun 640].

[c] **The certificates of location** under a patent, issued in pursuance of the act of congress of June 2, 1858, relating to the location of private land grants, being hereditaments, replevin would not lie to recover them. Walker v. Daly, 80 Wis. 222, 49 NW 812.

[d] **Culverts** placed in county roads cease to be personal property and cannot be replevied. Dixie Culvert Mfg. Co. v. Perry County, 178 Ark. 454, 12 SW (2d) 10.

Cross references:

Property attached to or severed from realty see infra §§ 18–23.

Recovery of fixtures see Fixtures § 128.

Title to real estate as within scope of inquiry see infra § 274.

69. Lazord v. Wheeler, 22 Cal. 139, 142; Asparren v. Ferrel, 44 Nev. 157, 191 P 571.

For goods in custody of another court see Courts § 646.

70. Eddy v. Davis, 35 Vt. 247 (holding that the term "goods" in Comp. St. c 33 §§ 1, 14 [Gen. St. p 320 § 13], providing that the action of replevin may be maintained for goods unlawfully taken or detained from the owner thereof, applies to animate as well as inanimate movable property, and therefore cattle are repleviable).

Cattle impounded see Animals §§ 644–652.

[a] **Pet cat.**—Livengood v. Markusson, 31 Oh. A. 183, 164 NE 61.

[b] **Logs** cast upon another's land by flood waters may be replevied by their owner. Maulsby v. Cook, 134 Wash. 133, 235 P 23.

71. Ashton v. Heydenfeldt, 124 Cal. 14, 56 P 624.

72. Bell v. California Bank, 153 Cal. 234, 94 P 889; Ashton v. Heydenfeldt, 124 Cal. 14, 56 P 624; Winterburn v. Sheriff, 61 Cal. A. 531, 215 P 406.

73. Burr v. Daugherty, 21 Ark. 559.

74. Vogt Mfg., etc., Co. v. Oettinger, 88 Hun 83, 34 NYS 729, 2 NYAnnot Cas 275.

75. **Time of valuation of property for ascertainment of damages** see infra §§ 366–368.

76. See infra § 322.

77. Williams v. Logue, 154 Miss. 74, 122 S 490.

[a] **Maturity of calf.**—A calf worth eight dollars which has grown up to be a cow worth seventy-five dollars may be recovered where defendant obtained transfer of the calf to him by plaintiff by active fraud. Williams v. Logue, 154 Miss. 74, 122 S 490.

78. Bachman-Bechtel Brewing Co. v. Gehl, 154 App. Div. 849, 139 NYS 807.

79. Cogen v. U. S., 24 F. (2d) 308 [certiorari granted 277 U. S. 579, 48 SCt 436, 72 L. ed. 997]; Gibbs v. Usher, 10 F. Cas. No. 5,387, Holmes 348; Bachman-Bechtel Brewing Co. v. Gehl, 154 App. Div. 849, 139 NYS 807.

[a] **Documents or writings held recoverable.**—(1) Insurance policies. Harris v. Harris, 43 Ark. 535. (2) Record books of corporations. Southern Plank Road Co. v. Hixon, 5 Ind. 165. (3) Parish records. Sawyer v. Baldwin, 11 Pick. (Mass.) 492; Stebbins v. Jennings, 10 Pick. (Mass.) 172. (4) Books of office of a public officer. Hammond v. McLay, 10 CanLJ (Ont.) 269. (5) Liquor tax certificate. Bachman-Bechtel Brewing Co. v. Gehl, 154 App. Div. 849, 139 NYS 807. (6) Verified claims against an estate. Willis v. Marks, 29 Or. 493, 45 P 293. (7) A contract assigning an interest in a patent. Geary v. Prudhomme, 117 Or. 165, 243 P 101. (8) Certificates of stock. Opperman v. Citizens' Bank, 44 Ind. A. 401, 85 NE 991; Smith v. Downey, 8 Ind. A. 179, 34 NE 823, 35 NE 568, 52 AmSR 467. (9) County warrant. Saunders v. Jordan, 54 Miss. 428. (10) Land scrip. Wright v. Battley, 15 Man. 322.

80. Christenson v. Hanna, 183 Ill. A. 115; Wilson v. Rybolt, 17 Ind. 391, 79 AmD 486; Campbell v. Brooks, 93 Miss. 853, 47 S 545, 20 LRANS 507, 17 AnnCas 1017; Bridgers v. Ormond, 148 N. C. 375, 62 SE 422; Pasterfield v. Sawyer, 132 N. C. 258, 43 SE 799.

[a] **Proof of value necessary.**—In replevin to recover a deed its value must be proved, and the failure to do so justifies a dismissal of the action. Flannigan v. Goggins, 71 Wis. 28, 36 NW 846.

81. Fla.—Holder v. Volusia County Bank, etc., Co., 95 Fla. 882, 116 S 861.

Ill.—Christenson v. Hanna, 183 Ill. A. 115.

Miss.—Campbell v. Brooks, 93 Miss. 853, 47 S 545, 20 LRANS 507, 17 Ann Cas 1017.

N. Y.—Walden v. Feller, 99 Misc. 576, 164 NYS 493, 494 [cit Cyc].

N. C.—Pasterfield v. Sawyer, 132 N. C. 258, 43 SE 799; Hooker v. Latham, 118 N. C. 179, 23 SE 1004.

Pa.—Smithson v. Johnston, 23 Pa. Dist. 68, 40 Pa. Co. 522, 526 [cit Cyc].

Wis.—Flannigan v. Goggins, 71 Wis. 28, 36 NW 846.

[a] **Rule applied.**—(1) Although replevin will lie merely to recover possession of a specific paper, and not to test title to land conveyed, it will not lie for the unlawful detention of a title deed, where there is dispute about its delivery, and the controversy involves determination of title to land. Walden v. Feller, 99 Misc. 576, 164 NYS 493 (plaintiff cannot maintain replevin to recover possession of paper, claimed to have been executed and delivered by defendant, creating in plaintiff a life estate in

title, is that of the delivery of the deed.[82]

[§ 9] 3. **Bills, Notes, Checks, Bonds, or Certificates of Deposit.** A promissory note is personal property, within the meaning of the various statutes, and may be recovered in an action of replevin.[83] Replevin likewise lies for the recovery of a check,[84] bill of exchange,[85] a bond,[86] or certificate of deposit.[87] However, after a check has been paid at bank and returned canceled to the drawer, being held by him only as a voucher, the drawer cannot resort to the action of replevin for the check, to enforce a claim he may have to be paid the amount of it by the payee.[88]

[§ 10] 4. **Money or Scrip.** The general rule is that money is not the subject of an action of replevin,[89] unless it is so marked or labeled as to be capable of identification.[90]

Savings accounts, as represented by a pass book admitted to be in defendant's possession, may be recovered in replevin.[91]

[§ 11] 5. **Undivided Shares in Property.**[92] The general rule is undisputed that replevin lies only for specific property, capable of identification or separation so as to be seized in kind,[93] and cannot be maintained for an undivided interest or share,[94] except in cases of fraud or wrongful confusion of property.[95] A further exception is made, by some authorities, where the property sought be replevied consists of a part of a larger mass of the same nature and quality which can be easily divided into aliquot parts.[96]

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realty). (2) Replevin does not lie to enforce delivery of deed from vendors to purchaser. Holder v. Volusia County Bank, etc., Co., 95 Fla. 882, 116 S 861.

[82] Simmonsen v. Curtis, 43 Minn. 539, 45 NW 1135.

[83] Ind.—Bush v. Croomes, 125 Ind. 14, 24 NE 81.

Iowa.—Sigler v. Hidy, 56 Iowa 504, 9 NW 374; Savery v. Hays, 20 Iowa 25, 89 AmD 511; Graff v. Shannon, 7 Iowa 508.

Ky.—Sternberg Dredging Co. v. Bondurant, 223 Ky. 668, 4 SW (2d) 686.

Mass.—Pritchard v. Norwood, 155 Mass. 539, 30 NE 80.

N. Y.—Masson v. Bovet, 1 Den. 69, 43 AmD 651; Boughton v. Bruce, 20 Wend. 234.

N. C.—Walter v. Earnhardt, 171 N. C. 731, 88 SE 753, LRA1916E 536.

S. D.—Wolfe v. Montgomery, 41 S. D. 267, 170 NW 158.

Man.—Wilton v. Manitoba Independent Oil Co., 25 Man. 628.

[a] **Paper in the form** of a promissory note, although not delivered nor supported by consideration, may be the subject of the action. Pounds v. Farmers' Union Mercantile Co., (Mo. A.) 190 SW 374.

Executed in illegal transaction see infra § 81.

[84] Haas v. Altieri, 2 Misc. 252, 21 NYS 950.

[a] **Where a certified check,** which was obtained by fraud from a bank, is cashed in good faith by a firm, and the payee, by mistake on both his part and that of the firm, fails to indorse it, the firm holds subject to all original defenses, and the bank is not liable; but it cannot maintain replevin to recover possession of the check. Goshen Nat. Bank v. Bingham, 118 N. Y. 349, 23 NE 180, 16 AmSR 765, 7 LRA 595.

[85] Smith v. Eals, 81 Iowa 235, 46 NW 1110, 25 AmSR 486.

[a] **Bill rendered void by alteration** may be replevied by the acceptor from the holder. Smith v. Eals, 81 Iowa 235, 46 NW 1110, 25 AmSR 486.

[86] Douglas v. Wolf, 6 Kan. 88; Sager v. Blain, 44 N. Y. 445.

[87] Robinson v. Stewart, 97 Mich. 454, 56 NW 853.

[88] Barnett v. Selling, 70 N. Y. 492.

[89] Ariz.—Dowdy v. Calvi, 14 Ariz. 148, 125 P 873.

Ark.—Spear v. Arkansas Nat. Bank. 111 Ark. 29, 163 SW 508, AnnCas1916A 735.

Cal.—Hillyer v. Eggers, 32 Cal. A. 764, 164 P 27.

Conn.—Lovell v. Hammond Co., 66 Conn. 500, 34 A 511.

Mo.—Pilkington v. Trigg, 28 Mo. 95; Hamilton v. Clark, 25 Mo. A. 428.

Mont.—Kramlich v. Tullock, 84 Mont. 601, 277 P 411.

N. Y.—Sager v. Blain, 44 N. Y. 445.

[a] **Scrip.**—A party cannot recover scrip of which the legal title is in defendant, by plaintiff's permission, in an action of replevin, or of claim and delivery, which is of the same legal nature. If plaintiff desires the identical scrip his remedy is in equity, and if he desires damages only he may maintain an action on the case. Wheeler v. Allen, 51 N. Y. 37 [aff 49 Barb. 460].

[90] Ariz.—Dowdy v. Calvi, 14 Ariz. 148, 125 P 873.

Cal.—Sharon v. Nunan, 63 Cal. 234; Skidmore v. Taylor, 29 Cal. 619; Griffith v. Bogardus, 14 Cal. 410; Hillyer v. Eggers, 32 Cal. A. 764, 164 P 27.

Ind. T.—Eddings v. Boner, 1 Ind. T. 173, 38 SW 1110.

Mo.—Hamilton v. Clark, 25 Mo. A. 428.

Mont.—Kramlich v. Tullock, 84 Mont. 601, 277 P 411 [cit Cyc].

N. Y.—Graves v. Dudley, 20 N. Y. 76.

Oh.—Knapp v. Springmeier, 7 Oh. Dec. (Reprint) 570, 3 CincLBul 1122.

[a] **Identification sufficient to support action.**—(1) Money sealed up in a buckskin bag (Skidmore v. Taylor, 29 Cal. 619; Griffith v. Bogardus, 14 Cal. 410), (2) or a canvas bag (Sharon v. Nunan, 63 Cal. 234), (3) or in a money belt sufficiently described (Eddings v. Boner, 1 Ind. T. 173, 38 SW 1110), (4) or money which is marked or in a parcel (Knapp v. Springmeier, 7 Oh. Dec. (Reprint) 570, 3 CincLBul 1122).

[91] Eaton v. Blood, 201 Iowa 834, 208 NW 508, 44 ALR 1516.

[92] **Right of joint owner or tenant in common to replevy chattel** see infra § 52.

[93] See infra § 12.

[94] Ark.—Moseley v. Cheatham, 62 Ark. 133, 34 SW 543; Titsworth v. Frauenthal, 52 Ark. 254, 12 SW 498; Hart v. Morton, 44 Ark. 447; Washington v. Love, 34 Ark. 93; Ward v. Worthington, 33 Ark. 830.

Colo.—Hoeffer v. Agee, 9 Colo. A. 189, 47 P 973.

D. C.—Notes v. Snyder, 55 App. 233, 4 F. (2d) 426, 427, 41 ALR 1052 [cit Cyc].

Ida.—Hull v. Hull, 1 Ida. 361.

Ill.—Low v. Martin, 18 Ill. 286; Stanley v. Robinson, 14 Ill. A. 480.

Ind.—Bowen v. Roach, 78 Ind. 361.

Iowa.—Read v. Middleton, 62 Iowa 317, 17 NW 532.

Ky.—Hibbard v. Estridge, 156 Ky. 122, 160 SW 746.

Mass.—Hackett v. Potter, 131 Mass. 50; Hart v. Fitzgerald, 2 Mass. 509, 3 AmD 75.

Mich.—Kindy v. Green, 32 Mich. 310.

Mo.—Pulliam v. Burlingame, 81 Mo. 111, 51 AmR 229; Lisenby v. Phelps, 71 Mo. 522; Kaufmann v. Schilling, 58 Mo. 218; Cross v. Hulett, 53 Mo. 397; Spooner v. Ross, 24 Mo. A. 599.

Okl.—Thomas v. Armstrong, 51 Okl. 203, 151 P 689, LRA1916B 1182; McDonald v. Bailey, 25 Okl. 849, 107 P 523, 37 LRANS 267.

Or.—Geary v. Prudhomme, 117 Or. 165, 243 P 101; Halsey v. Simmons, 85 Or. 324, 166 P 944, LRA1918A 321; Schwarz v. Lee Gon, 46 Or. 219, 80 P 110; Sharp v. Johnson, 38 Or. 246, 63 P 485, 84 AmSR 788; Phipps v. Taylor, 15 Or. 484, 16 P 171; Guille v. Fook, 13 Or. 577, 11 P 277.

Pa.—Schmoll v. Myers, 21 Pa. Dist. 14.

Tenn.—Jackson v. Stockard, 9 Baxt. 260.

Wash.—American Packing Co. v. Luketa, 98 Wash. 6, 167 P 87, 89 [cit Cyc].

[a] **Rule applied.**—(1) Replevin will not lie for an undivided share of a growing crop. Read v. Middleton, 62 Iowa 317, 17 NW 532. (2) A part owner of a ship cannot maintain replevin for his undivided part, although he owns a major interest. Hackett v. Potter, 131 Mass. 50.

[95] Low v. Martin, 18 Ill. 286; Stanley v. Robinson, 14 Ill. A. 480; American Packing Co. v. Luketa, 98 Wash. 6, 167 P 87, 89 [cit Cyc]. And see infra § 12.

[96] Kan.—Pitman v. Baumstark, 63 Kan. 69, 64 P 968.

Minn.—Johnson v. Stone, 111 Minn. 228, 126 NW 720; Ellingboe v. Brakken, 36 Minn. 156, 30 NW 659.

Mo.—Kaufmann v. Schilling, 58 Mo. 218; Huff v. Henry, 57 Mo. A. 341.

Nebr.—Fines v. Bolin, 36 Nebr. 621, 54 NW 990.

Okl.—El Reno First Nat. Bank v.

It seems, however, that if the character of the property is so essentially changed by the mixture that one aliquot part would not be the equivalent of another, the rule is otherwise.[97]

[§ 12] **6. Commingled Goods.** Generally, where property cannot be identified or separated so as to be seized in kind, replevin will not lie;[98] however, under statutes allowing the alternative recovery of the property or the value thereof, it has been held that an action for possession may be maintained in such a case.[99] Further, where goods are mixed, and are of the same nature and value, although not capable of an actual separation by identifying each particle, yet if a division can be made of equal value, then each party may claim his aliquot part, and enforce his right in an action of replevin;[1] although the contrary has been held,[2] where defendant, with fraudulent intent, takes property of plaintiff and intermingles it with property of his own so that they cannot be distinguished, plaintiff may maintain replevin for at least his share thereof.[3] In such cases the owner is allowed to take his own share of the bulk, kind for kind and measure for measure.[4] If the mixture occurs through plaintiff's fault, he is not entitled to maintain replevin for his share of the property,[5] but only for such part thereof as he can identify as his own.[6]

[§ 13] **7. Articles Manufactured from Material Taken.** If property be taken from the possession of the rightful owner by a willful trespasser or thief, who manufactures or converts it into a different article, the manufactured article, if it can be identified in its improved form, may be retaken by replevin from the wrongdoer,[7] or from a purchaser thereof whether he be an innocent purchaser[8] or one having notice,[9] because the wrongdoer has no title which he can convey,[10] however great the change that may be wrought;[11] and this is the rule of the civil as well as the common law.[12] The new product, in its improved state, belongs to the owner of the original materials, provided it be proved to have been made from them.[13] To authorize replevin for chattels so manufactured it is of course necessary that their

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Ball, 87 Okl. 162, 209 P 322.

Or.—Halsey v. Simmons, 85 Or. 324, 166 P 944, LRA1918A 321.

And see infra § 12.

[97] Schwarz v. Lee Gon, 46 Or. 219, 80 P 110.

[98] Hart v. Morton, 44 Ark. 447; Ward v. Worthington, 33 Ark. 830; Low v. Martin, 18 Ill. 286; Stanley v. Robinson, 14 Ill. A. 480; Kaufmann v. Schilling, 58 Mo. 218; Huff v. Henry, 57 Mo. A. 341; Halpin v. Stone, 78 Wis. 183, 47 NW 177.

[99] Clay, etc., Co. v. Martinez, 74 Colo. 10, 218 P 903.

[a] **Illustration.**—It is no defense to an action to recover possession of sheep bailed that the sheep cannot be identified. If replevin will not lie, trover will, and the code action for possession of property allows the alternative of recovering the property or its value. Clay, etc., Co. v. Martinez, 74 Colo. 10, 218 P 903.

[1] Ark.—Rust Land, etc., Co. v. Isom, 70 Ark. 99, 66 SW 434, 91 AmSR 68.

Cal.—Adams v. Gorham, 6 Cal. 68.

Iowa.—Read v. Middleton, 62 Iowa 317, 17 NW 532.

Kan.—Piazzek v. White, 23 Kan. 621, 33 AmR 211.

Mass.—Ryder v. Hathaway, 21 Pick. 298; Gardner v. Dutch, 9 Mass. 427. But see Scudder v. Worster, 11 Cush. 573 (holding certain barrels of pork not sufficiently specified or separated).

Minn.—Stone v. Quaal, 36 Minn. 46, 29 NW 326.

Mo.—Kaufmann v. Schilling, 58 Mo. 218; Mine La Motte Lead, etc., Co. v. White, 106 Mo. A. 222, 80 SW 356; Huff v. Henry, 57 Mo. A. 341.

Nebr.—Grimes v. Cannell, 23 Nebr. 187, 36 NW 479.

N. Y.—Kimberly v. Patchin, 19 N. Y. 330, 75 AmD 334.

Pa.—Wilkinson v. Stewart, 85 Pa. 255; Henderson v. Lauck, 21 Pa. 359; Root v. Hershey, 9 Pa. Dist. & Co. 54.

Wis.—Bent v. Hoxie, 90 Wis. 625, 64 NW 426; Halpin v. Stone, 78 Wis. 183, 47 NW 177; Eldred v. Oconto Co., 33 Wis. 133; Young v. Miles, 20 Wis. 615.

[a] **Grain.**—(1) Where grain belonging to different owners has been stored in mass with their consent, each may, if necessary for the maintenance of his rights, maintain replevin for his share (Piazzek v. White, 23 Kan. 621, 33 AmR 211; Kaufmann v. Schilling, 58 Mo. 218; Grimes v. Cannell, 23 Nebr. 187, 36 NW 479; Inglebright v. Hammond, 19 Oh. 337, 53 AmD 430; Henderson v. Lauck, 21 Pa. 359; Young v. Miles, 20 Wis. 615), (2) subject to deduction of his proportion of loss or waste occurring to it while so in mass (Young v. Miles, supra).

[b] **Lumber.**—(1) Replevin will lie for lumber, although it cannot be identified because of its being intermixed with other lumber of the same kind and value. Rust Land, etc., Co. v. Isom, 70 Ark. 99, 66 SW 434, 91 AmSR 68; Mine La Motte Lead, etc., Co. v. White, 106 Mo. A. 222, 80 SW 356. (2) The owner of the lumber manufactured from logs which the manufacturer had mingled with his own logs of the same quality may replevy out of the common mass of the lumber manufactured from all of such logs a quantity not exceeding his contribution thereto. Bent v. Hoxie, 90 Wis. 625, 64 NW 426.

[c] **When cotton has been innocently mixed and baled** it has been held that replevin will not lie for part of the bale, since division in kind cannot be made without injury to the other party. For if the bale be torn to pieces the cotton would have to be rebaled at additional expense. Rust Land, etc., Co. v. Isom, 70 Ark. 99, 66 SW 434, 91 AmSR 68; McKennon v. May, 39 Ark. 442.

[2] Hull v. Hull, 1 Ida. 361; Low v. Martin, 18 Ill. 286.

[3] U. S.—Schulenberg v. Harriman 21 Wall. 44, 22 L. ed. 551 [aff 21 F. Cas. No. 12,486, 2 Dill. 398].

Me.—Wingate v. Smith, 20 Me. 287.

Miss.—Peterson v. Polk, 67 Miss. 163, 6 S 615.

Wis.—Stearns v. Raymond, 26 Wis. 74.

Can.—McDonald v. Lane, 7 Can. S. C. 462.

N. B.—Des Brisay v. Mooney, 7 N. B. 53.

[4] Kaufmann v. Schilling, 58 Mo. 218; Huff v. Henry, 57 Mo. A. 341.

[5] Williams v. Morrison, 32 Fed. 177; Dillingham v. Smith, 30 Me. 370.

[6] Dillingham v. Smith, 30 Me. 370.

[7] Ark.—McKinnis v. Little Rock, etc., R. Co., 44 Ark. 210.

Me.—Wingate v. Smith, 20 Me. 287.

Miss.—Heard v. James, 49 Miss. 236.

Mo.—Gray v. Parker, 38 Mo. 160.

N. Y.—Silsbury v. McCoon, 3 N. Y. 379, 53 AmD 307; Clemmons v. Brinn, 36 Misc. 157, 72 NYS 1066 [aff 35 Misc. 844, 72 NYS 1097]; Brown v. Sax, 7 Cow. 95; Betts v. Lee, 5 Johns. 348, 4 AmD 368.

Pa.—Snyder v. Vaux, 2 Rawle 423.

[a] **Reasons for rule.**—(1) The law will not permit any man to take advantage of his own wrong. Gray v. Parker, 38 Mo. 160. (2) And if a willful trespasser should be able to protect himself by any change which he might communicate to the shape or form of the materials, an unbounded license would be given to plunder and the security of personal property would be exceedingly diminished. Snyder v. Vaux, 2 Rawle (Pa.) 423.

[b] **Applications of rule.**—(1) The rule has been applied in the case of timber converted into cross ties (Stotts v. Brookfield, 55 Ark. 307, 18 SW 179; McKinnis v. Little Rock, etc., R. Co., 44 Ark. 210), (2) corn into whisky (Silsbury v. McCoon, 3 N. Y. 379, 53 AmD 307), (3) trees or logs converted into boards or plank (Davis v. Easley, 13 Ill. 192; Wingate v. Smith, 20 Me. 287; Brown v. Sax, 7 Cow. (N. Y.) 95), (4), or into rails and posts (Snyder v. Vaux, 2 Rawle (Pa.) 423), (5) or into staves (Heard v. James, 49 Miss. 236).

[8] McKinnis v. Little Rock, etc., R. Co., 44 Ark. 210; Strubbee v. Cincinnati R. Co., 78 Ky. 481, 39 AmR 251; Silsbury v. McCoon, 3 N. Y. 379, 53 AmD 307.

[9] McKinnis v. Little Rock, etc., R. Co., 44 Ark. 210.

[10] McKinnis v. Little Rock, etc., R. Co., supra; Gray v. Parker, 38 Mo. 160; Silsbury v. McCoon, 3 N. Y. 379, 53 AmD 307.

[11] Gray v. Parker, 38 Mo. 160.

[12] Silsbury v. McCoon, 3 N. Y. 379, 53 AmD 307 [quot Justinian Inst. Dig. lib 10 tit 4 leg. 12 § 3].

[13] Silsbury v. McCoon, 3 N. Y. 379, 53 AmD 307.

identity be shown;[14] and in all cases where the new product cannot be identified by mere inspection, the original must be traced by the testimony of witnesses from hand to hand through the process of transformation.[15] Although the contrary has been suggested,[16] the weight of authority is to the effect that where the wrongful taking was in good faith, and not an intentional injury, the owner of the original material cannot maintain replevin after it has undergone a transformation which converts it into an article substantially different.[17] Likewise, if property wrongfully taken afterward comes into the hands of an innocent holder, who converts it into an article of different species, so that its identity is destroyed, the original owner cannot maintain replevin for it.[18] But if property wrongfully taken comes into the hands of one who has actual or constructive notice of the trespass, and he converts it into a different article, the original owner may maintain replevin for it if he can identify it.[19]

[§ 14] **8. Property on Defendant's Person.** Property worn on the person cannot be seized on a writ of replevin,[20] and it makes no difference that it was worn for the purpose of keeping it beyond the reach of legal process,[21] but an action for recovery of such property may be maintained where no order of delivery is made and the article is not taken from the person.[22]

[§ 15] **9. Property Distrained for Rent.** In the absence of any statute to the contrary[23] it has been held that property taken from its owner on a distress for rent against another may be recovered in replevin.[24] Replevin will not lie against one who has levied a distress warrant against property where the property remains in the actual possession of its owner.[25] The remedies of a tenant or owner of property for wrongful distress for rent, including the remedy of replevin, his right to pursue them, and defenses thereto are treated at length elsewhere in this work.[26]

[§ 16] **10. Slaves.** Replevin, it was held, would lie for the recovery of slaves,[27] but not for a free negro.[28]

[§ 17] **11. Dead Bodies.** As there is no right of property, in a strict sense or in the ordinary use of the term, in the dead body of a human being,[29] replevin will not lie for a corpse[30] or for a coffin, with the corpse inclosed within it, after burial.[31]

[§ 18] **B. Property Attached to, or Severed from, Realty[32]—1. Property Severed from Land in General.** The owner of realty may maintain replevin for chattels wrongfully severed therefrom or for articles wrongfully severed therefrom which by reason of the severance become personalty,[33] unless the land is held in adverse possession.[34] It is not to be un-

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14. Wingate v. Smith, 20 Me. 287; Gray v. Parker, 38 Mo. 160; Snyder v. Vaux, 2 Rawle (Pa.) 423.

[a] **Action for conversion,** instead of replevin, is the proper remedy if the identity cannot be shown. Gray v. Parker, 38 Mo. 160.

15. Silsbury v. McCoon, 3 N. Y. 379, 53 AmD 307.

16. Stotts v. Brookfield, 55 Ark. 307, 18 SW 179.

17. Wetherbee v. Green, 22 Mich. 311, 7 AmR 653; Heard v. James, 49 Miss. 236; Gray v. Parker, 38 Mo. 160; Potter v. Mardre, 74 N. C. 36.

[a] **Application of rule.**—The doctrine was applied where the property taken, a tree, was manufactured into a canoe. Potter v. Mardre, 74 N. C. 36.

18. Silsbury v. McCoon, 3 N. Y. 379, 53 AmD 307; Meyers v. Gerhart, 54 Wash. 657, 103 P 1114.

[a] **Reason for rule.**—In a case of this kind, the change in the species of the chattel is not an intentional wrong to the original owner. It is therefore regarded as a destruction or consumption of the original materials, and the true owner is not permitted to trace their identity into the manufactured article for the purpose of appropriating to his own use the labor and skill of the innocent occupant who wrought the change; but he is put to his action for damages as for a thing consumed and may recover its value as it was when the conversion or consumption took place. Silsbury v. McCoon, 3 N. Y. 379, 53 AmD 307.

19. Nelson v. Graff, 12 Fed. 389.

20. Maxham v. Day, 16 Gray (Mass.) 213, 77 AmD 409.

[a] **Reason for rule.**—"Practical jurisprudence looks, in the application of remedies, to the peace, good order and decorum of society. The evils which would flow from the unrestricted use of a civil process to search the person and to seize from it articles of dress or use or ornament, are obvious and manifold. It would bring the officer of law in direct contact with the citizen, under circumstances well calculated to excite irritation and anger, and lead directly to breaches of the peace. It would place in the hands of wicked and evil disposed persons the means of annoyance and injury, and the power to interfere wantonly and without just cause with the most sacred rights of the person." Maxham v. Day, 16 Gray (Mass.) 213, 219, 77 AmD 409.

21. Maxham v. Day, 16 Gray (Mass.) 213, 77 AmD 409.

22. Sibeck v. McTiernan, 94 Ark. 1, 125 SW 136.

23. See statutory provisions.

24. Esterly Mach. Co. v. Spencer, 147 Pa. 466, 23 A 774; Hatzel Furniture Co. v. Thompson, 67 Pa. Super. 170; Thomas v. Baner, 6 Pa. Dist. 177; Lardner v. Mutual L. Ins. Co., 32 Wkly NC (Pa.) 62 [overr Power v. Howard, 22 WklyNC (Pa.) 475; Southern R. Co. v. Sarratt, 58 S. C. 98, 36 SE 504.

[a] **Thus** where a distraint warrant was a fraud to circumvent the effect of a replevin suit and was in fact, although antedated, subsequent to seizure under replevin writ, the goods were subject to the replevin writ. Hatzel Furniture Co. v. Thompson, 67 Pa. Super. 170.

25. Johnson v. Prussing, 4 Ill. A. 575.

26. See Landlord and Tenant §§ 1726-1754.

27. Gullett v. Lamberton, 6 Ark. 109.

[a] **Statutes making slaves real estate** do not affect the right to maintain replevin, since such statutes make slaves real estate only for the purpose of descent and conveyance. Gullett v. Lamberton, 6 Ark. 109.

28. Morris v. Cannon, 1 Del. 220.

29. See Dead Bodies § 2.

30. Keyes v. Konkel, 119 Mich. 550, 78 NW 649, 75 AmSR 423, 44 LRA 242.

31. Guthrie v. Weaver, 1 Mo. A. 136.

32. **Fixtures** see Fixtures § 128.

33. U. S.—Nelson v. Graff, 12 Fed. 389.

Cal.—Kimball v. Lohmas, 31 Cal. 154.

Ill.—Ogden v. Stock, 34 Ill. 522, 85 AmD 332; Anderson v. Hapler, 34 Ill. 436, 85 AmD 318.

Iowa.—Dubuque Cong. Soc. v. Fleming, 11 Iowa 533, 79 AmD 511.

Ky.—Hail v. Reed, 15 B. Mon. 479.

Minn.—Washburn v. Cutter, 17 Minn. 361.

Mo.—Meeks v. Clear Jack Min. Co., 141 Mo. A. 648, 124 SW 1084.

N. Y.—Johnson v. Elwood, 53 N. Y. 431.

Pa.—Green v. Ashland Iron Co., 62 Pa. 97; Harlan v. Harlan, 15 Pa. 507, 53 AmD 612; Coomalt v. Stanley, 3 PaLJR 389.

But see Hull v. Hull, 1 Ida. 361 (which contains expressions in conflict with this view).

34. Cal.—Emerson v. Whitaker, 83 Cal. 147, 23 P 285; Martin v. Thompson, 62 Cal. 618; Page v. Fowler, 28 Cal. 605; Halleck v. Mixer, 16 Cal. 574.

Ida.—Hull v. Hull, 1 Ida. 361.

Ill.—Anderson v. Hapler, 34 Ill. 436, 85 AmD 318.

Minn.—Washburn v. Cutter, 17 Minn. 361.

Mo.—McAllister v. Lawler, 32 Mo. A. 91.

Pa.—Brown v. Caldwell, 10 Serg. & R. 114, 13 AmD 660.

derstood, however, that an action of replevin can be maintained only when plaintiff can make title to the chattel by making title to the land from which it was severed.[35] The rule does not exclude proof of title on the part of plaintiff where no question of adverse possession is involved, for in all cases where the owner of land sues for property severed from the freehold, the action must rest upon the proof in the first instance of title or right of possession to the premises in plaintiff, otherwise no action for the recovery of such property would ever lie.[36]

[§ 19] **2. Buildings.**[37] Since the title to land cannot be litigated in an action of replevin,[38] the general rule is that replevin cannot be maintained for the recovery of possession of a house attached to the freehold.[39] However, a house or building, which by the express contract of the parties, or by implied agreement, is treated by all the interested parties as personalty, may be the subject of replevin;[40] and where a house has been severed from the realty, the owner may maintain replevin for its recovery.[41]

[§ 20] **3. Trees and Timber.** The owner or person lawfully in possession of land may maintain replevin for wood and timber unlawfully severed from the soil,[42] even where it has been converted into a manufactured article, so long as it is capable of identification.[43] It is essential, however, that the land should not be in the adverse possession of another, whether defendant or a third person.[44] Where the owner of land makes a valid sale in writing of growing trees thereon, they become chattels in contemplation of law, and if a person who subsequently buys the land cuts and removes the trees, the purchaser of the trees may maintain replevin therefor.[45]

[§ 21] **4. Growing or Standing Crops.** The general rule is that replevin will lie for growing or standing crops by the owner thereof from whom they are unlawfully detained,[46] and this without regard to whether the crops are growing or, having matured, have ceased to derive any nutriment from the soil.[47] The rule is otherwise, however, when the land upon which the crop stands is held adversely to plaintiff.[48] Replevin will lie for a crop of growing fruit

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Wyo.—Gross v. Robinson, 36 Wyo. 392, 256 P 80, 57 ALR 578 [cit Cyc].

[a] **Reason for rule.**—"The personal action cannot be made the means of litigating and determining the title to the real property as between conflicting claimants." Halleck v. Mixer, 16 Cal. 574, 579.

[35] Harlan v. Harlan, 15 Pa. 507, 53 AmD 612.

[36] Halleck v. Mixer, 16 Cal. 574; Harlan v. Harlan, 15 Pa. 507, 53 AmD 612; Elliott v. Powell, 10 Watts (Pa.) 453, 36 AmD 200.

[37] **Fixtures generally** see Fixtures § 128.

[38] See supra § 7.

[39] Cal.—Hines v. Good, 128 Cal. 38, 60 P 527, 79 AmSR 22.

Colo.—Eddy v. Hall, 5 Colo. 576.

Ill.—Salter v. Sample, 71 Ill. 430.

Nebr.—Oskamp v. Crites, 37 Nebr. 837, 56 NW 394; McCormick v. Riewe, 14 Nebr. 509, 16 NW 832, 11 Nebr. 261, 9 NW 88.

S. C.—Vausse v. Russel, 13 S. C. L. 329.

[a] **Illustration of rule.**—Where defendant was in actual possession of certain real estate, claiming title in good faith, and sold a house thereon to another defendant, who removed it from the grounds, plaintiff, claiming to be the true owner of the realty, cannot bring an action of claim and delivery for the house. Hines v. Good, 128 Cal. 38, 60 P 527, 79 AmSR 22.

[b] **Sale of building with right to remove.**—The sale of a building affixed to the realty with the right to sever and remove it does not operate to give it the character of personalty prior to severance, and on the subsequent refusal of the vendor to permit severance and removal replevin will not lie for possession. Eddy v. Hall, 5 Colo. 576.

[40] Dak.—Myrick v. Bill, 3 Dak. 284, 17 NW 268.

Ill.—Ballou v. Jones, 37 Ill. 95.

Kan.—Rush County v. Stubbs, 25 Kan. 322.

Mich.—Harris Bros. Co. v. Nichols, 247 Mich. 89, 225 NW 525 [cit Cyc].

Miss.—Weathersby v. Sleeper, 42 Miss. 732.

Nebr.—McDaniel v. Lipp, 41 Nebr. 713, 60 NW 81; Waters v. Reuber, 16 Nebr. 99, 19 NW 687, 49 AmR 710; Mills v. Redick, 1 Nebr. 437.

N. J.—Brearley v. Cox, 24 N. J. L. 287.

Or.—Burdick v. Tum-A-Lum Lumber Co., 91 Or. 417, 179 P 245.

Wash.—Page v. Urick, 31 Wash. 601, 72 P 454, 96 AmSR 924.

Wis.—Fitzgerald v. Anderson, 81 Wis. 341, 51 NW 554.

[a] **Warehouse.**—Although plaintiff in replevin for a warehouse has not been granted a right to use the land on which the building is situated for warehouse purposes, he may recover if the building is in fact personal property. Burdick v. Tum-A-Lum Lumber Co., 91 Or. 417, 179 P 245.

[41] Ill.—Dorr v. Dudderar, 88 Ill. 107; Ogden v. Stock, 34 Ill. 522, 85 AmD 332.

Ind.—Foy v. Reddick, 31 Ind. 414.

Me.—Luce v. Ames, 84 Me. 133, 24 A 720.

Mich.—Cutter v. Wait, 131 Mich. 508, 91 NW 753; Michigan Mut. L. Ins. Co. v. Cronk, 93 Mich. 49, 52 NW 1035.

Wis.—Huebschmann v. McHenry, 29 Wis. 655.

[42] U. S.—Cloquet Lumber Co. v. Burns, 207 Fed. 40, 124 CCA 600.

Cal.—Kimball v. Lohmas, 31 Cal. 154; Halleck v. Mixer, 16 Cal. 574.

Fla.—Sanborn v. Franklin County Lumber Co., 55 Fla. 389, 46 S 85.

Ill.—Anderson v. Hapler, 34 Ill. 436, 85 AmD 318.

Minn.—Washburn v. Cutter, 17 Minn. 361.

Pa.—Brewer v. Fleming, 51 Pa. 102; Coomalt v. Stanley, 3 PaLJR 389.

[a] **Homesteader,** who entered on land of the United States to acquire it under the homestead laws, may maintain replevin although the land was unsurveyed, and although he had made no entry in the land office. Cloquet Lumber Co. v. Burns, 207 Fed. 40, 124 CCA 600 (plaintiff's right of action is not defeated by his subsequently acquiring title to the land from the government by the use of scrip, he, when applying to enter the land with scrip, not having abandoned it, but still insisting on his homestead right; the government, under these circumstances, having no right of action for the logs or their value).

Right of bona fide purchaser to maintain replevin for timber previously sold but cut after delivery of check see Vendor and Purchaser [39 Cyc 1776].

[43] See supra § 13.

[44] Anderson v. Hapler, 34 Ill. 436, 85 AmD 318; Yoakum v. Davis, 162 Mo. A. 253, 144 SW 877; Clarke v. Clyde, 25 Wash. 661, 66 P 46.

[45] Warren v. Leland, 2 Barb. (N. Y.) 613.

[46] Ark.—Cannon v. Matthews, 75 Ark. 336, 87 SW 428, 112 AmSR 64, 69 LRA 827.

Ill.—Reed v. Johnson, 14 Ill. 257.

Ind.—Matlock v. Fry, 15 Ind. 483.

Iowa.—Hecht v. Dettman, 56 Iowa 679, 7 NW 495, 10 NW 241, 41 AmR 131.

Mo.—Garth v. Caldwell, 72 Mo. 622; Stephens v. Steckdaub, (A.) 217 SW 871; Salmon v. Fewell, 17 Mo. A. 118.

[a] **Rule applied.**—Strawberry plants may be recovered in replevin, although attached to the soil. Cannon v. Matthews, 75 Ark. 336, 87 SW 428, 112 AmSR 64, 69 LRA 827, 5 AnnCas 478.

[47] Garth v. Caldwell, 72 Mo. 622; Stephens v. Steckdaub, (Mo. A.) 217 SW 871.

[48] Doebbeling v. Quimby, 221 Mo. A. 1178, 299 SW 629; Gross v. Robinson, 36 Wyo. 392, 256 P 80, 57 ALR 578.

[a] **Rule applied.**—A trustee for creditors claiming land might not replevin mature unharvested crops raised by assignor. Gross v. Robinson, 36 Wyo. 392, 256 P 80, 57 ALR 578.

sold while still upon the trees.[49]

[§ 22] **5. Harvested Crops.** Where crops have been wrongfully severed from the land of its owner, he may maintain replevin therefor if in possession of the land;[50] but in accordance with well settled principles[51] the action cannot be maintained if the land is in the adverse possession of another.[52] The remedy it has been said is ejectment and trespass for mesne profits.[53] However, the fact that a defendant in ejectment reënters and harvests the crop does not prevent plaintiff from replevying it.[54] Where a cropper takes part of the crop before any division is made, the landlord may replevy the part so taken.[55]

[§ 23] **6. Minerals.** Replevin will lie for the recovery of ore taken wrongfully from a mine[56] or slate so taken from a quarry.[57] But replevin will not lie until the mineral has been severed from the realty.[58]

[§ 24] **C. Property in Custody of Law—1. In General.** It is a well-settled doctrine of the common law that replevin will not lie for goods in the custody of the law,[59] any interference with goods so held being considered an infringement of the prerogative of the court and a contempt thereof.[60] However, the rule does not apply where process by virtue of which property is seized is void.[61] The seizure must be on valid and sufficient process.[62]

[§ 25] **2. Property Seized under Execution[63]—a. Right of Defendant in Execution To Bring Replevin—(1) In General.** The general rule is well settled that where property has been taken under a valid execution it cannot be replevied from the officer levying execution by defendant in the execution,[64] nor replevied by any one claiming title under him,[65] and in many jurisdictions this rule is adopted by statute.[66] Nor can he bring an action of replevin against one who is the officer's agent or depositary, the possession of the latter being none the less the custody of the law.[67] At common law it is a contempt of court issuing an execution to replevy property taken under it by the execution debtor.[68] The general rule is not in any way affected by the fact that the property seized was set apart to defendant in bankruptcy proceedings commenced after entry of the judgment on which execution issued,[69] nor by irregularities in the proceedings for the judgment on which the execution was issued;[70] nor by the neglect of the officer taking the goods on execution to make an inventory;[71] nor by the fact that the judgment on which the execution issued had been paid,[72] nor the execution satisfied,[73] or that the execution contained a recital that the judgment had been paid, as such a statement in no sense affects the formality of the writ.[74]

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[49] Simmons v. Williford, 60 Fla. 359, 53 S 452, AnnCas1912C 735.

[a] **Where an entire crop of growing oranges** is sold by the landowner, and the buyer has the right to take them from the trees, they may be regarded as personalty, so that an unlawful detention of the possession thereof by the seller may be adequately remedied by statutory action of replevin. Simmons v. Williford, 60 Fla. 359, 53 S 452, AnnCas1912C 735.

[50] Martin v. Thompson, 62 Cal. 618; Cronk v. Mulvaney, 168 Mich. 346, 134 NW 9.

[51] See supra § 18.

[52] Emerson v. Whitaker, 83 Cal. 147, 23 P 285; Martin v. Thompson, 62 Cal. 618; Pennybecker v. McDougal, 46 Cal. 661; Page v. Fowler, 28 Cal. 605; Stockwell v. Phelps, 34 N. Y. 363, 90 AmD 710; De Mott v. Hagerman, 8 Cow. (N. Y.) 220, 18 AmD 443; Renick v. Boyd, 99 Pa. 555, 44 AmR 124.

[a] **Effect of special statutory provisions.**—The rule is not affected by a statute which provides that in all actions of replevin to recover timber, lumber, coal, or "other property" severed from the realty, plaintiff shall be entitled to recover, although the title to the land from which the property severed was in dispute, provided plaintiff shows title in himself at the time of severance. Renick v. Boyd, 99 Pa. 555, 44 AmR 124.

[53] Pennybecker v. McDougal, 46 Cal. 661; Renick v. Boyd, 99 Pa. 555, 44 AmR 124.

[54] Stephens v. Steckdaub, (Mo. A.) 217 SW 871.

[55] Angell v. Egger, 6 N. D. 391, 71 NW 547; Kelly v. Rummerfield, 117 Wis. 620, 94 NW 649, 98 AmSR 951.

[56] Meeks v. Clear Jack Min. Co., 141 Mo. A. 648, 124 SW 1084.

[57] Brown v. Caldwell, 10 Serg. & R. (Pa.) 114, 13 AmD 660.

[58] Knowlton v. Culver, 2 Pinn. (Wis.) 243, 52 AmD 156, 1 Chandl. 214.

[59] U. S.—Covell v. Heymen, 111 U. S. 176, 4 SCt 355, 28 L. ed. 390; Murphy v. Tindall, 17 F. Cas. No. 9,952a, Hempst. 10.

Ark.—Hagan v. Deuell, 24 Ark. 216, 88 AmD 769.

Colo.—Wilde v. Rawles, 13 Colo. 583, 22 P 897.

Iowa.—Cooley v. Davis, 34 Iowa 128; Funk v. Israel, 5 Iowa 438.

Kan.—Karr v. Stahl, 75 Kan. 387, 89 P 669; Westenberger v. Wheaton, 8 Kan. 169.

Md.—Powell v. Bradlee, 9 Gill & J. 220; Cromwell v. Owings, 7 Harr. & J. 55.

Mass.—Cushman v. Boston Storage Warehouse Co., 207 Mass. 407, 93 NE 639; Ilsley v. Stubbs, 5 Mass. 280.

Minn.—Kelso v. Youngren, 86 Minn. 177, 90 NW 316.

Miss.—Union Motor Car Co. v. Farmer, 151 Miss. 734, 118 S 425.

Nev.—Asparren v. Ferrel, 44 Nev. 157, 191 P 571; Buckley v. Buckley, 9 Nev. 373.

N. H.—Smith v. Huntington, 3 N. H. 76, 14 AmD 331.

N. C.—McLeod v. Oates, 30 N. C. 387.

Okl.—Thompson v. Grove, 72 Okl. 290, 180 P 553, 556 [cit Cyc].

Pa.—York v. Marshall, 257 Pa. 503, 101 A 820; Pott v. Oldwine, 7 Watts 173; Zeigle v. Shaver, 2 Pa. Dist. & Co. 369; Devlin Mfg. Co. v. Reed, 37 Pa. Co. 488.

S. C.—Gist v. Cole, 11 S. C. L. 456, 10 AmD 616.

Wash.—Nasser v. Gaston, 70 Wash. 685, 127 P 470; Scott v. McGraw, 3 Wash. 675, 29 P 260.

Wis.—Byrne v. Byrne, 89 Wis. 659, 62 NW 413.

Eng.—Wilson v. Weller, 1 B. & B. 57, 5 ECL 501; Rex v. Monkhouse, Str. 1184, 93 Reprint 1116; Pritchard v. Stevens, 6 T. R. 522, 101 Reprint 681.

N. B.—Mitchell v. Davis, 39 N. B. 486.

Ont.—Samuels v. Dominion Bank, 15 OntWN 219; Scott v. McRae, 3 OntPr 16.

[a] **Reason for rule.**—(1) The reason why property in custodia legis cannot be replevied is that to permit it to be done would be to interfere with the possession before the office of the law had been performed as to the process under which it was taken. Hagan v. Deuell, 24 Ark. 216, 88 AmD 769. (2) The law will not be so inconsistent with itself as to be auxiliary or lend its aid to an act which would operate to defeat its own purposes. Powell v. Bradlee, 9 Gill & J. (Md.) 220.

[60] Cooley v. Davis, 34 Iowa 128; Funk v. Israel, 5 Iowa 438; Westenberger v. Wheaton, 8 Kan. 169; Scott v. McGraw, 3 Wash. 675, 29 P 260.

[61] Smith v. Huntington, 3 N. H. 76, 14 AmD 331; Read v. Brayton, 143 N. Y. 342, 38 NE 261; Mills v. Martin, 19 Johns. (N. Y.) 7; Marriott v. Shaw, Comyns 274, 92 Reprint 1069.

[62] Wilde v. Rawles, 13 Colo. 583, 22 P 897; Scott v. McGraw, 3 Wash. 675, 29 P 260.

[63] **Exempt property** see Exemptions § 284.

[64] Ark.—Morrison v. Berry, 170 Ark. 147, 278 SW 962; Goodrich v. Fritz, 4 Ark. 525.

Cal.—Norcross v. Nunan, 61 Cal. 640.

Ill.—Colwell v. Swick, 190 Ill. A. 369, 373 [cit Cyc].

Ind.—Miller v. Hudson, 114 Ind. 550, 17 NE 122; Louisville, etc., R. Co. v. Payne, 103 Ind. 183, 2 NE 582.

Iowa.—Young v. Evans, 118 Iowa 144, 92 NW 111; Armel v. Lendrum, 47 Iowa 535.

Kan.—McGlothlin v. Madden, 16 Kan. 466; Westenberger v. Wheaton, 8 Kan. 169.

Ky.—Philips v. Harriss, 3 J. J. Marsh. 122, 19 AmD 166; Bouldin v. Alexander, 7 T. B. Mon. 424.

Md.—Cromwell v. Owings, 7 Harr. & J. 55.

Mich.—Ferguson v. Washer, 49 Mich. 390, 13 NW 788.

Minn.—Kelso v. Youngren, 86 Minn. 177, 90 NW 316.

Mo.—Stephens v. Curtner, 205 Mo. A. 255, 222 SW 497.

N. H.—Smith v. Huntington, 3 N. H. 76, 14 AmD 331; Kellogg v. Churchill, 2 N. H. 412, 9 AmD 104.

N. J.—Hawk v. Lepple, 51 N. J. L. 208, 17 A 351, 14 AmSR 677, 4 LRA 48.

N. Y.—Keyser v. Waterbury, 7 Barb. 650; Barron v. Boyd, 1 Thomps. & C. 457; Dunham v. Wyckoff, 3 Wend. 280, 20 AmD 695; Hall v. Tuttle, 2 Wend. 475; Clark v. Skinner, 20 Johns. 465, 11 AmD 302.

N. C.—McLeod v. Oates, 30 N. C. 387.

[§ 26] **(2) Where Judgment on Which Execution Issued Is Void.** In some jurisdictions defendant in execution may maintain replevin for goods seized thereunder against the officer making the levy, where the judgment on which the execution issued is void;[75] and this is so, although the execution is regular on its face.[76] While such an execution would protect the officer when proceeded against as a wrongdoer, it cannot be made the basis of a claim of right to the property seized, without proof of a valid judgment.[77] In other jurisdictions, it is held that replevin will not lie for property seized on an execution regular on its face,[78] and where the statute requires an affidavit showing that the property was not seized on execution,[79] it is a good defense that the execution, although issued on a void judgment, was regular on its face;[80] although similar statutes have been construed to permit the action where the judgment, and therefore the execution, is void.[81]

[§ 27] **(3) Where Process Is Void on Its Face.** A writ of execution void on its face will not protect an officer who undertakes to execute it, and the execution defendant may maintain replevin against the officer for its recovery.[82]

[§ 28] **(4) Where Judgment Was Rendered after Issuance of Execution.** If at the time an execution issued, and replevin was brought by defendant in execution there was no judgment or authority for the execution whatever, a judgment subsequently entered cannot operate back upon the rights of such defendant and take away a right of possession which existed at the time his action was commenced.[83]

[§ 29] **b. Right of Stranger to Execution To Maintain Replevin—(1) In General.** In many jurisdictions it is well settled that goods or property seized under a writ of execution and not belonging to defendant in the writ may be replevied from the

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Wis.—Commercial Inv. Trust v. Frankfurth Hardware Co., 179 Wis. 21, 190 NW 1004.

Eng.—Winnard v. Foster, Lutw. 1190, 125 Reprint 660.

[a] **Reason for rule.**—(1) "The reasons for this are of that imperative nature that make the rule indispensable to the administration of the law. Execution has been called the end of the law. But it will be only the beginning, and there would be no end of the law, if after a person has established his right by judgment, the defendant's effects may be rescued from the execution at his will by suing out a writ of replevin." McLeod v. Oates, 30 N. C. 387. (2) "If a defendant in the execution, after judgment had been legally entered against him upon a full and fair trial, were tolerated in bringing his action of replevin, and by it, to replevy the goods, taken in execution there might be no end to the delays, which the defendant might thus create. Justice and the end of the law, would be effectually subdued; for, although, the defendant in the execution, and plaintiff, in the action of replevin, would fail upon the trial, and judgment would be rendered in favor of the officer, for the restoration of the goods; yet the action might be again and again renewed, and delays, without end, effected. To prevent such abuses, and such contempts of the authority of courts, to prevent the monstrous absurdity of rendering the remedies, afforded by law, with a view to redress wrongs, the means of defeating the very end to be accomplished; the defendant in an execution, who should thus pervert the action of replevin, might, and ought to be severely punished for contempt." Philips v. Harriss, 3 J. J. Marsh. (Ky.) 122, 124, 19 AmD 166 [quot with appr Westenberger v. Wheaton, 8 Kan. 169]. (3) "It would be troubling the execution awarded if the party on whom the money was to be levied should patch back the goods by a replevin." Gilbert Replevin p 122.

[b] **Rule applied.**—(1) If a joint execution issues against the principal and surety, and before exhausting the effects of the principal, the officer levies on property of the surety subject to execution, replevin is not the proper remedy of the surety. Miller v. Hudson, 114 Ind. 550, 17 NE 122. (2) Where no payment is made to the officer levying an execution, and the claim is made, but disputed, that the payment has been made to the execution plaintiff, such officer should not be held liable in replevin on his refusal to release the levy. Stephens v. Curtner, 205 Mo. A. 255, 222 SW 497.

65. Colwell v. Swick, 190 Ill. A. 369, 373 [cit Cyc]; Brown v. Loesch, 3 Ind. A. 145, 29 NE 450; Kelso v. Youngren, 86 Minn. 177, 90 NW 316.

66. See statutory provisions.

67. Keyser v. Waterbury, 7 Barb. (N. Y.) 650.

68. Philips v. Harriss, 3 J. J. Marsh. (Ky.) 122, 19 AmD 166; Cromwell v. Owings, 7 Harr. & J. (Md.) 55; Mitchell v. Roberts, 50 N. H. 486; Gilbert Replevin p 122.

69. Barron v. Boyd, 1 Thomps. & C. (N. Y.) 457.

70. Norcross v. Nunan, 61 Cal. 640.

71. Ferguson v. Washer, 49 Mich. 390, 13 NW 788.

72. Armel v. Lendrum, 47 Iowa 535.

73. Gardner v. Campbell, 15 Johns. (N. Y.) 401.

74. Kelso v. Youngren, 86 Minn. 177, 90 NW 316.

75. Ill.—White v. Jones, 38 Ill. 159; Schmieg v. Burkhardt, 215 Ill. A. 240, 245 [cit Cyc]; Colwell v. Swick, 190 Ill. A. 369, 373 [cit Cyc].

Iowa.—Balm v. Nunn, 63 Iowa 641, 19 NW 810.

Kan.—Karr v. Stahl, 75 Kan. 387, 89 P 669.

Mich.—Miller v. Davis, 241 Mich. 544, 217 NW 904; Iron Cliffs Co. v. Lahais, 52 Mich. 394, 18 NW 121; Wilson v. Martin, 44 Mich. 509, 7 NW 83; Gidday v. Witherspoon, 35 Mich. 368; Adams v. Hubbard, 30 Mich. 104; Beach v. Botsford, 1 Dougl. 199, 40 AmD 45.

Miss.—Nimocks v. McGehee, 97 Miss. 321, 52 S 626 [cit Cyc]; Breckenridge v. Johnson, 57 Miss. 371.

Nebr.—Muller v. Plue, 45 Nebr. 701, 64 NW 232.

Eng.—George v. Chambers, 11 M. & W. 149, 152 Reprint 752.

[a] **Rule applied.**—Replevin lies for property seized on an execution issued in void garnishment proceedings. Iron Cliffs Co. v. Lahais, 52 Mich. 394, 18 NW 121.

76. Schmieg v. Burkhardt, 215 Ill. A. 240, 246 [cit Cyc]; Colwell v. Swick, 190 Ill. A. 369, 373 [cit Cyc]; Adams v. Hubbard, 30 Mich. 104; Beach v. Botsford, 1 Dougl. (Mich.) 199, 40 AmD 45.

77. Adams v. Hubbard, 30 Mich. 104.

78. Cherry v. Dillard, 131 Ark. 245, 199 SW 83; Emerson v. Hopper, 94 Ark. 384, 127 SW 467, 140 AmSR 121.

79. See statutory provisions.

80. Emerson v. Hopper, 94 Ark. 384, 127 SW 467, 140 AmSR 121.

Defenses see infra § 85.

81. Schmieg v. Burkhardt, 215 Ill. A. 240.

82. Munis v. Herrera, 1 N. M. 362 (holding a bill in equity bad because of an adequate remedy at law).

83. Campbell v. Williams, 39 Iowa 646.

officer by the owner of the property,[84] and in a number of jurisdictions the replevin statutes have been held to permit the action in such case,[85] while in others the remedy is expressly provided by statutes.[86] These statutes of course have no application where plaintiff in replevin neither had nor was entitled to possession of the property at the time of the seizure under the execution.[87] Some jurisdictions, however, deny the right of a stranger to an execution to recover his property seized by an officer making the levy;[88]

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84. Cal.—Rhodes v. Patterson, 3 Cal. 469.

Colo.—Wyatt v. Freeman, 4 Colo. 14.

Del.—Sharp v. Arthurs, 6 Del. 353.

Ky.—Philips v. Harriss, 3 J. J. Marsh. 122, 19 AmD 166; Bouldin v. Alexander, 7 T. B. Mon. 424.

Ill.—Schneider v. Burke, 86 Ill. A. 160; Agnew v. Wilson, 46 Ill. A. 205; Nelson v. McIntyre, 1 Ill. A. 603. See also Cope v. Brentz, 190 Ill. A. 504.

N. J.—Hawk v. Lepple, 51 N. J. L. 208, 17 A 351, 14 AmSR 677, 4 LRA 48; Bruen v. Ogden, 11 N. J. L. 370, 20 AmD 593.

Wis.—Gallagher v. Bishop, 15 Wis. 276.

N. B.—Flanagan v. Wheten, 31 N. B. 295.

Ont.—Burke v. McWhirter, 35 U. C. Q. B. 1.

See also Mulholm v. Cheney, Add. (Pa.) 301 (stating the rule of the text to be the proper rule, although not applying to the facts).

[a] **In Arkansas.**—(1) The rule of the text has been followed (Morrison v. Berry, 170 Ark. 147, 278 SW 962; Maxey v. Cooper, 94 Ark. 296, 126 SW 842; Clayton v. Johnson, 36 Ark. 406, 38 AmR 40), (2) although the early cases are opposed (Spring v. Bourland, 11 Ark. 658, 54 AmD 243; Goodrich v. Fritz, 4 Ark. 525).

[b] **In Missouri.**—(1) The rule of the text applies. Belkin v. Hill, 53 Mo. 492; Talbot v. Magee, 59 Mo. A. 347; Hawk v. Applegate, 37 Mo. A. 32. (2) Under a local act in the county of St. Louis (Sess. Acts [1855] p 464), providing for the duties of the sheriff and marshal, and providing further for claims of persons whose property is seized on execution against another, it was held that where claim is made in accordance with the act, plaintiff cannot sue in replevin (Hambleton v. Lynch, 32 Mo. 259; St. Louis, etc., R. Co. v. Castello, 30 Mo. 124; Bradley v. Holloway, 28 Mo. 150); (3) but if claim is not so made, he may maintain the action (Bradley v. Holloway, supra). (4) However, it is now held that the taking of an indemnity bond from plaintiff by an officer, who has seized property under an execution, does not release the officer, nor plaintiff ordering or assenting to such action, from liability to a replevin suit by the owner of the property. Belkin v. Hill, 53 Mo. 492.

[c] **In New York.**—(1) The rule of the text has been followed in some cases (Stewart v. Wells, 6 Barb. 79; Allen v. Crary, 10 Wend. 349, 25 AmD 566; Dunham v. Wyckoff, 3 Wend. 280, 20 AmD 695; Clark v. Skinner, 20 Johns. 465, 11 AmD 302), (2) although some decisions seem to intimate that replevin will lie only when the property is taken from the possession of plaintiff in replevin (Johnson v. Carnley, 10 N. Y. 570, 61 AmD 762; Judd v. Fox, 9 Cow. 259; Gardner v. Campbell, 15 Johns. 401; Thompson v. Button, 14 Johns. 84), (3) or where at the time of the seizure plaintiff had the right to possession (Wise v. Grant, 140 N. Y. 593, 35 NE 1078). (4) Goods of a master or principal taken under an execution against his agent or servant while in the possession of the latter may be replevied. The chattels are deemed to be taken from the actual possession of plaintiff who was not the execution defendant, the possession of the servant or agent being the possession of the master or principal. Clark v. Skinner, 20 Johns. 465, 11 AmD 302. (5) If intermediate seizure and sale of A's property on execution against B, and a levy on a second execution is made on the property as belonging to A, A cannot maintain replevin therefor. Sharp v. Whittenhall, 3 Hill 576. (6) Replevin will lie by the owner of goods against a sheriff for the recovery of property, levied upon by him by virtue of an execution against a third person, the property at the time of the levy being in the possession of defendant in the execution, where such property, after the levy, came peacefully into the possession of the owner, and was retaken by the sheriff. Hall v. Tuttle, 2 Wend. 475.

[d] **Reasons assigned for rule.**—(1) The reasons for the rule, in respect to defendant in the execution, are not equally strong, in relation to those whose property may be seized under executions against others. The reason entirely fails, where an execution issues against A, and the officer levies on the property of B. It is a trespass, on the part of the officer, to seize property not owned by the defendant in the execution; and we perceive no reason founded in good policy, which should prevent the real owner from maintaining his action of replevin. Philips v. Harriss, 3 J. J. Marsh. (Ky.) 122, 19 AmD 166. (2) Where a stranger to the judgment and execution brings replevin, it is not to question or overhaul those proceedings, but to obtain redress for a trespass done to him; the judgment and execution set out in the avowry are res inter alios, and cannot affect his rights or his remedies. Clark v. Skinner, 20 Johns. (N. Y.) 465, 11 AmD 302.

[e] **Replevin against assignee of sheriff.**—Where the goods of A, having been seized by the sheriff under an execution against B, had been handed over by the sheriff to an assignee, to whom B had made a voluntary assignment in insolvency, it was held that A might maintain replevin against the assignee as well as the sheriff. Burke v. McWhirter, 35 U. C. Q. B. (Ont.) 1.

85. Ind.—Hadley v. Hadley, 82 Ind. 95; Louthain v. Fitzer, 78 Ind. 449; Chinn v. Russell, 2 Blackf. 172.

Iowa.—Mitchell v. McLeod, 127 Iowa 733, 104 NW 349; Ralston v. Black, 15 Iowa 47.

Kan.—Rankine v. Greer, 38 Kan. 343, 16 P 680, 5 AmSR 751; Scott v. Wagner, 2 Kan. A. 386, 42 P 741.

Mass.—Tracy v. Warren, 104 Mass. 376; Ilsley v. Stubbs, 5 Mass. 280.

Wash.—Scott v. McGraw, 3 Wash. 675, 29 P 260.

[a] **In Connecticut.**—(1) It was held that the statute (Gen. St. tit 1 § 327) did not permit replevin of goods seized under execution. Howard v. Crandall, 39 Conn. 213. (2) Under a revision of the statute (Gen. St. tit 19 c 17 part 15 § 1) replevin will now lie. Hilton v. Osgood, 49 Conn. 110.

[b] **In North Carolina.**—(1) The statutes permit replevin of property seized under execution against another (Mitchell v. Sims, 124 N. C. 411, 32 SE 735; Churchill v. Lee, 77 N. C. 341; Jones v. Ward, 77 N. C. 337), (2) but under the earlier statutes the rule was otherwise (Carroll v. Hussey, 31 N. C. 89; McLeod v. Oates, 30 N. C. 387).

[c] **Property in hands of bailee.**—The owner of property seized in execution to satisfy a judgment against a third party may maintain an action of replevin against the officer, notwithstanding the property at the time of the commencement of the action is in the hands of his bailee. Ralston v. Black, 15 Iowa 47.

[d] **Property left in hands of execution defendant.**—If a sheriff, by direction of a plaintiff, who is present, levy on execution upon goods of another than the execution defendant, the goods being present and within his control, and he leave them in the custody of the execution defendant where he found them, upon his delivery bond, without surety, the owner may, under the statute, maintain replevin against both, although the sheriff or plaintiff personally have not actual possession of the goods at the commencement of the suit. In such case the execution defendant is a mere receiptor of the goods, and the possession is that of the sheriff. Hadley v. Hadley, 82 Ind. 95.

86. See statutory provisions.

[a] **In Minnesota.**—Under a statute expressly authorizing replevin of property seized under execution against another, plaintiff need not wait until the property is sold before bringing his action. Whitney v. Swensen, 43 Minn. 337, 45 NW 609.

87. Stapleford v. White, 6 Del. 238, (where the goods seized had been rented to defendant in execution to be returned on reasonable notice, and it appeared that no such notice had been given at the time of the seizure).

88. Covell v. Heyman, 111 U. S. 176, 4 SCt 355, 28 L. ed. 390; St. Paul, etc., R. Co. v. Drake, 72 Fed. 945, 19 CCA 252; Cromwell v. Owings, 7 Harr. & J. (Md.) 55; Kittredge v. Holt, 55 N. H. 621; Mitchell v. Roberts, 50 N. H. 486; Melcher v. Lamprey, 20 N. H. 403; Kellogg v. Churchill, 2 N. H. 412, 9 AmD 104. See also Hewitson v. Hunt, 42 S. C. L. 106 (where the remedy was denied on the ground that replevin lies only in cases of wrongful distress in South Carolina).

"If the goods were permitted to be taken from the hands of the officer by a writ of replevin, the rights of a creditor might always be defeated, by a mere stranger, having no right, since it could only be determined at the trial, and after the mischief was done, and the very object of the judgment disappointed, to whom the property belonged. And thus the law, by allowing process to defeat its own ends, would virtually close the door of justice against creditors seeking to while others permit replevin if the property seized was taken from the possession of plaintiff in replevin.[89] Where replevin of a stranger's property is allowed,[90] the action may be brought notwithstanding plaintiff in replevin was one of defendants in the former action, if the order of sale did not direct the seizure or sale of the property of such plaintiff, and was not issued against him.[91] Where replevin is not permitted,[92] it makes no difference whether or not the property was in the hands of defendant in execution at the time of the taking,[93] and it is a contempt of the court issuing an execution to replevy property taken under it whether by defendant in execution or any one else.[94] The remedy of the party aggrieved is an action of trespass or trover against the officer,[95] or replevin against the purchaser at a sale of the goods under the execution,[96] or to make claim for the property in accordance with statutory provisions therefor.[97]

[§ 30] **(2) Property Owned in Common by Execution Debtor and Stranger to Execution.** Where an officer levies on property owned in common by the execution debtor and a stranger to the execution, he has the right to take the entire property into his possession and the stranger to the execution cannot maintain replevin for the property.[98]

[§ 31] **c. Property Sold under Execution.**[99] Where chattels have been sold under execution they cease to be in the custody of the law and may be replevied by the true owner, whether defendant in the execution,[1] or one whose property has been sold under execution against another,[2] from the purchaser in possession[3] or his bailee who has actual custody of the chattels,[4] and no demand is necessary before bringing suit.[5] Goods remaining in possession of an officer who has sold them on execution after notice of ownership in a third person may be replevied from the officer.[6]

[§ 32] **3. Property Seized under Process of Attachment—a. Right of Defendant in Attachment To Bring Replevin.**[7] The general rule is well settled that defendant in attachment cannot maintain replevin for the attached property against the officer making the seizure.[8] Nor can he replevy property

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enforce their judgments." Cromwell v. Owings, 7 Harr. & J. (Md.) 55, 60.

[a] **In Mississippi.**—(1) Under a statute providing that replevin shall not be maintained in any case of the seizure of property under execution or attachment when a remedy is given to claim the property by making claim to it in some mode provided by law, but the person claiming must resort to the specific mode prescribed in such case, and shall not resort to the action of replevin; replevin will not lie to recover property in the hands of the sheriffs under execution, the proper remedy being the interposition of a claim under another section which provides an exclusive remedy by claimant's issue. Bernheimer v. Martin, 66 Miss. 486, 6 S 326; Clark v. Clinton, 61 Miss. 337. (2) Under earlier statutes, one whose property was seized under execution against another might maintain replevin therefor against the officer seizing it. Saunders v. Jordan, 54 Miss. 428; Swain v. Alcorn, 50 Miss. 320; Yarborough v. Harper, 25 Miss. 112.

[b] **In Pennsylvania.**—(1) Under the statute (Act April 3, 1779) it is provided that all writs of replevin granted or issued for any owner of goods taken in execution by any officer, under the authority of the state are irregular, erroneous, and void. Under this statute it is held that property cannot be replevied. C. I. T. Corp. v. Shakespeare, 95 Pa. Super. 491 (where personal property was under levy when writ of replevin was issued, it is immaterial that property was not taken into possession by officer serving writ, or that there was postponement of sheriff's sale); Taylor v. Ellis, 200 Pa. 191, 49 A 946 [overr English v. Dalbrow, 1 Miles 160; Tufts v. Cole, 3 Kulp 436; Weed v. Hill, 2 Miles 122]; Yake v. Schmoll, 29 Pa. Dist. 107. (2) Under the statute replevin will not lie against the officer but only against his vendee. Shaw v. Levy, 17 Serg. & R. 99. (3) This statute does not apply where owner of property and not officer is defendant in replevin. Cortland Wagon Co. v. Landis, 9 Pa. Dist. 490.

[c] **Under the statutes of Nova Scotia** (1) a stranger to the execution whose goods are seized cannot maintain replevin against the sheriff. Carty v. Bonnett, 12 N. S. 293. (2) The rule was otherwise before the enactment of the statute. Ring v. Brennan, 2 N. S. 20.

[d] **Replevin in state court of property seized under process of federal court.**—(1) The possession by a marshal of a court of the United States of property by virtue of a levy under a writ of execution issued on a judgment recovered in a circuit court of the United States is a complete defense to an action in a state court of replevin of the property seized, without regard to its rightful ownership. Covell v. Heyman, 111 U. S. 176, 4 SCt 355, 28 L. ed. 390. (2) And it seems that vice versa the possession of property held by process issuing from state courts is protected against any disturbance under process of the courts of the United States, excepting of course those cases wherein the latter exercise jurisdiction for the purpose of enforcing the supremacy of the constitution and laws of the United States. Covell v. Heyman, supra.

[89] Williamson v. Ringgold, 30 F. Cas. No. 17,755, 4 Cranch C. C. 39; Schars v. Barnd, 27 Nebr. 94, 42 NW 906.

[90] See supra text and notes 84–86, 89.

[91] Scott v. Wagner, 2 Kan. A. 386, 42 P 741.

[92] See supra text and note 88.

[93] Cromwell v. Owings, 7 Harr. & J. (Md.) 55.

[94] Cromwell v. Owings, supra.

[95] Goodrich v. Fritz, 4 Ark. 525; Cromwell v. Owings, 7 Harr. & J. (Md.) 55.

[96] Goodrich v. Fritz, 4 Ark. 525; Cromwell v. Owings, 7 Harr. & J. (Md.) 55.

[97] Goodrich v. Fritz, 4 Ark. 525.

[98] Branch v. Wiseman, 51 Ind. 1, 3 (where it was said: "In an action against one of the partners, the officer must seize all the goods, because the moieties are undivided, for if he seize but a moiety and sell that, the other partners will have a right to a moiety of that moiety. He must seize the entire leviable property of the co-partnership. He must take and retain custody of the property, for in no other way can he legally execute the writ and sell as much of the interest of his judgment debtor as may be sufficient to satisfy the execution").

[99] **Exempt property** see Exemptions § 285.

[1] Heagle v. Wheeland, 64 Ill. 423 (holding that, where property is seized and sold for a fine, under a judgment void for want of jurisdiction, the party against whom the fine was recovered, and whose property was sold in satisfaction thereof, may contest the purchaser's title to the property, in an action of replevin).

[2] Ark.—Hicks v. Britt, 21 Ark. 422; Dodd v. McCraw, 8 Ark. 83, 46 AmD 301.

Md.—Cromwell v. Owings, 7 Harr. & J. 55.

Miss.—Armistead v. Bernard, 62 Miss. 180.

Oh.—Crittenden v. Lingle, 14 Oh. St. 182, 84 AmD 370.

Pa.—Shearick v. Huber, 6 Binn. 2; Cash Register Co. v. Mace, 20 Pa. Dist. 1053; Huber v. Sharck, 2 Browne 160.

[a] **Effect of special statutory provisions.**—A statute which provides that "the action of replevin shall not be maintainable in any case of the seizure of property under execution or attachment when a remedy is given to claim the property in some mode prescribed by law" only forbids the institution of an action of replevin to recover property held by an officer by virtue of an execution or attachment, and does not forbid an action of replevin against a purchaser of the property at a sale under the execution. Nor does plaintiff's failure to present and prosecute his claim operate as a waiver of his right to maintain replevin. Armistead v. Bernard, 62 Miss. 180.

[3] See cases supra notes 1, 2.

[4] Hicks v. Britt, 21 Ark. 422.

[5] See infra § 74.

[6] Mitchell v. McLeod, 127 Iowa 733, 104 NW 349.

[7] **Replevin of property exempt from attachment** see Exemptions § 284.

[8] U. S.—Tavenner v. Hunter, 22 F. Cas. No. 13,367, 1 Hayw. & H. 81.

Kan.—Blair v. Shew, 24 Kan. 280; Bailey v. Bayne, 20 Kan. 657.

attached a second time after it had been left in his possession by the officer first attaching it.[9] And the fact that the property is in the possession of another, as the mere agent or depositary of the officer, will not render it any the less in the custody of the law.[10] So the rule applies, although defendant in attachment is misdescribed in the writ and has pleaded in abatement thereof,[11] or although the levy is voidable[12] or even void.[13] But where on final judgment the attachment is dissolved, replevin will lie on refusal of the officer to surrender the property.[14] Where by statute the sheriff may sell attached goods if they are perishable or expensive to keep,[15] goods so sold may not be replevied by defendant in the proceedings in which they were attached.[16]

[§ 33] **b. Right of Stranger to Attachment To Bring Replevin**[17]**—(1) In General.** While in some jurisdictions property seized under a writ of attachment against a third person is not subject to replevin from the officer by its owner,[18] and while it has been held that where an officer under a warrant of attachment seizes property in the possession of and owned by a person other than the one against whose property the warrant is issued, he is liable in an action of replevin to such person;[19] the weight of authority is that if an officer, in attempting to execute process of attachment, by mistake or design, takes goods not the property of defendant in such writ, he is a trespasser and acquires no right to the goods seized, and the injured party may have replevin for their recovery,[20] without regard to whether the property was taken from the possession of the party

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Mass.—Perry v. Richardson, 9 Gray 216.

Mo.—Rice v. Thayer, (A.) 217 SW 576.

N. J.—Hawk v. Lepple, 51 N. J. L. 208, 17 A 351, 14 AmSR 677, 4 LRA 48.

N. Y.—Keyser v. Waterbury, 7 Barb. 650.

Okl.—Thompson v. Grove, 72 Okl. 290, 180 P 553.

Wis.—Commercial Inv. Trust v. Frankfurth Hardware Co., 179 Wis. 21, 190 NW 1004; Battis v. Hamlin, 22 Wis. 669.

[a] **Thus** where evidence did not show that office of the law had been performed as to writ of attachment, the property was still in custodia legis, and action against constable to recover it was prematurely commenced. Thompson v. Grove, 72 Okl. 290, 180 P 553.

[9] Brown v. Crockett, 22 Me. 537.

[10] Keyser v. Waterbury, 7 Barb. (N. Y.) 650.

[11] Perry v. Richardson, 9 Gray (Mass.) 216.

[12] Blair v. Shew, 24 Kan. 280.

[13] Blair v. Shew, supra.

[14] Thompson v. Grove, 72 Okl. 290, 180 P 553.

[15] See statutory provisions.

[16] Riggs v. Coker, 69 Miss. 266, 13 S 814.

[17] **Intervention in attachment as remedy of stranger** see Attachment § 831 et seq.

Power of court to issue replevin for property taken on process issued from another court see Courts §§ 587, 646.

Replevin by officer of property in his possession under attachment see Attachment § 608.

[18] Chong Yet You v. Rose, 23 Hawaii 220; Baltimore, etc., R. Co. v. Klaff, 103 Md. 357, 63 A 360, 115 Am SR 363, 5 LRANS 495; Smith v. Huntington, 3 N. H. 76, 14 AmD 331.

[a] **In New Mexico,** by virtue of a statutory provision prohibiting cross replevins or replevin of property in the hands of an officer, property seized under attachment process cannot be recovered by a third person claiming the right of possession. Butts v. Woods, 4 N. M. 187, 16 P 617.

[b] **A statute allowing replevin of attached property** where plaintiff in replevin has the right to possession has been held not to be retroactive so as to validate an action which, previous to the statute, could not have been maintained. New York Nat. Park Bank v. Goddard, 87 Hun 487, 34 NYS 1144 [aff 9 Misc. 626, 30 NYS 417].

[19] Deutsch v. Reilly, 8 Daly (N. Y.) 132; Lewis v. Birdsey, 19 Or. 164, 26 P 623.

[20] U. S.—Wise v. Jefferis, 51 Fed. 641, 2 CCA 432.

Ark.—Willis v. Reinhardt, 52 Ark. 128, 12 SW 241; Hickman v. Ford, 43 Ark. 207.

Cal.—Kellogg v. Burr, 126 Cal. 38, 58 P 306; Hillman v. Griffin, 6 Cal. Unrep. Cas. 354, 59 P 194.

Colo.—Stevenson v. Lord, 15 Colo. 131, 25 P 313; Wilde v. Rawles, 13 Colo. 583, 22 P 897; Hannan v. Connett, 10 Colo. A. 171, 50 P 214.

Del.—Stockwell v. Robinson, 14 Del. 313, 32 A 528.

Fla.—Lyle v. Semmes, 81 Fla. 460, 88 S 301.

Ill.—Samuel v. Agnew, 80 Ill. 553; La Salle Pressed Brick Co. v. Coe, 53 Ill. A. 506.

Ind.—Wood v. Rathman, 58 Ind. A. 229, 108 NE 126.

Iowa.—Hall v. Ballou, 58 Iowa 585, 12 NW 475; Ramsden v. Wilson, 49 Iowa 211; Smith v. Montgomery, 5 Iowa 370; Miller v. Bryan, 3 Iowa 58.

Mass.—Ayer v. Bartlett, 170 Mass. 142, 49 NE 82; Fay v. Duggan, 135 Mass. 242; Tracy v. Warren, 104 Mass. 376.

Miss.—Hopkins v. Drake, 44 Miss. 619; Ford v. Dyer, 26 Miss. 243.

Mo.—Wangler v. Franklin, 70 Mo. 659; Anchor Milling Co. v. Walsh, 20 Mo. A. 107.

N. H.—Wheeler v. Eaton, 67 N. H. 368, 39 A 901.

N. J.—Morey v. Schaad, 98 N. J. L. 799, 121 A 622; Brown v. Bissett, 21 N. J. L. 267.

N. Y.—Klee v. Grant, 4 Misc. 88, 23 NYS 855.

N. C.—Bowen v. King, 146 N. C. 385, 59 SE 1044.

Okl.—Alexander v. Alexander, 65 Okl. 105, 164 P 114, LRA1917D 984.

R. I.—Barron v. Arnold, 16 R. I. 22, 11 A 298.

S. C.—Ex p. Sales, 126 S. C. 155, 117 SE 350.

Tenn.—Brammell v. Hart, 12 Heisk. 366.

Vt.—Esty v. Love, 32 Vt. 744; May v. Hastings [cit Angell v. Keith, 24 Vt. 371 (holding that since in such case replevin will lie, trespass will also lie)].

Ont.—Arnold v. Higgins, 11 U. C. Q. B. 191.

[a] **In Minnesota.**—(1) An early decision followed the rule of the text. Caldwell v. Arnold, 8 Minn. 265. (2) Under a later case, however, it is held that a sheriff cannot take under replevin property which he is holding under prior writ of attachment (Farmers' State Bank v. Hammond, 170 Minn. 313, 212 NW 593), (3) but if attachment is released, it becomes the sheriff's duty to execute writ of replevin on attached property (Farmers' State Bank v. Hammond, supra).

[b] **In Wisconsin.**—(1) The rule of the text is generally followed. Commercial Inv. Trust v. Frankfurth Hardware Co., 179 Wis. 21, 190 NW 1004; Williams v. Morgan, 50 Wis. 548, 7 NW 541; Gallagher v. Bishop, 15 Wis. 276. (2) Where, however, a valid writ commands seizure of specific chattels to enforce a lien, they cannot be replevied. Irey v. Gorman, 118 Wis. 8, 94 NW 658; Union Lumbering Co. v. Tronson, 36 Wis. 126; Battis v. Hamlin, 22 Wis. 669; Griffith v. Smith, 22 Wis. 646, 99 AmD 90.

[c] **Estoppel.**—That a person was present and testified as a witness in an action, and knew at the time he testified that property which he claimed had been attached in the action, and that pending the action he brought suits in justices' courts for the property which he subsequently dismissed, did not estop him from maintaining replevin against the officer attaching the property. Hoover v. Lewin, 56 Ind. A. 367, 105 NE 400.

[d] **Suit against officer and attaching creditor jointly.**—The owner of property, attached in a suit against another, may maintain replevin therefor against the attaching creditor and the officer jointly, when the former assisted in taking the property, and took it into his own possession after the attachment. Esty v. Love, 32 Vt. 744.

[e] **Effect of assignment to dissolve attachment.**—Where goods are attached, one seeking to replevy them as owner, by virtue of a sale thereof to him by defendant in attachment, cannot claim that by reason of an assignment by defendant in attachment for the benefit of credi-

claiming it or from defendant in attachment,[21] and in many jurisdictions this rule is provided expressly or impliedly by statute.[22] In any event, however, plaintiff must have the right to immediate possession,[23] although his ownership need not be absolute.[24] Although under a statute allowing one claiming to be the owner of goods attached to replevy them but providing further that judgment shall be rendered against him if he fail to make out title to them, plaintiff can recover only by proving ownership.[25] By statute in some jurisdictions the attaching creditors only may be sued in replevin.[26]

A tenant in common cannot replevy goods owned jointly and attached by a sheriff.[27]

[§ 34] **(2) After Making Claim in Other Proceedings.** Where one who claims property seized under attachment process against another institutes proceedings for the trial of the right of property and judgment is rendered against him, he cannot thereafter maintain replevin against the officer for the property.[28] However, the mere fact that he asks and obtains leave to interplead in the attachment suit will not bar his right to maintain replevin, where he does nothing more in the cause than this, and was not made a party to the action, nor any judgment rendered against him.[29]

[§ 35] **4. Property Seized under Writ of Replevin—a. When in Hands of Officer—(1) Right of Defendant or His Privies To Replevy.** Property seized and in the hands of the officer under a writ of replevin cannot be replevied by defendant in replevin or his privies.[30] This rule is not affected by a stat-

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tors the attachment was dissolved. Josephi v. Furnish, 27 Or. 260, 41 P 424.

[f] **Retention by officer after offer to give possession to plaintiff.**—The owner of property attached as belonging to another may maintain replevin therefor, although on his demanding the property, the levying officer stated that he might have it if it was his, where the officer retained the same possession of the property after such statement as he had before. Wheeler v. Eaton, 67 N. H. 368, 39 A 901.

[g] **Attachment no bar to replevin by same party.**—The levy of an attachment on chattels as defendant's property does not prevent the party levying the attachment from subsequently seizing the same property in replevin as his own. There is no element of estoppel either of record or in pais. Anchor Milling Co. v. Walsh, 20 Mo. A. 107.

[h] **Where a wife's property is attached** in an action against her husband, she may recover it by an action in claim and delivery. Ex p. Sales, 126 S. C. 155, 117 SE 350.

[21] See cases supra note 20.

[22] See statutory provisions; and cases infra this note.

[a] **Statutes held to confer right.**—(1) The right is conferred by statutes providing that replevin shall not lie at the suit of any other person than defendant in execution or attachment unless he shall at the time have a right to reduce into his possession the goods taken (Samuel v. Agnew, 80 Ill. 553), (2) and by a statute providing that wherever goods shall be wrongfully distrained, or otherwise wrongfully taken, or shall be wrongfully detained, the owner or person who by law can maintain trespass or trover for personal property shall have and may bring an action of replevin for the recovery of such goods, in like manner as actions are brought and maintained "by any person complaining of an unlawful distress" (Arnold v. Higgins, 11 U. C. Q. B. (Ont.) 191).

[b] **Statutes held not to bar right.**—(1) Statutes providing that where an officer levying on property has taken an indemnity bond from the levying creditor, a claimant of the property shall be barred of an action against the officer, relate solely to the protection of the officer when he levies an execution; they do not bar an action to recover possession of property taken under the levy of an attachment. Hall v. Ballou, 58 Iowa 585, 12 NW 475. (2) So notwithstanding statutes which provide that, where property is seized by execution or attachment, any party other than defendant may file a complaint with the justice, or, if the officer executing the writ has reason to believe that a third person has some claim to the property, he shall give notice to such party in writing that the property has been seized, and require him to assert his claim within twenty days thereafter; that a claimant of attached property shall prosecute his claim as in cases of property taken on execution, or be barred, yet where plaintiff's property was attached, and he had actual notice thereof, but before service of the notice by the officer he had commenced replevin for such property, he was entitled to continue such suit, since his right, under the statute, to file a complaint in the attachment suit was cumulative only, the notice of the attachment not having been given until the replevin was instituted. Patterson v. Snow, 24 Ind. A. 572, 57 NE 286.

[23] Brown v. Bissett, 21 N. J. L. 267.

[24] Lewis v. Birdsey, 19 Or. 164, 26 P 623.

[25] Tomlinson v. Collins, 20 Conn. 364; Brown v. Chickopee Falls Co., 16 Conn. 87.

[26] See statutory provisions; and cases infra this note.

[a] **Under the statutes of Connecticut** (1) a writ of replevin to obtain the restoration of goods attached, in favor of a claimant who was not a party to the attachment, must be brought against the attaching creditor and cannot be sustained against the officer who served the attachment. Hathaway v. St. John, 20 Conn. 343 (likewise in this state the right of a person to replevy goods attached in a suit against another person, given by the eighth section of the statute authorizing writs of replevin, as revised in 1821, exists only in favor of the owner of the goods, who is required to make out a title thereto); Bowen v. Hutchins, 18 Conn. 550. (2) A person having a lien on goods attached in a suit against another person, who is the general owner, with no other interest therein, has not such a title to the property as will, under the statute, enable him to maintain an action of replevin. Brown v. Chickopee Falls Co., 16 Conn. 87.

[27] Lawrence v. Burnham, 4 Nev. 361, 97 AmD 540.

[28] Bray v. Saaman, 13 Nebr. 518, 14 NW 474; Storms v. Eaton, 5 Nebr. 453; Abbey v. Searls, 4 Oh. St. 598.

[29] Wangler v. Franklin, 70 Mo. 659.

[30] U. S.—Birch v. Gittings, 3 F. Cas. No. 1,426, 2 Cranch C. C. 66.

Cal.—Fleming v. Wells, 65 Cal. 336, 4 P 197.

Kan.—Gross v. Bogard, 18 Kan. 288.

Me.—Hines v. Allen, 55 Me. 114, 92 AmD 574.

Mich.—Cavanaugh v. Sanderson, 152 Mich. 11, 115 NW 955; Simon v. Leland, 105 Mich. 226, 63 NW 76; Fisher v. Busch, 64 Mich. 180, 31 NW 39; Fisher v. Marquette Cir. Judge, 58 Mich. 450, 25 NW 460; Belden v. Laing, 8 Mich. 500.

Minn.—Larsen v. Nichols, 62 Minn. 256, 64 NW 553, 54 AmSR 639.

Mo.—Mohr v. Langan, 162 Mo. 474, 63 SW 409, 85 AmSR 503.

N. H.—Bonney v. Smith, 59 N. H. 411; Sanborn v. Leavitt, 43 N. H. 473.

N. Y.—Morris v. De Witt, 5 Wend. 71.

Tenn.—Sartain v. Dixie Coal, etc., Co., 150 Tenn. 633, 266 SW 313; Dearmon v. Blackburn, 1 Sneed 390, 60 AmD 160.

[a] **Rule applied.**—(1) An officer's failure to secure a replevin bond from plaintiff before delivering an automobile to plaintiff's attorney does not make the action wrongful, nor enable defendant to maintain replevin therefor, either in this state or the state in which the former replevin was prosecuted. Krebs v. Sawyer, 162 Iowa 593, 144 NW 345. (2) A debtor mortgaged his stock of goods to a creditor in his individual capacity and as trustee for other creditors, and then sold the goods to a stranger to the mortgage. Certain of the unsecured creditors of the mortgagor replevied a portion of the goods, joining the mortgagor, the mortgagee, and the vendee as defendants, after which certain of the secured creditors, having received from the mortgagee an assignment of their interest in the mortgage, replevied the goods from the sheriff. It was held that the latter action was a cross replevin. Had the mortgagee brought the action it would have been a cross replevin. It was brought by persons in privity with him and is open to the same objection. Simon v. Leland, 105 Mich. 226, 63 NW 76.

[b] **Joinder of other parties in second suit.**—(1) B brought suit in replevin against F, who was a member of a firm, and N, who was its agent and in possession of the property, replevied. The firm then brought replevin against B, and joined three other defendants with him, for the same property delivered to

ute providing that when any goods or chattels attached on any writ of mesne or final process are claimed by any other person he may maintain replevin therefor.[31] In support of the rule it is said that the law is not so inconsistent as to issue to its officers, compelled to act at their peril, commands wholly incompatible with each other;[32] that if such a proceeding were permitted, there would be no end to suits and the benefit of that action could never be realized;[33] and that in any event such a proceeding is wholly unnecessary, as the rights of both parties can be fully determined in the first suit.[34] In some jurisdictions the statutes expressly prohibit a cross replevin.[35] These statutes have been held to be a reiteration of the common law.[36] Where, however, no process has ever been served on defendant, owner of the property seized in replevin, he may bring replevin for the return of the property.[37]

[§ 36] **(2) Right of Stranger to Writ To Replevy.** It is a very generally accepted doctrine that at common law property in the hands of an officer, which has been seized under a writ of replevin, cannot be taken on another writ of replevin pending suit even by a stranger to the first writ.[38] In some jurisdictions under the statutes however, a stranger to the writ may maintain replevin,[39] and it has been held that a right so conferred by statute is not affected by the fact that under the provisions of another statute he might have intervened in the first action and set up his title to the property, the view being taken that the remedy by intervention is not exclusive.[40]

An officer having possession of the property involved under a writ of execution may maintain replevin against another officer who subsequently seizes the same property under a writ of replevin.[41]

[§ 37] **b. Where Property Has Been Delivered to Plaintiff in Replevin.** Some decisions lay down the rule without qualification, that property taken under a writ of replevin, although delivered into the possession of plaintiff in replevin, is still in the custody of the law, plaintiff's custody being substituted for that of the officer,[42] and cannot be seized under any judicial process whatever,[43] and that defendant or his grantees or privies cannot maintain replevin for such property.[44] However, in many jurisdictions, after property has been delivered to plaintiff in replevin, it may be taken from him in another action of replevin by a third person who is a stranger to the parties to the first suit,[45] and it

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B upon the first writ, and the only question in both suits was whether B or the firm were the owners of the property. It was held that the second suit was a cross replevin, and could not be maintained. That the parties in the second suit are not identical with those in the first suit is not important, unless the new parties claim some interest in the property, or right thereto, different from or independent of the parties to the first suit. Fisher v. Busch, 64 Mich. 180, 31 NW 39. (2) So a second suit in replevin brought by defendant in the first jointly with his partner against the bailees of plaintiff in the first is a cross replevin and cannot be maintained. It is none the less cross replevin because the partner of defendant in the second suit is joined as coplaintiff, nor because the suit is brought against the bailees of plaintiff in the first suit. Beers v. Wuerpul, 24 Ark. 272.

[c] **Property not liable to seizure.**—The rule stated in the text has been held to apply, although the property was not liable to seizure. Dearmon v. Blackburn, 1 Sneed (Tenn.) 390, 60 AmD 160.

[31] Sanborn v. Leavitt, 43 N. H. 473.

[32] Sanborn v. Leavitt, supra.

[33] Larsen v. Nichols, 62 Minn. 256, 64 NW 553, 54 AmSR 639; Morris v. De Witt, 5 Wend. (N. Y.) 71.

[34] Larsen v. Nichols, 62 Minn. 256, 64 NW 553, 54 AmSR 639.

[35] See statutory provisions.

[36] Beers v. Wuerpul, 24 Ark. 272; Hagan v. Deuell, 24 Ark. 216, 88 AmD 769.

[37] Sharp-Flanigan-Hamilton Co. v. Tyler, 6 Tenn. Civ. A. 217.

[38] Del.—In re Gould, 31 Del. 218, 113 A 900.

Kan.—Gross v. Bogard, 18 Kan. 288.

Md.—Powell v. Bradlee, 9 Gill & J. 220.

Mass.—White v. Dolliver, 113 Mass. 400, 18 AmR 502; Ilsley v. Stubbs, 5 Mass. 280.

N. H.—Sanborn v. Leavitt, 43 N. H. 473.

N. J.—Weiner v. Van Rensselaer, 43 N. J. L. 547.

Wis.—Watkins v. Page, 2 Wis. 92.

See Waterhouse-Wilcox Co. v. Betz, 73 Cal. A. 236, 238 P 763 (where property was not shown to have been in possession of sheriff).

[a] **Reason for rule.**—"The distinction between goods taken on execution and by replevin is marked. In the latter case the identical goods are in the custody of the law, and are before the court to be disposed of as it shall see proper, and the proceeding is so far in rem that the goods cannot be seized upon any process until the court shall have taken action. If, therefore, a party finds his goods in the hands of an officer upon a valid writ of replevin, his remedy is by application to the court to be permitted to come in and set up his claim to them, and not by an independent replevin. Whereas, if goods are wrongfully seized by execution, it cannot be said to confer any lien on them, or to bear any resemblance to a proceeding in rem." Wells Replevin, § 257 [quot with appr Weiner v. Van Rensselaer, 43 N. J. L. 547, 549].

[39] Massachusetts Bonding, etc., Co. v. Novotny, 200 Iowa 227, 202 NW 588; Davis v. Gambert, 57 Iowa 239, 10 NW 658 (under a statute providing that the petition must show that the property "was neither taken on the order or judgment of a court against" plaintiff "nor under an execution or judgment against him or against the property"); Reiley v. Haynes, 38 Kan. 259, 16 P 440, 5 AmSR 737; Gross v. Bogard, 18 Kan. 288 (under a statute authorizing replevin for goods provided they were "not taken in execution on any order or judgment against said plaintiff, or for the payment of any tax, fine, or amercement assessed against him, or by virtue of an order of delivery issued under this article, or any other mesne or final process, issued against said plaintiff").

[40] Davis v. Gambert, 57 Iowa 239, 10 NW 658.

[41] Pracht v. Gunn, 69 App. Div. 396, 74 NYS 991.

[42] **Nature of possession** see infra § 170.

[43] U. S.—Hagan v. Lucas, 10 Pet. 400, 404, 9 L. ed. 470.

Cal.—Hunt v. Robinson, 11 Cal. 262.

Ill.—Rhines v. Phelps, 8 Ill. 455; Goodheart v. Bowen, 2 Ill. A. 578.

Ind.—Pipher v. Fordyce, 88 Ind. 436.

Mass.—Lockwood v. Perry, 9 Metc. 440.

Okl.—Wilson Motor Co. v. Dunn, 129 Okl. 211, 264 P 194, 57 ALR 17; Noble Bros. v. Ballew, 59 Okl. 90, 158 P 906; Bohannan v. Jennings, 31 Okl. 254, 121 P 195; Farmers' State Bank v. Stephenson, 23 Okl. 695, 102 P 992.

[44] Hines v. Allen, 55 Me. 114, 92 AmD 574; Mohr v. Langan, 162 Mo. 474, 63 SW 409, 85 AmSR 503.

[a] **Property delivered in foreign jurisdiction.**—Chattels delivered to plaintiff after a claim of property by defendant in a replevin issued out of the supreme court of New York cannot be counter-replevied in Pennsylvania, at least before the question of property has been determined in favor of defendant in the prior replevin. Lowry v. Hall, 2 Watts & S. (Pa.) 129, 37 AmD 495.

[45] Ark.—Hagan v. Deuell, 24 Ark. 216, 88 AmD 769.

Me.—Muskin v. Lazarovitch, 196 Me. 353, 76 A 702.

Md.—Powell v. Bradlee, 9 Gill & J. 220.

has been held that this right is not affected by a statute which makes provision for trial of the right of property before the sheriff or the judge, that on the contrary the remedy so conferred by statute is merely cumulative.[46]

Property in the hands of an agent, and replevied from his custody, may be replevied from plaintiff by the real owner when not a party to the original action,[47] although the contrary has been held.[48]

Where property has been sold by plaintiff in replevin. Although one who brings a replevin suit and gives bond to prosecute the same acquires the right of possession pending suit, the property in the goods seized does not absolutely vest in him, so that he can sell the property, and where the suit abates by his death the right of possession acquired temporarily by him ceases, and the rightful owner may maintain replevin for the property against one to whom plaintiff in replevin sold it pending the suit.[49]

[§ 38] **c. Where Property is Retained by Defendant.** When property has been seized by a sheriff, by virtue of a writ of replevin issued out of a state court, and released to defendant upon a forthcoming bond, it is still in the custody of the state court, to abide the result of the replevin suit, and not subject to seizure by the marshal under a writ of replevin subsequently issued out of a United States court, at the suit of the United States.[50] Nor can a plaintiff in replevin disturb the property in the hands of a defendant by another action of replevin.[51]

[§ 39] **d. Right of Plaintiff To Maintain Second Replevin.** Independently of a statute prohibiting the bringing of replevin for the recovery of property in custodia legis, a party at whose suit property has been seized by an officer cannot bring another suit to take the property out of his possession.[52] Plaintiff in replevin has no right to maintain a second suit in replevin against the same parties for the same goods, while the first suit is pending.[53] But where the replevin action has been dismissed, plaintiff may maintain a second action.[54]

[§ 40] **e. Replevin after Judgment in Replevin.** After judgment against defendant in replevin he cannot sue out another writ of replevin to prevent execution against himself and to procure a restoration of the property to himself.[55] A judgment in replevin against a defendant does not estop a stranger to that action from replevying the property from the successful party to the former action.[56]

[§ 41] **5. Property Seized in Satisfaction of Fines.** The general rule is that property seized by an officer for the collection of a fine is in the custody of the law and the owner cannot maintain replevin against him to recover such property.[57] The rule does not apply, however, where the warrant is issued on a void judgment.[58] And where property is seized and sold for a fine under a judgment void for want of jurisdiction the party against whom the fine was recovered and whose property was sold in satisfaction thereof may contest the purchaser's title

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Mass.—Kelleher v. Clark, 135 Mass. 45; White v. Dolliver, 113 Mass. 400, 18 AmR 502; Ilsley v. Stubbs, 5 Mass. 280.

Mo.—Coleman v. Reynolds, 207 Mo. 463, 105 SW 1070; Mohr v. Langan, 162 Mo. 474, 63 SW 409, 85 AmSR 503 [overr Bates County Nat. Bank v. Owen, 79 Mo. 429]; Westbay v. Milligan, 74 Mo. A. 179; Coen v. Watkins, 62 Mo. A. 502.

Nev.—Buckley v. Buckley, 9 Nev. 373.

N. H.—Bonney v. Smith, 59 N. H. 411 (dictum); Sanborn v. Leavitt, 43 N. H. 473; Bell v. Bartlett, 7 N. H. 178.

N. J.—Guttenburg v. Thomas, 88 N. J. L. 60, 95 A 732; Weiner v. Van Rensselaer, 43 N. J. L. 547.

[a] **Reason for rule.**—"This is manifestly the true rule, for otherwise the true owner or a creditor of the true owner would be kept out of his own while a replevin suit was pending, and to which he or they were not parties, over which he had no control and by the judgment in which his rights could in no manner be affected, impaired, or taken away, and which could not determine the title or claim of such owner or his creditor. No principle of law can be found to justify a rule which would thus postpone, at least, and might impair or effectually destroy, the rights of third persons. The common reason given for such holding, that if third persons could take the property from the possession of one of the parties to the replevin suit, he would be disabled from returning the property in case he lost his suit, and might have to pay his adversary in that suit the assessed value of the property, and still not have the property, is more specious than substantial or right. The same result would follow if his adversary elected to take the assessed value and gave him his title to the property, and the true owner thereafter, after the termination of the replevin suit, seized the property. The fallacy in the reason so given, lies in failing to observe that the judgment in the replevin suit only settles the controversy between the parties to that suit, and does not affect the rights of persons not parties to that suit." Mohr v. Langan, 162 Mo. 474, 63 SW 409, 414, 85 AmSR 503.

[b] **Effect of agreement by plaintiff in replevin to waive actual delivery.**—If plaintiff in replevin agrees to dispense with actual delivery of the property taken under the writ and to consider it delivered, a third person may replevy the property, as plaintiff in the first replevin will be precluded by the agreement from objecting that the property is in the custody of the law. Powell v. Bradlee, 9 Gill & J. (Md.) 220.

[46] Hagan v. Deuell, 24 Ark. 216, 88 AmD 769.

[47] White v. Dolliver, 113 Mass. 400, 18 AmR 502 [crit dictum in Portland Bank v. Stubbs, 6 Mass. 422, 4 AmD 151]; Westbay v. Milligan, 74 Mo. A. 179.

[48] Larsen v. Nichols, 62 Minn. 256, 64 NW 553, 54 AmSR 639 (which holds that the fact that a party is enabled to bring replevin against an agent instead of the principal, because the agent happens to have the actual possession of the property, ought not to be allowed to take the case out of the rule against allowing cross replevin; that to do so would be a mere evasion of the rule).

[49] Lockwood v. Perry, 9 Metc. (Mass.) 440.

[50] U. S. v. Dantzler, 25 F. Cas. No. 14,917, 3 Woods 719.

[51] Turner v. Reese, 22 Kan. 319.

[52] Pollard v. Stovall, 60 Miss. 266.

[53] Turner v. Reese, 22 Kan. 319.

[a] **Execution of redelivery bond.**—The fact that defendant in the first replevin suit executes a redelivery bond to plaintiff and receives a return of the property from the sheriff does not affect the rule; the title to the property remains the same as before. Turner v. Reese, 22 Kan. 319.

[54] Smith v. Weiss, 99 Conn. 262, 121 A 823.

[55] Tyson v. Bowden, 8 Fla. 61, 72, 71 AmD 101.

[56] Frank v. Jenkins, 22 Oh. St. 597.

[57] Martin v. Mott, 12 Wheat. (U. S.) 19, 6 L. ed. 537; Pott v. Oldwine, 7 Watts (Pa.) 173; Lynah v. St. Paul's Parish Road Comrs., 16 S. C. L. 336; Gist v. Cole, 11 S. C. L. 456, 10 AmD 616; Rex v. Monkhouse, Str. 1184, 93 Reprint 1116.

[a] **Rule applied** to: (1) Fine by commissioners of roads. Lynah v. St. Paul's Parish Road Comrs., 16 S. C. L. 336. (2) Fine for nonperformance of patrol duty. Gist v. Cole, 11 S. C. L. 456, 10 AmD 616. (3) Fine imposed by court martial for refusal to do military duty. Martin v. Mott, 12 Wheat. (U. S.) 19, 6 L. ed. 537. (4) Goods distrained on conviction for deer stealing. Rex v. Monkhouse, 2 Str. 1185, 93 Reprint 1116. (5) Militia fine. Pott v. Oldwine, 7 Watts (Pa.) 173.

[58] Mills v. Martin, 19 Johns. (N. Y.) 7; Marriott v. Shaw, Comyns, 274, 92 Reprint 1069.

to the property in an action of replevin.[59]

[§ 42] **6. Property Seized for Forfeiture under Revenue Laws.** Where property has been seized for forfeiture thereof for a breach of the revenue laws, it is in the custody of the law and cannot be replevied from the collector.[60] The rule has no application, however, where there is no law by virtue of which the property could be seized.[61]

[§ 43] **7. Property Seized in Enforcing Criminal Law—a. In General.** Property seized in enforcing the criminal laws is in the custody of the law and cannot be replevied,[62] until such custody is ended.[63] This custody has been held not to end with the discharge of the alleged criminal, where the property is such that its possession is prohibited.[64] Property seized, the possession of which is illegal, cannot be replevied.[65] But property wrongfully seized and held may be replevied.[66] Property held as evidence in a criminal prosecution cannot be replevied.[67]

Motor vehicle seized because used to transport liquor cannot be replevied.[68]

[§ 44] **b. Intoxicating Liquors Seized as Being Kept for Sale in Violation of Law.**[69] Intoxicating liquors seized on valid process issued by a court possessing the requisite jurisdiction, under a valid statute, as being kept in violation of the liquor laws, are in the custody of the law, and the person against whom the proceedings have been brought cannot maintain replevin for their recovery against the officer making the seizure pending a decision as to forfeiture.[70] It is held, however, that liquors seized under an unconstitutional law[71] or invalid ordinance[72] may be replevied. And where intoxicating liquors are seized on a warrant against one person at a place described therein, charged to be maintained in violation of the liquor laws, a third person may maintain replevin therefor against the officer making the seizure for the purpose of determining his right thereto.[73]

[59] Heagle v. Wheeland, 64 Ill. 423.

[60] Scott v. McRae, 3 OntPr 16.

[61] Slocum v. Mayberry, 2 Wheat. (U. S.) 1, 4 L. ed. 169. (In this case the revenue officer had seized and detained both vessel and cargo under the Embargo Act. The supreme court of the United States held that the officer had power to seize and detain the vessel only, and not the cargo; and maintained an action of replevin brought for the latter by the owner).

[62] Mullen v. Moseley, 13 Ida. 457, 90 P 986, 121 AmSR 277, 12 LRANS 394, 13 AnnCas 450; Allison v. Hern, 102 Kan. 48, 169 P 187; Burgess v. Drewen, 8 N. J. Misc. 179, 150 A 363; Simpson v. St. John, 93 N. Y. 363; Meegan v. Tracy, 220 App. Div. 600, 223 NYS 355; Triangle Mint Corp. v. Horgan, 133 Misc. 802, 233 NYS 570.

[a] **Rule applied.**—Taxicab used in maintaining liquor nuisance cannot be replevied. Allison v. Hern, 102 Kan. 48, 169 P 187.

[63] Triangle Mint Corp. v. Horgan, 133 Misc. 802, 233 NYS 570.

[64] Triangle Mint Corp. v. Horgan, supra.

[a] **Slot machines,** seized as gambling apparatus after discharge of possessors, in the absence of determination declaring apparatus lawful, could not be recovered by the owner by replevin. Triangle Mint Corp. v. Horgan, 133 Misc. 802, 233 NYS 570.

[65] Stanley-Thompson Liquor Co. v. Peo., 63 Colo. 456, 168 P 750; Triangle Mint Corp. v. Horgan, 133 Misc. 802, 233 NYS 570.

[66] Duboff v. Haslan, 182 NYS 896 [aff 195 App. Div. 117, 186 NYS 481].

[a] **Statutory and charter provisions** providing that parties desiring to recover goods seized by the police shall obtain an order from a magistrate, are by their terms limited to property "alleged to have been stolen or embezzled," or "alleged to have been feloniously obtained, or to be the proceeds of crime," and do not prevent a direct action against property clerks of the police department to obtain the property of one convicted of receiving stolen goods, where the property whose possession is desired was not the property which accused was charged with having unlawfully obtained. Duboff v. Haslan, 182 NYS 896 [aff 195 App. Div. 117, 186 NYS 481].

[67] Good v. Baltimore Police, 137 Md. 192, 112 A 294, 13 ALR 1164; Asparren v. Ferrel, 44 Nev. 157, 191 P 571; Zeigle v. Shaver, 2 Pa. Dist. & Co. 369; McDonald v. Weeks, 2 Tenn. Civ. A. 600.

[a] **Rule applied.**—Persons obtaining a bill of sale of property taken from a prisoner by officers in good faith to use as evidence and to prevent the escape of the prisoner, consisting of an automobile and other property, after such property had been attached by creditors in the hands of the officer, could not maintain replevin suits. Fitzgerald v. Nickerson, 43 R. I. 396, 113 A 290, 16 ALR 373.

[68] Commercial Credit Co. v. Johnson, 166 Ga. 316, 143 SE 377; Buell v. French, 24 OhNPNS 225 (automobile used in transportation of liquors).

[69] **Procedure to secure return of intoxicating liquors or other property seized** see Intoxicating Liquors § 397.

[70] Ark.—O'Neal v. Parker, 88 Ark. 133, 103 SW 165.

Iowa.—Annheuser-Busch Brewing Assoc. v. Fullerton, 83 Iowa 760, 50 NW 56; Lemp v. Fullerton, 83 Iowa 192, 48 NW 1034, 13 LRA 408; Fries v. Porch, 49 Iowa 351; Weir v. Allen, 47 Iowa 482; State v. Harris, 38 Iowa 242; Funk v. Israel, 5 Iowa 438.

Kan.—Greentree v. Wallace, 77 Kan. 149, 93 P 598.

Me.—Ring v. Nichols, 91 Me. 478, 40 A 329; Musgrave v. Hall, 40 Me. 498.

Mass.—Allen v. Staples, 6 Gray 491.

N. H.—State v. Barrels of Liquor, 47 N. H. 369.

Okl.—Stiller v. Atchison, etc., R. Co., 34 Okl. 45, 124 P 595.

N. B.—Woods v. Finley, 48 N. B. 398; McKeen v. Colpitts, 39 N. B. 256.

"To suffer a party, in an action of replevin, to take the liquors out of the hands of the officer seizing the same, would be an interference with the administration of justice in criminal proceedings, and would defeat the whole object and intention of the prohibitory liquor law." Funk v. Israel, 5 Iowa 438, 451.

[a] **Pending proceedings.**—(1) The filing of an officer's return in conformity with Code Cr. Proc. § 802-b, subd 3, as added by L. (1921) c 156, does not constitute a "pending proceeding" within the provision of such section that seized liquors shall not, pending proceedings, be taken from peace officer's custody by replevin or other process. Gatto v. Murray, 116 Misc. 270, 190 NYS 360. (2) There being no authority in L. (1921) cc 155, 156, for seizure without a warrant of intoxicating liquor from the owner's private residence, and no basis for the proceeding in rem against the seized liquor, where so illegally seized, replevin will lie therefor, after dismissal of the criminal charge against the owner, notwithstanding the pendency of the proceeding in rem, although in a case where the seizure could be without a warrant, replevin could not be maintained pending disposition of the proceeding in rem. Peo. v. Christmann, 117 Misc. 528, 191 NYS 704.

[71] Cooley v. Davis, 34 Iowa 128; State v. Weir, 33 Iowa 134, 11 AmR 115.

[72] Sullivan v. Stephenson, 62 Ill. 290.

[73] In re Massey, 56 Kan. 120, 42 P 365; Easter v. Traylor, 41 Kan. 493, 21 P 606.

[§ 45] **c. Property Taken from Possession of Alleged Thief.**[74] Property alleged to have been stolen, which is in the custody of an officer of court pending the prosecution of the alleged thief, for the purposes of the prosecution, is in the custody of the law and cannot be replevied;[75] but after his conviction or acquittal, such officer has no right to withhold it from the owner, and the latter would be entitled to bring replevin against him for the property.[76] So it has been held that where property taken by an officer from one arrested for theft is restored to defendant on his giving bond to return it on demand of the officer or on order of court, and the court in its order expressly declared that the right of the true owner to maintain replevin should not be impaired by such order, defendant's possession of the property cannot be called the possession of the law and the true owner may maintain replevin against defendant therefor.[77]

IV. TITLE AND RIGHT TO POSSESSION OF PLAINTIFF

[By Joseph W. Rouse]

[§ 46] **A. Necessity and Sufficiency of Right to Possession.** As replevin is strictly a possessory action,[78] it lies only in behalf of one entitled to possession.[79] Not only must plaintiff have the right to possession generally, but he must have the right to immediate[80] as well as the right to exclusive pos-

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74. Action for recovery of stolen goods generally see Larceny §§ 587–590.

75. Simpson v. St. John, 93 N. Y. 363; Jones v. Pavey, 10 Pa. Dist. 498; McDonald v. Weeks, 2 Tenn. Civ. A. 600, 602 [cit Cyc].

76. Lynch v. St. John, 8 Daly (N. Y.) 142.

77. Byrne v. Byrne, 89 Wis. 659, 62 NW 413.

78. See supra § 4.

79. U. S.—Southern Pac. Co. v. Bank of America, 29 F. (2d) 465 [aff 23 F. (2d) 939 (certiorari den 279 U. S. 847, 49 SCt 345, 73 L. ed. 991)].

Ariz.—Dowdy v. Calvi, 14 Ariz. 148, 125 P 873.

Cal.—General Securities Corp. v. Reo Motor Car Co., 91 Cal. A. 22, 266 P 579; Sidney v. Wilson, 67 Cal. A. 282, 227 P 672; Beggs v. Smith, 26 Cal. A. 532, 147 P 585.

Colo.—International Trust Co. v. Palisade Light, etc., Co., 60 Colo. 397, 153 P 1002.

Conn.—Spencer v. Roberts, 42 Conn. 75.

Del.—Frick v. Miller, 30 Del. 366, 107 A 391 [aff 30 Del. 374, 107 A 394]; Jefferson v. Chase, 6 Del. 219.

Fla.—Delco Light Co. v. John Le Roy Hutchinson Properties, 99 Fla. 410, 128 S 831; Gracy v. Seaboard Air Line R. Co., 69 Fla. 301, 68 S 722; Richbourg v. Rose, 53 Fla. 173, 44 S 69, 125 AmSR 1061; Roof v. Chattanooga Wood Split Pulley Co., 36 Fla. 284, 18 S 597; Holliday v. McKinne, 22 Fla. 153.

Ida.—Saxton v. Breshears, 21 Ida. 333, 121 P 567.

Ill.—Robinson v. Yetter, 238 Ill. 320, 87 NE 363 [aff 143 Ill. A. 172]; Swain v. Hutchinson First Nat. Bank, 100 Ill. A. 31 [aff 201 Ill. 416, 66 NE 220]; Blakely Printing Co. v. Pease, 95 Ill. A. 341.

Ind.—Bradley v. Michael, Smith 346.

Iowa.—Rosenthal v. Risley, 11 Iowa 541.

Kan.—Singer Mfg. Co. v. Godding, 89 Kan. 396, 131 P 572; Rucker v. Donovan, 13 Kan. 251, 19 AmR 84.

Me.—Marson v. Plummer, 64 Me. 315; Sanford School Dist. No. 5 v. Lord, 44 Me. 374.

Md.—Lamotte v. Wisner, 51 Md. 543.

Mass.—Fisher v. Alsten, 186 Mass. 549, 72 NE 78; Collins v. Evans, 15 Pick. 63; Wheeler v. Train, 3 Pick. 255.

Mich.—Sanford v. Millikin, 144 Mich. 311, 107 NW 884.

Miss.—Anderson Tully Co. v. C. M. Gooch Hardwood Co., 157 Miss. 380, 128 S 104.

Mo.—Gartside v. Nixon, 43 Mo. 138; Stone v. McNealy, 59 Mo. A. 396; Baker v. Campbell, 32 Mo. A. 529; St. Louis Dairy Co. v. Northwestern Bottle Co., (A.) 204 SW 281; Kerman v. Leeper, 172 Mo. A. 286, 157 SW 984; Cunningham v. Atterbury, 166 Mo. A. 137, 148 SW 176.

Mont.—Stephenson v. Combination Leasing, etc., Co., 86 Mont. 322, 283 P 1110, 1113 [cit Cyc]; Bach v. Montana Lumber, etc., Co., 15 Mont. 345, 39 P 291.

Nebr.—Jimmerson v. Greene, 7 Nebr. 26.

N. H.—Mitchell v. Roberts, 50 N. H. 486.

N. J.—Bierman v. Reinhorn, 71 N. J. L. 422, 58 A 1083; Kerr v. Henderson, 62 N. J. L. 724, 42 A 1073.

N. Y.—Wood v. Orser, 25 N. Y. 348; Brooklyn Ash Removal Co. v. Connell, 175 App. Div. 182, 161 NYS 1006; Dodworth v. Jones, 11 N. Y. Super. 201; Williamson v. Lawrence, 8 Misc. 71, 28 NYS 594; Redler v. Fuller, 121 NYS 331; Fagan Iron Works v. Dawson Realty Co., 109 NYS 740; Elwood v. Smith, 9 HowPr 528; Sharp v. Whittenhall, 3 Hill 576.

Pa.—Ferguson v. Lauterstein, 160 Pa. 427, 28 A 852; Miller v. Warden, 111 Pa. 300, 2 A 90; Weed v. Hall, 101 Pa. 592; Lester v. McDowell, 18 Pa. 91; Bower v. Tallman, 5 Watts & S. 556; Weidman v. Zeigler, 18 Pa. Dist. 537; Hoffman v. Sellers, 5 Pa. Dist. 395.

Tenn.—Walker v. Davis, 139 Tenn. 475, 202 SW 78; Bogard v. Jones, 9 Humphr. 739.

Wash.—Kimball v. Donohue, 124 Wash. 505, 214 P 1045, 217 P 37; North Shore Boom, etc., Co. v. Nicomen Boom Co., 52 Wash. 564, 101 P 48; Sires v. Newton, 1 Wash. T. 356.

Wis.—Timp v. Dockham, 32 Wis. 146.

Eng.—Comerford v. Blake, 2 Ir. Eq. 176.

[a] **Rule applied.**—(1) Where the holder of a note is an indorsee, and it contains several indorsers, possession of it will not be delivered to the maker, although he is not liable to the holder, as to do so would deprive the holder of his only evidence to establish the liability of the prior indorsers. Farr v. Farmers' Bank, (Mo. A.) 228 SW 1073. (2) A provision in a charter for demise that defendant owner of a scow will furnish a captain to act under plaintiff's control will not defeat the effect of the charter as a demise so as not to give plaintiff the right to possession. Brooklyn Ash Removal Co. v. Connell, 225 N. Y. 503, 122 NE 630 [rev 175 App. Div. 182, 161 NYS 1006].

[b] **A legal right** to possession must be shown to exist in plaintiff. An equitable right is not sufficient. Fisher v. Alsten, 186 Mass. 549, 72 NE 78; Truman v. Dakota Trust Co., 29 N. D. 456, 151 NW 219.

[c] **Right to possession held sufficient.**—Sidney v. Wilson, 67 Cal. A. 282, 227 P 672.

80. U. S.—Dixwell v. Jones, 7 F. Cas. No. 3,937, 2 Dill. 184 [foll Gray v. Parker, 38 Mo. 160].

Ariz.—Meyer v. Bigham, 16 Ariz. 212, 141 P 726.

Ark.—McFadden Bros.' Agency v. Keesee, 179 Ark. 510, 16 SW (2d) 994; Brown v. Loveless, 152 Ark. 540, 239 SW 21; McWhirter v. Penny, 82 Ark. 244, 101 SW 742; Carpenter v. Glass, 67 Ark. 135, 53 SW 678; Thatcher v. Franklin, 37 Ark. 64; Wallace v. Brown, 17 Ark. 449; Hill v. Robinson, 16 Ark. 90; Cox v. Morrow, 14 Ark. 603; Britt v. Aylett, 11 Ark. 475, 52 AmD 282.

Cal.—Commercial, etc., Bank v. Foster, 290 P 583; Boles v. Stiles, 188 Cal. 304, 204 P 848; Garcia v. Gunn, 119 Cal. 315, 51 P 684; People's Sav. Bank v. Jones, 114 Cal. 422, 46 P 278; Sutton v. Stephan, 101 Cal. 545, 36 P 106; Fredericks v. Tracy, 98 Cal. 658, 33 P 750; Paine v. Keszthelyi, 83 Cal. A. 449, 256 P 864; Automobile, etc., Impl. Co. v. Salladay, 55 Cal. A. 219, 203 P 163.

Colo.—Kelly v. Lewis, 38 Colo. 18, 88 P 388.

Conn.—Weller v. Ely, 45 Conn. 547; Peters v. Stewart, 45 Conn. 103, 29 AmR 663.

Del.—Bennett v. Brittingham, 33 Del. 519, 140 A 154; Rudnick v. Schoenberg, 32 Del. 339, 122 A 902; Frick v. Miller, 30 Del. 366, 107 A 391 [aff 30 Del. 374, 107 A 394].

D. C.—Notes v. Snyder, 55 App. 233, 4 F. (2d) 426, 427, 41 ALR 1052 [cit Cyc].

Hawaii.—Phillips v. Magoon, 9 Hawaii 9.

Ida.—American Fruit Growers v. Walmstad, 44 Ida. 786, 260 P 168.

Ind.—Clark v. Heck, 17 Ind. 281; Noble v. Epperly, 6 Ind. 414; Walpole v. Smith, 4 Blackf. 304; Parsley v. Huston, 3 Blackf. 348; Chinn v. Russell, 2 Blackf. 172; Jarrett v. Cauldwell, 47 Ind. A. 478, 94 NE 790.

Iowa.—Alden v. Carver, 13 Iowa

session[81] at the time of the commencement of the action,[82] or issuance of the writ;[83] or, as is sometimes stated, at the time of the taking and detention.[84] In some jurisdictions the rule has been relaxed to permit the maintenance of the action by one who, although not entitled to possession at the time the action is brought, has acquired it before trial.[85] Where plaintiff has title and right to pos-

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253, 81 AmD 430; Cassel v. Western Stage Co., 12 Iowa 47; Kingsbury v. Buchanan, 11 Iowa 387; Marienthal v. Shafer, 6 Iowa 223; McCoy v. Cadle, 4 Iowa 557.

Ky.—Hooser v. Hays, 10 B. Mon. 72, 50 AmD 540; Dillon v. Wright, 7 J. J. Marsh. 10.

Me.—Clark v. Anderson, 103 Me. 134, 68 A 633; Bartlett v. Goodwin, 71 Me. 350; Ingraham v. Martin, 15 Me. 373; Wyman v. Dorr, 3 Me. 183.

Mass.—Doody v. Collins, 223 Mass. 332, 111 NE 897; Lane v. Chadwick, 146 Mass. 68, 15 NE 121; Pratt v. Parkman, 24 Pick. 42.

Mich.—Clark v. West, 23 Mich. 242.

Minn.—Warren v. Driscoll, 178 Minn. 344, 227 NW 199, 200 [cit Cyc].

Miss.—Bell v. Smith, 155 Miss. 227, 124 S 331; Johnson v. Sanders, 148 Miss. 472, 114 S 334; Frizell v. White, 27 Miss. 198.

Mo.—American Metal Co. v. Daugherty, 204 Mo. 71, 102 SW 538; Leete v. St. Louis State Bank, 141 Mo. 584, 42 SW 927; Stonebraker v. Ford, 81 Mo. 532; Hinshaw v. Thornhill, (A.) 27 SW (2d) 776; Magnees v. Cox, (A.) 278 SW 1070; Kerman v. Leeper, 172 Mo. A. 286, 157 SW 984; Bryant v. Dyer, 96 Mo. A. 455, 70 SW 516; Westbay v. Milligan, 89 Mo. A. 294; Upham v. Allen, 73 Mo. A. 224, 76 Mo. A. 206; Baker v. Campbell, 32 Mo. A. 529.

Mont.—Perham v. Putnam, 82 Mont. 349, 354, 267 P 305 [cit Cyc]; Cameron v. Wentworth, 23 Mont. 70, 57 P 648; Laubenheimer v. McDermott, 5 Mont. 512, 6 P 344.

Nebr.—Kavanaugh v. Brodball, 40 Nebr. 875, 59 NW 517; Nollkamper v. Wyatt, 27 Nebr. 565, 43 NW 357; Jimmerson v. Greene, 7 Nebr. 26.

Nev.—William Johnson Land, etc., Co. v. Harris, 48 Nev. 312, 231 P 1095; Asparren v. Ferrel, 44 Nev. 157, 191 P 571.

N. H.—Peirce v. Finerty, 76 N. H. 38, 76 A 194, 79 A 23, 29 LRANS 547.

N. Y.—Osmun v. Barker, 92 Hun 609, 38 NYS 43; McCurdy v. Brown, 8 N. Y. Super. 101; Dodworth v. Jones, 11 N. Y. Super. 201; Temerson v. Esskay Dress Corp., 120 Misc. 55, 197 NYS 580.

N. D.—Truman v. Dakota Trust Co., 29 N. D. 456, 151 NW 219.

Oh.—Coe v. Peacock, 2 Oh. Dec. (Reprint) 230, 2 WestLMonth 134.

Okl.—Robb v. Dobrinski, 14 Okl. 563, 78 P 101; Olson v. Thompson, 6 Okl. 74, 48 P 184.

Or.—Almada v. Vandecar, 94 Or. 515, 185 P 907; Bohart v. Parker, 76 Or. 371, 147 P 188, 149 P 85; Kimball Co. v. Redfield, 33 Or. 292, 54 P 216.

Pa.—McKee v. Ward, 289 Pa. 414, 137 A 599; Leitch v. Sanford Motor Truck Co., 279 Pa. 160, 123 A 658; Strong v. Dinning, 175 Pa. 586, 34 A 919; Lester v. McDowell, 18 Pa. 91; Heilman v. McKinstry, 18 Pa. Super. 70; Stone v. Rogers, 17 Pa. Super. 358; Schmoll v. Myers, 21 Pa. Dist. 14; Crawford v. Fulmer, 14 Pa. Dist. 487; Houghton v. DuBell, 33 Pa. Co. 267.

Tenn.—Shaddon v. Knott, 2 Swan 358, 58 AmD 63.

Tex.—Crim v. Lukenbill, (Civ. A.) 21 SW (2d) 83.

Wis.—Gillett v. Treganza, 6 Wis. 343.

See also Braender Rubber, etc., Co. v. Dueth-Henes Corp., 207 Ill. A. 155.

[a] **Under a former statute in Connecticut,** plaintiff could maintain replevin by simply making out title as the true owner, even though he had not the right to immediate possession. Spencer v. Roberts, 42 Conn. 75.

[b] **Rule applied.**—Where property has been leased for a term of years plaintiff cannot replevy it when it is seized on execution, he not being entitled to immediate possession. Wyman v. Dorr, 3 Me. 183.

[81] U. S.—Dixwell v. Jones, 7 F. Cas. No. 3,937, 2 Dill. 184.

Cal.—Commercial, etc., Bank v. Foster, 290 P 583; Boles v. Stiles, 188 Cal. 304, 204 P 848; Garcia v. Gunn, 119 Cal. 315, 51 P 684; Fredericks v. Tracy, 98 Cal. 658, 33 P 750; Paine v. Keszthelyi, 83 Cal. A. 449, 256 P 864.

Del.—Bennett v. Brittingham, 32 Del. 339, 140 A 154.

D. C.—Notes v. Snyder, 55 App. 233, 4 F. (2d) 426, 427, 41 ALR 1052 [cit Cyc].

Hawaii.—Phillips v. Magoon, 9 Hawaii 9.

Mass.—Lane v. Chadwick, 146 Mass. 68, 15 NE 121.

Mo.—Leete v. St. Louis State Bank, 141 Mo. 584, 42 SW 927; Gray v. Parker, 38 Mo. 160; Hinshaw v. Thornhill, (A.) 27 SW (2d) 776; Magnees v. Cox, (A.) 278 SW 1070; Steckman v. Galt State Bank, 126 Mo. A. 664, 105 SW 674; Bryant v. Dyer, 96 Mo. A. 455, 70 SW 516; Westbay v. Milligan, 89 Mo. A. 294; Upham v. Allen, 76 Mo. A. 206, 73 Mo. A. 224; Kennedy v. Dodson, 44 Mo. A. 550.

Mont.—Agricultural Credit Co. v. O'Rourke, 65 Mont. 517, 211 P 200.

N. H.—Stevens v. Chase, 61 N. H. 340.

N. Y.—Brooklyn Ash Removal Co. v. Connell, 173 App. Div. 5, 158 NYS 1034; Rogers v. Arnold, 12 Wend. 30.

Pa.—Reinheimer v. Hemingway, 35 Pa. 432.

Wis.—Gillett v. Treganza, 6 Wis. 343.

[a] **Rule applied.**—Where plaintiff's right under his charter party to use a scow did not amount to complete control and possession, because the owner kept her master on board, he could not replevy such scow from the owner. Brooklyn Ash Removal Co. v. Connell, 173 App. Div. 5, 158 NYS 1034.

[b] **Immaterial joining of others.**—Where the whole possessory right is shown to be in plaintiff, the fact that he joins others with him in the suit and shares his recovery with him, is immaterial. Lieberman v. Clark, 114 Tenn. 117, 85 SW 258, 69 LRA 732.

Right of joint tenant to sue see infra § 52.

[82] Ark.—Bostick v. Brittain, 25 Ark. 482; Wallace v. Brown, 17 Ark. 449.

Cal.—Commercial, etc., Bank v. Foster, 290 P 583; Boles v. Stiles, 188 Cal. 304, 204 P 848; Garcia v. Gunn, 119 Cal. 315, 51 P 684; Holly v. Heiskell, 112 Cal. 174, 44 P 466; Masterson v. Clark, 41 P 796 [foll Fredericks v. Tracy, 98 Cal. 658, 33 P 750]; Affierbach v. McGovern, 79 Cal. 268, 21 P 837; Bolander v. Gentry, 36 Cal. 105, 95 AmD 162; Rhoades v. Lyons, 34 Cal. A. 615, 168 P 385.

Colo.—Kelly v. Lewis, 38 Colo. 18, 88 P 388; McCraw v. Welch, 2 Colo. 284; Buchanan v. Scandia Plow Co., 6 Colo. A. 34, 39 P 899.

Del.—Bennett v. Brittingham, 32 Del. 339, 140 A 154; Staunton v. Smith, 22 Del. 193, 65 A 593.

D. C.—Notes v. Snyder, 55 App. 233, 4 F. (2d) 426, 427, 41 ALR 1052 [cit Cyc].

Fla.—Delco Light Co. v. John Le Roy Hutchinson Properties, 99 Fla. 410, 128 S 831; Ittleson v. Browning, 99 Fla. 1195, 128 S 639; Malsby v. Gamble, 61 Fla. 310, 327, 54 S 766.

Ind.—Woods v. Shearer, 56 Ind. A. 650, 105 NE 917; Jarrett v. Cauldwell, 47 Ind. A. 478, 94 NE 790; Whitehead v. Coyle, 1 Ind. A. 450, 27 NE 716.

Iowa.—Jones v. Peterson, 170 Iowa 1, 152 NW 52; Hilman v. Brigham, 117 Iowa 70, 90 NW 491; Marshall v. Bunker, 40 Iowa 121.

Kan.—Oklahoma State Bank v. Hicklin, 100 Kan. 301, 164 P 257.

Md.—Shorter v. Dail, 122 Md. 101, 89 A 329.

Mich.—Eldridge v. Sherman, 70 Mich. 266, 38 NW 255; Darling v. Tegler, 30 Mich. 54.

Minn.—Warren v. Driscoll, 178 Minn. 344, 227 NW 199, 200 [cit Cyc].

Mo.—Cornett v. Best, 151 Mo. A. 546, 132 SW 35; Kennedy v. Dodson, 44 Mo. A. 550.

Mont.—Perham v. Putnam, 82 Mont. 349, 354, 267 P 305 [cit Cyc]; Cameron v. Wentworth, 23 Mont. 70, 57 P 648.

Nebr.—Kavanaugh v. Brodball, 40 Nebr. 875, 59 NW 517; Dillrance v. Murphy, 1 Nebr. (Unoff.) 298, 95 NW 608.

N. J.—Chambers v. Hunt, 18 N. J. L. 339.

N. Y.—Black River Ins. Co. v. New York State L. & T. Co., 73 N. Y. 282; Wood v. Orser, 25 N. Y. 348; Oakland Mfg. Co. v. F. C. Linde Co., 162 App. Div. 543, 147 NYS 1045; Dodworth v. Jones, 11 N. Y. Super. 201.

N. D.—Gunderson v. Holland, 22 N. D. 258, 133 NW 546, 547 [cit Cyc].

Okl.—Tulsa Rig, etc., Co. v. Arnold, 64 Okl. 160, 166 P 135.

Or.—Bohart v. Parker, 76 Or. 371, 147 P 188, 149 P 85; Casto v. Murray, 47 Or. 57, 81 P 388, 883; Kimball Co. v. Redfield, 33 Or. 292, 54 P 216.

[a] **Intervener's right to recover** property must exist when he intervenes. Essex v. Fife, 67 Okl. 55, 168 P 814 [rev 159 P 1009].

[83] Baltimore, etc., R. Co. v. Rueter, 114 Md. 687, 80 A 220; O'Dell v. Day, 214 Mich. 566, 183 NW 17.

[84] Jefferson v. Chase, 6 Del. 219; Sanford School Dist. No. 5 v. Lord, 44 Me. 374; McArthur v. Lane, 15 Me. 245; Stevens v. Chase, 61 N. H. 340.

[85] Flinn v. Ferry, 127 Cal. 648, 60 P 434; Pico v. Pico, 56 Cal. 453;

session at the time of bringing suit, subsequent sales by him or for his account do not affect his right to recovery.[86] Where possession, or the right thereto, is lost by abandonment of property before the action, replevin cannot be maintained.[87]

[§ 47] **B. Title or Ownership of Plaintiff[88]—1. In General.** As has been noted, the gist of the action of replevin is the right to possession of the property involved;[89] this right of possession may result from a general[90] or from a special[91] interest or ownership, but such a general or special interest or ownership in plaintiff so far as requisite to confer a right of immediate possession against defendant is essential to his action.[92] Since a mere pos-

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O'Connor v. Blake, 29 Cal. 312; Milk Dealers' Bottle Exch. v. Schaffer, 224 Ill. A. 411.

[86] Herman v. Rubin, 167 NYS 1038.

[87] Robinson v. Huschle, 233 Ill. A. 519; St. Louis Dairy Co. v. Northwestern Bottle Co., (Mo. A.) 204 SW 281.

[88] **Replevin by stranger to attachment for goods seized** see supra § 33.

[89] See supra § 4.

[90] Conn.—Spencer v. Roberts, 42 Conn. 75.

Del.—Bennett v. Brittingham, 32 Del. 339, 140 A 154.

Fla.—Delco Light Co. v. John Le Roy Hutchinson Properties, 99 Fla. 410, 128 S 831.

Iowa.—Hilman v. Brigham, 117 Iowa 70, 90 NW 491.

Mass.—Esson v. Tarbell, 9 Cush. 407.

N. H.—Chellis v. Grimes, 72 N. H. 104, 54 A 943.

N. Y.—Ely v. Ehle, 3 N. Y. 506; Warren v. Leland, 2 Barb. 613.

Tenn.—Young v. Harris-Cortner Co., 152 Tenn. 34, 268 SW 1120 [den reh 152 Tenn. 15, 268 SW 125, 54 ALR 516].

[a] **Rule where right is limited in time.**—After the expiration of the time during which defendant is entitled to possession, the owner may recover the property from him by replevin. Magdeburg v. Uihlein, 53 Wis. 165, 10 NW 363.

[b] **An owner of raffled property** may maintain replevin against a party who was unsuccessful in the raffle and who has taken possession of the property without authority, even though he has delivered to the successful party a writing stating that he delivered the property to him. Miller v. Le Piere, 136 Mass. 20.

[c] **Title acquired by adverse possession** confers upon the holder the right to maintain replevin, even against the original owner. Garrett v. Vaughan, 1 Baxt. (Tenn.) 113.

[91] Ark.—Prater v. Frazier, 11 Ark. 249.

Cal.—Commercial, etc., Bank v. Foster, 290 P 583; Parke v. Franciscus, 194 Cal. 284, 228 P 435; Boles v. Stiles, 188 Cal. 304, 204 P 848; Lazard v. Wheeler, 22 Cal. 139; Goodman v. Anglo-California Trust Co., 62 Cal. A. 702, 217 P 1078.

Ida.—American Fruit Growers v. Walmstad, 44 Ida. 786, 260 P 168; Schleiff v. McDonald, 41 Ida. 50, 237 P 1108; Smith v. Washburn-Wilson Seed Co., 40 Ida. 191, 232 P 574; Blackfoot City Bank v. Clements, 39 Ida. 194, 226 P 1079.

Ill.—Milk Dealers' Bottle Exch. v. Schaffer, 224 Ill. A. 411; Perfect Knitting Mills v. Obstfeld, 154 Ill. A. 637; Blakely Printing Co. v. Pease, 95 Ill. A. 341.

Ind.—Treharne v. Matson, 46 Ind. A. 705, 93 NE 553.

Ind. T.—Hancock v. Schockman, 4 Ind. T. 138, 69 SW 826.

Iowa.—Richards v. Hellen, 153 Iowa 66, 133 NW 393; McCoy v. Cadle, 4 Iowa 557.

Me.—Sandford School Dist. No. 5 v. Lord, 44 Me. 374.

Md.—Lamotte v. Wisner, 51 Md. 543; Smith v. Williamson, 1 Harr. & J. 147.

Miss.—Coleman v. Low, 13 S 227.

Mo.—Robertson v. Stead, 135 Mo. 135, 36 SW 610, 58 AmSR 569, 33 LRA 203; American Storage, etc., Co. v. Harding, 126 Mo. A. 489, 104 SW 484; Hazard v. Hall, 5 Mo. A. 584.

Nev.—William Johnson Land, etc., Co. v. Harris, 48 Nev. 312, 231 P 1095; Rahis v. McLeod, 45 Nev. 380, 204 P 501.

N. H.—Stevens v. Chase, 61 N. H. 340.

N. J.—General Motors Acceptance Corp. v. Smith, 101 N. J. L. 154, 127 A 179; Veader v. Veader, 89 N. J. L. 727, 99 A 309; Chambers v. Hunt, 18 N. J. L. 339.

N. Y.—Johnson v. Carnley, 10 N. Y. 570, 61 AmD 762; Rogers v. Arnold, 12 Wend. 30; Pangburn v. Patridge, 7 Johns. 140.

N. D.—Suchy v. Strain, 51 N. D. 106, 199 NW 193.

Oh.—Williams v. West, 2 Oh. St. 82.

Or.—Lewis v. Birdsey, 19 Or. 164, 26 P 623.

Pa.—Ferguson v. Lauterstein, 160 Pa. 427, 28 A 852; Miller v. Warden, 111 Pa. 300, 2 A 90; Ferguson v. Rafferty, 128 Pa. 337, 18 A 484, 6 LRA 33; Mead v. Kilday, 2 Watts 110; Crawford v. Fulmer, 14 Pa. Dist. 487; Hoffman v. Sellers, 5 Pa. Dist. 395; Nichol v. Abram, 20 Pa. Co. 605; Midvale Steel Works v. Hallgarten, 15 WklyNC 47.

R. I.—Waterman v. Matteson, 4 R. I. 539.

Tenn.—Imperial Cotton Milling Co. v. Citizens Bank, 4 Tenn. Civ. A. 332.

Vt.—Thompson-Starrett Co. v. Plunkett, 89 Vt. 177, 94 A 845; Tittemore v. Labounty, 60 Vt. 624, 15 A 196; Sprague v. Clark, 41 Vt. 6.

Wash.—Carabin v. Wilhelm, 87 Wash. 52, 151 P 87; Lillie v. Shaw, 22 Wash. 234, 60 P 406.

Wis.—Swenson v. Wells, 140 Wis. 316, 122 NW 724; Rohrer v. Lockery, 136 Wis. 532, 117 NW 1060.

Ont.—Lewis v. Teale, 32 U. C. Q. B. 108.

[a] **Illustrations.**—(1) One, agreeing to transport statutes after being carved and arranging with another to perform such undertaking, has such right of possession on the other's failure to perform, as would support replevin. Thompson-Starrett Co. v. Plunkett, 89 Vt. 177, 94 A 845. (2) If plaintiff, seeking to recover an automobile seized by the sheriff as the property of another, had merely a contract for purchase from still another party with the right of possession, until such right was forfeited for noncompliance with the terms of sale, it would be ample to sustain the action as against defendant. Rahis v. McLeod, 45 Nev. 380, 204 P 501. (3) Where a lease reserves title to the crop in the landlord, and the tenant agrees therein not to sell or remove it until a division thereof, without written consent of the landlord, and the tenant proceeds to dispose of the crop without fulfilling the terms of the lease and asserts title thereto superior and adverse to that of the landlord, the landlord is entitled to recover the crop in replevin. Wadsworth v. Owens, 21 N. D. 255, 130 NW 932.

[b] **Rule applied.**—Under a statute excepting certain property from inclusion in a decedent's estate and giving the possession of it to the widow, she has sufficient right of possession against all but the minor children to maintain replevin against a stranger. Brigham v. Bush, 33 Barb. (N. Y.) 596.

[c] **The head of a family** may maintain replevin to recover exempt property regardless of whether the technical ownership is in himself or his wife. Starrett v. Deerfield, 40 Nebr. 846, 59 NW 352.

[d] **A receiver of a railroad,** appointed by a court in Mexico, has such a special interest in the railroad property of which he has possession that he may maintain replevin, even against citizens of the United States attaching such property as creditors when it is brought into the United States. Robertson v. Stead, 135 Mo. 135, 36 SW 610, 58 AmSR 569, 33 LRA 203.

[92] U. S.—Dixwell v. Jones, 7 F. Cas. No. 3,937, 2 Dill. 184.

Ark.—McFadden Bros. Agency v. Keesee, 179 Ark. 510, 16 SW (2d) 994; Passwater-Chevrolet Co. v. Whitten, 178 Ark. 136, 9 SW (2d) 1057; Laughlin v. Tyler, 177 Ark. 1183, 9 SW (2d) 567; Brown v. Loveless, 152 Ark. 540, 239 SW 21; Black v. Roberson, 112 SW 402; Carpenter v. Glass, 67 Ark. 135, 53 SW 678; Thatcher v. Franklin, 37 Ark. 64; Wallace v. Brown, 17 Ark. 449.

Cal.—Young v. Matthew Turner Co., 168 Cal. 671, 143 P 1029; Keech v. Beatty, 127 Cal. 177, 59 P 837; Garcia v. Gunn, 119 Cal. 315, 51 P 684; Cardinell v. Bennett, 52 Cal. 476; Alchian v. MacDonald, 40 Cal. A. 505, 181 P 77.

Conn.—Weller v. Ely, 45 Conn. 547.

Del.—Rudnick v. Schoenberg, 32 Del. 339, 122 A 902; Frick v. Miller, 30 Del. 366, 107 A 391 [aff 30 Del. 374, 107 A 394].

Ida.—Lewis County v. Peck State Bank, 31 Ida. 244, 170 P 98.

Ill.—W. F. Hall Printing Co. v. Wells Warehouse, etc., Co., 241 Ill. A. 146; Dunsworth v. W. D. Chemical Co., 190 Ill. A. 453; Horn v. Zimmer, 180 Ill. A. 323; Stockton v. Lochnitt, 31 Ill. A. 214.

Ind.—Clark v. Heck, 17 Ind. 281; Walpole v. Smith, 4 Blackf. 304; Parsley v. Huston, 3 Blackf. 348; Williams v. Padelinetti, 73 Ind. A. 216, 127 NE 158.

Ky.—Dillon v. Wright, 7 J. J. Marsh. 10.

Me.—Clark v. Anderson, 103 Me. 134, 68 A 633; Wyman v. Dorr, 3 Me. 183.

Mass.—Doody v. Collins, 223 Mass.

session is prima facie evidence of a right to possession,[93] it may, according to the weight of authority, be sufficient to support an action for replevin against anyone not having a better right,[94] as for example a mere wrongdoer and trespasser,[95] al-

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332, 111 NE 897; Shrieves v. Morris, 151 Mass. 310, 23 NE 838; Perley v. Foster, 9 Mass. 112; Waterman v. Robinson, 5 Mass. 303.

Miss.—Saunders v. Jordan, 54 Miss. 428; Curll v. Compton, 22 Miss. 56.

Mo.—American Metal Co. v. Daugherty, 204 Mo. 71, 102 SW 538; Gartside v. Nixon, 43 Mo. 138; Pilkington v. Trigg, 28 Mo. 95; International Hospital Equipment Co. v. St. Louis Fire Door Co., (A.) 13 SW (2d) 582; Brunke v. Salinger, (A.) 8 SW (2d) 88; Ross v. May, 164 Mo. A. 398, 144 SW 901; Turner v. Morris, 142 Mo. A. 60, 125 SW 238 [transf 222 Mo. 21, 121 SW 9]; Meeks v. Clear Jack Min. Co., 141 Mo. A. 648, 124 SW 1084; Mattison v. Hooberry, 104 Mo. A. 287, 78 SW 642; Bryant v. Dyer, 96 Mo. A. 455, 70 SW 516; Baker v. Campbell, 32 Mo. A. 529; McMahill v. Walker, 22 Mo. A. 170.

N. J.—Chambers v. Hunt, 18 N. J. L. 339.

N. Y.—Tuska v. O'Brien, 68 N. Y. 446; Scofield v. Whitelegge, 49 N. Y. 259, 12 AbbPrNS 320 [aff 33 N. Y. Super. 179, 10 AbbPrNS 104]; Sammis v. McLaughlin, 35 N. Y. 647, 91 AmD 83; Dodworth v. Jones, 4 N. Y. Super. 201; Fagan Iron Works v. Dawson Realty Co., 109 NYS 740; Pattison v. Adams, 7 Hill 126, 42 AmD 59.

Oh.—Coe v. Peacock, 2 Oh. Dec. (Reprint) 230, 2 WestLMonth 134.

Okl.—Wagoner v. Briscoe, 105 Okl. 162, 232 P 22; Robb v. Dobrinski, 14 Okl. 563, 78 P 101, 1 AnnCas 981; Olson v. Thompson, 6 Okl. 74, 48 P 184.

Pa.—McKee v. Ward, 289 Pa. 414, 137 A 599; Leitch v. Sanford Motor Truck Co., 279 Pa. 160, 123 A 658; Strong v. Dinning, 175 Pa. 586, 34 A 919; Lester v. McDowell, 18 Pa. 91; Stone v. Rogers, 17 Pa. Super. 358; Schmoll v. Myers, 21 Pa. Dist. 14; Reymer v. Phillips, 16 Pa. Dist. 270.

Tenn.—Parham v. Riley, 4 Coldw. 5.

Tex.—Crim v. Lukenbill, (Civ. A.) 21 SW (2d) 83.

Wash.—Hays v. Bashor, 108 Wash. 491, 185 P 814.

Wis.—Gillett v. Treganza, 6 Wis. 343.

N. B.—McLaughlin v. Tompkins, 44 N. B. 249.

[a] **Rule applied.**—(1) To recover possession of an automobile which plaintiff claimed as the result of a drawing contest, a prior delivery of possession of the automobile to plaintiff was an essential element to sustain his claim of ownership by reason of either sale or gift, and without this he had no title. Patton v. Heath, 190 N. C. 586, 130 SE 500. (2) Where the automobile which plaintiff won in a contest for newspaper subscriptions was not delivered to him, he could not maintain replevin; but, where it was delivered with the consent of the party selling it to the newspaper and participating in the scheme, he could recover. Jones v. Burks, 110 Ark. 108, 161 SW 177. (3) Merchants conducting a prize contest could maintain an action in replevin for possession of an automobile mistakenly awarded to a contestant without the highest number of votes. Amlie Strand Hardware Co. v. Moose, 176 Minn. 598, 224 NW 158. (4) A tobacco inspector in a public warehouse, who delivers wrong goods on receipt of notes cannot afterward replevy the property, for which the notes were issued, from his successor as the surrender of the notes transferred no property. Stevenson v. Ridgeley, 3 Harr. & J. (Md.) 281. (5) Where there is no delivery of notes to the payee and no title thereto vests in him, he cannot maintain replevin against a third party in whose hands the maker has placed the notes with instructions not to deliver them until so directed by the maker. Nichols, etc., Co. v. Hillsboro First Nat. Bank, 6 N. D. 404, 71 NW 135. (6) Where defendant's agent forged defendant's signature as indorser to notes and made new forged notes exact duplicates of the true notes which defendant indorsed believing them genuine, the indorsee could not replevin the true notes, the delivery of the false notes not having been a valid transference vesting legal title in the indorsee in view of Negotiable Instruments Act, § 16. Horn v. Nicholas, 139 Tenn. 453, 201 SW 756 (nor can the indorsee replevin the true notes on the theory of constructive delivery). (7) When plaintiff, who leased equipment to defendant for use upon a government job, and knew there was an agreement that, when the rentals paid equaled the fixed value, the equipment was to pass to the government and received rentals until the aggregate equaled the price so fixed, he could not maintain replevin. Barry v. Feeney, etc., Bldg. Co., 190 App. Div. 26, 179 NYS 662. (8) A holder of a mere option had no such property right as would entitle him to maintain replevin. Young v. Matthew Turner Co., 168 Cal. 671, 143 P 1029. (9) The mere indorsement of notes, stipulating that ownership and title to property therein described shall remain in the payee until the notes are paid, does not vest title to such property in the indorsee, so as to enable him to sue in replevin therefor. Malsby v. Gamble, 61 Fla. 310, 327, 54 S 766; Roof v. Chattanooga Wood Split Pulley Co., 36 Fla. 284, 18 S 597. (10) A buyer of goods, whereof a seller holds the warehouse receipts, acquires no interest sufficient to support replevin action under an oral contract invalid under statute of frauds. W. F. Hall Printing Co. v. Wells Warehouse, etc., Co., 241 Ill. A. 146. (11) If the acts and declarations relied on by plaintiff to prove a sale were merely colorable and not intended to pass any title or possession to him he cannot maintain replevin. Dawson v. Wetherbee, 16 Gray (Mass.) 123. (12) In replevin for automobile purchased by a third person with funds furnished by plaintiff, if plaintiff gave the money to the third person to buy the car for himself plaintiff cannot recover. McClemy v. Brown, 29 Del. 253, 99 A 48. (13) In replevin for automobile purchased by third person with funds furnished by plaintiff, if he received the money from her to buy the car for her, the title and right of possession vested in her. McClemy v. Brown, supra.

[b] **Ownership in plaintiff is material only** so far as it is necessary to show the right to possession. Schlessinger v. Cook, 9 Wyo. 256, 62 P 152.

[c] **Whether the right is absolute** or for purposes of security, is immaterial. Brammell v. Hart, 12 Heisk. (Tenn.) 366.

[d] **Property acquired through robbery or theft** is not recoverable by him in replevin; Crawford & M. Dig. c 169 §§ 10240a–10240c, declaring that title cannot be obtained by such means. Carden v. Swagger, (Ark.) 238 SW 31.

[e] **Where the right to possession depends on a legal title,** plaintiff must have the legal title to maintain replevin. Daniel v. Daniel, 6 B. Mon. (Ky.) 230; Fisher v. Alsten, 186 Mass. 549, 72 NE 78; Leete v. St. Louis State Bank, 141 Mo. 584, 42 SW 927.

[f] **Bidder at a public sale,** whose bid was accepted under a mutual agreement, conditional on furnishing note and surety, and who never was given possession, has no title so as to maintain replevin. Day v. Evanston, 64 SW 749, 23 KyL 1099.

[93] See infra § 250.

[94] Cal.—Braden v. Cline, 51 Cal. A. 424, 196 P 913.

Iowa.—McCoy v. Cadle, 4 Iowa 557.

Mich.—Conely v. Dudley, 111 Mich. 122, 69 NW 151.

Nev.—William Johnson Land, etc., Co. v. Harris, 48 Nev. 312, 231 P 1095.

Vt.—Cramton v. Chapman, 85 Vt. 74, 81 A 231; Sprague v. Clark, 41 Vt. 6.

Wash.—Reynolds v. Dexter, 2 Wash. 185, 26 P 221.

Wis.—Dresser v. Lemma, 122 Wis. 387, 100 NW 844.

Ont.—Sargant v. Toronto, 12 U. C. C. P. 185.

[a] **Property temporarily in custody of third person.**—Where one in possession of a horse, claiming it as owner, temporarily loaned it to another from whose custody defendant took it, the possession of the former was sufficient to support replevin against defendant. Cramton v. Chapman, 85 Vt. 74, 81 A 231.

[b] **Possession obtained by mistake.**—Naked possession obtained from defendant by mistake is insufficient to support an action of replevin to regain the property taken by defendant on discovery of the mistake. Baltimore, etc., R. Co. v. Rueter, 114 Md. 687, 80 A 220.

[95] Del.—Stockwell v. Robinson, 14 Del. 313, 32 A 528.

Ill.—Van Namee v. Bradley, 69 Ill. 299; Warner v. Cushman, 31 Ill. 283; Wheeler v. McCorristen, 24 Ill. 40; Agnew v. Baker, 204 Ill. A. 56; Downey v. Arnold, 97 Ill. A. 91. Bartleson v. Mason, 53 Ill. A. 644.

Ind.—Moorman v. Quick, 20 Ind. 67.

Iowa.—Kinney v. McDermot, 55 Iowa 674, 8 NW 656, 39 AmR 191.

Ky.—Wiley v. Gates, 2 Ky. Op. 155.

Mass.—Odd Fellows' Hall Assoc. v. McAllister, 153 Mass. 292, 26 NE 862, 11 LRA 172. Contra Perley v. Foster, 9 Mass. 112; Waterman v. Robinson, 5 Mass. 303.

Mich.—Sanford v. Millikin, 144 Mich. 311, 107 NW 884.

Minn.—Anderson v. Gouldberg, 51 Minn. 294, 53 NW 636.

Mo.—Smith v. Lydick, 42 Mo. 209; Campbell v. Brown, 146 Mo. A. 319, 130 SW 50; Maryville Nat. Bank v. Snyder, 85 Mo. A. 82; Updyke v. Wheeler, 37 Mo. A. 680. Contra Broadwater v. Darne, 10 Mo. 277; Mc-

though there is authority to the contrary.[96] So where the right of immediate possession is in one and the title or ownership is in another, the former may maintain replevin against the latter.[97] On the other hand, the holder of the legal title cannot sue where he has not a right of immediate possession,[98] but the fact that the owner is not entitled to possession as against one person will not preclude his action against another not claiming under him.[99] The fact that a third person may have some interest in the property will not preclude replevin by one having the right to possession.[1] Wrongful possession by plaintiff cannot be made the basis of an action of replevin,[2] although it has been held that plaintiff may replevy from a wrongdoer, even though having obtained possession under an illegal transaction.[3]

[§ 48] **2. Equitable Title or Interest.** While in some jurisdictions an equitable title is insufficient,[4] in others the contrary rule prevails,[5] and actual possession and an equitable interest has been held sufficient.[6]

[§ 49] **3. Superiority of Title.** Plaintiff can recover only on the strength of his own title or right to possession, and not on the weakness of defendant's title or right.[7]

[§ 50] **C. Necessity of Prior Possession.** While

Mahill v. Walker, 22 Mo. A. 170; Wright v. Richmond, 21 Mo. A. 76.

N. Y.—Perkins v. Chautauqua Tract. Co., 76 Misc. 307, 137 NYS 80; Rogers v. Arnold, 12 Wend. 30.

N. C.—Freshwater v. Nichols, 52 N. C. 251.

Or.—Red Hawk v. Joines, 129 Or. 620, 278 P 572; Taylor v. Brown, 49 Or. 423, 90 P 673; Casto v. Murray, 47 Or. 57, 81 P 388, 883; Lewis v. Birdsey, 19 Or. 164, 26 P 623.

S. C.—Hall v. Ligon, 111 S. C. 245, 97 SE 710.

Tenn.—Lieberman v. Clark, 114 Tenn. 117, 85 SW 258, 69 LRA 732.

Wis.—Wisconsin Livestock Assoc. v. Bowerman, 198 Wis. 447, 224 NW 729; Kellogg v. Adams, 51 Wis. 138, 8 NW 115, 37 AmR 815; Dudley v. Ross, 27 Wis. 679.

See Murray v. Lyons, (Tex. Civ. A.) 95 SW 621 (limiting rule to trespassers).

[a] **Illustration.**—Where a corporation president, acting within his powers, purchased awnings from defendant, and the corporation affixed them to its building, and agreed to pay its president therefor, possession by the corporation, when defendant removed them, entitled the corporation to maintain replevin. Petit Bldg. Co. v. Merck, 169 NYS 496.

[b] **Vendor in possession.**—A person who has executed a contract of sale but retains the property in his possession may maintain replevin against a third person. Wills v. Barrister, 36 Vt. 220.

[c] **Possession unlawfully obtained** from defendant, himself a participant in the unlawful transaction, is sufficient to support replevin against defendant who by trespass takes possession of the property. Kinney v. McDermot, 55 Iowa 674, 8 NW 656, 39 AmR 191.

[d] **Logs removed by trespassers.**—Possession of land under a claim of ownership is sufficient to maintain replevin against trespassers for logs cut therefrom. Hickingbottom v. Lehman, 124 Miss. 682, 87 S 149; Walker v. Davis, 139 Tenn. 475, 202 SW 78.

[96] Chambers v. Hunt, 18 N. J. L. 339.

[97] Southern Pac. Co. v. Bank of America, 29 F. (2d) 465 [aff 23 F. (2d) 939 (certiorari den 279 U. S. 847, 49 SCt 345, 73 L. ed. 991)]; Richards v. Hellen, 153 Iowa 66, 133 NW 393; Woodson v. Pearce, 5 Sneed (Tenn.) 415.

[a] **Replevin against former owner and vendee.**—A person possessing such a property right may maintain his action against the former owner and his vendee, where the property has fallen into their hands. Brooke v. Berry, 1 Gill (Md.) 153.

[b] **Detention by the owner** without right of possession is as unlawful as detention by any other person. Williams v. West, 2 Oh. St. 82.

[c] **Where the legal title has been parted with through fraud,** plaintiff may nevertheless recover the property in replevin. Roesler v. Shastri, 168 Wis. 153, 169 NW 282; Singer v. Schilling, 74 Wis. 369, 43 NW 101.

[98] Ark.—Britt v. Aylett, 11 Ark. 475, 52 AmD 282.

Cal.—Sutton v. Stephan, 101 Cal. 545, 36 P 106.

Md.—Dentzel v. City, etc., R. Co., 90 Md. 434, 45 A 201.

Nebr.—Shackelford v. Hargreaves, 42 Nebr. 680, 60 NW 951.

N. J.—Hallet, etc., Piano Co. v. Roe, 85 N. J. L. 160, 88 A 624.

N. Y.—Wood v. Orser, 25 N. Y. 348.

Oh.—Williams v. West, 2 Oh. St. 82.

Utah.—Bush v. Bush, 55 Utah 237, 184 P 823.

[a] **In Connecticut** under an early statute, title was sufficient. Spencer v. Roberts, 42 Conn. 75 (statute repealed after commencement of this action).

[99] Electric City Motors v. Ross, 92 Pa. Super. 463.

[1] Rapp v. Vogel, 45 Mo. 524.

[2] Ellsworth v. McDowell, 44 Nebr. 707, 62 NW 1082 (holding that the possession of property obtained by trespass cannot be made the basis of an action of replevin).

[3] Gunn v. Williams, 246 Ill. A. 494; Colburn v. Coburn, (Tex. Civ. A.) 211 SW 248.

[4] Fisher v. Alsten, 186 Mass. 549, 72 NE 78; Truman v. Dakota Trust Co., 29 N. D. 456, 151 NW 219; Coe v. Peacock, 2 Oh. Dec. (Reprint) 239, 2 WestLMonth 134; Horn v. Nicholas, 139 Tenn. 453, 201 SW 756, LRA1918E 157; Richmond Type, etc., Fdy. v. Carter, 133 Tenn. 489, 182 SW 240.

[a] **Rule applied.**—(1) Replevin by a husband will not lie against a wife's estate for certificates of deposit taken out in her name with his consent, although he claims that they were held in trust for him and represented his money. Truman v. Dakota Trust Co., 29 N. D. 456, 151 NW 219. (2) A transfer of notes secured by a chattel mortgage without an assignment of the mortgage carries with it merely the equitable title to the mortgage, and does not entitle the holder to maintain replevin in his own name. Richmond Type, etc., Fdy. v. Carter, 133 Tenn. 489, 182 SW 240. (3) The indorsee of a false note which both parties thought was the valid note could not maintain replevin to recover the true note, since one to maintain replevin must show a legal right of possession or ownership as distinguished from such a right recognized in courts of equity. Horn v. Nicholas, 139 Tenn. 453, 201 SW 756.

[5] Frost v. Mott, 34 N. Y. 253; Carter v. Long, 26 Can. S. C. 430.

[6] Frost v. Mott, 34 N. Y. 253.

[7] U. S.—Radetsky v. Gramm-Bernstein Motor Truck Co., 4 F. (2d) 965.

Ariz.—Hall v. Southern Pac. Co., 6 Ariz. 378, 57 P 617.

Ark.—Holbrook v. Neely, 93 Ark. 272, 124 SW 1025; Black v. Roberson, 112 SW 402; Robinson v. Calloway, 4 Ark. 94.

Cal.—Dowd v. Russell, 78 Cal. A. 262, 248 P 293.

Colo.—Kelly v. Lewis, 38 Colo. 18, 88 P 388; Hall v. Johnson, 21 Colo. 414, 42 P 660; Buchanan v. Scandia Plow Co., 6 Colo. A. 34, 39 P 899.

Conn.—Weller v. Ely, 45 Conn. 547.

Del.—Bennett v. Brittingham, 32 Del. 339, 140 A 164; Frick v. Miller, 30 Del. 366, 107 A 391 [aff 30 Del. 374, 107 A 394]; Wilkins v. Wilson, 15 Del. 404, 41 A 76; Ott v. Specht, 13 Del. 61, 12 A 721.

Fla.—Delco Light Co. v. John Le Roy Hutchinson Properties, 99 Fla. 410, 128 S 831; Gracy v. Seaboard Air Line R. Co., 69 Fla. 301, 68 S 722; Richbourg v. Rose, 53 Fla. 173, 44 S 69, 125 AmSR 1061; Holliday v. McKinne, 22 Fla. 153.

Ida.—Western Seed Marketing Co. v. Pfost, 45 Ida. 340, 262 P 514; Mountain Home Sheep Co. v. Faraday, 36 Ida. 633, 212 P 970; Carstensen, etc., Co. v. Wright, 25 Ida. 492, 138 P 830.

Ill.—Pease v. Ditto, 189 Ill. 456, 59 NE 983; Reynolds v. McCormick, 62 Ill. 412; Constantine v. Foster, 57 Ill. 36; Commercial Credit Trust v. Land, 251 Ill. A. 469; Robinson v. Huschle, 233 Ill. A. 519; Perfect Knitting Mills v. Obstfeld, 154 Ill. A. 637; La Salle Pressed Brick Co. v. Coe, 126 Ill. A. 308; Hacker v. Munroe, 56 Ill. A. 532.

Ind.—Edmundson v. Friedell, 199 Ind. 582, 159 NE 428; Lane v. Sparks, 75 Ind. 278; Branch v. Wiseman, 51 Ind. 1; Davis v. Warfield, 38 Ind. 461; Simcoke v. Frederick, 1 Ind. 54; Guaranty Discount Corp. v. Bowers, (A.) 158 NE 231; Lynch v. Martin, 84 Ind. A. 478, 151 NE 620; Daily v. Smith, 66 Ind. A. 393, 118 NE 312; Morgan v. Jackson, 32 Ind. A. 169, 69 NE 410; Miller v. Lively, 1 Ind. A. 6, 27 NE 437.

Iowa.—Daniel v. Hammers, 199 Iowa 963, 203 NW 235; Iowa City State Bank v. Pritchard, 199 Iowa 676, 202 NW 512; Gardner v. Builders' Material Co., 190 Iowa 443, 180 NW 188; Hillman v. Brigham, 110 Iowa 220, 81 NW 451; Lufkin v. Preston, 52 Iowa 235, 3 NW 58; Hamilton v. Iowa

the right to possession is essential,[8] it may be stated generally that where plaintiff establishes his right to possession, through some general or special ownership, and where he does not base his right on mere naked possession, it is not necessary that he have ever had actual possession of the property,[9] although it has been held that plaintiff must have actual possession,[10] at least when he has only a special property in the goods.[11]

[§ 51] **D. Title and Right to Possession of Particular Classes of Persons[12]—1. Partners**[13] The members of a partnership may jointly maintain an action of replevin to recover the possession of property to which they are entitled;[14] but as the interest of one partner is only a right to share in the proceeds of the property after the payment of the firm debts[15] the action cannot be maintained by him alone,[16] except where he is entitled to the control and possession of the property,[17] although the con-

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City Nat. Bank, 40 Iowa 307.

Ky.—Hibbard v. Estridge, 156 Ky. 122, 160 SW 746.

La.—Pritchett v. Coyle, 22 La. Ann. 57.

Mass.—Dapson v. Daly, 257 Mass. 195, 153 NE 454, 49 ALR 1496; Davis v. Smith-Springfield Body Corp., 250 Mass. 278, 145 NE 434; Harding v. Eldridge, 186 Mass. 39, 71 NE 115; Stanley v. Neale, 98 Mass. 343; Johnson v. Neale, 6 Allen 227.

Mich.—Upham v. Caldwell, 100 Mich. 264, 58 NW 1001.

Miss.—Power v. Telford, 60 Miss. 195.

Mo.—Leete v. St. Louis State Bank, 141 Mo. 584, 42 SW 927; Brunke v. Salinger, (A.) 8 SW (2d) 88; Weaver v. Lake, (A.) 4 SW (2d) 834; Wrather v. Salyer, (A.) 274 SW 1106; Schick v. Rehkop, (A.) 237 SW 209; Johnston v. Brown Bros. Iron, etc., Co., 208 Mo. A. 189, 231 SW 1011; Luther v. Kinyon, (A.) 219 SW 117; Jackson v. Columbia, (A.) 217 SW 869; Ross v. May, 164 Mo. A. 398, 144 SW 901; Bowles Live Stock Commission Co. v. Hunter, 91 Mo. A. 436; Maryville Nat. Bank v. Snyder, 85 Mo. A. 82; Springfield Grocer Co. v. Shackelford, 65 Mo. A. 364; Moore v. Carr, 65 Mo. A. 64; Kennedy v. Dodson, 44 Mo. A. 550; Updyke v. Wheeler, 37 Mo. A. 580.

Mont.—Stephenson v. Combination Leasing, etc., Co., 86 Mont. 322, 329, 283 P 1110 [cit Cyc]; Davey v. Davey, 81 Mont. 375, 263 P 415; Gallick v. Bordeaux, 31 Mont. 328, 78 P 583.

Nebr.—Northrup v. Bathrick, 80 Nebr. 36, 113 NW 808; Chadron First Nat. Bank v. Hughes, 92 NW 986; Herman v. Kneipp, 59 Nebr. 208, 80 NW 816; Fuller v. Brownell, 48 Nebr. 145, 67 NW 6; Johannson v. Miller, 45 Nebr. 53, 63 NW 141; Kavanaugh v. Brodball, 40 Nebr. 875, 59 NW 517; St. John v. Swanback, 39 Nebr. 841, 58 NW 288; Jones v. Loree, 37 Nebr. 816, 56 NW 390; Bardwell v. Stubbert, 17 Nebr. 485, 23 NW 344; Goodman v. Kennedy, 10 Nebr. 270, 4 NW 987; G. T. Northwall Co. v. McCormick Harvester Mach. Co., 2 Nebr. (Unoff.) 699, 89 NW 767.

N. H.—Taylor v. True, 27 N. H. 220.

N. J.—Chambers v. Hunt, 18 N. J. L. 339.

N. D.—Sorlie v. Manthey, 55 N. D. 71, 212 NW 400; Sylvester v. Mackey, 48 N. D. 256, 183 NW 1019; Truman v. Dakota Trust Co., 29 N. D. 456, 151 NW 219.

Okl.—Craighead v. Myers, 293 P 192; Anglo-American Mill Co. v. Milam, 133 Okl. 271, 272 P 430; Producers' Supply Co. v. Sinclair Oil, etc., Co., 105 Okl. 47, 231 P 279; Robb v. Dobrinski, 14 Okl. 563, 78 P 101.

Or.—Commercial Credit Co. v. Click, 127 Or. 130, 271 P 36.

Pa.—Reymer v. Phillips, 16 Pa. Dist. 270; Swope v. Crawford, 17 Lanc LRev 196.

R. I.—Millard v. Hall, 135 A 855.

S. C.—Peeples v. Warren, 51 S. C. 560, 29 SE 659.

S. D.—Dixson v. Ladd, 32 S. D. 163, 142 NW 259, 46 LRANS 206, AnnCas 1916A 253; Palmer v. Hurst, 22 S. D. 68, 115 NW 516.

Utah.—Jones v. Commercial Inv. Trust, 64 Utah 151, 228 P 896.

Vt.—Ravine House Co. v. Bradstreet, 148 A 481.

Wash.—Sweet v. Lease, 154 Wash. 25, 280 P 742; Colby v. Nelson, 131 Wash. 650, 230 P 629; Curtis Studio v. Lennes, 121 Wash. 32, 208 P 79; Munson v. Baldwin, 88 Wash. 379, 153 P 338; North Shore Boom, etc., Co. v. Nicomen Boom Co., 52 Wash. 564, 101 P 48.

[a] **Rule applied.**—(1) Where a bill of sale of furniture on certain designated premises, did not cover furniture which was not on premises when bill of sale was executed, plaintiff could not maintain replevin therefor, since her right to recover must rest on her title, not on defendant's lack of title. Colby v. Nelson, 131 Wash. 650, 230 P 629. (2) If plaintiff has parted with his ownership for the obligation of another without fraud, it is immaterial that defendant paid nothing for the property. Hacker v. Munroe, 56 Ill. A. 532. (3) A purchaser of property of a third person in the presence of the owner cannot recover on the theory of the owner's estoppel. Schick v. Rehkop, (Mo. A.) 237 SW 209. (4) Where a void bill of lading is basis of plaintiff's claim, he is not entitled to recover, regardless of whether defendant has a right to possession. Ætna Nat. Bank v. Water Power Co., 58 Mo. A. 532. (5) If plaintiff's title was obtained through fraud and collusion he cannot replevy. Lane v. Sparks, 75 Ind. 278; Ætna Nat. Bank v. Water Power Co., 58 Mo. A. 532.

[b] **A stranger** who has no interest whatever in the goods in question cannot maintain replevin on the ground that they are wrongfully held by defendant. Wheeler v. Dixon, 51 Miss. 550; Jimmerson v. Greene, 7 Nebr. 26.

[c] **Contest between defendant and intervener.**—Where the issue resolves itself into one between defendant and an intervener, defendant virtually becomes plaintiff, and he must recover, if at all, on the strength of his own title. Burrows v. Waddell, 52 Iowa 195, 3 NW 37.

[8] See supra § 46.

[9] Ark.—Wilson v. Royston, 2 Ark. 315.

Cal.—Garcia v. Gunn, 119 Cal. 315, 51 P 684; Lazard v. Wheeler, 22 Cal. 139; Beggs v. Smith, 26 Cal. A. 532, 147 P 585.

Ind.—Chinn v. Russell, 2 Blackf. 172.

N. Y.—Neff v. Thompson, 8 Barb. 213; Williamson v. Lawrence, 8 Misc. 71, 28 NYS 594. Contra Pangburn v. Patridge, 7 Johns. 140, 5 AmD 250.

Okl.—Alexander v. Busch, 66 Okl. 17, 166 P 900, LRA1918E 125.

Pa.—Westinghouse Air Brake Co. v. Harris, 237 Pa. 203, 85 A 78; Ferguson v. Lauterstein, 160 Pa. 427, 28 A 852; Miller v. Warden, 111 Pa. 300, 2 A 90; Harlan v. Harlan, 15 Pa. 507, 53 AmD 612; Hoffman v. Sellers, 5 Pa. Dist. 395.

But see Wright v. Armstrong, 1 Ill. 172 (holding that plaintiff must have actual or constructive possession).

[10] Dickson v. Mathers, 7 F. Cas. No. 3,898a, Hempst. 65; Byrd v. O'Hanlin, 8 S. C. L. 401; Comerford v. Blake, 2 Ir. Eq. 176.

[11] Holliday v. Lewis, 15 Mo. 403.

[12] **Replevin:**
Between mortgagees see Chattel Mortgages § 329.
By:
  Creditor against purchaser of property sold in violation of Bulk Sales Act see Fraudulent Conveyances § 900.
  Mortgagee against:
    Mortgagor see Chattel Mortgages § 301.
    Third person see Chattel Mortgages § 301.
  Mortgagor against mortgagee see Chattel Mortgages § 289.
  Officer seizing goods under execution see Executions § 294.
Right of:
  Bailee to replevy see Bailments § 126.
  Bailor to replevy from bailee see Bailments § 123.
  Guardian to replevy property of ward see Guardian and Ward § 428.
  Pledgee to replevy property see Pledges §§ 115, 116.
  Purchaser to replevy goods from seller see Sales [35 Cyc 612].
  Seller to replevy:
    From purchaser see Sales [35 Cyc 512].
    Goods from one who buys from the original purchaser see Sales.

[13] **Right of one partner to maintain replevin against another copartner for partnership property** see Partnership § 250.

[14] Ferguson v. Day, 6 Ind. A. 138, 33 NE 213; Cinfel v. Malena, 67 Nebr. 95, 93 NW 165.

[15] See Partnership §§ 221, 222.

[16] Davis v. White, 6 Del. 228; Hacker v. Johnson, 66 Me. 21; Fay v. Duggan, 135 Mass. 242; Magnees v. Cox, (Mo. A.) 278 SW 1070.

[17] Harkey v. Tillman, 40 Ark. 551; Bostick v. Brittain, 25 Ark. 482; Anderson v. Stewart, 108 Md. 340, 70 A 228.

[a] **The fact that other parties have an ultimate interest** in an accounting for the proceeds of the property does not affect the right of plaintiff to maintain his action, where he

trary has been held.[18] One partner cannot replevy property from the bailee of the other partner.[19] A surviving partner, being entitled to the firm property, may replevy it from the administrator of his deceased partner.[20] Under a statute which prevents replevin of attached property by defendants in attachment the partners cannot replevy property on the ground that it is partnership property when some of the partners are defendants in attachment.[21]

[§ 52] **2. Joint Tenants and Tenants in Common.**[22] To enable one to maintain an action of replevin, his right to the possession must be exclusive.[23] Therefore, as a general rule, where a personal chattel is owned by several persons, one part owner cannot maintain replevin for it.[24] All the owners must unite in the action,[25] for the reason that all joint owners, unless there is an agreement to the contrary, by reason of which plaintiff has a right to possession against the other part owners,[26] are equally entitled to the possession of the property, and neither has the right to the immediate and exclusive possession of the same as against the other.[27] One tenant in common,[28] or joint owner,[29] cannot sustain replevin against his cotenant nor against one to whom such cotenant has transferred the property;[30] nor against a stranger in possession.[31] However, it has been held that the bare fact that plaintiff does not alone own the property, is no bar to replevin against a stranger.[32] The doctrine above stated, that one joint owner cannot sustain replevin against his coöwner, applies more particularly to a single piece of property, or to things in their nature so far indivisible that the share of one is not susceptible of delivery without the whole.[33] But it does not obtain where the property is absolutely alike in quality and value, and is readily divisible by measurement or weight.[34] And where one repudiates the other's interest in property susceptible of division,[35] or takes possession of the common property and converts it to his own use,[36] the other may bring replevin for

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had the right to take possession at the time of the commencement of the action. Bostick v. Brittain, 25 Ark. 482.

[18] Hutchinson v. Dubois, 45 Mich. 143, 7 NW 714.

[19] Tell v. Beyer, 38 N. Y. 161, 6 Transcr. A. 142.

[20] Smith v. Wood, 31 Md. 293.

[21] Smith v. Orser, 43 Barb. 187 [aff 42 N. Y. 132].

[22] **Replevin of undivided shares** see supra § 11.

[23] See supra § 46.

[24] U. S.—De Wolf v. Harris, 8 F. Cas. No. 4,221, 4 Mason 515.

Ill.—Harris v. Le Masters, 215 Ill. A. 282. See also Kelly v. Hakes, 190 Ill. A. 210.

Mass.—Bray v. Raymond, 166 Mass. 146, 44 NE 131; Ladd v. Billings, 15 Mass. 15; Hart v. Fitzgerald, 2 Mass. 509, 3 AmD 75.

Mo.—Gossett v. Drydale, 48 Mo. A. 430.

Pa.—Reinheimer v. Hemingway, 35 Pa. 432.

[25] De Wolf v. Harris, 8 F. Cas. No. 4,221, 4 Mason 515 [aff 4 Pet. 147, 7 L. ed. 811]; Ellis v. Culver, 2 Del. 129; Hart v. Fitzgerald, 2 Mass. 509, 3 AmD 75.

Joinder of parties plaintiff see infra § 91.

[26] Rich v. Ryder, 105 Mass. 306; Young v. Harris-Cortner Co., 152 Tenn. 34, 268 SW 1120 [den reh 152 Tenn. 15, 268 SW 125, 54 ALR 516].

[27] Cal.—Balch v. Jones, 61 Cal. 234.

Del.—Ellis v. Culver, 2 Del. 129.

Ind.—Bowen v. Roach, 78 Ind. 361.

Mo.—Lisenby v. Phelps, 71 Mo. 522; Cross v. Hulett, 53 Mo. 397; Spooner v. Ross, 24 Mo. A. 599.

Nebr.—Fines v. Bolin, 36 Nebr. 621, 54 NW 990.

[28] U. S.—Bohlen v. Arthurs, 115 U. S. 482, 6 SCt 114, 29 L. ed. 454.

Ark.—Ward v. Worthington, 33 Ark. 830.

Cal.—Balch v. Jones, 61 Cal. 234; Hewlett v. Owens, 50 Cal. 474.

Del.—Ellis v. Culver, 2 Del. 129.

Ky.—Chinn v. Respass, 1 T. B. Mon. 25.

Me.—Hardy v. Sprowle, 32 Me. 322.

Mass.—Silloway v. Brown, 12 Allen, 30; Barnes v. Bartlett, 15 Pick. 71; Wills v. Noyes, 12 Pick. 324.

Mich.—Busch v. Nester, 70 Mich. 525, 38 NW 458; Kindy v. Green, 32 Mich. 310.

Miss.—Staple Cotton Co-op. Assoc. v. Hemphill, 142 Miss. 298, 107 S 24.

Mo.—Gossett v. Drydale, 48 Mo. A. 430.

N. J.—Chambers v. Hunt, 22 N. J. L. 552; Hunt v. Chambers, 21 N. J. L. 620.

N. Y.—Hudson v. Swan, 83 N. Y. 552 [aff 7 AbbNCas 324]; Davis v. Lottich, 46 N. Y. 393; Russell v. Allen, 13 N. Y. 173; Barrowcliffe v. Cummins, 66 Hun 1, 20 NYS 787; Rogers v. Arnold, 12 Wend. 30.

N. C.—Strauss v. Crawford, 89 N. C. 149.

Or.—Halsey v. Simmons, 85 Or. 324, 166 P 944, 945, LRA1918A 321 [cit Cyc].

[29] U. S.—Olivier v. Mt. Union Tanning, etc., Co., 253 Fed. 593.

Ark.—Carle v. Wall, 16 SW 293.

Conn.—Prentice v. Ladd, 12 Conn. 331.

Del.—Ellis v. Culver, 2 Del. 129.

Ind.—Bowen v. Roach, 78 Ind. 361; Noble v. Epperly, 6 Ind. 414.

Ky.—Baum v. Baum, 200 Ky. 424, 255 SW 71; Chinn v. Respass, 1 T. B. Mon. 25.

Md.—McElderry v. Flannagan, 1 Harr. & G. 308.

Mass.—Jarvis v. De Peza, 251 Mass. 447, 146 NE 662.

Minn.—Wilkes v. Holmes, 128 Minn. 349, 150 NW 1098.

Miss.—Holton v. Binns, 40 Miss. 491.

Mo.—Pulliam v. Burlingame, 81 Mo. 111, 51 AmR 229; Lisenby v. Phelps, 71 Mo. 522; Cross v. Hulett, 53 Mo. 397; McDowell v. Hollingsworth, (A.) 10 SW (2d) 314; Farmers' Sav. Bank v. American Trust Co., (A.) 196 SW 35; Miller v. Crigler, 83 Mo. A. 395; Spooner v. Ross, 24 Mo. A. 599.

N. J.—Chambers v. Hunt, 22 N. J. L. 552; Hunt v. Chambers, 21 N. J. L. 620.

N. Y.—Davis v. Lottich, 46 N. Y. 393.

Or.—Sharp v. Johnson, 38 Or. 246, 63 P 485, 84 AmSR 788.

Utah.—Hill v. Seager, 3 Utah 379, 3 P 545.

[30] Frans v. Young, 24 Iowa 375; Alford v. Bradeen, 1 Nev. 228; Davis v. Lottich, 46 N. Y. 393.

[31] Del.—Ellis v. Culver, 2 Del. 129.

Mo.—Jackson v. Columbia, (A.) 217 SW 869; Spooner v. Ross, 24 Mo. A. 599.

Mont.—Agricultural Credit Co. v. O'Rourke, 65 Mont. 517, 211 P 200, 201 [cit Cyc].

N. J.—Hunt v. Chambers, 21 N. J. L. 620.

N. C.—Allen v. McMillan, 191 N. C. 517, 132 SE 276.

[a] **Rule applied.**—Intervener was not entitled to recover alleged stolen automobile taken from plaintiff's possession by sheriff, unless he was sole owner thereof. Allen v. McMillan, 191 N. C. 517, 132 SE 276.

[32] McDonald v. Daniels, 76 Kan. 388, 92 P 51; Miller v. Darling, 22 Minn. 303; Wright v. Bennett, 3 Barb. (N. Y.) 451.

[33] Read v. Middleton, 62 Iowa 317, 17 NW 532; Kaufmann v. Schilling, 58 Mo. 218; Fines v. Bolin, 36 Nebr. 621, 54 NW 990.

[34] Pitman v. Baumstark, 63 Kan. 69, 64 P 968; Freese v. Arnold, 99 Mich. 13, 57 NW 1038; Brumley v. McCormack, (Mo. A.) 17 SW (2d) 597; Fines v. Bolin, 36 Nebr. 621, 54 NW 990.

[a] **A tenant in common of grain** may maintain replevin against a cotenant who unlawfully withholds plaintiff's share. Freese v. Arnold, 99 Mich. 13, 57 NW 1038; Wattles v. Dubois, 67 Mich. 313, 34 NW 672; Sutherland v. Carter, 52 Mich. 471, 18 NW 223; Crapo v. Seybold, 36 Mich. 444.

[35] Cornett v. Hall, 103 Mo. A. 353, 77 SW 122; Halsey v. Simmons, 85 Or. 324, 166 P 944, 945, LRA1918A 321 [cit Cyc].

[36] Schwartz v. Skinner, 47 Cal. 3; Robbins v. Grooms, (Mo. A.) 257 SW 503, 504 [cit Cyc]; Halsey v. Sim-

his share. Where plaintiff must have the right to possession at the time of the taking,[37] property in himself and another will prevent the action, even though he alone have property in himself at the time of issuance of the writ.[38] A joint owner having sole possession may replevy from one whose right is not superior to his.[39] One to whom a joint owner sells the property cannot replevy it so as to deprive the cotenant of the right of possession.[40]

[§ 53] **3. Purchaser at Sale under Process or Distress Proceedings.**[41] One who has purchased personal property at an execution sale may maintain replevin against the execution debtor,[42] even though the sale was in some respects irregular,[43] and a purchaser of land at an execution or foreclosure sale may maintain replevin for timber, crops, or machinery detached from the realty after the sale;[44] but not where they were detached before the sale.[45] Replevin cannot be maintained where another person has the right to possession.[46] The purchaser of an undivided interest of personalty may maintain the action after the officer has divided the property and delivered one half to him,[47] but one who has purchased merely the interest of a partner in the firm property may not, as he is not entitled to possession.[48]

[§ 54] **4. Assignee, Consignee, or Pledgee.** An assignee,[49] or consignee,[50] has sufficient interest in the property to maintain replevin against a trespasser, or against an officer levying to satisfy a subordinate lien on the property. The assignee of a mortgage of an undivided interest cannot, however, because not entitled to exclusive right to possession.[51] A pledgee deprived of his possession by attachment of property by a creditor of his pledgor is entitled to recover it.[52]

V. TAKING, DETENTION, OR POSSESSION BY DEFENDANT

[By Joseph W. Rouse]

[§ 55] **A. Wrongful Taking.** At common law a writ of replevin lies only where there has been a tortious or wrongful taking of the property by defendant,[53] with the exception of cattle distrained damage feasant, where before impounding sufficient amends were tendered;[54] and it will not lie for a mere detention where the property was lawfully obtained.[55] Herein it is distinguishable from detinue which was the common-law action to obtain the property where defendant came rightfully into possession and the detention only was wrongful.[56] Any unlawful interference with or assertion of control over the property is sufficient without an actual forcible dispossession,[57] although an actual taking or detention has been held necessary.[58] Where property was secured through fraud its taking was wrongful ab

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mons, 85 Or. 324, 166 P 944, 945, LRA 1918A 321 [cit Cyc].

[37] See supra § 46.

[38] McArthur v. Lane, 15 Me. 245.

[39] Chaffee v. Harrington, 60 Vt. 718, 15 A 350.

[40] Parsons v. Kimmel, 206 Mich. 676, 173 NW 539.

[41] **Actions or proceedings generally** see Executions § 842.

[42] Hazzard v. Burton, 4 Del. 62.

[a] **Where goods not the property of the tenant,** and exempt from distress, were sold under distress proceedings, the purchaser thereof cannot maintain replevin against the true owner. Owen v. Boyle, 22 Me. 47.

[43] Hazzard v. Burton, 4 Del. 62.

[44] Marquette, etc., R. Co. v. Atkinson, 44 Mich. 166, 6 NW 230; Harlan v. Harlan, 15 Pa. 507, 53 AmD 612.

[45] Berthold v. Harmon, 12 Minn. 335, 93 AmD 233.

[46] Ind.—Bowen v. Roach, 78 Ind. 361.

Mich.—McArthur v. Oliver, 60 Mich. 605, 27 NW 689.

Minn.—Berthold v. Holman, 12 Minn. 335, 93 AmD 233.

Mo.—Williams v. Farm, etc., Sav., etc., Assoc., 217 Mo. A. 554, 272 SW 1006.

Ont.—Scott v. Carveth, 20 U. C. Q. B. 430.

[47] Snyder v. Stehman, 10 Pa. Super. 639.

[48] Reinheimer v. Hemingway, 35 Pa. 432.

[49] Cal.—Lazard v. Wheeler, 22 Cal. 139.

D. C.—Wall v. De Mitkiewicz, 9 App. 109.

Kan.—Sehrt-Patterson Milling Co. v. Levan, 9 Kan. A. 523, 58 P 275.

Mass.—Whipple v. Thayer, 16 Pick. 25, 26 AmD 626.

Nebr.—Gamble v. Wilson, 33 Nebr. 270, 50 NW 3.

Vt.—Grand Isle v. McGowan, 88 Vt. 140, 92 A 6.

[50] Peters v. Elliott, 78 Ill. 321; Powell v. Bradlee, 9 Gill & J. (Md.) 220; Butler v. Smith, 35 Miss. 457; Fitzhugh v. Wiman, 9 N. Y. 559; Grosvenor v. Phillips, 2 Hill (N. Y.) 147.

[51] Agricultural Credit Co. v. O'Rourke, 65 Mont. 517, 211 P 200.

[52] Currier v. Ford, 26 Ill. 488.

[53] U. S.—Meany v. Head, 16 F. Cas. No. 9,379, 1 Mason 319; Murphy v. Tindall, 17 F. Cas. No. 9,952a, Hempst. 10.

Ark.—Trapnall v. Hattier, 6 Ark. 18.

Del.—Drummond v. Hopper, 4 Del. 327. But see Clark v. Adair, 3 Del. 113 (stating that the action is not confined to cases of tortious taking, but lies whenever one claims property in the possession of another).

Fla.—Simmons v. Williford, 60 Fla. 359, 361, 53 S 452, AnnCas1912C 735 [cit Cyc].

Ky.—Harper v. Baker, 3 T. B. Mon. 421, 16 AmD 112.

Miss.—Wheelock v. Cozzens, 7 Miss. 279.

Mo.—Rector v. Chevalier, 1 Mo. 345.

N. H.—Peirce v. Finerty, 76 N. H. 38, 76 A 194, 79 A 23, 29 LRANS 547; Woodward v. Grand Trunk R. Co., 46 N. H. 524; Dame v. Dame, 43 N. H. 37.

N. J.—Harwood v. Smethurst, 29 N. J. L. 195, 80 AmD 207; Bruen v. Ogden, 11 N. J. L. 370, 20 AmD 593.

N. Y.—Hymann v. Cook, How. App. Cas. 419; Chapman v. Andrews, 3 Wend. 240; Marshall v. Davis, 1 Wend. 109, 19 AmD 463; Gardner v. Campbell, 15 Johns. 401; Thompson v. Button, 14 Johns. 84; Hopkins v. Hopkins, 10 Johns. 369; Pangburn v. Partridge, 7 Johns. 140, 5 AmD 250.

N. C.—Cummings v. MacGill, 6 N. C. 357.

Pa.—Herdic v. Young, 55 Pa. 176, 93 AmD 739.

Wyo.—Boswell v. Laramie First Nat. Bank, 16 Wyo. 161, 92 P 624, 93 P 661.

Eng.—Galloway v. Bird, 4 Bing. 299, 13 ECL 512, 130 Reprint 782; Mennie v. Blake, 6 E. & B. 842, 88 ECL 842, 119 Reprint 1078; Shannon v. Shannon, 1 Sch. & Lef. 324; Matter of Wilson, 1 Sch. & Lef. 320 note; Ex p. Chamberlain, 1 Sch. & Lef. 320.

[54] Dame v. Dame, 43 N. H. 37.

Replevin of animals distrained damage feasant see Animals § 438.

[55] Woodward v. Grand Trunk R. Co., 46 N. H. 524; Chapman v. Andrews, 3 Wend. (N. Y.) 240; Marshall v. Davis, 1 Wend. (N. Y.) 109, 19 AmD 463.

[56] See Detinue § 3.

[57] Moore v. Moore, 4 Mo. 421; Haythorn v. Rushforth, 19 N. J. L. 160, 38 AmD 540; Latimer v. Wheeler, 3 Abb. Dec. (N. Y.) 35, 1 Keyes 468; Neff v. Thompson, 8 Barb. (N. Y.) 213; Stewart v. Wells, 6 Barb. (N. Y.) 79.

[58] Wallace v. Brown, 17 Ark. 449.

initio.[59]

[§ 56] **B. Wrongful Detention—1. Detention without Wrongful Taking.** The common-law rule[60] has, in most, if not all, jurisdictions been changed by statutes.[61] The effect of which permit the action to be brought whenever property is unlawfully detained, although the original taking was lawful.[62] These statutes have been held not to be retroactive.[63]

[§ 57] **2. Necessity of Wrongful Detention.** The detention of goods is a material fact necessary to maintain an action of replevin. A mere unlawful taking not followed by detention will not sustain the action.[64]

[§ 58] **C. Possession of Defendant—1. Necessity for Actual or Constructive Possession—a. General Rule.** The general rule is well established that, in order to maintain replevin, it is essential that defendant should have either actual or constructive possession of the property sued for at the time suit was commenced, so that he may make delivery thereof to plaintiff if judgment be rendered against him.[65] Thus the action does not lie where defendant never

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[59] Joplin v. Carrier, 11 S. C. 327.

[60] See supra § 55.

[61] See statutory provisions.

[62] U. S.—Sutherland v. Brace, 73 Fed. 624, 19 CCA 589 [aff 71 Fed. 469, 18 CCA 199].

Ark.—McKinnis v. Little Rock, etc., R. Co., 44 Ark. 210; McDonald v. Smith, 21 Ark. 460.

Colo.—Paul v. Luttrell, 1 Colo. 317.

Conn.—Brown v. Poland, 54 Conn. 313, 7 A 719.

Del.—Bennett v. Brittingham, 33 Del. 519, 140 A 154; Atlantic Refining Co. v. Feinberg, 31 Del. 183, 115 A 685; Reynolds v. Donaway, 30 Del. 461, 108 A 139; Frick v. Miller, 30 Del. 366, 107 A 391 [aff 30 Del. 374, 107 A 394]; Whiteman v. Whiteman, 30 Del. 273, 105 A 787; McClemy v. Brown, 29 Del. 253, 99 A 48; Hitch v. Riggin, 26 Del. 84, 80 A 975; Stafford v. Williams, 24 Del. 288, 76 A 626.

Fla.—Evans v. Kloeppel, 72 Fla. 267, 73 S 180; Simmons v. Williford, 60 Fla. 359, 361, 53 S 452, AnnCas 1912C 735 [cit Cyc]; Williams v. Hampton, 57 Fla. 272, 49 S 506.

Ind.—Rose v. Cash, 58 Ind. 278; Baer v. Martin, 2 Ind. 229; Daggett v. Robins, 2 Blackf. 415, 21 AmD 752; Opperman v. Citizens' Bank, 44 Ind. A. 401, 85 NE 991.

Me.—Douglass v. Gardner, 63 Me. 462; Eveleth v. Blossom, 54 Me. 447, 92 AmD 555; Seaver v. Dingley, 4 Me. 306.

Md.—Lamotte v. Wisner, 51 Md. 543.

Mass.—Whitman v. Merrill, 125 Mass. 127; Lockwood v. Perry, 9 Metc. 440; Marston v. Baldwin, 17 Mass. 606; Baker v. Fales, 16 Mass. 147; Badger v. Phinney, 15 Mass. 359, 8 AmD 105.

Mich.—Gildas v. Crosby, 61 Mich. 413, 28 NW 153; Burt v. Burt, 41 Mich. 82, 1 NW 936; Parish v. Morey, 40 Mich. 417; Sexton v. McDowd, 38 Mich. 148; Detroit Frear Stone Works v. White, 35 Mich. 77; Hickey v. Hinsdale, 12 Mich. 99.

Minn.—O'Brien v. Curry, 111 Minn. 533, 127 NW 411, 137 AmSR 563.

Miss.—Burrage v. Melson, 48 Miss. 237.

Mo.—Skinner v. Stouse, 4 Mo. 93.

N. H.—Peirce v. Finerty, 76 N. H. 38, 79 A 23, 29 LRANS 547; Hart v. Boston, etc., R. Co., 72 N. H. 410, 56 A 920.

N. J.—Schwartz v. King Realty, etc., Co., 93 N. J. L. 111, 107 A 154.

N. Y.—Hymann v. Cook, How. App. Cas. 419; Cummings v. Vorce, 3 Hill 282; Ross v. Cassidy, 27 HowPr 416; Drake v. Wakefield, 11 HowPr 106.

Oh.—State v. Jennings, 14 Oh. St. 73; Stone v. Wilson, Wright 159.

Or.—Krebs Hop Co. v. Taylor, 52 Or. 627, 97 P 44, 98 P 494.

Pa.—Herdic v. Young, 55 Pa. 176, 93 AmD 739; Moser v. Libenguth, 2 Rawle 428; Keite v. Boyd, 16 Serg. & R. 300; Stoughton v. Rappalo, 3 Serg. & R. 559; Shearick v. Huber, 6 Binn. 2; Weaver v. Lawrence, 1 Dall. 156, 1 L. ed. 79.

R. I.—Waterman v. Matteson, 4 R. I. 539.

S. D.—Willis v. De Witt, 3 S. D. 281, 52 NW 1090.

Vt.—Dearing v. Smith, 66 Vt. 60, 28 A 630; Rowe v. Hicks, 58 Vt. 18, 4 A 563.

Wash.—Laurendeau v. Fugelli, 5 Wash. 632, 32 P 465.

Wyo.—Boswell v. Laramie First Nat. Bank, 16 Wyo. 161, 92 P 624, 93 P 661.

N. S.—Grant v. Robertson, 2 N. S. Dec. 247.

Ont.—Lewis v. Teale, 32 U. C. Q. B. 108; Deal v. Potter, 26 U. C. Q. B. 578.

[a] **Rule applied.**—Where defendant's possession of property by purchase was not wrongful in the first instance, if the transaction was fraudulent, it was void at the election of plaintiff, who could render the detention unlawful by an offer to restore the consideration and a demand for his own property. Woods v. Shearer, 56 Ind. A. 650, 105 NE 917.

[63] Smith v. Lyon, 44 Conn. 175.

[64] Ariz.—Meyer v. Bigham, 16 Ariz. 212, 141 P 726.

Colo.—Paul v. Luttrell, 1 Colo. 317.

Del.—Johnson v. Johnson, 4 Del. 171.

Ida.—Saxton v. Breshears, 21 Ida. 333, 121 P 567.

Kan.—Moses v. Morris, 20 Kan. 208; Brown v. Holmes, 13 Kan. 482; Arthur v. Wallace, 8 Kan. 267.

Mass.—Page v. Crosby, 24 Pick. 211.

Mich.—Aber v. Bratton, 60 Mich. 357, 27 NW 564; Toomey v. Woodruff, 50 Mich. 31, 14 NW 689; Morrison v. Lumbard, 48 Mich. 548, 12 NW 696; Burt v. Burt, 41 Mich. 82, 1 NW 936; Sexton v. McDowd, 38 Mich. 148; Bacon v. Davis, 30 Mich. 157; Hickey v. Hinsdale, 12 Mich. 99.

Mo.—Barnes v. Plessner, 137 Mo. A. 571, 119 SW 457.

N. Y.—Sherman v. Jenkins, 70 Hun 593, 24 NYS 186; Thomas v. Williams, 32 Hun 257; Savage v. Perkins, 11 HowPr 17.

Oh.—State v. Jennings, 14 Oh. St. 73.

S. D.—Kierbow v. Young, 20 S. D. 414, 107 NW 371, 8 LRANS 216.

Vt.—Dearing v. Smith, 66 Vt. 60, 28 A 630; Bent v. Bent, 44 Vt. 633.

[65] U. S.—Berio v. Gay, 272 Fed. 404 (Porto Rico rule).

Ark.—Stark v. Couch, 109 Ark. 534, 160 SW 853; Casey v. Scott, 82 Ark. 362, 101 SW 1152; Wallace v. Brown, 17 Ark. 499; Beebe v. De Baun, 8 Ark. 510.

Cal.—Richards v. Morey, 133 Cal. 437, 65 P 886; Henderson v. Hart, 122 Cal. 332, 54 P 1110; Riciotto v. Clement, 94 Cal. 105, 29 P 414; Taylor v. Bernheim, 58 Cal. A. 404, 209 P 55; California Packing Corp. v. Stone, 64 Cal. A. 488, 222 P 193; Runge v. Wilson, 7 Cal. A. 577, 95 P 178.

Del.—Reed v. Wiltbank, 18 Del. 243, 45 A 400.

D. C.—Carpenter v. Starr, 12 D. C. 417.

Ind.—Van Gorder v. Smith, 99 Ind. 404; Hadley v. Hadley, 82 Ind. 75; Louthain v. Fitzer, 78 Ind. 449; Rose v. Cash, 58 Ind. 278; Fruits v. Elmore, 8 Ind. A. 278, 34 NE 829; Peninsular Stove Co. v. Ellis, 20 Ind. A. 491, 51 NE 105; West v. Graff, 23 Ind. A. 410, 55 NE 506.

Iowa.—Carr v. King, 184 Iowa 734, 169 NW 133; Coffin v. Gephart, 18 Iowa 256.

Kan.—Redinger v. Jones, 68 Kan. 627, 75 P 997; Davis v. Van de Mark, 45 Kan. 130, 25 P 589; Moses v. Morris, 20 Kan. 208; Ladd v. Brewer, 17 Kan. 204.

Me.—Peacock v. Rich, 125 Me. 504, 130 A 509; Howe v. Shaw, 56 Me. 291; Ramsdell v. Buswell, 54 Me. 546, Small v. Hutchins, 19 Me. 255.

Md.—Herzberg v. Sachsed, 60 Md. 426.

Mass.—Calnan v. Stern, 153 Mass. 413, 26 NE 994; Hall v. White, 106 Mass. 599; Richardson v. Reed, 4 Gray 441, 64 AmD 77.

Mich.—Marcelletti v. Hawley, 187 Mich. 400, 153 NW 724; Hall v. Kalamazoo, 131 Mich. 404, 91 NW 615; Reid v. Parks, 122 Mich. 363, 81 NW 252; Eales v. Francis, 115 Mich. 636, 73 NW 894; House v. Turner, 106 Mich. 240, 64 NW 20; Gildas v. Crosby, 61 Mich. 413, 28 NW 153; Aber v. Bratton, 60 Mich. 357, 27 NW 564; Hinchman v. Doak, 48 Mich. 168, 12 NW 39; Sexton v. McDowd, 38 Mich. 148.

Minn.—Northern Timber Products Co. v. Stone-Ordean-Wells Co., 143 Minn. 200, 173 NW 439; Ames v. Mississippi Boom Co., 8 Minn. 467.

Miss.—Ainsworth v. Smith, 157 Miss. 202, 127 S 771; Vaughn v. Ruff, 99 Miss. 110, 54 S 837; Myrick v. National Cash-Register Co., 25 S 155; Griffin v. Lancaster, 59 Miss. 340.

Mo.—Sipe v. Gross, (A.) 1 SW (2d) 1034; Leavel v. Johnston, 209 Mo. A. 197, 232 SW 1064; Leisey Brewing Co. v. Cline, (A.) 211 SW 689; Martin v. Barnett, 158 Mo. A. 375, 138 SW 538; Fergusson v. Comfort, 194 Mo. A. 423, 184 SW 1192; Emory v. Ar-

had possession of any sort,[66] although he tried to get possession and failed to do so;[67] or where he neither had possession nor claimed any right to possession[68] and was not in collusion with a codefendant in respect of the property;[69] where he did not have possession and disclaimed possession;[70] where plaintiff has actual possession of the goods sued for at the time of bringing suit;[71] where defendant has restored the property to plaintiff before suit was commenced;[72] or where defendant has in good faith and prior to the commencement of the action transferred and parted with possession of the property.[73] One jointly interested in the object of the detention and assenting thereto for such purpose is also lia-

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nold, 184 Mo. A. 99, 168 SW 320; Morrow v. Pryor, 125 Mo. A. 344, 102 SW 582; Penn v. Brashear, 65 Mo. A. 24; Feder v. Abrahams, 28 Mo. A. 454; Gulath v. Waldstein, 7 Mo. A. 66; Haeger v. Marcus, 5 Mo. A. 565; Davis v. Randolph, 3 Mo. A. 454.

Mont.—Sullivan v. Girson, 39 Mont. 274, 102 P 320; Glass v. Basin, etc., Min. Co., 31 Mont. 21, 77 P 302.

Nebr.—Frank v. Stearns, 111 Nebr. 101, 195 NW 949, 198 NW 480; Burr v. McCallum, 59 Nebr. 326, 80 NW 1040, 80 AmSR 677; Heidiman-Benoist Saddlery Co. v. Schott, 59 Nebr. 20, 80 NW 47; Depriest v. McKinstry, 38 Nebr. 194, 56 NW 806.

Nev.—Nielsen v. Rebard, 43 Nev. 274, 183 P 984; Gardner v. Brown, 22 Nev. 156, 37 P 240.

N. H.—Mitchell v. Roberts, 50 N. H. 486.

N. Y.—Sinnott v. Feiock, 165 N. Y. 444, 59 NE 265, 80 AmSR 736, 53 LRA 565; Wheeler v. Allen, 51 N. Y. 37; Latimer v. Wheeler, 30 Barb. 485 [aff 3 Abb. Dec. 35, 1 Keyes 468]; Popper v. Seufert, 147 App. Div. 371, 132 NYS 209; Fox v. Wall, 161 NYS 264; Alaske Unterstuetzung Verein v. Wall, 28 Misc. 174, 58 NYS 1115; Christie v. Corbett, 34 HowPr 19.

N. C.—Bowen v. King, 146 N. C. 385, 59 SE 1044; Moore v. Brady, 125 N. C. 35, 34 SE 72; Webb v. Taylor, 80 N. C. 305; Haughton v. Newberry, 69 N. C. 456; Myers v. Credle, 63 N. C. 504.

N. D.—Best v. Muir, 8 N. D. 44, 77 NW 95, 73 AmSR 742.

Oh.—State v. Jennings, 14 Oh. St. 73; Simper v. Bentley, 15 Oh. Cir. Ct. 515, 8 Oh. Cir. Dec. 356; Allen v. Leget, 2 Oh. Dec. (Reprint) 152, 1 WestLMonth 585.

Okl.—Bales v. Breedlove, 96 Okl. 280, 222 P 542; Carpenter v. Mead, 153 P 658; Robb v. Dobrinski, 14 Okl. 563, 78 P 101.

Or.—De Lore v. Smith, 67 Or. 304, 132 P 521, 136 P 13, 49 LRANS 555; Krebs Hop Co. v. Taylor, 52 Or. 627, 97 P 44, 98 P 494; Jenkins v. Ontario, 44 Or. 72, 74 P 466, 102 AmSR 625.

Pa.—English v. Dalbrow, 1 Miles 160.

S. D.—Lyle v. Barnes, 30 S. D. 647, 139 NW 338; Fotheringham v. Lockhart, 30 S. D. 394, 138 NW 804; Kierbow v. Young, 20 S. D. 414, 107 NW 371, 8 LRANS 216; Longerbeam v. Huston, 20 S. D. 254, 105 NW 743; McCormick Harvesting Mach. Co. v. Woulph, 11 S. D. 252, 76 NW 939; Willis v. De Witt, 3 S. D. 281, 52 NW 1090.

Utah.—Watkins v. Jensen, 58 Utah 13, 197 P 222; Nielsen v. Hyland, 51 Utah 334, 170 P 778.

Wis.—McHugh v. Robinson, 71 Wis. 565, 37 NW 426; Grace v. Michel, 31 Wis. 533, 11 AmR 613; Johnson v. Garlick, 25 Wis. 705.

Can.—Great Western R. Co. v. McEwan, 28 U. C. Q. B. 528.

"Possession essential to support an action is to be determined by reference to the time the action was instituted, and not by reference to the time the writ is served." Leavel v. Johnston, 209 Mo. A. 197, 232 SW 1064, 1069.

[a] **Illustrations.**—(1) Replevin would not lie against an indorser on a note given for the purchase price of mules, where the mules were not sold to him, and he never had them in his possession, or under his control. Starks v. Couch, 109 Ark. 534, 160 SW 853. (2) Where plaintiff knew that at the time of the institution of the action one of two horses had died, the value of the animal which died while in defendants' possession cannot be recovered. Nielsen v. Hyland, 51 Utah 334, 170 P 778. (3) Replevin will not lie against a justice who rendered judgment and issued the execution under which the property was seized but who was never either actually or constructively in possession of the property. Without this replevin does not lie. Fruits v. Elmore, 8 Ind. A. 278, 34 NE 829.

[b] **Subsequent release of property after refusal.**—Replevin does not lie for an animal which defendant refused to deliver where he drove the animal from his premises before the writ was issued. Rogers v. Davis, 21 Mo. A. 150.

[c] **Joint possession.**—(1) A bank has such control over its vaults, in which a safe deposit box is kept, that its possession and that of a minor, claiming the box and in possession of the key, is joint, and claim and delivery is an appropriate action. Lamus v. Engwicht, 39 Cal. A. 523, 179 P 435. (2) Where one defendant exercised acts of ownership and was a joint wrongdoer with co-defendant in detaining the property, both may be sued jointly. Sibeck v. McTiernan, 94 Ark. 1, 125 SW 136.

[d] **A landlord** cannot be sued in replevin by a third person for property of his tenant. Bonnell v. Ferris, (N. S.) [1929] 1 DomLR 540.

[e] **In Idaho** (1) under the common law, replevin would not lie against a defendant who had parted with the possession of the chattel prior to the commencement of the action. Bates v. Capital State Bank, 21 Ida. 141, 121 P 561. (2) But under claim and delivery statutes, for the purpose of avoiding a multiplicity of suits, an action may be maintained to recover personalty, although defendant has not the possession of it at the commencement of the action. Bates v. Capital State Bank, supra.

[66] Ind.—Krug v. Herod, 69 Ind. 78; Baer v. Martin, 2 Ind. 229.

Mass.—Whitwell v. Wells, 24 Pick. 25.

Miss.—Myrick v. National Cash Register, 25 S 155.

Nebr.—Depriest v. McKinstry, 38 Nebr. 194, 56 NW 806.

N. Y.—Wheeler v. Allen, 51 N. Y. 37.

Wis.—Grace v. Mitchell, 31 Wis. 533, 11 AmR 613.

[67] Whitwell v. Wells, 24 Pick. (Mass.) 25.

[68] Coffin v. Gephart, 18 Iowa 256; Ladd v. Brewer, 17 Kan. 204; Kittridge v. Miller, 45 Mich. 478, 8 NW 87.

[69] Carr v. King, 184 Iowa 734, 169 NW 133; Coffin v. Gephart, 18 Iowa 256.

[70] McHugh v. Robinson, 71 Wis. 565, 37 NW 426; Johnson v. Garlick, 25 Wis. 705.

[71] U. S.—Sloan v. Merchants' Sav., etc., Co., 160 Fed. 654, 88 CCA 20.

Ark.—Hodges v. Nall, 66 Ark. 135, 49 SW 352.

Mass.—Calman v. Stern, 153 Mass. 413, 26 NE 994.

Mich.—Clute v. Everhardt, 137 Mich. 5, 100 NW 124; Aber v. Bratton, 60 Mich. 357, 27 NW 564.

N. Y.—Jawitz v. Reitman, 128 Misc. 20, 217 NYS 480; Mahr v. Livingston, 55 Misc. 133, 106 NYS 308.

Wis.—McHugh v. Robinson, 71 Wis. 565, 37 NW 426.

[72] Aber v. Bratton, 60 Mich. 357, 27 NW 564; Kieper v. Carrier, 53 Wis. 404, 10 NW 562; Wheeler, etc., Mfg. Co. v. Teetzlaff, 53 Wis. 211, 10 NW 155.

[a] **Rule applied.**—Aber v. Bratton, 60 Mich. 357, 27 NW 564 (the fact that defendant was guilty of a trespass in taking and using the chattels does not authorize replevin where the property was returned to plaintiff before suit was commenced); Christie v. Corbett, 34 HowPr (N. Y.) 19 (although plaintiff objects to the manner in which the property is returned by defendant, as being injurious to him, but nevertheless accepts the possession, the action cannot be maintained).

[b] **Unconditional offer to restore property.**—(1) The object of the action is the recovery of the property in specie; and if, before suit brought, defendant unconditionally offers to restore the property, the object is already attained, and the suit is wholly unnecessary. Such offer is equivalent to a tender before suit brought. Although, in such actions, damages are recovered for the wrongful detention, yet they are merely incidents to the action. Church v. Frost, 3 Thomps. & C. (N. Y.) 318; Savage v. Perkins, 11 HowPr (N. Y.) 17. (2) But an offer made after suit would not defeat the action. Guthman v. Kearn, 8 Nebr. 502, 1 NW 129.

[73] Moses v. Morris, 20 Kan. 208; Gildas v. Crosby, 61 Mich. 413, 28 NW 153; Murray v. Lese, 86 NYS 581; Simper v. Bentley, 15 Oh. Cir. Ct. 515, 8 Oh. Cir. Dec. 356.

[a] **Illustration.**—Where defendant received from K, without fraudulent purpose toward plaintiff or circumstances to put him on inquiry, certain goods as security for money loaned, but before suit was brought defendant had returned the goods to K without notice from plaintiff that the goods were his, plaintiff could not recover. Carpenter v. Starr, 12 D. C. 417.

ble.[74]

[§ 59] **b. Exceptions to Rule.** In many jurisdictions the rule requiring that defendant be in actual or constructive possession at the time the action is brought[75] is subject to the exception that one in possession of property without right cannot avoid the action of replevin by wrongfully parting with or disposing of the property before the suit is brought.[76] This rule has been denied in some states.[77] The doctrine, has never been extended to cases where defendant before suit brought did not part with possession by any act on his part, but the property was taken from him by process of law valid on its face which he cannot resist.[78] Another exception is that when defendant has the property in his possession at the time the action is commenced, he cannot by the subsequent transfer or destruction of the property wholly deprive plaintiff of relief, and in such case the alternative judgment for the value of the property is granted.[79]

[§ 60] **2. Sufficiency of Constructive Possession.** Possession by defendant need not be actual; a constructive possession is sufficient.[80] Replevin will lie for personal property, although not in the actual possession of defendant, if it be under his control in the hands of another.[81]

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[74] Riley v. Noyes, 44 Vt. 455 (where one is interested jointly with another in the detention and impounding of a cow taken damage feasant as a mode of recovering the damage done by her, his assent to such detention for that purpose is sufficient to make him liable in replevin).

[75] See supra § 58.

[76] Ark.—Sibeck v. McTiernan, 94 Ark. 1, 125 SW 136; Harkey v. Tillman, 40 Ark. 551; Washington v. Love, 34 Ark. 93.

Ind.—Helman v. Withers, 3 Ind. A. 532, 30 NE 5, 50 AmSR 295; West v. Graff, 23 Ind. A. 410, 55 NE 506.

Iowa.—Hardy v. Moore, 62 Iowa 65, 17 NW 200.

Mich.—Brewster Loud Lumber Co. v. General Builders' Supply Co., 233 Mich. 633, 208 NW 28; Anderson v. Boneman, 199 Mich. 532, 165 NW 830; McBrian v. Morrison, 55 Mich. 351, 21 NW 368.

Minn.—Johnson v. Minneapolis Business College, 153 Minn. 205, 190 NW 60.

Nebr.—Depriest v. McKinstry, 38 Nebr. 194, 56 NW 806.

N. Y.—Sinnott v. Feiock, 165 N. Y. 444, 59 NE 265, 80 AmSR 736, 53 LRA 565; Manning v. Keenan, 73 N. Y. 45; Barnett v. Selling, 70 N. Y. 492 [aff on this point 9 Hun 236]; Nichols v. Michael, 23 N. Y. 264, 80 AmD 259 [overr Roberts v. Randel, 5 N. Y. Super. 707; Elwood v. Smith, 9 How Pr 528]; Latimer v. Wheeler, 3 Abb. Dec. 35, 1 Keyes 468; Dunham v. Troy, etc., R. Co., 1 Abb. Dec. 565, 3 Keyes 543, 3 Transcr. A. 67; Duboff v. Haslan, 195 App. Div. 117, 186 NYS 481 [aff 182 NYS 896]; O'Connor v. Lock, 148 App. Div. 765, 133 NYS 320, 3 NYCivProcNS 145; Popper v. Seufert, 147 App. Div. 371, 132 NYS 209; Hitchcock v. Wimpleberg, 103 App. Div. 53, 92 NYS 997; Ellis v. Lersner, 48 Barb. 539; Brockway v. Burnap, 16 Barb. 309 [rev 12 Barb. 347]; Tyler v. Young, 46 Misc. 575, 92 NYS 818; Standard Match Co. v. Porter, 178 NYS 375; Ross v. Cassidy, 27 HowPr 416; Drake v. Wakefield, 11 HowPr 106; Savage v. Perkins, 11 HowPr 17.

Oh.—Tischler v. Seeley, 14 Oh. Cir. Ct. N. S. 236.

Okl.—Robb v. Dobrinski, 14 Okl. 563, 78 P 101.

Or.—Reed v. Mills, 78 Or. 558, 154 P 113.

S. C.—Segars v. Segars, 82 S. C. 196, 63 SE 891; Holliday v. Poston, 60 S. C. 103, 38 SE 449.

Wash.—White v. Miley, 137 Wash. 80, 241 P 670; Andrews v. Hoeslich, 47 Wash. 220, 224, 91 P 772, 125 AmSR 896, 18 LRANS 1265. Contra Dow v. Dempsey, 21 Wash. 86, 57 P 355.

Wis.—Murray v. Norwood, 77 Wis. 405, 46 NW 499; Gassner v. Marquardt, 76 Wis. 579, 45 NW 674.

[a] **Illustrations.**—(1) A mortgagee of chattels to which the mortgagor had no title is liable to the real owner where he sells the chattels under the mortgage and delivers them to the purchaser after notice of the owner's claim, and it is no defense that he parted with the possession or control of the chattels before the action against him was commenced. Tasker v. Ryan, 4 App. Div. 616, 40 NYS 942. (2) So the fraudulent vendee of goods and his assignee thereof for the benefit are liable to a joint action in replevin by the vendor to recover possession. Nichols v. Michael, 23 N. Y. 264, 80 AmD 259. (3) And in replevin against an agent for the sale of plaintiff's horses and another, to whom, without authority, such agent had traded the horses, it was held error to dismiss the complaint as against defendant agent, although it appeared on the trial that he had parted with possession of the property in suit. Jones v. Richards, 50 Misc. 645, 98 NYS 698.

[b] **Rule applied.**—Where an execution was given a sheriff, and he gave it to a constable who served it, and turned the property over to the sheriff, who never made a valid levy, and the owner brought replevin against the constable, not knowing of the transfer to the sheriff, she could recover against the constable, although he was not in actual possession. Anderson v. Boneman, 199 Mich. 532, 165 NW 830.

[c] **Reason for rule.**—(1) In New York the reason assigned was that on such a state of facts detinue would lie at common law (Nichols v. Michael, 23 N. Y. 264, 272, 80 AmD 259 [cit Garth v. Howard, 8 Bing. 451, 21 ECL 616, 131 Reprint 468, 5 C. & P. 346; 24 ECL 599, 172 Reprint 1005; Jones v. Dowle, 9 M. & W. 19, 152 Reprint 9), (2) and that by the statutes the action of detinue was abolished and the action of replevin extended so as to serve all the purposes of both actions (Nichols v. Michael, 23 N. Y. 264, 80 AmD 259).

[d] **In support of the expediency of the rule** it has been said: "That would be a very inconvenient rule, which would enable one who had wrongfully taken or detained property from the owner to refuse to deliver, and hold to the last moment before the writ, and then evade a suit by a transfer of possession. His successor might do the same; and his after him; and so on toties quoties, until the costs of writs to the owner would consume the property." Harkey v. Tillman, 40 Ark. 551, 555.

[77] Me.—Ramsdell v. Buswell, 54 Me. 546 [overr Sayward v. Warren, 27 Me. 453].

Mo.—Sipe v. Gross, (A.) 1 SW (2d) 1034; Feder v. Abrahams, 28 Mo. A. 454; Davis v. Randolph, 3 Mo. A. 454.

Mont.—Glass v. Basin, etc., Min. Co., 31 Mont. 21, 77 P 302.

N. C.—Webb v. Taylor, 80 N. C. 305; Haughton v. Newberry, 69 N. C. 456.

S. D.—Kierbow v. Young, 20 S. D. 414, 107 NW 371, 8 LRANS 216; Longerbeam v. Huston, 20 S. D. 254, 105 NW 743.

[a] **Conversion,** and not replevin, is plaintiff's proper action for recovery of her property, wrongfully disposed of by defendants before suit. Sipe v. Groce, (Mo. A.) 1 SW (2d) 1034.

[78] Florence, etc., R. Co. v. Radetsky, 52 Colo. 479, 122 P 791; Marcelletti v. Hawley, 187 Mich. 400, 153 NW 724; Sinnott v. Feiock, 165 N. Y. 444, 59 NE 265, 80 AmSR 736, 53 LRA 565; Stern v. Murray, 173 NYS 447.

[79] Richards v. Morey, 133 Cal. 437, 65 P 886.

[80] Cal.—Taylor v. Bernheim, 58 Cal. A. 404, 209 P 55.

Ind.—Teeple v. Dickey, 94 Ind. 124; Berghoff v. McDonald, 87 Ind. 549; Hadley v. Hadley, 82 Ind. 75; Louthain v. Fitzer, 78 Ind. 449; Wood v. Rathman, 58 Ind. A. 229, 108 NE 126.

Kan.—Meixell v. Kirkpatrick, 33 Kan. 282, 6 P 241.

Me.—Howe v. Shaw, 56 Me. 291.

Mich.—Coomer v. Gale Mfg. Co., 40 Mich. 691.

Minn.—Burkee v. Great Northern R. Co., 133 Minn. 200, 158 NW 41, 42 [cit Cyc]; Bradley v. Gamelle, 7 Minn. 331.

Mo.—Emory v. Arnold, 184 Mo. A. 99, 168 SW 320.

Mont.—Hayes v. Moffatt, 83 Mont. 185, 271 P 452, 454 [cit Cyc].

N. Y.—Tyler v. Young, 46 Misc. 575, 92 NYS 818.

Or.—Krebs Hop Co. v. Taylor, 52 Or. 627, 97 P 44, 98 P 494.

[a] **Rule applied.**—(1) Replevin will lie against the assignee of property, even though he allow it to remain in the assignor's hands, unless he clearly makes known that he does not claim it. Coomer v. Gale Mfg. Co., 40 Mich. 691. (2) A principal's constructive possession of goods in the hands of his agent or bailee is sufficient to entitle the owner to maintain replevin against the principal. Krebs Hop Co. v. Taylor, 52 Or. 627, 97 P 44, 98 P 494. (3) Where the owner of the property filed a third party claim, and the sheriff holding it under the writ demanded, and plaintiff as attaching creditor furnished, an indemnifying bond, it was always within the power of plaintiff to release the property by so instructing the sheriff, and thus having the ostensible and actual control of the property, he was consequently liable for any damages for its wrongful detention. Taylor v. Bernheim, 58 Cal. A. 404, 209 P 55.

[b] **Defendant is not in constructive possession** (1) where the property was in the hands of the constable under directions from plaintiff to return to defendant, after the dismissal of plaintiff's prior suit in the

[§ 61] **3. Possession of Particular Classes of Defendants—a. Officer Who Has Sold Property under Execution.** It has been held that an action of replevin does not lie against an officer who has sold goods seized under execution and parted with possession before the commencement of the action.[82] The contrary has also been held[83] and replevin will lie when the officer, after receiving notice of ownership, sells the property,[84] and also for the recovery of the property sold, even though there was no actual possession taken thereof by the sheriff or purchaser at the time of or after the sale.[85]

[§ 62] **b. Officer Who Has Levied on but Not Taken Possession of Property.** While it has been held that a levy on property is such an exercise of dominion over it as to sustain replevin against the officer, although there was no actual removal of the property,[86] generally where property levied on is not taken out of the actual possession of plaintiff in replevin, nor the possession in any way interfered with, it has been held that the action cannot be maintained,[87] although an inventory and appraisal is made of the property,[88] and although a receipt[89] or delivery bond[90] is given to defendant for the property. When, however, the officer's possession is such that, if interfered with, he could maintain replevin, the owner of the property levied on may replevy it, although the officer is not in actual possession.[91] Thus, where a sheriff levies on property of a stranger to an execution, and on the owner giving a delivery bond allows him to retain possession, the sheriff has such constructive possession as will justify replevin against him by the owner.[92] And where property of one person is levied on as the property of another who is allowed to remain in the possession thereof, there is no such restoration to the rightful owner as will estop him from bringing an action of replevin.[93]

[§ 63] **c. Execution or Attachment Creditor.** Where property has been seized under execution or attachment, replevin against the execution or attachment creditor does not lie whether by defendant in execution or attachment or a third person claiming the property seized,[94] although the contrary has been held,[95] and in some jurisdictions an action of replevin to recover goods attached in favor of a claimant who was not a party to the attachment must be brought against the attaching creditor and cannot be brought against the officer who served the attachment.[96] The actual possession of the property by an officer is not constructive possession of the creditor, under whose direction the officer had seized the goods on execution; but until they pass out of the officer's control by sale on the execution or other legal means, they are regarded as in the custody of the law and in no way subject to the creditor's control.[97]

[§ 64] **d. Person in Possession for Another.** One whose goods are wrongfully withheld by the agent of another may maintain replevin therefor against the agent where the goods are in his actual pos-

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justice's court for want of jurisdiction. Emory v. Arnold, 184 Mo. A. 99, 168 SW 320. (2) It cannot, in replevin, be held defendant had constructive possession at the commencement of the action, merely because of the judgment of dismissal in plaintiff's prior replevin action for the article. Parish v. Neil, 181 App. Div. 965, 167 NYS 861.

81. Taylor v. Bernheim, 58 Cal. A. 404, 209 P 55; Bradley v. Gamelle, 7 Minn. 331.

82. Riciotto v. Clement, 94 Cal. 105, 29 P 414; Redinger v. Jones, 68 Kan. 627, 75 P 997; Moses v. Morris, 20 Kan. 208.

83. Dudley v. Green, 46 S. C. 199, 24 SE 186.

84. Hardy v. Moore, 62 Iowa 65, 17 NW 200.

85. Neff v. Thompson, 8 Barb. (N. Y.) 213.

86. Alvord v. Haynes, 13 Hun (N. Y.) 26; Stewart v. Wells, 6 Barb. (N. Y.) 79.

87. Del.—Reed v. Wiltbank, 18 Del. 243, 45 A 400.

Ind.—Standard Oil Co. v. Bretz, 98 Ind. 231.

Iowa.—Hove v. McHenry, 60 Iowa 227, 14 NW 301.

Me.—Lathrop v. Cook, 14 Me. 414, 31 AmD 62.

Mich.—Morrison v. Lumbard, 48 Mich. 548, 12 NW 696; Bacon v. Davis, 30 Mich. 157; Hickey v. Hinsdale, 12 Mich. 99.

[a] **Invalid service of writ.**—Where an officer read to plaintiff a writ of attachment against the property of a third person and told her that he attached certain property (which belonged to her), but did not remove it, nor take it into his possession or control, nor serve the writ on the attachment defendant, nor make return thereof, replevin would not lie against him, there being no legal service of the writ. Libby v. Murray, 51 Wis. 371, 8 NW 238.

88. Reed v. Wiltbank, 18 Del. 243, 45 A 400; Hove v. McHenry, 60 Iowa 227, 14 NW 301; Hickey v. Hinsdale, 12 Mich. 99.

89. Lathrop v. Cook, 14 Me. 414, 31 AmD 62; Morrison v. Lumbard, 48 Mich. 548, 12 NW 696. But compare Small v. Hutchins, 19 Me. 255 [dist Lathrop v. Cook, 14 Me. 414, 31 AmD 62, and holding that the general owner of property in the hands of a bailee may maintain replevin against an officer who, having attached the same as the property of the bailee, puts it in the hands of a receiptor, by whom it is suffered to go back into the hands of the bailee—the attachment being not thereby dissolved].

90. Standard Oil Co. v. Bretz, 98 Ind. 231.

91. Wood v. Rathman, 58 Ind. A. 229, 108 NE 126; Wetherill v. Elmer, (N. M.) 88 P 1133; Hyde v. Elmer, 14 N. M. 39, 88 P 1132; Francis v. Guaranty State Bank, 44 Okl. 446, 145 P 324.

92. Hadley v. Hadley, 82 Ind. 75; Louthain v. Fitzer, 78 Ind. 449.

93. Gutsch v. McIlhargey, 69 Mich. 377, 37 NW 303.

94. Mass.—Richardson v. Reed, 4 Gray (Mass.) 441, 64 AmD 77.

Mich.—House v. Turner, 106 Mich. 240, 64 NW 20.

Miss.—Griffin v. Lancaster, 59 Miss. 340.

N. H.—Mitchell v. Roberts, 50 N. H. 486.

Oh.—Bogan v. Stoutenburgh, 7 Oh. Pt. II 133.

Wis.—Grace v. Mitchell, 31 Wis. 533, 11 AmR 613.

95. Stewart v. Wells, 6 Barb. (N. Y.) 79; Acker v. Campbell, 23 Wend. (N. Y.) 372; Fonda v. Van Horne, 15 Wend. (N. Y.) 631, 30 AmD 77; Allen v. Crary, 10 Wend. (N. Y.) 349, 25 AmD 566. See also Bowen v. Hutchins, 18 Conn. 550 (where it was held that replevin lies in favor of a third person claiming goods attached, against plaintiff in attachment under a statute providing that plaintiff in such writ of replevin may cite the party who attached the goods, to appear before a proper court, to answer to a charge for unlawfully taking the same).

[a] **Where plaintiff in attachment or execution assumes control of the process** or directs the officer to levy the same upon specific property, the action may be brought against him (Firestone v. Mishler, 18 Ind. 439; Knapp v. Smith, 27 N. Y. 277; Allen v. Crary, 10 Wend. (N. Y.) 349, 25 AmD 566), (2) or against him and the officer jointly (Knapp v. Smith, 27 N. Y. 277), (3) and if plaintiff in attachment assists the officer in seizing the property and thereafter takes it into his own possession with the concurrence of the officer, he may be sued jointly with the officer (Estey v. Love, 32 Vt. 744).

96. McDonald v. Holmes, 45 Conn. 157; Bowen v. Hutchins, 18 Conn. 550.

97. House v. Turner, 106 Mich. 240, 64 NW 20; Mitchell v. Roberts, 50 N. H. 486; Bogan v. Stoutenburgh, 7 Oh. Pt. II 133.

session,[98] and it has been held that he will still have such possession as to make him liable to the action, although he has placed the property in the custody of a third person.[99] It has also been held that replevin will lie against any person wrongfully in actual physical possession of property, although he be holding it for another,[1] although there is authority to the effect that replevin will not lie against a mere servant who refuses to deliver property which he holds for his master who lawfully acquired possession.[2] Possession by a tenant of defendant is sufficient to support an action against defendant.[3]

[§ 65] **4. Estoppel to Deny Possession.** Where defendants in replevin secured possession of the property by giving a forthcoming and delivery bond, they are estopped to deny that the property was in their possession at the time of the levy of the writ,[4] although it has been held otherwise where defendant never had possession or any control over the goods.[5] It is only on the assumption that the property was taken from his possession that he was entitled to demand its return.[6] So, where plaintiff in replevin alleges defendant to be in possession of the property and detaining the same from him, he is estopped from denying defendant's possession at the time of action brought.[7] Defendant is likewise estopped from claiming that less property was replevied than was described in the bond;[8] but the giving of a redelivery bond where the property claimed is indefinite in amount is not conclusive on defendant as to the amount.[9] Defendant is not estopped from denying that the property taken from him was the property described in plaintiff's complaint,[10] nor from showing the true amount and value of the goods.[11] An officer, by agreeing with plaintiff that property actually in another's possession should be considered to be in the possession of the officer for the purpose of replevin, is estopped from denying possession.[12]

[§ 66] **5. Effect of Voluntary Surrender of Property by Plaintiff.** Where one voluntarily surrenders property to another believing, although erroneously, that the latter is legally entitled to it, he cannot maintain replevin therefor.[13]

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[98] Eveleth v. Blossom, 54 Me. 447, 92 AmD 555; Stevenson v. Taylor, 2 Mich. N. P. 95; Haskins v. Kelly, 1 Rob. (N. Y.) 160, 1 AbbPrNS 63; Grossman v. Walters, 11 NYS 471 [aff 132 N. Y. 594 mem, 30 NE 1151 mem].

[a] **Persons acting ostensibly as agents** for a steamship line, but who were in fact general partners in a firm operating the line, are liable to an action of replevin to recover possession of baggage delivered to them for carriage to a foreign port. Tanco v. Booth, 15 NYS 110.

[99] Berghoff v. McDonald, 87 Ind. 549; DeWolff v. Morino, (Mo. A.) 187 SW 620.

[1] Flatner v. Good, 35 Minn. 395, 29 NW 56.

[2] McDougall v. Travis, 24 Hun (N. Y.) 590.

[3] Eastern Outfitting Co. v. Myers, 39 Cal. A. 316, 180 P 669.

[4] Alaska.—Mayhood v. Letender, 4 Alaska 226.

Ark.—Sibeck v. McTiernan, 94 Ark. 1, 125 SW 136.

Colo.—Benesch v. Waggner, 12 Colo. 534, 21 P 706, 13 AmSR 254.

Del.—Ott v. Specht, 13 Del. 61, 12 A 721.

Fla.—Gaulden v. Hill, 81 Fla. 251, 87 S 758.

Ind.—Indiana Union Tract. Co. v. Bick, 40 Ind. A. 451, 81 NE 617.

Kan.—Kohler v. Harlow, 126 Kan. 215, 268 P 122; Jordan v. Johnson, 1 Kan. 656, 42 P 415; Nye v. Weiss, 7 Kan. A. 627, 53 P 152.

Miss.—Furst v. Pease, 97 Miss. 468, 52 S 257.

Mo.—Exchange Finance Co. v. Brown, 222 Mo. A. 1113, 14 SW (2d) 683; Carpenter v. Stearns, 32 Mo. A. 132; Joseph Schnaider Brewing Co. v. Niederweiser, 28 Mo. A. 233.

N. Y.—Martin v. Gilbert, 119 N. Y. 298, 23 NE 813, 24 NE 460, 16 AmSR 823; Diossy v. Morgan, 74 N. Y. 11; Weber v. Manne, 105 N. Y. 627 [rev 42 Hun 557]; Denier v. Bonewur, 134 App. Div. 577, 119 NYS 313; Nowell v. Gilbert, 49 Hun 489, 2 NYS 525; Austin v. Wauful, 13 NYS 184.

N. C.—Griffith v. Richmond, 126 N. C. 377, 35 SE 620.

N. D.—Warren v. Olson, 46 N. D. 203, 180 NW 529.

Oh.—Stein-Block Co. v. Heinscheimer, 1 OhS&CP 651, 1 OhNP 43.

Okl.—Musgraves v. Addington First Nat. Bank, 139 Okl. 259, 284 P 15; Howard v. Addington First Nat. Bank, 139 Okl. 58, 281 P 224; Blanchard First State Bank v. Armstrong, 119 Okl. 98, 248 P 1107; Boyce v. Augusta Camp, 14 Okl. 642, 78 P 322.

Pa.—Rickard v. Mayor, 34 Pa. Super. 107.

S. D.—Griswold v. Lundback, 4 S. D. 441, 57 NW 339.

Wash.—Harris v. Hayfield, 5 Wash. 230, 31 P 601.

[a] **Thus** defendant, by giving a redelivery bond, estops himself from denying that he had possession of the goods taken, and that they were the same as those taken from and by the plaintiff, and that he had retaken them, but is not estopped to deny that they were the goods mortgaged to plaintiff, on which mortgage plaintiff based his claim. Denier v. Bonewur, 134 App. Div. 577, 119 NYS 313.

[b] **Defendant and sureties** are estopped from denying possession. Musgraves v. Addington First Nat. Bank, 139 Okl. 259, 284 P 15; Howard v. Addington First Nat. Bank, 139 Okl. 58, 281 P 224; Blanchard First State Bank v. Armstrong, 119 Okl. 98, 248 P 1107.

[5] Andrews v. Shattuck, 32 Barb. (N. Y.) 396.

[6] Diossy v. Morgan, 74 N. Y. 11.

[7] Kingsbury v. Buchanan, 11 Iowa 387.

[8] Gaulden v. Hill, 81 Fla. 251, 87 S 758.

[9] Susquehanna Boom Co. v. Finney, 58 Pa. 200.

[10] Talcott v. Belding, 36 N. Y. Super. 84 [aff 46 HowPr 419].

[11] Nowell v. Gilbert, 49 Hun 489, 2 NYS 525; Talcott v. Belding, 46 HowPr (N. Y.) 419.

[12] Gaff v. Harding, 66 Ill. 61.

[13] Taplin v. Wilson, 6 Thomps. & C. (N. Y.) 502.

[a] **What is not a voluntary surrender.**—(1) Where defendant, having learned that plaintiff had purchased personal property on which defendant held an unrecorded mortgage, told plaintiff that the articles were his property, whereupon plaintiff replied that, if they were defendant's property, he could come and get them, and defendant took the property in plaintiff's absence, and without his authority, the servant falsely representing to plaintiff's wife that plaintiff had sent him for them, it was held that plaintiff had not voluntarily surrendered the property, so as to preclude him from maintaining claim and delivery to recover it. Taylor v. Mills, 148 N. C. 415, 62 SE 556. (2) And where, pending a dispute over the cost of constructing a building, plaintiff, at defendants' request, furnished them with certain vouchers, a general statement of expenditures, and an affidavit of its correctness made by his bookkeeper, it was held that these papers were furnished for inspection only and that defendants did not become owners thereof and that plaintiff might recover them in an action of replevin. Drake v. Auerbach, 37 Minn. 505, 35 NW 367. (3) The delivery by a lienor, fraudulently induced by means of a worthless check, is no bar to replevin. Fox v. Magaw, 12 Pa. Dist. 53.

VI. CONDITIONS PRECEDENT[14]

[By Joseph W. Rouse]

[§ 67] **A. In General.** Since in order to maintain an action of replevin plaintiff must be entitled to the immediate possession of the property,[15] he must as a condition precedent make payment or tender of any money or performance of any other condition or obligation which may be necessary to vest in him such right of possession;[16] while on the other hand, although there may be something due from plaintiff to defendant, if its return or payment is not essential to vest in plaintiff a right to the possession of the property in question, no tender or payment is necessary as a condition precedent to the right to maintain the action.[17] Where payment or tender is a condition precedent, it must be made before the action is commenced,[18] unless, by reason of the defendant claiming absolute ownership, the cause of action is complete without such payment or tender;[19] and must be kept good up to and at the time of the trial.[20] Where plaintiff has parted with property under circumstances which entitle him to recover the same, he must return or tender the money, notes, or other thing of value which was the consideration on which he acted in parting with such property,[21] unless he is prevented from so doing by defendant.[22] Where expenses have been incurred by an officer in regard to property taken under a wrongful levy, the owner may replevy the same without tendering the amount so expended.[23] If plaintiff's property has been sold to defendant by a third person having no right to dispose of it, it is not necessary for him to refund to defendant the amount paid by the latter to such third person.[24] Where property is obtained by fraud on plaintiff's borrowing a sum of money from defendant to be repaid in a certain time which has not yet expired, no tender of the sum need be made.[25]

Liens. Where the party in possession has a lien on the property, a tender of an amount sufficient to discharge such lien is a condition precedent to the right of the owner to maintain replevin for such property,[26] unless such lien is waived,[27] or unless defendant has indicated that tender would be useless.[28]

A bill of lading must be surrendered[29] or its negotiation enjoined,[30] before goods may be replevied from a carrier issuing the bill on delivery of the goods.

Necessity for notice of ownership. If a statute provides that notice of ownership must be given to the officer who seized property under execution prior to bringing suit, this requirement must be complied with or the suit cannot be maintained.[31]

[§ 68] **B. Demand and Refusal—1. Necessity for Demand[32]—a. In General.** While it has been said that the decisions as to the necessity of a demand for a surrender of the property in question as a condition precedent to an action of replevin are in conflict and not entirely reconcilable;[33] the general rule is that no demand need be made except where it is necessary to terminate a right of possession in defendant or to confer such right upon plaintiff,[34] or in other words when necessary to establish an unlawful taking or detention as against the rights of the true owner,[35] and wherever this may be otherwise shown no demand is necessary.[36] In some jurisdictions it has been held that no demand is necessary in replevin in any case.[37]

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[14] **Cross references:**
Bond as condition precedent see infra § 117.
Conditions precedent to recovery of goods by:
  Purchaser see Sales [35 Cyc 619].
  Seller see Sales [35 Cyc 513].

[15] See supra § 46.

[16] New Jersey Mut. Ins. Co. v. Glore, 6 Ky. Op. 523; Lane v. Chadwick, 146 Mass. 68, 15 NE 121; Farrell v. Stuart, 152 NYS 986.

[17] Kahle v. Sneed, 59 Pa. 388.

[a] **Illustrations.**—(1) Where a borrowing bank after insolvency turned over additional assets to a lender as security, it was not a condition precedent that the borrower tender back securities surrendered by the lender when additional securities were turned over. Citizens' State Bank v. Sedan First Nat. Bank, 98 Kan. 109, 157 P 392, LRA1917A 696. (2) A father reclaiming an automobile which defendant had purchased from plaintiff's son, where no actual agency was established, was not required to make restoration, notwithstanding the son had induced defendant to pay four hundred dollars for the roadster. Whitten v. Kemp, 77 Ind. A. 615, 134 NE 211.

[18] Ohio, etc., R. Co. v. Noe, 77 Ill. 513; Smith v. Woodleaf, 21 Kan. 717; Bills v. Vose, 27 N. H. 212.

[a] **If the thing received by plaintiff is worthless,** a tender at the time of the trial would be sufficient. See Pangborn v. Ruemenapp, 74 Mich. 572, 42 NW 78.

[19] Lutz v. Yount, 61 N. C. 367; Soell v. Hadden, 85 Tex. 182, 19 SW 1087.

[20] Dodge v. Fearey, 19 Hun (N. Y.) 277.

[21] Ford Motor Co. v. Farrington, 245 Fed. 850, 158 CCA 190; Reynolds v. Copeland, 71 Ind. 422; Harvey v. Petrie, 100 Mich. 190, 59 NW 187; Pangborn v. Ruemenapp, 74 Mich. 572, 42 NW 78. See also MacCracken v. Wheaton First Nat. Bank, 204 Ill. A. 20.

[22] Potter v. Dennison, 10 Ill. 590 (holding that, in an action by a principal to recover goods which his agent had without authority transferred in exchange for land, it is not necessary to execute a return deed to defendant before bringing suit where plaintiff offers to do so but is prevented from so doing by defendant's refusal to furnish him with the necessary description of the land).

[23] Sims v. Mead, 29 Kan. 124.

[24] More v. Finger, 128 Cal. 313, 60 P 933, 58 P 322.

[25] Moffitt v. Shields, 67 Mich. 610, 35 NW 174.

[26] Ark.—Burr v. Daugherty, 21 Ark. 559.

Ill.—Ohio, etc., R. Co. v. Noe, 77 Ill. 513; Edwin v. Jacobson, 47 Ill. A. 93.

Mass.—Fowler v. Parsons, 143 Mass. 401, 9 NE 799.

Mo.—Hinshaw v. Thornhill, (A.) 27 SW (2d) 776.

Nebr.—Gates v. Parrott, 31 Nebr. 581, 48 NW 387.

N. Y.—Williams v. Johnson, 11 Barb. 501.

Ont.—Kendal v. Fitzgerald, 21 U. C. Q. B. 585; Lake v. Biggar, 11 U. C. C. P. 170.

[a] **Rule applied.**—A principal, claiming that his agent had exchanged his land for cattle, could not replevin the cattle without discharging or tendering discharge of the agent's lien for the amount paid out to discharge a chattel mortgage and for the shipment of the cattle. Hinshaw v. Thornhill, (Mo. A.) 27 SW (2d) 776.

[b] **That defendant would have refused** to deliver the property on which he has a lien if the amount due had been tendered will not excuse the failure to make such tender, since plaintiff in order to maintain the action must have a right of immediate possession, and if the lien is not waived it must be discharged before plaintiff can have such right. Fowler v. Parsons, 143 Mass. 401, 9 NE 799.

[27] Fowler v. Parsons, supra; Clemson v. Davidson, 5 Binn. (Pa.) 392.

[28] Crosby v. Hill, 121 Me. 423, 117 A 585.

[29] Abbe v. Erie R. Co., 97 N. J. L. 212, 116 A 778; Salant v. Pennsylvania R. Co., 178 NYS 285.

[30] Salant v. Pennsylvania R. Co., supra.

[31] Finch v. Hollinger, 43 Iowa 598; Kaster v. Pease, 42 Iowa 488.

[32] **Demand by chattel mortgagee** see Chattel Mortgages § 307.

[33] Lamping v. Keenan, 9 Colo. 390, 12 P 434; Bell v. Niles, 61 Fla. 114, 55 S 392, 395 [cit Cyc]; Webster v. Brunswick-Balke-Callender Co., 37 Fla. 433, 20 S 536; Guthrie v. Olson, 44 Minn. 404, 46 NW 853.

Discontinuance after demand, does not necessitate a new demand on commencement of another action of replevin.[38]

[§ 69] **b. Property Lawfully Taken by, or in Possession of, Defendant.** The general rule is that replevin will not lie against one who has obtained possession of the property lawfully until a proper demand is made for the same, and possession refused,[39] since the law presumes, in the absence of any rebutting circumstances, that property which has come rightfully into the possession of defendant and which he is not entitled to retain will be surrendered to the person entitled thereto upon demand,[40] and he should be given an opportunity to do so before being subjected to the expense and inconvenience of an action.[41] This rule has been applied to actions against a bailee,[42] an assignee for the benefit of creditors,[43] a depository of an instru-

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34. Colo.—Klug v. Munce, 40 Colo. 276, 90 P 603; Lamping v. Keenan, 9 Colo. 390, 12 P 434.

Iowa.—Leek v. Chesley, 98 Iowa 593, 67 NW 580; Smith v. McLean, 24 Iowa 322.

Kan.—Stone v. Bird, 16 Kan. 488; Shoemaker v. Simpson, 16 Kan. 43.

N. Y.—Milligan v. Brooklyn Warehouse, etc., Co., 34 Misc. 55, 68 NYS 744.

Wyo.—Bunce v. McMahon, 6 Wyo. 24, 42 P 23.

"As a general rule, whenever the action of trover or other equivalent action could be maintained without demand, replevin will lie without demand." Employers' F. Ins. Co. v. Cotten, 245 N. Y. 102, 156 NE 629, 630.

35. Hoover v. Lewin, 56 Ind. A. 367, 105 NE 400; Edmunds v. Hill, 133 Mass. 445.

36. Edmunds v. Hill, 133 Mass. 445; Perkins v. Barnes, 3 Nev. 557.

37. Dearing v. Ford, 21 Miss. 269; Cole v. Wabash, etc., R. Co., 21 Mo. A. 443; Jackson v. Darden, 82 Okl. 256, 200 P 223; Wall v. Rouse, 49 Okl. 544, 153 P 1112; Citizens' State Bank v. Chattanooga State Bank, 23 Okl. 767, 101 P 1118; Burchett v. Purdy, 2 Okl. 391, 37 P 1053; Draper v. Moseley, 3 Baxt. (Tenn.) 201.

38. Brown v. Kolb, 92 S. C. 309, 75 SE 529.

39. Ariz.—Mosher v. Rowe, 26 Ariz. 307, 224 P 1065, 1066 [cit Cyc].

Cal.—Commercial, etc., Bank v. Foster, 290 P 583; Burke v. Maguire, 154 Cal. 456, 98 P 21; McNally v. Connolly, 9 P 169; Davenport v. Alexander, 53 Cal. A. 688, 200 P 771; Home Payment Jewelry Co. v. Smith, 24 Cal. A. 486, 141 P 933.

Colo.—Roach v. Binder, 1 Colo. 322.

Conn.—Patchin v. Rowell, 86 Conn. 372, 85 A 511; Trowbridge v. Bosworth, 45 Conn. 166; Lynch v. Beecher, 38 Conn. 490.

Del.—Alrich v. Bowers, 8 Del. 367; Windsor v. Boyce, 6 Del. 605.

Ida.—Hays v. Robinson, 35 Ida. 265, 206 P 173.

Ill.—Ohio, etc., R. Co. v. Noe, 77 Ill. 513; Ingalls v. Bulkley, 13 Ill. 315; Hudson v. Maze, 4 Ill. 578; Rosenbaum v. King, 114 Ill. A. 648; Toledo, etc., R. Co. v. American Refrigerator Transit Co., 41 Ill. A. 625; Ehle v. Deitz, 32 Ill. A. 547. See also Snite v. Gehrke, 189 Ill. A. 382.

Ind.—Torian v. McClure, 83 Ind. 310; Lewis v. Masters, 8 Blackf. 244.

Iowa.—Gilchrist v. Moore, 7 Iowa 9; Stanchfield v. Palmer, 4 Greene 23.

Kan.—Jordan v. Johnson, 1 Kan. A. 656, 42 P 415.

Me.—General Motors Acceptance Corp. v. Littlefield, Crockett Co., 128 Me. 388, 147 A 868; Newman v. Jenne, 47 Me. 520.

Md.—Burrier v. Cunningham Piano Co., 135 Md. 135, 108 A 492.

Mich.—Myers v. Sawvel, 219 Mich. 252, 189 NW 88; Detroit Safe Co. v. Myer, 192 Mich. 215, 158 NW 860; Anderson v. Pendl, 153 Mich. 693, 117 NW 326; Pangborn v. Ruemenapp, 74 Mich. 572, 42 NW 78; Grand Rapids Chair Co. v. Lyon, 73 Mich. 438, 41 NW 497; Adams v. Wood, 51 Mich. 411, 16 NW 788; Campbell v. Quackenbush, 33 Mich. 287; Darling v. Tegler, 30 Mich. 54.

Minn.—Jumiska v. Andrews, 87 Minn. 515, 92 NW 470; Stratton v. Allen, 7 Minn. 502.

Nebr.—Nunn v. Home Ins. Co., 31 Nebr. 39, 47 NW 467.

Nev.—Studebaker Bros. Co. v. Witcher, 44 Nev. 468, 199 P 477 [reh den 201 P 322].

N. J.—Crown Co. v. Reilly, 88 N. J. L. 555, 96 A 481; Veader v. Veader, 87 N. J. L. 140, 94 A 30; Wolfe v. Jersey City, 3 N. J. Misc. 231, 316, 127 A 696.

N. Y.—Goodwin v. Wertheimer, 99 N. Y. 149, 1 NE 404; Jessop v. Miller, 2 Abb. Dec. 449, 1 Keyes 321; Hall v. Bassler, 96 App. Div. 96, 88 NYS 1039; Moran v. Abbott, 26 App. Div. 570, 50 NYS 337; Delahunty v. Hake, 10 App. Div. 230, 41 NYS 896; Treat v. Hathorn, 3 Hun 646; White v. Brown, 5 Lans. 78; Sluyter v. Williams, 31 N. Y. Super. 215, 37 HowPr 109; Cumiskey v. Lewis, 14 Daly 466, 15 NYSt 364; Milligan v. Brooklyn Warehouse, etc., Co., 34 Misc. 55, 68 NYS 744; Fleischman v. Glaser, 28 Misc. 555, 59 NYS 686; Frischman v. Mandel, 26 Misc. 820, 56 NYS 1029; Porges v. Cohen, 23 Misc. 703, 52 NYS 71; Talcott v. Belding, 46 HowPr 419; Boughton v. Bruce, 20 Wend. 234.

Oh.—Shur v. Statler, 2 Oh. Dec. (Reprint) 70, 1 WestLMonth 317.

Or.—Albright v. Browne, 55 Or. 599, 107 P 458.

Utah.—Watkins v. Jensen, 58 Utah 13, 197 P 222, 224 [cit Cyc].

Wis.—George v. McGovern, 83 Wis. 555, 53 NW 899, 35 AmSR 77.

N. S.—Inglis v. Greenwood, 14 N. S. 2.

Ont.—Great Western R. Co. v. McEwan, 28 U. C. Q. B. 528.

[a] **Illustrations.**—(1) When a defendant does not deny the right of plaintiff to the possession and will not contest the same but does not have the possession of the article, either actual or constructive, so that it is out of his power to deliver the same, then plaintiff should make demand upon defendant and give him an opportunity of surrendering possession before haling him into court and subjecting him to the harassment of a lawsuit. Jones v. Keebey, 159 Ark. 586, 252 SW 591. (2) Under an executory land contract, a written notice of forfeiture or demand for the surrender of personal property which plaintiff claimed was sold with the land by oral agreement was a prerequisite to an action to recover possession thereof. Myers v. Sawvel, 219 Mich. 252, 189 NW 88. (3) Under a contract for the sale of a mine, which provided that, on breach of conditions the contract should be forfeited, including all tools, machinery, and equipment of every kind on the premises, where the purchaser in anticipation of a forfeiture removed the tools from the property, plaintiffs' subsequent seizure thereof without the purchaser's consent did not confer on them any legal title authorizing them to sue in replevin without demand, although they might have a valid claim thereto under the sale contract. Albright v. Browne, 55 Or. 599, 107 P 458 (where in anticipation of forfeiture, the buyer sold the goods to B, who stored them in a cabin belonging to another, and the sellers, obtaining title to the cabin or securing authority from the owner, placed a lock on the door thereof, such acts did not give the sellers lawful possession of the goods, so that they could maintain replevin against B without demand). (4) Where a school teacher purchased a piano for the benefit of a school, and, while the school was closed, permitted a local grange to use it, the town's right to recover it in replevin did not accrue until demand for its return. Grand Isle v. McGowan, 88 Vt. 140, 92 A 6.

[b] **Abandoned property.**—Where a stranger removes to a blacksmith's shop a blanket apparently abandoned, and the blacksmith after several months loans it to one who does not know who the owner is, replevin cannot be maintained against the latter without making demand. Becker v. Vandercook, 54 Mich. 114, 19 NW 771.

Failure to demand as affecting costs see infra § 352.

40. Webster v. Brunswick-Balke-Callender Co., 37 Fla. 433, 20 S 536; Guthrie v. Olson, 44 Minn. 404, 46 NW 853.

41. Burke v. Maguire, 154 Cal. 456, 98 P 21; Becker v. Vandercook, 54 Mich. 114, 19 NW 771; Guthrie v. Olson, 44 Minn. 404, 46 NW 853.

42. Banque de France v. Equitable Trust Co., 33 F. (2d) 202; Burr v. Dougherty, 21 Ark. 559; George v. McGovern, 83 Wis. 555, 53 NW 899, 35 AmSR 77.

43. Hudson v. Maze, 4 Ill. 578; Jessop v. Miller, 2 Abb. Dec. (N. Y.) 449, 1 Keyes 321. But see Wolff v. Zeller, 31 Misc. 255, 64 NYS 129 [rev 27 Misc. 646, 58 NYS 608] (holding that no demand is necessary in an action against an assignee for the benefit of creditors, where the contract by means of which defendant's assignor fraudulently acquired the property ment delivered to be held in escrow,[44] and in some cases, although not uniformly, to innocent purchasers for value and without notice from persons having no authority to sell.[45]

[§ 70] **c. Property Wrongfully Taken by, or in Possession of, Defendant.** A previous demand is not necessary in order to maintain replevin where the original taking or possession of defendant is shown to have been wrongful,[46] as where defendant obtained property by fraud.[47] So also no demand is necessary as against a defendant who, although not the original wrongful taker, received the property with knowledge that it was so taken.[48]

[§ 71] **d. Property Obtained from Person without Authority To Transfer.** It has been held that a demand is necessary where defendant is an innocent purchaser for value and without notice from one who was a wrongful taker or without authority to sell,[49] on the ground that such purchaser cannot be deemed a wrongdoer in merely retaining, in the absence of any demand, what he has in good faith acquired,[50] and should not be subjected to suit without being given an opportunity to surrender the property;[51] and it has been held that this rule applies regardless of the nature of the fraud or wrong by which the property was originally acquired from plaintiff, or in what character or manner it was delivered to defendant, if no fraud or complicity in the transaction can be imputed to him.[52] On the contrary it has been held that a person wrongfully in possession or rightfully in possession but without authority to transfer the property cannot confer upon another a possession which, although innocent, will be rightful as against the true owner,[53] and that therefore no demand by plaintiff is necessary, al-

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was rescinded prior to the assignment).

[44] Delahunty v. Hake, 10 App. Div. 230, 41 NYS 896.

[45] See infra § 71.

[46] Ariz.—Mosher v. Rowe, 26 Ariz. 307, 224 P 1065.

Cal.—Cerf v. Phillips, 75 Cal. 185, 16 P 778; McNally v. Connolly, 9 P 169.

Colo.—Klug v. Munce, 40 Colo. 276, 90 P 603.

Conn.—Lynch v. Beecher, 38 Conn. 490.

Del.—Stockwell v. Robinson, 14 Del. 313, 32 A 528.

D. C.—Justh v. Wilson, 19 D. C. 529.

Ill.—Butters v. Haughwout, 42 Ill. 18, 89 AmD 401; Burdick v. Peer, 170 Ill. A. 604; Sanitary Can Co. v. Hines, 149 Ill. A. 244; Taylor v. Welsh, 138 Ill. A. 190; Ryan v. Schutt, 135 Ill. A. 554; Adams v. Wallace, 122 Ill. A. 550; Schwamb Lumber Co. v. Schaar, 94 Ill. A. 544; W. H. Howard Commission Co. v. National Live Stock Bank, 93 Ill. A. 473; Richey v. Ford, 84 Ill. A. 121. See also Frank v. Woodward, 210 Ill. A. 98; Haller v. Hopkins, 195 Ill. A. 380.

Ind.—Jones v. Smith, 123 Ind. 585, 24 NE 368; Hall v. Durham, 117 Ind. 429, 20 NE 282; Hamilton v. Browning, 94 Ind. 242; Parrish v. Thurston, 87 Ind. 437; Cunningham v. Baker, 84 Ind. 597; Robinson v. Shatzley, 75 Ind. 461; Lewis v. Masters, 8 Blackf. 244; Hoover v. Lewin, 58 Ind. A. 367, 105 NE 400; Davis v. Bryant, 52 Ind. A. 343, 100 NE 1062; Teague v. Abbott, 51 Ind. A. 604, 100 NE 27; Ahlendorf v. Barkous, 20 Ind. A. 656, 50 NE 887.

Iowa.—Carr v. King, 184 Iowa 734, 169 NW 133; Smith v. Meeker, 153 Iowa 655, 133 NW 1058; Kennedy v. Roberts, 105 Iowa 521, 75 NW 363; Delancey v. Holcomb, 26 Iowa 94; Stanchfield v. Palmer, 4 Greene 23.

Kan.—Minneapolis Threshing Mach. Co. v. Francisco, 106 Kan. 704, 189 P 981, 982 [cit Cyc]; Salisbury v. Barton, 63 Kan. 552, 66 P 618; Schmidt v. Bender, 39 Kan. 437, 18 P 491; Jordan v. Johnson, 1 Kan. A. 656, 42 P 415.

Me.—Ayers v. Hewett, 19 Me. 281; Seaver v. Dingley, 4 Me. 306.

Mass.—Cottrell v. Carter, 173 Mass. 155, 53 NE 375; Bisbee v. Fadden, 140 Mass. 6, 1 NE 742; Bussing v. Rice, 2 Cush. 48.

Mich.—Kophal v. Weisenberger, 191 Mich. 448, 158 NW 122; Payn v. Gidley, 122 Mich. 605, 81 NW 558; Reeder v. Moore, 95 Mich. 594, 55 NW 436; Bertwhistle v. Goodrich, 53 Mich. 457, 19 NW 143; Le Roy v. East Saginaw City R. Co., 18 Mich. 233, 100 AmD 162.

Minn.—Guthrie v. Olson, 44 Minn. 404, 46 NW 853; Kellogg v. Olson, 34 Minn. 103, 24 NW 364.

N. J.—Arthur v. Calabrese, 8 N. J. Misc. 51, 148 A 569.

N. Y.—Jessop v. Miller, 2 Abb. Dec. 449, 1 Keyes 321; New York Car Oil Co. v. Richmond, 19 N. Y. Super. 213; Pringle v. Phillips, 7 N. Y. Super. 157; Milligan v. Brooklyn Warehouse, etc., Co., 34 Misc. 55, 68 NYS 744; Salomon v. Van Praag, 48 HowPr 338 [aff 6 Hun 529]; Stillman v. Squire, 1 Den. 327; Pierce v. Van Dyke, 6 Hill 613.

Oh.—Wilmot v. Lyon, 11 Oh. Cir. Ct. 238, 7 Oh. Cir. Dec. 394.

Okl.—Byers v. Ingraham, 51 Okl. 440, 151 P 1061.

Or.—Krebs Hop Co. v. Taylor, 97 P 44, 98 P 494; Brown v. Lewis, 50 Or. 358, 92 P 1058.

S. C.—Cromer v. Watson, 59 S. C. 488, 38 SE 126; Burckhalter v. Mitchell, 27 S. C. 240, 3 SE 225.

Utah.—Watkins v. Jensen, 58 Utah 13, 197 P 222; Nielsen v. Hyland, 51 Utah 334, 170 P 778; Woodward v. Edmunds, 20 Utah 118, 57 P 848.

Wis.—Goodrich v. Crabtree, 142 Wis. 16, 124 NW 1023; Perkins v. Best, 94 Wis. 168, 68 NW 762; Hyland v. Bohn Mfg. Co., 92 Wis. 157, 65 NW 170.

[a] **Illustrations.**—(1) A demand before bringing a replevin suit was unnecessary, where defendant landlord's taking was unlawful under excessive claim for rent and amount actually due had been tendered. Arthur v. Calabrese, 8 N. J. Misc. 51, 148 A 569. (2) Where plaintiff's father, made a completed gift of stock to plaintiff, and thereafter the father's administrator obtained possession of the certificates from the corporation to which the stock had been sent for transfer, such possession was wrongful, and no proof of demand was necessary to sustain replevin. Smith v. Meeker, 153 Iowa 655, 133 NW 1058. (3) Where a tenant leased premises from month to month for an automobile salesroom, the seizure of automobiles belonging to him at a time when the lease was fully paid was unlawful, and demand was not prerequisite to replevin. Mosher v. Rowe, 26 Ariz. 307, 224 P 1065.

[b] **Taking subsequently becoming wrongful ab initio.**—Where defendants took up trespassing horses, their failure to comply with the statutory provisions relative to impounding animals rendered them trespassers from beginning, and no demand was necessary to support replevin for the horses. Nielsen v. Hyland, 51 Utah 334, 170 P 778; Goodrich v. Crabtree, 142 Wis. 16, 124 NW 1023.

[47] Cal.—Cerf v. Phillips, 75 Cal. 185, 16 P 778.

Conn.—Lynch v. Beecher, 38 Conn. 490.

D. C.—Justh v. Wilson, 19 D. C. 529.

Ill.—Bruner v. Dyball, 42 Ill. 34; Goldschmidt v. Berry, 18 Ill. A. 276.

Ind.—Parrish v. Thurston, 87 Ind. 437.

Iowa.—Sievertsen v. Paxton-Eckman Chemical Co., 160 Iowa 662, 133 NW 744, 745, 142 NW 424 [cit Cyc].

Me.—Ayers v. Hewett, 19 Me. 281.

Mass.—Bussing v. Rice, 2 Cush. 48.

Mich.—Reeder v. Moore, 95 Mich. 594, 55 NW 436.

N. Y.—Salomon v. Van Praag, 48 HowPr 338 [aff 6 Hun 529].

Oh.—Wilmot v. Lyon, 11 Oh. Cir. Ct. 238, 7 Oh. Cir. Dec. 394.

[48] Butters v. Haughwout, 42 Ill. 18, 89 AmD 401; Tallman v. Turck, 26 Barb. (N. Y.) 167; Pringle v. Phillips, 7 N. Y. Super. 157.

[49] Colo.—Roach v. Binder, 1 Colo. 322.

Conn.—Lynch v. Beecher, 38 Conn. 490.

Ind.—Torian v. McClure, 83 Ind. 310; Conner v. Comstock, 17 Ind. 90; Wood v. Cohen, 6 Ind. 455, 63 AmD 389; Ledbetter v. Embree, 12 Ind. A. 617, 40 NE 928.

Minn.—Kellogg v. Olson, 34 Minn. 103, 24 NW 364.

N. Y.—Millspaugh v. Mitchell, 8 Barb. 333; Barrett v. Warren, 3 Hill 348.

S. C.—Burckhalter v. Mitchell, 27 S. C. 240, 3 SE 225.

[50] Burckhalter v. Mitchell, supra.

[51] Millspaugh v. Mitchell, 8 Barb. (N. Y.) 333; Burckhalter v. Mitchell, 27 S. C. 240, 3 SE 225.

[52] Fuller v. Lewis, 3 AbbPr (N. Y.) 383, 13 HowPr 219.

[53] Galvin v. Bacon, 11 Me. 28, 25 AmD 258.

though defendant is an innocent purchaser for value and without notice.[54] No demand is necessary where defendant knew that the holder of the property had no authority to sell,[55] or trade,[56] or that he had procured the property by fraud,[57] or that it was claimed by other persons.[58] No demand need be made before bringing an action of replevin against the bailee of one who wrongfully obtained possession of plaintiff's property.[59]

[§ 72] **e. Property Wrongfully Converted.** It is very generally held that where there has been a conversion of the property by defendant or acts amounting to a conversion, no demand by plaintiff is necessary,[60] and this is the case notwithstanding the prior possession of the property was lawfully and rightfully acquired.[61]

[§ 73] **f. Property Taken under Process[62]—(1) In General.** The owner of property which has been taken under execution or other process against another person may maintain an action of replevin against the officer to recover the same without any previous demand if the taking was wrongful;[63] but if the property was rightfully taken by the officer under valid process and in the discharge of his official duty, if subsequent events entitle the owner to recover it a demand is necessary.[64] So it is held that no demand is necessary to recover property taken by an officer in abuse of his authority,[65] as by taking property under execution which is exempt,[66] or to recover property taken under an attachment founded upon a void affidavit.[67] The general rule is also that no demand is necessary to enable the true owner to recover property which has been seized as the property of another person under process against the latter,[68] particularly where at the time of the seizure the officer was notified as to the ownership of the property.[69] Some of the decisions, however, make a distinction in cases of this character, according to whose possession the property was in at the time of the seizure, it being held that no demand is necessary if the property when seized was not in possession of the person named in the process;[70] but that if the property is found by the officer in the actual custody of the person named in the writ or process, the seizure is not to be deemed wrongful and a demand is necessary,[71] unless the officer at the time of the seizure was notified that the person in possession was not the owner.[72] Elsewhere this distinction has been expressly disapproved,[73] and it is held that the owner of the property may sue without demand, although at the time it was taken it was in possession of the person named in the process.[74] Where an officer has made an effectual levy on property which he leaves in the possession of the owner, he may without demand maintain replevin therefor against another officer who subsequently seizes it under a different process,[75] and the owner of property may without demand sue to recover it from a person who as plaintiff in another action of replevin has recovered it from a third person in whose possession it then was.[76]

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[54] Ill.—Clark v. Lewis, 35 Ill. 417; Schwamb Lumber Co. v. Schaar, 94 Ill. A. 544.

Me.—Prime v. Cobb, 63 Me. 200; Galvin v. Bacon, 11 Me. 28, 25 AmD 258.

Mich.—Ballou v. O'Brien, 20 Mich. 304; Trudo v. Anderson, 10 Mich. 357, 81 AmD 795.

Mo.—Globe, etc., F. Ins. Co. v. Adams, (A.) 230 SW 345.

Or.—Brown v. Truax, 58 Or. 572, 115 P 597; Surles v. Sweeney, 11 Or. 21, 4 P 469.

Tex.—Hamilton v. Palmer, (Civ. A.) 265 SW 240.

[a] **Illegal sale by poundmaster.**—No demand is necessary before bringing a replevin suit for a horse purchased by defendant at an illegal sale by a poundmaster. Clark v. Lewis, 35 Ill. 417.

[55] Kuhns v. Gates, 92 Ind. 66.

[56] Whitten v. Kemp, 77 Ind. A. 615, 134 NE 211.

[57] Lynch v. Beecher, 38 Conn. 490; Butters v. Haughwout, 42 Ill. 18, 89 AmD 401; Goldschmidt v. Berry, 18 Ill. A. 276; Pringle v. Phillips, 7 N. Y. Super. 157.

[58] Seibold v. Welch, 78 Ind. A. 238, 135 NE 258; Log Owners' Booming Co. v. Hubbell, 135 Mich. 65, 97 NW 157, 4 LRANS 573.

[59] Milligan v. Brooklyn Warehouse, etc., Co., 34 Misc. 55, 68 NYS 744.

[60] Ark.—Jones v. Southern Cooperage Co., 127 SW 704; Sibeck v. McTiernan, 94 Ark. 1, 125 SW 136; Henry v. Fine, 23 Ark. 417; McNiell v. Arnold, 17 Ark. 154; Prater v. Frazier, 11 Ark. 249; Beebe v. De Baun, 8 Ark. 540.

Ill.—Sinamaker v. Rose, 62 Ill. A. 118.

Ind.—Hillel v. Julius H. Buettner Furniture, etc., Co., 62 Ind. A. 481, 113 NE 12; Hoover v. Lewin, 56 Ind. A. 367, 105 NE 400.

Minn.—Guthrie v. Olson, 44 Minn. 404, 46 NW 853.

Miss.—Morris v. Rucks, 62 Miss. 76.

N. Y.—Milligan v. Brooklyn Warehouse, etc., Co., 34 Misc. 55, 68 NYS 744.

S. C.—Sizer v. Dopson, 89 S. C. 535, 72 SE 464; Holliday v. Poston, 60 S. C. 103, 38 SE 449; Ladson v. Mostowitz, 45 S. C. 388, 23 SE 49.

[61] Prater v. Frazier, 11 Ark. 249; Beebe v. De Baun, 8 Ark. 510; Guthrie v. Olson, 44 Minn. 404, 46 NW 853.

[a] **Acts not amounting to a conversion.**—The removal from one house to another of a piano which defendant came legally into the possession of, in the absence of anything to indicate an intention to secrete it or place it beyond the reach of the owner, is not a conversion and will not dispense with the necessity of a demand. Moran v. Abbott, 26 App. Div. 570, 50 NYS 337.

[62] **Demand by mortgagee on levying officer** see Chattel Mortgages § 308.

Right to replevy property taken under process generally see supra §§ 24–45.

[63] Hopkins v. Bishop, 91 Mich. 328, 51 NW 902, 30 AmSR 480; Coie v. Carl, 82 Hun 360, 31 NYS 565; Burchett v. Purdy, 2 Okl. 391, 396, 37 P 1053.

"When the original taking was wrongful, and the officer was not in the proper discharge of his duty, or if the seizure on execution is illegal in any manner, no demand is necessary." Burchett v. Purdy, supra.

[a] **Property taken under tax warrant.**—Where property is taken under a tax warrant by a tax collector, and the owner of the property taken was not liable for the tax, the taking is wrongful and such owner may maintain replevin against the officer without any demand. Coie v. Carl, 82 Hun 360, 31 NYS 565.

[64] Hardy v. Wallis, 103 Ill. A. 141; Hines v. Chambers, 29 Minn. 7, 11 NW 129; Herzog's Cloak, etc., Co. v. Fedorko, 92 N. J. L. 34, 105 A 21.

[a] **Thus** a constable, levying on goods intrusted to a bailee for hire, by virtue of process against the bailee, has a lawful possession, which makes a demand for goods necessary before the bailor can maintain replevin. Herzog's Cloak, etc., Co. v. Fedorko, 92 N. J. L. 34, 105 A 21.

[b] **Under New Brunswick statute** intoxicating liquors cannot be replevied from the seizing officers without one month's notice. Woods v. Finley, 48 N. B. 398.

[65] Vanderhorst v. Bacon, 38 Mich. 669, 31 AmR 328.

[66] Vanderhorst v. Bacon, supra; Byers v. Ingraham, 51 Okl. 440, 151 P 1061. But see Ehle v. Deitz, 32 Ill. A. 547 (exempt property taken under distress warrant).

[67] Aspell v. Hosbein, 98 Mich. 117, 57 NW 27.

[68] Cal.—Ledley v. Hays, 1 Cal. 160.

Colo.—Smith v. Jensen, 13 Colo. 213, 22 P 434.

D. C.—Williams v. Luckett, 18 D. C. 275.

Ill.—Pogue v. Rowe, 236 Ill. 157, 86 NE 207.

Kan.—Dickson v. Randall, 19 Kan. 212; Stone v. Bird, 16 Kan. 488; Burgwald v. Donelson, 2 Kan. A. 301, 43 P 100.

Mich.—Hopkins v. Bishop, 91 Mich. 328, 51 NW 902, 30 AmSR 480; Jackson v. Dean, 1 Dougl. 519.

N. Y.—Masten v. Webb, 24 Hun 90 [rev 60 HowPr 302]; Schwabeland v. Holahan, 10 Misc. 176, 30 NYS 910 [aff 6 Misc. 623, 26 NYS 880].

Oh.—Bancroft v. Blizzard, 13 Oh. 30.

Okl.—Burchett v. Purdy, 2 Okl. 391, 37 P 1053.

Or.—Hexter v. Schneider, 14 Or. 184, 12 P 668.

[69] Ledley v. Hays, 1 Cal. 160; Greenberg v. Stevens, 212 Ill. 606, 72 NE 722 [aff 114 Ill. A. 483]; Stone v. Bird, 16 Kan. 488; Burchett v. Purdy, 2 Okl. 391, 37 P 1053. See also Smeeth v. Zimmer, 182 Ill. A. 374.

[70] Stone v. O'Brien, 7 Colo. 458, 4 P 792; Bell v. Niles, 61 Fla. 114, 55 S 392; Tuttle v. Robinson, 78 Ill. 332; Nigh v. Dovel, 84 Ill. A. 228.

[71] Killey v. Scannell, 12 Cal. 73; Stone v. O'Brien, 7 Colo. 458, 4 P 792; Tuttle v. Robinson, 78 Ill. 332; Gilbert v. Murray, 69 Ill. A. 664; Nigh

[§ 74] **(2) Property Sold under Process.** Where property has been wrongfully sold under process it has been held that the owner must make a demand therefor before he can maintain an action of replevin against one who has purchased it in good faith at the sale;[77] but in other cases it has been held that no demand is necessary.[78] A purchaser at a sheriff's sale must make a demand for the property bought before he can maintain replevin therefor.[79]

[§ 75] **g. Where Demand Would Have Been Unavailing.** No demand is necessary where it appears from the facts and circumstances of the case that a demand if made would have been futile and unavailing,[80] and this fact may appear either from the acts or declarations of defendant in regard to the property before the action is instituted,[81] or from the position taken by him upon the trial, as where he does not rely upon the want of a demand as a technical defense but contests the right of plaintiff upon the merits, claiming a superior right or title in himself.[82]

[§ 76] **h. Claim of Title and Right of Possession by Defendant.** Where in replevin defendant claims title to the property and the right of possession incident thereto, no demand by plaintiff is necessary,[83]

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v. Dovel, 84 Ill. A. 228; Vose v. Stickney, 8 Minn. 75.

[72] Greenberg v. Stevens, 212 Ill. 606, 72 NE 722 [aff 114 Ill. A. 483].

[73] Hopkins v. Bishop, 91 Mich. 328, 51 NW 902, 30 AmSR 480.

[74] Hopkins v. Bishop, supra; Jackson v. Dean, 1 Dougl. (Mich.) 519; Masten v. Webb, 24 Hun (N. Y.) 90 [rev 60 HowPr 302]; Bancroft v. Blizzard, 13 Oh. 30.

[75] Pugh v. Calloway, 10 Oh. St. 488.

Replevin by officer seizing goods under valid process see Executions § 294.

[76] Kelleher v. Clark, 135 Mass. 45.

[a] **Demand in prior suit.**—In an action of replevin to recover property which defendant has obtained by replevying it from a third person, the question as to whether any demand was necessary in the prior action is immaterial in the second action. Walls v. Long, 2 Ind. A. 202, 28 NE 101.

[77] Ledbetter v. Embree, 12 Ind. A. 617, 40 NE 928; Jumiska v. Andrews, 87 Minn. 515, 92 NW 470; Kellogg v. Olson, 34 Minn. 103, 24 NW 364; Rawley v. Brown, 18 Hun (N. Y.) 456; Millspaugh v. Mitchell, 8 Barb. (N. Y.) 333; Masten v. Webb, 60 HowPr (N. Y.) 302.

[78] Hicks v. Britt, 21 Ark. 422; Edmunds v. Hill, 133 Mass. 445; Byers v. Ingraham, 51 Okl. 440, 151 P 1061; Hexter v. Schneider, 14 Or. 184, 12 P 668.

[a] **Exempt property.**—A demand for the return of the property before bringing replevin is not necessary, where the property was exempt and sold under execution. Byers v. Ingraham, 51 Okl. 440, 151 P 1061.

[79] Johnson v. Johnson, 4 Del. 171.

[80] Ariz.—Mosher v. Rowe, 26 Ariz. 307, 224 P 1065; Yates v. Russell, 20 Ariz. 338, 180 P 910.

Ark.—Beebe v. De Baun, 8 Ark. 510.

Cal.—Commercial, etc., Bank v. Foster, 290 P 583; Churchill v. More, 4 Cal. A. 219, 88 P 290.

Colo.—Scott v. Bohe, 81 Colo. 454, 256 P 315; Copeland v. Kilpatrick, 38 Colo. 208, 88 P 472; Hennessey v. Barnett, 12 Colo. A. 254, 55 P 197.

Dak.—Myrick v. Bill, 3 Dak. 284, 17 NW 268.

D. C.—Wall v. De Mitkiewicz, 9 App. 109.

Ill.—Kee, etc., Dairy Co. v. Pennsylvania Co., 291 Ill. 248, 126 NE 179; Cranz v. Kroger, 22 Ill. 74; Sinamaker v. Rose, 62 Ill. A. 118.

Ind.—Jordan v. Jordan, 78 Ind. A. 617, 136 NE 866, 868 [cit Cyc].

Kan.—Barton v. Mulvane, 59 Kan. 313, 52 P 883; Raper v. Harrison, 37 Kan. 243, 15 P 219; St. John State Bank v. Norduff, 2 Kan. A. 55, 43 P 312; Jordan v. Johnson, 1 Kan. A. 656, 42 P 415.

Md.—Wimbrow v. Morris, 118 Md. 91, 84 A 238, 47 LRANS 882.

N. Y.—Torres v. Rogers, 28 Misc. 176, 58 NYS 1104.

N. C.—Satterthwaite v. Ellis, 129 N. C. 67, 39 SE 726.

N. D.—Thompson v. Thompson, 11 N. D. 208, 91 NW 44.

Utah.—Watkins v. Jensen, 58 Utah 13, 197 P 222; Nielsen v. Hyland, 51 Utah 334, 170 P 778.

Wash.—World Finance Co. v. Westlake Garage Co., 115 Wash. 45, 196 P 586.

Wis.—Wadleigh v. Buckingham, 80 Wis. 230, 49 NW 745.

[a] **Rule applied.**—Where plaintiff's representative told a railroad freight agent that milk bottles received by it for transportation belonged to plaintiff, and that he was going to take them away, the agent's reply that if he took them he would have to do so legally, was sufficient to show that a demand would have been unavailing. Kee, etc., Dairy Co. v. Pennsylvania Co., 291 Ill. 248, 126 NE 179.

[81] Ill.—Sinamaker v. Rose, 62 Ill. A. 118.

Ind.—Whitten v. Kemp, 77 Ind. A. 615, 134 NE 211.

Utah.—Watkins v. Jensen, 58 Utah 13, 197 P 222; Nielsen v. Hyland, 51 Utah 334, 170 P 778.

Wis.—Wadleigh v. Buckingham, 80 Wis. 230, 49 NW 745.

Wyo.—Boswell v. Laramie First Nat. Bank, 16 Wyo. 161, 92 P 624, 93 P 661.

[82] Kan.—Raper v. Harrison, 37 Kan. 243, 15 P 219.

Mich.—Rameau v. Valley, 168 Mich. 569, 134 NW 987.

Minn.—Kellogg v. Olson, 34 Minn. 103, 24 NW 364.

N. D.—Thompson v. Thompson, 11 N. D. 208, 91 NW 44.

Wyo.—Boswell v. Laramie First Nat. Bank, 16 Wyo. 161, 92 P 624, 93 P 661.

[a] **Such a position is inconsistent** with any supposition that the property would have been surrendered if a demand therefor had been made. Guthrie v. Olson, 44 Minn. 404, 46 NW 853.

[83] Ark.—Whittington v. Hooks, 154 Ark. 423, 242 SW 817; Jones v. Southern Cooperage Co., 127 SW 704; Sibeck v. McTiernan, 94 Ark. 1, 125 SW 136; Henry v. Fine, 23 Ark. 417.

Cal.—Latta v. Tutton, 122 Cal. 279, 54 P 844, 68 AmSR 30.

Colo.—Copeland v. Kilpatrick, 38 Colo. 208, 88 P 472; Lamping v. Keenan, 9 Colo. 390, 12 P 434.

Dak.—Myrick v. Bill, 3 Dak. 284, 17 NW 268.

D. C.—Wall v. De Mitkiewicz, 9 App. 109.

Fla.—Evans v. Kloeppel, 72 Fla. 267, 73 S 180; Williams v. Hampton, 57 Fla. 272, 49 S 506; Webster v. Brunswick-Balke-Callender Co., 37 Fla. 433, 20 S 536.

Ill.—Oswald v. Hutchinson, 26 Ill. A. 273.

Iowa.—Adamson v. Harper, 162 Iowa 56, 143 NW 844; Leek v. Chesley, 98 Iowa 593, 67 NW 580; Redding v. Page, 52 Iowa 406, 3 NW 427; Delancey v. Holcomb, 26 Iowa 94; Smith v. McLean, 24 Iowa 322.

Kan.—Beall v. Spear, 106 Kan. 690, 189 P 938; Barton v. Mulvane, 59 Kan. 313, 52 P 883; Chapin v. Jenkins, 50 Kan. 385, 31 P 1084; Shoemaker v. Simpson, 16 Kan. 43; Jordan v. Johnson, 1 Kan. A. 656, 42 P 415.

Md.—Wimbrow v. Morris, 118 Md. 91, 84 A 238, 47 LRANS 882.

Mass.—Freelove v. Freelove, 128 Mass. 190.

Mich.—Breitenwischer v. Clough, 111 Mich. 6, 69 NW 88, 66 AmSR 372.

For **later cases, developments** and **changes** in the law see **Annotations,** same title and section number.

although defendant may honestly believe that his claim is legal and just.[84] So if on the trial defendant contests the case on the merits, basing his defense on title in himself and the right of possession incident thereto,[85] or title in a third person,[86] no demand is necessary; nor in such case can defendant defeat the action on the ground that no demand was in fact made,[87] although the case is one where a demand should have been made,[88] since defendant's position on the trial is inconsistent with any supposition that he would have restored the property if a demand had been made.[89] The rule that a demand is unnecessary where defendant contests the case upon the merits does not, however, apply to cases where a demand is necessary not merely as a basis for asserting the remedy, but to vest in plaintiff a right of possession.[90]

[§ 77] **2. Sufficiency of Demand and Refusal.** Where a demand is necessary there must be a distinct demand for possession and a refusal to deliver possession on the making of such demand.[91] Except where the form of demand is prescribed by statute,[92] there need not be a formal demand and refusal in express words,[93] any words will suffice so long as they are understood by both parties to be a demand and refusal.[94] An oral demand has been held to be

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Mo.—Harding v. Kelso, 91 Mo. A. 607.

N. M.—Ross v. Berry, 17 N. M. 48, 124 P 342, 344 [cit Cyc].

N. Y.—Employers' F. Ins. Co. v. Cotten, 245 N. Y. 102, 156 NE 629.

N. D.—First Guaranty Bank v. Rex Theatre Co., 50 N. D. 322, 195 NW 564.

Wis.—Byrne v. Byrne, 89 Wis. 659, 62 NW 413.

[84] Shoemaker v. Simpson, 16 Kan. 43.

[85] Ariz.—Mosher v. Rowe, 26 Ariz. 307, 224 P 1065.

Cal.—Drinkhouse v. Van Ness, 202 Cal. 359, 260 P 869; California Cured Fruit Assoc. v. Stelling, 141 Cal. 713, 75 P 320; Latta v. Tutton, 122 Cal. 279, 54 P 844, 68 AmSR 30; Ruzanoff v. Sacramento Retailers' Credit Assoc., 97 Cal. A. 682, 276 P 156; Cline v. Smith, 96 Cal. A. 703, 274 P 763; Campbell v. Smith, 96 Cal. A. 689, 274 P 758; Waterhouse-Wilcox Co. v. Betz, 73 Cal. A. 236, 238 P 763.

Colo.—Scott v. Bohe, 81 Colo. 454, 256 P 315; Denver Live Stock Commission Co. v. Parks, 41 Colo. 164, 91 P 1110; Hennessey v. Barnett, 12 Colo. A. 254, 55 P 197.

Fla.—Williams v. Hampton, 57 Fla. 272, 49 S 506; Webster v. Brunswick-Balke-Callender Co., 37 Fla. 433, 20 S 536.

Ida.—Neitzel v. Lawrence, 40 Ida. 26, 231 P 423; Leaf v. Reynolds, 34 Ida. 643, 203 P 458.

Ill.—Kingman v. Reinemer, 58 Ill. A. 173 [aff 166 Ill. 208, 46 NE 786].

Iowa.—Hart v. Wood, 202 Iowa 58, 209 NW 430; Brandenburg v. Carmichael, 192 Iowa 694, 185 NW 486; Smith v. McLean, 24 Iowa 322.

Kan.—Greenawalt v. Wilson, 52 Kan. 109, 34 P 403; Chapin v. Jenkins, 50 Kan. 385, 31 P 1084; Bliss v. Couch, 46 Kan. 400, 26 P 706; Raper v. Harrison, 37 Kan. 243, 15 P 219; Shoemaker v. Simpson, 16 Kan. 43; St. John State Bank v. Norduff, 2 Kan. A. 55, 43 P 312.

Me.—O'Neil v. Bailey, 68 Me. 429; Lewis v. Smart, 67 Me. 206; Seaver v. Dingley, 4 Me. 306.

Md.—Burrier v. Cunningham Piano Co., 135 Md. 135, 108 A 492; Petey Mfg. Co. v. Morris, 118 Md. 91, 84 A 238, 47 LRANS 882.

Minn.—Guthrie v. Olson, 44 Minn. 404, 46 NW 853; Ellingboe v. Brakken, 36 Minn. 156, 30 NW 659; Kellogg v. Olson, 34 Minn. 103, 24 NW 364.

Nebr.—Ogden v. Warren, 36 Nebr. 715, 55 NW 221; Heagney v. J. I. Case Threshing Mach. Co., 4 Nebr. (Unoff.) 745, 96 NW 175; Homan v. Laboo, 1 Nebr. 204.

Nev.—Perkins v. Barnes, 3 Nev. 557.

N. Y.—Knapp v. Scheider, 10 Daly 218.

N. C.—Buffkins v. Eason, 112 N. C. 162, 16 SE 916; Felton v. Hales, 67 N. C. 107.

N. D.—First Guaranty Bank v. Rex Theatre Co., 50 N. D. 322, 195 NW 564.

Okl.—Seidenbach's v. A. E. Little Co., 128 Okl. 65, 261 P 175.

Or.—Lind v. Boulin, 97 Or. 232, 190 P 1103; Brown v. Truax, 58 Or. 572, 115 P 597.

S. C.—Nixon v. Robinson, 104 S. C. 376, 89 SE 320.

S. D.—Howard v. Braun, 14 S. D. 579, 86 NW 635.

Utah.—Watkins v. Jensen, 58 Utah 13, 197 P 222.

Wash.—World Finance Co. v. Westlake Garage Co., 115 Wash. 45, 196 P 586; Armour v. Seixas, 80 Wash. 181, 141 P 308, 310 [cit Cyc].

W. Va.—Kuykendall v. Fisher, 61 W. Va. 87, 56 SE 48, 8 LRANS 94.

Wis.—Byrne v. Byrne, 89 Wis. 659, 62 NW 413.

Wyo.—Bunce v. McMahon, 6 Wyo. 24, 42 P 23.

[86] Old Kentucky Distillery v. Stromberg-Mullins Co., 54 Mont. 285, 169 P 734.

[87] Cal.—Godfrey v. Godfrey, 85 Cal. A. 204, 259 P 71.

Colo.—Lamping v. Keenan, 9 Colo. 390, 12 P 434.

Dak.—Myrick v. Bill, 3 Dak. 284, 17 NW 268.

Ind. T.—Sellers v. Catron, 5 Ind. T. 263, 82 SW 742.

Kan.—Chapin v. Jenkins, 50 Kan. 385, 31 P 1084; Raper v. Harrison, 37 Kan. 243, 15 P 219; St. John State Bank v. Norduff, 2 Kan. A. 55, 43 P 312.

Miss.—Newell v. Newell, 34 Miss. 385.

Nebr.—Homan v. Laboo, 1 Nebr. 204.

Nev.—Studebaker Bros. Co. v. Witcher, 44 Nev. 468, 199 P 477, 478 [reh den 201 P 322, and cit Cyc].

N. C.—Heath v. Morgan, 117 N. C. 504, 23 SE 489; Felton v. Hales, 67 N. C. 107.

N. D.—Thompson v. Thompson, 11 N. D. 208, 91 NW 44.

S. D.—Howard v. Braun, 14 S. D. 579, 86 NW 635.

Wash.—World Finance Co. v. Westlake Garage Co., 115 Wash. 45, 196 P 586; Seattle Nat. Bank v. Meerwaldt, 8 Wash. 630, 36 P 763.

Wyo.—Carroll v. Anderson, 30 Wyo. 217, 218 P 1038; Bunce v. McMahon, 6 Wyo. 24, 42 P 23.

[88] Thompson v. Thompson, 11 N. D. 208, 91 NW 44.

[89] Myrick v. Bill, 3 Dak. 284, 17 NW 268; Raper v. Harrison, 37 Kan. 243, 15 P 219; C. W. Raymond Co. v. Kahn, 124 Minn. 426, 145 NW 164, 51 LRANS 251; Guthrie v. Olson, 44 Minn. 404, 46 NW 853; Kellogg v. Olson, 34 Minn. 103, 24 NW 364; Boswell v. Laramie First Nat. Bank, 16 Wyo. 161, 92 P 624, 93 P 661.

[90] People's Furniture, etc., Co. v, Crosby, 57 Nebr. 282, 77 NW 658, 73 AmSR 504; Goodwin v. Wertheimer, 99 N. Y. 149, 1 NE 404; Ludden, etc., Southern Music House v. Sumter, 47 S. C. 335, 25 SE 150.

[91] Chandler v. Colcord, 1 Okl. 260, 32 P 330; Bent v. Bent, 44 Vt. 633 (holding that a refusal by the owner of a building containing furniture belonging to another to allow the latter to enter the building for the purpose of taking it away, if accompanied by an offer to put out the furniture for him whenever called for, is not such a refusal as will authorize an action of replevin).

[92] See statutory provisions.

[93] Truax v. Purvis, 12 Del. 330, 32 A 227 [rev on other grounds 12 Del. 574, 32 A 1050]; Kiefer v. Carrier, 53 Wis. 404, 10 NW 562 (holding that, where plaintiff's horses escaped and went upon the land of defendant who had previously forbidden plaintiff to come upon his land, and plaintiff with his servant went to defendant's house stating that they had come for the horses, and defendant merely stated that there were certain horses on his premises but that he did not know whether they belonged to plaintiff, the failure of defendant to revoke his previous notice and give plaintiff express permission to come upon his land to get the horses was equivalent to a refusal of plaintiff's demand); Merriam v. Lynch, 53 Wis. 82, 10 NW 1. See also Machelli v. Torrelli, 190 Ill. A. 287.

[94] Truax v. Parvis, 12 Del. 330, 32 A 227 [rev on other grounds 12 Del. 574, 32 A 1050].

[a] **Demand held sufficient.**—Where a lessee had the right to pasture a cow in his landlord's pasture and the landlord let the cow out and then impounded her, and the lessee demanded her return to the pasture, which the landlord refused, unless the lessee would keep her tied, there was a demand and refusal. Smith v. Hopper, 172 N. C. 630, 90 SE 770.

[b] **Demand held insufficient.**—Lyle v. Barnes, 30 S. D. 647, 139 NW 338 (demand that cattle be returned to either of two specified places).

[c] **A demand of a bill of lading** constituting the evidence of title to

sufficient.[95] The demand may be sufficient, although it does not specify each article composing the property demanded,[96] particularly where plaintiff attempts to point out the particular articles claimed and defendant refuses to look or consider plaintiff's claims,[97] or peremptorily refuses to surrender any of the property.[98] So also the demand is not necessarily invalidated because it is for more than plaintiff is entitled to,[99] or because plaintiff fails to state the nature of his interest in the property.[1] In some jurisdictions it is held that if defendant contests the action the writ itself is a sufficient demand, and defending the suit a refusal.[2] Where a demand must be made[3] a mere notification that some one wrongfully took the property from plaintiff is not sufficient.[4] A refusal not amounting to a conversion cannot be made the basis of an action of replevin,[5] as, for example, a refusal to deliver to one whose right to possession is doubtful until defendant can ascertain if such person is so entitled, is not such a refusal as will authorize suit until after a reasonable time has elapsed.[6] A demand for payment from a vendee is not a demand for delivery,[7] but an alternative demand of payment or return is sufficient.[8]

[§ 78] **3. By and on Whom Demand May Be Made.** The demand need not be made by plaintiff personally, it being sufficient if it is made by a person authorized to act for him;[9] as, for example, one who stands in loco parentis,[10] but it must be made either by plaintiff or by some one authorized to act for him,[11] and a demand made by a person acting in his own right and not as agent of plaintiff cannot avail plaintiff.[12] The authority of an agent to make demand need not be in writing,[13] but defendant is not bound to deliver the property unless there is some evidence of the agent's authority sufficient to justify a reasonably prudent man in doing so.[14] A demand by plaintiff, as an individual, is insufficient to support an action to recover property obtained from plaintiff as a company.[15] The demand must ordinarily be made on defendant himself.[16] In some cases it has been held that where the property is found in the possession of defendant's agent, a demand on the agent is sufficient;[17] but on the contrary it has been held that a demand on an agent having merely the custody of the property and without any general authority to act for defendant or make a delivery thereof is not sufficient,[18] that a demand made on a servant of defendant having the custody of the property is not sufficient[19] unless the servant acted under the direction of the master in refusing to deliver the property,[20] and that a demand made on defendant's wife is not sufficient unless it is shown that defendant had constituted her his agent for the purpose of receiving such demand.[21] In an action against a husband and wife to recover community property a demand on the husband alone is sufficient where by statute he is manager of the community property,[22] and where a husband and wife are jointly in possession of property and the action is brought against the husband alone, a failure to also make demand on the wife will not defeat the action;[23] but where the property is in possession of assignees for the benefit of creditors, and such assignees are not partners, a demand must be made on each in order to maintain a joint action against them.[24]

[§ 79] **4. Time for Making Demand.** The demand must be made while defendant is still in possession of the property,[25] and at a time when plaintiff is en-

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property is equivalent to a demand of the property represented by it and is sufficient to support an action of replevin for such property. Zachrisson v. Ahman, 4 N. Y. Super. 68.

[95] Old Kentucky Distillery v. Stromberg-Mullins Co., 54 Mont. 285, 169 P 734.

[96] Newman v. Bennett, 23 Ill. 427.

[97] Greenberg v. Stevens, 212 Ill. 606, 72 NE 722 [aff 114 Ill. A. 483].

[98] Appleton v. Barrett, 29 Wis. 221.

[99] King v. Fitch, 2 Abb. Dec. (N. Y.) 508, 1 Keyes 432 (holding that, where the owner of property which came lawfully into defendant's possession demands a delivery of more than he is entitled to, and defendant without requesting plaintiff to specify what he is entitled to refuses absolutely to deliver any of the property, he cannot afterward object that the demand was for too much); Nielsen v. Hyland, 51 Utah 334, 170 P 778.

[a] **Thus,** where plaintiff, whose two horses had been taken up by defendants as trespassing animals, demanded return of the team, although he was informed that one of the horses had died, such demand is a sufficient demand for the remaining horse. Nielsen v. Hyland, 51 Utah 334, 170 P 778.

[1] Schoolcraft v. Simpson, 123 Mich. 215, 81 NW 1076.

[2] Maddox v. Dowdy, 31 Okl. 169, 120 P 651; Hutchings v. Cobble, 30 Okl. 158, 120 P 1013; Citizens' State Bank v. Chattanooga State Bank, 23 Okl. 767, 101 P 1118.

[3] See supra §§ 68-76.

[4] Trowbridge v. Bosworth, 45 Conn. 166.

[5] Banque de France v. Equitable Trust Co., 33 F. (2d) 202.

[6] Page v. Crosby, 24 Pick. (Mass.) 211.

[7] Moran v. Abbott, 26 App. Div. 570, 50 NYS 337.

[8] Bennett Bros. Co. v. Tam, 24 Mont. 457, 62 P 780.

[9] Brown v. Poland, 54 Conn. 313, 7 A 719; Mason v. Rodgers, 116 Mo. A. 611, 92 SW 745.

[10] Newman v. Bennett, 23 Ill. 427.

[11] Ingalls v. Bulkley, 13 Ill. 315; Fleischman v. Glaser, 28 Misc. 555, 59 NYS 686.

[12] Page v. Crosby, 24 Pick. (Mass.) 211.

[13] Ingalls v. Bulkley, 13 Ill. 315.

[14] Ingalls v. Bulkley, supra.

[15] Freedlander v. Wilson, 167 NYS 849.

[16] Davenport v. Alexander, 53 Cal. A. 688, 200 P 771; Kellogg v. Olson, 34 Minn. 103, 24 NW 364; Henrich v. Van Wrickler, 80 App. Div. 250, 80 NYS 226. But see Chamberlin v. Fuller, 59 Vt. 247, 9 A 832 (holding that, in an action against an assignee of an insolvent debtor to recover property alleged to have been obtained by the debtor through fraud, a demand made upon the messenger of the court of insolvency who was in possession of the property awaiting the appointment of an assignee, is sufficient).

[17] Udell v. Slocum, 56 Ill. A. 216; Congdon v. Bailey, 121 Mich. 570, 80 NW 369.

[a] **Demand on agent in possession** is sufficient, even though the property is thereafter delivered to defendant. Congdon v. Bailey, 121 Mich. 570, 80 NW 369.

[18] Davenport v. Alexander, 53 Cal. A. 688, 200 P 771; Kellogg v. Olson, 34 Minn. 103, 24 NW 364; Goodwin v. Wertheimer, 99 N. Y. 149, 1 NE 404.

[19] Page v. Crosby, 24 Pick. (Mass.) 211; Goodwin v. Wertheimer, 99 N. Y. 149, 1 NE 404.

[20] Goodwin v. Wertheimer, supra.

[21] Shapiro v. De Leuce, 89 N. J. L. 161, 97 A 721, 722 [cit Cyc]; Wheeler, etc., Mfg. Co. v. Teetzlaff, 53 Wis. 211, 10 NW 155.

[22] Standard Furniture Co. v. Anderson, 38 Wash. 582, 80 P 813.

[23] McGregor v. Cole, 100 Mich. 262, 58 NW 1008.

[24] Jessop v. Miller, 2 Abb. Dec. (N. Y.) 449, 1 Keyes 321.

[25] West v. Graff, 23 Ind. A. 410, 55 NE 506.

titled to its possession;[26] but plaintiff is not obliged to make such demand as soon as he is entitled to do so.[27] As to the stage of the proceedings at which the demand must be made the authorities are conflicting, it being held in some cases that the demand must be made before the writ is issued,[28] and in others that it may be made after the writ is issued if before it is served,[29] particularly if it is made provisionally to be used only in case defendant refuses to give up the property on demand.[30]

[§ 80] **5. Waiver of Demand.** In cases where a demand is necessary in replevin it may be waived by defendant,[31] by his conduct or assertions,[32] or by expressly stating that he waives all demand,[33] or he may by contesting the case on the merits and claiming title in himself be precluded from relying on the absence of a demand as a defense to the action;[34] but a refusal to comply with a demand made after the suit is begun and the writ issued will not prevent defendant from relying on the defense that no demand was made before suit,[35] and a mere denial of plaintiff's right to possession is not a plea of property in defendant and does not waive a demand where a demand is necessary to entitle plaintiff to recover.[36] If a demand is technically defective, but defendant absolutely refuses to deliver the goods except on replevin, no further demand is necessary.[37]

VII. DEFENSES[38]

[By Joseph W. Rouse]

[§ 81] **A. In General.** It is no defense to replevin for a wrongful taking that the owner of the property was indebted to defendant.[39] Any defense which controverts plaintiff's right of possession at the time the suit was brought is allowable,[40] such as invalidity of plaintiff's title,[41] or title or right to possession in defendant[42] or some stranger to the action.[43]

Illegality of transaction. Where parties engage in an unlawful transaction, and in the accomplishment of the illegal purpose one party obtains possession of property claimed by the other, replevin will not lie in behalf of claimant to recover such possession.[44]

Miscellaneous defenses. It is no defense to an action of replevin that defendant purchased the property from one who had tortiously taken it from plaintiff and that plaintiff made no effort to obtain redress from the latter who was financially responsible;[45] that no demand was made for the property prior to suit, unless there was a tender of the property at the trial in accordance with statutory requirements[46] that plaintiff had committed an act which exposed the goods to forfeiture by the federal government, the property belonging to plaintiff until rendition of judgment of forfeiture;[47] that the property was more valuable than at the time of the taking, because of expenditures by defendant;[48] that plaintiff by the use of the property since the commencement of the action has realized more than sufficient to pay the amount of his claim, and has sold the property for a certain sum for which he has not accounted;[49] or that the property replevied (scrip) was of no value in the hands of any one else than plaintiff and that he might have obtained duplicates of it.[50] Where a stranger by means of a redelivery bond secures property seized under a writ against another, on replevin against him it is no defense that he holds under such bond.[51] A breach by plaintiff of a contract to deliver goods is no defense to an action to recover goods delivered.[52] It is no defense that property was taken by defendant as agent of another when he had notice of plaintiff's title.[53] It is no defense that defendant got property through the contributory negligence of plaintiff.[54] An equitable defense of subrogation cannot be set up in replevin.[55] In replevin for money taken, failure of a grand jury to indict defendant for theft, is no defense.[56]

[§ 82] **B. Invalidity of Plaintiff's Title.** While it has been held that in replevin a denial that the goods are the property of plaintiff is a good defense,[57] it has been held that denial of plaintiff's title alone is not sufficient;[58] and defendant cannot impeach plaintiff's title where in himself he has no title[59] or right to possession.[60] Where each party pleads in general terms that he has title to the property, and denies the title alleged by the other party, defendant may avail himself of the defense that the conveyance under which plaintiff claims title was fraudulent and void as to defendant.[61] Loss of plaintiff's title or ownership before commencement of the action is a good defense.[62]

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[26] Delahunty v. Hake, 10 App. Div. 230, 41 NYS 896.

[27] Farrand, etc., Organ Co. v. Methodist Episcopal Church Bd. of Extension, 18 Utah 29, 54 P 818.

[28] Underwood v. Tatham, Smith (Ind.) 152; Darling v. Tegler, 30 Mich. 54.

[29] Denver Live Stock Commission Co. v. Parks, 41 Colo. 164, 91 P 1110; Irr v. Schroeder, 6 NYCivProc 253.

[30] O'Neil v. Bailey, 68 Me. 429.

[31] Hamilton v. Seeger, 75 Ill. A. 599; Boswell v. Laramie First Nat. Bank, 16 Wyo. 161, 92 P 624, 93 P 661.

[32] Boswell v. Laramie First Nat. Bank, supra.

[33] Hamilton v. Seeger, 75 Ill. A. 599.

[34] See supra § 76.

[35] Keller v. Robinson, 153 Ill. 458, 38 NE 1072 [rev 55 Ill. A. 56].

[36] Peters v. Parsons, 18 Nebr. 191, 24 NW 687.

[37] New Columbus Buggy Co. v. Empire Express Storage, etc., Co., 198 Ill. A. 421.

[38] **Cross references:**
Defense by mortgagor against mortgagee see Chattel Mortgages § 310.
Defense of purchaser in replevin by assignee of conditional contract of sale see Sales [35 Cyc 709].
Defenses in replevin:
By purchaser see Sales [35 Cyc 515].
By seller see Sales [35 Cyc 613].

[39] Ray v. Navarre, 47 Okl. 438, 147 P 1019; Reed v. Mills, 78 Or. 558, 154 P 113.

Set-off and counterclaim see infra § 86.

[40] Transport Motor Co. v. Ferguson, 42 Ida. 134, 243 P 825; McCargar v. Wiley, 112 Or. 215, 229 P 665.

[41] See infra § 82.

[42] See infra § 83.

[43] See infra § 84.

[44] Wiltz v. Classen, 153 Ill. A. 562; Jackson v. Columbia, (Mo. A.) 217 SW 869.

[a] **Where promissory notes** are executed as part of an illegal transaction, replevin will not lie for their recovery from one party to the transaction by the other. Wiltz v. Classen, 153 Ill. A. 562.

[45] Welker v. Wolverkuehler, 49 Mo. 35.

[46] Goldsmith v. Taussig, 60 Mo. A. 460.

[47] Stark v. Grant, 16 NYS 526.

[48] Sawyer v. Middlesboro Town Co., 17 SW 444, 13 KyL 550.

[49] Charles v. Malott, 51 Ind. 350.

[50] Bradley v. Gamelle, 7 Minn. 331.

[51] Alexander v. Alexander, 65 Okl. 105, 164 P 114, LRA1917D 984.

[52] Salant v. Richfield Shirt Co., 29 Pa. Dist. 651.

[53] Warder-Bushnell, etc., Co. v. Harris, 81 Iowa 153, 46 NW 859.

[54] Hudson Iron Co. v. Mershon, 149 App. Div. 556, 133 NYS 998.

[55] Luckett v. Brickell, 115 Miss. 457, 76 S 502.

[56] Hecker-Jones-Jewell Milling Co. v. Murray, 178 NYS 335.

Want of title to land is no defense to an action for recovery of crops grown thereon.[63]

[§ 83] **C. Property in, or Lien of, Defendant.**[64] Property in defendant is a good defense in an action of replevin,[65] and this is ordinarily true whether it be an absolute, or a special or qualified property in the goods which are the subject matter of the litigation.[66] A bona fide purchase from a vendee of plaintiff,[67] or purchase at a sheriff's sale,[68] or purchase of crops from one holding land adversely to plaintiff,[69] is a good defense. But where the property purchased has been stolen, it is no defense that defendant did not know that fact.[70] Where defendant seized goods under a void attachment, and thereafter acquired title to a past due note secured by a mortgage, his right under the mortgage is no defense.[71] Purchase from one who had no title is no defense.[72] Defendant, having no more than an interest in a contract affecting property as distinguished from an interest in the property cannot justify its detention after demand.[73] Title to land under a champertous deed is no defense to replevin of timber cut therefrom.[74]

An equitable lien on the property in controversy may be interposed as a defense,[75] but it is no defense to replevin for an illegal seizure that defendant had an equitable mortgage, where there was nothing due him at the time of the seizure.[76]

[§ 84] **D. Property in, or Lien of, Third Person.**[77] As plaintiff must be entitled to the immediate possession of the property at the time of the suit,[78] in the absence of statute to the contrary,[79] property and right of possession in a third person is general-

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57. Reynolds v. Donaway, 30 Del. 461, 108 A 139; Shur v. Statler, 2 Oh. Dec. (Reprint) 70, 1 WestLMonth 317.

58. Siedenbach v. Riley, 36 Hun 211 [aff 111 N. Y. 560, 19 NE 275]; Anstice v. Holmes, 3 Den. (N. Y.) 244.

59. Wyman v. Gould, 47 Me. 159; Brown v. Judge, 80 Pa. Super. 570.

60. Raber v. Hyde, 138 Mich. 101, 101 NW 61.

61. Mullen v. Noonan, 44 Minn. 541, 47 NW 164.

62. Schlessinger v. Cook, 9 Wyo. 256, 62 P 152.

63. Barnhart v. Ford, 37 Kan. 520, 15 P 542.

64. **Pleading title in defendant** see infra § 191.

65. U. S.—Ingle v. Wallach, 1 Black 96, 17 L. ed. 50; Radetsky v. Gramm-Bernstein Motor Truck Co., 4 F. (2d) 965.

Ark.—Passwater-Chevrolet Co. v. Whitten, 178 Ark. 136, 9 SW (2d) 1057, 1058 [cit Cyc]; Laughlin v. Tyler, 177 Ark. 1183, 1185, 9 SW (2d) 567 [quot Cyc].

Del.—Hitch v. Riggin, 26 Del. 84, 80 A 975.

Hawaii.—Atau v. Goo Wan Hoy, 23 Hawaii 182.

Ill.—Van Namee v. Bradley, 69 Ill. 299; Anderson v. Talcott, 6 Ill. 365.

Ind.—Darter v. Brown, 48 Ind. 395.

Mich.—Busch v. Nester, 70 Mich. 525, 38 NW 458.

N. Y.—Mitchell v. Hinman, 8 Wend. 667.

N. C.—Alsbrook v. Shields, 67 N. C. 333.

Or.—Spores v. Boggs, 6 Or. 122.

Pa.—Elliott v. Powell, 10 Watts 453, 36 AmD 200; Johnson v. Groff, 22 Pa. Super. 85.

Tenn.—Deaderick v. Oulds, 86 Tenn. 14, 5 SW 487, 6 AmSR 812.

N. B.—Mitchell v. Davis, 39 N. B. 486.

[a] **Rights of mortgage bondholders.**—In replevin for property sold by plaintiff with reservation of title as security for the purchase-price, the rights of innocent mortgage bondholders under a mortgage executed by the vendee are available as a defense. Ryle v. Knowles Loom Works, 87 Fed. 976, 31 CCA 340.

[b] **Purchase from one having authority to sell.**—Where defendant claimed that person from whom he bought had authority to sell certain oxen from the owner thereof, the fact that the person from whom he bought had no title and the plaintiff did, does not authorize plaintiff to recover, for defendant's title does not depend on the good faith of the person selling to him. Gavigan v. Evans, 45 Mich. 597, 8 NW 545.

[c] **Rule applied.**—That the intervener obtained possession of goods by subterfuge would not prevent judgment for him when he was in fact the owner and entitled to possession. Lutz v. Merchants' Nat. Bank, 179 Cal. 401, 177 P 158.

66. Ark.—Passwater-Chevrolet Co. v. Whitten, 178 Ark. 136, 9 SW (2d) 1057, 1058 [cit Cyc]; Laughlin v. Tyler, 177 Ark. 1183, 1185, 9 SW (2d) 567 [quot Cyc].

Ind.—Darter v. Brown, 48 Ind. 395; Reardon v. Higgins, 39 Ind. A. 363, 79 NE 208.

Iowa.—Lytle v. Crum, 50 Iowa 37.

Mo.—Sutton v. St. Louis, etc., R. Co., 159 Mo. A. 685, 140 SW 76; Duke v. Duke, 93 Mo. A. 244; Anthony v. Carp, 90 Mo. A. 387.

N. Y.—Mitchell v. Hinman, 8 Wend. 667.

Sask.—Pocock v. Novitz, 5 Sask. L. 339.

[a] **Rule applied to:** (1) Agister's lien. Duke v. Duke, 93 Mo. A. 244; Anthony v. Carp, 90 Mo. A. 387. (2) Bailee. Darter v. Brown, 48 Ind. 395. (3) Carrier's lien for freight. Sutton v. St. Louis, etc., R. Co., 159 Mo. A. 685, 140 SW 76. (4) Warehouseman's lien for storage. Finn v. Erickson, 127 Or. 107, 269 P 232, 270 P 767.

[b] **Lien for damages.**—Where a horse which strayed upon defendant's inclosed lot, and was seized by defendant to secure compensation for the damage it had done, was replevied, defendant may show that he had acquired a lawful lien on the horse, and that the owner could not recover possession of it with the consequent destruction of the defendant's lien, except upon the conditions contemplated by Act April 19, 1901 (P. L. p 90) § 6 providing for a conditional verdict. Young v. Couche, 52 Pa. Super. 592.

[c] **Failure of defense.**—Where defendant in replevin was not entitled to her sole defense of innkeeper's lien on the property in question, not being an innkeeper, she was a stranger to the property and could not prevail over a bailor's right of possession. Friederich Music House v. Harris, 20 Mich. 421, 166 NW 869, LRA1918D 400.

67. Bragdon v. Penney, 35 Minn. 204, 28 NW 241; Lee v. Portwood, 41 Miss. 109; Norfolk Southern R. Co. v. Barnes, 104 N. C. 25, 10 SE 83, 5 LRA 611.

68. Kingsbury v. Lane, 17 Mo. 261.

69. Stockwell v. Phelps, 34 N. Y. 363, 90 AmD 710.

70. Morris v. Schuttles, (Tex. Civ. A.) 139 SW 1053.

71. Hart v. Grove, 92 Okl. 203, 218 P 855.

72. Driscoll v. Waite, 6 Pa. Dist. & Co. 417.

73. Nettleton v. Jackson, 30 Mo. A. 135.

74. Lieberman v. Clark, 114 Tenn. 117, 85 SW 258, 69 LRA 732.

75. American Soda Fountain Co. v. Futrall, 73 Ark. 464, 84 SW 505, 108 AmSR 64.

76. Murdouch v. Tuten, 76 S. C. 502, 57 SE 547.

77. **Pleading title in third person** see infra § 191.

78. See supra § 46.

79. See statutory provisions; and cases infra this note.

[a] **In Iowa** (1) title in a third person not a party to the action can-

ly a good defense to an action of replevin.[80] It has been held unnecessary for defendant to connect himself with the outstanding title,[81] even when the action is in the cepit,[82] and statutes may provide that title in a third person is a good defense without showing such connection.[83] But as mere possession by plaintiff is sufficient to maintain an action against a trespasser or wrong-doer,[84] it is generally held, in the absence of statutory provisions to the contrary, that where the property has been wrongfully taken from plaintiff's possession, defendant cannot set up an outstanding title in a third person, with which he does not connect himself.[85] The lien of a third person upon the property in question is no defense in replevin, as plaintiff takes subject thereto.[86] Where during the pendency of the action, and before trial, defendant has been legally required to deliver the property in dispute to a third person, who is the owner as against both parties to the suit, such delivery may be pleaded, and will constitute a good defense to the replevin suit,[87] but it has been held otherwise when the original taking was wrongful.[88] The property in a third person, sufficient to defeat plaintiff's action, must be such as destroys plaintiff's interest.[89] Title in a third person is no defense when such title is the result of a fraudulent delivery to such person by defendant.[90]

[§ 85] **E. In Actions for Property Taken on Legal Process.** In replevin against an officer he may justify under a writ not returned at the time the suit was commenced, if the time for making the return had not then expired;[91] and where damages for detention are claimed he may justify by showing the issuance and levy of process by him on the property in suit subsequent to its seizure.[92] Nor is he deprived of the right to defend an action against him for the recovery of the property seized, by the fact that he violated an injunction improvidently granted restraining him from making the seizure.[93] It is not a valid defense, however, to an action against him by one whose property he has seized on execution against another, that he has taken an indemnity bond from plaintiff in execution,[94] but a compliance by plaintiff in execution with a statutory provision requiring execution of an undertaking in favor of claimant, and tender thereof to claimant by the officer, is a valid defense.[95] It is not a defense to an action of replevin for property wrongfully seized on attachment, that defendant subsequently delivered the property to another person on order of the court made in a suit to which plaintiff was not a party;[96] and he cannot justify on the ground that the attachment plaintiff had an independent lien on the property prior to the attachment;[97] nor under a return not made within the

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not be shown in defense to a suit in replevin. Under Code § 1999 such third person should be made a party. Reed v. Reed, 13 Iowa 5. (2) Title in a third person is no defense when plaintiff claims merely the right to possession. Corbitt v. Heisey, 15 Iowa 296.

[80] U. S.—Banque de France v. Equitable Trust Co., 33 F. (2d) 202.

Del.—Hitch v. Riggin, 26 Del. 84, 80 A 975.

Ill.—Edwards v. McCurdy, 13 Ill. 496; Anderson v. Talcott, 6 Ill. 365.

Ind.—Hall v. Henline, 9 Ind. 256; Martin v. Ray, 1 Blackf. 291.

Minn.—Loomis v. Youle, 1 Minn. 175.

Mo.—Jackson v. Columbia, (A.) 217 SW 869; Moriund v. Johnson, 140 Mo. A. 345, 124 SW 80.

Nebr.—Fuller v. Brownell, 48 Nebr. 145, 67 NW 6; Sutro v. Hoile, 2 Nebr. 186.

N. Y.—Siedenbach v. Riley, 111 N. Y. 560, 19 NE 275; Central Stock Yard, etc., Co. v. Mears, 89 App. Div. 452, 85 NYS 795; Beck v. Schneider, 84 Misc. 23, 145 NYS 1046; Ingraham v. Hammond, 1 Hill 353; Prosser v. Woodward, 21 Wend. 205; Harrison v. McIntosh, 1 Johns. 380.

Or.—Spores v. Boggs, 6 Or. 122.

Pa.—Johnson v. Groff, 22 Pa. Super. 85.

Tex.—Mexia Planing Mill Co. v. Werner, (Civ. A.) 24 SW (2d) 737.

Wis.—General Motors Acceptance Corp. v. Stock, 197 Wis. 224, 221 NW 736.

Eng.—Butcher v. Porter, 1 Salk. 94, 91 Reprint 87.

Ont.—Scott v. Carveth, 20 U. C. Q. B. 430.

[81] U. S.—Banque de France v. Equitable Trust Co., 33 F. (2d) 202.

Ill.—Anderson v. Talcott, 6 Ill. 365.

Minn.—Loomis v. Youle, 1 Minn. 175.

N. Y.—Ingraham v. Hammond, 1 Hill 353; Prosser v. Woodward, 21 Wend. 205.

Or.—Spores v. Boggs, 6 Or. 122.

[82] Loomis v. Youle, 1 Minn. 175.

[83] See statutory provisions.

[a] **In New York** (1) although by virtue of Code Civ. Proc. § 1723 defendant may justify under a stranger's title without connecting himself therewith, in a justice's court, defendant cannot so justify without connecting himself therewith, as this provision of the code does not apply to actions in justice court. Bills v. Baker, 178 App. Div. 480, 165 NYS 171 (a person, to whom sheep were delivered by a constable replevying them under requisition subsequently set aside, is not so connected with the title of plaintiff as to defeat a recovery against him by defendant). (2) District courts of the city of New York do not come within this provision. Carswell v. Alden, 12 NYCiv Proc 137.

[84] See supra § 47.

[85] Kan.—Buckhalter v. Nuzum, (A.) 61 P 310.

N. Y.—Stowell v. Otis, 71 N. Y. 36; Johnson v. Carnley, 10 N. Y. 570, 61 AmD 762; Gerber v. Monie, 56 Barb. 652; Hoyt v. Van Alstyne, 15 Barb. 568; Thompson v. Stever, 11 NYSt 784; Rogers v. Arnold, 12 Wend. 30.

Oh.—Shur v. Statler, 2 Oh. Dec. (Reprint) 70, 1 WestLMonth 317.

Okl.—Hart v. Grove, 92 Okl. 203, 218 P 855.

R. I.—Kebabian v. Adams Express Co., 28 R. I. 177, 66 A 201.

Tex.—Murray v. Lyons, (Civ. A.) 95 SW 621; Jackson v. Nelson, (Civ. A.) 39 SW 315.

Wis.—Stern v. Riches, 111 Wis. 589, 87 NW 554.

[86] Cal.—Laughlin v. Thompson, 76 Cal. 287, 18 P 330.

Miss.—McGill v. Howard, 61 Miss. 411.

Mo.—Burns v. Lidwell, 6 Mo. A. 192 (holding that, in a claim and delivery action, it is no defense for the taker to show that a third person claimed a lien on the property, the abstract right amounting to nothing unless enforced).

Mont.—Conrad Mercantile Co. v. Siler, 75 Mont. 36, 241 P 617, 619 [cit Cyc].

N. Y.—Stowel v. Otis, 71 N. Y. 36; Neff v. Thompson, 8 Barb. 213; Carswell v. Alden, 12 NYCivProc 137.

[a] **Rule applied** where third party was a mortgagee. Sharp v. Bartlett, 76 Mont. 415, 248 P 199; Conrad Merc. Co. v. Siler, 75 Mont. 36, 241 P 617.

[87] Bolander v. Gentry, 36 Cal. 105, 95 AmD 162; Neeb v. McMillan, 98 Iowa 718, 68 NW 438.

[88] Wise v. Jefferis, 51 Fed. 641, 2 CCA 432.

[89] Van Namee v. Bradley, 69 Ill. 299; Rogers v. Arnold, 12 Wend. (N. Y.) 30.

[90] General Motors Acceptance Corp. v. Stock, 197 Wis. 224, 221 NW 736.

[91] Kingsbury v. Buchanan, 11 Iowa 387.

[92] Blackman v. Wheaton, 13 Minn. 326.

[93] Kaehler v. Dobberpuhl, 60 Wis. 256, 18 NW 841.

[94] Saunders v. Jordon, 54 Miss. 428.

[95] Ralston v. Oursler, 12 Oh. St. 105.

[96] Wise v. Jefferis, 51 Fed. 641, 2 CCA 432.

[97] Houck v. Linn, 48 Nebr. 227, 66 NW 1103.

prescribed time,[98] but it has been held a good defense that since the commencement of the action a landlord's lien has been established and the property taken from him.[99] An execution valid on its face but in fact irregular, is a good defense.[1] Where defendant is an officer holding under proper process, he may show that plaintiff acquired the property in fraud of plaintiff in his writ,[2] except where he seizes property owned by some person other than the person named in the process,[3] or where by unlawfully turning over property to plaintiff in the attachment he becomes a trespasser ab initio,[4] and such officer cannot set up in defense that the property was transferred fraudulently as to third persons, if such third persons make no complaint.[5] In an action by a third person for property seized on execution it is no defense that a sheriff's jury found the property in the execution defendant.[6]

[§ 86] **F. Set-Off and Counterclaim.**[7] Except as the rule may have been altered by statute, a set-off or counterclaim has ordinarily been regarded as not allowable in an action of replevin,[8] except where equitable relief may be demanded under exceptional circumstances.[9] In some jurisdictions the filing of a counterclaim in a replevin suit is expressly prohibited by statute.[10] By an early decision, under the codes counterclaims were held not to be available in any action for a tort, and therefore not in replevin, which sounds in tort.[11] But this rule has been so far modified as to allow the interposition of a counterclaim in the full sense of the code, whether arising on contract or based on a tort, in an action of replevin, whenever such counterclaim is founded on a cause of action arising out of the transaction set forth in the complaint as the foundation of plaintiff's claim, or whenever it is connected with the subject of the action,[12] at least where a money judgment is sought,[13] but otherwise, a counterclaim cannot be allowed.[14] While in some decisions recognizing the right to a counterclaim no affirmative relief was granted,[15] and in others the right was limited to the defeating of plaintiff's demand,[16] in others defendant has been allowed affirmative relief by judgment in his favor for excess of his demand over the amount found to be due to plaintiff.[17] Matter pleaded expressly as a counter-

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[98] Carson v. Fuller, 11 S. D. 502, 78 NW 960, 74 AmSR 823.

[99] Neeb v. McMillan, 98 Iowa 718, 68 NW 438.

[1] Law v. Lovell, 49 N. S. 282.

[2] Cal.—Bolander v. Gentry, 36 Cal. 105, 95 AmD 162.

Mass.—Gates v. Gates, 15 Mass. 310.

Mich.—Pierce v. Hill, 35 Mich. 194, 24 AmR 541.

N. Y.—Thayer v. Willet, 18 N. Y. Super. 344, 9 AbbPr 325; Hall v. Stryker, 9 AbbPr 342.

S. C.—Paris v. Du Pre, 17 S. C. 282.

[a] **It is a material element of such defense** that the relation of debtor and creditor exist between the attachment plaintiffs and the fraudulent grantor, and the question as to whether such transfer was fraudulent is immaterial until the officer has shown that he represents creditors. Dunn v. Overton, 15 Okl. 670, 83 P 715; Marrinan v. Knight, 7 Okl. 419, 54 P 656.

[b] **Where the judgment on which an execution was issued is held invalid** in an action of replevin by a purchaser from the execution debtor to recover goods taken by defendant, a constable, under the execution, defendant cannot attack the sale to plaintiff. Wilson v. Martin, 44 Mich. 509, 7 NW 83.

[3] Deutsch v. Reilly, 8 Daly (N. Y.) 132, 57 HowPr 75.

[4] Griswold v. Sundback, 6 S. D. 269, 60 NW 1068.

[5] Hall v. Moriarty, 57 Mich. 345, 24 NW 96; Town v. Tabor, 34 Mich. 262.

[6] Pfeifer v. Hatton, 17 N. D. 99, 115 NW 191.

[7] **Generally** see Set-Off and Counterclaim [34 Cyc 899].

Replevin by mortgagee see Chattel Mortgages § 312.

[8] Mich.—Dearing Water Tube Boiler Co. v. Thompson, 156 Mich. 365, 120 NW 801, 24 LRANS 748.

N. J.—Auto Security Co. v. Stewart, 103 N. J. L. 1, 135 A 92; McDade v. Reilly, 102 N. J. L. 268, 132 A 247 [rev 3 N. J. Misc. 49, 129 A 408].

Pa.—Lee-Strauss Co. v. Kelly, 292 Pa. 403, 141 A 236; General Motors Truck Co. v. Philadelphia Pav. Co., 248 Pa. 499, 94 A 235; Macky v. Dillinger, 73 Pa. 85; Phillips v. Monges, 4 Whart. 226; Warner v. Caulk, 3 Whart. 193; Peterson v. Haight, 3 Whart. 150; Fairman v. Fluck, 5 Watts 516; Liveright v. Thornton, 56 Pa. Super. 611; C. H. Hardy Auto Co. v. Posey, 50 Pa. Super. 399; Guernsey v. Moon, 46 Pa. Super. 645; Hall's Safe Co. v. Walenk, 42 Pa. Super. 576; National Cash Register Co. v. Cochran, 22 Pa. Super. 582; Travelers Hotel Co. v. Yorke, 11 Pa. Dist. & Co. 370; Fedel v. Miller, 1 Pa. Dist. & Co. 705; Com. v. King, 18 Pa. Dist. 404; Harrison v. Brink, 18 Pa. Dist. 22; Mfg. Co. v. Killinger, 12 Pa. Dist. 6, 26 Pa. Co. 539; Snyder v. Frankenfield, 4 Pa. Dist. 767; Walsh v. Greenwood, 2 Pa. Dist. 64; Sprague Electric Co. v. Perley, 32 Pa. Co. 577; Patch Mfg. Co. v. Killinger, 26 Pa. Co. 539, 15 YorkLegRec 174; Jennings v. McKay, 4 WklyNC 421.

S. C.—Pee Dee River Lumber Co. v. Fountain, 90 S. C. 122, 72 SE 885; Sparks v. Green, 85 S. C. 109, 67 SE 230; Ludden, etc., Music House v. Hornsby, 45 S. C. 111, 22 SE 781; Talbott v. Padgett, 30 S. C. 167, 8 SE 845; Williams v. Irby, 15 S. C. 458.

Utah.—Beck v. Lee, 52 Utah 31, 172 P 686.

Wash.—Sekor v. Anderson, 123 Wash. 472, 212 P 578.

Wyo.—Jones v. Parker, 39 Wyo. 423, 273 P 687.

[a] **Reason for rule.**—Replevin is in form an action ex delicto, and seeks damages for unlawfully seizing and carrying away personal property. Defendant cannot avail himself of a set-off, because the demand is uncertain in its nature, and it is no justification for a tortious act, that plaintiff is indebted to defendant. Fairman v. Fluck, 5 Watts (Pa.) 516.

[b] **Rule applied.**—(1) In replevin for goods delivered to defendant under a bailment, and retaken for default of installments of rental, defendant cannot set off an overpayment on another and entirely distinct transaction. Liveright v. Thornton, 56 Pa. Super. 611. (2) In replevin to recover an automobile leased by plaintiff to defendant, proof of conversations in regard to the condition of the machine prior to the execution of the lease are inadmissible, if the purpose of the officer is to lay ground for a set-off. C. H. Hardy Auto Co. v. Posey, 50 Pa. Super. 399.

[c] **Avowry for rent.**—(1) A set-off cannot be pleaded in bar to an avowry for rent. Roach v. Burgess, 20 F. Cas. No. 11,873, 4 Cranch C. C. 449; Goslin v. Redden, 3 Del. 21; Wolgamot v. Bruner, 4 Harr. & M. (Md.) 89; Fairman v. Fluck, 5 Watts (Pa.) 516; Laycock v. Tufnell, 2 Chit. 531, 18 ECL 772. (2) This rule does not prevent the tenant from availing himself of anything in bar to the avowry for rent in arrear, which goes to show that the rent claimed by the avowant, or any portion of it, is not due; for that is the ground of the distress. Bloodworth v. Stevens, 51 Miss. 475; Fairman v. Fluck, 5 Watts (Pa.) 516. (3) The tenant may deduct from the rent due the damages he may have sustained by the landlord's breach of covenant in the same lease relating to the demised premises and constituting part of the consideration of the rent. Harrison v. Brink, 18 Pa. Dist. 22, 35 Pa. Co. 161.

[d] **Where a lessor has covenanted to make certain repairs and improvements in the demised premises,** (1) and has failed to perform his covenant, the tenant is entitled in replevin to such defalcation or reduction from the amount of the rent due as is equal to the proportionate part of the damages for the year; but he is not entitled to a deduction of the whole amount of the damage which he has sustained. Bloodworth v. Stevens, 51 Miss. 475; Warner v. Caulk, 3 Whart. (Pa.) 193; Peterson v. Haight, 3 Whart. (Pa.) 150; Fairman v. Fluck, 5 Watts (Pa.) 516; Murray v. Pennington, 3 Gratt. (44 Va.) 87. (2) Therefore, where the goods of the tenant were distrained for the third quarter's rent, it was held that he could not deduct the damages which he had sustained during the quarters preceding. Warner v. Caulk, 3 Whart. (Pa.) 193.

[e] **A demand originating in contract** cannot be pleaded as a counterclaim in an action for the recovery of a specific chattel. Williams v. Irby, 15 S. C. 458.

[f] **Claim against estate.**—A statute providing for set-offs or counterclaims in actions by executors and administrators does not give defendant any right to seize decedent's property and, in replevin by an administrator, set off his claim against the estate. Weissman v. Weissman, 156 Wis. 26, 145 NW 230.

Counterclaim in reply see infra § 201.

[9] Pee Dee River Lumber Co. v. Fountain, 90 S. C. 122, 72 SE 885; Ludden, etc., Music House v. Hornsby, 45 S. C. 111, 22 SE 781; Williams v. Irby, 15 S. C. 458. But see Zimmerman, Wells-Brown Co. v. Sunset Lumber Co., 57 Or. 309, 111 P 690, 32 LRANS 123, AnnCas1913A 103 (equitable set-off is no defense in an action of replevin, for the distinctions between actions at law and suits in equity have not been abolished).

[a] **Where plaintiff's right depends upon existence of indebtedness,** defendant may show that debt giving plaintiff the right to possession was extinguished when action was commenced even though no set-off or counterclaim is allowable. Jones v. Parker, 39 Wyo. 423, 273 P 687.

[10] See statutory provisions; and cases infra this note.

[a] **In Iowa.**—(1) Under the express provisions of Code (1897) § 4164, no counterclaim is allowable, since it would allow a creditor to forcibly seize property of his debtor without process and then plead the indebtedness as an offset to an action to recover it back. J. J. Smith

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Lumber Co. v. Scott County Garbage Reducing, etc., Co., 149 Iowa 272, 128 NW 389, 30 LRANS 1184. (2) Matter which is in fact a counterclaim cannot be interposed either as a counterclaim or otherwise. Sylvester v. Ammons, 126 Iowa 140, 101 NW 782. (3) A cross petition in the nature of a counterclaim is improper. Muir v. Miller, 82 Iowa 700, 47 NW 1011, 48 NW 1032. (4) A defendant may nevertheless recover damages for the detention of the property replevied. McIntire v. Eastman, 76 Iowa 455, 41 NW 162. (5) Under an earlier statute, Code (1851) § 1740, any claim which would be the subject of an action against plaintiff, and which was held by defendant, either matured or not at the time the suit was commenced, may be set up as a set-off in an action of replevin. Dunham v. Dennis, 9 Iowa 543.

[11] Gottler v. Babcock, 7 AbbPr (N. Y.) 392 note.

[a] **In Kansas.**—Under the statute providing that a set-off can only be pleaded in actions founded on contract, it cannot be pleaded as a defense in an action of replevin, since such action is founded on tort and not on contract. Kennett v. Fickel, 41 Kan. 211, 21 P 93.

[12] U. S.—Clement v. Field, 147 U. S. 467, 13 SCt 358, 37 L. ed. 244 [foll Gardner v. Risher, 35 Kan. 93, 10 P 584].

Cal.—Glide v. Kayser, 142 Cal. 419, 76 P 50.

Ind.—Reardon v. Higgins, 39 Ind. A. 363, 79 NE 208; Shipman Coal Min., etc., Co. v. Pfeiffer, 11 Ind. A. 445, 39 NE 291 (holding, however, that the pleading, when considered as a cross bill to set aside the sale, must fail, as it introduces into the cause matter which is foreign to the subject of the complaint, although the same matter may be sufficient when pleaded as an answer in bar).

Kan.—Masopust v. Hopkins, 117 Kan. 366, 231 P 843 [cit Cyc]; Deford v. Hutchison, 45 Kan. 318, 25 P 641, 11 LRA 257. But see Frick Co. v. Stephens, 7 Kan. A. 745, 53 P 378 (holding evidence of counterclaim inadmissible as a defense).

Mo.—Boehme v. Roth, (A.) 280 SW 730; Weber Impl., etc., Co. v. Ransburg, (A.) 274 SW 856; Ely v. Sutton, 177 Mo. A. 546, 162 SW 755; McCormick Harvesting Mach. Co. v. Hill, 104 Mo. A. 544, 79 SW 745; Workman v. Warder, 28 Mo. A. 1.

Nev.—Clarke v. Johnson, 43 Nev. 359, 187 P 510; Lapham v. Osborne, 20 Nev. 168, 18 P 881.

N. Y.—Thompson v. Kessel, 30 N. Y. 383; Cooper v. Kipp, 52 App. Div. 250, 65 NYS 379; Gigliotti v. Hawkins, 129 Misc. 180, 221 NYS 733; Brown v. Buckingham, 11 AbbPr 387, 21 How Pr 190. But see Spaus v. Stolwein, 75 Misc. 1, 134 NYS 603 (a counterclaim for damages is not a defense to replevin for the recovery of specific chattels).

N. C.—Wilson v. Hughes, 94 N. C. 182.

N. D.—McCarty v. Kepreta, 24 N. D. 395, 139 NW 992, 48 LRANS 65, AnnCas1915A 834 [foll McCarthy v. Talley, 24 N. D. 395, 139 NW 1012].

Or.—Nunn v. Bird, 36 Or. 515, 59 P 808; Guille v. Fook, 13 Or. 577, 11 P 277.

Wash.—Sekor v. Anderson, 123 Wash. 472, 212 P 578, 579 [quot Cyc].

Wis.—De Groot v. Veldboom, 167 Wis. 107, 166 NW 662.

[a] **Claim founded on contract.**—(1) Where plaintiff's claim is really founded on contract, as where he seeks, by a writ of replevin, to enforce the provisions of a chattel mortgage, defendant may, notwithstanding the form of the action is replevin, avail himself, by way of set-off, of damages caused by the failure to the other party to the chattel mortgage to comply with his contract. Clement v. Field, 147 U. S. 467, 13 SCt 358, 37 L. ed. 244 [construing a statute of Kansas, and foll Gardner v. Risher, 35 Kan. 93, 10 P 584]. (2) The buyer may, in replevin by the seller for the article sold, counterclaim for damages for breach of the contract of sale; there being involved matters growing out of the same transaction. Titan Truck Co. v. Richardson, 122 Wash. 452, 210 P 790.

[b] **In replevin by a mortgagee to recover possession of the mortgaged property,** which was sold to defendant, and the mortgage given to secure the purchase-price thereof, defendant may counterclaim damages arising from a breach of warranty of the goods sold. McCormick Harvesting Mach. Co. v. Hill, 104 Mo. A. 544, 79 SW 745; Wilson v. Hughes, 94 N. C. 182; Minneapolis Threshing Mach. Co. v. Darnall, 13 S. D. 279, 83 NW 266; Aultman Co. v. McDonough, 110 Wis. 263, 85 NW 980.

[c] **Counterclaim for repair work** on an automobile, in an action in replevin thereof, concerns the subject matter of the original action. Sekor v. Anderson, 123 Wash. 472, 212 P 578.

[d] **Amount of set-off must equal or exceed debt,** default in payment of which gave rise to plaintiff's right of action, before set-off can be availed of. McCargar v. Wiley, 112 Or. 215, 229 P 665 (where plaintiff's right of possession arises, from defendant's default in payment of debt under contract giving plaintiff right to possession, in such case, no set-off is available to defeat such right, unless amount of set-off equals or exceeds debt due, and defendant cannot recover judgment for excess, unless facts pleaded as set-off constitute counterclaim); Zimmerman v. Sunset Lumber Co., 57 Or. 309, 111 P 690, 32 LRANS 123, AnnCas1913A 103 (in replevin for two engines, where defendant set up a contract of purchase and claimed certain amounts as set-off for damages, both by reason of defects in the engines and from damages incurred because of their failure to work, although a set-off could be pleaded, yet, as the amount of the counterclaim did not equal the amount claimed by plaintiff, it would not go to the entire cause of action, so that it could not defeat it).

[13] W. P. Galloway Co. v. Puryear, 179 Ark. 524, 16 SW (2d) 1000; Mills Novelty Co. v. Millsaps, 173 Ark. 1136, 294 SW 69; Commercial Credit Co. v. Stanley, 164 Ark. 473, 262 SW 318; Crawford v. Slaten, 155 Ark. 283, 244 SW 32; Workman v. Warder, 28 Mo. A. 1.

[14] Yraceburn v. Cape, 60 Cal. A. 374, 212 P 938; Fleming v. Jackson, 222 App. Div. 296, 226 NYS 281; New York Democrat Pub. Corp. v. Laing, 132 Misc. 57, 229 NYS 45; Freeman v. Trummer, 50 Or. 287, 91 P 1077.

[a] **Counterclaim for services** by defendant using stockholders' list cannot be interposed in an action to replevy list as not arising out of same transaction. Fleming v. Jackson, 222 App. Div. 296, 226 NYS 281 (such a counterclaim cannot be interposed in an action to replevy list, because complaint is not based on contract).

[b] **Where defendant was unlawful conversioner** by accepting wife's notes which the husband without authority indorsed could not hold them as an offset against an indebtedness of the wife, when sued in replevin. Litteer v. Harrell, 117 Okl. 255, 245 P 990.

[15] Johnson v. St. Louis Butchers' Supply Co., 60 Ark. 387, 30 SW 429; Ames Iron Works v. Rea, 56 Ark. 450, 19 SW 1063; Rogers v. Kerr, 42 Ark. 100; Delco Light Co. v. John Le Roy Hutchinson Properties, 99 Fla. 410, 128 S 831; Lapham v. Osborne, 20 Nev. 168, 18 P 881.

[a] **Set-off not available** in replevin in the ordinary sense in which it is allowable in other actions, but defendant may plead and prove claim for damages against plaintiff, arising out of the same transaction, by way of recoupment. Delco Light Co. v. John Le Roy Hutchinson Properties, 99 Fla. 410, 128 S 831.

[16] Baldwin v. Burrows, 95 Ind. 81.

[17] Kan.—Deford v. Hutchison, 45 Kan. 318, 25 P 641, 11 LRA 257.

Mo.—McCormick Harvesting Mach. Co. v. Hill, 104 Mo. A. 544, 79 SW 745.

N. Y.—Cooper v. Kipp, 52 App. Div. 250, 65 NYS 379.

N. C.—Wilson v. Hughes, 94 N. C. 182.

S. D.—Minneapolis Threshing Mach. Co. v. Darnall, 13 S. D. 279, 83 NW 266.

Wis.—Aultman Co. v. McDonough, 110 Wis. 263, 85 NW 980.

claim, although not proper as such, may, if it constitute a defense to a claim in the opposite pleading, be available as a defense.[18]

Recoupment. Although the right to set-off is not recognized in the particular jurisdiction[19] when the goods are the subject of a lien or charge, the charge may be enforced by way of recoupment.[20] However, a claim for unliquidated damages cannot be set up, it has been held, in replevin for property conditionally sold by plaintiff,[21] although it has been held to the contrary that one may reduce claim of plaintiff seeking to replevy goods sold on conditional sale by amount of damage sustained by goods being defective.[22]

[§ 87] **G. Waiver of, and Estoppel To Set Up, Defense.**[23] The general principles of waiver and estoppel[24] are applicable to the question of waiver of or estoppel to set up defenses in actions of replevin.[25] The filing of a claim of property under a statute providing therefor upon seizure of property by an officer under process does not estop defendant from asserting property in himself in a replevin suit, although he failed to continue his efforts under the claim filed.[26]

VIII. VENUE[27]

[By JOSEPH W. ROUSE]

[§ 88] **A. In General.** Although there is authority to the contrary,[28] replevin is ordinarily held to be a local action,[29] although brought for a cause of action for which trespass de bonis asportatis would lie,[30] and where so held should be brought in the county where the cause of action arose,[31] that is,

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18. Townsend v. Minneapolis Cold-Storage, etc., Co., 46 Minn. 121, 48 NW 682.

19. See supra text and note 8.

20. Macky v. Dillinger, 73 Pa. 85.

21. Dearing Water Tube Boiler Co. v. Thompson, 156 Mich. 365, 120 NW 801, 24 LRANS 748.

22. Beck v. Lee, 52 Utah 31, 172 P 686.

23. **Estoppel to deny possession by giving bond** see supra § 65.

24. See generally Estoppel 21 C. J. p 1052.

25. See cases infra this note.

[a] **Illustrations.**—(1) A bill in equity to restrain the sale of cut logs and for an accounting for the logs already sold does not estop defendants from setting up title in themselves when sued in replevin for the remaining logs. Hogan v. Hogan, 102 Mich. 641, 61 NW 73. (2) A defendant in execution is not estopped from setting up the defense, in replevin for the property sold under the execution, that he had no vendible interest therein. Yeldell v. Stemmons, 15 Mo. 443. (3) In replevin for the wrongful detention of property, defendant is estopped, by an assertion of an absolute title to the property, made to plaintiff before suit, to allege at the trial that suit was brought prematurely. Collins v. Bellefonte Cent. R. Co., 171 Pa. 243, 33 A 331. (4) Nondelivery of property to plaintiff. Pomeroy v. Trimper, 8 Allen (Mass.) 398, 85 AmD 714 (holding that a defendant in replevin who has prevented the officer from delivering the replevied property to plaintiff, by attaching it on a writ in his own favor, is estopped to object to the prosecution of the replevin on the ground of such nondelivery). (5) Property in custody of the law. Hasie v. Connor, 53 Kan. 713, 37 P 128; Powell v. Bradlee, 9 Gill & J. (Md.) 220 (if one of plaintiffs in a previous replevin agrees to dispense with the actual delivery of the property taken under it, and to consider it delivered, so that plaintiff in a subsequent replevin may take it as if the delivery under the first writ has been consummated, it is not competent for plaintiffs in such first writ, to object that the property when taken under the second, was in custodia legis, but the objection that the property is in custodia legis may be made, unless there is an agreement, dispensing with the delivery prior to the execution of the second writ, although defendants subsequently to its execution may agree to waive the irregularity, and to ratify and confirm the proceedings of the sheriff). (6) Return of nulla bona will not estop the sheriff from showing, when afterward sued to recover goods which he had seized under execution, that they belonged to the execution debtor and were subject to levy. Burnham v. Brennan, 42 N. Y. Super. 49. (7) In replevin for goods levied on by an officer under execution, the defense of want of notice of the right of ownership by plaintiff should be taken advantage of by demurrer to the complaint or petition, or by an averment in the answer or plea, and where it is not set up until the parties have rested, it will be deemed to have been waived. Warder v. Hoover, 51 Iowa 491, 1 NW 795. (8) When plaintiff and defendant both claim under the same person, plaintiff by purchase and defendant by way of exchange, defendant is not estopped by his relation to the party under whom both claim, to show that the title was not in such party, but in a stranger. McFerrin v. Perry, 1 Sneed (Tenn.) 314. (9) Where the drawer delivers a check to a third person on his promise to deliver it to the person for whom it was intended, such party becomes a bailee for such person; and is estopped to assert a right in himself to the check. Haas v. Altieri, 2 Misc. 252, 21 NYS 950. (10) In an action against a constable to recover property seized on an attachment against a third person, a defense based on contract rights to the property in plaintiff in attachment is properly excluded where no such rights were set up when the demand was made before the replevin suit was brought, and it does not fairly appear that the officer was instructed to hold on the footing of such rights, and where the contract set up gave the right of possession to another. Town v. Tabor, 34 Mich. 262. (11) In Pennsylvania defendant by giving a claim property bond and retaining the property puts it out of his power to set up as a defense distraint for rent in arrear. Baird v. Porter, 67 Pa. 105.

[b] **After verdict.**—Defendants in replevin who claimed the property absolutely, cannot claim that they were entitled to a lien thereon for the amount paid by them for the assignment of a bill of sale, which was given by plaintiff to the assignor to secure a debt, which had been paid before the assignment. Atkinson v. Lawrence, 161 Ky. 166, 170 SW 528.

26. Nelson v. Bock, 84 N. J. L. 123, 85 A 1009.

27. **In actions brought before justice of peace** see Justices of the Peace § 136.

28. Crocker v. Mann, 3 Mo. 472, 26 AmD 684.

29. U. S.—Healey v. Humphrey, 81 Fed. 990, 27 CCA 39.

Del.—Parvis v. Truax, 12 Del. 574, 32 A 1050 [rev 12 Del. 330, 32 A 227].

Me.—Pease v. Simpson, 12 Me. 261.

Miss.—Ellison v. Lewis, 57 Miss. 588.

N. H.—Sleeper v. Osgood, 50 N. H. 331.

N. J.—Metropolitan Credit Corp. v. Anderson, (Sup.) 118 A 581 [cit Cyc].

N. Y.—Williams v. Welch, 5 Wend. 290; Atkinson v. Holcomb, 4 Cow. 45.

Or.—Byers v. Ferguson, 41 Or. 77, 65 P 1067, 68 P 5.

Utah.—Nebeker v. Harvey, 21 Utah 363, 60 P 1029.

Eng.—Read v. How, 1 Brownl. & G. 176, 123 Reprint 738; Traverton v. Hicks, Carth. 185, 90 Reprint 712; Ward v. Lakin, Moore K. B. 678, 72 Reprint 834. But see Powell v. Smith, 2 Watts (Pa.) 126 (where the action of replevin was said to be transitory so far as recovery of chattels severed from the freehold is concerned).

[a] **At common law** (1) replevin was a local action (Healey v. Humphrey, 81 Fed. 990, 27 CCA 39; Parvis v. Truax, 12 Del. 574, 32 A 1050); (2) while under the statutes it is in some jurisdictions local, and in others transitory (Healey v. Humphrey, supra).

[b] **In Nevada,** under the statute, the action is transitory and may be brought wherever defendant resides, or if defendant is a nonresident, in any county plaintiff may designate in his complaint. Healey v. Humphrey, 81 Fed. 990, 27 CCA 39.

30. Williams v. Welch, 5 Wend. (N. Y.) 290.

31. Atkinson v. Holcomb, 4 Cow.

where the property was unlawfully taken or is unlawfully detained,[32] and while it has been held that the action may be brought in either of such counties,[33] it has also been held that, where the gist of the action is the unlawful taking or cepit, it should be brought in the county of the taking;[34] but where it is for a wrongful detention only, necessitating a demand and refusal as a condition precedent to the right of action,[35] the action must be brought at the place where the demand and refusal occurred.[36] The venue of such actions is now ordinarily regulated by the statutes of the various jurisdictions,[37] some of which provide for bringing the action in the county where the property or some part thereof is situated or found,[38] or in the county where defendant or one of defendants resides,[39] or the action may be brought either in the county where the wrongful taking occurred or where plaintiff resides.[40] Where the statute provides that the action may be brought in the county where the property is situated, it may be brought in any such county even though defendant does not reside therein,[41] or, if defendant resides in another county plaintiff may elect to bring the action in that county;[42] but the action must be brought either in the county where the property is situated or where defendant resides.[43]

[§ 89] **B. Change of Venue.** Under and subject to the rules relative to change of venue in civil actions generally,[44] a change of venue may and should be granted where it appears that the action was not brought in the proper county,[45] or when such change may be necessary for the convenience of witnesses,[46] provided a motion for a change of venue is made[47] and notice thereof given to the adverse party.[48] If, however, the action was properly brought in the county where the property was taken or is situated, defendant is not entitled to a change of venue to the county of his residence because the property was not taken or delivered under the writ,[49] or because plaintiff does not claim an immediate delivery of the property;[50] and where replevin is held to be a local action, the venue will not ordinarily be changed from the county where the cause of action arose.[51]

(N. Y.) 45; Woodward v. Edmunds, 20 Utah 118, 57 P 848.

32. Hall v. Gilmore, 40 Me. 578; Pease v. Simpson, 12 Me. 261; Sleeper v. Osgood, 50 N. H. 331.

33. Pease v. Simpson, 12 Me. 261.

34. Woodward v. Edmunds, 20 Utah 118, 57 P 848.

35. See supra § 68.

36. Nebeker v. Harvey, 21 Utah 363, 60 P 1029.

37. See statutory provisions; and cases infra notes 38–43.

38. See statutory provisions; and cases infra this note.

[a] **Local action.**—A statute providing that the action shall be brought where the goods are detained makes it a local action. Central Maine Power Co. v. Maine Cent. R. Co., 113 Me. 103, 93 A 41.

[b] **Provisions construed.**—(1) A statutory provision for trial of action for recovery of personal property in the county where the property is situate applies to the ancillary remedy of claim and delivery. Brown v. Cogdell, 136 N. C. 32, 48 SE 515. (2) In a statute providing for the recovery of property distrained for any cause, distrain means holding for any purpose. Byers v. Ferguson, 41 Or. 77, 65 P 1067, 68 P 5; Wolfe v. Montgomery, 41 S. D. 267, 170 NW 158. (3) The county where the property "is found" related to its location at the time the action is commenced and not to its location when seized under the writ. Craft v. Franks, 34 Iowa 504. (4) The county where the property is situated is not the county where it was taken, but the county where it is unlawfully held at the time the action is instituted. Byers v. Ferguson, supra.

39. See statutory provisions; and cases infra this note.

[a] **Particular provision applicable to replevin.**—Where a sale provides for bringing of certain actions in certain places and further provides that in all other cases the action shall be brought where defendants or one of them resides, such provision applies to replevin, where replevin is not included in the sections dealing with specified actions. Fry v. Shafor, 164 Ind. 699, 74 NE 503; Hodson v. Warner, 60 Ind. 214; Shryer v. Miner, 20 Ind. 175; Boswell v. Laramie First Nat. Bank, 16 Wyo. 161, 92 P 624, 93 P 661 (holding that, under such a statute of Wyoming, replevin is not a local action and need not be brought where the goods are detained).

[b] **Where there are several defendants** residing in different counties, the action may be brought in any county in which any defendant resides, if such defendant was made a party in good faith, but if such defendant is not a necessary party and was made such merely to give the court of the county of his residence jurisdiction of the action, and the action is dismissed as to him, the case stands as if it had been originally instituted in a county where no defendant resided, and such fact may be pleaded by plaintiff to defeat the jurisdiction of the court. Shryer v. Miner, 20 Ind. 175.

40. See statutory provisions; and cases infra this note.

[a] **Repeal of previous enactments.**—A statute providing that the action may be brought "in the county where the wrongful taking occurred, or where the plaintiff resides," authorizes an action to be brought in the county where plaintiff resides, although the taking was by a sheriff, and the prior statutes in regard to actions against public officers provided that such actions should be tried in the county where the cause of action arose. Hinds v. Backus, 45 Minn. 170, 47 NW 655; Leonard v. Maginnis, 34 Minn. 506, 26 NW 733.

41. Rummelhart v. Boone, 147 Iowa 390, 126 NW 338; Porter v. Dalhoff, 59 Iowa 459, 13 NW 420.

[a] **Removal after institution of suit.**—Where the petition shows that the property has been wrongfully removed into another county from that in which the action is commenced, the order may issue from the county whence the property was taken and be served in the county where the property is found. Rummelhart v. Boone, 147 Iowa 390, 126 NW 338; Hibbs v. Dunham, 54 Iowa 559, 6 NW 719.

42. Hibbs v. Dunham, supra.

43. Parker v. Norris, 56 Iowa 295, 9 NW 225; Hibbs v. Dunham, 54 Iowa 559, 6 NW 719.

44. See generally Venue [40 Cyc 116 et seq].

45. Parker v. Norris, 56 Iowa 295, 9 NW 225; Brown v. Cogdell, 136 N. C. 32, 48 SE 515; Williams v. Rollins, 107 S. C. 440, 93 SE 1.

[a] **Under statutory provisions** requiring the action to be brought in the county in which the property, or some part thereof, is found, it is error to refuse change of venue to such county where defendant, having possession, resided. Williams v. Rollins, 107 S. C. 440, 93 SE 1.

[b] **It is reversible error to exclude evidence** offered in support of a motion for a change of venue in an action of replevin, where such evidence tends to show that the action was not brought in the proper county. Parker v. Norris, 56 Iowa 295, 9 NW 225.

46. Zenner v. Dexter, 92 Hun 195, 36 NYS 590. Contra Atkinson v. Holcomb, 4 Cow. (N. Y.) 45.

47. Goldsmith v. Willson, 67 Iowa 662, 25 NW 870 (holding that, although the action should be brought in the county where the property is situated instead of the county of defendant's residence, yet if no motion for a change of venue is made, an action brought in the latter county may be prosecuted there to final judgment).

[a] **The demand must be made before answer** under the Iowa statute, and if not so made the action, although brought in the wrong county, may be prosecuted there to termination. Kelley v. Cosgrove, 83 Iowa 229, 48 NW 979, 17 LRA 779.

48. Graves v. Shoefelt, 60 Ill. 462.

49. Laughlin v. Main, 63 Iowa 580, 19 NW 673.

50. Benjamin v. Smith, 43 Minn. 146, 44 NW 1083 (holding that, under Gen. St. [1878] c 66 § 132, it is optional with plaintiff to claim an immediate delivery of the property or to let the action proceed and obtain possession upon execution after judgment, and that a failure to claim immediate delivery does not change the action to one for conversion, and does not necessitate a change of venue from the county where the property was taken to the county of defendant's residence).

51. Atkinson v. Holcomb, 4 Cow. (N. Y.) 45.

IX. TIME TO SUE AND LIMITATIONS

[By Joseph W. Rouse]

[§ 90] The action depending on the right to possession,[52] it is premature if brought before plaintiff acquires the right to possession.[53] Replevin will not lie for property held in connection with a tenancy on shares running from year to year and terminable only on notice until the year has expired and notice has been given,[54] and a landlord cannot replevy his share of a crop until sufficient time has elapsed to allow the tenant to deliver it,[55] but replevin will lie for animals impounded either before or after they are advertised.[56] Where a demand is necessary before bringing suit,[57] the action is not prematurely brought when brought before demand if the writ is made provisionally for use only in case of refusal to deliver the property on demand.[58]

The statutes of limitations applicable to actions for the recovery of personal property have been held to apply to actions of replevin,[59] and begin to run from the time of the wrongful taking and not from the time when plaintiff first had knowledge thereof if there was no fraud or attempt at concealment,[60] and if such fraud or concealment exists it must, in order to avail plaintiff, be the act of defendant himself;[61] but where a demand is a prerequisite to the bringing of the action,[62] the limitation runs from the time of such demand.[63] A statute requiring the filing of an affidavit stating that the cause of action arose within two years has been held not a statute of limitations,[64] the affidavit being merely a prerequisite to the issuance of the writ.[65]

Laches. A delay of thirty-three days after demand before bringing suit is not laches.[66]

X. PARTIES[67]

[By Joseph W. Rouse]

[§ 91] **A. Plaintiffs.** Since in replevin the right to possession is essentially involved,[68] the party entitled thereto must be the real plaintiff in the suit,[69] and a party not holding the legal title, nor entitled to possession, cannot maintain replevin for the use of another;[70] but if a party who sues for the use of another is entitled to recover in his own name, the fact that the usee's name is inserted in the pleading should not alone defeat a recovery.[71] In such case the usee's name may be treated as surplusage,[72] but recovery can be had only when the nominal plaintiff is entitled to recover.[73] While it has been held that a joint owner or tenant in common of property may sue alone to recover it from a trespasser,[74] or where he has the consent of the cotenants,[75] or where his prior possession was with the consent of his coowner,[76] the general rule is that an action of replevin cannot be maintained by one of several joint owners or tenants in common without joining the others as parties,[77] but while joint tenants or tenants in common may and should be joined,[78] several persons having separate and distinct interests in a chattel cannot join in such action,[79] nor can a person having neither title nor right of possession to the property in question join in an action for its recovery,[80] although the joinder of other parties by a plaintiff having the whole possessory right has been held immaterial to defendant.[81] A person in the lawful possession of property for another may bring the action of replevin in his own name for the recovery thereof,[82] and an administrator or executor may bring an action of replevin for property of his intestate in his own name; he need not sue in his representative capacity.[83]

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[52] See supra § 46.

[53] Vitagraph Co. v. Swaab, 248 Pa. 478, 94 A 126, AnnCas1916C 311.

[a] **Thus,** where the right to possession depends on the expiration of a certain time after notice of termination of a contract, replevin brought before expiration of that time is premature. Vitagraph Co. v. Swaab, 248 Pa. 478, 94 A 126, AnnCas1916C 311.

[54] Coan v. Mole, 39 Mich. 454.

[55] Mouser v. Davis, 9 Oh. Dec. (Reprint) 237, 11 CincLBul 249.

[56] Varney v. Bowker, 63 Me. 154.

[57] See supra §§ 68-76.

[58] General Motors Acceptance Corp. v. Littlefield, etc., Co., 128 Me. 338, 147 A 868.

[59] See Limitations of Actions § 66 note 76.

[60] Dee v. Hyland, 3 Utah 308, 3 P 388.

[61] Wells v. Halpin, 59 Mo. 92.

[62] See supra §§ 68-76.

[63] Torian v. McClure, 83 Ind. 310. See also King v. Cressap, 22 La. Ann. 211 (holding that a suit for the recovery of goods on deposit or their value is in time if brought within one year after demand for restitution).

[64] Payne v. Bruton, 10 Ark. 53.

[65] See infra § 98.

[66] National Cash Register Co. v. Shurber, 41 Pa. Super. 187.

[67] **Replevin by or against particular classes of persons** see cross references supra p 415.

[68] See supra § 46.

[69] Roof v. Chattanooga Wood Split Pulley Co., 36 Fla. 284, 18 S 597. See also Wright v. Battley, (Man.) 24 CanLTOccNotes 278 (holding that one who probably had the legal title was properly joined as plaintiff, and if his interest was equitable only, he could still maintain the action).

[70] Roof v. Chattanooga Wood Split Pulley Co., 36 Fla. 284, 18 S 597; Peo. v. McKinley, 220 Mich. 112, 189 NW 872; Meyer v. Mosler, 64 Miss. 610, 1 S 837; Moore v. Watson, 20 R. I. 495, 40 A 345.

[a] **Rule applied.**—Where the declaration contained a count in replevin, plaintiff was not entitled to maintain the replevin action against the sheriff in the name of the people for plaintiff's use, as the action must be prosecuted in the name of the real party in interest. Peo. v. McKinley, 220 Mich. 112, 189 NW 872.

[b] **Where property is sold** by plaintiff pending the action, the statute providing that actions must be prosecuted in the name of the real party in interest is modified by a statutory provision that, in case of a transfer of interest, the action may be continued by the original party. Johnston v. King, 88 Wis. 211, 58 NW 1105.

[71] Roof v. Chattanooga Wood Split Pulley Co., 36 Fla. 284, 18 S 597.

[72] Roof v. Chattanooga Wood Split Pulley Co., supra; Meyer v. Mosler, 64 Miss. 610, 1 S 837.

[73] Meyer v. Mosler, supra.

[74] Lannes v. Courege, 31 La. Ann. 74.

[75] Ferguson v. Rafferty, 128 Pa. 337, 18 A 484, 6 LRA 33.

[76] Chaffee v. Harrington, 60 Vt. 718, 15 A 350.

[77] Ark.—Cox v. Morrow, 14 Ark. 603.

Del.—Fell v. Taylor, 18 Del. 372, 45 A 716.

Ill.—Harris v. Le Masters, 215 Ill. A. 282.

Ind.—Bain v. Trixler, 24 Ind. A. 246, 56 NE 690.

Mass.—Corcoran v. White, 146 Mass. 329, 15 NE 636, 4 AmSR 313; Fay v. Duggan, 135 Mass. 242; Hart v. Fitzgerald, 2 Mass. 509, 3 AmD 75.

Mo.—Upham v. Allen, 73 Mo. A. 224.

Nebr.—Honaker v. Vesey, 57 Nebr. 413, 77 NW 1100.

N. J.—Chambers v. Hunt, 18 N. J. L. 339.

N. C.—Heaton v. Wilson, 123 N. C. 398, 31 SE 671.

Tenn.—Collier v. Yearwood, 5 Baxt. 581.

Wis.—Swenson v. Wells, 140 Wis. 316, 122 NW 724.

[§ 92] **B. Defendants.** It is essential that defendant have actual or constructive possession of the property,[84] and the person in possession of the property is ordinarily the proper and only necessary party defendant,[85] and persons who were never in actual or constructive possession are improperly joined as defendants,[86] but the joinder as defendant of a person not in possession of the property is not necessarily fatal to the action.[87] Plaintiff is not required to join as defendants persons claiming an interest in the property but not in possession thereof,[88] although he may do so;[89] or a stranger in whom property is pleaded or shown,[90] or one claiming no interest in the property nor any right to possession;[91] nor is he entitled to an order making persons so interested but whose presence is not necessary to the determination of the controversy between him and defendant in possession parties against their will,[92] although they may properly be admitted as defendants upon their own application.[93] It has been held, however, that a servant who in the course of his employment wrongfully takes the property of another may be joined with the master in an action of replevin.[94] One who participated in a wrongful taking, although not in possession of, and making no claim to, any of the property, is a proper party defendant,[95] and it has also been held that, where one person wrongfully takes property and turns it over to another who wrongfully retains it, they may be sued jointly,[96] and where the physical possession is in one who is directed by another to refuse to give it up, the action may be brought against both.[97]

One having constructive possession by his agent is a proper party defendant.[98]

Where several persons are in possession of the property, they are all properly made defendants.[99]

Separate possession. A single action of replevin against two defendants, each of whom was in the separate possession of some of the goods, is a misjoinder of parties.[1]

Where the action is against an officer to recover property wrongfully taken by him under process, he may be sued either as an officer or as an individual,[2] and in such action the officer is the only necessary party defendant,[3] the joinder of the judgment creditor or plaintiff in attachment being neither necessary nor proper,[4] and it is improper to join the sureties on the officer's bond,[5] although it is proper to join the execution plaintiff when he assumed control of the writ and directed the levy.[6] A sheriff and his purchaser under an execution sale may be joined in a replevin action by a third person who served notice of ownership on the sheriff prior to the sale.[7]

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[78] Honaker v. Vesey, 57 Nebr. 413, 77 NW 1100; Chambers v. Hunt, 18 N. J. L. 339.

[79] Chambers v. Hunt, supra; Wehlen v. Macke, 9 Oh. Dec. (Reprint) 565, 15 CincLBul 125.

[80] Refeld v. Bellette, 14 Ark. 148.

[81] Lieberman v. Clark, 114 Tenn. 117, 85 SW 258, 69 LRA 732.

[82] Colo.—Bartels v. Arms, 3 Colo. 72.

Ga.—McDuffie v. Irvine, 91 Ga. 748, 17 SE 1028.

Mich.—Rose v. Eaton, 77 Mich. 247, 43 NW 972.

Miss.—Garrett v. Carlton, 65 Miss. 188, 3 S 376.

Okl.—Essex v. Fife, 67 Okl. 55, 168 P 814 [rev 159 P 1009].

S. D.—Church v. Foley, 10 S. D. 74, 71 NW 759.

[a] **Agent of mortgagee,** never in possession of the property, cannot bring an action of replevin in his own name. Fullerton v. Morse, 162 Ill. 43, 44 NE 390 [aff 63 Ill. A. 541].

[83] Branch v. Branch, 6 Fla. 314; Kent v. Bothwell, 152 Mass. 341, 25 NE 721, 9 LRA 258; Trask v. Donoghue, 1 Aik. (Vt.) 370.

[a] **But after person has ceased to be administrator,** he cannot maintain an action of replevin for property belonging to the estate. Afflerbach v. McGovern, 79 Cal. 268, 21 P 837.

[84] See supra § 58.

[85] Cal.—Home Payment Jewelry Co. v. Smith, 24 Cal. A. 486, 141 P 933.

Ill.—Blatchford v. Boyden, 122 Ill. 657, 13 NE 801 [aff 18 Ill. A. 378]; Christy v. Ashlock, 93 Ill. A. 651.

Md.—Hergberg v. Sachse, 60 Md. 426.

Mich.—Colby v. Portman, 115 Mich. 95, 72 NW 1098.

Mont.—Gallick v. Bordeaux, 31 Mont. 328, 78 P 583.

Nebr.—Engel v. Dado, 66 Nebr. 400, 92 NW 629.

N. Y.—Read v. Brayton, 143 N. Y. 342, 38 NE 261; Hazlett v. Hamilton Storage, etc., Co., 47 Misc. 660, 94 NYS 580; King Co. v. Seed, 6 Misc. 4, 25 NYS 1115.

Okl.—Irwin v. Walling, 4 Okl. 128, 44 P 219; Burchett v. Purdy, 2 Okl. 391, 37 P 1053.

[a] **Rule applied.**—(1) If one sells goods by a conditional sale, and afterward takes possession of them for an alleged breach of condition, and sells them to a third person, in whose possession they are when taken by the original vendee by a writ of replevin, the joinder of the vendor as a party defendant is wrongful. Swett v. Boyce, 134 Mass. 381. (2) In an action by one who delivered personalty under a lease contract to recover from third persons the property delivered to him by the lessee, the lessee was not a necessary party. Home Payment Jewelry Co. v. Smith, 24 Cal. A. 486, 141 P 933. (3) That warehousemen had transferred to a succeeding corporation whatever interest they had in stored property is a defense to an action of claim and delivery. Fapp v. McQuillan, 38 Nev. 117, 145 P 962.

[b] **Where property is left by an officer** with another person who retains possession thereof, such person, although he may be acting under the officer's orders, is a proper defendant in replevin to recover such property and the officer is not a necessary party. Engel v. Dado, 66 Nebr. 400, 92 NW 629.

[c] **Necessary defendants.**—In claim and delivery to recover personalty held by warehousemen, the successors to the business, as well as the one whom the warehousemen asserted was the owner, are necessary parties. Fapp v. McQuillan, 38 Nev. 117, 145 P 962.

[86] Lamus v. Engwicht, 39 Cal. A. 523, 179 P 435.

[87] Herzberg v. Sachse, 60 Md. 426.

[a] **Illustration.**—Holders of notes for the purchase price of corporate stock, sold by the intervener, could have been properly joined. Lutz v. Merchants' Nat. Bank, 179 Cal. 401, 177 P 158.

[83] Scottsdale Ginning Co. v. Longan, 24 Ariz. 356, 209 P 876; Read v. Brayton, 143 N. Y. 342, 38 NE 261; Hazlett v. Hamilton Storage, etc., Co., 47 Misc. 660, 94 NYS 580.

[89] Northern Timber Products Co. v. Stone-Ordean-Wells Co., 143 Minn. 200, 173 NW 439.

[90] Thompson v. Sweetser, 43 Ind. 312.

[91] Gerth v. Gerth, 9 Cal. A. 735, 95 P 904.

[92] Goldstein v. Shapiro, 85 App. Div. 83, 82 NYS 1038; Hochman v. Hauptman, 76 App. Div. 72, 78 NYS 659; King Co. v. Seed, 6 Misc. 4, 25 NYS 1115.

[93] **Intervention** see infra § 93.

[94] Hewitt v. Watertown Steam Engine Co., 65 Ill. A. 153.

[95] Swartz v. Stein, 78 Pa. Super. 515.

[96] Murdouch v. Tuten, 76 S. C. 502, 57 SE 547.

[97] Northwestern State Bank v. Silberman, 154 Fed. 809, 83 CCA 525.

[98] Schwartz v. King Realty, etc., Co., 93 N. J. L. 111, 107 A 154.

[99] Fields v. Brown, 160 N. C. 295, 76 SE 8.

[1] Patchin v. Rowell, 86 Conn. 372, 85 A 511.

[2] Mann v. Ridenhour, 46 Okl. 565,

Wife. Where a house is wrongfully detached from land and moved to another piece of land by defendant who claims to occupy the house as a homestead, it remains personalty after its detachment, and defendant's wife is not a necessary party.[8]

[§ 93] **C. Intervention.**[9] Subject to the general rules governing the right of intervention,[10] a person claiming title to, or an interest in, or claim or lien upon, the property involved in an action of replevin may intervene in such action to protect his rights,[11] and the sureties on the bond of defendant in replevin may intervene to protect themselves from liability, as where defendant is insolvent,[12] or the action is not being defended in good faith.[13] But while interested parties may be permitted to come in, they will not be compelled to do so against their will,[14] although it has been held that, where defendant by his answer disclaims title and alleges ownership of the property in a third person, the court should of its own motion require such person to intervene.[15] A person is not entitled to intervene, who has no interest which will in any way be affected by the decision of the case,[16] nor will a person be permitted to intervene where there has been an unreasonable delay in making the application.[17] An interested person will not be allowed to inter-

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149 P 124; Irwin v. Walling, 4 Okl. 128, 44 P 219; Burchett v. Purdy, 2 Okl. 391, 37 P 1053.

[a] **Joinder in official capacity.**—It is unnecessary, in replevin against a sheriff personally for a wrongful attachment, to join him as a party defendant in his official capacity, as he does not act within his authority when he makes such an attachment, and the writ affords him no excuse or protection. Marden v. Starr, 107 Fed. 199.

[3] Ill.—Blatchford v. Boyden, 122 Ill. 657, 13 NE 801 [aff 18 Ill. A. 378].

Iowa.—Bevan v. Hayden, 13 Iowa 122.

Kan.—Hoisington v. Brakey, 31 Kan. 560, 3 P 353.

Mo.—Valle v. Cerre, 36 Mo. 575, 88 AmD 161; Long v. Hickey, 206 Mo. A. 92, 221 SW 757.

Mont.—Gallick v. Bordeaux, 31 Mont. 328, 78 P 583.

Wash.—Scott v. McGraw, 3 Wash. 675, 29 P 260.

[a] **Property in hands of bailee.**—When an officer wrongfully levies upon property of a stranger, he is the proper party defendant in an action of replevin even though the property levied upon be left with a third person as bailee. Talbot v. Magee, 59 Mo. A. 347.

[4] Blatchford v. Boyden, 122 Ill. 657, 13 NE 801 [aff 18 Ill. A. 378]; Birma v. Muir, 152 Ill. A. 505; Bevan v. Hayden, 13 Iowa 122; Hoisington v. Brakey, 31 Kan. 560, 3 P 353.

[5] Gallick v. Bordeaux, 31 Mont. 328, 78 P 583.

[6] Taylor v. Bernheim, 58 Cal. A. 404, 209 P 55; McFerran v. Swaynie, 50 Ind. A. 50, 98 NE 135.

[7] Mitchell v. McLeod, 127 Iowa 733, 104 NW 349.

[8] Michigan Mut. L. Ins. Co. v. Cronk, 93 Mich. 49, 52 NW 1035.

[9] **Delivery of property to interveners** see infra § 167.

[10] See Parties §§ 185–226.

[11] Ark.—Lambert v. Tucker, 83 Ark. 416, 104 SW 131.

Cal.—Hendy Mach. Works v. Dillon, 135 Cal. 9, 66 P 960; Bogue v. Roeth, 98 Cal. A. 257, 276 P 1071.

Colo.—Western Finance, etc., Co. v. Fisher, 72 Colo. 121, 210 P 66.

Kan.—Ely v. Holloway, 95 Kan. 8, 147 P 1128; Wafer v. Harvey County Bank, 36 Kan. 292, 13 P 209.

Mo.—Valle v. Cerre, 36 Mo. 575, 88 AmD 161.

Nebr.—Welborn v. Eskey, 25 Nebr. 195, 40 NW 960; Albright v. Brown, 23 Nebr. 136, 36 NW 297.

N. J.—Joseph Marrone Contracting Co. v. Monahan, 88 N. J. Eq. 238, 95 A 984.

N. Y.—Rosenberg v. Salomon, 144 N. Y. 92, 38 NE 982; Inventions Corp. v. Slease, 174 App. Div. 851, 159 NYS 548; Conklin v. Bishop, 10 N. Y. Super. 646; Friedman v. Schreiber, 50 Misc. 617, 98 NYS 235; Standard Sewing Mach. Co. v. Heyman, 25 Misc. 429, 54 NYS 936.

Oh.—Morgan v. Spangler, 20 Oh. St. 38.

Pa.—Lawall v. Lawall, 150 Pa. 626, 24 A 289; Holmes v. Pennsylvania R. Co., 2 Pa. Co. 345.

S. C.—Wilkins v. Lee, 42 S. C. 31, 19 SE 1016.

S. D.—Taylor v. Volga Bank, 9 S. D. 572, 70 NW 834.

Tex.—Legg v. McNeill, 2 Tex. 428.

[a] **Persons held to have right to intervene.**—(1) Attachment creditors of mortgagor. Wafer v. Harvey County Bank, 36 Kan. 292, 13 P 209. (2) Claimant of property involved in a replevin suit brought by a chattel mortgagee, although plaintiff after commencement of the suit, has assigned the note and mortgage to a third person not a party to the suit. Western Finance, etc., Co. v. Fisher, 72 Colo. 121, 210 P 66 (such intervention not being, in effect, the bringing of replevin against a person not in possession, and the assignment operating on property in custodia legis, so that the assignee takes title subject to the result of the suit). (3) Execution debtor, in action by claimant to recover from the sheriff the goods levied on. Uhlfelder v. Tamsen, 18 Misc. 173, 41 NYS 438 [rev on other grounds 15 App. Div. 436, 44 NYS 484]. (4) Holder of valid contract to purchase cattle, sought to be replevined. Bogue v. Roeth, 98 Cal. A. 257, 276 P 1071 (such interest is not altered or terminated by delivery of cattle to seller). (5) Judgment creditor, in action against officer. Rosenberg v. Salomon, 144 N. Y. 92, 38 NE 982. (6) Mortgagee. Albright v. Brown, 23 Nebr. 136, 36 NW 297. (7) Plaintiff in attachment, in action against officer. Morgan v. Spangler, 20 Oh. St. 38. (8) Plaintiff in execution, in action against officer. Conklin v. Bishop, 10 N. Y. Super. 646. (9) Person claiming title. Hendy Mach. Works v. Dillon, 135 Cal. 9, 66 P 960. (10) Receiver and bondholder, in an action for replevin by a manufacturing company against a traction company to which generators had been sold conditionally, which the traction company installed in its power plant permanently as a necessary part of the plant. Bullock Electric Mfg. Co. v. Lehigh Valley Tract. Co., 231 Pa. 129, 80 A 568. (11) Subcontractor. Graves El. Co. v. Masonic Temple Assoc., 85 Hun 496, 33 NYS 362. (12) Trustee under a deed of trust covering stocks and bonds sought in replevin was entitled to be made a party defendant. Michaelis v. Towne, 51 App. Div. 466, 64 NYS 751. (13) Wife of plaintiff, where defendant claimed to hold the property as bailee or custodian of plaintiff's wife. Carney v. Gleissner, 62 Wis. 493, 22 NW 735 (where wife made application to be made a party defendant, claiming that the property was her property, that plaintiff had no interest therein, and that he claimed adversely, the application should have been granted, and was not merely a matter of discretion).

[b] **Status of intervener.**—Intervener is not a party to the action in the same sense or status as original parties, or those made so, pending action. Sitterson v. Speller, 190 N. C. 192, 129 SE 191.

[12] Coburn v. Smart, 53 Cal. 742; Boessneck v. Bab, 27 Misc. 379, 58 NYS 849.

[13] Coburn v. Smart, 53 Cal. 742.

[14] Goldstein v. Shapiro, 85 App. Div. 83, 82 NYS 1038; King Co. v. Seed, 6 Misc. 4, 25 NYS 1115.

[15] Wilkins v. Lee, 42 S. C. 31, 19 SE 1016.

[16] Knowles Loom Works v. Ryle, 81 Fed. 940; Van Gorder v. Smith, 99 Ind. 404; Antrim v. Gilson, 79 Ind. 339; Welborn v. Eskey, 25 Nebr. 193, 40 NW 959; Hornby v. Gordon, 22 N. Y. Super. 656.

[17] Clemmons v. Hampton, 70 N. C. 534 (where it was held that an application to intervene made by a person claiming to be the owner of a part of the property is properly denied on the ground of laches, where he has waited for more than three years after the seizure and shows no excuse for the delay).

vene after a default has been entered against defendant.[18] The only question an intervenor can raise is his title or claim to the property,[19] and one who seeks to intervene must claim ownership of the goods.[20] It has been held not erroneous to refuse to permit a third person to intervene when defendant holds the property for such person and can interpose all defenses available to the third person,[21] or to refuse to grant the application if it would delay the disposition of the case between the original parties,[22] or where the only right which applicant shows to the property rests upon his own fraud;[23] and where a person with the consent of the parties consents to be a defendant after the action has been pending for several months, and no action is then taken by the court, it is not error for the trial court on rendering judgment to order that he be dropped from the action.[24] In replevin to recover goods seized by a landlord from his tenant, if plaintiff fails to join the bailiff who distrained for the landlord, the bailiff may intervene.[25] Where defendant appears and answers as the defendant sued under a fictitious name, he need not obtain leave to intervene.[26]

[§ 94] **D. Substitution of Parties.** In some jurisdictions the statutes provide that, in actions against an officer for the recovery of property seized under process, the court may upon application substitute plaintiff in such process as defendant,[27] but it is within the discretion of the court to grant or refuse such application,[28] although it is said that it should be permitted when the rights of plaintiff will not be injured.[29] Provision is also made by statute in some jurisdictions for the substitution of an assignee of the cause of action after suit brought as plaintiff,[30] and for the substitution as defendant of a person claiming the property in question, upon application of the original defendant who is in possession of the property but has no claim thereto.[31] It has been held, in the absence of express statutory provision, that, where the property has been distrained for rent by an agent of a landlord, the landlord may come in and be substituted for the agent and avow for rent in arrear,[32] and that the coheirs or joint tenants of a defendant in replevin may upon his death come in and defend the action;[33] but where plaintiff has taken the property, it is error to permit a stranger to be substituted for the original plaintiff, over defendant's objection,[34] or at least it is not error to refuse to do so where the person sought to be substituted as plaintiff has not given any bond,[35] and in any case, where a substitution of parties is not a matter of right, it should not be permitted where it would operate to the prejudice of the adverse party.[36] So it has been held that a substitution introducing entire new parties is properly refused.[37] Where there is a substitution of parties plaintiff, a stipulation entered into by the original plaintiff will bind the substituted plaintiff.[38]

[§ 95] **E. Defects and Objections.**[39] Under the rule that in actions ex delicto the nonjoinder of all proper parties plaintiff must be objected to by plea in abatement,[40] the nonjoinder of a joint owner as a party plaintiff must be objected to by plea in abatement,[41] and such objection is waived by pleading to the merits.[42] But where this rule is not in force, it is not necessary to object by plea in abatement,[43] but the non-joinder may be pleaded either in bar or abatement,[44] or be taken advantage of by demurrer,[45] or by motion in arrest of judgment,[46] or upon the trial under the general issue.[47]

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[18] Dupont v. Amos, 97 Iowa 484, 66 NW 774.

[19] Sitterson v. Speller, 190 N. C. 192, 129 SE 191; Dawson v. Thigpen, 137 N. C. 462, 49 SE 959.

[20] Keystone Auto. Finance Co. v. Williams, 82 Pa. Super. 109.

[a] **Thus,** where a sheriff erroneously named the wrong person as the party in possession, the right party cannot be made a party defendant without setting forth that the goods in question belong to him. Keystone Auto. Finance Co. v. Williams, 82 Pa. Super. 109 (in such case the court, on proper proof, will allow the sheriff's return to be amended so as to accord with the facts, and the party will be afforded an opportunity to litigate the validity of his alleged claim. It cannot be done on a rule to intervene as a party defendant).

[21] Talbot v. Magee, 59 Mo. App. 347.

[22] Dupont v. Amos, 97 Iowa 484, 66 NW 774.

[23] Levy v. Woodcock, 63 N. H. 413.

[24] Harrison v. Clark, 74 Conn. 18, 49 A 186.

[25] Stieff v. Bailey, 27 Del. 508, 89 A 366.

[26] Financial Ins. Corp. v. Brockton, 96 Cal. A. 179, 273 P 829.

[27] See statutory provisions; and cases infra this note.

[a] **Purpose of such statutory provisions** is to prevent useless and unnecessary litigation, and provide for the settlement of the rights of all persons interested in the property. France v. Omaha First Nat. Bank, 3 Wyo. 187, 18 P 748.

[b] **Judgment creditor** may be substituted as defendant. Pennington Grocery Co. v. Ortwein, 130 Okl. 130, 265 P 765 (where judgment creditor was substituted as defendant in replevin for goods levied on, the officer is no longer a necessary party).

[c] **Attachment plaintiff** may be substituted as defendant. Moore v. Calvert, 8 Okl. 358, 58 P 627.

[28] Wafer v. Harvey County Bank, 36 Kan. 292, 13 P 209; Sifford v. Beatty, 12 Oh. St. 189; Gross v. Lincoln, 81 Okl. 87, 196 P 960.

[29] Wafer v. Harvey County Bank, 36 Kan. 292, 13 P 209.

[30] See statutory provisions; and case infra this note.

[a] **Application of statute.**—Under a statute authorizing the substitution of the assignee of a cause of action as plaintiff after suit brought, there is no error in the trial court's requiring plaintiff's assignee in an action of replevin who had possession of the property claimed to give a new bond as a condition for substitution. Kreibohm v. Yancey, 154 Mo. 67, 55 SW 260.

[31] See statutory provisions; and cases infra this note.

[a] **Limitation on power to substitute.**—(1) The court cannot make the order substituting a claimant on the application of a defendant who has no control of the property, because of its previous delivery to the sheriff, and no power to deliver it on the court's order. State v. First Judicial Dist. Ct., 28 Mont. 445, 72 P 867. (2) The court cannot make an order substituting a claimant to the property as defendant unless the original defendant in possession thereof delivers it to the sheriff and claimant makes the affidavit of title and right of possession as required by statute. Lynch v. St. Johns, 8 Daly (N. Y.) 142.

[b] **Statute held not mandatory.**—Defendant in charge of a plantation as agent for the owner could defend a suit in replevin of a tenant, although as agent he had no personal title to, or interest in, or claim upon, the property. Scarborough v. Lucas, 119 Miss. 128, 80 S 521.

[32] Keckley v. Harris, 27 S. C. L. 196.

[33] Talvande v. Cripps, 13 S. C. L. 164.

[34] Meyer v. Omaha Furniture, etc., Co., 76 Nebr. 405, 107 NW 767; Flanders v. Lyon, 51 Nebr. 102, 70 NW 524.

[35] Pierce v. Batten, 3 Kan. A. 396, 42 P 924 (holding that one who neither demanded the property nor gave a bond could not be substituted for a plaintiff in replevin, who had made a demand and given bond, and who was in possession of the property).

[36] Flanders v. Lyon, 51 Nebr. 102, 70 NW 524.

[37] Anderson v. Stewart, 108 Md. 340, 70 A 228.

[38] Temple v. Alexander, 53 Cal. 3.

[39] **Generally** see Parties §§ 333–475.

[40] See Abatement and Revival § 198.

[41] De Wolf v. Harris, 8 F. Cas. No. 4,221, 4 Mason 515 [aff 4 Pet. 173, 8 L. ed. 86]; Brown v. Ravenscraft, 88 Md. 216, 44 A 170; Wright v. Bennett, 3 Barb. (N. Y.) 451.

[42] De Wolf v. Harris, 8 F. Cas. No. 4,221, 4 Mason 515 [aff 4 Pet. (U. S.)

[§ 96] **F. Interpleader.** Interplea is said to be unknown in replevin[48] and cannot be treated as an intervention,[49] although interpleader is expressly provided for by statute in some jurisdictions.[50]

XI. PRELIMINARY TAKING, REDELIVERY, AND IMPOUNDING OF PROPERTY

[By FELIX C. GRABER]

[§ 97] **A. Taking Property—1. Necessity.** Under various statutory provisions the action of replevin may be brought and the rights of the parties tried without a preliminary seizure of the property,[51] such proceeding being a mere ancillary or provisional remedy which plaintiff may or may not pursue at his option.[52]

[§ 98] **2. Procedure[53]—a. Affidavit—(1) Nature and Purpose.** The affidavit required in an action of replevin as a condition precedent to obtaining a writ or order of delivery[54] corresponds to the "proceeding by plaint"[55] under the statute of Marlbridge.[56] For some purposes it is considered as being in the nature of process,[57] and its filing has been said to commence the suit in replevin.[58] Although under various statutory provisions its use as a pleading is permitted,[59] filing the affidavit is a proceeding,[60] as distinguished from a pleading.[61] The office of the affidavit is to anticipate the delivery of the property to plaintiff without waiting for the determination of his rights by judgment,[62] and to prevent defendant's retention thereof;[63] and its office ceases upon delivery of the property.[64]

[§ 99] **(2) Necessity—(a) In General.** Upon suing out a writ of replevin, or instituting a claim and delivery proceeding, plaintiff is required under variout statutes to furnish an affidavit.[65] Where immediate possession of the property is demanded, the affidavit required by statute is an essential prerequisite to the order for delivery or the issue or execu-

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147, 7 L. ed. 811]; Brown v. Ravenscraft, 88 Md. 216, 44 A 170; Sawyer v. Burris, 141 Mo. A. 108, 121 SW 321; Wright v. Bennett, 3 Barb. (N. Y.) 451; Jawitz v. Reitman, 128 Misc. 20, 217 NYS 480.

[a] **For instance,** where one of two joint owners was not joined as party plaintiff in a replevin action, and defendant failed to move to amend in this respect as required under local rules of practice, he thereby waived such defect. Jawitz v. Reitman, 128 Misc. 20, 217 NYS 480.

43. Upham v. Allen, 76 Mo. A. 206; Reinheimer v. Hemingway, 35 Pa. 432.

44. Cox v. Morrow, 14 Ark. 603; Fay v. Duggan, 135 Mass. 242; Chambers v. Hunt, 18 N. J. L. 339; Reinheimer v. Hemingway, 35 Pa. 432.

45. Heaton v. Wilson, 123 N. C. 398, 31 SE 671.

46. Heaton v. Wilson, supra.

47. Upham v. Allen, 76 Mo. A. 206; Heaton v. Wilson, 123 N. C. 398, 31 SE 671.

48. Charlsworth v. Jacob, (Mo. A.) 24 SW (2d) 671.

49. Browning v. Randol, 69 Mo. A. 594.

50. See statutory provisions; and case infra this note.

[a] **Necessity for compliance with statutory requirements.**—Where defendant does not tender the property into court, and cannot because he has lost the right of possession, he is not entitled to an order of interpleader, where the statute requires tender of the property. Pelham Hod Elevating Co. v. Baggaley, 12 NYS 218.

51. See statutory provisions.

52. Ariz.—Tucson Cons. Nat. Bank v. Cunningham, 24 Ariz. 437, 210 P 850.

Ark.—Chapman v. Claybrook, 173 Ark. 705, 293 SW 43.

Cal.—Wellman v. English, 38 Cal. 583.

Ida.—Bates v. Capital State Bank, 21 Ida. 141, 121 P 561.

Ind.—Catterlin v. Mitchell, 27 Ind. 298, 89 AmD 501.

Iowa.—Lewis v. Best-By-Test Garage, 200 Iowa 1051, 205 NW 983.

Kan.—Varner v. Bowling, 54 Kan. 380, 38 P 481.

Ky.—Halcomb v. Phipps, 194 Ky. 648, 240 SW 363.

Mo.—Gibson v. Ball, 159 Mo. A. 345, 141 SW 23.

Nebr.—Racine-Sattley Co. v. Meinen, 79 Nebr. 33, 114 NW 602.

N. Y.—Johnstone v. Weibel, 131 App. Div. 166, 115 NYS 255; Coler v. Judd, 124 Misc. 22, 207 NYS 248; Vogel v. Badcock, 1 AbbPr 176.

N. C.—Bridgers v. Ormond, 148 N. C. 375, 62 SE 422.

Okl.—Thompson v. Grove, 72 Okl. 290, 180 P 553; Jantzen v. Emanuel German Baptist Church, 27 Okl. 473, 112 P 1127, AnnCas1912C 659.

S. C.—Adeimy v. Dleykan, 116 S. C. 159, 107 SE 35.

S. D.—Eads v. Wagner, 35 S. D. 547, 153 NW 302; Abel v. Teets, 28 S. D. 633, 134 NW 817.

Wis.—Hart v. Moulton, 104 Wis. 349, 352, 80 NW 599, 76 AmSR 881.

Necessity, in actions not involving preliminary seizure, of:
Affidavit see infra § 100.
Bond see infra § 118.

In Rhode Island see supra § 5.

53. **Affidavits generally** see Affidavits 2 C. J. p 314.

54. **Necessity of affidavit** see infra § 99.

55. Anderson v. Hapler, 34 Ill. 436, 85 AmD 318; Bardwell v. Stubbert, 17 Nebr. 485, 23 NW 344.

56. St. 52 Hen. III c 21.

57. See infra § 111.

58. Roberts v. Perrine, 247 Ill. A. 259.

Summons or writ as commencing suit see infra § 135.

59. See infra § 172.

60. German Nat. Bank v. Aultman, 63 Nebr. 324, 88 NW 479; Commercial State Bank v. Ketcham, 46 Nebr. 568, 65 NW 201; Wilson v. Macklin, 7 Nebr. 50.

61. Wilson v. Macklin, supra.

62. Ark.—Higgason v. Braswell, 163 Ark. 348, 258 SW 983; Eaton v. Langley, 65 Ark. 448, 47 SW 123, 42 LRA 474; Hawes v. Robinson, 44 Ark. 308.

Mo.—Keim v. Vette, 167 Mo. 389, 67 SW 223; Eads v. Stephens, 63 Mo. 90; Bingham v. Morrow, 29 Mo. A. 448.

Oh.—Harrison v. Mack Internationtal Truck Corp., 20 Oh. A. 256, 151 NE 797 [cit Cyc].

Okl.—Hutchings v. Cobble, 30 Okl. 158, 120 P 1013, 1015.

S. C.—Adeimy v. Dleykan, 116 S. C. 159, 107 SE 35.

"The office of the affidavit and bond in a replevin suit is to obtain an order of delivery." Higgason v. Braswell, 163 Ark. 348, 258 SW 983, 984.

"The office of an affidavit is to authorize the issuance of the writ." Hutchings v. Cobble, supra.

[a] **Office of complaint distinguished.**—"The offices of the complaint and the affidavit in claim and delivery are entirely separate and distinct. The complaint states the cause of action; the affidavit is in no sense a part of the complaint, and need not be executed at all, unless the plaintiff desires to claim the immediate delivery of the property, which may be done at the time the summons is issued or at any time thereafter; it is essentially a subsidiary proceeding." Adeimy v. Dleykan, 116 S. C. 159, 163, 107 SE 35.

Affidavit as complaint see infra § 172.

63. Keim v. Vette, 167 Mo. 389, 67 SW 223.

64. Jantzen v. Emanuel German Baptist Church, 27 Okl. 473, 112 P 1127, AnnCas1912C 659; Pond Creek First Nat. Bank v. Cochran, 17 Okl. 538, 87 P 855.

65. See statutory provisions.

[a] **In Nova Scotia** no affidavit is required where the goods replevied were distrained for rent. McDonald v. Praught, (N. S.) 7 EastLR 231.

tion of the writ as the statute may provide,[66] and, although failure to comply with the requirement has been held to be merely an irregularity in procuring and issuing the replevin process,[67] under some statutes conferring jurisdiction of such possessory actions upon inferior courts, the affidavit is held to be the basis of the suit without which there is no jurisdiction;[68] and in such case an oath before the magistrate will not suffice to take the place of the prescribed affidavit or oath or affirmation reduced to writing.[69] Where an affidavit before execution, but not before issue of the writ, is contemplated by the statute, jurisdiction to issue the writ does not depend upon the affidavit[70] but it must be made and annexed to the writ before it is executed.[71]

As to new party brought in by amendment after obtaining an order of delivery, the proceeding is held to be void without any additional affidavit.[72]

Affidavit of value.[73] In order to determine the amount of bail, statutes in some jurisdictions require plaintiff to file an affidavit of value.[74] Such statutes are directory,[75] and the making of the affidavit is not a prerequisite to the power of the officer to issue the writ.[76]

[§ 100] **(b) In Actions Not Involving Preliminary Seizure.** Where the action of replevin may be brought and the rights of the parties tried without a preliminary seizure of the property,[77] the affidavit is not essential if plaintiff elects to proceed without disturbing defendant's possession.[78] In such cases the affidavit is not jurisdictional.[79] If there is no pleading there is no case in court to be tried, even though the affidavit is filed,[80] while, on the other hand, if there is a good pleading there is a cause in court without the affidavit;[81] and in the absence of the affidavit the action may proceed to judgment determining the rights of the parties.[82] If the writ or order has issued improperly without such affidavit it may be quashed or set aside,[83] and the goods taken thereunder must be returned;[84] but even if the writ has issued, the want of proper affidavit is not material after judgment, where the possession was not taken under the writ[85] or the property was not found.[86]

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[66] Ark.—Schattler v. Heisman, 85 Ark. 73, 107 SW 196.

Conn.—Nichols v. Standish, 48 Conn. 321.

Ida.—Bates v. Capital State Bank, 21 Ida. 141, 121 P 561.

Kan.—Paul v. Hodges, 26 Kan. 225.

Nebr.—Racine-Sattley Co. v. Meinen, 79 Nebr. 33, 114 NW 602 [vacating judgment 79 Nebr. 32, 112 NW 321]; J. I. Case Threshing Mach. Co. v. Rosso, 78 Nebr. 184, 110 NW 685; Muller v. Plue, 45 Nebr. 701, 64 NW 232; Armour v. Arres, 5 Nebr. (Unoff.) 383, 98 NW 843.

N. Y.—Berrien v. Westervelt, 12 Wend. 194.

Porto Rico.—Ex p. Lippitt, 12 Porto Rico 182.

[a] **Rule applied** under statute forbidding execution of writ unless the prescribed affidavit is made. Berrien v. Westervelt, 12 Wend. (N. Y.) 194.

[67] Nichols v. Standish, 48 Conn. 321.

[a] **Effect of irregularity** is, at most, to make the replevin process voidable; it does not render it void. Nichols v. Standish, 48 Conn. 321.

[68] Ill.—Clow v. Gilbert, 54 Ill. A. 134.

Kan.—Woodworth v. Maddox, 115 Kan. 445, 223 P 275.

Mich.—Bloomingdale v. Chittenden, 75 Mich. 305, 42 NW 836; Elliott v. Whitmore, 5 Mich. 532.

Mo.—White v. Grace, 192 Mo. A. 610, 184 SW 947 [disappr Zimmerman v. Downey, 66 Mo. A. 106; Bingham v. Morrow, 29 Mo. A. 448 (both contra)]; Turner v. Bondalier, 31 Mo. A. 582.

Nebr.—Crawford Commercial State Bank v. Ketcham, 46 Nebr. 568, 65 NW 201; Armour v. Arres, 5 Nebr. (Unoff.) 383, 98 NW 843.

Wis.—Detroit Safe Co. v. Kelly, 78 Wis. 134, 47 NW 187.

[a] **In Indiana** (1) the cases are not in accord, some considering the affidavit as not jurisdictional (Fawkner v. Baden, 89 Ind. 587; Eddy v. Beal, 34 Ind. 159; Lemert v. Shaffer, 5 Ind. A. 468, 31 NE 1128, 32 NE 788); (2) while others take a different view (Deardoff v. Ulmer, 34 Ind. 353; Allen v. Frederick, 26 Ind. A. 430, 59 NE 330).

[b] **In New York** (1) under the code provisions that a justice of the peace shall have jurisdiction of an action to recover chattels where their value, as stated in the affidavit of the plaintiff, does not exceed two hundred dollars, and that plaintiff may, when summons is issued in such an action, but not afterwards, require the chattels to be replevied, for which purpose he must deliver to the justice an affidavit and undertaking, in an action for the recovery of a chattel, where the chattel is not sought to be replevied before judgment, an affidavit as to value is not required. Young v. Carey, 29 Misc. 278, 61 NYS 508. (2) But under a former provision giving a justice of the peace jurisdiction in such action, but providing further that before any process shall issue, plaintiff, his agent, or attorney shall make proof by affidavit, etc., it was held that the justice could not, without the affidavit, acquire jurisdiction. Daily v. Doe, 3 Fed. 903.

[69] Evans v. Bouton, 85 Ill. 579.

[70] Taylor v. Judge Kalamazoo Cir. Ct., 100 Mich. 181, 58 NW 835; Baker v. Dubois, 32 Mich. 92; Wilbur v. Flood, 16 Mich. 40, 93 AmD 203; Phenix v. Clark, 2 Mich. 327.

[71] See cases supra note 70.

[72] Bardwell v. Stubbert, 17 Nebr. 485, 23 NW 344.

[73] **Averment as to value in affidavit generally** see infra § 109.

Requisites, sufficiency, and validity see infra § 101.

[74] See statutory provisions.

[a] **In Kentucky** before the passage of the act of 1842, it was necessary for plaintiff to execute bond in the clerk's office, in a penalty double the amount of the property about to be sued for, and hence an affidavit of its value was required as the means of fixing the penalty of the bond. But the act of 1842, instead of requiring the bond to be executed in the clerk's office, directed that it should be taken by the sheriff in the same penalty, and that the value of the property should be ascertained by two or more disinterested persons, under an oath administered by the officer, and this act was held to repeal all others coming within its purview, and substantially so much of the earlier act as required an affidavit of value to be filed in the clerk's office. Aulick v. Adams, 12 B. Mon. (Ky.) 104.

[75] Automobile Securities Co. v. Swisshelm, 269 Pa. 153, 112 A 56; Hill v. Mervine, 13 Pa. Dist. 582, 29 Pa. Co. 260.

[76] Hill v. Mervine, supra. Contra Ammerman v. Stone, 11 Pa. Dist. 726.

[a] **Quashal of writ** will not be granted for mere failure to comply with a directory statute relative to the making of the affidavit. Hill v. Mervine, 13 Pa. Dist. 582, 29 Pa. Co. 260. But see Ammerman v. Stone, 11 Pa. Dist. 726 (holding statute mandatory and quashing writ).

[77] See supra § 97.

[78] Ariz.—Tucson Cons. Nat. Bank v. Cunningham, 24 Ariz. 437, 210 P 850.

Ark.—Chapman v. Claybrook, 173 Ark. 705, 293 SW 43; Higgason v. Braswell, 163 Ark. 348, 258 SW 983; Schattler v. Heisman, 85 Ark. 73, 107 SW 196; Eaton v. Langley, 65 Ark. 448, 47 SW 123, 42 LRA 474.

Cal.—Wellman v. English, 38 Cal. 583 (under claim and delivery statute).

Ind.—Hodson v. Warner, 60 Ind. 214; Catterlin v. Mitchell, 27 Ind. 298, 89 AmD 501.

Kan.—Lamont v. Williams, 43 Kan. 558, 23 P 592; Batchelor v. Walburn, 23 Kan. 733; Williams v. Gardner, 22 Kan. 122.

Nebr.—Racine-Sattley Co. v. Meinen, 79 Nebr. 33, 114 NW 602 [vacating judgment 79 Nebr. 32, 112 NW 321].

N. Y.—Young v. Carey, 29 Misc. 278, 61 NYS 508.

N. C.—Bridgers v. Ormond, 148 N. C. 375, 62 SE 422; Jarman v. Ward, 67 N. C. 32.

Okl.—Scott v. Smith, 36 Okl. 313, 129 P 49; Hutchings v. Cobble, 30 Okl. 158, 120 P 1013; Jantzen v. Emanuel German Baptist Church, 27 Okl. 473, 112 P 1127, AnnCas1912C 659.

S. C.—Adeimy v. Dleykan, 116 S. C. 159, 107 SE 35.

S. D.—Johnson v. Hillenhand, 18 S. D. 446, 101 NW 33; Simpson Brick-Press Co. v. Marshall, 5 S. D. 528, 59 NW 728.

[a] **In Missouri** (1) Rev. St. (1909) § 2637 applies the rule of the text to actions in the circuit court (Keim v. Vette, 167 Mo. 389, 67 SW 223; Eads v. Stephens, 63 Mo. 90; Stephens v. Steckdaub, (A.) 217 SW 871; Rice v. Thayer, (A.) 217 SW 576; Keen v. Munger, 52 Mo. A. 660; F. G. Oxley Stave Co. v. Whitson, 34 Mo. A. 624; Hamilton v. Clark, 25 Mo. A. 428); (2) but in actions in the justice court there must be an affidavit to give the justice jurisdiction (White v. Grace, 192 Mo. A. 610, 184 SW 947; Turner v. Bondalier, 31 Mo. A. 582. And see cases supra § 99 text and note 68). (3) This distinction was not observed in some early cases which held that an affidavit was not necessary in an action before a justice of the peace (Zimmerman v. Downey, 66 Mo. A. 106; Bingham v. Morrow, 29 Mo. A. 448); (4) but later the distinction and the error of those cases was recognized (White v. Grace, supra).

[79] See cases supra note 78.

[§ 101] **(3) Requisites, Sufficiency, and Validity[87]—(a) In General.** An affidavit made to obtain an order for delivery of the property or to authorize the issue of a writ of replevin should be in the form prescribed[88] and must contain all the material averments which by the statute are essential to entitle the party to anticipate delivery of the property;[89] but it need not contain any other averments,[90] and if it is in the language of the statute it will be sufficient.[91] While there is authority to the effect that the statutory requisites of an affidavit for such purpose must be strictly complied with,[92] it has been held that a substantial compliance therewith is sufficient[93] and that mere formal or clerical defects are not fatal to the exercise of jurisdiction of the cause.[94] Thus defects in designating the name of plaintiff will not render the affidavit insufficient where the officer who issues the writ thereon certifies that the affidavit was subscribed and sworn to,[95] or where the affidavit by reference to another instrument sufficiently identifies plaintiff;[96] and a clerical mistake in the spelling of defendant's name is immaterial where the identity of the party otherwise appears.[97] It is not a good rule to permit affidavits to be untruly made under the expectation that something will be done to make them true,[98] and where a demand is necessary to support the writ,[99] an affidavit which is sworn to before the demand is made is not sufficient.[1] The affidavit of ownership of property annexed to a writ of replevin should not be entitled.[2] It is not fatal to a recovery that, inadvertently, the affidavit made at the time it was filed did not have the jurat of the officer attached until after such filing.[3]

Officer administering oath. The affidavit must be made before an officer who is authorized to administer oaths.[4] An affidavit made before a notary who is plaintiff's attorney, however, is void.[5]

Subscription by affiant. Pursuant to the general rule announced in many jurisdictions,[6] an affidavit in replevin is sufficient, although it is not subscribed by affiant, where his name appears as affiant in the body of the instrument and the officer attaches his jurat and certifies that the affidavit was subscribed and sworn to before him.[7]

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[80] Keim v. Vette, 167 Mo. 389, 67 SW 223; F. G. Oxley Stave Co. v. Whitson, 34 Mo. A. 624.

[81] See cases supra note 78.

[82] Higgason v. Braswell, 163 Ark. 348, 258 SW 983; Schattler v. Heisman, 85 Ark. 73, 107 SW 196; Eaton v. Langley, 65 Ark. 448, 47 SW 123, 42 LRA 474; Williams v. Gardner, 22 Kan. 122; Jarman v. Ward, 67 N. C. 32.

[a] **Thus** (1) the action proceeds as for damages (Williams v. Gardner, 22 Kan. 122) (2) or as the old action of detinue (Jarman v. Ward, 67 N. C. 32).

[83] See infra § 111.

[84] See infra § 169.

[85] Lamont v. Williams, 43 Kan. 558, 23 P 592.

[86] Williams v. Gardner, 22 Kan. 122.

[87] **Form and contents of affidavit generally** see Affidavits §§ 50-120.

[88] Ill.—Kehoe v. Rounds, 69 Ill. 351; Frink v. Flanagan, 6 Ill. 35.

Ind.—Bringhurst v. Pollard, 6 Ind. 452.

Ky.—Halcomb v. Phipps, 194 Ky. 648, 240 SW 363.

Mich.—Stever v. Brown, 119 Mich. 196, 77 NW 704.

Nebr.—Lewis v. Connolly, 29 Nebr. 222, 45 NW 622.

N. Y.—Cutler v. Rathbone, 1 Hill 204.

Wis.—Hass v. Prescott, 38 Wis. 146.

N. B.—Dalhousie Lumber Co., Ltd. v. Walker, 44 N. B. 81.

[a] **Mere statement without jurat** is not of itself an affidavit. Kehoe v. Rounds, 69 Ill. 351.

[b] **Approved forms.**—Burton v. Curyea, 40 Ill. 320, 322, 89 AmD 350; Whisler v. Roberts, 19 Ill. 274; Stever v. Brown, 119 Mich. 196, 197, 77 NW 704.

[89] Evans v. Bouton, 85 Ill. 579; Paul v. Hodges, 26 Kan. 225; Halcomb v. Phipps, 194 Ky. 648, 240 SW 363; Armour v. Arres, 5 Nebr. (Unoff.) 383, 98 NW 843.

[90] Whisler v. Roberts, 19 Ill. 274; Ryan v. Schutt, 135 Ill. A. 554; Bringhurst v. Pollard, 6 Ind. 452; Sloan v. Implement Dealers' Mfg. Co., 25 Misc. 451, 55 NYS 558; Hass v. Prescott, 38 Wis. 146.

[a] **Incorporation of defendant.**—Under a statutory provision that in an action against a corporation, plaintiff need not prove the existence of a corporation unless the answer is verified and contains an affirmative allegation that it is not a corporation, an allegation of incorporation in the affidavit in replevin made before an answer has been served, upon information and belief has been held sufficient. Sloan v. Implement Dealers' Mfg. Co., 25 Misc. 451, 55 NYS 558.

[91] Burton v. Curyea, 40 Ill. 320, 89 AmD 350; Ryan v. Schutt, 135 Ill. A. 554; National Enameling, etc., Co. v. Kaplan, 53 App. Div. 96, 65 NYS 732.

[92] Halcomb v. Phipps, 194 Ky. 648, 240 SW 363.

[93] Smith v. Dodge, 37 Mich. 354.

[94] See cases infra notes 95-97.

[95] Olson v. Peabody, 121 Wis. 675, 99 NW 458; Dalhousie Lumber Co., Ltd. v. Walker, 44 N. B. 81.

[a] **Rule applied** where plaintiff was described in the body of the affidavit as "Charles Olsen," and the instrument was signed "Charley Olson." Olson v. Peabody, 121 Wis. 675, 99 NW 458.

[b] **Omission of "Limited"** after plaintiff company's name in the body of the affidavit, where the whole name properly appears in the title, is a mere irregularity and not misleading. Dalhousie Lumber Co., Ltd. v. Walker, 44 N. B. 81.

[96] Knowles v. Cavanaugh, 144 Mich. 260, 107 NW 1073.

[a] **Names of partners.**—An affidavit and process in replevin by a partnership are not so defective as to oust the justice of jurisdiction, although the names of the partners are not given, where the affidavit, by reference to the mortgage under which plaintiffs claim the property, sufficiently identifies plaintiffs. Knowles v. Cavanaugh, 144 Mich. 260, 107 NW 1073.

[97] Olson v. Peabody, 121 Wis. 675, 99 NW 458.

[a] **Thus** the fact that a replevin affidavit gave the first name of the defendant as "Wimmiam," instead of "William," as it appeared in the warrant, was immaterial, where he appeared in the cause, and in his affidavit for the removal of the cause gave the name as it appeared in the warrant. Olson v. Peabody, 121 Wis. 675, 99 NW 458.

[98] McAdam v. Walbrau, 8 NYCiv Proc 451.

[99] See supra § 68.

[1] McAdam v. Walbrau, 8 NYCiv Proc 451.

Averment as to demand see infra § 107.

[2] Stacy v. Farnham, 2 HowPr (N. Y.) 26.

[3] Schattler v. Heisman, 85 Ark. 73, 107 SW 196; Peterson v. Fowler, 76 Mich. 258, 43 NW 10.

[4] Berrien v. Westervelt, 12 Wend. (N. Y.) 194.

Officers authorized to take see Affidavits §§ 30-47.

[5] Lyric Piano Co. v. Blinn, 13 Oh NPNS 521.

[6] See Affidavits § 90.

In determining sufficiency of an affidavit its allegations must be regarded as true.[8]

Affidavit of value.[9] Defects or irregularities in an affidavit of value are not fatal to the action of replevin.[10] The writ will not be quashed for failure of an affidavit of value to aver the authority of the person making it for a corporation.[11] The affidavit need not be in the language of the statute if it contains everything required thereby.[12]

[§ 102] **(b) Incorporating in, or Annexing Affidavit to, Pleading.** Although the better practice is to keep the affidavit and pleading separate,[13] if plaintiff's pleading contains a statement of every fact which the statute requires to be shown in the affidavit, and the pleading is verified by affidavit covering every statement therein, this will be sufficient without a separate affidavit;[14] but in no event can the pleading supply the absence of the affidavit unless all that the affidavit is required to contain is embodied in the pleading,[15] and the pleading is verified in the form as required in the case of a separate affidavit.[16] On the other hand, the affidavit need not be annexed to the pleading or filed contemporaneously with it, but may be an independent instrument.[17]

[§ 103] **(c) Affidavit by Agent or Attorney.**[18] Generally, under the various statutory provisions, an affidavit in replevin which is verified by plaintiff's duly authorized agent or attorney,[19] or by plaintiff or someone who acts in his behalf,[20] is sufficient, as where the facts are within his personal knowledge or plaintiff is not within the county, or the like;[21] but it should appear that the person so making the affidavit is acting for the principal in the capacity as contemplated by the statute.[22] An affidavit signed by a representative of a plaintiff corporation without stating why an officer did not sign is sufficient to sustain the issuing of a writ.[23] The agent must be enabled to speak from facts independent of the mere information of the party;[24] but it has been said that the court will assume personal knowledge without an express allegation thereof in the case of allegations made by one who appears to have been in a position to have had such knowledge of the particular matters.[25] The same positiveness is required in an affidavit made by his agent as would be required in an affidavit made by plaintiff himself;[26] hence the facts which the statute requires to be alleged positively cannot be alleged in the form that affiant believes them;[27] but where the principal might have alleged particular matters according to his best knowledge, the agent may make the affidavit in the same manner.[28] In the absence of statutory provision therefor, the required facts need not be made to appear "to the satisfaction" of the court.[29] The affidavit must refer to the rights and claims of the principal and not those of the affiant,[30] and if in each necessary allegation it refers to the claims of the affiant, it will be treated as in his favor individually, and insufficient to authorize the issue of an order of delivery in favor of the principal.[31] Where plaintiff is a corporation, and therefore cannot make an affidavit, any official engaged in its management and familiar with the facts may properly do so,[32] but an affidavit made under such circumstances on information and belief must allege the sources of the information, or the agent's knowledge, or the grounds of his belief.[33]

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[7] Bloomingdale v. Chittenden, 75 Mich. 305, 42 NW 836; Williams v. Williams, 117 Miss. 251, 78 S 152.

Signing by agent see infra § 103.

[8] Hall v. Lignon, 111 S. C. 245, 97 SE 710.

[9] **Averments as to value of property** see infra § 109.

Necessity for affidavit of value see supra § 99.

[10] Midwest Commercial Credit Co. v. Woloszyn, 11 Pa. Dist. & Co., 494.

[11] Automobile Securities Co. v. Swisshelm, 269 Pa. 153, 112 A 56.

Affidavit by agent see infra § 103.

Quashal of writ for defects in, or want of, affidavit generally see infra § 111.

[12] Guinn v. Vitte, 63 Pa. Super. 611.

[a] **Thus** an affidavit is not fatally defective because it does not contain the words "which shall be the cost to the defendant of replacing them," such words being mere direction in the statute showing upon what basis the value is to be fixed. Guinn v. Vitte, 63 Pa. Super. 611.

[13] Bobilya v. Priddy, 68 Oh. St. 373, 67 NE 736.

[a] **Reason for rule.**—Where this is done, either can be questioned without reference to the other. Bobilya v. Priddy, 68 Oh. St. 373, 67 NE 736.

[14] Ark.—Hanner v. Bailey, 30 Ark. 681.

Ind.—Turpie v. Fagg, 124 Ind. 476, 22 NE 743; Louisville, etc., R. Co. v. Payne, 103 Ind. 183, 2 NE 582; Eddy v. Beal, 34 Ind. 159; Minchrod v. Windoes, 29 Ind. 288.

Ind. T.—Harris v. Castleberry, 3 Ind. T. 576, 64 SW 541.

Kan.—Upton v. Pendry, 109 Kan. 744, 202 P 73, 75 [reh den 110 Kan. 191, 203 P 300, and quot Cyc].

Ky.—Halcomb v. Phipps, 194 Ky. 648, 240 SW 363.

Mo.—Keim v. Vette, 167 Mo. 389, 67 SW 223.

Nebr.—Lewis v. Connolly, 29 Nebr. 222, 45 NW 622.

Oh.—Bobilya v. Priddy, 68 Oh. St. 373, 67 NE 736.

[15] Halcomb v. Phipps, 194 Ky. 648, 240 SW 363; J. I. Case Threshing Mach. Co. v. Rosso, 78 Nebr. 184, 110 NW 686.

[16] Lewis v. Connolly, 29 Nebr. 222, 45 NW 622.

[17] Upton v. Pendry, 109 Kan. 744, 202 P 73, 75 [reh den 110 Kan. 191, 203 P 300, and quot Cyc]; Keen v. Munger, 52 Mo. A. 660.

[18] **Affidavit of agent or attorney generally** see Affidavits §§ 19-22.

[19] Colo.—Miller v. Graf, 14 Colo. A. 167, 59 P 416.

Ill.—Colborn v. Barton, 14 Ill. A. 449.

Kan.—Wilson v. Me-ne-chas, 40 Kan. 648, 20 P 468.

Mich.—Phenix v. Clark, 2 Mich. 327.

Nebr.—Hershiser v. Delone, 24 Nebr. 380, 38 NW 863.

N. Y.—Sloan v. Implement Dealers' Mfg. Co., 25 Misc. 451, 55 NYS 558.

Oh.—Smith v. Feasley, 6 Oh. A. 242; Smith v. Feasley, 27 O. C. A. 15.

Pa.—Midwest Commercial Credit Co. v. Woloszyn, 11 Pa. Dist. & Co. 494.

Wis.—Detroit Safe Co. v. Kelly, 78 Wis. 134, 47 NW 187.

N. B.—Dalhousie Lumber Co., Ltd. v. Walker, 44 N. B. 81.

Ont.—Arnold v. Hamilton, 1 Ont. Pr. 263.

[a] **Father of minor,** who is his next friend in an action, can, as his natural guardian, make an affidavit in replevin for his son. Wilson v. Me-ne-chas, 40 Kan. 648, 20 P 468.

Amended affidavit by agent see infra § 113.

[20] Spencer v. Bell, 109 N. C. 39, 13 SE 704.

[21] See cases supra note 19.

[22] Colo.—Miller v. Graf, 14 Colo. A. 167, 59 P 416.

Nebr.—Hershiser v. Delone, 24 Nebr. 380, 38 NW 863.

N. C.—Spencer v. Bell, 109 N. C. 39, 13 SE 704.

Wis.—Detroit Safe Co. v. Kelly, 78 Wis. 134, 47 NW 187.

Ont.—Arnold v. Hamilton, 1 Ont. Pr. 263.

See Crawshaw v. Wright, 5 Mo. A. 577.

[a] **Agent in particular business.**—(1) A statute enacting that before a writ of replevin shall issue, the person claiming the property, "his servant or agent" shall make a prescribed affidavit, requires that the agent or servant shall sustain that relation in the particular business of the principal in which the cause of action arose and not one who is merely deputed to make the affidavit. Arnold v. Hamilton, 1 Ont. Pr. 263. (2) Under such a statute the affidavit must show the agency contemplated (Arnold v. Hamilton, supra), (3) but an affidavit showing that affiant is "now acting" for the principal will be sufficient if it can be gathered from other parts of the affidavit that such acting is as agent within the meaning of the statute (Arnold v. Hamilton, supra).

[b] **Signing name of principal.**—The affidavit should regularly be signed in the name of the agent, but signing in the name of the principal by the agent, naming him as such, is sufficient where it is shown in the body of the instrument that it is made by affiant as agent. Hershiser v. Delone, 24 Nebr. 380, 38 NW 863; Spencer v. Bell, 109 N. C. 39, 13 SE 704.

[23] Midwest Commercial Credit Co. v. Woloszyn, 11 Pa. Dist. & Co. 494.

[24] Cutler v. Rathbone, 1 Hill (N. Y.) 204.

[a] **Thus** a mere allegation that the attorney was well acquainted with the facts which acquaintance may have been derived from the mere statement of the client is insufficient. Cutler v. Rathbone, 1 Hill (N. Y.) 204.

[25] Sloan v. Implement Dealers' Mfg. Co., 25 Misc. 451, 55 NYS 558 (where, however, there was an express allegation of personal knowledge).

Description as agent or allegation of relation. Although it is more regular that the fact of the agency should be stated and sworn to instead of being added to the name of the affiant by way of description,[34] an affidavit in the latter form is not fatally defective,[35] and the objection is not jurisdictional.[36]

Affidavit of value need not aver the authority of the person who makes the affidavit for a corporation.[37]

[§ 104] **(d) Particular Averments—aa. Title and Right to Possession.**[38] The affidavit in replevin should contain such an allegation as to ownership, general or special, in plaintiff, and his right to the immediate possession of the property, as the statute prescribes,[39] and an omission of such allegation will render the affidavit defective, upon proper objection thereto.[40] A general allegation of ownership is sufficient when the plaintiff does not claim a special property,[41] and an affidavit of general ownership is sufficient where as a matter of fact the interest in the subject matter is special.[42] Where the plaintiff claims a special property, however, the facts with respect to such special property are under some statutes required to be alleged.[43] Where the statute merely requires an allegation that plaintiff is the owner or entitled to immediate possession, an affidavit which shows that it was manifestly the intention to allege that plaintiff was in possession when defendant seized the property is sufficient;[44] plaintiff is not under such statute bound to set out evidence of his title,[45] and when he does so, such averments are surplusage.[46] Under a statute which confers jurisdiction upon justices of the peace upon the filing of the prescribed affidavit,[47] the omission of an averment of title or right to possession is fatal to the jurisdiction at any stage of the cause.[48] It is not sufficient to aver the right, in the alternative, to be in one of two persons.[49]

Mere clerical error manifest upon the face of the affidavit will not vitiate it.[50]

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[26] Frink v. Flanagan, 6 Ill. 35.

[27] Frink v. Flanagan, supra.

[28] Sloan v. Implement Dealers' Mfg. Co., 25 Misc. 451, 55 NYS 558.

[29] Sloan v. Implement Dealers' Mfg. Co., supra.

[a] **Rule applied** under statutory requirement that the affidavit should "contain the following allegations," enumerating them. Sloan v. Implement Dealers' Mfg. Co., 25 Misc. 451, 55 NYS 558.

[30] Commercial State Bank v. Ketcham, 46 Nebr. 568, 65 NW 201; Armour v. Arres, 5 Nebr. (Unoff.) 383, 98 NW 843.

[31] Commercial State Bank v. Ketcham, 46 Nebr. 568, 65 NW 201; Armour v. Arres, 5 Nebr. (Unoff.) 383, 98 NW 843.

[32] National Enameling, etc., Co. v. Kaplan, 53 App. Div. 96, 65 NYS 732; Dalhousie Lumber Co., Ltd. v. Walker, 44 N. B. 81.

[a] **Affidavit by treasurer** is sufficient. National Enameling, etc., Co. v. Kaplan, 53 App. Div. 96, 65 NYS 732.

[b] **Affidavit of resident manager** with knowledge of the facts is sufficient. Dalhousie Lumber Co., Ltd. v. Walker, 44 N. B. 81.

[33] Peo. v. Lauer, 80 Misc. 436, 141 NYS 299.

[34] Remington Sewing Mach. Co. v. Cushen, 8 Mo. A. 528.

[35] Remington Sewing Mach. Co. v. Cushen, supra.

[a] **Thus,** where the affidavit states "J. L. Jackson, agent for plaintiff, makes oath and says," etc., the fact that J's agency is not stated is not fatal. Remington Sewing Mach. Co. v. Cushen, 8 Mo. A. 528.

[36] Remington Sewing Mach. Co. v. Cushen, supra.

[37] Automobile Securities Co. v. Swisshelm, 269 Pa. 153, 112 A 56.

[38] **Title and right to possession of plaintiff generally** see supra §§ 46-54.

[39] See statutory provisions.

[40] McArthur v. Hogan, 15 F. Cas. No. 8,659a, Hempst. 286; Spencer v. Bidwell, 49 Conn. 61; Frink v. Flanagan, 6 Ill. 35; Paul v. Hodges, 26 Kan. 225.

Objections see infra § 111.

[41] Vinnedge v. Nicholai, 28 Nebr. 133, 44 NW 89; Burns v. Roberts, 1 CodeRep (N. Y.) 62.

[a] **Absolute ownership based on mortgage.**—An affidavit averring that plaintiff was the owner and entitled to the immediate possession of the property is prima facie good, as an allegation of absolute ownership, notwithstanding such ownership was alleged to have been based upon a chattel mortgage, when attacked by a motion in the nature of a demurrer. Vinnedge v. Nicholai, 28 Nebr. 133, 44 NW 89.

[42] Woolery v. Barkley, 26 Ariz. 443, 226 P 533.

[43] See statutory provisions.

[a] **Thus,** where the prescribed affidavit is jurisdictional, as in replevin before a justice of the peace, one alleging that affiant is entitled to the immediate possession of the property under a chattel mortgage securing a note is insufficient to give the justice jurisdiction to issue a writ where it does not show that the note has matured, or that any part of it remains unpaid, or the existence of any fact entitling him to the immediate possession of the property. Bolin v. Fines, 51 Nebr. 650, 71 NW 293.

[b] **Where right is claimed under writing** it should be set out. Depew v. Leal, 2 AbbPr (N. Y.) 131.

[44] Hall v. Ligon, 111 S. C. 245, 97 SE 710.

[45] Osteen v. Lowry, 111 S. C. 217, 97 SE 244.

[46] Osteen v. Lowry, supra.

[a] **Thus,** where plaintiff's original affidavit contained an allegation that his ownership rested on a mortgage, and this was amended to contain an allegation resting it on a different mortgage, both were surplusage, and plaintiff could prove ownership by any testimony evidencing it. Osteen v. Lowry, 111 S. C. 217, 97 SE 244.

[47] See supra § 99.

[48] Bolin v. Fines, 51 Nebr. 650, 71 NW 293; Armour v. Arres, 5 Nebr. (Unoff.) 383, 98 NW 843; Clendenning v. Guise, 8 Wyo. 91, 55 P 447.

[49] Spencer v. Bidwell, 49 Conn. 61.

[a] **Rule applied,** where the affidavit alleged right to possession in affiant as trustee of his wife, or in his wife in her own right. Spencer v. Bidwell, 49 Conn. 61.

[50] Churchill v. Rea, 126 Mich. 175, 85 NW 465.

[a] **Erroneous substitution** in one place of the names of defendants for plaintiffs does not vitiate the affidavit. Churchill v. Rea, 126 Mich. 175, 85 NW 465.

[§ 105] **bb. Taking or Detention**[51]**—(aa) In General.** An allegation that the property was unlawfully taken or unlawfully detained is not necessary where the statute requires no such allegation,[52] but the requirement being only that the allegation in this respect shall be that plaintiff is the owner and lawfully entitled to the possession of the property, such allegation is all that is necessary.[53] An allegation of unlawful taking or detention,[54] or that plaintiff was lawfully in possession of the property and that it was unlawfully taken from his possession,[55] is necessary, however, under statutes requiring it. Allegations in the language of the statute[56] or its equivalent[57] are sufficient; but the entire absence of any statement of a wrongful or other detention of the property is fatal when such statement is required.[58] It has been held, however, that in a court of record where the petition on file contains the allegation, this is sufficient to confer jurisdiction to issue the writ and it will be voidable merely.[59] An allegation that defendant wrongfully detains possession from plaintiff is insufficient to show such possession in defendant as will unite with his right to a lien.[60]

Place of taking. At common law, replevin is a local action and the place, vill, or parish must be averred;[61] but under statutory provisions enlarging the remedy and making it transitory in its nature, it is not necessary to allege the particular place where the property was taken.[62]

[§ 106] **(bb) Cause of Taking, or Detention.** The statutes often require that the affidavit in replevin shall allege the cause of detention according to the best knowledge, information, and belief of the person making the affidavit,[63] that the property was not taken for any tax, fine, or assessment,[64] and that it was not seized under any execution, attachment, or other legal process against the property of the plaintiff in replevin,[65] or that if so seized, the property is exempt from such seizure.[66] Such provisions, being general and without exceptions as to any action, apply indiscriminately to all actions of replevin,[67] notwithstanding the property is of such a character that the statement in its nature is inappropriate thereto;[68] and all the required facts must be sworn to exist, an omission of any of them being fatal to the writ or order of delivery.[69] A substantial compliance with the statute is sufficient with respect to the form of the allegation.[70]

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[51] **Taking, detention, or possession by defendant generally** see supra §§ 55-66.

[52] Whisler v. Roberts, 19 Ill. 274; Ryan v. Schutt, 135 Ill. A. 554.

[53] Whisler v. Roberts, 19 Ill. 274.

Averment as to title and right to possession generally see supra § 104.

[54] See statutory provisions; and Wilburn v. Flood, 16 Mich. 40, 93 AmD 203 (applying such statute). See also Crawshaw v. Wright, 5 Mo. A. 577.

[55] McArthur v. Hogan, 15 F. Cas. No. 8,659a, Hempst. 286.

[56] National Enameling, etc., Co. v. Kaplan, 53 App. Div. 96, 65 NYS 732.

[57] Smith v. Dodge, 37 Mich. 354; Cartwright v. Smith, 104 Tenn. 689, 58 SW 331.

[a] **Thus,** (1) although the word "detained" is omitted, to say that a man has property in his possession unlawfully, to which another is entitled, means about the same thing as to say it is detained, and the affidavit is not fatally defective. Smith v. Dodge, 37 Mich. 354. (2) So an affidavit stating that plaintiff was entitled to possession of the property, which was then in the possession of defendant, and that it was not subject to seizure, was a substantial compliance with the statute, and defendant's motion to quash the writ was properly overruled. Cartwright v. Smith, 104 Tenn. 689, 58 SW 331.

[58] McArthur v. Hogan, 15 F. Cas. No. 8,659a, Hempst. 286; Hudelson v. Tobias First Nat. Bank, 51 Nebr. 557, 71 NW 304.

[59] Hudelson v. Tobias First Nat. Bank, supra.

[60] Brownell v. Twyman, 68 Ill. A. 67.

[a] **Thus** the mere fact that plaintiff in his affidavit alleges that defendant wrongfully detains possession from him will not by itself show possession in defendant so as to unite such possession to her right to a landlord's lien, and to enable her to retain such possession as against plaintiff an innocent purchaser from the tenant apparently in possession, where the purchaser was actually in possession for the purpose of removing the property when defendant interfered with such removal. Brownell v. Twyman, 68 Ill. A. 67.

[61] Whisler v. Roberts, 19 Ill. 274.

[62] Whisler v. Roberts, supra.

[63] See statutory provisions.

[64] See statutory provisions.

[a] **Validity of tax.**—(1) The taking for a tax cannot be negatived in a form merely to raise the question of the validity of the tax, leaving the implication that the property had been taken in fact for a tax of some description, since the policy of the state forbids the stay of the execution of its revenue laws by such means. McClaughry v. Cratzenberg, 39 Ill. 117. (2) But an exception in this respect is sometimes made by the statute, and the form of affidavit in that kind of a case is prescribed. See statutory provisions. (3) Thus, under a statute in effect permitting replevin of property taken under color of a warrant against plaintiff for the collection of a tax assessment or fine issued in pursuance of a statute of the state or of the United States, providing that the affidavit delivered to the sheriff states either that the taking was unlawful by reason of defects in the process or other cause specified, or that the detention is unlawful by reason of facts specified, which have subsequently occurred, an affidavit is insufficient, as stating a mere conclusion, where it alleges that the process was defective, in that the tax contained moneys which were not legally chargeable, but does not state what moneys were improperly included. Norris v. Jones, 7 Misc. 198, 27 NYS 209 [aff 81 Hun 304, 27 NYS 209, 30 NYS 1134]. (4) The regularity of such an affidavit will not, however, be considered when questioned by a motion not sufficiently specifying the irregularities. Paddock v. Guyder, 8 NYS 905.

[65] See statutory provisions.

[a] **Control of particular statute omitting requirement.**—Although the statute requires the affidavit for a writ of replevin in circuit court to aver that the property sought to be replevied had not been taken from plaintiff for any tax or assessment, nor seized under any execution or attachment against his goods, where such provision is omitted from the statute relating exclusively to proceedings in replevin before justices of the peace, in such actions the affidavit is not required. Bringhurst v. Pollard, 6 Ind. 452.

[b] **Validity of judgment, process, or execution.**—(1) A valid judgment cannot be successfully contested in any way except by proceedings to set it aside. So the object of such statute is not solely to protect the process of the court when issued on a valid judgment. The object of the clause, as drawn from its language, and from other parts of the section, as well as from the history of the action known as replevin, is to compel a party who desires to contest the validity of any judgment or order of a court, or any tax, fine, or amercement, or any other mesne or final process, so to do in some other way than by seizing property already in the custody of the law. An order of attachment is most frequently issued by the clerk under the law. If improvidently issued, and property is seized, the remedy of taking it out of the possession of the law, and by such a proceeding trying the validity of the order or writ is not tolerated. A safer and more reasonable remedy exists. Much less ought the validity of a judgment to be contested in such a proceeding. Westenberger v. Wheaton, 8 Kan. 169. (2) Accordingly plaintiff, seeking to recover property levied on under execution in a suit by infants, can not evade such provision by alleging that the property was not seized under any "valid process or execution." Stephens v. Curtner, 205 Mo. A. 255, 222 SW 497. (3) On the other hand it has been held that the purpose of the statute in requiring an averment that the property was not taken in execution, etc., was to prevent one from replevying property which has been seized on execution issued upon a valid judgment against him, and should not be construed as prohibiting in all cases the replevin of property which has been levied upon by an officer under an execution, where the judgment is void or has been paid. Muller v. Plue, 45 Nebr. 701, 64 NW 232 [overr Wilson v. Macklin, 7 Nebr. 50 (which held that an affidavit stating that the goods were not taken in execution on any order or judgment against plaintiff, but were taken by execution issued against plaintiff on a void judgment, was defective and that plaintiff could not assail the validity of the judgment upon which the execution issued)].

Collateral attack on judgment by subsequent action of replevin see Judgments § 830.

[66] See statutory provisions.

[§ 107] **cc. Demand.** In an action founded upon wrongful detention only, and not upon a wrongful taking of a chattel, a demand for the return of the property must be alleged in the affidavit.[71] The failure of the affidavit to meet this requirement goes to the validity of the writ itself and makes it void.[72]

[§ 108] **dd. Description and Value of Property—(aa) Description.** It is essential to a proper affidavit in replevin that it describe the property sued for in such manner as to afford the means of identifying it,[73] and the affidavit is sufficient as to description if it does this.[74] In the subjoined notes may be found illustrations of descriptions which have been held sufficient[75] or have been held insuf-

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[a] **Averment substantially in statutory language** (1) is sufficient. Carlson v. Small, 32 Minn. 492, 21 NW 737. And see cases infra note 70. (2) Thus, although the correct practice is to state the case accurately either negativing the taking of the property under lawful process, or stating that process has been levied thereon, and that it is exempt, an affidavit stating that the property "was not taken from him [plaintiff] by any process legally and properly issued against him, or, if so taken, it was exempt" is not void. Carlson v. Small, supra.

67. Phenix v. Clark, 2 Mich. 327.

68. Phenix v. Clark, supra.

[a] **Rule applied** to replevin of assessment roll by highway commissioners from township supervisor. Phenix v. Clark, 2 Mich. 327.

69. Ill.—McClaughry v. Cratzenberg, 39 Ill. 117; Campbell v. Head, 13 Ill. 122; Clow v. Gilbert, 54 Ill. A. 134.

Kan.—Westenberger v. Wheaton, 8 Kan. 169.

Ky.—Halcomb v. Phipps, 194 Ky. 648, 240 SW 363.

Mich.—Phenix v. Clark, 2 Mich. 327.

N. Y.—Northwest Engineering Co. v. Rappl, 132 Misc. 497, 230 NYS 177.

N. C.—Hirsh v. Whitehead, 65 N. C. 516.

Okl.—Anglo-American Mill Co. v. Milam, 133 Okl. 271, 272 P. 430.

70. Ark.—Higgason v. Braswell, 163 Ark. 348, 258 SW 983.

Kan.—Williams v. Gardner, 22 Kan. 122; Auld v. Kimberlin, 7 Kan. 601.

Mich.—Stever v. Brown, 119 Mich. 196, 77 NW 704.

Minn.—Carlson v. Small, 32 Minn. 492, 21 NW 737.

Okl.—Scott v. Jones, 7 Okl. 42, 54 P 308.

[a] **Thus** (1) an affidavit alleging that the property in question "was not taken in execution on or under a judgment against the plaintiff," nor "by virtue of any other mesne or final process" issued against plaintiff, was not insufficient because the allegation was not in the language of the statute that the property "was not taken in execution on any order or judgment against the plaintiff," and was sufficient to confer jurisdiction although it might have been defective in form. Williams v. Gardner, 22 Kan. 122. (2) Where the affidavit did not expressly state in specific terms and in the very language of the statute that "the property had not been seized by virtue of an order of delivery issued under this article," but it did state, in addition to the other statutory averments required in the affidavit of replevin, that "the property was not taken on execution by any order of the court," it was held that since "an order of delivery issued under this article" is "an order of the court," the omitted clause is adequately covered by the language used. Scott v. Jones, 7 Okl. 42, 54 P 308. (3) An affidavit of replevin given to secure an order of delivery of two bales of cotton, which alleges that the cotton was not taken as a tax or fine against plaintiff, but merely stored for safe-keeping, inferentially shows that the property was not taken under a judgment or execution as required by the statute. Higgason v. Braswell, 163 Ark. 348, 258 SW 983.

71. People v. Lauer, 80 Misc. 436, 141 NYS 299.

72. Northwest Engineering Co. v. Rappl, 132 Misc. 497, 230 NYS 177.

73. Ark.—Spear v. Arkansas Nat. Bank, 111 Ark. 29, 163 SW 508, Ann Cas1916A 735; King v. Connevy, 52 Ark. 115, 12 SW 203; Hawes v. Robinson, 44 Ark. 308; Hill v. Robinson, 16 Ark. 90.

Conn.—Brown v. Poland, 54 Conn. 313, 7 A 719.

Ill.—Chatterton v. Saul, 16 Ill. 149.

Kan.—Upton v. Pendry, 109 Kan. 744, 202 P 73, 76 [reh den 110 Kan. 191, 203 P 300, and cit Cyc].

Mich.—Simmons v. Robinson, 101 Mich. 240, 59 NW 623; Peterson v. Fowler, 76 Mich. 258, 43 NW 10; Proper v. Conkling, 67 Mich. 244, 34 NW 560.

Mo.—Blurton v. Hansen, 135 Mo. A. 548, 116 SW 474.

Nebr.—Sullivan v. Hansen, 95 Nebr. 779, 146 NW 983.

N. Y.—McCarthy v. Ockerman, 154 N. Y. 565, 49 NE 153; National Enameling, etc., Co. v. Kaplan, 53 App. Div. 96, 65 NYS 732; Thorn v. Lazarus, 39 App. Div. 508, 57 NYS 279; Schweitering v. Rothschild, 26 App. Div. 614, 50 NYS 206; Marshall v. Friend, 33 Misc. 443, 68 NYS 502; Springfield Metal Casket Co. v. Wielar, 26 Misc. 863, 56 NYS 394; Sloan v. Implement Dealers' Mfg. Co., 25 Misc. 451, 55 NYS 558; Devoe v. Selig, 25 Misc. 411, 54 NYS 941; Van Dyke v. New York State Banking Co., 18 Misc. 661, 43 NYS 735.

Ont.—Jones v. Cook, 2 Ont. Pr. 396.

"The affidavit . . . should identify the property replevined." Sullivan v. Hansen, 95 Nebr. 779, 146 NW 983.

[a] **Description as personalty.**—In replevin for a steam sawmill and its appurtenances the affidavit must aver that the property in question is personal estate. Chatterton v. Saul, 16 Ill. 149.

74. Ark.—King v. Connevy, 52 Ark. 115, 12 SW 203.

Kan.—Upton v. Pendry, 109 Kan. 744, 202 P 73, 76, 203 P 300 [cit Cyc].

Mich.—Peterson v. Fowler, 76 Mich. 258, 43 NW 10.

Mo.—Blurton v. Hansen, 135 Mo. A. 548, 116 SW 474.

N. Y.—McCarthy v. Ockerman, 154 N. Y. 565, 49 NE 163.

75. See cases infra this note.

[a] **Itemized schedule.**—In a replevin for articles used in a hotel, where a schedule of two or three hundred articles was itemized and the aggregate value given, and by leave of court the affidavit was amended to show plaintiff entitled to all the goods and chattels on the premises the value of which did not exceed the sum first named, the affidavit and amendment, together with the list, was a sufficient description of the property. Upton v. Pendry, 109 Kan. 744, 202 P 73, 76 [reh den 110 Kan. 191, 203 P 300, and cit Cyc].

[b] **Place where property found.**—An affidavit describing the property as "one lot of wood" and giving the place where it would be found is sufficient. Peterson v. Fowler, 76 Mich. 258, 43 NW 10.

[c] **Dry goods.**—An affidavit describing the property as "all the dry goods, notions, carpets, wall paper, crockery, boots and shoes, groceries, fixtures, safe, and the personal effects of Parsons & Beach, in the Birdsall Block, in the said village of Whitney's Point," although in general terms, is sufficient. McCarthy v. Ockerman, 154 N. Y. 565, 49 NE 153.

[d] **Lumber.**—An affidavit describing the lumber as North Carolina pine, and giving an itemized and detailed statement of the various sizes, and in many instances of the particular grade, and of the use for which designed, with the respective quantity in feet of each kind is sufficient. Sloan v. Implement Dealers' Mfg. Co., 25 Misc. 451, 55 NYS 558.

[e] **Mare** described in an affidavit as a blazed-faced, cream-colored mare, eight or nine years old, described in a certain mortgage of record as being a cream-colored mare seven years old, is sufficiently described in such affidavit. King v. Connevy, 52 Ark. 115, 12 SW 203.

[f] **"One sewing machine and one pool-table"** is a sufficient description. Proper v. Conkling, 67 Mich. 244, 34 NW 560.

[g] **Ore.**—The description in a replevin affidavit which described the property as two thousand five hundred pounds of zinc and lead ore, the same being a quantity of such ore delivery, to defendants on the ———

ficient,[76] or which have been questioned.[77]

[§ 109] **(bb) Value.**[78] Although statutes requiring such averment must be complied with,[79] when the statute does not, in terms, require the affidavit to state the value of the property, and the jurisdiction of the court does not depend upon value, it need not be stated.[80] It is otherwise, however, as to inferior courts whose jurisdiction is limited by the amount or value of property in controversy, as in the case of justices of the peace,[81] or when such a showing is required by the statute as a condition to the exercise of jurisdiction,[82] notwithstanding such averment has been omitted from a form prescribed by the same statute.[83] Even where the statute does not specifically require such fact to be shown by affidavit, the jurisdiction of the justice which is made to depend upon the value of the property should be shown by the affidavit;[84] but the value need not be averred where the statute contemplates that the writ may issue from a justice of the peace for property of greater value than the amount limiting his jurisdiction.[85] A statute requiring the affidavit to state the value of the property is not satisfied by a statement of the value of a portion thereof.[86]

Purpose of statement of value required in the affidavit under some statutes has been held to be to fix the amount of the replevin and redelivery bonds,[87] to aid in identifying the property,[88] and to determine the jurisdiction of the court where jurisdiction is limited by the amount involved.[89]

Statement of aggregate value satisfies the general terms of a statement of the real value of the property,[90] and under a statute requiring the value of each of several articles claimed to be stated as near-

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day of July, 1907, to be milled, of the value of fifty dollars, and alleged that it had been damaged by being mixed with inferior ore is sufficient. Blurton v. Hansen, 135 Mo. A. 548, 116 SW 474.

[h] **"Quantity of wheat, rye, and oats,** being one-half of the grain grown on the Simmons farm in the year 1892," is a sufficient description. Simmons v. Robinson, 101 Mich. 240, 59 NW 623.

[i] **Wool pelts.**—An affidavit describing the property as "10,090 wool pelts, the wool taken therefrom, and the skins thereof (otherwise known as slats) in pickle or lime" is sufficient. Marshall v. Friend, 33 Misc. 443, 68 NYS 502.

[76] See cases infra this note.

[a] **Description intelligible only to an expert** is not a sufficient compliance with the statute. Van Dyke v. New York State Banking Co., 18 Misc. 661, 43 NYS 735.

[b] **Specification of property.**—(1) An affidavit describing the property sought to be replevied as "ten thousand, two hundred dollars, in money, currency of the United States," is insufficient for failure to indicate what specific money was to be taken by the sheriff. Spear v. Arkansas Nat. Bank, 111 Ark. 29, 163 SW 508, AnnCas1916A 735. (2) A description of property as "182 bushels of corn," without attempting to identify it, is insufficient. Sullivan v. Hansen, 95 Nebr. 779, 146 NW 983. (3) A description of property as ninety-eight trees which affiant has been informed and believes were cut upon a specified lot, is insufficient. Jones v. Cook, 2 Ont. Pr. 396.

[c] **Unexplained abbreviations, figures, and letters.**—An Affidavit describing some of the articles by abbreviations and by figures and letters, the meaning of which is not shown by anything contained in the schedule or in the affidavit is insufficient. National Enameling, etc., Co. v. Kaplan, 53 App. Div. 96, 65 NYS 732.

[d] **Unintelligible descriptions** are insufficient, as: (1) Where the affidavit simply referred to some pieces and numbers of yards and other unintelligible numbers (Schweitering v. Rothschild, 26 App. Div. 614, 50 NYS 206); (2) where the chattels were described as "Eleven cotton linings, 610 1-4 yds.; 9 cotton linings, 459 yds.; 3 6-4 woolen cloth, 201 4-8 yds." (Devoe v. Selig, 25 Misc. 411, 54 NYS 941); (3) where the property was described as "2 6–0 elliptic solid copper lining; 1 6–0 octagon, solid copper lining, full glass; 1 6–3 elliptic, zinc plated, full glass; 1 5–9 elliptic zinc plated, full glass" (Springfield Metal Casket Co. v. Wielar, 26 Misc. 863, 56 NYS 394).

[77] See infra this note.

[a] **"Fifteen hundred pounds of seed cotton"** is sufficiently descriptive of the article, and also of the quantity; but since the officer was required to take it into his possession, it was held very doubtful whether some further identification of the particular cotton sought to be recovered should not have been made, such as that it was a certain place, in a pen, or house, or in a pile. Hill v. Robinson, 16 Ark. 90.

[78] **Jurisdiction of justices as dependent on showing of value in affidavit** see Justices of the Peace § 85.

Necessity for, and purpose of, affidavit of value see supra § 99.

[79] Williams v. Williams, 117 Miss. 251, 78 S 152; Ex p. Lippitt, 12 Porto Rico 182.

[80] Rice v. Travis, 216 Ill. 249, 74 NE 801; Peo. v. Core, 85 Ill. 248; Mattoon Heat, etc., Co. v. Walker, 134 Ill. A. 414; Trujillo v. Tucker, 24 N. M. 339, 171 P 788; Tillotson v. Delfelder, 40 Wyo. 283, 276 P 935, 277 P 714.

[81] McClure v. Hill, 36 Ark. 268.

[a] **Liability in trespass.**—A justice who issues an order of delivery based upon an affidavit which fails to set forth the value of the property, and therefore to show or confer jurisdiction, is liable in trespass. McClure v. Hill, 36 Ark. 268.

[82] Colo.—Miller v. Graf, 14 Colo. A. 167, 59 P 416.

Mich.—Sager v. Shutts, 53 Mich. 116, 18 NW 580.

N. M.—Barruel v. Irwin, 2 N. M. 223.

N. Y.—Dennis v. Crittenden, 42 N. Y. 542; Jaynes v. Jaynes, 8 NYCiv Proc 99 [disappr Irr v. Schroeder, 6 NYCivProc 253 (holding that the affidavit was a jurisdictional prerequisite to the issue of the writ as a provisional remedy, and that judgment on the merits might be rendered, although a judgment on objection to the issue of the provisional writ should be reversed)].

Wis.—Darling v. Conklin, 42 Wis. 478.

[83] Barruel v. Irwin, 2 N. M. 223.

[84] Rice v. Travis, 216 Ill. 249, 74 NE 801.

[a] **Rule applied** in construing a statutory provision under which jurisdiction is conferred upon justices of the peace "in actions of replevin when the value of the property claimed does not exceed $200." Rice v. Travis, 216 Ill. 249, 74 NE 801.

[b] **In Wisconsin** the point has not been decided but the court has expressed the opinion that it is much the safer practice to allege the value of the property in the affidavit, which is the foundation of the proceedings, and thus affirmatively show in the first instance that the justice has jurisdiction. Roach v. Moulton, 2 Pinn. (Wis.) 221.

[85] Hill v. Wilkinson, 25 Nebr. 103, 41 NW 134; Fergus v. Gagnon, 4 Nebr. (Unoff.) 25, 93 NW 146.

[a] **Jurisdiction dependent upon subsequent appraisement.**—The rule of the text has been applied under a statutory provision that "whenever the appraised value of the property so taken shall exceed two hundred dollars the justice shall certify the proceeding upon the said writ to the district court of his county," etc. In a certain sense, it is the appraisement of the property at a sum not in excess of the jurisdictional amount that gives the justice jurisdiction to try the cause; or more correctly speaking, the justice having jurisdiction of the cause, derived from the making and filing of the affidavit, will be divested of jurisdiction to try the cause by an appraisement of the property at a sum in excess of the jurisdictional amount; but in that case will retain jurisdiction to certify the proceedings to the district court. Hill v. Wilkinson, 25 Nebr. 103, 41 NW 134; Fergus v. Gagnon, 4 Nebr. (Unoff.) 25, 93 NW 146.

[86] Clough v. Greenwood, 27 B. C. 140.

[87] Tucson Cons. Nat. Bank v. Cunningham, 24 Ariz. 437, 210 P 850; Bernhardt v. Cappelletti, 104 Conn. 501, 133 A 576.

[88] Bernhardt v. Cappelletti, supra.

[89] Bernhardt v. Cappelletti, supra.

[90] Miller v. Graf, 14 Colo. A. 167, 59 P 416.

ly as practicable, when it is impracticable to do this a statement of the aggregate value will suffice.[91]

Inferential showing. Where statutes require value to be shown, an affidavit which inferentially shows it is sufficient.[92]

Negativing value in excess of jurisdiction. Some courts hold that it is necessary to negative value in excess of jurisdiction,[93] but the necessity of this has been denied by others.[94]

Affidavit of value need not aver, after specifying the value of the goods, that such value represented the cost to defendant of replacing them should the issue be decided in his favor.[95]

[§ 110] **(4) Construction.**[96] A statement in an affidavit will be construed so as to avoid unnecessary technicality;[97] and where it may be so read as to give to the language a natural meaning consonant with the requirements of the statute, this course will be adopted rather than to give the instrument a strained construction which will render it defective.[98]

[§ 111] **(5) Objections and Amendments—(a) Objections—aa. In General.** The affidavit and requisition indorsed thereon to obtain the immediate delivery of the property in the statutory action for that purpose should be considered in the nature of process;[99] and if used in a prohibited way,[1] or for a prohibited purpose,[2] the court, upon having its attention called to the matter, has a right to ascertain the fact and vindicate its process. Accordingly, in conformity with the general rules relating to the mode of taking objection to process,[3] objections based upon irregularities in plaintiff's affidavit may be raised by a plea in abatement,[4] by rule to show cause,[5] or by motion,[6] specifying the particular irregularities or defects relied on.[7] If a writ of replevin issues without any affidavit,[8] or with an affidavit made before an officer unauthorized to administer oaths,[9] it will be set aside; and if the order for delivery is made or the writ is improperly issued without the required affidavit, which is not essential to the jurisdiction of the court over the action, the remedy is the quashal or setting aside of the writ or order, and an order for the return of the property,[10] but not a dismissal of the suit,[11] or arrest of judgment.[12] A demurrer to the declaration does not reach a defective affidavit.[13]

Petition used as affidavit. When a petition is used as an affidavit[14] its insufficiency as an affidavit cannot be objected to by demurrer,[15] but the proper remedy is a motion to set aside the writ and return the property to defendant.[16]

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[91] Upton v. Pendry, 109 Kan. 744, 202 P 73, 76, 203 P 300 [cit Cyc].

[a] **Thus,** under such a statute a statement of the aggregate value is sufficient, and the separate value of each of two or three hundred items sought to be replevied need not be given where it would be impracticable to do so, especially where the matter is not before an inferior court whose jurisdiction would depend upon the value of the chattels in controversy. Upton v. Pendry, 109 Kan. 744, 202 P 73, 76, 203 P 300 [cit Cyc].

[92] Higgason v. Braswell, 163 Ark. 348, 258 SW 983.

[a] **For example,** an affidavit given to secure an order of delivery of two bales of cotton which alleges that plaintiff ought to recover the cotton or two hundred dollars for the debt. Higgason v. Braswell, 163 Ark. 348, 258 SW 983.

[93] Sager v. Shutts, 53 Mich. 116, 18 NW 580.

[a] **Illustration.**—Where the jurisdiction is conferred if the value of the property does not exceed a fixed sum, the affidavit which alleges a certain value within the jurisdictional amount without alleging that it does not exceed such jurisdictional amount in value is insufficient upon timely objection, because property worth more than such amount may be truly averred to be worth that sum. Sager v. Shutts, 53 Mich. 116, 18 NW 580.

[94] Dennis v. Crittenden, 42 N. Y. 542.

[a] **Thus** (1) it has been said that it is not a fair criticism that the property may be worth more than the jurisdictional amount, and that all the affiant means is that it is worth as much as the sum which he names as the actual value (Dennis v. Crittenden, 42 N. Y. 542); (2) and accordingly, under provisions first providing that the justice shall have jurisdiction of an action for possession of personalty "the value of which as stated in the affidavit," etc., "shall not exceed the sum of," etc., and next that before any process shall issue plaintiff shall make proof by affidavit showing the "actual value" of the property, it was held that the affidavit is sufficient if its states the value within the jurisdiction of the court without negativing the fact that the property does not exceed such amount in value, the provision that the value shall not exceed the jurisdictional amount not appearing in that portion of the statute which specifies what shall be shown by the affidavit (Dennis v. Crittenden, supra).

[95] Automobile Securities Co. v. Swisshelm, 269 Pa. 153, 112 A 56; Guinn v. Vitte, 63 Pa. Super. 611.

[96] **Statements taken as true** see supra § 101.

[97] Hudelson v. Tobias First Nat. Bank, 51 Nebr. 557, 71 NW 304.

[98] Hudelson v. Tobias First Nat. Bank, supra.

[a] **Right to immediate possession.**—Under a provision requiring the affidavit to state that plaintiffs are entitled to the "immediate" possession of the property, a liberal and natural construction of the language employed will be adopted to render sufficient the affidavit, which omits the word "immediate" but is phrased in the present tense, which will be taken to mean that plaintiffs are entitled to the instant possession. Hudelson v. Tobias First Nat. Bank, 51 Nebr. 557, 71 NW 304.

[99] Rice v. Thayer, (Mo. A.) 217 SW 576, 577 [cit Cyc]; O'Reilly v. Good, 42 Barb. (N. Y.) 521.

[1] Rice v. Thayer, (Mo. A.) 217 SW 576, 577 [cit Cyc]; Buell v. French, 24 OhNPNS 225, 226, 235 [cit Cyc].

[2] Rice v. Thayer, (Mo. A.) 217 SW 576; Buell v. French, 24 OhNP NS 225, 226, 235 [cit Cyc].

[3] See Process §§ 324, 326.

[4] Cox v. Grace, 10 Ark. 86; Spencer v. Bidwell, 49 Conn. 61.

[5] Adeimy v. Dleykan, 46 S. C. 159, 163, 107 SE 35, 36 [cit Cyc].

[6] Meyer v. Lane, 40 Kan. 491, 20 P 258; O'Reilly v. Good. 42 Barb. (N. Y.) 521; Paddock v. Guyder, 8 NYS 905; Ethridge v. Orcutt, 12 NYSt 372; Adeimy v. Dleykan, 46 S. C. 159, 163, 107 SE 35, 36 [cit Cyc].

[a] **Duty of court.**—When an affidavit for an order for the delivery of property is insufficient, it is the duty of the court, upon motion of defendant, to set the order aside, unless plaintiff, within a reasonable time to be fixed by the court, makes the affidavit sufficient by amendment. Meyer v. Lane, 40 Kan. 491, 20 P 258.

[7] Paddock v. Guyder, 8 NYS 905; Adeimy v. Dleykan, 46 S. C. 159, 163, 107 SE 35 [cit Cyc].

[8] Xenia Twine, etc., Co. v. Hooven, etc., Co., 11 Oh. Dec. (Reprint) 120, 25 CincLBul 10.

[9] Berrien v. Westervelt, 12 Wend. (N. Y.) 194.

[a] **For example,** a coroner. Berrien v. Westervelt, 12 Wend. (N. Y.) 194.

[10] Ark.—Schattler v. Heisman, 85 Ark. 73, 107 SW 196.

Kan.—Paul v. Hodges, 26 Kan. 225.

Mo.—Eads v. Stephens, 63 Mo. 90; Bingham v. Morrow, 29 Mo. A. 448.

Nebr.—Racine-Sattley Co. v. Meinen, 79 Nebr. 33, 114 NW 602 [vacating judgment on other grounds 79 Nebr. 32, 112 NW 321]; J. I. Case Threshing Mach. Co. v. Rosso, 78 Nebr. 184, 110 NW 686.

Okl.—Hutchings v. Cobble, 30 Okl. 158, 120 P 1013.

S. C.—Adeimy v. Dleykan, 116 S. C. 159, 163, 107 SE 35 [cit Cyc].

[11] Eads v. Stephens, 63 Mo. 90; Bingham v. Morrow, 29 Mo. A. 448; Abel v. Teets, 28 S. D. 633, 134 NW 817.

[12] Keen v. Munger, 52 Mo. A. 660.

[13] Cox v. Grace, 10 Ark. 86; Magdeburg v. Uihlein, 53 Wis. 165, 10 NW 363.

Truth of allegations in the affidavit may be inquired into to defeat the proceedings;[17] and where a material and essential allegation is found to be false, plaintiff can stand in no better position than if he had made no affidavit whatever,[18] and the court has power to set aside the proceedings[19] whether the affidavit was made fraudulently[20] or ignorantly.[21] The proper method of presenting the issue is by answer[22] and not, although there seems to be authority to the contrary,[23] by motion.[24]

Hearing of objection. Secondary evidence is admissible on the hearing of a motion to quash the writ for want of affidavit, to show that the affidavit was duly made and filed, but was afterwards lost or mislaid.[25]

[§ 112] **bb. Time To Object, and Waiver.** Objections to the affidavit should be taken promptly,[26] and if not seasonably taken they may be waived.[27] Thus by appearing generally and pleading without objection and trying the cause upon the merits, defendant waives informalities, amendable defects, and clerical errors therein.[28] So it has been held too late to question the validity of the affidavit after the writ is issued and served and the possession of the property secured by plaintiff,[29] after the order or writ is issued and served and there has been a defense to the action on the merits, and a verdict for plaintiff,[30] or after expiration of the time in which to reclaim the property or to except to plaintiff's sureties;[31] and a delay until time to answer has expired has been disapproved.[32] Where the affidavit in an action before a justice of the peace is jurisdictional, objections for failure to file it may be raised for the first time when the cause is removed to the appellate court and called for trial there,[33] and failure to raise the objection either before the magistrate or in the circuit court cannot operate as a waiver.[34]

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[14] See supra § 102.

[15] Halcomb v. Phipps, 194 Ky. 648, 240 SW 363.

[16] Halcomb v. Phipps, supra.

[17] Rice v. Thayer, (Mo. A.) 217 SW 576; Xenia Twine, etc., Co. v. Hooven, etc., Co., 11 Oh. Dec. (Reprint) 120, 25 CincLBul 10.

[a] **For example,** to defeat a cross replevin. Xenia Twine, etc., Co. v. Hooven, etc., Co., 11 Oh. Dec. (Reprint) 120, 25 CincLBul 10; Buell v. French, 24 OhNPNS 225, 226, 235 [cit Cyc].

[18] O'Reilly v. Good, 42 Barb. (N. Y.) 521; Buell v. French, 24 OhNPNS 225, 226, 235 [cit Cyc].

[19] O'Reilly v. Good, 42 Barb. (N. Y.) 521; Buell v. French, 24 OhNPNS 225, 226, 235 [cit Cyc].

[20] O'Reilly v. Good, 42 Barb. (N. Y.) 521; Buell v. French, 24 OhNPNS 225, 226, 235 [cit Cyc].

[21] O'Reilly v. Good, 42 Barb. (N. Y.) 521; Buell v. French, 24 OhNPNS 225, 226, 235 [cit Cyc].

[a] **Rule applied** to the falsity of the allegation that the property sought to be replevied had not been taken under process against plaintiff or for a tax, etc. O'Reilly v. Good, 42 Barb. (N. Y.) 521.

[22] Perryman v. Brown, 25 Okl. 138, 105 P 680.

[23] Buell v. French, 24 OhNPNS 225, 226, 235 [cit Cyc].

[a] **Motion for order directing return** of property on ground that writ of replevin issued in the case was wrongfully and fraudulently obtained has been granted where the fraud charged was in swearing falsely in the affidavit. Buell v. French, 24 OhNPNS 225, 226, 235 [cit Cyc].

[24] Perryman v. Brown, 25 Okl. 138, 105 P 680.

[25] Morgan v. Morgan, 31 Miss. 546.

[26] Ark.—Hawes v. Robinson, 44 Ark. 308.

Fla.—Branch v. Branch, 6 Fla. 314.

Ill.—Frink v. Flanagan, 6 Ill. 35.

Ind.—Eddy v. Beal, 34 Ind. 159.

Kan.—Auld v. Kimberlin, 7 Kan. 601.

Mich.—Sager v. Shutts, 53 Mich. 116, 18 NW 580.

Minn.—McKee v. Metraw, 31 Minn. 429, 18 NW 148.

Nebr.—Hudelson v. Tobias First Nat. Bank, 51 Nebr. 557, 71 NW 304.

N. M.—Sakariason v. James, 22 N. M. 437, 163 P 1080.

N. Y.—Paddock v. Guyder, 8 NYS 905; Ethridge v. Orcutt, 12 NYSt 372.

Oh.—Harrison v. Mack International Motor Truck Corp., 20 Oh. A. 256, 151 NE 797 [cit Cyc].

Okl.—Hutchings v. Cobble, 30 Okl. 158, 120 P 1013.

N. B.—Dalhousie Lumber Co., Ltd. v. Walker, 44 N. B. 81.

[a] **Rule applied** (1) as to defective averment that goods were not taken in execution or under any order or judgment against plaintiff. Auld v. Kimberlin, 7 Kan. 601. (2) In such case where the motion to set aside an order of delivery is not made until after answer filed and issues made up, and not called up for action of the court until six months later, some discretion is left to the courts and it is not unreasonable to hold that in ordinary cases such a motion ought not to be heard just as a cause is called up for hearing. Auld v. Kimberlin, supra.

[27] Fla.—Branch v. Branch, 6 Fla. 314.

Ill.—Frink v. Flanagan, 6 Ill. 35.

Ind.—Eddy v. Beal, 34 Ind. 159.

Kan.—Minneapolis Threshing Mach. Co. v. Francisco, 106 Kan. 704, 189 P 981.

Mich.—Sager v. Shutts, 53 Mich. 116, 18 NW 580.

Minn.—McKee v. Metraw, 31 Minn. 429, 18 NW 148.

Nebr.—Hudelson v. Tobias First Nat. Bank, 51 Nebr. 557, 71 NW 304.

N. M.—Sakariason v. James, 22 N. M. 437, 163 P 1080.

Oh.—Gaiser v. Heim, 8 Oh. Cir. Ct. 120, 4 Oh. Cir. Dec. 378.

Okl.—Hutchings v. Cobble, 30 Okl. 158, 120 P 1013.

N. B.—Dalhousie Lumber Co., Ltd. v. Walker, 44 N. B. 81.

[a] **Rule applied** to objection that statement of value does not negative the fact that the value does not exceed the jurisdictional amount. Sager v. Shutts, 53 Mich. 116, 18 NW 580.

[28] Fla.—Branch v. Branch, 6 Fla. 314.

Ill.—Frink v. Flanagan, 6 Ill. 35; Blake-Silkwood Motor Co. v. Spires, 245 Ill. A. 148; Fisher v. Brown, 111 Ill. A. 486.

Ind.—Eddy v. Beal, 34 Ind. 159; Smith v. Emerson, 16 Ind. 355; Mooney v. Myers, 5 Blackf. 331; Perkins v. Smith, 4 Blackf. 299.

Kan.—Minneapolis Threshing Mach. Co. v. Francisco, 106 Kan. 704, 189 P 981, 983 [cit Cyc].

Mich.—Clark v. Dunlap, 50 Mich. 492, 15 NW 565; Smith v. Dodge, 37 Mich. 354; Baker v. Dubois, 32 Mich. 92.

Minn.—McKee v. Metraw, 31 Minn. 429, 18 NW 148.

Nebr.—Hudelson v. Tobias First Nat. Bank, 51 Nebr. 557, 71 NW 304.

N. M.—Sakariason v. James, 22 N. M. 437, 163 P 1080.

Oh.—Gaiser v. Heim, 8 Oh. Cir. Ct. 120, 4 Oh. Cir. Dec. 378.

Okl.—Hutchings v. Cobble, 30 Okl. 158, 120 P 1013.

N. B.—Dalhousie Lumber Co., Ltd. v. Walker, 44 N. B. 81.

[a] **In New York** (1) a distinction has been made between actions commenced by writ of replevin and those commenced by service of summons distinct from the replevin proceedings. McAdam v. Walbrau, 8 NYCiv Proc 451. (2) In actions of the latter type it has been held that objections to the affidavit made in support of process for the immediate delivery of property are not waived by a general appearance in the action (McAdam v. Walbrau, supra), (3) although under the earlier practice when the action was commenced by the writ, such appearance operated as a waiver (McAdam v. Walbrau, supra). (4) This distinction was not observed in an early case deciding that appearance operated to waive. Hyde v. Patterson, 1 AbbPr 248.

[b] **Defect requiring dismissal if presented on time** may be waived by answering without objection in an action before a justice of the peace. McKee v. Metraw, 31 Minn. 429, 18 NW 148.

[c] **Failure to state facts as to special ownership** is waived by failing to call the attention of the trial court thereto. Minneapolis Threshing Mach. Co. v. Francisco, 106 Kan. 704, 189 P 981, 983 [cit Cyc].

[d] **Omission to state value** (1) has been considered a defect which is not material after appearance and pleading to the merits (Mooney v. Myers, 5 Blackf. (Ind.) 331; Perkins v. Smith, 4 Blackf. (Ind.) 299), (2) as where in an action before a justice of the peace, the statement of demand filed before the writ issued stated the value of the property (Mooney v. Myers, supra).

[e] **Omission of "limited" after company's name** in the body of the affidavit is waived by entering an appearance after having an opportunity of knowing the contents of the affidavit. Dalhousie Lumber Co., Ltd. v. Walker, 44 N. B. 81.

Excepting to sureties. Irregularities in an affidavit are waived by excepting to the sureties on plaintiff's undertaking.[35]

Defects not specified in notice of motion to vacate the writ cannot be urged as a ground of the motion.[36]

[§ 113] **(b) Amendment[37]—aa. In General.** In replevin, amendments may be made to meet objections to and cure defects in the affidavit, under statutes specifically relating to actions of replevin,[38] and, without the aid of any statute particularly relating to this form of action,[39] under the general rules and statutory provisions governing the subject of the amendments.[40] Amendments may be allowed to correct defective statements,[41] the affidavit not being jurisdictional,[42] and to introduce matters purely explanatory of the facts stated in the original affidavit, not amounting to new substantive matter,[43] and even to obviate objections of a substantial nature where the objection does not go to the jurisdiction of the court;[44] and, in applying these rules,[45] amendments have been permitted for the purpose of curing defective statements as to the description of the property,[46] as to the ownership, title, and right to possession of the property,[47] or as to the taking or detention.[48] But before an omission may be supplied or a mistake corrected, jurisdiction of the person, property, and cause of action must have been regularly acquired,[49] and an amendment to cure an irregularity essential to jurisdiction will not be allowed.[50] An amendment which could not obviate

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29. Harrison v. Mack International Truck Corp., 20 Oh. A. 256, 151 NE 797 [cit Cyc].

30. Hawes v. Robinson, 44 Ark. 308.

[a] **For example**, an objection that the affidavit does not contain a specific description of the property. Hawes v. Robinson, 44 Ark. 308.

31. Ethridge v. Orcutt, 12 NYSt 372.

32. Paddock v. Guyder, 8 NYS 905.

33. See infra § 349.

34. Detroit Safe Co. v. Kelly, 78 Wis. 134, 47 NW 187.

35. Brenker v. Dlatt, 116 NYS 575.

36. Brenker v. Dlatt, supra.

37. **Amendment of affidavits used as pleadings** see infra § 203.

38. See statutory provisions.

[a] **Thus**, an affidavit may be amended to make it show that the goods had not been seized under process against "plaintiffs" instead of against "affiant." Fisher v. Brown, 111 Ill. A. 486.

39. Frink v. Flanagan, 6 Ill. 35; Cutler v. Rathbone, 1 Hill (N. Y.) 204.

40. Ill.—Blake-Silkwood Motor Co. v. Spires, 245 Ill. A. 148; Colborn v. Barton, 14 Ill. A. 449.

Kan.—Minneapolis Threshing Mach. Co. v. Francisco, 106 Kan. 704, 189 P 981, 983 [cit Cyc]; Washington Nat. Bank v. Rooney, 96 Kan. 133, 150 P 555; Meyer v. Lane, 40 Kan. 491, 20 P 258; Williams v. Gardner, 22 Kan. 122.

Mich.—Taylor v. Judge Kalamazoo Cir. Ct., 100 Mich. 181, 58 NW 835.

Miss.—McCarty v. Key, 87 Miss. 248, 39 S 780.

Nebr.—Tackaberry v. Gilmore, 57 Nebr. 450, 78 NW 32; Crawford Commercial State Bank v. Ketcham, 46 Nebr. 568, 65 NW 201; Crans v. Cunningham, 13 Nebr. 204, 13 NW 176; Wilson v. Macklin, 7 Nebr. 50.

N. Y.—Thorn v. Lazarus, 39 App. Div. 508, 57 NYS 279; Van Dyke v. New York State Banking Co., 18 Misc. 661, 43 NYS 735; McAdam v. Walbrau, 8 NYCivProc 451; Depew v. Leal, 2 AbbPr 131; Stacy v. Farnham, 2 HowPr 26.

Oh.—Van Halen v. Ridgeway, 2 Oh. Dec. (Reprint) 66, 1 WestLMonth 280.

S. C.—Adeimy v. Dleykan, 116 S. C. 159, 107 SE 35, 37 [cit Cyc].

Tenn.—Applewhite v. Allen, 8 Humphr. 697.

[a] **Informality and indefiniteness.**—"An original affidavit in replevin may be amended so as to state sufficiently what has already been stated informally and indefinitely." Meyer v. Lane, 40 Kan. 491, 492, 20 P 258.

41. Fisher v. Brown, 111 Ill. A. 486; Meyer v. Lane, 40 Kan. 491, 20 P 258; McCarty v. Key, 87 Miss. 248, 39 S 780; Commercial State Bank v. Ketcham, 46 Nebr. 568, 65 NW 201; Lewis v. Connolly, 29 Nebr. 222, 45 NW 622; Armour v. Arres, 5 Nebr. (Unoff.) 383, 98 NW 843.

42. Frink v. Flanagan, 6 Ill. 35; Cutler v. Rathbone, 1 Hill (N. Y.) 204.

43. Depew v. Leal, 2 AbbPr (N. Y.) 131.

44. Colborn v. Barton, 14 Ill. A. 449; Hudelson v. Tobias First Nat. Bank, 51 Nebr. 557, 71 NW 304.

[a] **Petition supplying defect.**—The rule has been applied in a court of record, where a defect which would have been fatal to the affidavit on objection was held to be amendable, the petition supplying the necessary allegation. Hudelson v. Tobias First Nat. Bank, 51 Nebr. 557, 71 NW 304.

45. See supra text and notes 38–44.

46. Thorn v. Lazarus, 39 App. Div. 508, 57 NYS 279; Van Dyke v. New York State Banking Co., 18 Misc. 661, 43 NYS 735; Depew v. Leal, 2 AbbPr (N. Y.) 131.

47. See cases infra this note.

[a] **Thus** (1) an amendment may be allowed to cure defects with respect to averments of ownership and right to possession. Tackaberry v. Gilmore, 57 Nebr. 450, 78 NW 32; Applewhite v. Allen, 8 Humphr. (Tenn.) 697. (2) So an amendment of the affidavit to conform to the allegation of ownership contained in an amended petition may be granted (Tackaberry v. Gilmore, supra), (3) and where a trustee sued out the writ by affidavit in his own name without adding the word "trustee," he will not fail in showing that he held as trustee, but an amendment will be allowed (McCarty v. Key, 87 Miss. 248, 39 S 780). (4) A defect with respect to averment of special ownership is amendable (Minneapolis Threshing Mach. Co. v. Francisco, 106 Kan. 704, 189 P 981, 983 [cit Cyc]; Williams v. Gardner, 22 Kan. 122), (5) as where there is a failure to set out a right claimed under a writing (Depew v. Leal, 2 AbbPr (N. Y.) 131).

48. See cases infra this note.

[a] **Thus** an amendment may be allowed to cure a defect in respect of an averment that property was not taken for any tax, fine, or assessment, or seized under any execution, attachment, or other legal process against it. Colborn v. Barton, 14 Ill. A. 449; Taylor v. Kalamazoo Cir. Ct. Judge, 100 Mich. 181, 58 NW 835; Wilson v. Macklin, 7 Nebr. 50.

49. Northwest Engineering Co. v. Rappl, 132 Misc. 497, 230 NYS 177.

50. Commercial State Bank v. Ketcham, 46 Nebr. 568, 61 NW 201; Armour v. Arres, 5 Nebr. (Unoff.) 383, 98 NW 843; Northwest Engineering Co. v. Rappl, 132 Misc. 497, 230 NYS 177; Jaynes v. Jaynes, 8 NYCivProc 99; Clendenning v. Guise, 8 Wyo. 91, 55 P 447. See Crawshaw v. Wright, 5 Mo. A. 577.

[a] **Rule applied.**—Where the affidavit showed the value of the property to be beyond the jurisdiction of the court. Jaynes v. Jaynes, 8 NYCivProc 99.

[b] **On appeal** (1) from the judgment of the justice an amendment is refused to cure fatal defects in a jurisdictional affidavit. Commercial State Bank v. Ketcham, 46 Nebr. 568, 61 NW 201; Clendenning v. Guise, 8 Wyo. 91, 55 P 447. (2) Where the writ is attacked by motion to quash

the objection to the remedy by replevin is properly rejected.[51]

By making new affidavit. An affidavit of ownership, informal and defective for being entitled, may be amended in this respect by the making and filing of a new affidavit[52] and a defect as to description may be corrected by a supplementary affidavit.[53] So an amendment may be allowed upon just terms by the filing of an affidavit in proper form in the place of a verification of a pleading upon belief.[54]

Amendment by agent of plaintiff other than the agent who made the original affidavit is permissible.[55]

Discretion of court. A motion to amend an affidavit in replevin is addressed to the sound discretion of the court;[56] but it has been held to be the duty of the court to allow the amendment where the ends of justice will be subserved thereby.[57]

[§ 114] **bb. Time To Amend.** An amendment to the affidavit may be made after issuance and execution of the order of delivery,[58] when the particular objection is raised,[59] especially when the objection is not timely,[60] or even after the objection is presented.[61] It may be allowed while the issues formed by the pleadings are being tried before a referee[62] or at any time before trial, or on the trial, where such amendment will be in furtherance of justice;[63] but the application to amend should be made before the cause is dismissed or a motion to quash is sustained.[64]

[§ 115] **cc. Imposition of Conditions.** Upon granting leave to amend, the court may,[65] or, as it has been held, must,[66] impose reasonable conditions as to costs. If plaintiff fails to comply therewith he forfeits only his right to amend,[67] and it is error to dismiss the case, if one is properly presented by the pleadings, for such noncompliance.[68]

[§ 116] **b. Bond or Undertaking[69]—(1) In General—(a) Nature and Purpose.** The bond or undertaking required in replevin proceedings to obtain possession of the property, pending the action,[70] is a substitute for the pledges at common law: plegii de prosequando, and plegii de retorno habendo.[71] Its purpose is to provide security to defendant, if he prevails, for a return of the property, and to indemnify him for such damages and costs as he may be entitled to recover,[72] and at the same time to indemnify

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on the ground that the rights and claims are alleged as in the individual individually instead of in the principal, it cannot be amended to make it an affidavit of the failure of the principal. Commercial State Bank v. Ketcham, supra; Armour v. Arres, 5 Nebr. (Unoff.) 383, 98 NW 843.

51. McClaughry v. Cratzenberg, 39 Ill. 117.

52. Stacy v. Farnham, 2 HowPr (N. Y.) 26.

53. Depew v. Leal, 2 AbbPr (N. Y.) 131.

54. Lewis v. Connolly, 29 Nebr. 222, 45 NW 622.

55. Colborn v. Barton, 14 Ill. A. 449.

56. McClaughry v. Cratzenberg, 39 Ill. 117; Campbell v. Head, 13 Ill. 122; Harris v. Le Masters, 215 Ill. A. 282; Barruel v. Irwin, 2 N. M. 223.

[a] **After quashing writ** while the record is still within the control of the court, it may within its discretion allow the amendment and set aside the order quashing the writ, but it is not bound to do so. Campbell v. Head, 13 Ill. 122.

57. Crans v. Cunningham, 13 Nebr. 204, 13 NW 176; Wilson v. Macklin, 7 Nebr. 50.

58. Washington Nat. Bank v. Rooney, 96 Kan. 133, 150 P 555.

59. Peterson v. Fowler, 76 Mich. 258, 43 NW 10; Thorn v. Lazarus, 39 App. Div. 508, 57 NYS 279; McAdam v. Walbrau, 8 NYCivProc 451; Adeimy v. Dleykan, 116 S. C. 159, 107 SE 35, 37 [cit Cyc]; Applewhite v. Allen, 8 Humphr. (Tenn.) 697.

[a] **Rule applied** as to averment of ownership and right to possession. Applewhite v. Allen, 8 Humphr. (Tenn.) 697.

60. Frink v. Flanagan, 6 Ill. 35; Ethridge v. Orcutt, 12 NYSt 372.

[a] **Rule applied** (1) although the defect might have been fatal on a timely objection. Ethridge v. Orcutt, 12 NYSt 372. (2) Where the defects were waived by appearance and pleading, the affidavit not being the foundation of the jurisdiction. Frink v. Flanagan, 6 Ill. 35.

61. Wilson v. Macklin, 7 Nebr. 50.

[a] **Illustration.**—After motion to dismiss on the ground of a defect in the affidavit it is the duty of the court to allow an amendment. Wilson v. Macklin, 7 Nebr. 50.

62. Tackaberry v. Gilmore, 57 Nebr. 450, 78 NW 32.

63. Alexander v. Vaughan, 106 Ark. 438, 153 SW 594; Crans v. Cunningham, 13 Nebr. 204, 13 NW 176.

64. Campbell v. Head, 13 Ill. 122; Barruel v. Irwin, 2 N. M. 223; Wilson v. Macklin, 7 Nebr. 50.

[a] **Taking and detention.**—An affidavit containing a defective averment that property has not been taken for a tax, assessment, or fine, is within the rule. Campbell v. Head, 13 Ill. 122.

65. Crans v. Cunningham, 13 Nebr. 204, 13 NW 176; Applewhite v. Allen, 8 Humphr. (Tenn.) 697.

[a] **For example** payment of all previous costs of the cause may be imposed upon allowing an amendment upon a motion to quash the writ. Applewhite v. Allen, 8 Humphr. (Tenn.) 697.

66. Thorn v. Lazarus, 39 App. Div. 508, 57 NYS 279.

[a] **Thus,** where defendants' motion was regular and authorized, the privilege accorded plaintiff should have been upon terms, and the order should be modified so as to deny defendants' motion and grant the leave to amend on the payment of costs of the motion below. Thorn v. Lazarus, 39 App. Div. 508, 57 NYS 279.

67. Bayless v. McFarland, 10 Okl. 747, 63 P 859.

68. Bayless v. McFarland, supra. But see Wilson v. Macklin, 7 Nebr. 50 (dictum, to the effect that the better practice is to make the order allowing the amendment conditional so that, in case of failure to amend in the time and upon the terms prescribed, the action be dismissed).

[a] **Illustration.**—Where, after the granting of a new trial, a party asks leave of court to amend the affidavit or replevin, and leave is granted by the court on condition, the conditions apply only to the right to amend, and if the party fails to comply with the conditions, he forfeits only his right to amend, and in such event the pleadings in the case remain precisely in the same condition they were before the leave to amend was granted; and if such pleadings properly present a case, the court should hear and determine the same on the merits, and it is error to dismiss the case for a failure to comply with the conditions attached to the leave to amend. Bayless v. McFarland, 10 Okl. 747, 63 P 859.

69. Liability on bond or undertaking see infra §§ 394-429.

Liabilities of officer arising out of taking of bond or security see Sheriffs and Constables [35 Cyc 1711-1719].

70. Necessity of bond see infra §§ 117, 118.

71. Morris v. Baker, 5 Wis. 389.

72. Ala.—Ward v. Hood, 124 Ala. 570, 27 S 245, 82 AmSR 205.

Md.—Burrier v. Cunningham Piano Co., 135 Md. 135, 108 A 492; Crabbs v. Koontz, 69 Md. 59, 13 A 591; Belt v. Worthington, 3 Gill & J. 247.

Mass.—Standard Varnish Works v. Cushing, 202 Mass. 576, 89 NE 163; Parker v. Young, 188 Mass. 600, 75 NE 98; Smith v. Whiting, 97 Mass. 316.

N. H.—Walker v. Kennison, 34 N. H. 257.

R. I.—Bates v. American Surety Co., 148 A 323; Kimball Co. v. Tasca, 26 R. I. 565, 59 A 919; Pierce v. King, 14 R. I. 611.

N. B.—Hubbard v. Young, 34 N. B. 641.

"The bond given by the plaintiff stands as security to the defendant for a proper disposition of the property, according to the order of the court." Standard Varnish Works v. Cushing, 202 Mass. 576, 581, 89 NE 163.

"The object of requiring a replevin bond to be filed before the writ is the officer,[73] the officer and defendant or person from whose custody he takes the property,[74] or, although it is given to the officer, all those interested in the trial of the right to the propery.[75]

[§ 117] **(b) Necessity—aa. Replevin Bond—(aa) In General.** Generally the taking of a replevin bond or undertaking is a necessary prerequisite to immediate delivery of the property;[76] and, until compliance with the requirement, the officer is under no duty,[77] and has no right,[78] to execute the process; and the want of a proper bond exonerates defendant from heeding the summons in the writ.[79] It is the officer's duty to take a bond as required by the statute,[80] and it has been held that defendant, on application to the sheriff, is entitled to see the bond before he takes any step in the cause.[81] In some jurisdictions a bond or recognizance is required before the writ can lawfully issue,[82] and plaintiff, without having given the prescribed bond, has no right to demand execution of an order of delivery,[83] or, even where the officer has taken the property in his possession, to demand a delivery of it to him.[84] In other jurisdictions before the bond is furnished, the writ may issue, and the officer may commence the service thereof;[85] but in such cases the statutes sometimes provide that he cannot deliver the property to plaintiff prior to the giving of the bond.[86] Under some provisions,[87] the officer cannot, after taking the property, do anything more than is necessary to effect an appraisement of the property, until plaintiff has given the bond required by the statute.[88] Although the statute does not distinctly provide for a bond, if provision therefor is made in the statutory form of the writ, such bond is required.[89] In some jurisdictions it is held that while it is customary for the sheriff to take a replevin bond, he is not required to do so for the protection of defendant except in replevin of goods distrained for rent.[90]

In action by state. Where a state institutes an action of replevin, in the absence of express provision therefor, it is not bound by statute requiring plaintiff in such action to furnish a bond.[91]

Jurisdiction. Omission to give bond and security before issuing of the writ may not invalidate the writ,[92] and is not jurisdictional,[93] the only effect of such omission being to subject the sheriff to an action by defendant.[94]

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issued is to secure the defendant . . . against loss in case the plaintiff fails to prosecute the suit with effect." Burrier v. Cunningham Piano Co., 135 Md. 135, 108 A 492, 495.

[a] **Right of possession.**—The replevin bond is given primarily to secure defendant's right of possession in the replevied chattels if he has such right. Bates v. American Surety Co., (R. I.) 148 A 323; Pierce v. King, 14 R. I. 611.

[73] Caldwell v. West, 21 N. J. L. 411; Clark v. Morss, 142 Pa. 311, 21 A 802; Clawsen v. Seanor, 23 Pa. Co. 257.

[74] Imel v. Van Deren, 8 Colo. 90, 5 P 803; Roberts v. Perrine, 247 Ill. A. 259; Mayer v. Peo., 190 Ill. 109, 60 NE 96; Humphrey v. Taggart, 38 Ill. 228; Smith v. Brown, 60 Ill. A. 77.

[75] Kendall v. Fitts, 22 N. H. 1.

[76] See statutory provisions; and Bates v. Capital State Bank, 21 Ida. 141, 121 P 561 (applying statute).

[77] Southern Orchard Planting Co. v. Gore, 83 Ark. 78, 102 SW 709; Smith v. McFall, 18 Wend. (N. Y.) 521; Taylor v. Adams Express Co., 9 Phila. (Pa.) 272.

[78] Southern Orchard Planting Co. v. Gore, 83 Ark. 78, 102 SW 709; State v. Stephens, 14 Ark. 264; Poole v. Loomis, 5 Ark. 110; Pirani v. Barden, 5 Ark. 81; Taylor v. Adams Express Co., 9 Phila. (Pa.) 272.

[79] Taylor v. Adams Express Co., supra.

[80] Ark.—State v. Stephens, 14 Ark. 264; Nunn v. Goodlett, 10 Ark. 89.

Del.—Clark v. Adair, 3 Del. 113.

Me.—Garlin v. Strickland, 27 Me. 443.

Mo.—McAleenan v. Dickmann, 128 Mo. A. 703, 107 SW 444.

N. H.—Kendall v. Fitts, 22 N. H. 1.

N. B.—Logue v. Prescott, 18 CanLT OccNotes 186.

[81] Logue v. Prescott, (N. B.) 18 CanLTOccNotes 186.

[82] Gregory v. Sherman, 44 Conn. 466; Branch v. Branch, 6 Fla. 314; Baldwin v. Whittier, 16 Me. 33; Crawford v. Fulmer, 14 Pa. Dist. 487, 31 Pa. Co. 219.

[83] Southern Orchard Planting Co. v. Gore, 83 Ark. 78, 102 SW 709.

[84] Southern Orchard Planting Co. v. Gore, supra; State v. Stephens, 14 Ark. 264.

[85] Hill v. Scott, 101 Vt. 356, 143 A 276; Morris v. Baker, 5 Wis. 389.

[86] See statutory provisions.

Custody and care of property generally see infra § 169.

[87] See statutory provisions.

[88] Hamberger v. Seavey, 165 Mass. 505, 43 NE 297; Smith v. Whiting, 97 Mass. 316; Wolcott v. Mead, 12 Metc. (Mass.) 516; Hill v. Scott, 101 Vt. 356, 143 A 276; McKinstry v. Collins, 76 Vt. 221, 56 A 985.

Appraisement generally see infra § 153.

[89] Purple v. Purple, 5 Pick. (Mass.) 226.

[a] **Rule applied** where, although there is no distinct enactment providing for a bond, etc., the statute contains a distinct proviso or condition in the form of the writ provided for in these words: "Provided, he the said P. D. (which are the initials used to describe the plaintiff in the suit) shall give bond to the said S. P. (which letters are used in the same form to describe the defendant in the suit) with sufficient surety or sureties, etc." Purple v. Purple, 5 Pick. (Mass.) 226.

[90] Clawsen v. Seanor, 23 Pa. Co. 257.

[a] **Rule applied** in action against sheriff for taking an insufficient replevin bond. Clawsen v. Seanor, 23 Pa. Co. 257.

[91] Morris v. State, 88 Okl. 189, 212 P 588.

[a] **Illustration.**—Where the state, on relation of the bank commissioner, institutes an action in replevin to recover possession of personal property covered by a chattel mortgage given to secure a note which is an asset of an insolvent bank, the assets of which have been taken possession of by the bank commissioner, the state is entitled to an order of delivery without executing the undertaking required of private litigants under the statute. Morris v. State, 88 Okl. 189, 212 P 588.

[b] **Reason for rule.**—"This is one of the attributes of political sovereignty which attaches to the government." Morris v. State, 88 Okl. 189, 212 P 588, 589.

[92] Vaiden v. Bell, 3 Rand. (24 Va.) 448.

[93] Fawkner v. Baden, 89 Ind. 587; Lemert v. Shaffner, 5 Ind. A. 468, 31 NE 1128, 32 NE 788; Laird v. Upton, 8 N. M. 409, 45 P 1010.

[a] **Thus,** under a statute not requiring the giving of a bond in replevin prior to the issuance of the writ, except in actions against a sheriff, when, instead of being given to the sheriff as in ordinary cases, it is to be given to the clerk, who is also, in such case, to see to the service of the writ, the giving of the bond even in such a case, prior to issuance of the writ is not jurisdictional. Laird v. Upton, 8 N. M. 409, 45 P 1010.

[b] **In justice court.**—The rule of the text has been applied as to actions before justices of the peace, the bond not being necessary to the jurisdiction "to try and determine" the action, the immediate seizure of the property being a provisional remedy in the action. Fawkner v. Baden, 89 Ind. 587; Lemert v. Shaffner, 5 Ind. A. 468, 31 NE 1128, 32 NE 788. But see Allen v. Frederick, 28 Ind. A. 430, 59 NE 330 (holding bond jurisdictional, and dismissing action for failure to file one and failing to verify complaint).

[94] Vaiden v. Bell, 3 Rand. (24 Va.) 448.

Waiver.[95] Defendant may waive a bond required only for his security.[96]

New bond in case of alias writ.[97] Under a statute requiring a bond to be filed before any writ of replevin shall be issued, a new bond must be given prior to issuance of an alias writ.[98]

Pauper oath. A replevin suit cannot be instituted on a pauper oath, permitted in other kinds of actions.[99]

[§ 118] **(bb) In Actions Not Involving Preliminary Seizure.** Where the action may proceed without immediate delivery and the immediate delivery is not demanded,[1] it is unnecessary to file a bond in an action for the possession of personalty.[2]

[§ 119] **bb. Bond or Security for Costs.** Where by statute plaintiff in replevin is required to give an undertaking as security for costs or a bond conditioned to pay such costs as defendant shall recover,[3] such bond or undertaking is all that can be required of him, and it is not necessary that he should give in addition thereto any other bond or undertaking for costs.[4] Where the penalty of a replevin bond was sufficient to secure the costs of the action in addition to the other amounts secured thereby an application for an order to secure costs was refused.[5] It is otherwise where the replevin bond does not provide security for costs, in which case an additional bond for that purpose is necessary;[6] and, under a statute requiring nonresident plaintiffs to give a bond in a fixed penalty, defendant in an action to recover a judgment for the possession of personal property under the code is entitled to the security for costs, notwithstanding plaintiff had filed an undertaking not under seal in the form prescribed by the code for the purpose of obtaining the delivery of the property.[7]

[§ 120] **(c) Requisites, Validity, and Sufficiency—aa. In General.** The bond should conform to the requirements of the statute,[8] but where the language of the statute in giving a form is permissive, it is not necessary to follow it strictly.[9] The bond will not be rendered void for errors or defects in recitals,[10] for errors in or omissions of date,[11] or for mere irregularities in that the statute has not been literally complied with,[12] although defendant in the replevin suit might have objected thereto at the proper time in that suit;[13] and after plaintiff has obtained possession of the property in dispute by acting on the bond as a lawful and valid security, neither he nor his surety ought to be permitted to get rid of it by alleging that it is not so strong or perfect as defendant might have required him to make it.[14] It is enough that it contains all the essentials of a valid contract, and answers all the purposes intended by the statute.[15] Where the writ of replevin is void on its face, the replevin bond is also void,[16]

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95. **Waiver of:**
Defects and objections to bond see infra § 132.
Formal requisites of statute see infra § 120.

96. Spencer v. Dickerson, 15 Ind. 368; Greely v. Currier, 39 Me. 516; Wilson v. Nichols, 29 Me. 566; Bloomingdale v. Chittenden, 75 Mich. 305, 42 NW 836.

97. **Issuance of alias and pluries writs generally** see infra § 136.

98. National Cash Register Co. v. Wilmore, 27 Pa. Co. 464.

99. Scott v. Brandon, 125 Tenn. 314, 143 SW 601.

[a] **Reason for rule.**—"In replevin cases bond is required for the security of the property involved, not for the security of costs." Scott v. Brandon, 125 Tenn. 314, 143 SW 601, 602.

1. See supra § 97.

2. Ind.—Hodson v. Warner, 60 Ind. 214.

Iowa.—Lewis v. Best-By-Test Garage, 200 Iowa 1051, 205 NW 983.

Kan.—Batchelor v. Walburn, 23 Kan. 733; Goodwin v. Sutheimer, 8 Kan. A. 212, 55 P 486.

Mo.—Stephens v. Steckdaub, (A.) 217 SW 871; South Missouri Land Co. v. Jeffries, 40 Mo. A. 360; Hamilton v. Clark, 25 Mo. A. 428.

N. C.—Jarman v. Ward, 67 N. C. 32.

S. C.—Dillard v. Samuels, 25 S. C. 318.

S. D.—Simpson Brick-Press Co. v. Marshall, 5 S. D. 528, 59 NW 728.

3. See statutory provisions.

4. Singer Mfg. Co. v. Rhodes, 54 Conn. 48, 5 A 610; Moore v. Herron, 17 Nebr. 697, 703, 24 NW 425, 451; Vulcanite Portland Cement Co. v. Williams, 46 Misc. 405, 92 NYS 574; Doty v. Brown, 1 HowPr (N. Y.) 245; Rogers v. Hitchcock, 9 Wend. (N. Y.) 462; Stoddard v. Gilman, 22 Vt. 568; Dunshee v. Stearns, 1 Aik. (Vt.) 149.

[a] **Thus** (1) Where a replevin bond conditioned to prosecute the suit to effect and pay any judgment that defendant may recover necessarily covers the costs as a part of the judgment, and it is not necessary for a nonresident plaintiff to give the ordinary bond for costs. Singer Mfg. Co. v. Rhodes, 54 Conn. 48, 5 A 610. (2) Where the undertaking as security in replevin was that plaintiff should duly prosecute the action and pay all costs, etc., a separate undertaking as security for costs is not required. Moore v. Herron, 17 Nebr. 697, 703, 24 NW 425, 451.

[b] **Costs in excess of penalty of bond.**—An additional bond for costs will not be required pending a new trial, although the costs already incurred exceed the penalty of the replevin bond. Doty v. Brown, 1 HowPr (N. Y.) 245.

5. King v. McKinley, 32 N. B. 373.

6. Fleet v. Lockwood, 17 Conn. 233.

7. Boucher v. Pia, 21 N. Y. Super. 691, 14 AbbPr 1; Gelch v. Barnaby, 14 N. Y. Super. 657, 7 AbbPr 19. But see Wisconsin M. & F. Ins. Co. Bank v. Hobbs, 22 HowPr (N. Y.) 494 (where the undertaking in replevin was held sufficient on a motion to dismiss the proceedings for irregularity in commencing them by reason of the failure to give the cost bond).

[a] **Rule applied** on motion to require the additional cost bond. Boucher v. Pia, 21 N. Y. Super. 691, 14 AbbPr 1; Gelch v. Barnaby, 14 N. Y. Super. 657, 7 AbbPr 19.

8. Hubbard v. Young, 34 N. B. 641.

9. Persse v. Watrous, 30 Conn. 139.

10. Hotz v. Bollman Bros. Co., 47 Ill. A. 378; Fuller v. Wright, 59 Ind. 333; Chadwick v. Badger, 9 N. H. 450; Hyde v. Patterson, 1 AbbPr (N. Y.) 248.

[a] **For example,** errors in: (1) Reciting a wrong date as the commencement of the suit. Hotz v. Bollman Bros. Co., 47 Ill. A. 378. (2) Giving the wrong date of the affidavit made by plaintiff, there being only one affidavit in the cause. Hyde v. Patterson, 1 AbbPr (N. Y.) 248. (3) Description of the court in which the action is pending. Fuller v. Wright, 59 Ind. 333. (4) Use of words in describing court which did not affect the identity of the court and might have been rejected. Chadwick v. Badger, 9 N. H. 450.

[b] **Want of form, substance, recital, or condition** will not render the bond void, under statute in Indiana. Lemert v. Shaffer, 5 Ind. A. 468, 31 NE 1128, 32 NE 788.

11. Chandler v. Smith, 14 Mass. 313; Kimball v. Tasca, 26 R. I. 565, 59 A 919.

12. Branch v. Branch, 6 Fla. 314; Simonds v. Parker, 1 Metc. (Mass.) 508; Hicklin v. Nebraska City Nat. Bank, 8 Nebr. 463, 1 NW 135.

13. Hicklin v. Nebraska City Nat. Bank, supra.

14. Shaw v. Tobias, 3 N. Y. 188.

[a] **For example,** that it has only one surety when defendant might have required two. Shaw v. Tobias, 3 N. Y. 188.

15. Shaw v. Tobias, 3 N. Y. 188.

16. Rosen v. Fischel, 44 Conn. 371; Hicks v. Mendenhall, 17 Minn. 475.

[a] **Thus,** where under the statute, a writ of replevin could no longer issue, the proceeding being by indorsement upon the affidavit of a requisition to the sheriff to take the property, instead of to the clerk to issue a writ, and the writ was unauthorized and void, the bond given to procure the issuance thereof, and a bond given in substitution thereof for insufficiency of the sureties in the first, are void, notwithstanding all the parties

as is a bond executed pursuant to an unconstitutional statute.[17]

Bond good at common law. Although there is authority to the effect that no action can be maintained on a bond not in the statutory form,[18] it is held that if the instrument is good and enforceable at common law, and is not prohibited by statute, it may be enforced notwithstanding it may not be in all respects regular as a replevin bond or in strict conformity with the statute.[19]

Names of parties to action.[20] Defendant's name should appear in the bond,[21] and if it is not inserted, nor any language used from which can be ascertained in what suit the bond was given, the bond has been held fatally defective.[22]

Description of property, which is required only to be set forth in the affidavit, need not be contained in the bond.[23]

Waiver of defects. The parties to the action may waive the formalities of the statutory proceedings,[24] and, in such case, the sureties to the undertaking are bound by the waiver, and are estopped from questioning the recitals in the undertakings.[25]

[§ 121] **bb. Seal.** In accordance with the rules relating to bonds generally,[26] unless there are statutes providing otherwise,[27] a seal is of the essence of a replevin bond;[28] and in the absence of a seal an instrument will not be construed as a sealed bond, although there is a recital in the body thereof that the obligors have set their hands and seals thereto.[29] The seal attached to a bond executed by a corporation must be the official seal of the corporation[30] or one adopted by the corporation for the particular transaction;[31] and an unauthorized device by a subordinate officer, to take the place of the official corporate seal in a particular bond, is not sufficient.[32] A bond signed by the agent of a surety company in the course of his business is sufficient, however, even though it does not have the corporate seal of such company, where the word "Seal" is printed after the name of the company.[33]

[§ 122] **cc. Acceptance or Approval.** Under some statutes, before the replevying officer can lawfully deliver the property to plaintiff, the latter's replevin bond must be accepted or approved in a prescribed manner;[34] but where the statute[35] does not require that the acceptance or approval shall be made in any prescribed manner, it may be sufficiently evidenced by the conduct of the magistrate or officer authorized to act.[36] Approval of the bond, in an

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may have treated all the proceedings as regular. Hicks v. Mendenhall, 17 Minn. 475.

[17] Dupree v. State, 102 Tex. 455, 119 SW 301.

[18] Pollok v. Gardner, 4 N. B. 655,

[19] Ala.—Rains v. Ethridge-Atkins Motor Co., 127 S 905.

Ark.—Nunn v. Goodlett, 10 Ark. 89.

Fla.—Branch v. Branch, 6 Fla. 314.

Ill.—Wolfe v. McClure, 79 Ill. 564; Edwin v. Cox, 61 Ill. A. 567.

Mass.—Morse v. Hodsdon, 5 Mass. 314.

N. H.—Claggett v. Richards, 45 N. H. 360; Chadwick v. Badger, 9 N. H. 450; Whittemore v. Jones, 5 N. H. 362.

Pa.—Clark v. Morss, 142 Pa. 311, 21 A 802.

[a] **Rule applied** as to replevy bond held to be a good common-law bond, although the person to whom the property was to be delivered was not named. Rains v. Ethridge-Atkins Motor Co., (Ala.) 127 S 905.

[b] **Determination of validity.**—(1) The validity of a bond not prescribed by statute depends upon usage and the legality of its conditions. Clark v. Morss, 142 Pa. 311, 21 A 802. (2) Thus if the sheriff takes a bond voluntarily given, with warrant to confess judgment, it is valid, although he might not have had the right to demand a bond containing such warrant; such warrant affects only the remedy and not the liability. Clark v. Morss, supra.

[c] **Omission of seals.**—Although the instrument was not a bond because of the omission of seals, a suit could be maintained upon it. It filled the office of a replevin bond and secured the execution of the writ and the taking of the goods. Edwin v. Cox, 61 Ill. A. 567.

Liability on bonds and undertakings generally see infra §§ 394-429.

[20] **Obligors and obligees of bond** see infra § 125.

[21] Matthews v. Storms, 72 Ill. 316; Arter v. Peo., 54 Ill. 228.

[22] Matthews v. Storms, 72 Ill. 316.

[a] **Rule applied:** (1) In an action on the bond. Matthews v. Storms, 72 Ill. 316. (2) In an action on the officer's bond for taking property without first requiring the necessary replevin bond. Arter v. Peo., 54 Ill. 228.

[23] Branch v. Branch, 6 Fla. 314.

[24] Harrison v. Wilkin, 69 N. Y. 412; Shaw v. Tobias, 3 N. Y. 188; Kilgore v. Rabb, 10 S. C. L. 331.

Waiver of:
Bond see supra § 117.
Defects and objections to bond see infra § 132.

[25] Harrison v. Wilkin, 69 N. Y. 412; Shaw v. Tobias, 3 N. Y. 188.

[26] See Bonds § 19.

[27] See statutory provisions.

[28] Edwin v. Cox, 61 Ill. A. 567; Wile v. Freedman, 12 Pa. Dist. & Co. 40; Hartford Acc., etc., Co. v. Brooks, 11 Pa. Dist. & Co. 194.

[29] Wile v. Freedman, 12 Pa. Dist. & Co. 40; Hartford Acc., etc., Co. v. Brooks, 11 Pa. Dist. & Co. 194.

[30] Wile v. Freedman, 12 Pa. Dist. & Co. 40. See also Corporations § 2545 et seq.

[31] Wile v. Freedman, supra.

[32] Wile v. Freedman, supra.

[33] Midwest Commercial Credit Co. v. Woloszyn, 11 Pa. Dist. & Co. 494.

[34] See statutory provisions.

[a] **Approval of clerk.**—Where the clerk in approving the bond adds to his name the word "clerk" only, it is sufficient if the other proceedings which occur at the same time show of what court he is clerk, and that it is the same as that into which the writ is returnable. Branch v. Branch, 6 Fla. 314.

[b] **Approval of justice or marshal.**—Plaintiff's undertaking in replevin proceedings in a district court must be approved by the justice and not by the marshal. Grotz v. Hussey, 61 HowPr (N. Y.) 448.

[c] **In Massachusetts** (1) Pub. St. c 183 § 12 does not require the officer to have the sureties approved. Stone v. Jenks, 142 Mass. 519, 8 NE 403. (2) Under Rev. L. (1902) c 190 §§ 15, 16, it is optional with the replevying officer to approve the sureties and thus become responsible if subsequently they are found financially insufficient, or to refer this question to a magistrate authorized to act, for his decision, and so avoid this liability; but if the latter course is adopted, defendant, under the statute, is entitled to notice in writing from the officer, stating the time and place of hearing with the names and places of residence of the sureties proposed. Parker v. Young, 188 Mass. 600, 75 NE 98.

[35] See statutory provisions.

[a] **In Maine** the sheriff is not required formally to approve sureties on the replevin bond. Provost v. Jodoin, 126 Me. 593, 136 A 813.

[b] **In New Jersey** a replevin bond does not require the approval of either the judge of the court or a supreme court commissioner, but the obligation to take a sufficient bond rests on the sheriff. Auto Brokerage Co. v. Wilson, 102 N. J. L. 425, 132 A 663.

[36] Hartlep v. Cole, 120 Ind. 247, 22 NE 130; Doe v. Cunningham, 6 Blackf. (Ind.) 430; Burns v. Robbins, 1 Code Rep (N. Y.) 62; Cromer v. Watson, 59 S. C. 488, 38 SE 126.

[a] **Acts constituting acceptance or approval.**—(1) Where the bond is delivered to the sheriff, and he, acting upon such delivery, places the property in the possession of the principal obligor, it constitutes an acceptance and approval of the bond. Hartlep v. Cole, 120 Ind. 247, 22 NE 130. (2) If the sheriff proceeds to execute the process his approval may be inferred, and he may be permitted to indorse

action brought in his court, by the federal district judge instead of by the marshal, in a state where the statute prescribes approval by the sheriff, does not render the obligation invalid.[37] Acceptance or approval forms no part of the obligation of the bond as against the obligor and sureties, and its omission does not affect its validity or render it unenforceable as against them.[38]

[§ 123] **dd. Filing and Indorsement.** Statutory provisions relative to the filing of replevin bonds or counter bonds must be complied with.[39] The receipt of a bond by the proper custodian and its lodgment in his office, and not the clerical act of indorsing it as filed, is the filing,[40] and it is not material that a justice of the peace failed to perform the act of indorsing it as filed.[41] That the bond was executed and filed at the proper time may appear sufficiently from its date and the fact that the justice in the writ itself certified that the bond was filed before the writ was issued.[42] The fact that the undertaking was indorsed as filed after the issuance of the writ does not affect its validity, where it was signed at a prior date and the writ recites that before its issuance an undertaking was filed.[43]

[§ 124] **ee. Conditions.** Ordinarily the conditions of a replevin bond are prescribed by statute,[44] and in some jurisdictions the terms of the security depend upon the cause for which the writ was sued out.[45] It is necessary only that the bond shall contain substantially the statutory conditions, and it need not follow the statute in totidem verbis[46] if the legal import is the same.[47] Although a condition may not be in conformity with the statute, liability thereon may be enforceable as upon a voluntary obligation,[48] and if a condition partly conformable to the statute contains a part not required, it is valid for the part which is good, unless the statute expressly annuls such bond.[49] The omission of a condition has been held not to invalidate the bond.[50]

[§ 125] **ff. Obligors and Obligees[51]—(aa) In General.** The name of the obligee should appear in the bond.[52] Where the form prescribed by the statute does not particularize to whom it shall be made payable, the court has sanctioned the form making the officer the obligee where that had become the settled practice,[53] but, although a mere clerical error does not vitiate the bond,[54] where the statute directs

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the undertaking as of the day it was received. Burns v. Robbins, 1 Code Rep (N. Y.) 62. (3) If a magistrate takes the bond and with his own hands sends it out of his office into the hands of an officer appointed by him, it is sufficient evidence of approval by him. Cromer v. Watson, 59 S. C. 488, 38 SE 126.

[37] Curtis v. North American Indian, Inc., 277 Fed. 909 (applying Washington statute).

[38] Parker v. Young, 188 Mass. 600, 75 NE 98; Stoke v. Jenks, 142 Mass. 519, 8 NE 403.

[a] **Rule applied.**—The approval of the bond provided for by the statute is for the officer's protection only, and a failure to have it approved does not thereby invalidate it. Stoke v. Jenks, 142 Mass. 519, 8 NE 403.

[39] Tyger v. Chambers, 26 Pa. Dist. 392.

[40] Hook v. Fenner, 18 Colo. 283, 32 P 614, 36 AmSR 277.

[41] Hook v. Fenner, supra.

[42] Hook v. Fenner, supra.

[43] Leeper v. Hobart First Nat. Bank, 26 Okl. 707, 110 P 655, 29 LRA NS 747, AnnCas1912B 302.

[44] See statutory provisions.

[45] Clark v. Adair, 3 Del. 113.

[a] **Thus** it has been said that in case of replevin for goods taken in distress for rent, the condition of the replevin bond is prescribed by the statute to prosecute the suit with effect and satisfy the judgment, and in other cases the condition is to prosecute the suit with effect, and to return the goods, if a return be awarded. Clark v. Adair, 3 Del. 113.

[46] Persse v. Watrous, 30 Conn. 139; Lambden v. Conoway, 5 Del. 1; Duggan v. England, 16 S. C. L. 215. And see cases infra note 47.

[47] Conn.—Persse v. Watrous, 30 Conn. 139.

Del.—Lambden v. Conoway, 5 Del. 1.

Ky.—Cooper v. Brown, 7 Dana 333.

Mass.—Arnold v. Allen, 8 Mass. 147.

Mont.—Parrott v. Scott, 6 Mont. 340, 12 P 763.

N. J.—West v. Caldwell, 23 N. J. L. 736.

[a] **Thus** (1) Where the condition of the bond was to prosecute to effect before A B, justice of the peace, and the justice had not final jurisdiction, it was held that the bond was not void, as not complying with the statute, which requires a bond to prosecute to effect generally. Persse v. Watrous, 30 Conn. 139. (2) A replevin bond conditioned to appear and prosecute the suit to effect, and to indemnify the sheriff, is good, although the statutory condition is to prosecute the suit with effect, and satisfy any judgment which shall be given against the sheriff in replevin. Lambden v. Conoway, 5 Del. 1. (3) A bond which, instead of providing for the return of the property and a payment of hire in the event of failing to establish plaintiff's right, as the statute prescribed, provided that plaintiff would well and truly prosecute his writ, pay all damages which might ensue to defendant and be adjudged against plaintiff and also to perform any judgment of the court is sufficient. Cooper v. Brown, 7 Dana (Ky.) 333. (4) The condition "to prosecute the suit and to return the same goods and chattels, if return thereof shall be adjudged," directed by the statute, is not essentially different from that "to prosecute the suit with effect and without delay, and to return the goods and chattels distrained in case return shall be awarded." West v. Caldwell, 23 N. J. L. 736. (5) Under the statute, requiring an undertaking in replevin to be conditioned "for the prosecution of the action without delay and with effect," an undertaking is sufficient as a statutory bond which provides "for the prosecution of the action," omitting the words "without delay and with effect," over the objection that not being good as a statutory bond an assignment was necessary. Parrott v. Scott, 6 Mont. 340, 12 P 763.

[b] **Misdescription of court.**—A replevin bond conditioned to prosecute the action at the "county court" next to be held at, etc., rightly describing the next term of the "common pleas" has been held to be good; the words "county court" must intend the court of common pleas. Arnold v. Allen, 8 Mass. 147.

[48] Claggett v. Richards, 45 N. H. 360; Whittemore v. Jones, 5 N. H. 362.

[49] Lambden v. Conoway, 5 Del. 1.

[50] Hotz v. Bollman Bros. Co., 47 Ill. A. 378; Rauh v. Waterman, 29 Ind. A. 344, 61 NE 743, 63 NE 42; Hicklin v. Nebraska City Nat. Bank, 8 Nebr. 463, 1 NW 135.

[a] **Reason for rule.**—Each condition is an independent obligation; and liability on that contained in the bond will be enforced. Hotz v. Bollman Bros. Co., 47 Ill. A. 378.

[b] **Rule applied** (1) as to omission in the bond as to the payment of the costs and damages for wrongfully suing out the writ, such condition being separate and distinct from the conditions embodied in the bond sued on. Hotz v. Bollman Bros. Co., 47 Ill. A. 378. (2) So under a statute providing that the principal and sureties to a bond shall be bound to the full extent contemplated by the law requiring the same, although defective in form, the sureties on a replevin bond which omits the statutory provision that the principal shall prosecute his action with effect are liable, where the principal dismisses his action without a determination of the merits. Rauh v. Waterman, 29 Ind. A. 344, 61 NE 743, 63 NE 42. (3) The omission of provision in an undertaking for the return of the property to defendant in the event of a judgment for such return, is not fatal but it creates a liability as far as it goes. Hicklin v. Nebraska City Nat. Bank, 8 Nebr. 463, 1 NW 135.

[51] **Requirement of names of parties to action** see supra § 120.

[52] Titus v. Berry, 73 Me. 127.

[53] Whittemore v. Jones, 5 N. H. 362; Sumner v. Stewart, 2 N. H. 39.

[54] Eickhoff v. Eikenbary, 52 Nebr. 332, 72 NW 308.

[a] **For example,** where the bond which was entitled in the case naming the parties, and recited the institution of the action, again naming the parties, named the obligee as fol-

a replevin bond to be given to defendant as obligee, a bond to the officer as obligee instead of to defendant is void, since it stands as a bond given to one who has no lawful authority to take it.[55] Where the bond is to be made to the officer, it is held that the officer intended by the statute is the one who in fact seizes the property,[56] and although the statute names the sheriff as the party to whom the bond is to be given, since under other provisions the coroner is required to perform the duties of the sheriff in certain prescribed emergencies, a bond in replevin given to the coroner is good.[57] It is sufficient in the replevin action if the bond is signed by the surety only, if the statute does not require more than a bond with sureties, plaintiff in replevin being liable without any bond,[58] but as to the sureties, a bond not signed by the principal obligor has been held void in an action thereupon.[59] Where the form of the recognizance required is a joint and several bond, inasmuch as the recognizors are jointly and severally liable, it is immaterial to defendant in the replevin which of the obligors is styled principal and which surety, as both are in legal effect principals,[60] and it is not necessary to its validity that the name of the surety is not mentioned in the body of the bond.[61] A statute requiring the bond of plaintiff and one surety is directory,[62] and a bond containing two sureties in not void thereunder.[63] A partner may sign as principal in behalf of himself and copartners,[64] but a bond executed by one claiming to execute it as agent for plaintiff, but having in fact no authority, will not authorize service of the writ.[65] A statutory requirement that the replevin bond be "executed" to the sheriff does not mean that the sheriff should be the obligee.[66] A bond naming the sureties as individuals in its body, and signed as by a corporation with the individuals designated as officers thereof, is sufficient as a bond of individual sureties, such designation being merely descriptio personæ.[67]

[§ 126] **(bb) Sufficiency of Surety.** Although the English statute requiring two securities to a replevin bond[68] may not be in force,[69] under statutes requiring the bond to be executed "with sufficient sureties,"[70] it has been decided that defendant in replevin is entitled to two sureties therein,[71] independent of plaintiff[72] who cannot be taken as a surety.[73] When permitted by statute,[74] however, a surety company may properly be accepted as sole surety on a replevin bond.[75] The solvency of plaintiff in the replevin suit does not dispense with the necessity for the number of sureties required by statute on the bond.[76] In a bond executed by a partnership, one of the several copartners is no additional security within a statutory requirement of security additional to the financial responsibility

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lows: "We . . . undertake to the said . . . (naming the officer), defendant in said action," the insertion of the name of the officer under such circumstances being considered as surplusage and as such disregarded, no proof of extrinsic circumstances being required to show who was the real obligee. Eickhoff v. Eikenbary, 52 Nebr. 332, 72 NW 308.

55. Purple v. Purple, 5 Pick. (Mass.) 226.

[a] **Rule applied** although the statute contained no distinct requirement for such a bond, it being necessary under what was equivalent to such a requirement by reason of the proviso in the form of the writ required by the statute that plaintiff in the suit should give a bond to defendant, etc. Purple v. Purple, 5 Pick. (Mass.) 226.

56. Clagett v. Richards, 45 N. H. 360. But see Smeeth v. Zimmer, 182 Ill. A. 374.

[a] **Thus,** where the writ appears to have been issued in one county and executed in another by the sheriff of the latter, and it was held that the bond was properly made to the latter. Clagett v. Richards, 45 N. H. 360.

57. Speer v. Skinner, 35 Ill. 282.

58. Phillippi Christian Church v. Harbaugh, 64 Ind. 340; Cooper v. Brown, 7 Dana (Ky.) 333; South Missouri Land Co. v. Jeffries, 40 Mo. A. 360; Dupree v. Jordan, 123 Okl. 91, 252 P 67, 69 [quot Cyc].

[a] **Rule applied** (1) where the statute did not require plaintiff to file his bond, but a bond with surety (Phillippi Christian Church v. Harbaugh, 64 Ind. 340; South Missouri Land Co. v. Jeffries, 40 Mo. A. 360), (2) notwithstanding another section following in the statute gave the form of a bond which contemplated such signature (South Missouri Land Co. v. Jeffries, supra).

Liability of surety in action on bond not signed by principal see infra § 438.

59. Horton v. Stone, 32 R. I. 499, 80 A 1.

60. Dorus v. Somers, 57 Conn. 192, 17 A 852.

[a] **Thus** a plea in abatement on the ground of the insufficiency of a recognizance entered into by a stranger as principal and plaintiff in replevin as surety should not be sustained. Dorus v. Somers, 57 Conn. 192, 17 A 852.

61. Clarke v. Bell, 2 Litt. (Ky.) 164.

[a] **Rule applied** where the bond was in the first person plural and signed by the principal and surety. Clarke v. Bell, 2 Litt. (Ky.) 164.

62. Saeltzer v. Ginther, 2 Miles (Pa.) 86.

63. Saeltzer v. Ginther, supra.

64. Dunbar v. Scott, 14 R. I. 152.

65. Garlin v. Strickland, 27 Me. 443; Horton v. Stone, 32 R. I. 499, 80 A 1; Kimball Co. v. Tasca, 26 R. I. 565, 59 A 919; Smith v. Fisher, 13 R. I. 624.

[a] **Rule applied:** (1) In an action against officer for taking property without first taking the statutory bond. Garlin v. Strickland, 27 Me. 443. (2) To a bond offered, executed in name of plaintiff in replevin as principal by another as his agent, there being nothing to show the agent's authority to sign plaintiff's name, and the bond not being given by such "plaintiff or some one in his behalf." Horton v. Stone, 32 R. I. 499, 80 A 1 (under Gen. L. (1909) c 336 § 3, requiring a bond in replevin, either by plaintiff or some one in his behalf, a bond given by a third person on behalf of the plaintiff must be executed by such third person in his own name on the plaintiff's behalf, and not in the name of plaintiff by such third person as his agent).

[b] **Bond of corporation.**—A replevin bond purporting to be given by a corporation, but signed only by an individual, is defective, and would be so held on a plea in abatement on motion to dismiss seasonably made in the case. Kimball v. Tasca, 26 R. I. 565, 59 A 919.

66. McLean v. Emerson, 1 Ill. 320.

67. Edgecomb v. Lawlis, 126 Me. 550, 140 A 182.

[a] **Rule applied** to bond signed "Phair Co., M. T. Phair, Treas., Henry Phair, Pres." Edgecomb v. Lawlis, 126 Me. 550, 140 A 182.

68. St. 2 Geo. II c 19.

69. McClary v. De Bow, 14 S. C. L. 44.

70. See statutory provisions.

[a] **Word "sufficient,"** within the statute requiring "sufficient" sureties on replevin bonds, means adequate to suffice or equal to the end proposed. Massachusetts Breweries Co. v. Herman, 106 Me. 524, 76 A 943.

71. Claflin v. Thayer, 13 Gray (Mass.) 459; Shaw v. Tobias, 3 N. Y. 188; Irr v. Schroeder, 6 NYCiv Proc 253; Whaling v. Shales, 20 Wend. (N. Y.) 673; Smith v. McFall, 18 Wend. (N. Y.) 521; Whitford v. Goodwin, 13 R. I. 145; Hubbard v. Young, 34 N. B. 641.

72. Smith v. Trawl, 1 Root (Conn.) 165; Burns v. Robbins, 1 CodeRep (N. Y.) 62.

73. Burns v. Robbins, supra.

74. See Principal and Surety § 535 et seq.

75. Leiter v. Lyons, 24 R. I. 1, 42, 52 A 78.

76. Wilson v. Williams, 52 Ark. 360, 12 SW 780.

of plaintiffs.[77] But a bond which the statute requires to be given with two or more sureties is not void because actually signed and delivered by one surety only.[78] The sufficiency of the sureties has been said to be a matter which does not in any way affect plaintiff in the replevin suit, but is a matter entirely between the sheriff and defendant in the suit.[79]

Next friend of infant may become surety in a replevin bond, where the infant is plaintiff and there is a cosurety;[80] and a requirement of two sureties independent of the party is thereby satisfied.[81]

Residence. Under a statute requiring two sufficient sureties on a replevin bond, mere nonresidence in the state has been held not to disqualify a surety.[82] On the other hand, there is authority to the effect that an officer is not bound, or even permitted, to accept as securities persons not residents of the court in which the proceedings are pending.[83] One who rents and occupies a business office within the state is a "householder or freeholder,"[84] and may be a surety on a replevin bond.[85]

[§ 127] **gg. Justification.** In the absence of statute the validity of a replevin bond is not affected by the failure of the sureties therein to justify.[86] Provision, however, is usually made by statute for the justification of such sureties, and when so required they must justify in the form and manner prescribed.[87] Under some statutes if defendant duly excepts to the sufficiency of plaintiff's sureties,[88] it is the duty of plaintiff either to procure a satisfactory justification of his sureties,[89] or to furnish another undertaking to the same effect as the original one, with other sureties who must then appear and justify,[90] and if neither of these things are done, it is the duty of the officer who seizes the property to return it to defendant to remain in his possession until the case is finally disposed of.[91] So if the sureties fail to justify, upon such an exception, it is a defect in the proceedings which affects the substantial rights of defendant and for which a judgment against him will be reversed,[92] except where they attend and are ready to justify, but defendant's counsel does not request it, and the trial proceeds on the merits without objection to the failure to justify.[93]

Justification of party. A party cannot be taken as surety by the sheriff,[94] but as to whether a party to the action who, with a surety has signed the bond, must justify depends upon the intent of the sheriff when he received the undertaking.[95] Both the persons who signed it must justify unless the sheriff dispenses with the party and considers his name as improperly signed,[96] which with the consent of the surety[97] the sheriff can do if he approves the undertaking with one surety only.[98]

[§ 128] **hh. Amount of Penalty.**[99] The obligation or penalty of a replevin bond should be in an amount sufficient to secure a return of the property or an equivalent value,[1] and the statutes[2] usually require that this amount shall be at least double the value of the property. A bond for costs only does not comply with such a requirement.[3] Where the statute fixes the penalty of the bond at twice the value alleged in the affidavit, it is error for the court, no affidavit being made, arbitrarily to fix the amount.[4] The fact that the penalty is in more than double the value of the property is no ground for quashing the writ;[5] and a bond for less than double the value of the property is not for that reason void,[6] but may be good at common law,[7] and, although it may be good ground for a motion in arrest of judgment,[8] defendant may waive the defect and accept the bond.[9] A bond omitting to fix the amount or penalty is, as to the sureties thereon, void.[10] So, where the penalty is "double the value of the property hereinafter named to be replevied," without stating what that value is, the bond is invalid,[11] and if an objection be reasonably taken, the action of replevin must be dismissed.[12]

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[77] Hopkins v. Green, 93 Mich. 394, 53 NW 537.

[78] U. S.—Haller v. Beall, 11 F. Cas. No. 5,957, 2 Cranch C. C. 227.

Mass.—Simonds v. Parker, 1 Metc. 508.

N. Y.—Shaw v. Tobias, 3 N. Y. 188; Kesler v. Haynes, 6 Wend. 547.

Oh.—Bigelow v. Comegys, 5 Oh. St. 256.

Pa.—Saeltzer v. Ginther, 2 Miles 86.

[79] Shaw v. Tobias, 3 N. Y. 188; Hubbard v. Young, 34 N. B. 641; Taylor v. Burpee, 10 N. B. 191.

[a] **Rule applied.**—If the party for whose benefit it was taken accepts a bond with only one surety, the maker of the bond cannot resist a recovery thereon on that ground. Shaw v. Tobias, 3 N. Y. 188.

[80] Anonymous, 2 Hill (N. Y.) 417.

[81] Anonymous, supra.

[82] Massachusetts Breweries Co. v. Herman, 106 Me. 524, 76 A 943.

[83] State v. Wait, 23 Nebr. 166, 36 NW 380.

[84] Somerset, etc., Sav. Bank v. Huyck, 33 HowPr (N. Y.) 323.

[85] Somerset, etc., Sav. Bank v. Huyck, supra.

[86] Wheeler v. Paterson, 64 Minn. 231, 66 NW 964, 58 AmSR 527.

[a] **Thus** the omission of the sureties in a replevin bond, given in an action in a justice's court, to justify, does not affect the validity of the bond, although it would be otherwise if it were in a district court. Wheeler v. Paterson, 64 Minn. 231, 66 NW 964, 58 AmSR 527.

[87] See statutory provisions.

[a] **Filing affidavit bond.**—Under Code Civ. Proc. § 2925, providing that in replevin in a justice's court the sureties in the replevin bond "must justify before the justice" on the return of the summons, an affidavit of justification need not be filed with the bond as section 812, providing that a bond executed by sureties must be accompanied by affidavits of justification, does not apply. Clark v. Hooper, 69 Hun 445, 23 NYS 447.

[b] **Adjournment of proceedings.**—Under Code Civ. Proc. §§ 580, 1705, it is within the discretion of the court, where one party refuses to consent to an adjournment of the proceedings for justification of the other party's sureties, to adjourn for a reasonable length of time beyond the next judicial day. Troy Carriage Works v. Muxlow, 16 Misc. 561, 38 NYS 938 [aff 15 Misc. 696, 37 NYS 1023].

[88] **Defects and objections to bond** see infra § 130.

[89] Shull v. Barton, 58 Nebr. 741, 79 NW 732 [overr Shull v. Barton, 56 Nebr. 716, 77 NW 132, 71 AmSR 698]; Goff v. Bliss, 12 NYCivProc 99.

[90] Goff v. Bliss, supra.

New or additional bond generally see infra § 133.

[91] Hofheimer v. Campbell, 59 N. Y. 269; Goff v. Bliss, 12 NYCivProc 99.

[92] Goff v. Bliss, supra.

[93] Webb v. Hecox, 27 Misc. 169, 58 NYS 382.

[94] See supra § 126.

[95] Burns v. Robbins, 1 CodeRep (N. Y.) 62.

[96] Burns v. Robbins, supra.

[97] Burns v. Robbins, supra.

[98] Burns v. Robbins, supra.

[99] **Increase of penalty** see infra § 133.

[1] Plunkett v. Moore, 4 Del. 379.

[2] See statutory provisions. But see Bugle v. Meyers, 59 Ind. 73 (holding that a replevin bond in a justice's court is sufficient if it provides for the payment of all sums recovered against plaintiff, as required by statute in actions in the circuit court, instead of being "in a sum double the value of such goods," as required by statute in a replevin bond before a justice).

[a] **Order nullifying bond** because it was for the same amount as the value of the property alleged in the complaint is, under such a statute, within the sound discretion of the trial court. Melin v. Dalseide, 179 Minn. 588, 229 NW 804.

[3] Creamer v. Ford, 1 Heisk. (Tenn.) 307.

[4] Ex p. Lippitt, 12 Porto Rico 182.

[5] Clap v. Guild, 8 Mass. 153.

Criterion of value. Although there is authority to the effect that the amount of the bond should be based on the value alleged in the verified complaint,[13] the criterion of the value of the property has been said to be not that stated in the declaration[14] or the affidavit,[15] but the estimated value to be ascertained at the time the bond is given.[16] In an action to replevy goods distrained for rent, it has been held proper to base the penalty of the replevin bond on the value of the goods as fixed by the appraisers on the distress.[17]

[§ 129] **(d) Operation and Effect.**[18] The giving of the replevin bond determines nothing concerning the ultimate right of the parties to the property;[19] it simply determines the right to its custody pending the outcome of the suit.[20] A bond given by plaintiff in a replevin suit to obtain possession of property in order to foreclose it stands in place of the property to the extent of defendant's interest,[21] and the property passes into the exclusive possession and control of plaintiff.[22]

[§ 130] **(e) Defects and Objections**[23]**—aa. In General.** If an officer serve a writ of replevin without first taking bond according to the provisions of the writ, defendant may avoid the process by plea in abatement,[24] and, although a contrary rule has been applied where the writ was not executed,[25] it is held to be a good ground for quashing or vacating the writ or requisition that plaintiff has not given a proper bond;[26] but if a sufficient bond is filed before the application is heard, the writ will not be quashed.[27] A valid bond being a condition precedent to the service of a writ of replevin,[28] plaintiff cannot, by ratification of an invalid bond, after service of the writ, validate such service.[29] A defect apparent upon the face of a replevin bond may be taken advantage of by a motion to dismiss,[30] or by either a motion to dismiss or a plea or answer in abatement.[31] A demurrer cannot be used to object to the form of the replevin bond.[32] Where the defect in such a bond does not appear upon its face, it should be suggested and shown to the court by proof,[33] and so the sufficiency of a nonresident surety's property within the state can be attacked only by a plea in abatement[34] and not by motion to dismiss.[35] When proceedings in replevin are quashed for such defect, plaintiff cannot contest, by the introduction of testimony, the right of defendant to a return of the property.[36]

Place of filing and hearing. Exceptions to sureties may, it has been held, be filed with the clerk of court[37] and need not be indorsed on the bond[38] or on the writ.[39] Under a statute requiring the prothonotary to fix the amount of the bond, exceptions thereto should be filed with,[40] and be heard by,[41] him.

Parties. A motion to quash a replevin bond cannot be made in the name of the surety only without joining the principal.[42]

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[6] Rhodenbaugh v. Carey, 2 Oh. Dec. (Reprint) 162, 1 WestLMonth 599.

[7] Tuck v. Moses, 54 Me. 115.

[8] Deardorff v. Ulmer, 34 Ind. 353.

[9] Rhodenbaugh v. Carey, 2 Oh. Dec. (Reprint) 162, 1 WestLMonth 599.

Waiver of defects in, and objections to, replevin bond see infra § 132.

[10] Harbin v. Nations, 214 Ala. 649, 108 S 749.

[11] Clark v. Connecticut River R. Co., 6 Gray (Mass.) 363; Case v. Pettee, 5 Gray (Mass.) 27.

[12] See infra § 259.

Defects and objections generally see infra § 130.

[13] Deardorff v. Ulmer, 34 Ind. 353.

[14] Branch v. Branch, 6 Fla. 314.

[15] Mayer v. Peo., 190 Ill. 109, 60 NE 96; Peo. v. Core, 85 Ill. 248.

[16] Branch v. Branch, 6 Fla. 314; Mayer v. Peo., 190 Ill. 109, 60 NE 96 [aff 92 Ill. A. 123]; Peo. v. Core, 85 Ill. 248.

[a] **Officer's inventory and invoice.**—To fix the amount of the bond, the officer must take an inventory and invoice of the value of the property, the bond being taken in double the amount of the value as he finds it to be. Mayer v. Peo., 190 Ill. 109, 60 NE 96 [aff 92 Ill. A. 123]. See Peo. v. Core, 85 Ill. 248 (best means of ascertaining value is to call on defendant and learn the value from invoices or otherwise).

[17] Furlong v. Munn, 1 HowPr (N. Y.) 43.

[18] **Effect of omission to give bond** see supra § 117.

[19] In re Irwin, 320 Mo. 20, 6 SW (2d) 597.

[20] In re Irwin, supra.

[21] McDaniel v. Hoblit, 34 Wyo. 509, 245 P 295.

[22] McDaniel v. Hoblit, supra.

Custody and care of property generally see infra §§ 169–171.

[23] **Dismissal of action for want of, or defect in, bond** see infra § 259.

[24] Cady v. Eggleston, 11 Mass. 282.

[25] Greenwade v. Fisher, 5 B. Mon. (Ky.) 167.

[26] Me.—Greely v. Currier, 39 Me. 516.

N. Y.—Smith v. McFall, 18 Wend. 521.

Vt.—Campbell v. Morey, 27 Vt. 575.

Wis.—Morris v. Baker, 5 Wis. 389.

N. B.—Hubbard v. Young, 34 N. B. 641.

Quashing or vacating writ generally see infra § 146.

[27] Sprague Sells Corp. v. Garrahan Canning Co., 11 Pa. Dist. & Co. 659; Adams v. Young, 8 Pa. Dist. & Co. 106.

[28] See supra § 117.

[29] Smith v. Fisher, 13 R. I. 624.

[30] Claflin v. Thayer, 13 Gray (Mass.) 459; Whaling v. Shales, 20 Wend. (N. Y.) 673.

[a] **Rule applied** where bond had only one surety instead of two as required. Claflin v. Thayer, 13 Gray (Mass.) 459; Whaling v. Shales, 20 Wend. (N. Y.) 673.

[31] Bank of Kentucky v. Lacey, 1 Litt. (Ky.) 295; Greely v. Currier, 39 Me. 516; Houghton v. Ware, 113 Mass. 49; Whitford v. Goodwin, 13 R. I. 145.

[a] **For example,** where the bond has only one surety and two are required. Greely v. Currier, 39 Me. 516.

[32] Smith v. Dexter, 121 Mass. 597.

[33] Dixon v. Thatcher, 8 Ark. 134.

[a] **Insufficiency of security** is such a defect. Dixon v. Thatcher, 8 Ark. 134.

[34] Massachusetts Breweries Co. v. Herman, 106 Me. 524, 76 A 943.

[35] Massachusetts Breweries Co. v. Herman, supra.

[36] Greely v. Currier, 39 Me. 516.

[37] Cusick v. Cohen, 3 Den. (N. Y.) 267.

[38] Cusick v. Cohen, supra.

[39] Cusick v. Cohen, supra.

[40] Hogg v. Washington Oil Co., 17 Pa. Dist. 118.

[41] Hogg v. Washington Oil Co., supra; Conrad v. Hines, 41 Pa. Co. 385.

Notice of a motion to quash is not necessary where the defects are apparent on the record.[43] A statute requiring defendant to give notice to the sheriff that he excepts to the sufficiency of the replevin bond has been held not applicable to such a bond taken by a constable in an action pending before a justice of the peace.[44]

[§ 131] **bb. Curing Defects by Amendment.**[45] It has been held that the court may allow a replevin bond to be amended so as to conform to the statute;[46] and the right of amendment is frequently expressly conferred by statute.[47] Thus plaintiff on payment of costs may amend, by filing a new bond with sureties, and the sureties justifying;[48] and under the same terms a replevin bond, imperfect in itself, and executed with but one surety, may be amended, after service of the writ.[49] But where replevin is brought by plaintiff as an individual, the bond cannot be amended by adding after his name the word "executor."[50]

Substitution of surety. Sureties on a bond can be changed by order of court.[51] But where defendant excepts because one of the sureties fails to justify[52] and a new surety is substituted, a new undertaking should be executed;[53] and the original undertaking cannot be altered by inserting therein the name of the new surety, without the consent of the other surety, or of those for whose benefit or protection it is required to be given.[54]

[§ 132] **cc. Time To Object, and Waiver.**[55] Defects and irregularities in a replevin bond, not jurisdictional, but such that defendant may waive them, are deemed waived by defendant's neglecting to object, and pleading[56] or proceeding to trial on, the merits;[57] or by executing and filing a good and sufficient redelivery bond;[58] or by failure to make objection at the earliest opportunity,[59] or within a reasonable time,[60] or within the time prescribed by statute,[61] or limited by rule of court for filing dilatory pleas,[62] or before entry of judgment.[63] A motion to dismiss must be made within the time prescribed for filing pleas in abatement.[64] Exceptions to the sureties are filed in time if filed within the statutory period after the return day of the writ,[65] notwithstanding such writ was filed before the return day.[66]

[§ 133] **(2) Increase of Penalty, and New or Additional Bond.**[67] If defendant does not elect to hold the property himself, he may take measures to see that the security given by plaintiff for a return of the property, in case a return should be adjudged,

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42. Bank of Kentucky v. Lacey, 1 Litt. (Ky.) 295.

43. McCormick v. Young, 3 J. J. Marsh. (Ky.) 180.

44. Busch v. Moline, etc., Co., 52 Nebr. 83, 71 NW 947; Thomas v. Edgerton, 40 Nebr. 25, 58 NW 551.

45. **Filing new or additional bond** see infra § 133.

46. Smith v. Howard, 23 Ark. 203; Lee v. Mills, 69 Ga. 740; McDonald v. Praught, (N. S.) 7 EastLR 231.

47. See statutory provisions.

[a] **General statutes** relating to the amendment of bonds apply to replevin bonds. Donley v. Fowler, 147 Mich. 288, 110 NW 1097; Bublitz v. Trombley, 113 Mich. 413, 71 NW 840; Hopkins v. Green, 93 Mich. 394, 53 NW 537.

[b] **In New York** Code Civ. Proc. § 730, permitting an amendment of any defects in a bond or undertaking, applies to justices' courts; and, by L. (1894) c 615 §§ 103, 117, the proceedings and practice in justices' courts apply to the city court. Rich v. Conley, 64 NYS 333.

[c] **In Rhode Island** a defective replevin bond cannot be amended under Gen. St. c 224 § 4, that provision being applicable only in favor of defendant, and on his motion; nor under Gen. St. c 199 § 4, reënacted in Pub. St. c 210 § 4, permitting amendments of process, because the bond in a replevin suit is not a part of the process, but collateral to it. Simpson v. Wilcox, 18 R. I. 40, 25 A 391; Whitford v. Goodwin, 13 R. I. 145.

48. Shaw v. Tobias, 3 N. Y. 188; Whaling v. Shales, 20 Wend. (N. Y.) 673.

New or additional bond generally see infra § 133.

49. Hawley v. Bates, 19 Wend. (N. Y.) 632.

50. Taylor v. Jackson, 35 Misc. 300, 71 NYS 745.

51. Kendall v. Fitts, 22 N. H. 1.

52. **Justification of sureties** see supra § 127.

53. Cobb v. Lackey, 13 N. Y. Super. 649.

New or additional bond see infra § 133.

54. Cobb v. Lackey, 13 N. Y. Super. 649.

55. **Waiver of bond** see supra § 117.

Waiver of formal requisites of statute see supra § 120.

56. Morris v. Hanson, 2 Colo. A. 154, 30 P 139; Roberts v. Perrine, 247 Ill. A. 259, 262 [cit Cyc]; Wilson v. Nichols, 29 Me. 566; Johnson v. Richards, 11 Me. 49; Laird v. Upton, 8 N. M. 409, 45 P 1010.

[a] **Rule applied** to the objection that the bond was not given in due time, the bond not being jurisdictional. Laird v. Upton, 8 N. M. 409, 45 P 1010.

57. Ind.—Spencer v. Dickerson, 15 Ind. 368.

Md.—Burrier v. Cunningham Piano Co., 135 Md. 135, 108 A 492, 495 [cit Cyc].

Mass.—Simonds v. Parker, 1 Metc. 508; Chandler v. Smith, 14 Mass. 313.

Mich.—Bloomingdale v. Chittenden, 75 Mich. 305, 42 NW 836; Pistorius v. Swarthout, 67 Mich. 186, 34 NW 547; Clark v. Dunlap, 50 Mich. 492, 15 NW 565.

Minn.—McKee v. Metraw, 31 Minn. 429, 18 NW 148.

Nebr.—Hudelson v. Tobias First Nat. Bank, 50 Nebr. 557, 71 NW 304.

Okl.—Wood v. Colby, 30 Okl. 106, 118 P 584.

R. I.—Grove v. Gardiner, 30 R. I. 477, 76 A 178; W. W. Kimball Co. v. Tasca, 26 R. I. 565, 59 A. 919.

Vt.—Shapiro v. Reid, 98 Vt. 76, 126 A 496; Tripp v. Howe, 45 Vt. 523.

[a] **For example,** an objection that the bond was executed by one having no authority to do so. Kimball Co. v. Tasca, 26 R. I. 565, 59 A. 919.

58. Wood v. Colby, 30 Okl. 106, 118 P 584.

Operation, effect, and construction of redelivery bond generally see infra § 161.

59. Roberts v. Perrine, 247 Ill. A. 259, 262 [cit Cyc].

"The failure to take a bond, or the taking of an insufficient bond must be taken advantage of at the earliest opportunity." Roberts v. Perrine, supra.

60. Hughes v. Hardesty, 13 Bush (Ky.) 364; Hatch v. Christmas, 68 Mich. 84, 35 NW 833.

[a] **Failure of sureties to justify** their pecuniary responsibility in writing indorsed on the bond is not jurisdictional, and is waived unless objection is seasonably made. Hatch v. Christmas, 68 Mich. 84, 35 NW 833.

61. Barton v. Shull, 70 Nebr. 324, 97 NW 292; Spencer v. Bell, 109 N. C. 39, 13 SE 704; Safran v. Safran, 107 S. C. 452, 93 SE 140; Cromer v. Watson, 59 S. C. 488, 38 SE 126.

[a] **Rule applied** to objection: (1) That the magistrate did not indorse his approval on an undertaking. Cromer v. Watson, 59 S. C. 488, 38 SE 126. (2) To the sufficiency of the sureties. Barton v. Shull, 70 Nebr. 324, 97 NW 292; Spencer v. Bell, 109 N. C. 39, 13 SE 704.

[b] **Objection held timely** where process was served Jan. 27, an agreement to attempt an arbitration was made Jan. 29, and terminated Jan. 31, and defendant duly excepted to the undertaking Febr. 1. Safran v. Safran, 107 S. C. 452, 93 SE 140.

62. Greely v. Currier, 39 Me. 516; Simonds v. Parker, 1 Metc. (Mass.) 508; Shapiro v. Reed, 98 Vt. 76, 126 A 496; Tripp v. Howe, 45 Vt. 523.

63. Kesler v. Haynes, 6 Wend. (N. Y.) 547; Rehm v. Askew, 13 Pa. Dist. 353; McClary v. De Bow, 14 S. C. L. 44.

[a] **Default judgment,** for example. Kesler v. Haynes, 6 Wend. (N. Y.) 547; Rehm v. Askew, 13 Pa. Dist. 353.

64. Greely v. Currier, 39 Me. 516.

65. Pardee v. Buell, 2 Hill (N. Y.) 357.

66. Pardee v. Buell, supra.

67. **Dismissal of action for defective bond where plaintiff is willing to give new one** see infra § 259.

is sufficient.[68] Under some statutes a defective or insufficient replevin bond may be amended,[69] a new or additional bond may be filed nunc pro tunc,[70] or a new bond may be ordered filed within such time as may be directed.[71] For example, a new or additional bond may be filed so as to cure a bond which is defective in not providing for a sufficient penalty,[72] or for not having the required sureties;[73] and under statutes authorizing the court to order filing of a new bond, such bond may be required in any case where it becomes necessary for the proper security of defendant,[74] or where the original bond is insufficient for any reason.[75] It may be authorized when the original is attacked by plea in abatement.[76] There is, however, authority to the effect that the court cannot require plaintiff to file a new bond;[77] and defendant may waive a new or additional bond, as by going to trial upon the merits without objection.[78] So a new or additional bond cannot be required where defendant has retained possession of the property by giving a delivery bond,[79] where the property has been placed in the custody of the court,[80] or if the bond which is given is sufficient and regular under the statute.[81] The giving of a new bond does not operate to release the old.[82]

Jurisdiction of a justice to determine a pending application for a new bond does not, in the absence of statutory provision, cease upon the return day of the writ.[83]

[§ 134] **c. Writ, Order, and Summons—(1) Nature of Writ.** A writ of replevin is a writ of summons as opposed to a writ of attachment;[84] but although, in addition to the other purposes for which it is assumed, it is made to perform an office analogous to that of a summons, it is not a summons within the meaning of a statute prescribing the time within which a summons should be returnable.[85]

[§ 135] **(2) Issuance—(a) In General.** At common law and under some statutes an action of replevin is commenced by a writ of replevin commanding the officer to whom it is directed to replevy the goods and deliver them to plaintiff and to summon defendant to appear and answer the taking and detention;[86] but under other statutes the action is commenced by a summons,[87] and a writ or order for the delivery of the property, which has, under such statutes, taken the place of the old writ of replevin, not only is not essential to the commencement of the action,[88] but cannot be issued until after the action has commenced by the service of summons,[89] and furthermore the maintenance of the action is not dependent on such an order being issued,[90] as such order is merely ancillary,[91] and confers no title, but covers only a temporary right which may terminate upon a judgment against plaintiff.[92] Under some of such statutes, after plaintiff in replevin has complied with the statutory requirements as to the filing of a proper affidavit and bond,[93] it is the duty of the clerk of court forthwith to issue an order or writ for the replevin of the property designated,[94] which duty is purely ministerial.[95] A writ of replevin may be issued in one county to replevy goods in another county.[96] Where the writ has become lost, it should be restored by a copy thereof.[97] After a statute prescribing the mode of issuing writs is repealed, a writ issued thereunder is void.[98]

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[68] Graham v. Wells, 18 HowPr (N. Y.) 376.

[a] **For example,** by excepting within three days to the sufficiency of the sureties. Graham v. Wells, 18 HowPr (N. Y.) 376.

Excepting to sufficiency of sureties as waiver of right of redelivery see infra § 164.

[69] See statutory provisions. See also supra § 131.

[70] See statutory provisions.

[a] **Applicability of general statutes.**—A statute permitting new bonds to be filed nunc pro tunc whenever a bond required to be filed is defective in any respect applies to replevin bonds. Moore v. Lewis, 76 Mich. 300, 43 NW 11.

[71] See statutory provisions.

[a] **Relation back.**—Where a motion for a new bond is continued to the next term and then granted, and plaintiff files a motion to set aside the order requiring the bond, which motion is continued to the next term and overruled, the order for a new bond will not be made to relate back to the term when the motion for it was filed, where there is nothing in the record to show on whose application the motion was continued. McAleenan v. Dickmann, 128 Mo. A. 703, 107 SW 444.

[72] Smith v. Howard, 23 Ark. 203; Donley v. Fowler, 147 Mich. 288, 110 NW 1097; Briggs v. Wiswell, 56 N. H. 319; Angell v. Sprague, 35 R. I. 156, 85 A 790.

[73] Newland v. Willetts, 1 Barb. (N. Y.) 20; Whaling v. Shales, 20 Wend. (N. Y.) 673; Angell v. Sprague, 35 R. I. 156, 85 A 790; McDonald v. Praught, (N. S.) 7 EastLR 231.

Justification of surety see supra § 127.

Substitution of surety see supra § 131.

Sufficiency of surety generally see supra § 126.

[74] Treman v. Morris, 9 Ill. A. 237.

[75] Greig v. Ware, 25 Colo. 184, 55 P 163.

[76] Silox Pure Water Co. v. Vendome Lunch Co., 219 Mass. 194, 106 NE 852.

[77] Lynch v. Bruce, 2 Dougl. (Mich.) 123.

[78] Bloomingdale v. Chittenden, 75 Mich. 305, 42 NW 836.

Waiver of defects and objections see supra § 132.

[79] Jackson v. Dummit, 62 Mo. A. 426.

[80] Kennedy v. Roberts, 105 Iowa 521, 75 NW 363.

Custody and care of property generally see infra §§ 169–171.

[81] Hohensstein v. Westminster Candle Co., 31 App. Div. 11, 52 NYS 235; U. S. Land, etc., Co. v. Bussey, 53 Hun 516, 6 NYS 416, 17 NYCiv Proc 164; De Reguie v. Lewis, 26 N. Y. Super. 708; Bulmer v. Jenkins, 3 HowPr (N. Y.) 11.

[a] **Approval of sheriff.**—After the sheriff has approved the bond, a new undertaking cannot be required, as the code of procedure does not provide for any other undertaking than that to be taken and approved by the sheriff, however inadequate the amount for which it is given. De Reguie v. Lewis, 26 N. Y. Super. 708.

[b] **Discretion of officers.**—The court will not entertain a motion to increase the penalty of the replevin bond as it is a matter of discretion with the officers taking it, under the statute. Bulmer v. Jenkins, 3 HowPr (N. Y.) 11.

[c] **Insolvency of surety.**—Even though one of the original sureties on a bond regular and sufficient when given becomes insolvent, the court cannot require a new bond. Hohenstein v. Wesminster Candle Co., 31 App. Div. 11, 52 NYS 235.

[82] U, S. Fidelity, etc., Co. v. Calvin, (Mo. A.) 7 SW (2d) 732.

[83] Butterfield v. Brady, 111 Conn. 112, 149 A 252.

[84] Gaffield v. Avery, 43 Vt. 668.

[85] Duffield v. Denver, etc., R. Co., 5 Colo. A. 25, 36 P 622.

[86] Bates v. Capital State Bank, 21 Ida. 141, 121 P 561; Snedeker v. Quick, 11 N. J. L. 179; Taylor v. Adams Express Co., 9 Phila. (Pa.) 272; Warren v. Leiter, 24 R. I. 36, 52 A 76. See In re Alton Mfg. Co., 158 Fed. 367 (Rhode Island).

"At common law . . . [the action of replevin] could be commenced only by the issuance of a writ of replevin. Hart v. Moulton, 104 Wis. 349, 80 NW 599, 600, 76 AmSR 881.

Filing affidavit as commencing suit in replevin see supra § 98.

[87] See statutory provisions. See also Pelham v. Edwards, 45 Kan. 547, 26 P 41 (applying such statute).

[88] McAdam v. Walbrau, 8 NYCiv Proc 451; Delin v. Stohl, 2 NYCiv Proc 222.

[a] **Thus** the action may be maintained in a justice's court, where summons has been personally served upon defendant or where he appears, although no process is issued for replevying the property at any time before execution is issued upon the judgment obtained. Delin v. Stohl, 2 NYCivProc 222.

[89] Pelham v. Edwards, 45 Kan. 547, 26 P 41.

[90] Varner v. Bowling, 54 Kan. 380, 38 P 481; Halcomb v. Phipps, 194 Ky. 648, 240 SW 363; Hutchinson Gin Co. v. Latimer County Nat. Bank, 106 Okl. 159, 233 P 438; Thompson v. Grove, 72 Okl. 290, 180 P 553; Hutchings v. Cobble, 30 Okl. 158, 120 P 1013.

[91] Varner v. Bowling, 54 Kan. 380, 38 P 481; Thompson v. Grove, 72 Okl.

Time of issuance. The writ, it has been held, should be sued out by plaintiff in time for the pleadings to be perfected at or before the next term of court.[99]

[§ 136] **(b) Alias and Pluries Writs.** As in case of the issuance of process generally,[1] where an original writ of replevin is improperly executed or for some other reason fails fully to subserve the purpose for which it is issued, an alias writ may be issued,[2] and if an alias writ proves to be ineffectual, a pluries writ may be issued.[3] The alias or pluries writ may be issued by order of the court[4] or without such order,[5] but there must be no delay in the prosecution of the suit.[6] Where two writs issue on one affidavit, the issuance of the second does not invalidate or render void the first or the proceedings under it.[7]

Alias summons may be issued where the original summons in a replevin suit is irregular.[8]

[§ 137] **(3) Requisites and Sufficiency—(a) Writ or Order—aa. In General.** A writ or order of replevin should comply with all requirements as to matters of form or contents prescribed by statute,[9] or rules of court.[10] It should be directed to the officer who is authorized to serve it,[11] and against the person who has the possession or custody of the property involved,[12] and who is a party or the agent of a party to the action.[13] Thus where the property has been seized under process or attachment, it should be directed against the sheriff or other officer who has the custody of the property.[14] The process should be made returnable at or before the next term

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290, 180 P 553.

Seizure of property as ancillary to action of replevin see supra § 97.

92. Mohr v. Langan, 77 Mo. A. 481.

93. **Requisites, sufficiency, and validity of:**
Affidavit see supra §§ 101-109.
Bond see supra §§ 120-128.

94. See statutory provisions.

95. Easter v. Traylor, 41 Kan. 493, 21 P 606.

[a] **Rule applied.**—The duty of the clerk to issue a writ in such cases being purely ministerial and not discretionary, he is not excused from issuing it by the fact that he has been enjoined from issuing a writ in another action, or that the property is already in the custody of the sheriff. Easter v. Traylor, 41 Kan. 493, 21 P 606.

96. Judson v. Adams, 8 Cush. (Mass.) 556; Hiles v. McFarland, 3 Pinn. (Wis.) 365, 4 Chandl. 89; Buffalo, etc., R. Co. v. Gordon, 3 CanLJ 28.

[a] **Alias writ** is within the rule. Hiles v. McFarland, 3 Pinn. (Wis.) 365, 4 Chandl. 89.

[b] **Illustrations.**—(1) The writ may be issued by the clerk of court in one county returnable in another. Judson v. Adams, 8 Cush. (Mass.) 556. (2) So where the goods to be replevied have not been distrained, the writ may be sued out in any county to replevy goods in another county. Buffalo, etc., R. Co. v. Gordon, 3 CanLJ 28.

97. Kehoe v. Rounds, 69 Ill. 351.

98. Hicks v. Mendenhall, 17 Minn. 475; Castle v. Thomas, 16 Minn. 490.

99. Luther v. Arnold, 41 S. C. L. 397.

1. See Process §§ 49-52.

2. Pool v. Loomis, 5 Ark. 110; O'Brien v. Haynes, 61 Ill. 494; Anderson v. Judge Lenawee Cir. Ct., 105 Mich. 89, 62 NW 1027; Peo. v. Judge Mecosta Cir. Ct., 26 Mich. 414; Hiles v. McFarland, 3 Pinn. (Wis.) 365, 4 Chandl. 81.

[a] **Irregular service.**—Where the service is irregular, but there has been no substantial damage to defendant, the proper practice is to allow an alias writ to issue, rather than to dismiss the proceeding. Anderson v. Judge Lenawee Cir. Ct., 105 Mich. 89, 62 NW 1027.

3. Branch v. Branch, 6 Fla. 314; Snow v. Roy, 22 Wend. (N. Y.) 602.

[a] **Illustration.**—Where plaintiff accepts part of the property which is the subject of the suit, the remainder not being found, he may issue an alias writ followed by a pluries for the residue of the property. Snow v. Roy, 22 Wend. (N. Y.) 602.

4. Branch v. Branch, 6 Fla. 314; Peo. v. Judge Mecosta Cir. Ct., 26 Mich. 414.

[a] **Thus** an alias writ may be issued by an order of court for the purpose of personal service merely, where the property has been seized on the original writ, but there has been a failure of personal service on defendant during the lifetime of the original writ. Peo. v. Judge Mecosta Cir. Ct., 26 Mich. 414.

5. Pool v. Loomis, 5 Ark. 110; Branch v. Branch, 6 Fla. 314.

[a] **Thus** (1) the clerk may issue an alias writ without an order of the court. Pool v. Loomis, 5 Ark. 110. (2) So plaintiff may cause a pluries writ to be issued without such an order. Branch v. Branch, 6 Fla. 314.

6. Snow v. Roy, 22 Wend. (N. Y.) 602.

7. Rhodenbaugh v. Carey, 2 Oh. Dec. (Reprint) 162, 1 WestLMonth 599.

8. Ex p. Johnson, 7 Cow. (N. Y.) 424.

9. Mass.—Gould v. Barnard, 3 Mass. 199.

Minn.—Dahl v. Halverson, 178 Minn. 174, 226 NW 405.

Tenn.—Reynolds v. Lowthrop, 7 Tenn. Civ. A. 12.

Wis.—Roach v. Moulton, 2 Pinn. 221, 1 Chandl. 187.

Man.—Schatsky v. Bateman, 17 Man. 347.

[a] **Rule applied** as to the statutory requirement that: (1) The writ be indorsed. Gould v. Barnard, 3 Mass. 199. (2) All process shall run in the name of the state. Reynolds v. Lowthrop, 7 Tenn. Civ. A. 12. (3) All process issued by justices of the peace shall run in the name of the United States. Roach v. Moulton, 2 Pinn. (Wis.) 221, 1 Chandl. 187.

[b] **Writ held valid** as issued pursuant to statute. Dahl v. Halverson, 178 Minn. 174, 226 NW 405.

10. West Pub. Co. v. Bottineau, 34 Minn. 239, 25 NW 405.

11. Stacy v. Farnham, 2 HowPr (N. Y.) 26; Ralston v. Strong, 1 D. Chipm. (Vt.) 287; Hocken v. Doucett, 31 N. B. 369; Gilchrist v. Conger, 11 U. C. Q. B. (Ont.) 197.

[a] **To coroner.**—(1) Where the remedy sought is against the sheriff, the writ should be directed to the coroner (Hocken v. Doucett, 31 N. B. 369; Gilchrist v. Conger, 11 U. C. Q. B. (Ont.) 197), (2) notwithstanding the statute does not in terms provide for such a case (Gilchrist v. Conger, supra). (3) Where there are several coroners in the county, the writ should be directed to all of them generally. Hocken v. Doucett, supra.

[b] **Writ directed to constable** has been held not authorized under a statute requiring replevin writs to be directed to the sheriff or his deputy. Ralston v. Strong, 1 D. Chipm. (Vt.) 287.

[c] **Where under sheriff attaches property,** a writ of replevin against him may be directed to the sheriff whom he is under. Stacy v. Farnham, 2 HowPr (N. Y.) 26.

12. Maxey v. White, 53 Miss. 80.

13. Lehman v. Mayer, 8 App. Div. 311, 40 NYS 933.

[a] **Thus** an order requiring the sheriff to take chattels from a person who is not a party to the action or to the motion for the order, nor an agent of a party, is erroneous. Lehman v. Mayer, 8 App. Div. 311, 40 NYS 933.

14. Maxey v. White, 53 Miss. 80. See Denison v. Raymond, Kirby (Conn.) 274 (the writ should be directed to the officer serving the attachment, requiring him to redeliver the goods to defendant in attachment and notify plaintiff therein).

Replevin of property in custodia legis generally see supra § 24.

of court,[15] or within the time prescribed by statute.[16] It should also be made to appear in the writ that a legal bond was given, where such bond is a prerequisite to the issue of the writ;[17] but it is not necessary that the bond should appear at length on the face of the writ.[18] It is not essential that the writ should disclose the fact that the property to be replevied belonged to plaintiff or had been impounded or distrained;[19] nor need the writ show that the affidavit required by statute had been made by plaintiff.[20] Mere irregularities or informalities will not ordinarily invalidate the writ,[21] and if it is regular on its face, it will protect the officer who serves it because it is his duty to execute such process without investigating the cause of action.[22] A writ directed to the sheriff and commanding him to hear the cause and do justice to the parties, which writ is in the form of the old English writ of replevin issuing out of chancery, is irregular under modern practice.[23]

An immaterial variance between the writ and the copy served is no ground for abatement.[24]

[§ 138] **bb. Description and Value of Property.** A writ or order of replevin must specify the particular property to be replevied, and describe it with such a reasonable degree of certainty that the property may be identified and delivered to plaintiff[25] but as a general rule it is not necessary that the writ should allege the value of the property to be replevied.[26] This rule, however, does not require a greater certainty of description than the nature of the property will reasonably admit of,[27] and although the description is general in its terms, if it is sufficiently full and definite to enable the property, with outside help, to be pointed out to or identified by the officer executing the writ, it is sufficient.[28] If there is no uncertainty as to the property to be taken, and the right property is taken, a variance between the description in the affidavit and that in the writ is immaterial;[29] but if the writ insufficiently describes the property the sheriff or other officer may refuse to execute it.[30] The requirement of a description in the writ is not satisfied by a description in the affidavit annexed to the writ,[31] but, on the other hand, a writ is not defective because the schedule of articles is on a separate paper attached to the writ instead of being written on the paper on which the writ is printed.[32] Under a statute authorizing the replevying of "goods," a writ may command the taking of both beasts and chattels.[33]

[§ 139] **(b) Summons.** Under some statutes provision is made for the commencement of an action of replevin by a summons,[34] which must comply with the statutory requirements as to matters of form,[35] although it is usually sufficient if it fairly apprises defendant of the fact that the action is an action of replevin, of the name of plaintiff and his attorney, of the court whence the writ issued, and the time and place for defendant to appear.[36] A formal variance between the writ and summons as to the nature of the action, as where the writ is in the detinet and the summons in the cepit et detinet, is immaterial.[37]

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[15] Cayward v. Doolittle, 6 Cow. (N. Y.) 602.

[a] **Rule applied.**—A writ attested at one term and returnable at the next term but one, an entire term intervening, is voidable. Cayward v. Doolittle, 6 Cow. (N. Y.) 602.

[16] Duffield v. Denver, etc., R. Co., 5 Colo. A. 25, 36 P 622.

[17] Watson v. Watson, 9 Conn. 140, 23 AmD 324.

[18] Watson v. Watson, supra.

[19] Watson v. Watson, supra.

[20] Magee v. Siggerson, 4 Blackf. (Ind.) 70.

[21] Osgood v. Carver, 43 Conn. 24; State v. Wilson, 24 Kan. 50.

[a] **Failure to name court** in which the action was brought in the body of the writ is merely irregular. State v. Wilson, 24 Kan. 50.

[b] **In Rhode Island** (1) the omission of the words, "original writ," from the clause, "provided the same is not taken, attached, or detained upon original writ," etc., cannot be objected to by plaintiff in replevin. Goodell v. Bates, 14 R. I. 65. (2) But, where the question was presented by objection of defendant, it was held that a writ without amendment is fatally defective by reason of such omission. Parker v. Palmer, 13 R. I. 359.

[22] Osgood v. Carver, 43 Conn. 24; Watson v. Watson, 9 Conn. 140, 23 AmD 324.

[23] Cornell v. Quick, Draper (Ont.) 427.

[24] Matthai v. Capen, 65 Conn. 593, 33 A 495.

[a] **Variance held immaterial** where defendant in replevin was served with a copy of the writ which failed to contain the name of affiant at the foot of the affidavit, although his name did appear in the body of the affidavit, and the original affidavit was duly subscribed and complete, the copy in all other respects conforming thereto. Matthai v. Capen, 65 Conn. 539, 33 A 495.

[25] Colo.—Hook v. Fenner, 18 Colo. 283, 32 P 614, 36 AmSR 277.

Ind.—Magee v. Siggerson, 4 Blackf. 70.

Me.—Hartford F. Ins. Co. v. Stevens, 123 Me. 368, 123 A 38; Musgrave v. Farren, 92 Me. 198, 42 A 355; Wingate v. Smith, 20 Me. 287.

Mass.—Whittle v. Phelps, 181 Mass. 317, 63 NE 907.

Mich.—Peterson v. Fowler, 76 Mich. 258, 43 NW 10; Humphrey v. Bayn, 45 Mich. 565, 8 NW 556; Coman v. Thompson, 43 Mich. 389, 5 NW 452; Parsell v. Judge Genesee Cir. Ct., 39 Mich. 542; Paterson v. Parsell, 38 Mich. 607.

Miss.—Evans v. Parks, 13 S 240.

Nebr.—Sullivan v. Hansen, 95 Nebr. 779, 146 NW 983.

N. J.—Snedeker v. Quick, 11 N. J. L. 179.

N. Y.—De Witt v. Morris, 13 Wend. 496.

Or.—Foredice v. Rinehart, 11 Or. 208, 8 P 285.

Wis.—State v. Welch, 37 Wis. 196.

Ont.—Hoorigan v. Driscoll, 8 Ont. Pr. 184.

[a] **Thus,** where mill logs are converted into boards before the writ is sued out, the writ should describe them as boards, and not as mill logs. Wingate v. Smith, 20 Me. 287.

[26] Litchman v. Potter, 116 Mass. 371; Blake v. Darling, 116 Mass. 300; Pomeroy v. Trimper, 8 Allen (Mass.) 398, 85 AmD 714; State v. Welch, 37 Wis. 196; Dunlap v. Babang, 27 N. B. 549.

[27] Hook v. Fenner, 18 Colo. 283, 32 P 614, 36 AmSR 277.

[28] U. S.—Williams v. Morrison, 28 Fed. 872.

Md.—Anderson v. Stewart, 108 Md. 340, 70 A 228.

Mass.—Litchman v. Potter, 116 Mass. 371.

Mich.—Durrell v. Richardson, 119 Mich. 592, 78 NW 650; Pingree v. Steere, 68 Mich. 204, 35 NW 905; Wattles v. Dubois, 67 Mich. 313, 34 NW 672; Proper v. Conkling, 67 Mich. 244, 34 NW 560; Kelso v. Saxton, 40 Mich. 666; Sexton v. McDowd, 38 Mich. 148; Farwell v. Fox, 18 Mich. 166.

Pa.—Selig Polyscope Co. v. Swaab, 20 Pa. Dist. 194.

R. I.—Waldron v. Leach, 9 R. I. 588.

[a] **Descriptions held sufficient:** (1) "The goods and chattels following, viz.: the contents of a grocery store," describing the store and naming the person by whom the goods were taken and held. Litchman v. Potter, 116 Mass. 371. (2) "One sewing machine and one pool table." Proper v. Conkling, 67 Mich. 244, 34 NW 560. (3) "Two yearlings, red and white in color." Kelso v. Saxton, 40 Mich. 666. (4) "Six oxen." Farwell v. Fox, 18 Mich. 166. (5) So a description of the property as so many bushels of wheat is sufficient to authorize a seizure of unthreshed wheat which has been harvested. Wattles v. Dubois, 67 Mich. 313, 34 NW 672.

[29] McCourt v. Bond, 64 Wis. 596, 25 NW 532.

[30] De Witt v. Morris, 13 Wend. (N. Y.) 496.

[31] Paterson v. Parsell, 38 Mich. 607.

[32] Cate v. Merrill, 116 Me. 432, 102 A 235.

[33] Cate v. Merrill, supra.

[34] See supra § 135.

[§ 140] **(4) Service and Execution—(a) In General.** The court has no jurisdiction to render judgment in a replevin suit where no service of process has been made on defendant,[38] unless service is waived by him.[39] Service of a writ of replevin must be made within the time,[40] and in the manner,[41] prescribed by statute; and under some statutes[42] it has been held that compliance with the statutory provisions as to service of the writ of replevin gives the court complete jurisdiction so as to enable it to control subsequent proceedings in the action, notwithstanding a failure to serve the summons.[43] In the absence of statutes defining the powers of officers in executing the writ, the common law furnishes the rule of procedure.[44] A plaintiff after demand need not delay serving his writ in order that defendant may satisfy himself that the demand is rightfully made.[45]

Service in another county.[46] Where service of process in an action of replevin has been properly made on an agent holding the property within the county in which suit is brought, summons may issue and be served in another county on his principal who claims the right to possession as against plaintiff.[47] So a writ of replevin made returnable to the county in which the property is detained may be served in another county to which the property has been transferred after the beginning of the suit.[48]

Service by publication has been held insufficient.[49]

Service of affidavit. Where there is no statute so providing, service of the affidavit in replevin is not sufficient service of process.[50]

[§ 141] **(b) Who May Serve.** Unless the proper officer to serve a writ of replevin is designated by statute,[51] it is immaterial whether it is served by a sheriff or by a constable.[52] In many jurisdictions the statutes provide that the coroner is the proper officer to serve the writ where the sheriff or his deputy is a party to the action,[53] or is interested in the case;[54] but a remote or contingent interest of the sheriff which may arise and grow out of the suit afterward is not such an interest as authorizes a coroner to serve the writ,[55] and it has been held that a sheriff may properly execute a writ against

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35. Roggencamp v. Moore, 9 Nebr. 105, 2 NW 227.

[a] **Summons held in compliance with statute** (1) as to return date. Roggencamp v. Moore, 9 Nebr. 105, 2 NW 227. (2) So, where it is only in actions for the recovery of money that the amount for which judgment will be taken if defendant fails to appear need be indorsed on the summons, a summons in replevin which does not contain such indorsement is sufficient. Roggencamp v. Moore, supra.

36. Cutler v. Rathbone, 1 Hill (N. Y.) 204.

37. Cutler v. Rathbone, supra.

38. Webb v. Hecox, 27 Misc. 169, 58 NYS 382; Abrams v. Jones, 4 Wis. 806.

[a] **Service on one not defendant's agent.**—Under Code Civ. Proc. § 1700, requiring a constable in replevin to serve on defendant, or his agent from whom the possession is taken, a copy of the affidavit, requisition, and undertaking, a judgment for costs is void against a defendant not so served, where the constable's return does not show that the person in whose possession the property is found was such defendant's agent. Webb v. Hecox, 27 Misc. 169, 58 NYS 382.

39. Swann v. Shemwell, 2 Harr. & G. (Md.) 283; Miller v. Warden, 111 Pa. 300, 2 A 90.

[a] **General appearance** by defendant waives service of the writ or summons in replevin. Swann v. Shemwell, 2 Harr. & G. (Md.) 283; Miller v. Warden, 111 Pa. 300, 2 A 90.

Waiver of objections to service see infra § 148.

40. Lord v. Poor, 23 Me. 569.

41. Gaffield v. Avery, 43 Vt. 668.

[a] **Delivery of copy to agent** of defendant, the latter being out of the state, has been held insufficient under controlling statutes. Gaffield v. Avery, 43 Vt. 668.

42. See statutory provisions.

[a] **Statutes construed together.**—Code Civ. Proc. § 416, providing that from the granting of the provisional remedy the court acquires jurisdiction and control of all subsequent proceedings, must be read in connection with § 1693, providing that, where a chattel is replevied before service of summons, seizure is equivalent to the granting of a provisional remedy for the purpose of giving jurisdiction. Kurzweil v. Story, etc., Piano Co., 95 Misc. 484, 159 NYS 231.

43. Kurzweil v. Story, etc., Piano Co., 95 Misc. 484, 159 NYS 231.

[a] **Judgment.**—Where the court has jurisdiction over the subject matter in an action of replevin, it has inherent power to enter judgment. Kurzweil v. Story, etc., Piano Co., 95 Misc. 484, 159 NYS 231.

44. Palmer v. King, 41 App. (D. C.) 419, LRA1916D 278, AnnCas1915C 1139.

45. Parker v. Palmer, 13 R. I. 359.

46. Service of process in another county generally see Process § 69.

47. Central Nat. Bank v. Brooke, 71 Kan. 767, 81 P 498.

48. Crosier v. Stillson, 67 Vt. 315, 31 A 779.

49. Rose v. Union Sav. Bank, etc., Co., 14 OhNPNS 143.

[a] **Illustration.**—A safety deposit company rented a box to three individuals, with the stipulation that such box should be opened only in the presence of all three renters. In a suit against the company and the renters to obtain possession of property alleged to be in the box, actual service on the company and two renters, and service by publication on the other renter, is not sufficient. Rose v. Union Sav. Bank, etc., Co., 14 OhNPNS 143.

50. Hoffman v. Spokane Jobbers' Assoc., 54 Wash. 179, 102 P 1045.

51. See statutory provisions.

[a] **In Massachusetts** a constable had no authority, by Rev. St. c 15, to serve a writ of replevin, except in a case where the sheriff or his deputy was a party to a suit in which the value of the property to be replevied did not exceed the sum of seventy dollars. Conner v. Palmer, 13 Metc. 302.

[b] **In Missouri** a town marshal who is appointed as special constable by a justice of the peace, under the provisions of Rev. St. § 6149, has no authority or power to execute a writ of replevin. Mitchell v. Shaw, 53 Mo. A. 652.

[c] **In Vermont** a writ of replevin on attached property, directed to, and served by, a constable, was void, as under Judiciary Act, § 46 such writs must have been directed to the sheriff. Ralston v. Strong, Brayt. 216.

52. Smith v. Eals, 81 Iowa 235, 46 NW 1110, 25 AmSR 486.

53. See statutory provisions.

[a] **Officer as party.**—(1) The term "party," as used in the Maine statute, is confined to persons whose names are expressly mentioned in the record as plaintiff or defendant, and does not forbid the service of a writ of replevin by a deputy sheriff on one in whose hands another deputy to the same sheriff had placed the goods replevied, for the purpose of safekeeping, after having attached them as the goods of a person other than plaintiff in replevin. Douglass v. Gardner, 63 Me. 462. (2) Where the action is brought neither by nor against the sheriff, the writ is properly directed to, and executed by, him. Stacy v. Farnham, 2 HowPr (N. Y.) 26.

54. See statutory provisions.

55. Browning v. Bancroft, 5 Metc. (Mass.) 88.

[a] **Action against deputy.**—The interest of the sheriff must be that

his deputy.[56] A coroner authorized to execute a writ of replevin may appoint a special deputy to do it,[57] but under a statute authorizing a constable to appoint a deputy with the consent of the county judge, no power to execute an order of claim and delivery is conferred upon a deputy appointed without such consent.[58] A city marshal, empowered to serve any process which a constable may serve, may serve a writ required by statute to be served by a constable,[59] but county patrolmen, in the absence of statutes so providing, are not authorized to make such service,[60] notwithstanding authority in them to make such arrests and searches and seizures as sheriffs may make.[61] Where a statute provides that unexecuted process remaining with the sheriff at the expiration of his term of office shall be executed by his successor, the word "process" includes the proceedings which authorize a sheriff to take the property in replevin;[62] and one who had seized property in such proceedings and returned it to defendant after taking an ineffective redelivery bond cannot, after expiration of his term, be compelled to retake the property and deliver it to plaintiff.[63]

[§ 142] **(c) Taking Property under Writ or Order—aa. In General.** The officer to whom the writ or order of replevin is directed should execute it by taking and delivering the property as commanded therein,[64] and he has a right to enter defendant's place of abode for that purpose[65] provided he can enter peaceably;[66] but only the property described or set forth in the writ or order,[67] or in the affidavit,[68] when found in the possession of defendant himself or his agent,[69] may lawfully be taken. The officer executing the process may seize the property before serving defendant with a writ or copy thereof,[70] and he must take the property before returning the writ.[71] Where he has not returned the original writ, he has the right to complete the service thereof by taking and delivering the property described in it, although he has previously delivered a copy of the writ to defendant named therein.[72] It has been held that the officer is not obliged to execute the writ unless some one attends to point out the articles he is to deliver.[73]

What constitutes valid levy. In order to constitute a valid levy, the act of taking possession must as a general rule be of such a character as will make the officer, if not protected by the writ or order, liable as for a trespass.[74] It is not necessary that he should actually remove the property from the premises of defendant, but it is sufficient that he place his deputy or agent in possession,[75] or he may, with plaintiff's consent, leave the property in the possession of defendant;[76] and so, upon taking a receipt

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the judgment in the suit will bind or conclude some valuable right or pecuniary interest of the sheriff. The sheriff has no such interest in an action of replevin by a third person against one of his deputies. Browning v. Bancroft, 5 Metc. (Mass.) 88.

[56] Ford v. Dyer, 26 Miss. 243 (containing also a dictum that the deputy cannot execute a writ against the sheriff, the distinction being that the sheriff acts in his own name, and by virtue of his official authority while the deputy acts in the name of the sheriff, and by virtue of the authority from him derived); Carson v. Browder, 2 Lea (Tenn.) 701.

[a] **Rule applied:** (1) Under a statute providing that, where the sheriff is a party to the suit, "process may be directed to the coroner." Carson v. Browder, 2 Lea (Tenn.) 701. (2) Where defendant held the property as deputy sheriff by virtue of the levy of an execution. Ford v. Dyer, 26 Miss. 243; Carson v. Browder, supra.

[57] Jewell v. Hutchinson, 31 N. J. L. 71.

[a] **Reason for rule.**—An officer who acts ministerially may execute his office by means of a special deputy; and in the execution of writs a coroner acts ministerially. Jewell v. Hutchinson, 31 N. J. L. 71.

[58] Koehler v. Com., 222 Ky. 670, 1 SW (2d) 1072.

[59] Fleugel v. Lards, 108 Mich. 682, 66 NW 585.

[a] **Illustration.**—Where the city charter provides that the city marshal shall be the chief of police of the city, and that the chief of police may serve any process which by law a constable may serve, the city marshal may serve a writ of replevin issued by a justice of the peace, and required by statute to be served by a constable. Fleugel v. Lards, 108 Mich. 682, 66 NW 585.

[60] Koehler v. Com., 222 Ky. 670, 1 SW (2d) 1072.

[61] Koehler v. Com., supra.

[62] Ex p. Baker, 32 Cal. A. 320, 162 P 922.

[63] Ex p. Baker, supra.

[64] McKinstry v. Collins, 74 Vt. 147, 52 A 438.

[65] Durgin v. Cohen, 168 Minn. 77, 209 NW 532; Kneas v. Fitler, 2 Serg. & R. (Pa.) 263.

[66] Durgin v. Cohen, 168 Minn. 77, 209 NW 532.

Use of force in taking property see infra § 143.

[67] Chandler v. Smith, 34 Ark. 527; Standard Fdy. Co. v. Schloss, 43 Mo. A. 304; De Witt v. Morris, 13 Wend. (N. Y.) 496.

[68] King v. Orser, 11 N. Y. Super. 431.

[69] Mich.—Sexton v. McDowd, 38 Mich. 148.

Nebr.—Singer Sewing Mach. Co. v. Robertson, 87 Nebr. 542, 127 NW 866, 34 LRANS 887.

N. Y.—Otis v. Williams, 70 N. Y. 208; Einstein v. Dunn, 61 App. Div. 195, 70 NYS 520, 32 NYCivProc 70 [aff 171 N. Y. 648 mem, 63 NE 1116 mem]; Lehman v. Mayer, 8 App. Div. 311, 40 NYS 933; King v. Orser, 11 N. Y. Super. 421.

Pa.—Jones v. Pavey, 10 Pa. Dist. 498.

N. S.—Fraser v. Bruce, 12 N. S. 61.

[a] **Property in custody of peace officer,** as evidence in a case before him, cannot be seized by a sheriff under his writ. Jones v. Pavey, 10 Pa. Dist. 498. But see Devine v. Gilmore, 192 Ill. A. 625.

[b] **Property in possession of third persons.**—(1) An officer cannot be compelled to execute a requisition of replevin and take into his possession property which is in the possession of persons who are not parties to the action, or who are not shown to be the agents of defendant or in any way connected with him. Lehman v. Mayer, 8 App. Div. 311, 40 NYS 933. (2) So the sheriff cannot seize the property in the hands of a stranger claiming to be the owner but not protected by the replevin bond, even though plaintiff and the owner are directed by defendant to the place where the property may be found (Singer Sewing Mach. Co. v. Robertson, 87 Nebr. 542, 127 NW 866, 34 LRANS 887), (3) and a writ of replevin will not protect an officer in taking the property described from some person besides defendant, owning and holding it in good faith (Sexton v. McDowd, 38 Mich. 148; Otis v. Williams, 70 N. Y. 208; Einstein v. Dunn, 61 App. Div. 195, 70 NYS 520, 32 NYCivProc 70 [aff 171 N. Y. 648 mem, 63 NE 1116 mem]).

[70] State v. Wilson, 24 Kan. 50; Erskine v. Vannah, 114 Me. 225, 95 A 1024.

[71] Erskine v. Vannah, supra.

[72] McKinstry v. Collins, 74 Vt. 147, 52 A 438.

[73] Foredice v. Rinehart, 11 Or. 208, 8 P 285; Warner v. Aughenbaugh, 15 Serg. & R. (Pa.) 9.

[74] State v. Beckner, 132 Ind. 371, 31 NE 950, 32 AmSR 257, 26 NE 553.

[75] Barbour v. White, 37 Ill. 164.

[a] **Thus,** where the furniture of a hotel is to be levied on, an officer is to be considered as having made the levy from the time he places a deputy or agent in possession. Barbour v. White, 37 Ill. 164.

[76] McGinnis v. Hart, 6 Iowa 204; Hunton v. Palmer, 67 N. J. L. 94, 50 A 599.

[a] **Where so directed in writing** by plaintiff or his attorney, the officer to whom the writ issues may serve the process as in other cases without taking or delivering the property.

therefor, the property may be left with defendant[77] or a third person.[78]

Finding only part of property. In the absence of a statute otherwise providing[79] it seems that the sheriff is not bound to take a part of the goods unless he can find them all.[80]

[§ 143] **bb. Use of Force in Taking Property.** As a general rule the officer to whom a writ or order of replevin is directed may use whatever force is reasonably necessary to enable him to execute it.[81] But, although some authorities have declared the common law to be otherwise,[82] it has been held that, in the absence of statute, such officer ordinarily is not justified in breaking open an outer door or window in order to execute the writ or order,[83] and, if he does so, he commits a trespass which makes his subsequent acts unlawful, and justifies a householder in resisting his further progress.[84] Accordingly, when an officer in the execution of a writ finds an outer door or window slightly ajar but so obstructed as to require force to overcome the obstruction, he may not use such force,[85] for such an entrance would constitute a breaking.[86] An officer may, however, be justified in breaking open the outer door of a building which is fraudulently used to protect the property from legal process,[87] after demanding that the goods be delivered to him;[88] and, where he has taken possession of the property in partial execution of the writ, he may on his return to complete the levy break open an outer door if necessary.[89] Where, however, the officer has lawfully entered or been admitted into the building, he may, if necessary, break open an inner door in order to reach the property called for in the writ.[90] Statutes, providing that before the officer is justified in breaking open a door or building in order to execute the writ he must publicly demand the delivery of the property, and grant a reasonable opportunity therefor,[91] have been held applicable to a dwelling house[92] or a vault[93] in which the property may be found; but no demand is necessary where the property is in an untenanted or unoccupied house.[94]

[§ 144] **(d) Failure To Take Property.**[95] Usually the jurisdiction of the court to proceed in the cause and award the possession or the value of the property to the party entitled thereto is not ousted by a failure to take the property, caused either by an absence of demand by plaintiff for immediate possession,[96] or by the inability of the officer to find and seize the property.[97] An express stipulation by

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Hunton v. Palmer, 67 N. J. L. 94, 50 A 599.

[77] Glass v. Hauser, 40 Misc. 661, 83 NYS 177; Marshall v. Friend, 33 Misc. 443, 68 NYS 502.

[78] Du Rant v. Brown Motor Co., 147 S. C. 88, 144 SE 705.

[79] See Code Civ. Proc. (1919) § 1698 (changing rule in New York).

[80] Lowrey v. Mansfield, 3 HowPr (N. Y.) 88.

[a] **Arrest of defendant.**—Where only a part of property can be found, the sheriff is not bound to take the goods unless he can find the rest, but, under a statute requiring the sheriff, in case he cannot find the goods described in the writ, to take the body of defendant, he may arrest defendant instead; but if he does take part he cannot arrest defendant on the same writ, although an alias writ may be issued for the part not taken at first and the remainder be taken or defendant be arrested on that. Lowrey v. Mansfield, 3 HowPr (N. Y.) 88.

[81] Prettyman v. Dean, 2 Del. 494; Yott v. Peo., 91 Ill. 11.

[82] Howe v. Oyer, 50 Hun 559, 3 NYS 726; Jones v. Herron, 12 Pa. Co. 183.

[83] Palmer v. King, 41 App. (D. C.) 419, LRA1916D 278, AnnCas1915C 1139; State v. Beckner, 132 Ind. 371, 31 NE 950, 32 AmSR 257, 26 NE 553; Kelley v. Schuyler, 20 R. I. 432, 39 A 893, 44 LRA 435, 73 AmSR 887.

[a] **Statute authorizing sheriff to use force** in executing a writ of replevin (1) does not give such right to a constable (State v. Beckner, 132 Ind. 371, 31 NE 950, 32 AmSR 257, 26 NE 553), (2) and the latter will be guilty of trespass for breaking into a building or inclosure to execute a writ (State v. Beckner, supra).

[84] Palmer v. King, 41 App. (D. C.) 419, LRA1916D 278, AnnCas1915C 1139; State v. Beckner, 132 Ind. 371, 31 NE 950, 32 AmSR 257, 26 NE 553.

[85] Palmer v. King, 41 App. (D. C.) 419, LRA1916D 278, AnnCas1915C 1139.

[a] **Illustration.**—A deputy marshal, seeking to execute a writ, rang a doorbell and plaintiff answered through an adjoining window, informing him that her husband was not at home and suggesting that the papers which the deputy said he had for him be left with her to deliver. As she opened the window to receive the papers the deputy started to climb through. Plaintiff vigorously resisted, but he forced his way in. It was held that such entry was illegal. Palmer v. King, 41 App. (D. C.) 419, LRA1916D 278, AnnCas1915C 1139.

[86] Palmer v. King, supra.

[87] Stitt v. Wilson, Wright (Oh.) 505; Semayne's Case, 5 Coke 91a, 77 Reprint 194.

[a] **Untenanted house.**—Where an untenanted house is fraudulently used to protect property from legal process, it may be broken open by an officer without a demand to have it opened. Stitt v. Wilson, Wright (Oh.) 505.

[88] Semayne's Case, 5 Coke 91a, 77 Reprint 194.

[89] State v. Beckner, 132 Ind. 371, 31 NE 950, 32 AmSR 257, 26 NE 553.

[90] Prettyman v. Dean, 2 Del. 494; State v. Beckner, 132 Ind. 371, 31 NE 950, 32 AmSR 257, 26 NE 553.

[a] **If outer door is open,** a sheriff has a right to enter a house to execute a writ of replevin, and to break open inner doors if the property is concealed. Prettyman v. Dean, 2 Del. 494.

[91] See statutory provisions.

[92] Howe v. Oyer, 50 Hun 559, 3 NYS 726.

[93] Butterfield v. Oppenheimer, 18 NYS 826 [aff 135 N. Y. 648, 32 NE 647].

[a] **Thus** an officer in whose hands a requisition for goods has been placed for execution has no right to break open a vault in which such goods are, unless the person in possession of the vault refuses to open it after a reasonable opportunity to do so has been given him. Butterfield v. Oppenheimer, 18 NYS 826 [aff 135 N. Y. 648, 32 NE 647].

[94] Howe v. Oyer, 50 Hun 559, 3 NYS 726; Stitt v. Wilson, Wright (Oh.) 505.

[a] **Rule applied** (1) where the untenanted house was fraudulently used to protect the property from legal process. Stitt v. Wilson, Wright (Oh.) 505. (2) Where a constable, after knocking at the door of a dwelling house in which the property is, and calling out the name of the occupant, learns that no one is within, he need not make such public demand, but may lawfully break open the house and take the chattel. Howe v. Oyer, 50 Hun 559, 3 NYS 726.

[95] **Necessity, in actions not involving preliminary seizure, of:**
Affidavit see supra § 100.
Bond see supra § 118.

[96] Catterlin v. Mitchell, 27 Ind. 298, 89 AmD 501; Hunton v. Palmer, 67 N. J. L. 94, 50 A 599; Vogel v. Badcock, 1 AbbPr (N. Y.) 176.

[a] **In Minnesota** (1) the rule of the text prevails. Benjamin v. Smith, 43 Minn. 146, 44 NW 1083. (2) But under an earlier statute a justice had no power to try actions in replevin until the property had been found and seized. St. Martin v. Desnoyer, 1 Minn. 41.

Ancillary nature of preliminary seizure see supra § 97.

[97] Babcock v. Ashmead, 24 Kan. 585; McBrian v. Morrison, 55 Mich. 351, 21 NW 368; Fergus v. Gagnon, 4 Nebr. (Unoff.) 25, 93 NW 146; Bower v. Tallman, 5 Watts & S. (Pa.) 556.

[a] **Rule applied** where the wrong property was taken possession of by the officer. Babcock v. Ashmead, 24 Kan. 585.

[b] **In Mississippi** the statute, allowing plaintiff to proceed to recover the value of the property on "a failure to take the goods," applies only to a case where defendant secreted or refused to deliver the property on proper demand therefor being made by the officer. Meyer v. Mosler, 64 Miss. 610, 1 S 837.

the parties that the right of property in one of the chattels, which was embraced in the pleadings but not taken under the writ, should be submitted to the jury, confers full jurisdiction of the question upon the court.[98] At common law, when the goods sought to be replevied were concealed or removed beyond the reach of the officer, a writ of capias in withernam, authorizing the taking and detention of other goods of defendant, might issue.[99] Statutes sometimes provide that, where the property claimed has not been taken, the action may proceed as one for damages only.[1] Such statutes, however, are intended to apply where the officer has not obtained possession of the property under the order of delivery issued to him,[2] and not where the property, after being seized by the officer, is returned to defendant upon the giving of a forthcoming bond.[3]

[§ 145] **(e) Citation on Disposal and Concealment of Property.** Under a statute providing that, where it appears by affidavit that property has been disposed of or concealed so that the writ of replevin cannot be executed, the court, upon verified petition therefor, may compel defendant's attendance and examine him as to the situation of the property, the proceedings cannot be instituted where the sheriff's affidavit negatives both the allegations of disposal and concealment required in the petition.[4] So an unverified petition in addition to the sheriff's affidavit is insufficient;[5] and an application purporting to be a "second amended and substituted petition to cite defendant" is not sufficient under such statute where the only previous paper filed by plaintiff was his original petition in the replevin suit and the amendment thereto.[6]

[§ 146] **(5) Defects and Objections[7]—(a) In General.** The proper remedy to obtain a quashal of the writ for defects in the writ itself,[8] or in the proceedings taken to obtain it,[9] is by motion; demurrer cannot be used to object to authority of the officer serving the writ.[10] The motion should be made after service[11] and return[12] of the writ, and before issue joined[13] or raised for the jury;[14] but where there are two or more defendants, one of them cannot, by pleading, conclude the others of their right to attack irregularities in the proceedings by motion to quash;[15] and a void writ may be attacked after defendant has pleaded,[16] or on the trial.[17] So it has been held that after appearance, defendant may move to quash for a material defect,[18] as that the writ failed to specify the property,[19] but it is then too late to move to quash the writ on the ground that the goods are not described with sufficient particularity.[20] The writ will not be quashed where a clear case has not been made out,[21] nor on motion of the sheriff where he is not a party to the action;[22] and a formal defect in the writ which may be remedied by amendment is not sufficient to require quashal.[23] Where, in replevin for several chattels, the sheriff seized part of the property in the county in which the action was properly brought, and the rest in another county to which it had been taken after the commencement of the action, the court could not quash the writ, although the second seizure was illegal.[24]

Nature of motion. A motion to quash goes to the technical regularity of procedure,[25] and not to the merits of the case.[26]

Notice of motion. Statutory provisions and rules of courts providing for notice of the motion to set aside a writ or order must be complied with.[27]

Effect of quashal. A quashal of the writ on the motion of one defendant operates as a dismissal or discontinuance as to all,[28] and defendant is ordinarily entitled to a return of the property,[29] but not to an assessment of damages, where the writ was quashed for nondescription of the property seized.[30]

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[98] Sanger v. Kinkade, 16 Ill. 44.

[99] Bennett v. Berry, 8 Blackf. (Ind.) 1; Swann v. Shemwell, 2 Harr. & G. (Md.) 283; McBrian v. Morrison, 55 Mich. 351, 21 NW 368; McColgan v. Huston, 11 S. C. L. 444.

[a] **In New York** the writ was abolished by statute and the taking of the body of defendant as on a capias ad respondendum was substituted in its stead. This statute did not apply where a part of the goods was found. Snow v. Roy, 22 Wend. 602.

[1] See statutory provisions.

[2] Ladd v. Stratton, 122 Kan. 274, 252 P 234.

[3] Ladd v. Stratton, supra.

[4] Cox v. Carrick, 187 Iowa 1130, 175 NW 44.

[5] Cox v. Carrick, supra.

[6] Cox v. Carrick, supra.

[a] **Reason for rule.**—The substituted petition must have been intended as a substitute for something already filed. Under the circumstances, therefore, the substitute petition necessarily supplanted the first petition and first amendment, and became a pleading and the only pleading on the part of plaintiff in the case. Cox v. Carrick, 187 Iowa 1130, 175 NW 44.

[7] **Cross references:**
Quashing writ for defects in:
  Affidavit see supra § 111.
Quashing writ for defects in: Continued
  Bond see supra § 130.
  Return see infra § 152.
Variance between writ and declaration see infra §§ 173, 209.

[8] Anderson v. Stewart, 108 Md. 340, 70 A 228; Evans v. Parks, (Miss.) 13 S 240; Snedeker v. Quick, 11 N. J. L. 179.

[a] **For example,** where it fails to specify and describe the property to be replevied. Anderson v. Stewart, 108 Md. 340, 70 A 228; Evans v. Parks, (Miss.) 13 S 240; Snedeker v. Quick, 11 N. J. L. 179.

[9] Fawkner v. Baden, 89 Ind. 587.

[10] Smith v. Dexter, 121 Mass. 597.

[11] Shewell v. MacKinley, 1 Miles (Pa.) 54.

[12] Lewis v. Griswold, 1 Wend. (N. Y.) 292.

[13] Haller v. Beall, 11 F. Cas. No. 5,957, 2 Cranch C. C. 227; Clark v. Dunlap, 50 Mich. 492, 15 NW 565; Tripp v. Howe, 45 Vt. 523.

[14] Renner v. Stephens, 76 Pa. Super. 596.

[a] **Rule applied.**—The writ will not be quashed where plaintiff obtained the writ by due compliance with the statute, it was duly served, defendant filed a counter bond and retained the property, plaintiff filed his declaration and defendant his affidavit of defense, and evidence was heard on the issues so raised. Renner v. Stephens, 76 Pa. Super. 596.

[15] Morris v. Baker, 5 Wis. 389.

[16] Yake v. Schmoll, 29 Pa. Dist. 107.

[a] **Rule applied** on motion to quash made on the ground that the property was in the custody of the law. Yake v. Schmoll, 29 Pa. Dist. 107.

[17] Taylor v. Ellis, 200 Pa. 191, 49 A 946.

[18] Snedeker v. Quick, 11 N. J. L. 179.

[19] Snedeker v. Quick, supra.

[20] Kraemer v. Kraemer Drug Co., 59 N. J. L. 9, 35 A 791.

[21] Cunningham v. Wilmerding, 38 Pa. Super. 20; Cliff v. Gunter, 4 N. B. 493.

[22] English v. Dalbrow, 1 Miles (Pa.) 160.

[23] Cutler v. Rathbone, 1 Hill (N. Y.) 204.

[24] Bummelhart v. Boone, 147 Iowa 390, 126 NW 338.

[25] Cummings v. Gordon, 29 Pa. Dist. 740.

[26] Cummings v. Gordon, supra.

[27] McDonald v. McKenzie, 26 N. S. 282.

Useless writ. Where an alias writ is useless, it is immaterial whether the court grants or overrules a motion to quash it, as no injury can accrue under either view.[31]

[§ 147] **(b) Curing Defects by Amendment.** Informalities and irregularities in a writ or order of replevin may, upon seasonable application made by plaintiff therefor, be amended[32] so as to make it conform to the affidavit and bond,[33] or so as to correct a mistake or insufficiency in the description of the property;[34] and such an amendment has been allowed on motion by defendant to quash or dismiss.[35] A writ, however, will not be amended where the effect thereof would be to introduce a new cause of action;[36] neither will it be amended in an action for conversion defended on the ground that the goods were taken under a writ of replevin in another suit.[37] A void writ cannot be amended.[38]

[§ 148] **(c) Waiver.**[39] Informalities or irregularities in a writ or order of replevin may be waived by defendant by his appearing, pleading, and proceeding to trial on the merits of the case without objecting thereto,[40] or by failing to object before expiration of the time limit for filing dilatory pleas;[41] and an objection on the ground of insufficiency of the undertaking is waived by applying for a new undertaking.[42] So, where defendant does not take exception to defects in the service at the term when he enters appearance,[43] or before trial,[44] he cannot take it afterward. But a general appearance does not waive the illegality of the writ[45] or radical defects therein;[46] neither is a general appearance a waiver where, due to the defect, defendant was not bound to heed the summons in the writ.[47]

[§ 149] **d. Return of Writ—(1) Necessity.** After service the officer must, in strict compliance with the controlling statutory provisions,[48] make a return of the writ showing that it was duly served.[49] There is no duty on defendant to see that the writ is returned.[50]

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[28] Morris v. Baker, 5 Wis. 389.

[29] See infra § 263.

[30] Parsell v. Judge Genesee Cir. Ct., 39 Mich. 542.

[31] Morgan v. Morgan, 31 Miss. 546.

[32] Del.—Pond v. Benzik, 29 Del. 451, 100 A 476.

Fla.—Roberts v. Gee, 39 Fla. 531, 22 S 877.

Ind.—Simcoke v. Frederick, 1 Ind. 54.

Mass.—Judson v. Adams, 8 Cush. 556; Jaques v. Sanderson, 8 Cush. 271; Poyen v. McNeill, 10 Metc. 291.

Miss.—Evans v. Parks, 13 S 240 (holding that a writ of replevin which contains no description whatever of the property sought to be levied on should be quashed, in the absence of a motion for leave to amend).

N. Y.—Anonymous, 4 Hill 603; Cutler v. Rathbone, 1 Hill 204; Cayward v. Doolittle, 6 Cow. 602.

R. I.—Parker v. Palmer, 13 R. I. 359.

Vt.—Elwell v. Olin, 99 Vt. 460, 134 A 592.

N. B.—Hocken v. Doucett, 31 N. B. 369.

[a] **Jurisdictional sufficiency of writ.**—"An amendment is allowable where the process, although irregular, is sufficient to give jurisdiction, where there is anything to amend by—that is, when it can clearly be determined from the process itself what was intended." Elwell v. Olin, 99 Vt. 460, 134 A 592, 593.

[33] Roberts v. Gee, 39 Fla. 531, 22 S 877; Parks v. Barkham, 1 Mich. 95.

[34] Evans v. Parks, (Miss.) 13 S 240; McCourt v. Bond, 64 Wis. 596, 25 NW 532; Nolty v. State, 17 Wis. 668; Hoorigan v. Driscoll, 8 Ont. Pr. 184.

[35] Ind.—Simcoke v. Frederick, 1 Ind. 54.

Mass.—Judson v. Adams, 8 Cush. 556; Jaques v. Sanderson, 8 Cush. 271; Poyen v. McNeill, 10 Metc. 291.

N Y.—Cutler v. Rathbone, 1 Hill 204.

R. I.—Parker v. Palmer, 13 R. I. 359.

Vt.—Elwell v. Olin, 99 Vt. 460, 134 A 592.

N. B.—Hocken v. Doucett, 31 N. B. 369.

[36] Musgrove v. Farren, 92 Me. 198, 42 A 355.

[a] **Illustration.**—A writ insufficiently describing the property cannot be amended so as to increase the amount of property replevied. Musgrove v. Farren, 92 Me. 198, 42 A 355.

[37] Allswede v. Central Warehouse Co., 203 Mich. 368, 169 NW 13.

[a] **Illustration.**—Where plaintiff in conversion objects to the admission of the replevin proceedings by defendant in conversion, a warehouseman, who was also defendant in replevin, because the writ called for two hundred and fifty bags of beans described as lot 330, whereas conversion plaintiff's warehouse receipt calls for two hundred and fifty bags of beans described as lot 233, a motion by counsel for defendant in the conversion action, who was also counsel for plaintiff in the replevin suit, to amend the description in the writ and return to correspond with the description in the warehouse receipt, is properly denied. Allswede v. Central Warehouse Co., 203 Mich. 368, 169 NW 13.

[38] Reynolds v. Lowthrop, 7 Tenn. Civ. A. 12.

[a] **For example,** a writ not running in the name of the state. Reynolds v. Lowthrop, 7 Tenn. Civ. A. 12.

[39] **Waiver of service** see supra § 140.

[40] Ark.—King v. Connevy, 52 Ark. 115, 12 SW 203.

Colo.—Hook v. Fenner, 18 Colo. 283, 32 P 614, 36 AmSR 277.

Ill.—Tahedl v. Woodford Distilling Co., 176 Ill. A. 173.

Kan.—Carr v. Huffman, 47 Kan. 188, 27 P 827; Kennedy v. Beck, 15 Kan. 555.

Mich.—Durrell v. Richardson, 119 Mich. 592, 78 NW 650; Peterson v. Fowler, 76 Mich. 258, 43 NW 10.

Minn.—McKee v. Metraw, 31 Minn. 429, 18 NW 148.

N. J.—Kraemer v. Kraemer Drug Co., 59 N. J. L. 9, 35 A 791.

R. I.—Grove v. Gardiner, 30 R. I. 477, 76 A 178.

Vt.—Tripp v. Howe, 45 Vt. 523.

Ont.—Alpha Oil Co. v. Donnelly, 12 Ont. Pr. 515.

[a] **Illustrations.**—(1) Where defendant has pleaded that the property is his and has submitted the case to the jury upon its merits, it is too late for him to ask that the judgment be reversed because of uncertainty of description in the writ. Hook v. Fenner, 18 Colo. 283, 32 P 614, 36 AmSR 277. (2) So defendant cannot claim to have been misled by an insufficient description of the property in the writ, where by his plea and notice he alleges title to the same property. Peterson v. Fowler, 76 Mich. 258, 43 NW 10.

[b] **Inaccurate description.**—Although it develops from the evidence that the property sought to be replevied is not, as described in the writ, "warehouse receipts," but mere contracts, defendant cannot object where he knew what property was intended and himself called it "warehouse receipts." Tahedl v. Woodford Distilling Co., 176 Ill. A. 173.

[41] Shapiro v. Reed, 98 Vt. 76, 126 A 496; Tripp v. Howe, 45 Vt. 523.

[42] Butterfield v. Brady, 111 Conn. 112, 149 A 252.

Defects in, and objections to, bond or undertaking in replevin generally see supra § 130.

[43] Jacques v. Sanderson, 8 Cush. (Mass.) 271; Kittridge v. Bancroft, 1 Metc. (Mass.) 508.

[44] Baker v. Daily, 6 Nebr. 464.

[a] **Rule applied** to objection that a copy of the order of delivery was not served on defendant, where the court acquired jurisdiction over his person by service of summons on him, and over the property by the sheriff taking it into his possession under the order of delivery. Baker v. Daily, 6 Nebr. 464.

[45] Castle v. Thomas, 16 Minn. 490; Yake v. Schnoll, 29 Pa. Dist. 107.

[46] Snedeker v. Quick, 11 N. J. L. 179.

[a] **For example,** appearance by defendant will not cure a writ of replevin defective in failing to specify the goods and chattels to be replevied. Snedeker v. Quick, 11 N. J. L. 179.

[47] Taylor v. Adams Express Co.,

[§ 150] **(2) Construction and Sufficiency.** A fair construction will be given the return when its sufficiency is questioned,[51] and a statement of the substantial facts will be held sufficient.[52] So a return is sufficient where it shows that defendant was served in the manner required by law,[53] notwithstanding evident clerical errors contained therein.[54]

Appraisement. Under a statute requiring an officer, upon taking the property, to cause it to be appraised,[55] it is not necessary that it appear in the officer's return that defendant was requested to appoint an appraiser;[56] nor is it necessary that it appear that the parties did not agree as to the value of the property,[57] although, when they do so agree, such agreement must be certified in order to excuse the nonappointment of appraisers.[58]

[§ 151] **(3) Conclusiveness; Impeachment or Contradiction.** The return, when made, is conclusive upon the parties,[59] or at least prima facie evidence of the facts which are set forth therein.[60] But it is conclusive only in so far as it is responsive to the precept,[61] and, when sufficiently definite,[62] is not collaterally impeachable.[63] It is not, however, conclusive as to facts not stated therein.[64]

[§ 152] **(4) Defects, Objections, and Amendment.** The writ or requisition may be quashed where a proper return has not been made within a reasonable time,[65] as where the return was not signed;[66] but it has been held that failure of the officer to comply with directory provisions of a statute in regard to reporting the assessed value of the property is not ground for quashing the writ.[67] The return may be amended upon proof of mistake,[68] and, when it is substantially correct, other facts not stated therein may be supplied by reference to other parts of the record.[69]

Waiver of objection. An objection that no return was filed by the sheriff is waived by failure to raise it in the replevin suit.[70]

[§ 153] **e. Appraisement.** In jurisdictions where the statutes require the officer, immediately upon taking property in replevin, to cause it to be appraised by disinterested persons,[71] it is his duty so to proceed[72] upon demand and tender of indemni-

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9 Phila. (Pa.) 272.

[a] **Rule applied** where execution was defective in that the sheriff served the writ as a summons without having received an indemnity bond from plaintiff. Taylor v. Adams Express Co., 9 Phila. (Pa.) 272.

48. Hutchinson v. McClellan, 2 Wis. 17.

[a] **In South Carolina,** as there is no penalty attached by statute or rule of court for the failure of the sheriff to file the affidavit and notice, required by Code § 238, with the clerk within twenty days after taking the property, his noncompliance with the statute does not invalidate the proceedings. Alexander v. Jamison, 56 S. C. 409, 34 SE 695.

49. Pool v. Loomis, 5 Ark. 110; Bent v. Bent, 43 Vt. 42.

50. Persse v. Watrous, 30 Conn. 139.

51. Upton v. Pendry, 109 Kan. 744, 202 P 73 [reh den 110 Kan. 191, 203 P 300]; Miller v. Cushman, 38 Vt. 593. See Barrett v. Marschak, 192 Ill. A. 481.

[a] **Opportunity to file redelivery bond.**—A sheriff's return showing goods seized on the day of service and not showing when they were delivered to plaintiff, but reciting that such delivery was because defendant did not give a delivery bond within twenty-four hours after service, is not susceptible of an interpretation that the goods seized were delivered to plaintiff without giving defendants twenty-four hours for filing a redelivery bond. Upton v. Pendry, 109 Kan. 744, 202 P 73 [reh den 110 Kan. 191, 203 P 300].

52. Miller v. Cushman, 38 Vt. 593; Western Farquhar Mach. Co. v. Pierce, 108 Wash. 621, 185 P 570.

[a] **Location of property.**—In replevin to recover property sold to defendant by plaintiff under a conditional bill of sale, the sheriff's return that he found and took possession of the property in Thurston County was sufficient, although there was no allegation that the property was in such county at the time the action was commenced. Western Farquhar Mach. Co. v. Pierce, 108 Wash. 621, 185 P 570.

53. Hoyt v. Carson, 60 Pa. Super. 172.

[a] **Service on adult member of family.**—A sheriff's return which avers that he did not find the property in the possession of defendants, or either of them, and that he served the writ and copy of plaintiff's statement on each defendant, naming him, by handing true and attested copies of the writ and statement to an adult member of his family at his dwelling house, is sufficient. Hoyt v. Carson, 60 Pa. Super. 172.

54. Fleugel v. Lards, 108 Mich. 682, 66 NW 585.

55. See statutory provisions.

Appraisement of replevied property generally see infra § 153.

56. Wolcott v. Mead, 12 Metc. (Mass.) 516.

57. Wolcott v. Mead, supra.

58. Wolcott v. Mead, supra.

59. Rowell v. Klein, 44 Ind. 290, 15 AmR 235; Green v. Kindy, 43 Mich. 279, 5 NW 297; Claggett v. Richards, 45 N. H. 360; Knowles v. Lord, 4 Whart. (Pa.) 500, 34 AmD 525; Diller v. Roberts, 13 Serg. & R. (Pa.) 60, 15 AmD 578.

60. Hayes v. Lusby, 5 Harr. & J. (Md.) 485.

61. Parker v. Palmer, 13 R. I. 359.

62. Miller v. Moses, 56 Me. 128.

63. Crane v. McCoy, 6 F. Cas. No. 3,354, 1 Bond 42.

64. Central of Missouri Trust Co. v. Wulfert, 198 Mo. A. 85, 199 SW 724; Clark v. Soublette, 117 Mo. A. 519, 94 SW 733.

[a] **Thus** (1) the return of the officer that he took the property from the possession of defendant is not conclusive as to the fact of defendant's possession at the time suit was instituted, as the time of the service of the writ may be and often is a different date from that when suit was instituted. Clark v. Sublette, 117 Mo. A. 519, 94 SW 733. (2) That the sheriff's return showed that he took one horse out of the possession of one defendant and the other out of the possession of the other defendant is not conclusive of misjoinder of defendants. Central Missouri Trust Co. v. Wulfert, 198 Mo. A. 85, 199 SW 724.

65. Lanahan v. Judge Kent Cir. Ct., 106 Mich. 685, 64 NW 740.

66. Sommers v. Hinas, (Mich.) 58 NW 66.

67. Fryer v. Fryer, 6 Dana (Ky.) 54.

68. Hammond v. Eaton, 15 Gray (Mass.) 186; Bent v. Bent, 43 Vt. 42.

69. Miller v. Cushman, 38 Vt. 593. See Barrett v. Marschak, 192 Ill. A. 481.

70. Gilloth v. Trow, 53 S. D. 551, 221 NW 266.

71. See statutory provisions.

72. See cases infra this note.

[a] **Basis of appraisement.**—Goods replevied by a wholesale merchant from a retailer should be appraised at what they are worth to the latter in his store at the time they are replevied, and not their retail price. Grossman v. Wenham, 10 Oh. Cir. Ct. 348, 6 Oh. Cir. Dec. 563.

[b] **Place of appraisement.**—(1) An officer serving a writ of replevin has no right, after he has taken possession of the goods, to keep them in defendant's shop against his consent for the purpose of having them appraised (Steuer v. Maguire, 182 Mass. 575, 66 NE 706), (2) although he has a right to a reasonable time to ascertain which are the goods that his writ calls for, and to remove them, his right to occupy the shop then ceasing (Steuer v. Maguire, supra).

ty,[73] but he is justified or excused for omitting so to do, when the parties agree as to the value.[74]

Amendment of appraiser's certificate. The court may, in its discretion, allow the appraiser's certificate to be amended upon proof satisfactory to itself.[75]

[§ 154] **B. Proceedings for Redelivery[76]—1. Nature and Purpose.** In some jurisdictions, it is provided by statute that, at any time before the delivery of the property to plaintiff, defendant may require the return thereof upon giving a prescribed bond or undertaking conditioned for the delivery of the property to plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may be adjudged against defendant;[77] and sometimes, upon his also making affidavit that he is the owner of the property or entitled to possession, and serving upon the sheriff written notice that he requires the return thereof.[78] The purpose of such statutes is to secure to defendant speedy relief where property is wrongfully seized in replevin.[79] But, under the controlling statutes, it has been held that, where defendant in replevin claims no adverse title to, or ownership of, the goods in the suit, but only a lien upon them, he has no right to give a counter bond and retain possession of the goods.[80] Even where there is not statutory authority therefor, a claim property bond may be given in replevin, where the procedure is sanctioned by long usage;[81] but in such case defendant has no right to retain the chattels by giving a claim property bond unless he has a general or special property which entitles him to possession.[82] Where chattels not specified in plaintiff's affidavit are seized, defendant's remedy is not by giving bond for redelivery of such chattels,[83] but he should proceed against the sheriff as a trespasser.[84]

[§ 155] **2. Compliance with Requirements—a. In General.** In order to avail himself of the privilege of retaining the possession of the property, compliance by defendant with the conditions precedent imposed is necessary,[85] and failure to comply therewith entitles plaintiff to possession.[86] The initial steps in obtaining redelivery must be taken within the time limited by the statute,[87] and the officer is required to hold the property a designated[88] or reasonable[89] time before turning it over to plaintiff, in order to give defendant an opportunity to give such bond, if he so desires. If the officer fails to do so, a writ of de retorno habendo pendente lite will be issued upon entry by defendant of proper security.[90] When the proceedings are commenced in time,

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[c] **Reappraisement.**—Under the statute, there is no authority for reappraisement of property taken in replevin. Coombs v. Brenklander, 29 Nebr. 586, 45 NW 929.

[73] Hamberger v. Seavey, 165 Mass. 505, 43 NE 297.

[74] Wolcott v. Mead, 12 Metc. (Mass.) 516.

Certification in return see supra § 150.

[75] Hammond v. Eaton, 15 Gray (Mass.) 186.

[76] **Judgment for return of property** see infra § 323.

Mandamus to compel redelivery see Mandamus § 195.

[77] See statutory provisions; and Cermak v. Chicago Bonding, etc., Co., 210 Ill. A. 187.

[a] **In federal courts** it seems that defendant may, in a proper case, obtain a return of the property upon motion and giving the usual security. Emack v. Crabb, 8 F. Cas. No. 4,432, 5 Cranch C. C. 611; Greenwell v. Botelor, 10 F. Cas. No. 5,791, 3 Cranch C. C. 7.

[b] **In Ohio** there was no provision for such a bond prior to the amendment of the replevin laws of April 3, 1891. Uphaus v. Roof, 68 Oh. St. 401, 67 NE 717.

[78] See statutory provisions.

[79] Perryman v. Brown, 25 Okl. 138, 105 P 680.

[80] Pickering v. Yates, 51 Pa. Super. 436; Shreiner v. Kauffman, 26 Pa. Dist. 721; Shorley v. Welding, etc., Co., 23 Pa. Dist. 363, 42 Pa. Co. 83; Fleming v. Heitshu, 8 Pa. Dist. 715; Bugert v. Fitch, 43 Pa. Co. 397. Contra Fenninger v. Grebe, 33 Pa. Co. 564.

[a] **Rule applied:** (1) In an action of replevin against a landlord who had distrained the goods for rent. McCrary v. McCully, 75 Pa. Super. 464; Pickering v. Yates, 51 Pa. Super. 436; Fleming v. Heitshu, 8 Pa. Dist. 715. Contra Fenninger v. Grebe, 33 Pa. Co. 564. (2) In an action against a person having a lien for repairs. Shorley v. Welding, etc., Co., 23 Pa. Dist. 363, 42 Pa. Co. 83; Bugert v. Fitch, 43 Pa. Co. 397.

[81] Snyder v. Frankenfield, 4 Pa. Dist. 767.

[82] Baird v. Porter, 67 Pa. 105.

[83] Klinkowstein v. Greenberg, 15 Misc. 479, 37 NYS 206.

[84] Klinkowstein v. Greenberg, supra.

Liability of officer seizing property not covered by process see Sheriffs and Constables [35 Cyc 1646].

[85] Cal.—Bailey v. Security Trust Co., 34 Cal. A. 348, 167 P 409.

Md.—Montgomery v. Black, 4 Harr. & M. 391.

Mo.—Haeger v. Marcus, 5 Mo. A. 565.

Mont.—State v. Collins, 41 Mont. 526, 110 P 526.

Nev.—State v. Lamb, 37 Nev. 19, 138 P 907.

N. Y.—Teschner v. Deveron, 59 How Pr 467.

Okl.—Burton v. Doyle, 65 Okl. 126, 165 P 169.

Pa.—Select Furniture Co. v. Kearns, 12 Pa. Dist. & Co. 604.

[a] **Unauthorized procedure.**—A petition praying that defendant be permitted to retain property pending the trial upon which a rule to show cause is issued, the reason assigned being that he is unable to secure a counter bond, is unauthorized. Select Furniture Co. v. Kearns, 12 Pa. Dist. & Co. 604.

[86] Bailey v. Security Trust Co., 34 Cal. A. 348, 167 P 409; Bailey v. Baker, 28 Cal. A. 537, 153 P 242; State v. Collins, 41 Mont. 526, 110 P 526; Teschner v. Deveron, 59 HowPr (N. Y.) 467.

[a] **Failure to file affidavit** in compliance with a statute, requiring defendant desiring to reclaim chattels replevied to file an affidavit setting forth his right to possession, entitles plaintiff to their possession. Teschner v. Deveron, 59 HowPr (N. Y.) 467.

[b] **In Wyoming** Comp. St. (1910) §§ 5010, 5011 provide that where defendant in replevin for ordinary property fails to give, within forty-eight hours of the levy, an undertaking to produce the property and pay any damages awarded by the judgment, plaintiff may have the property on the execution of an undertaking to duly prosecute and pay all costs and damages. Section 5015, provides on a failure of the plaintiff's suit by lack of prosecution or on demurrer, for the assessment of proper damages to the defendant. Title to the property delivered to plaintiff under the provisions of the statute passes to him by the delivery as no provision is made for its return. Hunt v. Thompson, 19 Wyo. 523, 120 P 181, 122 P 624.

[87] Graham v. Wells, 18 HowPr (N. Y.) 376; McCann v. Thompson, 13 HowPr (N. Y.) 380; Lunneman v. Lunneman, 11 Pa. Dist. 759.

[a] **Bond must be filed** within the time prescribed. Lunneman v. Lunneman, 11 Pa. Dist. 759.

[88] Graham v. Wells, 18 HowPr (N. Y.) 376.

[a] **In Pennsylvania** (1) it was formerly the practice to require the sheriff to hold the property a reasonable time to afford defendant or anyone claiming through him an opportunity to file a claim property bond. Kuhn v. Primer, 1 Dall. 225, 1 L. ed. 111; Lunneman v. Lunneman, 27 Pa. Co. 657. (2) This practice, however, was changed by the act of April 19, 1901, permitting defendant or an intervening party to file a counter bond within seventy-two hours after replevy of goods and requiring the sheriff to remain in possession of them during that time. Lunneman v. Lunneman, supra.

[89] In re Gould, 31 Del. 218, 113 A 900; McCall v. Stern, 30 Del. 233, 105 A 666; Clark v. Adair, 3 Del. 113.

[90] McCall v. Stern, 30 Del. 233, 105 A 666.

they may be completed so as to entitle defendant to a return of the property at any time before final determination of the action;[91] but there is authority to the effect that, after the officer has accepted plaintiff's bond and delivered the property to him, the court will not compel the officer to accept defendant's bond and deliver to him such property.[92] The redelivery bond in an action before a justice of the peace, it has been held, must be taken by the officer levying the writ;[93] and in the absence of statutory provision therefor, the counter bond should be filed with the sheriff where that has been the uniform practice,[94] and he is responsible for its sufficiency.[95]

Failure to take proceedings to reclaim the property has been held, as a matter of law, to concede plaintiff's right to possession.[96]

[§ 156] **b. Requisites, Validity, and Sufficiency—(1) Bond or Undertaking—(a) In General.** Under some statutes the bond of defendant is couched in the same language as that of plaintiff, in so far as it relates to the payment of money;[97] and a condition which states substantially that, if defendant is not successful in the suit, he and the sureties will pay whatever judgment is rendered against him is sufficient.[98] A redelivery bond is not fatally defective because it runs to plaintiff instead of the sheriff,[99] or to the sheriff instead of plaintiff, it being conditioned for the delivery of the property or payment of its value not to him, but to plaintiff,[1] or because an unnecessary recital is inserted[2] or omitted,[3] or because it is signed by the sureties only.[4] Signature of the sureties by mark, with attestation, in literal compliance with the statute governing the same, constitutes a sufficient signing;[5] and two sureties are not required under a statute requiring a bond "with security to be approved by" the officer executing the writ.[6] An undertaking in which the sureties assume no obligation is void,[7] notwithstanding it has been approved by order.[8] A bond not violating a statute or contravening public policy, although invalid as a statutory bond or undertaking, may nevertheless be good as a common-law obligation.[9]

Consideration. The inconvenience, loss, or detriment resulting to plaintiff from a return of the property to defendant constitutes a legal and sufficient consideration for a redelivery.[10]

Attachment or execution bond. A bond to indemnify the sheriff on seizure of property under attachment or execution is not sufficient as a redelivery bond in replevin.[11]

Noncompliance with alleged conditions. In the absence of any notice to the obligee or the sheriff respecting alleged conditions under which a redelivery bond was signed, and where it is regular on its face and duly approved, it is valid and binding on the sureties, notwithstanding noncompliance with the alleged conditions.[12]

[§ 157] **(b) Justification.** Where the statute so requires, defendant must have sureties on his bond or undertaking justify.[13] The time within which justification must be had is not limited,[14] and a justification completed at any time before the final determination of the action is sufficient.[15] Where the justification has been commenced and suspended, the court may fix a method by which it may be resumed at the pleasure of plaintiff,[16] statutory provisions relating to the adjournment of the justification being directory and not mandatory.[17] Justification by the sureties in accordance with the statutory provisions governing the same is sufficient,[18] and a new justification will not be ordered for insolvency where it does not appear that the insolvency of the sureties has arisen since they justified, or that their financial condition was unknown to plaintiff at the time of their approval by the court.[19]

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[91] Corn Exch. Bank v. Blye, 102 N. Y. 305, 7 NE 49, 9 NYCivProc 416.

[92] Keasler Lumber Co. v. Clark, (Tex. Civ. A.) 151 SW 345.

[a] **Rule applied** notwithstanding defendant tendered his bond before plaintiff, the constable refusing to accept the former. Keasler Lumber Co. v. Clark, (Tex. Civ. A.) 151 SW 345.

[93] Burton v. Doyle, 65 Okl. 126, 165 P 169.

[94] Hill v. Mervine, 13 Pa. Dist. 580, 29 Pa. Co. 262. But see Tyger v. Chambers, 26 Pa. Dist. 392 (holding that statute requires counter bond to be filed with prothonotary).

[95] Hill v. Mervine, 13 Pa. Dist. 580, 29 Pa. Co. 262. But see Automobile Finance Co. v. Standen, 29 Pa. Dist. 541; Tyger v. Chambers, 26 Pa. Dist. 392 (both holding that statute requires prothonotary to fix amount of counter bond).

[96] O. B. Brush Corp. v. Weiner Bookbinding Co., 120 Misc. 101, 198 NYS 566.

[a] **Illustration.**—Where the seller, for default in payments on a machine sold on an installment contract secured by a chattel mortgage, replevied the machine, the buyer, not having given the statutory bond and reclaimed the chattel, nor having demanded the return thereof, has, as a matter of law, conceded the seller's right to possession. O. B. Brush Corp. v. Weiner Bookbinding Co., 120 Misc. 101, 198 NYS 566.

[97] John Church Co. v. Dorsey, 38 Misc. 542, 77 NYS 1065; Hill v. Mervine, 13 Pa. Dist. 580, 29 Pa. Co. 262.

[98] Watterson v. Fuellhart, 169 Pa. 612, 32 A 597.

[99] Slack v. Heath, 4 E. D. Smith (N. Y.) 95, 1 AbbPr 331; Kimball Co. v. Bleick, 24 Or. 59, 32 P 766.

[1] Smith v. Stubbs, 16 Colo. A. 130, 63 P 955.

[2] O'Brien v. Alford, 114 Ark. 257, 169 SW 774; Weber v. Manne, 42 Hun 557, 4 NYSt 497 [aff 11 NYCivProc 64]; Chaffee v. Sangston, 10 Watts (Pa.) 265; Snyder v. Frankenfield, 4 Pa. Dist. 767.

[a] **Effect of void independent condition.**—Although, in jurisdictions where a judgment for a return of the property is unauthorized, a condition in the bond for a return is void; when independent of other conditions in the bond, its invalidity does not vitiate the whole bond. Chaffee v. Sangston, 10 Watts (Pa.) 265; Snyder v. Frankenfield, 4 Pa. Dist. 767.

[3] Rouse v. Haas, 26 App. Div. 171, 49 NYS 867.

[a] **Thus,** where defendant intends to dispute the identity of the goods, the undertaking is sufficient, although it does not recite that the property sought to be returned is the property mentioned and described in the affidavit. Rouse v. Haas, 26 App. Div. 171, 49 NYS 867.

[4] Hedderick v. Pontet, 6 Mont. 345, 12 P 765; Polite v. Bero, 63 S. C. 209, 41 SE 305.

[5] Terry v. Johnson, 109 Ky. 589, 60 SW 300, 22 KyL 1210.

[6] Link-Belt Co. v. Hanner, 12 F. (2d) 453.

[7] Klinkowstein v. Greenberg, 15 Misc. 479, 37 NYS 206.

[8] Klinkowstein v. Greenberg, supra.

[9] Colo.—Smith v. Stubbs, 16 Colo. A. 130, 63 P 955.

Kan.—General Securities Co. v. Hindes, 119 Kan. 226, 237 P 659, 662 [cit Cyc].

Mont.—Hedderick v. Pontet, 6 Mont. 345, 12 P 765.

N. Y.—Thompson v. Illinois Surety Co., 175 App. Div. 379, 161 NYS 1009.

Okl.—Wood v. Colby, 30 Okl. 106, 118 P 584.

[10] Hedderick v. Pontet, 6 Mont. 345, 12 P 765.

[11] Hoeffler Mfg. Co. v. Machajewski, 163 Wis. 184, 157 NW 702.

[12] Howard v. Addington First Nat. Bank, 139 Okl. 58, 281 P 224.

[13] Bailey v. Security Trust Co., 34 Cal. A. 348, 167 P 409; Bailey v. Baker, 28 Cal. A. 537, 153 P 242; State v. Collins, 41 Mont. 526, 110 P 526; State v. Lamb, 37 Nev. 19, 138 P 907; O'Connell v. Kelly, 15 Daly 513, 8 NYS 475; Graham v. Wells, 18 HowPr (N. Y.) 376.

[14] Graham v. Wells, supra.

[15] Corn Exch. Bank v. Blye, 102 N. Y. 305, 7 NE 49.

[§ 158] **(c) Amendment.** The court possesses the same power and discretion as in other actions to allow an amendment[20] or the filing of a new[21] or additional[22] security.

[§ 159] **(d) Order of Approval.** An order of approval of the sufficiency of sureties, who have assumed no binding obligation, is nugatory and of no effect.[23] Where the statute provides that, upon approval of the undertaking, the sheriff is exonerated from liability, a provision to that effect is proper in the order approving the undertaking.[24]

[§ 160] **(2) Affidavit.** The sufficiency of the affidavit required by some statutes will depend on the statute.[25] It has been held sufficient when it contains the allegations required, although made on information and belief,[26] and when made by an agent or attorney of defendant, provided it sets forth the reason why it is not made by the party and the matter constituting the grounds of his belief.[27]

[§ 161] **3. Operation, Effect, and Construction.** The redelivery bond in replevin is a substitute for the property only in those cases where a delivery of the property cannot be had on final judgment.[28] It stands in place of the property as security for the payment of the value thereof,[29] so that plaintiff may rely on it exclusively,[30] but not so as to entitle defendant, after judgment against him, to pay the assessed value and retain the property.[31] Thus the effect of defendant's rebonding is to turn the suit into an action for damages for the value of the property or for the return of the goods to plaintiff, at his option.[32] The redelivery bond admits possession of the property to be in defendant at the time of the levy of the writ,[33] and it operates as a waiver of objections to the sufficiency of the description thereof in the complaint,[34] and, by giving it and obtaining a redelivery of the property, defendant waives his right to object to the insufficiency of the proceedings taken by plaintiff to obtain a delivery;[35] but such bond does not admit the title[36] or the right of possession[37] of the identical property described to be in plaintiff. A valid approved bond is a fixed contract between the sureties and plaintiff, which cannot be changed or disturbed by the court, except by consent of the parties.[38] General rules[39] apply in construing bonds given to obtain redelivery of the property in replevin.[40]

[§ 162] **4. Failure To Permit Remedy.** The writ will not be quashed or vacated on account of the

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16. Troy Carriage Works v. Muxlow, 16 Misc. 561, 38 NYS 938.

17. Troy Carriage Works v. Muxlow, supra.

18. Grant v. Booth, 21 HowPr (N. Y.) 354.

[a] **Justification of three sureties** in the aggregate sum of eighty thousand dollars when the sum specified in the undertaking was forty thousand dollars is sufficient under a statute requiring the entire justification to be equivalent to two sufficient bail. Grant v. Booth, 21 HowPr (N. Y.) 354.

19. McCrossin v. Clark, 1 WklyNC (Pa.) 301.

20. Dale v. Gilbert, 128 N. Y. 625, 28 NE 512.

21. Sopris v. Truax, 1 Colo. 89; Hafelin v. Silverman, 11 Misc. 723, 32 NYS 918.

[a] **Filing new bond to make surety competent witness.**—A motion of defendant for leave to file a new bond in order that he may call one of the sureties on the bond already given as a witness is not improperly denied, when not supported, by affidavit showing the materiality of the testimony of the surety. Sopris v. Truax, 1 Colo. 89.

22. Smith v. Whitten, 117 N. C. 389, 23 SE 320.

[a] **Illustration.**—Where an undertaking was insufficient in amount, and the court ordered it to be enlarged, a new undertaking, filed in compliance with the order, is not a substitute for, but is in addition to, the original undertaking. Smith v. Whitten, 117 N. C. 389, 23 SE 320.

23. Klinkowstein v. Greenberg, 15 Misc. 479, 37 NYS 206.

24. Spellman v. Spellman, 203 App. Div. 373, 196 NYS 664.

25. See statutory provisions.

26. Lange v. Lewe, 58 N. Y. Super. 265, 11 NYS 202.

27. Agnew v. Latham, 54 Misc. 61, 105 NYS 366.

28. O'Brien v. Curry, 111 Minn. 533, 127 NW 411, 137 AmSR 563.

29. O'Brien v. Curry, supra; Larson v. Hanson, 26 N. D. 406, 144 NW 681, 51 LRANS 655; Howard v. Addington First Nat. Bank, 139 Okl. 58, 281 P 224.

30. Howard v. Addington First Nat. Bank, supra.

31. Swantz v. Pillow, 50 Ark. 300, 7 SW 167, 7 AmSR 98; Hanlon v. O'Keefe, 55 Mo. A. 528.

[a] **In Pennsylvania** (1) the retention of the property by defendant under bond was formerly held to extinguish plaintiff's title and the case proceeded as one of trespass (Watterson v. Fuellhart, 169 Pa. 612, 32 A 597; Rockey v. Burkhalter, 68 Pa. 221; Fisher v. Whoollery, 25 Pa. 197; Swope v. Crawford, 16 Pa. Super. 474, 18 LancLRev 177; Schuckers v. Schuckers, 21 Pa. Dist. 608; Fleming v. Heitshu, 8 Pa. Dist. 715; Snyder v. Frankenfield, 4 Pa. Dist. 767; Shoemaker v. Shoemaker, 4 Pa. Dist. 398, 16 Pa. Co. 159, 7 Kulp 273; Conlin v. Butler, 10 Kulp 273), (2) and a condition in defendant's redelivery bond for a return of the property was void (Moore v. Shenk, 3 Pa. 13, 45 AmD 618; Chaffee v. Sangston, 10 Watts 265; Snyder v. Frankenfield, supra). (3) But since the passage of the Replevin Act of April 19, 1901 the rule has been changed (Schuckers v. Schuckers, 21 Pa. Dist. 608), (4) and plaintiff may now at his option proceed to recover the property by a writ of retorno habendo with an added clause of fieri facias as to damages awarded and costs (Schuckers v. Schuckers, supra).

32. Nelson v. Bock, 84 N. J. L. 123, 85 A 1009; Lembeck, etc., Brewing Co. v. Tarrant, 79 N. J. L. 372, 75 A 474.

33. See supra § 65.

34. See supra § 210.

35. Jones v. General Motors Acceptance Corp., 149 Miss. 164, 115 S 201; Carraway v. Wallace, (Miss.) 17 S 930; Wisconsin Mar., etc., Bank v. Hobbs, 22 HowPr (N. Y.) 494; Nicoll v. Pinner, 10 HowPr (N. Y.) 376; Wood v. Colby, 30 Okl. 106, 118 P 584; DuRant v. Brown Motor Co., 147 S. C. 88, 144 SE 705, 707 [quot Cyc].

36. Producers' Supply Co. v. Sinclair Oil, etc., Co., 105 Okl. 47, 231 P 279.

37. Producers' Supply Co. v. Sinclair Oil, etc., Co., supra.

38. Quarch v. Metz, 15 Misc. 222, 37 NYS 218.

Void approved bond see supra § 156.

39. See Bonds §§ 51-59.

40. See case infra this note.

[a] **Bail bond or delivery bond.**—A bond made payable directly to the sheriff is a bail bond under Crawford & M. Dig. § 8645, executed for the sheriff's protection in case defendant in replevin failed to surrender herself, the words "for the use and benefit of" plaintiff, added after the name of the sheriff, who had no personal interest in the replevin proceedings, not being essential under the statute to make the bail bond valid, and, when construed with the capias clause, showed no intention to constitute a delivery bond under § 8649. Daniels v. Wagner, 156 Ark. 198, 245 SW 487.

failure of the sheriff to permit defendant to give bond and retain the property.[41]

[§ 163] **5. Defects and Objections.** Neither defendant[42] nor his surety[43] may object to an irregularity in the taking of a redelivery bond from defendant. Reasons going to the merits of the case will not justify striking off a counter bond on motion.[44]

[§ 164] **6. Waiver of Right.** Where defendant, at the time the sheriff serves the papers and seeks to take possession of the property, tenders to the sheriff a cash bond to retain it, he thereby waives his right to tender a delivery bond.[45] So, under the statutes prevailing in some jurisdictions, it has been held that defendant waives his right to give bond and regain possession of the property by excepting to the sufficiency of the sureties on plaintiff's undertaking;[46] and such right cannot be restored by countermanding his exception to the sureties after the expiration of the statutory time allowed for claiming a return.[47]

[§ 165] **7. Restoration of Property Taken from Custody of Court.**[48] The court in an action of replevin has power to direct plaintiff to restore property to the custody of a court from which it was wrongfully taken in the suit.[49]

[§ 166] **C. Delivery to Third Persons or Interveners—1. Third Persons.** Sometimes under statutory provision a third person, not a party to the action, may obtain possession of the property at any time before actual delivery thereof to either party by delivering to the sheriff an affidavit embodying his claim, and upon plaintiff failing to indemnify the sheriff.[50] Under such statutes, when plaintiff fulfills the conditions by furnishing security, he is entitled to retain possession of the property.[51] The claim of a third party may be set up by his agent,[52] but the property should not be delivered to a third party claimant who has not served an affidavit of claim in compliance with the terms of the statute[53] or given proper security for its return, if required.[54]

Remedy not exclusive. The remedy furnished by the statute is not exclusive, and does not bar a third person from maintaining an action of replevin for the property,[55] or becoming a party to the action by intervention.[56]

[§ 167] **2. Interveners.**[57] An officer levying on property under a writ of replevin must, before making delivery to plaintiff, give a third person having a right to intervene in the suit a reasonable time to give a counter bond.[58] Where the intervener claims only a part of the chattels replevied, the amount of the bond he is required to furnish depends on the value of that part of the property claimed by him.[59]

[§ 168] **D. Impounding Property.** It is sometimes provided by statute that, when defendant gives a counter bond for goods replevied and retains them, plaintiff may, by making proper affidavit and furnishing bond, have the property impounded in the custody of the sheriff or some other person.[60] The affidavit of plaintiff under such statute, that by reason of the nature of the property the actual pecuniary value of the property replevied will not compensate him for its loss, is conclusive on the court,[61] and, upon his compliance with the requirements of the statute, the court must order such property impounded.[62] The purpose of the remedy being the preservation of the goods exactly as they are when suit is instituted,[63] they ought never to be impounded with either of the parties to the controversy.[64]

[§ 169] **E. Custody and Care of Property.—1. In General.** Where the execution of the bond need not precede the issuance of the writ,[65] the officer is authorized to seize the property under the writ and hold it a reasonable time for plaintiff to give the bond required by statute;[66] but under some statutes he cannot, prior to the giving of the bond, deliver the property to plaintiff.[67] On giving bond, however,[68] and upon expiration of the time for filing a redelivery bond,[69] plaintiff is entitled to the possession of the property in dispute during the pendency of the action,[70] unless defendant elects to retain the possession and pursues the statutory requirements prescribing the procedure in such cases.[71] If in excess of his power and authority an officer takes property into his possession without having received the bond intended for the protection and security of defendant, he is under no obligation to retain such property,[72] and it is his duty at once to restore it to defendant.[73] So, if plaintiff neglects or refuses to give the bond required in a reasonable time, the officer should redeliver the property to defendant.[74] If the writ or order of replevin has issued improperly without the affidavit required as a condition precedent thereto,[75] goods taken under it must likewise be returned.[76] Property which has been replevied does not pass into the possession of plaintiff, after he has given a bond which has been accepted by the officer, until there is a formal delivery of the property.[77]

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[41] Wyatt v. Freeman, 4 Colo. 14; Robinson v. Austin, 3 Colo. 375; Parlin v. Austin, 3 Colo. 337.

[42] Gilbert v. Glenny, 135 Miss. 603, 99 S 507; Spears v. Robinson, 71 Miss. 774, 15 S 111.

[43] Gilbert v. Glenny, 135 Miss. 603, 99 S 507.

[a] **Rule applied** to the taking of a redelivery bond by a person who is neither a constable nor a sheriff for property seized by him under the appointment of a justice of the peace to execute the writ under which the seizure was made. Gilbert v. Glenny, 135 Miss. 603, 99 S 507.

[44] Jones v. Breck, 29 Pa. Dist. 842.

[45] State v. Collins, 41 Mont. 526, 110 P 526.

[46] Vanderburgh v. Bassett, 4 Minn. 242; Hofheimer v. Campbell, 59 N. Y. 269 [aff 7 Lans. 157]; Cullen v. Miller, 5 AbbNCas (N. Y.) 282; Graham v. Wells, 18 HowPr (N. Y.) 376; Le May v. Renier, 183 Wis. 320, 197 NW 736.

[47] Vanderburgh v. Bassett, 4 Minn. 242.

[48] **Property in custody of court as subject of replevin** see supra § 24.

[49] Meegan v. Tracy, 220 App. Div. 600, 223 NYS 355.

[50] See statutory provisions.

[51] Wright Steam Engine Works v. New York Kerosene Oil Engine Co., 44 Misc. 580, 90 NYS 130.

[52] Bishop v. Baxter, 3 Daly (N. Y.) 176.

[a] **Affidavit** may be made by an agent of the third person. Bishop v. Baxter, 3 Daly (N. Y.) 176.

[53] Lyons v. Mulvihill, 125 NYS 475.

[54] Greenberger v. North Side Storage Warehouse Co., 170 App. Div. 887, 154 NYS 450.

[55] Pracht v. Gunn, 69 App. Div. 396, 74 NYS 991.

[56] Standard Sewing Mach. Co. v. Heyman, 25 Misc. 429, 54 NYS 936.

Delivery of property to intervener see infra § 167.

Intervention in replevin proceedings generally see supra § 93.

[57] **Intervention in replevin proceedings generally** see supra § 93.

[58] In re Gould, 31 Del. 218, 113 A 900.

[59] Quirk v. Wood, 29 Pa. Dist. 1031.

[a] **Thus,** when a person intervenes, claiming a part of the chattels as his sole property, the action in effect becomes a separate suit as to him, divorced from the rights and liabilities of other defendants claiming other property sought to be replevied, and where the value of the specific chattel claimed by the intervener has been fixed by plaintiff, the bond of the petitioner in double that amount will comply with the statutes, in that it will be in the same amount as the original bond as to the chattel claimed. Quirk v. Wood, 29 Pa. Dist. 1031.

[60] See statutory provisions.

[61] Lynn v. Lynn, 256 Pa. 563, 100 A 975; Balog v. McGurl, 3 Pa. Dist. & Co. 828.

[62] Lynn v. Lynn, 256 Pa. 563, 100 A 975; Balog v. McGurl, 3 Pa. Dist & Co. 828.

[63] Brown v. Judge, 29 Pa. Dist. 1025.

[64] Brown v. Judge, supra.

[65] **Necessity of replevin bond generally** see supra §§ 117, 118.

[66] Morris v. Baker, 5 Wis. 389.

On abatement of the writ the temporary right of possession falls with it.[78]

[§ 170] **2. Nature of Possession.** From the moment an order of delivery in replevin is executed by taking possession of the property named therein, such property is in custodia legis,[79] and it continues so to be as long as the property actually remains in the manual possession of the sheriff.[80] Whether property when in the possession of plaintiff is in custodia legis or not is a question upon which the authorities are not entirely in accord.[81] The question mainly depends for its solution upon statutory provisions.[82] Although there is some authority to the effect that, upon transfer by the sheriff to one of the parties to the suit, the possession of the court is at an end,[83] it has been held that, where the statute or the party's undertaking provides for a return of the property to the other party, if he so elects, in case the judgment is for him, no title to the property vests in the former on its delivery to him,[84] but it remains in the custody of the law;[85]

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67. See statutory provisions.

[a] **Return of property.**—If plaintiff neglects or refuses to give the bond required in a reasonable time, the officer should redeliver the property to defendant. Morris v. Baker, 5 Wis. 389.

[b] **Liability of officer.**—A plaintiff in replevin, neglecting under such statute to execute a bond and take possession, cannot have damages for the detention or depreciation of the property while in the hands of the officer. Graves v. Sittig, 5 Wis. 219.

68. Jenkins v. State, 60 Nebr. 205, 82 NW 622.

69. Rushbrook v. Mead, 72 Misc. 230, 131 NYS 47; McRae v. Angeles Brewing Co., 101 Wash. 269, 172 P 263.

Right to give redelivery bond see supra § 154.

70. See cases supra notes 68, 69.

71. See supra §§ 154-165.

72. State v. Stephens, 14 Ark. 264.

73. State v. Stephens, supra.

74. Morris v. Baker, 5 Wis. 389.

75. See supra § 99.

76. Eads v. Stephens, 63 Mo. 90; Rice v. Thayer, (Mo. A.) 217 SW 576.

77. Crane v. McCoy, 6 F. Cas. No. 3,354, 1 Bond 422; Hayes v. Lusby, 5 Harr. & J. (Md.) 485.

78. Burkle v. Luce, 6 Hill (N. Y.) 558.

[a] **Death of plaintiff.**—Where goods held by an officer under an execution were replevied, but plaintiff in replevin died pending the action, a retaking by the officer is lawful, as the right of possession of plaintiff in replevin terminated with his death, and his executor could not recover the goods from the officer by virtue of that possession. Burkle v. Luce, 6 Hill (N. Y.) 558.

79. Hearn v. Ayres, 77 Ark. 497, 92 SW 768.

80. Kan.—McKinney v. Purcell, 28 Kan. 446.

Mass.—White v. Dolliver, 113 Mass. 400, 18 AmR 502.

Minn.—Katz v. Hlavac, 88 Minn. 56, 92 NW 506.

N. H.—Sanborn v. Leavitt, 43 N. H. 473.

N. J.—Weiner v. Van Rensselaer, 43 N. J. L. 547.

81. Mohr v. Langan, 162 Mo. 474, 63 SW 409, 85 AmSR 503; Scott v. Standridge, 117 Okl. 111, 245 P 591, 593 [quot Cyc].

[a] **Causes for difference.**—Much of the difference arises from diverse statutory regulation, and some of it may be ascribed to the fact that some cases treat a replevin bond as similar in all essential respects to a forthcoming bond, while other cases draw a distinction between the effect of the writ when used by a third person to recover possession of property that has been seized by an officer under judicial process, and when it is used to recover property from a private citizen. Mohr v. Langan, 162 Mo. 474, 63 SW 409, 85 AmSR 503.

82. Mohr v. Langan, supra; Scott v. Standridge, 117 Okl. 111, 245 P 591, 593 [quot Cyc].

83. Hagan v. Deuell, 24 Ark. 216, 88 AmD 769; White v. Dolliver, 113 Mass. 400, 18 AmR 502; Buckley v. Buckley, 9 Nev. 373. See Weiner v. Van Rensselaer, 43 N. J. L. 547 (dictum that, as soon as sheriff perfects service, property may be replevied from person to whom officer delivered it).

[a] **Rule applied** (1) in an action of replevin by a third person against plaintiff in another pending replevin suit (Hagan v. Deuell, 24 Ark. 216, 88 AmD 769; Buckley v. Buckley, 9 Nev. 373), (2) even though defendant in the pending suit was the agent or bailee of plaintiff in the later action (White v. Dolliver, 113 Mass. 400, 18 AmR 502).

[b] **In Minnesota** (1) it has been said without qualification that, after delivery of the property by the officer to a party to the action, it is no longer in the custody of the court. Katz v. Hlavac, 88 Minn. 56, 92 NW 506. (2) This case has, however, been explained as one in which the question of title was not in issue, the language of the court being characterized as unguarded. O'Brien v. Curry, 111 Minn. 533, 127 NW 411, 137 AmSR 563.

84. Cal.—Riverside Portland Cement Co. v. Taft, 192 Cal. 643, 221 P 357; Hunt v. Robinson, 11 Cal. 262.

Ill.—Bruner v. Dyball, 42 Ill. 34.

Mass.—Lockwood v. Perry, 9 Metc. 440.

Mich.—Mannausau v. Wallace, 87 Mich. 543, 49 NW 1082.

Minn.—Kurtz v. Republic State Co., 158 Minn. 401, 197 NW 842; Republic State Co. v. Brown, 158 Minn. 396, 197 NW 840; O'Brien v. Curry, 111 Minn. 533, 127 NW 411, 137 AmSR 563; Katz v. Hlavac, 88 Minn. 56, 92 NW 506 [expl O'Brien v. Curry, supra].

Mo.—Hawkins v. Taylor, 15 Mo. A. 238.

Mont.—Caldwell v. Gans, 1 Mont. 570.

Okl.—Scott v. Standridge, 117 Okl. 111, 245 P 591, 593 [quot Cyc].

Pa.—Schuckers v. Schuckers, 21 Pa. Dist. 608.

Vt.—Farnham v. Chapman, 60 Vt. 338, 14 A 690.

85. U. S.—Hagan v. Lucas, 10 Pet. 400, 9 L. ed. 470.

Cal.—Steele v. Marlborough Hall Corp., 100 Cal. A. 491, 280 P 380; Bisconer v. Billing, 71 Cal. A. 779, 236 P 329 (dictum).

Colo.—Grattan v. Wilson, 82 Colo. 239, 259 P 6.

Ill.—Rhines v. Phelps, 8 Ill. 455.

Ind.—Pipher v. Fordyce, 88 Ind. 436.

Kan.—McKinney v. Purcell, 28 Kan. 446.

Mich.—Mannausau v. Wallace, 87 Mich. 543, 49 NW 1082.

N. Y.—Oswego First Nat. Bank v. Dunn, 97 N. Y. 149, 49 AmR 517; Semel v. Dunn, 55 NYS 1006, 28 NY CivProc 206.

Okl.—Wilson Motor Co. v. Dunn, 129 Okl. 211, 264 P 194, 57 ALR 17; Federal Nat. Bank v. McDonald, 129 Okl. 75, 263 P 105; Scott v. Standridge, 117 Okl. 111, 245 P 591, 593 [quot Cyc]; Mid-Continent Motor Securities Co. v. Art Harris Transfer, etc., Co., 97 Okl. 139, 223 P 130; Salisbury v. Taloga First Nat. Bank, 99 Okl. 138, 221 P 444; Noble Bros. v.

and, while there is some authority to the contrary,[86] the rule in some jurisdictions is that the party in possession cannot sell the property pending the action,[87] or pass title thereto even to a bona fide purchaser.[88] Neither can the goods ordinarily be levied upon under attachment[89] or execution,[90] or in another action of replevin.[91] The party's possession is one which his adversary has no right to disturb or contest.[92]

Ownership in party in possession. A plaintiff in replevin who is the real owner of the goods replevied may, of course, deal with them as his own;[93] and, as against a person who, whether he is plaintiff in the suit or defendant asking for a return of the property seized by plaintiff therein,[94] is merely seeking to obtain possession to enforce a lien on the property, the party in possession may dispose of the property pendente lite,[95] and give good title to the purchaser,[96] and thereafter the holder of the lien must look to the bond for protection.[97] So, where property distrained for rent is replevied by a party claiming to be the general owner, the lien of the distrainer is lost,[98] and he is remitted to the replevin bond.[99]

Absence of condition for return. Where property is delivered to plaintiff upon the giving of a bond in double the value of the goods, and not conditioned for a return of the property, such bond, it has been held, is a substitute for the property, and plaintiff in the writ, while so in possession, can make a good title to the property to purchasers thereof, notwithstanding upon the trial of the replevin there is a verdict for defendant.[1]

Ballew, 59 Okl. 90, 158 P 906; Grossman Co. v. White, 52 Okl. 117, 152 P 816; Fidelity Trust Co. v. Pumroy, 45 Okl. 66, 144 P 1052; Bohannan v. Jennings, 31 Okl. 254, 121 P 195; Farmers' State Bank v. Stephenson, 23 Okl. 695, 102 P 992.

Pa.—Schuckers v. Schuckers, 21 Pa. Dist. 608.

[a] **In Missouri** (1) the property is treated in custodia legis pending the litigation so far as the parties to the replevin suit are concerned. Mohr v. Langan, 162 Mo. 474, 63 SW 409, 85 AmSR 503; Ely v. Sutton, 177 Mo. A. 546, 162 SW 755 (parties, grantees, or privies). (2) But as to third persons the property is not in custodia legis so that it cannot be levied upon by any other kind of judicial process. Mohr v. Langan, supra; Coen v. Watkins, 62 Mo. A. 502. (3) Early cases left the law in an unsettled state (Mohr v. Langan, supra); (4) thus, cases have proceeded on the idea that the property after it is turned over to plaintiff in replevin is in custodia legis as to third persons (Bates County Nat. Bank v. Owen, 79 Mo. 429 [overr Mohr v. Langan, supra]), (5) that it is not in custodia legis (Donohoe v. McAleer, 37 Mo. 312), (6) and that even the true owner cannot disturb the possession of a party to a replevin suit, this being laid down as a general rule without qualification as to the rights of a true owner not a party to the replevin action (Hawkins v. Taylor, 15 Mo. A. 238).

[b] **Reach of other processes.**—The property is as free from the reach of other processes as it would have been in the hands of the sheriff. Hagan v. Lucas, 10 Pet. (U. S.) 400, 9 L. ed. 470.

[86] Brown Shoe Co. v. Vandam Warehouse Co., 186 App. Div. 718, 175 NYS 68; O. B. Brush Corp. v. Weiner Bookbinding Co., 120 Misc. 101, 198 NYS 566.

[a] **Motion to stay.**—Where a forwarding company deposited plaintiff's goods with defendant, and plaintiff replevied the same, the receipt made in the name of the forwarding company being lost, and the forwarding company denying all interest in the goods, it was held that, as defendant was protected by the replevin bond, its motion to stay plaintiff from disposing of the property until the negotiable receipt was returned, or an order of the court furnished under Gen. Business L. § 100, which provides for delivery to an owner who has lost a negotiable receipt, by order of the court on which an indemnity bond must be given, should be denied, for that would result in a trial of the merits on a motion to stay. Brown Shoe Co. v. Vandam Warehouse Co., 186 App. Div. 718, 175 NYS 68.

[b] **Injunction.**—(1) Where, on defaults in payments, the seller replevied a machine on the buyer's refusal to surrender it under the terms of a chattel mortgage, and the buyer did not rebond, the seller need not await the determination of the replevin action, before disposing of the property by sale, even though the buyer had made due demand for the return of the machine, because the seller would be answerable only for the machine or its value if the buyer were ultimately successful in the action. O. B. Brush Corp. v. Weiner Bookbinding Co., 120 Misc. 101, 198 NYS 566. (2) Where goods are replevied and a bond is issued, an injunction will not be granted to prevent their disposal, the remedy of the party from whose custody they are taken being to rebond the goods. Brown Shoe Co. v. Vandam Warehouse Co., 186 App. Div. 718, 175 NYS 68.

[87] Cal.—Steele v. Marlborough Hall Corp., 100 Cal. A. 491, 280 P 380.

Mass.—Lockwood v. Perry, 9 Metc. 440.

Mich.—Mannausau v. Wallace, 87 Mich. 543, 49 NW 1082.

Minn.—O'Brien v. Curry, 111 Minn. 533, 127 NW 411, 137 AmSR 563.

Mo.—Mohr v. Langan, 162 Mo. 474, 63 SW 409, 85 AmSR 503 [disappr contrary dictum Donohoe v. McAleer, 37 Mo. 312]; Ely v. Sutton, 177 Mo. A. 546, 162 SW 755; Hawkins v. Taylor, 15 Mo. A. 238.

Okl.—Federal Nat. Bank v. McDonald, 129 Okl. 75, 263 P 105; Salisbury v. Taloga First Nat. Bank, 99 Okl. 138, 221 P 444; Fidelity Trust Co. v. Pumroy, 45 Okl. 66, 144 P 1052.

[a] **Conversion.**—(1) The sale of property pending a replevin suit while in custodia legis constitutes conversion. Mohr v. Langan, 162 Mo. 474, 63 SW 409, 85 AmSR 503; Federal Nat. Bank v. McDonald, 129 Okl. 75, 263 P 105; Salisbury v. Taloga First Nat. Bank, 99 Okl. 138, 221 P 444. (2) Thus, where a complainant in replevin secured possession of the property under the writ, and sold the same, and judgment in the replevin suit was rendered against her, he was liable for conversion. Mohr v. Langan, supra.

[88] Lockwood v. Perry, 9 Metc. (Mass.) 440; Mannausau v. Wallace, 87 Mich. 543, 49 NW 1082; Mohr v. Langan, 162 Mo. 474, 63 SW 409, 85 AmSR 503; Scott v. Standridge, 117 Okl. 111, 245 P 591, 593 [quot Cyc].

[89] See Attachment § 394.

[90] See Executions § 108.

[91] See supra §§ 35–40.

[92] Ford v. Bushor, 48 Mich. 534, 12 NW 690; Hawkins v. Taylor, 15 Mo. A. 238; Scott v. Standridge, 117 Okl. 111, 245 P 591, 593 [quot Cyc].

[93] Gordon v. Jenney, 16 Mass. 465; Donohoe v. McAleer, 37 Mo. 312.

[94] Oshkosh Union Nat. Bank v. Milburn, etc., Co., 7 N. D. 201, 73 NW 527.

[95] Iowa.—Gimble v. Ackley, 12 Iowa 27.

Minn.—Kurtz v. Republic State Co., 158 Minn. 401, 197 NW 842; Republic State Co. v. Brown, 158 Minn. 396, 197 NW 840.

N. Y.—Acker v. White, 25 Wend. 614.

N. D.—Union Nat. Bank v. Moline, etc., Co., 7 N. D. 201, 73 NW 527.

Eng.—Bradyll v. Ball, 1 Bro. Ch. 427, 28 Reprint 1219.

[96] Kurtz v. Republic State Co., 158 Minn. 401, 197 NW 842; Republic State Co. v. Brown, 158 Minn. 396, 197 NW 840.

[97] Gimble v. Ackley, 12 Iowa 27; Kurtz v. Republic State Co., 158 Minn. 401, 197 NW 842; Republic State Co. v. Brown, 158 Minn. 396, 197 NW 840; Union Nat. Bank v. Moline. etc., Co., 7 N. D. 201, 73 NW 527; Bradyll v. Ball, 1 Bro. Ch. 427, 28 Reprint 1219.

[98] Speer v. Skinner, 35 Ill. 282; Frey v. Leeper, 2 Dall. (Pa.) 131, 1 L. ed. 319; Woglam v. Cowperthwaite, 2 Dall. (Pa.) 68, 1 L. ed. 292; Bradyll v. Ball, 1 Bro. Ch. 427, 28 Reprint 1219.

[99] See cases supra note 98.

[1] Stewart v. Wolfe, 4 Pa. Cas. 314, 7 A 165. But see Lovett v. Burkhardt, 44 Pa. 173 (holding that the mere delivery to plaintiff in a writ of replevin of the goods for which the writ is issued does not tend to prove property in him).

[a] **In Ohio** (1) it was formerly held that, when one, claiming the right of property and of possession to personal property, brings replevin against the person having the actual possession, and, claiming property in the goods, causes the goods to be seized and delivered to him, and

As bailment. The rights of a party who has replevied property are those of a bailee who might be required to return it.[2]

Unauthorized taking and retention. Property taken and retained by the sheriff without authority of law cannot be regarded as in the custody of the law.[3]

[§ 171] **3. Hearings To Determine Possession Pending Suit.** Statutes sometimes provide for proceedings to determine who may have possession of the property pending the suit.[4] Such proceedings are available to plaintiff as well as defendant.[5] In them the court will not try the case on the merits,[6] but will merely determine to whom the property will be awarded.[7] Thus, where the statute permits a party to have such proceedings instituted where the property involved had an especial value that could not be satisfied in money,[8] the single question for the court is whether that is the fact,[9] and other questions are immaterial.[10] Articles of especial value within the statutory meaning may include articles which could be replaced,[11] and are not confined to irreplaceable works of art or skill or documents or records.[12]

XII. PLEADING

[By Joseph W. Rouse]

[§ 172] **A. Declaration, Petition, or Complaint—1. In General—a. Form and Requisites.**[13] In an action of replevin as in other civil actions the complaint must allege facts sufficient to constitute a cause of action,[14] and to show that it exists in favor of plaintiff,[15] and against defendant.[16] The complaint must state in clear and concise language the facts upon which plaintiff bases his right and which entitle him to recover,[17] and it must allege facts and

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gives a bond with surety, as required by the statute, the bond takes the place of the property to the extent of the interest of defendant in replevin, and to that extent plaintiff in replevin becomes invested with the property. Crittenden v. Lingle, 14 Oh. St. 182, 84 AmD 370; Smith v. McGregor, 10 Oh. St. 461; Hunt v. Williams, 7 Oh. Cir. Ct. 224, 4 Oh. Cir. Dec. 568; Knight v. Kinney, 7 Oh. Cir. Ct. 59, 3 Oh. Cir. Dec. 662. (2) But under the amendment of April 4, 1891, of the Ohio Replevin Law (88 Oh. L. p 273), the bond no longer vests title to the property. Knight v. Kinney, supra.

2. Houston v. Walton, 23 Colo. A. 282, 129 P 263.

[a] **Rule applied** as to the owner of intoxicating liquor who retook it in replevin after it had been confiscated by the city. Houston v. Walton, 23 Colo. A. 282, 129 P 263.

3. Davis v. Gambert, 57 Iowa 239, 10 NW 658.

[a] **Rule applied** when an officer with a writ of replevin issued against A for property owned by, and in the possession of, B, who was not a party to the suit, wrongfully deprived B of his possession. Davis v. Gambert, 57 Iowa 239, 10 NW 658.

4. See statutory provisions.

5. Detroit, etc., R. Co. v. Judge Alpena Cir. Ct., 152 Mich. 201, 115 NW 724.

6. Klatt v. Judge Wayne Cir. Ct., 212 Mich. 590, 180 NW 625.

7. Klatt v. Judge Wayne Cir. Ct., supra.

8. See statutory provisions.

9. Klatt v. Judge Wayne Cir. Ct., 212 Mich. 590, 180 NW 625.

10. Klatt v. Judge Wayne Cir. Ct., supra.

[a] **For example:** (1) Whether the property was personal property or real estate. Klatt v. Judge Wayne Cir. Ct., 212 Mich. 590, 180 NW 625. (2) Who was entitled to its possession as a matter of law. Klatt v. Judge Wayne Cir. Ct., supra. (3) Whether the foreign corporation from whom the property had originally been purchased had been licensed to do business in the state. Klatt v. Judge Wayne Cir. Ct., supra. (4) Whether the sale by such company was absolute or conditional. Klatt v. Judge Wayne Cir. Ct., supra.

11. Klatt v. Judge Wayne Cir. Ct., 212 Mich. 590, 180 NW 625; Detroit, etc., R. Co. v. Judge Alpena Cir. Ct., 152 Mich. 201, 115 NW 724.

[a] **Theater chairs** may be within the statute. Klatt v. Judge Wayne Cir. Ct., 212 Mich. 590, 180 NW 625.

[b] **Hides.**—The statute has been construed and applied in reference to property consisting of three carloads of dry hides. Detroit, etc., R. Co. v. Judge Alpena Cir. Ct., 152 Mich. 201, 115 NW 724.

12. Klatt v. Judge Wayne Cir. Ct., 212 Mich. 590, 180 NW 625.

13. Declarations, petitions, or complaints generally see Pleading §§ 136–196.

14. Meadows v. Jones, 17 Ariz. 104, 148 P 874; Bingham County Agricultural Assoc. v. Rogers, 7 Ida. 63, 59 P 931; Scofield v. Whitlegge, 49 N. Y. 259, 12 AbbPrNS 320 [aff 10 AbbPrNS 104]; Bush v. Bush, 55 Utah 237, 184 P 823, 825 [quot Cyc].

[a] **Complaint held to state cause of action in replevin.**—A complaint alleging deposit of money in defendant bank, evidenced by a pass book, which, being stolen from plaintiff, came into defendant's possession and that defendant refuses to surrender it, states a cause of action in replevin rather than upon contract. Wegner v. Second Ward Sav. Bank, 76 Wis. 242, 44 NW 1096.

[b] **Residence of plaintiff.**—A petition in replevin which contains all the averments required by the code need not aver plaintiff's residence. Newell v. Hayden, 8 Iowa 140.

15. Meadows v. Jones, 17 Ariz. 104, 148 P 874 [quot Cyc]; Entsminger v. Jackson, 73 Ind. 144; Scofield v. Whitelegge, 49 N. Y. 259, 12 AbbPrNS 320 [aff 10 AbbPrNS 104]; Bush v. Bush, 55 Utah 237, 184 P 823, 824 [quot Cyc].

[a] **In an action by an executor** to recover property of his testator, the complaint should allege in direct terms the fact of the testator's death and that he left a last will and testament. Halleck v. Mixer, 16 Cal. 574.

[b] **Description of parties plaintiff.**—(1) A declaration in replevin in which plaintiffs described themselves as "trustees of the Colored Zion Baptist Church of Denver, who sue for the use and benefit of said church," is good on demurrer, whether the beneficiary is a corporation or a mere voluntary association. Shipton v. Norrid, 1 Colo. 404. (2) The omission of the names of the parties from the body of the complaint is not a fatal defect, when the names appear in the title thereof. Scott v. Vulcan Iron Works Co., 31 Okl. 334, 122 P 186.

[c] **Confusion of names of plaintiff.**—In an action of replevin by the "C. H. Hardy Auto Company" to the use of "Harry Thomas," to recover an automobile leased by the auto company to defendant, where there was indorsed on the agreement an assignment by "C. H. Hardy" to Thomas, and the statement of claim avers that the auto company had assigned its interest to Thomas, and this averment is not denied in the affidavit of defense, no question can be raised by defendant as to a confusion of names of the legal plaintiff, and it is immaterial whether the auto company was a corporation, a trading name, or an individual. C. H. Hardy Auto Co. v. Posey, 50 Pa. Super. 399.

Title and right to possession of plaintiff see infra §§ 179–181.

16. Meadows v. Jones, 17 Ariz. 104, 148 P 874; Bush v. Bush, 55 Utah 237, 184 P 823, 825 [quot Cyc].

Taking and detention by defendant see infra §§ 184, 185.

17. Meadows v. Jones, 17 Ariz. 104, 148 P 874; Bingham County Agricultural Assoc. v. Rogers, 7 Ida. 63, 59 P 931; Bush v. Bush, 55 Utah 237, 184 P 823, 825 [quot Cyc].

[a] **Complaint held not uncertain or ambiguous.**—(1) Complaint alleging that defendants wrongfully took into their possession two horses and two blankets, which they have since wrongfully withheld, notwithstanding plaintiff's demand. Nielsen v. Hyland, 51 Utah 334, 170 P 778. (2)

not matters of evidence,[18] or legal conclusions,[19] and it should allege the material facts distinctly and separately, instead of assuming them.[20] The material facts to be alleged are plaintiff's ownership, either general or special, of the property, describing it, his right to its immediate possession, and the wrongful taking or detention thereof by defendant,[21] and a complaint which states these essentials ordinarily sufficiently states a cause of action,[22] except where it is necessary to allege a demand,[23] it being unnecessary to anticipate and negative matters of defense.[24] In some jurisdictions statutes provide what allegations the petition shall contain,[25] and a petition containing all the required allegations states a cause of action.[26] But where the form of complaint is prescribed by statute, it need not be literally followed, it being sufficient if the statute is substantially complied with,[27] and if the statute does not prescribe any particular form of complaint, it is sufficient if it contains a plain and concise statement of the cause of action,[28] and it is not always necessary to allege in the complaint everything that is required to be stated in the affidavit.[29] A declaration or complaint is not demurrable for failure to state a cause of action if the facts stated are sufficient to constitute any cause of action against defendant,[30]

Complaint in married woman's action to recover property levied on under execution against her husband. Beggs v. Smith, 26 Cal. A. 532, 147 P 585.

18. Meadows v. Jones, 17 Ariz. 104, 148 P 874; Scofield v. Whitelegge, 49 N. Y. 259, 12 AbbPrNS 320 [aff 10 AbbPrNS 104]; Pattison v. Adams, 7 Hill (N. Y.) 126, 42 AmD 59; Bush v. Bush, 55 Utah 237, 184 P 823, 825 [quot Cyc].

19. Meadows v. Jones, 17 Ariz. 104, 148 P 874; Scofield v. Whitelegge, 49 N. Y. 259, 12 AbbPrNS 320 [aff 10 AbbPrNS 104]; Bush v. Bush, 55 Utah 237, 184 P 823, 825 [quot Cyc].

20. Halleck v. Mixer, 16 Cal. 574.

21. Ariz.—Meadows v. Jones, 17 Ariz. 104, 148 P 874.

Ind.—Catterlin v. Mitchell, 27 Ind. 298, 89 AmD 501.

Kan.—Hoisington v. Armstrong, 22 Kan. 110; Wilson v. Fuller, 9 Kan. 176.

Okl.—Hivick v. Oklahoma-Colorado Oil, etc., Co., 89 Okl. 181, 212 P 420.

Utah.—Bush v. Bush, 55 Utah 237, 184 P 823, 825 [quot Cyc].

[a] **Thus,** where the complaint alleges a wrongful taking by a person other than defendant, and does not allege any facts showing that the property was ever in possession of defendant, it is insufficient, although it alleges a wrongful detention by defendant. Stahl v. Chicago, etc., R. Co., 94 Wis. 315, 68 NW 954.

[b] **General allegations of ownership and right to immediate possession** of a note are sufficient until met with the answer that defendant was a bona fide holder, and then the reply might properly join issue on that point. Wade v. Mankato Nat. Bank of Commerce, 144 Minn. 187, 174 NW 889 (defendant not entitled to judgment on pleadings).

Description and value of property see infra §§ 182, 183.

Taking and detention by defendant see infra §§ 184, 185.

Title and right to possession of plaintiff see infra §§ 179–181.

22. Ariz.—Meadows v. Jones, 17 Ariz. 104, 148 P 874.

Ark.—Feldman v. Feldman, 171 Ark. 1097, 287 SW 384.

Cal.—Halleck v. Mixer, 16 Cal. 574.

Dak.—Everett v. Buchanan, 2 Dak. 249, 6 NW 439, 8 NW 31.

Ind.—Schenck v. Long, 67 Ind. 579; Catterlin v. Mitchell, 27 Ind. 298, 89 AmD 501; Hoover v. Lewin, 56 Ind. A. 367, 105 NE 400.

Kan.—Hoisington v. Armstrong, 22 Kan. 110.

Miss.—Young v. Terry, 129 Miss. 281, 92 S 76.

Nebr.—McKinney v. Chadron First Nat. Bank, 36 Nebr. 629, 54 NW 963.

Okl.—Walker v. Hinton, 70 Okl. 61, 172 P 73; Stone v. American Nat. Bank, 34 Okl. 786, 127 P 393.

Pa.—McCrary v. McCully, 75 Pa. Super. 464; Rickard v. Major, 34 Pa. Super. 107.

S. D.—Towne v. Liedle, 10 S. D. 460, 74 NW 232.

Wash.—Brookman v. State Ins. Co., 15 Wash. 29, 45 P 655, 46 P 243.

[a] **Declaration, petition, or complaint** states a cause of action where it alleges: (1) Ownership, right to possession, and detention, but does not allege defendants' fraud or bad faith in obtaining the goods sought to be replevied. Shapiro v. Wolf, 126 Misc. 564, 214 NYS 48. (2) That a chattel mortgage was executed and delivered to plaintiff by defendant covering the personal property described, and providing when it should become due; that the chattel mortgage was breached, and plaintiff was entitled to possession of the personal property described therein, which had been demanded; and that defendant refused to deliver the property for foreclosure. Hivick v. Oklahoma-Colorado Oil, etc., Co., 89 Okl. 181, 212 P 420. (3) That bonds belonging to plaintiff were deposited with defendant bank as a bank and banker, that they were plaintiff's property, and that plaintiff had made demand on the bank and its receiver therefor, which was refused. Bates v. Capital State Bank, 18 Ida. 429, 110 P 277. (4) That plaintiff claimed a certain horse, that he was entitled to immediate possession, and that it was wrongfully detained by defendant, who made the false claim of being the owner thereof, and that the horse was not taken from plaintiff for tax or fine as under an order or judgment against his property. Climer v. Aylor, 123 Ark. 510, 185 SW 1097. (5) That plaintiff deposited stock, covered by a certificate which also covered stock owned by defendant, with defendant for sale, and that after a reasonable time defendant refused to return it or its value. Wentz v. Linthicum, 76 Cal. A. 486, 245 P 205. (6) That plaintiffs owned and were entitled to immediate possession of property described in the affidavit made a part of the complaint, that defendant's possession was wrongful, that the property was of a stated value and had been seized under the affidavit of claim, and then returned to defendant on his execution bond, and demanding judgment for the delivery of the goods or for their value with damages for detention. Hare v. Grantham, 158 N. C. 598, 74 SE 102.

[b] **In replevin of liquor certificate** it is not necessary that the complaint allege that plaintiff was not forbidden by the statutes to traffic in liquors. Bachmann-Bechtel Brewing Co. v. Gehl, 154 App. Div. 849, 139 NYS 807.

[c] **Omission of time, place, and value** does not render a complaint alleging plaintiff's ownership and defendant's unlawful taking and detention, bad as against general demurrer. Clay, etc., Co. v. Martinez, 74 Colo. 10, 218 P 903.

23. See infra § 186.

24. Meadows v. Jones, 17 Ariz. 104, 148 P 874; McKinney v. Chadron First Nat. Bank, 36 Nebr. 629, 54 NW 963; McCrary v. McCully, 75 Pa. Super. 464; Heisley v. Economy Tool Mfg. Co., 33 Pa. Super. 218; Drumgoole v. Lyle, 30 Pa. Super. 463.

25. See statutory provisions; and case infra this note.

[a] **Compliance with statutes.**—A statute requiring that, where the action is in the detinet and does not allege a wrongful taking, the complaint may allege with requisite certainty of time, place, and value, a receipt of the property by defendant from plaintiff or from some other person to be delivered to plaintiff, and that, although requested he has refused to deliver the same to plaintiff, must be followed. Pirani v. Barden, 5 Ark. 81.

26. Marden v. Starr, 107 Fed. 199; Bummelhart v. Boone, 147 Iowa 390, 126 NW 338.

27. Smith v. Montgomery, 5 Iowa 370; Berry v. Kauffmann, 70 Mo. 186.

28. Western R. Co. v. Bayne, 75 N. Y. 1.

29. Bosse v. Thomas, 3 Mo. A. 472.

30. Ingel v. Scott, 86 Ind. 518; Ladson v. Mostowitz, 45 S. C. 388, 23 SE 49; Burr v. Brantley, 40 S. C. 538, 19 SE 199; Johnston v. Holmes, 32 S. C. 434, 11 SE 208.

[a] **Illustration.** — Notwithstanding code and charter provisions, as to the custody and disposition of property seized by the police, a complaint to recover of the person from whom it is alleged the police wrongfully seized the property, against the property clerk of the police department, to whom it was delivered and who is alleged to have refused plaintiff's demand therefor, and to have delivered it to the succeeding clerk, with knowledge of all the facts, states a cause of action; the statutory remedy not being exclusive. Duboff v. Haslan, 195 App. Div. 117, 186 NYS 481.

[b] **Divisible declaration.**—If defendant demur to the whole declaration, part of which is sufficient, and the residue not, the demurrer will be overruled, if the matters alleged be

even though such facts may not be sufficient to sustain the particular cause of action upon which the complaint may seem to be based.[31] If the complaint states a cause of action in replevin, the fact that it also alleges a conversion of the property by defendant to his own use does not change the form of action,[32] or deprive plaintiff of his right to a recovery of the property, if the evidence upon the trial justifies such relief.[33]

The sufficiency of declaration, petition, or complaint is determined by its averments,[34] and it is not affected by defects in the affidavit,[35] nor by the name given to the pleading or cause of action.[36] A complaint which is otherwise sufficient is not defective because of failure to ask immediate delivery of the property.[37]

Affidavit as complaint.[38] The affidavit required to be filed in an action of replevin has been held to be no part of the pleadings.[39] The facts set forth in the affidavit form no part of the issues of the case,[40] unless they are again set forth in the pleadings.[41] In some jurisdictions however where the action is brought before a justice of the peace, the affidavit is the only pleading required,[42] and in others, it has been held that an affidavit filed without a separate complaint, but containing all the essentials of a complaint, is to be treated as both affidavit and complaint.[43]

Prayer for judgment. The omission of a prayer for judgment is not fatal where it is apparent what judgment plaintiff would be entitled to.[44]

[§ 173] **b. Conformity to Writ or Affidavit.**[45] Where the proceeding in replevin is begun by the issuance of a writ of replevin,[46] the declaration or complaint should not include any property not taken under the writ[47] but where the action is begun by the service of summons in which it is not required that the property shall be specified, the declaration may properly include all of the articles described in the writ, although in consequence of directions given by plaintiff a part of them only was seized by the officer and the summons served described only the articles seized.[48] The declaration need not include all of the property described in the affidavit on which the requisition to the sheriff, to cause the property to be delivered to him, is founded.[49] In general there should be a substantial correspondence between the petition and the affidavit,[50] but the affidavit not being necessarily a part of the pleadings,[51] its allegations will not control as to the evidence to be offered,[52] and a variance between the allegations of the petition and of the affidavit as to the character of the ownership of plaintiff[53] or as to the description of the property[54] is not material.

[§ 174] **c. Venue.**[55] Replevin at common law and under most of the statutes is regarded as a local action,[56] and the complaint should contain allegations of venue,[57] and should allege the place from which

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divisible in their nature. Newell v. Newell, 34 Miss. 385 (holding that a declaration in replevin, for the recovery of a chattel and for damages for the wrongful taking or detention, is divisible, and hence a demurrer to the whole will be overruled if it be sufficient so far as it relates to the specific recovery of the chattel, although defective in reference to the damages claimed).

[31] Burr v. Brantley, 40 S. C. 538, 19 SE 199.

[32] Enos v. Bemis, 61 Wis. 656, 21 NW 812.

[33] More v. Finger, 128 Cal. 313, 60 P 933, 58 P 322.

[34] Bates v. Capital State Bank, 18 Ida. 429, 110 P 277; Cudd v. Farmers' Exch. Bank, 76 Okl. 317, 185 P 521; Jantzen v. Emanuel German Baptist Church, 27 Okl. 473, 112 P 1127, Ann Cas1912C 659.

[35] Cudd v. Farmers' Exch. Bank, 76 Okl. 317, 185 P 521; Jantzen v. Emanuel German Baptist Church, 27 Okl. 473, 112 P 1127, AnnCas1912C 659.

[36] Bates v. Capital State Bank, 18 Ida. 429, 110 P 277.

[37] Northern Timber Products Co. v. Stone-Ordean-Wells Co., 143 Minn. 200, 173 NW 439.

[a] **Allegation to support seizure of property.**—Where the cause may proceed without a preliminary seizure of the property, the facts justifying such seizure need not be set up in plaintiff's pleading in order to confer jurisdiction. Racine-Sattley Co. v. Meinen, 79 Nebr. 33, 114 NW 602 [vacating judgment 79 Nebr. 32, 112 NW 321].

[38] **Nature of affidavit** see supra § 98.

[39] Wilhite v. Williams, 41 Kan. 288, 21 P 256, 13 AmSR 281; Hoisington v. Armstrong, 22 Kan. 110; Crawford v. Furlong, 21 Kan. 698; Loomis v. Youle, 1 Minn. 175.

[40] Hoisington v. Armstrong, 22 Kan. 110; King v. King, 42 Okl. 405, 141 P 788; Pond Creek First Nat. Bank v. Cochran, 17 Okl. 538, 87 P 855; Moser v. Jenkins, 5 Or. 447.

[41] Hoisington v. Armstrong, 22 Kan. 110; Pond Creek First Nat. Bank v. Cochran, 17 Okl. 538, 87 P 855.

[42] Alexander v. Vaughan, 106 Ark. 438, 153 SW 594; Hanner v. Bailey, 30 Ark. 681; Fergus v. Gagnon, 4 Nebr. (Unoff.) 25, 93 NW 146.

[a] **In a justice's court** the affidavit may be treated as a bill of particulars, but in a district court the affidavit is no part of the pleadings. Hawes v. Robinson, 44 Ark. 308; Wilhite v. Williams, 41 Kan. 288, 21 P 256, 13 AmSR 281.

[b] **On appeal from a judgment of a justice's court** a new affidavit in replevin need not be filed unless by way of amendment, and, the original affidavit being sufficient, if another is filed in the appellate court it must be taken to be by way of amendment and not as stating a new cause of action. Dodd v. Skelton, 65 Nebr. 585, 91 NW 543; German Nat. Bank v. Aultman, 63 Nebr. 324, 88 NW 479.

[43] Burnham-Hanna-Munger Dry Goods Co. v. Hill, 17 N. M. 347, 128 P 62; Mann v. Ridenhour, 46 Okl. 565, 149 P 124; Scott v. Vulcan Iron Works Co., 31 Okl. 334, 122 P 186.

[44] Scott v. Vulcan Iron Works Co., supra.

[45] **Description and value of property** see infra §§ 182–183.

[46] See supra § 135.

[47] Sanderson v. Marks, 1 Harr. & G. (Md.) 252. See Kerrigan v. Ray, 10 HowPr (N. Y.) 213 (wherein it is stated that under the old system the original writ on which the action was founded described the property claimed and that the declaration must conform thereto).

[48] Finehout v. Crain, 4 Hill (N. Y.) 537.

[49] Kerrigan v. Ray, 10 HowPr (N. Y.) 213; King v. King, 42 Okl. 405, 141 P 788.

[50] Pond Creek First Nat. Bank v. Cochran, 17 Okl. 538, 87 P 855.

[51] See supra § 172.

[52] Pond Creek First Nat. Bank v. Cochran, 17 Okl. 538, 87 P 855.

[53] Pond Creek First Nat. Bank v. Cochran, supra.

[54] Kerrigan v. Ray, 10 HowPr (N. Y.) 213; King v. King, 42 Okl. 405, 141 P 788; Moser v. Jenkins, 5 Or. 447.

[55] **Allegations as to venue in declarations or complaints generally** see Pleading § 138.

Venue in actions of replevin see supra § 88.

[56] See supra § 88.

[57] Parvis v. Truax, 12 Del. 575, 32 A 1050; Metropolitan Credit Corp. v. Anderson, (N. J. Sup.) 118 A 581; Byers v. Ferguson, 41 Or. 77, 65 P 1067, 68 P 5; Stiles v. James, 2 Wash. T. 194, 2 P 188.

[a] **Where no venue was laid** in the complaint, and it did not state where the taking of the property occurred, or where it was retained, the complaint was insufficient. Metropolitan Credit Corp. v. Anderson, (N. J. Sup.) 118 A 581.

[b] **Allegations held sufficient.**—Where it was alleged that all the parties resided in a certain county, and inferentially that all transactions took place there, the complaint is not bad for failure to allege that the property was present in that county where

the property was taken,[58] and show the county in which the property is wrongfully held at the time the action is instituted.[59] In some jurisdictions it has been held that the venue must be alleged as of a particular place within the town or parish,[60] but in other jurisdictions it is held that, except perhaps in replevin of property seized in distress for rent,[61] it is sufficient if the venue is laid within the town[62] or county.[63] In some jurisdictions it is held that in actions of replevin brought before a justice of the peace, it is not necessary to allege detention of the property in the county in which suit is brought,[64] and in others it is held that the venue is sufficiently laid if it appears in the margin of the complaint instead of in the body.[65]

[§ 175] **d. Surplusage.** Allegations in the declaration or complaint which are not necessary to the statement of plaintiff's cause of action may be disregarded as surplusage.[66] A complaint which otherwise states a good cause of action and the relief demanded is in harmony therewith is not demurrable for the inclusion of unnecessary and irrelevant allegations and demanding judgment for more than the facts warrant.[67]

[§ 176] **e. Verification.**[68] The statutes ordinarily require that the declaration, complaint, or petition in an action of replevin shall be verified,[69] and in the absence of such verification the writ cannot legally be issued;[70] but unless the statute so requires, the verification need not be by plaintiff in person,[71] but it may be by an agent,[72] or by plaintiff's attorney.[73] A verification by an agent which fails to show for whom he acts is insufficient.[74] If the verification contains the proper allegations for the purpose of a verification the fact that it contains additional allegations will not vitiate it, but such additional matter may be treated as surplusage.[75]

[§ 177] **f. Time for Filing and Serving.** In the absence of statute, the rules applicable to filing and service of a declaration, petition, or complaint in civil actions generally[76] apply in actions of replevin.[77] The provisions of statutes if any as to the filing and service of the declaration must, it has been held, be strictly complied with.[78] When a statute limits the time within which a declaration or complaint must be filed or served after return of the writ, it cannot be filed after the expiration of that period,[79] or served until the writ is returned.[80]

[§ 178] **g. Exhibits, Bills of Particulars, and Copies of Instruments.**[81] An exhibit containing a description of the property must, in order to become a part of the complaint, be attached thereto.[82] A bill of particulars is not necessary in an action of replevin before a justice of the peace where the ac-

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the suit was brought. Armour v. Seixas, 80 Wash. 181, 141 P 308.

[58] Kirk v. Matlock, 12 Or. 319, 7 P 322.

[59] Byers v. Ferguson, 41 Or. 77, 65 P 1067, 68 P 5; Moorhouse v. Donaca, 14 Or. 430, 13 P 112.

[60] Gardner v. Humphrey, 10 Johns. (N. Y.) 53; Potten v. Bradley, 2 M. & P. 78, 17 ECL 625.

[61] Strong v. Lawler, 37 Conn. 177; Muck v. Folkroad, 1 Browne (Pa.) 60.

[62] Strong v. Lawler, 37 Conn. 177.

[63] Muck v. Folkroad, 1 Browne (Pa.) 60.

[64] Gould v. O'Neal, 1 Ind. A. 144, 27 NE 307.

[65] Stokes v. Crane, 46 Mo. 264.

[66] Ark.—Collier v. Hopper, 202 SW 687.

Cal.—Conner v. Bludworth, 54 Cal. 635.

Fla.—Roof v. Chattanooga, etc., Pulley Co., 36 Fla. 284, 18 S 597.

Nebr.—Racine-Sattley Co. v. Meinen, 79 Nebr. 33, 114 NW 602 [vacating 79 Nebr. 32, 112 NW 321].

N. Y.—Banfield v. Haeger, 45 N. Y. Super. 428.

[a] **Rule applied.**—Allegations as to a fraudulent transfer being mere surplusage, a complaint in a suit by a trustee to recover personal property belonging to the estate of the bankrupt states a cause of action in replevin as against a demurrer. Collier v. Hopper, (Ark.) 202 SW 687.

[b] **Particular allegations held surplusage.**—(1) Allegations as to facts constituting plaintiff's ownership following general allegations of ownership but not in any way contradictory of such general allegations. Racine-Sattley Co. v. Meinen, 79 Nebr. 33, 114 NW 602 [vacating former opinion 79 Nebr. 32, 112 NW 321]. (2) Allegations setting forth written instrument on which plaintiff's ownership is based may be disregarded as surplusage. Quarles v. Hucherson, 139 Miss. 356, 104 S 148. (3) Allegations as to instruments by virtue of which plaintiff claims right to possession. Conner v. Bludworth, 54 Cal. 635. (4) Allegations as to place where property was taken. Lay v. Neville, 25 Cal. 545. (5) Insertion of the name of usee in a complaint by plaintiff entitled to recover in his own right. Roof v. Chattanooga Wood Split Pulley Co., 36 Fla. 284, 18 S 597. (6) Allegations in the nature of a reply to the position plaintiff believed would be assumed by defendants, will be regarded as surplusage, and judgment should not be entered for defendants on demurrer to the statement alleging insufficiency in such unnecessary averments. McCrary v. McCully, 75 Pa. Super. 464.

[67] Sisson v. Bassett, 134 App. Div. 53, 118 NYS 664.

[68] **Verifications of pleadings generally** see Justices of the Peace § 241; Pleading §§ 824–864.

[69] See statutory provisions; and cases infra this note.

[a] **In Indiana**, under a statute requiring the verification of the complaint by affidavit in replevin before a justice of the peace, a complaint not so verified is insufficient. Dowell v. Richardson, 10 Ind. 573.

[b] **Affidavit used as complaint.**—The statement in an affidavit that the facts set forth are true, to the best of affiant's knowledge and belief, is a sufficient compliance with the statutes relating to such affidavits. Kesse v. Wilson, 139 Mo. A. 1, 119 SW 508.

[70] Cure v. Wilson, 25 Iowa 205 (holding that, where the statute expressly requires the petition to be verified, the writ cannot legally be issued without such verification, and if so issued should be quashed and the suit dismissed on motion).

[71] Hall v. Durham, 117 Ind. 429, 20 NE 282.

[a] **In Pennsylvania** the statute requires that the declaration be verified by plaintiff. Dunham, Inc. v. Kelly, 8 Pa. Dist. & Co. 25 (holding verification by attorney improper).

Who may or must verify pleadings generally see Pleading §§ 847–850.

[72] South Missouri Land Co. v. Jeffries, 40 Mo. A. 360.

[73] Hall v. Durham, 117 Ind. 429, 20 NE 282.

[74] Crawshaw v. Wright, 5 Mo. A. 577.

[75] Bingham v. Hill, 38 Oh. St. 657.

[76] See Pleading § 196.

[77] Rodericks v. Payne, 12 S. C. L. 407.

[a] **In Illinois** the statutory provision governing the filing of declarations generally (Cahill St. c 110 § 32) applies to filing of declarations in replevin. Hanson v. Eagan, 228 Ill. A. 329 (holding that filing is not optional under Replevin Act § 17).

[78] Elmore v. Garvey, 4 Wis. 152; Hutchinson v. McClellan, 2 Wis. 17.

[a] **Service on adult member** of defendant's family is sufficient in some jurisdictions. Hoyt v. Carson, 22 Pa. Dist. 1039, 40 Pa. Co. 556 [disappr Smith v. Smith, 17 Pa. Dist. 380].

[79] Murphy v. Sumner, 19 S. C. L. 216.

[80] Wilson v. Williams, 18 Wend. (N. Y.) 581.

[81] **Bills of particulars generally** see Pleading §§ 885–918.

Exhibits generally see Pleading §§ 876–884.

[82] Riley v. Pearson, 21 Or. 15, 26 P 849 (holding that it is not sufficient to file the exhibit as a separate paper, although it is referred to in the complaint and alleged to be a part thereof).

tion is instituted by the filing of an affidavit,[83] since the affidavit contains all that is necessary to be stated in a bill of particulars and may be considered as such.[84] A bill of particulars, one item of which was an undivided interest, is not objectionable where it does not show that the property could not be divided.[85] In an action of replevin to recover a written instrument it is not necessary to set out a copy thereof in the complaint.[86]

[§ 179] **2. Title and Right to Possession—a. Title.** The complaint in an action of replevin must allege either a general or special ownership of the property in plaintiff.[87] This should be done by a direct and issuable averment and not by allegations of the evidence of such ownership,[88] or allegations of legal conclusions growing out of the fact of ownership;[89] and so it is not sufficient merely to allege that plaintiff is entitled to possession,[90] nor to allege a wrongful detention by defendant.[91] In the absence of any statutory provision so requiring, the declaration or complaint need not allege in specific words a general or special ownership or interest[92] if words of equivalent import are used,[93] or if it alleges facts which show plaintiff's ownership or from which ownership may be implied.[94] It is sufficient to allege plaintiff's ownership in general terms,[95] without setting out the evidence, source, or nature of his title;[96] and, although plaintiff unnecessarily attempts to set out the facts constituting such ownership, his complaint is nevertheless good if these allegations are not derogatory of the general allegations of ownership;[97] yet if plaintiff chooses to set out the source, evidence, or nature of his title, his right of recovery is restricted to that derived from the specific facts alleged.[98] If plaintiff bases his right of recovery upon a special ownership in the property, he must in his complaint set out the facts in relation thereto;[99] but if the facts alleged show plaintiff to be the owner of the property, it is not a fatal defect that he erroneously denominates his interest as a special property.[1] In some jurisdictions statutory provisions require a statement of the facts upon which plaintiff bases his title.[2] Where several persons join in an action of replevin, the declaration or statement must allege a joint ownership or joint right to possession.[3] In an action by a husband and wife jointly, the declaration must show the wife's title to the property.[4]

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[83] Coombs v. Brenklander, 29 Nebr. 586, 45 NW 929; Hill v. Wilkinson, 25 Nebr. 103, 41 NW 134 (holding that the affidavit takes the place of a bill of particulars). See also Sanderson v. Pullman, 9 Oh. Dec. (Reprint) 175, 11 CincLBul 145.

[a] **In the county court** a bill of particulars is not necessary, when the value of the property is within the jurisdiction of a justice of the peace; and if a defective bill of particulars is filed in such a case, it is not sufficient ground for rendering judgment for defendant on the pleadings. Coombs v. Brenklander, 29 Nebr. 586, 45 NW 929.

[84] Casterline v. Day, 26 Kan. 306; Starr v. Hinshaw, 23 Kan. 532.

[85] Smith v. Gooding, 100 Okl. 230, 229 P 269.

Replevin of undivided shares see supra § 11.

[86] Bales v. Scott, 26 Ind. 202.

[87] Ark.—Climer v. Aylor, 123 Ark. 510, 185 SW 1097.

Colo.—Street v. Sederburg, 41 Colo. 128, 92 P 29; Elliott v. Greeley First Nat. Bank, 30 Colo. 279, 70 P 421; Baker v. Cordwell, 6 Colo. 199.

Ind.—Bailey v. Troxell, 43 Ind. 432.

Mo.—Stenson v. Lancaster, 178 Mo. A. 340, 165 SW 1158; Donnell v. Miller, 133 Mo. A. 693, 113 SW 1132; McCabe v. Black River Transp. Co., 131 Mo. A. 531, 110 SW 606; Benedict, etc., Mfg. Co. v. Jones, 60 Mo. A. 219.

N. Y.—Scofield v. Whitelegge, 49 N. Y. 259, 12 AbbPrNS 320 [aff 33 N. Y. Super. 179, 10 AbbPrNS 104]; Vandenburgh v. Van Valkenburgh, 8 Barb. 217; Bond v. Mitchell, 3 Barb. 304; Pattison v. Adams, 7 Hill 126, 42 AmD 59.

Oh.—Shur v. Statler, 2 Oh. Dec. (Reprint) 70, 1 WestLMonth 317.

Okl.—Williams v. Williams, 87 Okl. 195, 209 P 769.

S. C.—Luther v. Arnold, 42 S. C. L. 24, 62 AmD 422.

S. D.—Kierbow v. Young, 20 S. D. 414, 107 NW 371, 8 LRANS 216.

[a] **Special demurrer.**—A complaint which fails to show whether plaintiff's ownership is general or special is bad upon special demurrer. Climer v. Aylor, 123 Ark. 510, 185 SW 1097.

[b] **In Louisiana** a petition alleging ownership of property and praying that plaintiff be placed in possession states a cause of action as against the contention that it is a mere possessory action for recovery of movables. Levert v. Hebert, 51 La. Ann. 222, 25 S 118 (under civil law a possessory action lies only for realty).

[c] **Allegations held sufficient.**—Complaint in intervention showing creation of trust and acceptance by intervener entitling him to intervene. Stephenson v. Combination Leasing, etc., Co., 86 Mont. 322, 283 P 1110.

[d] **Allegations held insufficient.**—A complaint, which merely alleges a promise of defendant to vest ownership in plaintiff upon certain conditions, is bad. Bailey v. Troxell, 43 Ind. 432.

[e] **If the statute does not require averment of ownership,** no such averment need be made. Hass v. Prescott, 38 Wis. 146 [overr Child v. Child, 13 Wis. 17] (affidavit constituting plaintiff's pleading before a justice of the peace).

[88] Vandenburgh v. Van Valkenburgh, 8 Barb. (N. Y.) 217; Bond v. Mitchell, 3 Barb. (N. Y.) 304.

[a] **Allegation of the intervener that he had purchased and paid for** property is mere evidence tending to show him to be the owner. Benish v. Jones, 68 Colo. 484, 190 P 538.

[89] Street v. Sederburg, 41 Colo. 128, 92 P 29; Scofield v. Whitelegge, 49 N. Y. 259, 12 AbbPrNS 320 [aff 33 N. Y. Super. 179, 10 AbbPrNS 104]; Thiering v. Gage, (Or.) 284 P 832.

[90] Street v. Sederburg, 41 Colo. 128, 92 P 29; Baker v. Cordwell, 6 Colo. 199; Donnell v. Miller, 133 Mo. A. 693, 113 SW 1132; Harmon v. Iden, 88 Mo. A. 314 (stating rule in circuit court, but holding it not applicable in action before justice of the peace); Dillard v. McClure, 64 Mo. A. 488; Benedict, etc., Mfg. Co. v. Jones, 60 Mo. A. 219; Vandenburgh v. Van Valkenburgh, 8 Barb. (N. Y.) 217; Bond v. Mitchell, 3 Barb. (N. Y.) 304; Pattison v. Adams, 7 Hill (N. Y.) 126, 42 AmD 59; Shur v. Statler, 2 Oh. Dec. (Reprint) 70, 1 WestLMonth 317.

[91] Scofield v. Whitelegge, 49 N. Y. 259, 12 AbbPrNS 320 [aff 10 AbbPr NS 104]; Tronson v. Union Lumbering Co., 38 Wis. 202.

[92] Climer v. Aylor, 123 Ark. 510, 185 SW 1097; Stickney v. Smith, 5 Minn. 486.

[93] Stickney v. Smith, 5 Minn. 486.

[a] **Allegations held to imply ownership:** (1) That at the time of the taking plaintiff was lawfully in possession. Seifret v. Kraft, 13 NY CivProc 321. (2) That plaintiffs were possessed of the property as of their own proper goods. Stickney v. Smith, 5 Minn. 486. (3) Wrongful detention by defendant of the property "of the plaintiff." Van der Minden v. Elsas, 36 N. Y. Super. 66; Grever v. Taylor, 53 Oh. St. 621, 42 NE 829; Wilmot v. Lyon, 11 Oh. Cir. Ct. 238, 7 Oh. Cir. Dec. 394.

[94] Climer v. Aylor, 123 Ark. 510, 185 SW 1097; Visher v. Smith, 91 Cal. 260, 27 P 650; Morrison v. Lewis, 49 N. Y. Super. 178.

[a] **If the complaint alleges facts** from which ownership may be implied, as distinguished from conclusions based upon the fact of ownership, it is sufficient without an express allegation of ownership. Morrison v. Lewis, 49 N. Y. Super. 178.

[95] Ark.—Climer v. Aylor, 123 Ark. 510, 185 SW 1097.

Conn.—Norman Printers' Supply Co. v. Ford, 77 Conn. 461, 59 A 499.

Ind.—Krug v. McGilliard, 76 Ind. 28; Goodman v. Sampliner, 23 Ind. A. 72, 54 NE 823.

Miss.—Quarles v. Hucherson, 139 Miss. 356, 104 S 148.

Mo.—Mexico First Nat. Bank v. Ragsdale, 158 Mo. 668, 59 SW 987, 81 AmSR 332.

N. Y.—Pattison v. Adams, Lalor 426.

[96] Colo.—Shipton v. Norrid, 1 Colo. 404.

Conn.—Norman Printers' Supply Co. v. Ford, 77 Conn. 461, 59 A 499.

Ind.—Hoke v. Applegate, 92 Ind. 570; Krug v. McGilliard, 76 Ind. 28.

Minn.—Carlson v. Small, 32 Minn. 492, 21 NW 737.

Mo.—Mexico First Nat. Bank v. Ragsdale, 158 Mo. 668, 59 SW 987, 81 AmSR 332; Weaver v. Lake, (A.) 4 SW (2d) 834; Kansas City Wholesale Grocery Co. v. McDonald, 118 Mo. A. 471, 95 SW 279.

Pa.—Elsasser v. Elsasser, 29 Pa. Dist. 698.

[a] **Application of rule.**—(1) In an action by a guardian an allegation that "plaintiff as guardian," etc., "is entitled to the possession," is a sufficient allegation of ownership (Hoke v. Applegate, 92 Ind. 570); (2) and in an action by an assignee for the benefit of creditors, it is sufficient for him to allege generally that he is the owner and entitled to possession without alleging that he is the owner as assignee (Krug v. McGilliard, 76 Ind. 28); (3) and a trustee suing need not set out how the trust was created or his title accrued (Skipton v. Norrid, 1 Colo. 404). (4) Where plaintiff relies on an assignment, the consideration of the assignment need not be alleged. **Vogel v. Badcock, 1** AbbPr (N. Y.) 176.

Property in defendant is not pleaded by an averment in the complaint that defendant "acquired" the property.[5]

In actions before a justice of the peace it has been held unnecessary in some jurisdictions to allege ownership, as right to possession is all that need be alleged.[6]

[§ 180] **b. Right to Possession.** As replevin is a possessory action[7] the complaint should allege that plaintiff is entitled to the possession of the property,[8] but this need not be alleged in express terms,[9] it being sufficient if the complaint alleges facts which show that he is so entitled.[10] It has been held, however, that it is not a sufficient allegation of plaintiff's right to possession to allege merely that he is the owner of the property,[11] or that it is wrongfully detained by defendant,[12] or to allege both ownership and a wrongful detention,[13] since the ownership and right of possession may be in different persons,[14] and the allegation of wrongful detention is merely a conclusion of law;[15] but on the contrary it has been held that it is sufficient if the complaint alleges both ownership in plaintiff and a wrongful detention by defendant,[16] or if it merely alleges that plaintiff is the owner of the property.[17] An allegation of right to immediate possession, without allegation of either general or special ownership, is bad for the reason that the allegation of right to possession, standing alone, is a legal conclusion.[18] Where plaintiff relies upon a special ownership in the property, he must set out in his complaint the facts in relation thereto which entitle him to its possession.[19] If it is alleged that plaintiff is the owner and entitled to possession, it is not necessary to allege that he is lawfully entitled to the property.[20]

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[97] American Clay Mach. Co. v. Sedalia Brick, etc., Co., 174 Mo. A. 485, 160 SW 902; Racine-Sattley Co. v. Meinen, 79 Nebr. 33, 114 NW 602 [vacating former op. 79 Nebr. 32, 112 NW 321]; Donovan v. Stuber, 130 App. Div. 235, 114 NYS 593.

[98] Kansas City Wholesale Grocery Co. v. McDonald, 118 Mo. A. 471, 95 SW 279.

[99] Paxton v. Learn, 55 Nebr. 459, 75 NW 1096; Thompson, etc., Mfg. Co. v. Nicholls, 52 Nebr. 312, 72 NW 217; Hudelson v. Tobias First Nat. Bank, 51 Nebr. 557, 71 NW 304; Norcross v. Baldwin, 50 Nebr. 885, 70 NW 511; Griffing v. Curtis, 50 Nebr. 334, 69 NW 968; Scott v. Vulcan Iron Works Co., 31 Okl. 334, 122 P 186; Thompson v. Caddo County Bank, 15 Okl. 615, 82 P 927.

[a] **Allegation held sufficient.**—Dalton v. Bilbo, 126 Okl. 139, 258 P 274 (a petition alleging plaintiff was trustee and had possession of property situate upon a lease owned by beneficiaries avers ownership as against a general demurrer).

Allegations in action by mortgagee see Chattel Mortgages § 316.

[1] Robinson v. Fitch, 26 Oh. St. 659.

[2] See statutory provisions; and cases infra this note.

[a] **In Pennsylvania** (1) although St. (1920) § 18973 requires plaintiff to set forth the facts upon which his title is based, if defendants claim no interest in the property except that given to them by a lease from plaintiff, plaintiff need not prove and so need not aver anything in regard to the prior title. Commercial Car Co. v. Murphy, 275 Pa. 105, 118 A 641. (2) A declaration that states that "the title in and to the said goods and chattels has at all times lawfully been in the plaintiff herein . . ." sufficiently sets forth the facts on which the plaintiff's title to the property was based. McCray Refrigerator Co. v. Basco, 79 Pa. Super. 185 (this fairly implies that plaintiff was the producer of the property, and the absolute assertion of original ownership is sufficient). (3) An allegation that the article was the property of plaintiff is not sufficient. Stern v. McMenamin, 28 Pa. Dist. 103; Davis v. Nipple, 22 Pa. Dist. 1043; Forsyth v. Stumbaugh, 13 Pa. Dist. 339, 29 Pa. Co. 476. (4) The Replevin Act (P. L. [1901] p 88) applies to writs of replevin issued by tenants against landlords where goods are distrained for rent. McCrary v. McCully, 75 Pa. Super. 464.

[3] Asure v. Hankele, 71 Pa. Super. 305.

[4] Gentry v. Bargis, 6 Blackf. (Ind.) 261.

[5] Goodwin v. Tuttle, 70 Or. 424, 141 P 1120.

[6] Studebaker Bros. Mfg. Co. v. Davis, 137 Mo. A. 58, 119 SW 532; Harmon v. Iden, 88 Mo. A. 314; Randol v. Buchanan, 61 Mo. A. 445.

[7] See supra § 4.

[8] Midland Contracting Co. v. Toledo Fdy., etc., Co., 154 Fed. 797, 83 CCA 489; Entsminger v. Jackson, 73 Ind. 144.

[9] American Storage, etc., Co. v. Harding, 126 Mo. A. 489, 104 SW 484; Gage v. Wayland, 67 Wis. 566, 31 NW 108.

[10] Visher v. Smith, 91 Cal. 260, 27 P 650; American Storage, etc., Co. v. Harding, 126 Mo. A. 489, 104 SW 484; Gage v. Wayland, 67 Wis. 566, 31 NW 108; Spaugh v. Peterson, 34 Wyo. 374, 244 P 224.

[a] **Sufficiency of petition.**—A petition alleging facts showing that plaintiff was the real party in interest is sufficient, and is not contradicted by a copy of the petition of an assignment of a conditional contract of sale, not showing that the assignment was ever delivered or ever became effective as such. Spaugh v. Peterson, 34 Wyo. 374, 244 P 224.

[11] Entsminger v. Jackson, 73 Ind. 144.

[12] Loomis v. Youle, 1 Minn. 175; Scofield v. Whitelegge, 49 N. Y. 259, 12 AbbPrNS 320 [aff 33 N. Y. Super. 179, 10 AbbPrNS 104].

[13] Midland Contracting Co. v. Toledo Fdy., etc., Co., 154 Fed. 797, 83 CCA 489.

[14] Midland Contracting Co. v. Toledo Fdy., etc., Co., supra; Entsminger v. Jackson, 73 Ind. 144.

[15] Scofield v. Whitelegge, 49 N. Y. 259, 12 AbbPrNS 320 [aff 33 N. Y. Super. 179, 10 AbbPrNS 104].

[16] Grever v. Taylor, 53 Oh. St. 621, 42 NE 829 [rev 6 Oh. Cir. Ct. 269, 3 Oh. Cir. Dec. 448]; Drumgoole v. Lyle, 30 Pa. Super. 463.

"There can be no such thing as a wrongful detention of property from a plaintiff where he is not entitled to the possession. So that where there is an averment of ownership, whether general or special, with an averment of wrongful detention, by the defendant, the plaintiff must, by necessary implication, aver that he is entitled to the possession." Grever v. Taylor, 53 Oh. St. 621, 623, 42 NE 829.

[17] Illinois Sewing Mach. Co. v. Harrison, 43 Colo. 362, 96 P 177; Pattison v. Adams, Lalor (N. Y.) 426.

[a] **Thus,** where the complaint alleged both that plaintiffs were the owners of the property and also that they were entitled to the possession, the court said: "The last clause is idle and nugatory; it adds nothing to the right or title of the plaintiffs, and is to be overlooked as surplusage. If the plaintiffs were, as they allege, owners of the chattels, the law implies that they were 'entitled to the possession thereof.'" Pattison v. Adams, Lalor (N. Y.) 426, 428.

[18] Street v. Sederburg, 41 Colo. 128, 92 P 29.

[19] Norcross v. Baldwin, 50 Nebr. 885, 70 NW 511.

[a] **Allegations held sufficient** to show a right to possession, where a special ownership is claimed. Hoy v.

[§ 181] **c. Right to Possession at Commencement of Action.** Since plaintiff must have an immediate right to possession at the commencement of the action,[21] the allegations in the declaration or complaint of his ownership and right of possession must be as of the time that the action is instituted,[22] and it is not sufficient to allege that he was so entitled upon some specified date which was prior to the institution of the action,[23] even though it is further alleged that plaintiff demanded possession of the property,[24] and that defendant still wrongfully detains the same;[25] but if in addition to an allegation of ownership and right to possession on a certain prior date, it is alleged that plaintiff was then in possession and defendant wrongfully took the property, the right to possession at the time of the action is sufficiently alleged.[26] It need not be alleged in express terms that plaintiff is entitled to the possession at the time the action is instituted if facts are alleged which show that he is so entitled,[27] and if it is alleged generally that plaintiff is the owner and is entitled to the possession of the property, it is not necessary to allege expressly that he is entitled to the immediate possession,[28] particularly where it is further alleged that defendant wrongfully took and detained the property.[29] A complaint alleging that plaintiff's assignor was the owner until assignment and that previous to the commencement of the action plaintiff was assigned the property is good against a general demurrer.[30] Allegations as to ownership and right to possession, if made in the present tense, are sufficient as to right to possession at the time the action is commenced,[31] and this, although the complaint was not filed until several days after its verification.[32] A mere allegation of ownership is not a sufficient allegation of right to possession at the commencement of the suit,[33] as the owner may not be entitled to possession,[34] but the complaint should state facts from which it can be inferred with reasonable certainty that plaintiff is so entitled.[35]

[§ 182] **3. Description and Value of Property—a. Description.** In an action of replevin the complaint must describe the property sought to be recovered with reasonable certainty,[36] more particularity be-

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Leonard, 13 Colo. A. 449, 59 P 229 (ownership and right to possession by virtue of chattel mortgages).

20. Stoker v. Crane, 46 Mo. 264.

21. See supra § 46.

22. Cal.—Vanalstine v. Whelan, 135 Cal. 232, 67 P 125; Bane v. Peerman, 125 Cal. 220, 57 P 885; Truman v. Young, 121 Cal. 490, 53 P 1073; Holly v. Heiskell, 112 Cal. 174, 44 P 466; Masterson v. Clark, 41 P 796; Fredericks v. Tracy, 98 Cal. 658, 33 P 750; Afflerbach v. McGovern, 79 Cal. 268, 21 P 837.

Ida.—Bingham County Agricultural Assoc. v. Rogers, 7 Ida. 63, 59 P 931.

Kan.—Burgwald v. Donelson, 2 Kan. A. 301, 43 P 100.

Minn.—Tancre v. Reynolds, 35 Minn. 476, 29 NW 171; Loomis v. Youle, 1 Minn. 175.

Mont.—Chan v. Slater, 33 Mont. 155, 82 P 657; McGregor v. Lang, 32 Mont. 568, 81 P 343 (holding, however, that the allegations were sufficient as against a general demurrer); Cameron v. Wentworth, 23 Mont. 70, 57 P 648.

N. Y.—Burdick v. Chesebrough, 94 App. Div. 532, 88 NYS 13.

Or.—Casto v. Murray, 47 Or. 57, 81 P 388, 883; Simonds v. Wrightman, 36 Or. 120, 58 P 1100; Kimball Co. v. Redfield, 33 Or. 292, 54 P 216.

Utah.—Chambers v. Emery, 36 Utah 380, 103 P 1081, AnnCas1912A 332; Manti City Sav. Bank v. Peterson, 30 Utah 475, 86 P 414, 116 AmSR 862.

[a] **Allegations held sufficient:** (1) That at all times mentioned plaintiff was and now is the owner and entitled to the immediate possession of the property. Johnson v. Iankovetz, 57 Or. 24, 102 P 799, 110 P 398, 29 LRANS 709. (2) "That at all the times herein mentioned the plaintiff was, continuously has been and is now the owner and entitled to the immediate possession of the automobile." Olcott v. Gebo, 54 Mont. 35, 166 P 300.

[b] **Rule applied.**—A complaint in intervention, claiming the right to possession at a time in the past, and prior thereto, without alleging an existing right at time of filing, is fatally defective. Sanders v. Milford Auto Co., 62 Utah 110, 218 P 126.

23. Cal.—Vanalstine v. Whelan, 135 Cal. 232, 67 P 125; Bane v. Peerman, 125 Cal. 220, 57 P 885; Truman v. Young, 121 Cal. 490, 53 P 1073; Holly v. Heiskell, 112 Cal. 174, 44 P 466; Fredericks v. Tracy, 98 Cal. 658, 33 P 750.

Ida.—Bingham County Agricultural Assoc. v. Rogers, 7 Ida. 63, 59 P 931.

Mont.—Chan v. Slater, 33 Mont. 155, 82 P 657.

Or.—Almada v. Vandecar, 94 Or. 515, 185 P 907; Eilers Piano House v. Pick, 58 Or. 54, 113 P 54; Simonds v. Wrightman, 36 Or. 120, 58 P 1100; Kimball Co. v. Redfield, 33 Or. 292, 54 P 216.

Utah.—Chambers v. Emery, 36 Utah 380, 103 P 1081, AnnCas1912A 332; Manti City Sav. Bank v. Peterson, 30 Utah 475, 86 P 414, 116 AmSR 862.

[a] **Thus** a complaint, alleging that plaintiff was the owner of a steer when it was taken from him, but not alleging that plaintiff was entitled to the possession at the time the action was commenced, which was some two years later, is insufficient to support a judgment for plaintiff. Almada v. Vandecar, 94 Or. 515, 185 P 907.

[b] **Ownership or right of possession at a prior date is evidence** of a similar right at the time the action is instituted, but in pleading, the ultimate, and not the probative, facts must be alleged. Fredericks v. Tracy, 98 Cal. 658, 33 P 750 (complaint showing right two days before commencement of suit is insufficient).

[c] **The proximity of the date named** to that on which the action is instituted does not alter the principle of the rule, and the complaint is insufficient, although it alleges ownership and right of possession on a date only one day prior to the institution of the action. Manti City Sav. Bank v. Peterson, 30 Utah 475, 86 P 414, 116 AmSR 862.

24. Chan v. Slater, 33 Mont. 155, 82 P 657.

25. Truman v. Young, 121 Cal. 490, 53 P 1073; Chan v. Slater, 33 Mont. 155, 82 P 657; Kimball Co. v. Redfield, 33 Or. 292, 54 P 216.

26. Harris v. Smith, 132 Cal. 316, 64 P 409.

27. Lane v. Alexander, 168 Ark. 700, 271 SW 710; Chestnut v. Sales, 44 Mont. 534, 121 P 481; Cameron v. Wentworth, 23 Mont. 70, 57 P 648; Casto v. Murray, 47 Or. 57, 81 P 388, 883.

[a] **Requirement of allegation of right to immediate possession is satisfied:** (1) By an allegation of ownership of the property in plaintiff and defendant's unlawful possession thereof, especially where the answer alleged defendant won such property from plaintiff at a gaming table. Lane v. Alexander, 168 Ark. 700, 271 SW 710. (2) By an allegation that defendant unlawfully seized the property, and has wrongfully and unlawfully detained the possession of the same from plaintiff. Chestnut v. Sales, 44 Mont. 534, 121 P 481.

28. Smith v. Wisconsin Inv. Co., 114 Wis. 151, 89 NW 829.

29. Smith v. Wisconsin Inv. Co., supra.

30. Golden v. Fischer, 27 Cal. A. 271, 149 P 797.

31. James v. Jensen, 50 Utah 485, 167 P 827.

32. James v. Jensen, supra.

33. Bush v. Bush, 55 Utah 237, 184 P 823.

34. Bush v. Bush, supra.

35. Bush v. Bush, supra.

36. Cal.—Hawley v. Kocher, 123 Cal. 77, 55 P 696; Hill v. Walsh, (A.) 287 P 119; Hillyer v. Eggers, 32 Cal. A. 764, 164 P 27.

Ida.—Pierce v. Langdon, 3 Ida. 141, 28 P 401.

Ind.—Entsminger v. Jackson, 73 Ind. 144.

Kan.—Smith v. McCoole, 5 Kan. A. 713, 46 P 988.

Ky.—American-German Nat. Bank v. Gray, etc., Hardware Co., 129 Ky. 105, 110 SW 393, 33 KyL 547.

Me.—Wingate v. Smith, 20 Me. 287.

ing required in such an action where the property itself is sought to be recovered than in trespass, case, or trover, where the action is merely for damages,[37] although where the statute requires an affidavit to be delivered to the sheriff particularly describing the property, the complaint need not describe the property with the same particularity as the affidavit.[38] The description must be sufficient to identify the property, and to enable the officer to distinguish it from other property of like character,[39] and to enable defendant to know what property he is charged with detaining in order that he may prepare his defense to the action;[40] but if the property is thus clearly identified, the description is sufficient,[41] and if the identity of the property is shown, an error in the description is not fatal.[42] So also, where circumstances render a specific description impossible, a more general description may be sufficient if the circumstances are stated by way of excuse and are a sufficient excuse.[43] If the property has undergone a material change, it must be described as it existed at the commencement of the suit.[44] As shares of stock in a corporation cannot be replevied,[45] the complaint must describe or refer to the certificates representing such shares of stock.[46]

Mich.—Stevens v. Osman, 1 Mich. 92, 48 AmD 696.

Mo.—American Clay Mach. Co. v. Sedalia Brick, etc., Co., 174 Mo. A. 485, 160 SW 902; Edwards v. Eveler, 84 Mo. A. 405.

N. Y.—Root v. Woodruff, 6 Hill 418.

Oh.—Knapp v. Springmeier, 7 Oh. Dec. (Reprint) 570, 3 CincLBul 1122.

Or.—Farmers' Loan, etc., Co. v. Hansen, 123 Or. 72, 260 P 999; Fox v. Tift, 57 Or. 268, 111 P 51, AnnCas 1912D 845; Prescott v. Heilner, 13 Or. 200, 9 P 403.

S. C.—Lockhart v. Little, 30 S. C. 326, 9 SE 511.

S. D.—Kierbow v. Young, 20 S. D. 414, 107 NW 371, 8 LRANS 216, 11 AnnCas 1148.

[a] **Description need not be so definite** as to make extrinsic aid unnecessary. Farmers' Loan, etc., Co. v. Hansen, 123 Or. 72, 260 P 999.

[b] **Description held insufficient:** (1) In an action of replevin to recover grain. Pierce v. Langdon, 3 Ida. 141, 28 P 401 (five hundred and ninety sacks of wheat); Stevens v. Osman, 1 Mich. 92, 48 AmD 696 (a quantity of corn consisting of about two hundred bushels and a quantity of rye consisting of about one hundred bushels); Edwards v. Eveler, 84 Mo. A. 405 (corn of about the value of one hundred dollars). (2) In an action to recover live stock. Smith v. McCoole, 5 Kan. A. 713, 46 P 988 (the declaration being merely for live stock of certain values). (3) A description of the property as "goods, wares and merchandise," to a specified amount, is insufficient. Kierbow v. Young, 20 S. D. 414, 107 NW 371, 8 LRANS 216. (4) In an action to recover money. Spear v. Arkansas Nat. Bank, 111 Ark. 29, 163 SW 508, AnnCas1914A 735 (complaint failing to allege that defendant had in its possession any specific money capable of identification as such proceeds).

[37] Hoke v. Applegate, 92 Ind. 570.

[38] Clemmons v. Brinn, 36 Misc. 157, 72 NYS 1066 [aff 35 Misc. 844, 72 NYS 1097, 7 AmBankrR 714].

[39] Kan.—Smith v. McCoole, 5 Kan. A. 713, 46 P 988.

Mich.—Stevens v. Osman, 1 Mich. 92, 48 AmD 696.

Minn.—Wade v. Mankato Nat. Bank of Commerce, 144 Minn. 187, 174 NW 889.

Mo.—Edwards v. Eveler, 84 Mo. A. 405.

Or.—Farmers' Loan, etc., Co. v. Hansen, 123 Or. 72, 260 P 999.

S. C.—Lockhart v. Little, 30 S. C. 326, 9 SE 511.

S. D.—Kierbow v. Young, 20 S. D. 414, 107 NW 371, 8 LRANS 216.

[40] Smith v. McCoole, 5 Kan. A. 713, 46 P 988; Wade v. Mankato Nat. Bank of Commerce, 144 Minn. 187, 174 NW 889; Farmers' Loan, etc., Co. v. Hansen, 123 Or. 72, 260 P 999; Kierbow v. Young, 20 S. D. 414, 107 NW 371, 8 LRANS 216.

[41] Smith v. Stanford, 62 Ind. 392; Ellsworth v. Henshall, 4 Greene (Iowa) 417; Alberson v. Elk Creek Min. Co., 39 Or. 552, 65 P 978.

[a] **Description held sufficient:** (1) In actions of replevin generally. McNorrill v. Daniel, 121 Ga. 78, 48 SE 680; Charles v. Valdosta Foundry, etc., Co., 4 Ga. A. 733, 62 SE 493 (petition setting forth the name and value of each article sued for); Minchrod v. Windoes, 29 Ind. 288 (a box of skins and furs marked with plaintiff's name and address); Indiana Union Tract. Co. v. Bick, 40 Ind. A. 451, 81 NE 617 (a certain car plant in possession of defendant in a designated county and state); Hill v. Kerstetter, 43 Ind. A. 431, 86 NE 997, 87 NE 695 (allegation that defendants wrongfully procured to be transferred to them ten shares of stock thereof belonging to plaintiff, without describing the particular certificate by which plaintiff claimed to hold such stock); Sawyer v. Middlesborough Town Co., 17 SW 444, 13 KyL 550 (two hundred or two hundred and fifty cubic yards of stone, lying in its natural state, in oblong blocks); Feil v. Wells, (Mo. A.) 268 SW 893 (in suit to replevy liberty bonds which were originally coupon bonds, but later recalled by the government and others issued, which were registered, describing bonds as liberty bonds); Rabenort v. Frazier, (Mo. A.) 238 SW 550 (a stock of groceries, described as all the stock of groceries, meats, etc., and all other merchandise, and all the fixtures situated at a designated street and number); Cook v. Wheeler, (Mo. A.) 218 SW 929 (a description of the property as consisting of a certain number of horses, cows, wagons, cultivators, etc., "kept and contained on the farm known as the Watson farm, approximately two miles northeast of the city of St. Joseph," was sufficient, although the farm was northwest of St. Joseph and not northeast); Alberson v. Elk Creek Min. Co., 39 Or. 552, 65 P 978 (property described as certain number of pounds of steel rails, spikes, fishplates, etc.); Ruch v. Morris, 28 Pa. 245 ("two carriages and two horses"); Casey v. Malidore, 19 Wash. 279, 53 P 60 ("one hundred cords of shingle bolts and all cedar timber" located on certain described real estate). (2) In actions to recover grain. Hall v. Durham, 117 Ind. 429, 20 NE 282 (describing property as a certain quantity of wheat of a certain value, grown in and harvested on a certain date, threshed off a certain described piece of land); Smith v. Stanford, 62 Ind. 392 (one crib of corn, being the north crib of three cribs situated south of the house); Burr v. Brantley, 40 S. C. 538, 19 SE 199 (describing property seized, and place from which it was taken). (3) In actions to recover live stock. Central Sav. Bank, etc., Co. v. Hall, 73 Colo. 17, 213 P 116 (that horses described in a recorded chattel mortgage as bearing a certain brand were so branded after the execution of the mortgage, but before a levy by defendant); Onstatt v. Ream, 30 Ind. 259, 95 AmD 695 (one white shoat of specified value); Wood v. Darnell, 1 Ind. A. 215, 27 NE 447 (horse described as to age, height, and markings); Farwell v. Fox, 18 Mich. 166 (six oxen); Crum v. Elliston, 33 Mo. A. 591 (nine head of fat hogs, mostly black); Bilby v. Townsend, 29 Nebr. 220, 45 NW 619 (two bay mares, five years old); Prescott v. Heilner, 13 Or. 200, 9 P 403 (holding it unnecessary to particularly describe each animal of a group when the group description is sufficient); Wey v. Hobart City Bank, 29 Okl. 313, 116 P 943 (two young mules); Fox v. Tift, 57 Or. 268, 111 P 51, AnnCas1912D 845 (yearling sheep, consisting of ewes and wethers, of which the ewes had a crop off the left ear and the wethers were slick ears, meaning full natural ears, and all the sheep being what is known as fine wool sheep).

[b] **A description which would pass title in a chattel mortgage** is sufficient in an action of replevin. Ft. Dodge v. Moore, 37 Iowa 388.

[42] Barse Live-Stock Commn. Co. v. Turner, 56 Kan. 778, 44 P 987; Farrell v. Stuart, 152 NYS 986.

[a] **Rule applied.**—A description, which is otherwise sufficient to identify cattle to the satisfaction of the jury, is not affected by an error as to the age of the cattle. Barse Live-Stock Commission Co. v. Turner, 56 Kan. 778, 44 P 987.

[43] Orchardson v. Christie, 30 Cal. A. 8, 157 P 547; Hoke v. Applegate, 92 Ind. 570 (holding that, where plaintiff gives a general description of the property and alleges that he is unable to give a more specific description, for the reason that the property is in possession of defendant, the complaint is sufficient).

[44] Wingate v. Smith, 20 Me. 287 (holding that, where logs belonging to plaintiff have been wrongfully taken by defendant and converted into boards before the commencement of the action, the property must be described as boards and not as logs).

[45] See supra § 7.

[46] Lamus v. Engwicht, 39 Cal. A. 523, 179 P 435.

Fixtures. In replevin of an article which may be a fixture, it has been held necessary that the complaint allege such facts as will show it to be personalty,[47] but the contrary has also been held.[48]

Where the property sought is an undivided part of a quantity of property, uniform in quality and value and susceptible of fair and equal division by count, measurement, or weight, the description of the property sought, as such undivided fractional part, is sufficiently specific.[49] Reference to a description in an exhibit, attached to the petition, is insufficient to remedy a failure of the petition to describe the property.[50]

[§ 183] **b. Value.** There is some conflict of authority as to the necessity of alleging in the complaint the value of the property sought to be recovered, it having been held in some cases that no allegation of value is necessary,[51] as in cases of actions brought in courts of general jurisdictions,[52] or that it is not necessary if the action is in the detinuit,[53] and that an allegation of value, if made, is a mere matter of form;[54] while on the other hand, it has been held that there must be an allegation of value,[55] or at least where plaintiff seeks to recover the value of the property in case possession thereof cannot be delivered to him,[56] and that the allegation of value is a material allegation.[57] So also, it has been held in some cases that a general allegation of value is sufficient without stating separately the value of the different articles sought to be recovered,[58] and in others that the separate value of each article must be stated.[59] Under a statute requiring that the value of the property must be found,[60] the complaint must allege value, so that issue may be joined thereon.[61] Under a statute requiring the affidavit to state the value,[62] when the affidavit so states it, the petition need not.[63]

[§ 184] **4. Taking, Detention, and Possession by Defendant—a. In General.** As it is necessary that there be a wrongful taking or detention,[64] the complaint must not only allege ownership or right of possession in plaintiff,[65] but in order to state a cause of action in replevin it must allege either a wrongful taking or a wrongful detention of the property by defendant;[66] but having sufficiently alleged a wrongful taking, it need not in terms allege detention,[67] although it is proper to do so when necessary to make the complaint conform to the writ.[68] At common law replevin was spoken of as being in the cepit or in the detinet,[69] it being necessary in the former to allege a wrongful taking,[70] but not a wrongful detention,[71] which was necessary only in the latter,[72] although counts in the cepit and detinet might be joined.[73] Under the statutes, it is held that the formal distinctions between replevin in the cepit and detinet have generally been done away with,[74] and the gist of the action being defendant's wrongful detention,[75] this must be alleged in the complaint;[76]

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[47] Burdick v. Tum-A-Lum Lumber Co., 91 Or. 417, 179 P 245; Enterprise Mercantile, etc., Co. v. Cunningham, 84 Or. 319, 165 P 224.

[48] Brearley v. Cox, 24 N. J. L. 287 (holding that such articles as "mills, barns, steam engines, offices and sheds" may or may not be fixtures, and whether they are or are not is matter of evidence, unnecessary to be stated in the pleading).

[49] Ellingboe v. Brakken, 36 Minn. 156, 30 NW 659.

[50] American Clay Mach. Co. v. Sedalia Brick, etc., Co., 174 Mo. A. 485, 160 SW 902.

[51] Britton v. Morss, 6 Blackf. (Ind.) 469; Tillotson v. Delfelder, 40 Wyo. 283, 276 P 935, 277 P 714.

[52] Trujillo v. Tucker, 24 N. M. 339, 171 P 788.

[53] Root v. Woodruff, 6 Hill (N. Y.) 418.

[54] Bailey v. Evers, 21 Ark. 488 (holding that an allegation in the declaration of the value of the property in replevin is a matter of form in pleading, and not an admission by plaintiff in an inquiry by the jury as to its value); Fergusson v. Comfort, 194 Mo. A. 423, 184 SW 1192.

[55] Eads v. Wagner, 35 S. D. 547, 153 NW 302; State v. Welch, 37 Wis. 196.

[a] **The reasons** for requiring an allegation of value in the complaint in an action to recover specific personal property rest upon different grounds than the statutory requirement of an allegation of value in the affidavit for the provisional remedy of claim and delivery. Eads v. Wagner, 35 S. D. 547, 153 NW 302.

[b] **When immediate possession is not sought.**—The statute requiring the statement of the value of the property only applies to affidavits made in actions in claim and delivery, when the immediate possession is sought to be obtained, but no such requirement is made where the action to recover possession of the property is unaccompanied by a claim for immediate delivery. Johnson v. Hillenbrand, 18 S. D. 446, 101 NW 33.

[56] Lomme v. Sweeney, 1 Mont. 584 [aff 22 Wall. (U. S.) 208, 22 L. ed. 727].

[57] Tucker v. Parks, 7 Colo. 62, 1 P 427.

[58] Haynes v. Crutchfield, 7 Ala. 189; Wall v. De Mitkiewicz, 9 App. (D. C.) 109; Wood v. Rathman, 58 Ind. A. 229, 108 NE 126; Root v. Woodruff, 6 Hill (N. Y.) 418.

[59] American-German Nat. Bank v. Gray, etc., Hardware Co., 110 SW 393, 33 KyL 547.

[60] See statutory provisions.

[61] Hennessy Co. v. Wagner, 69 Mont. 46, 220 P 101.

[62] See statutory provisions.

Statement of value in affidavit see supra § 109.

[63] Schaffer v. Faldwesch, 16 Mo. 337; Marshall v. Moore, 146 Mo. A. 618, 124 SW 585.

[64] See supra §§ 55–57.

[65] See supra §§ 179–181.

[66] Entsminger v. Jackson, 73 Ind. 144; Chestnut v. Sales, 44 Mont. 534, 121 P 481; Howe Sewing Mach. Co. v. Haupt, 7 Daly (N. Y.) 108; Miller v. Fenton, (Tex. Civ. A.) 207 SW 631, 632 [cit Cyc].

[a] **Allegations of wrongful taking and detention** in a declaration, where the affidavit and writ allege only a wrongful detention, do not render the declaration bad. Newell v. Newell, 34 Miss. 385.

[b] **Where writ is for taking and detention,** a declaration for a wrongful detention only is bad. Nichols v. Nichols, 10 Wend. (N. Y.) 629.

[c] **Failure to allege wrongful taking or detention.**—Where a petition did not allege a wrongful taking or a wrongful detention, and defendant's answer contained a general demurrer, it was the duty of the court of its own motion, if demurrer was not called to its attention, to hold that the petition did not state a cause of action. Miller v. Fenton, (Tex. Civ. A.) 207 SW 631.

[67] Hoffman v. Markham, 88 Hun 18, 34 NYS 508.

[68] Dawes v. Glasgow, 1 Pinn. (Wis.) 171.

[69] Hale v. Wigton, 20 Nebr. 83, 29 NW 177.

[70] Coit v. Waples, 1 Minn. 134; Childs v. Hart, 7 Barb. (N. Y.) 370; Reynolds v. Loundsbury, 6 Hill (N. Y.) 534.

[a] **It need not be expressly alleged** that the taking was wrongful if the allegations used import a wrongful taking or set out facts showing the taking to have been wrongful. Childs v. Hart, 7 Barb. (N. Y.) 370; Button v. Lusk, 10 NYS 582, 19 NY CivProc 111 (action before justices' court).

[71] Hoffman v. Markham, 88 Hun 18, 34 NYS 508.

[72] Hoffman v. Markham, supra.

[73] Cox v. Grace, 10 Ark. 86 (holding that in such case plaintiff must support each count by affidavit).

[74] Denver Onyx, etc., Mfg. Co. v. Reynolds, 72 Fed. 464, 18 CCA 638; Hale v. Wigton, 20 Nebr. 83, 29 NW 177.

[75] See supra § 4.

[76] Iowa.—Draper v. Ellis, 12 Iowa 316.

Kan.—Wilhite v. Williams, 41 Kan. 288, 21 P 256, 13 AmSR 281; Wilson v. Fuller, 9 Kan. 176.

but it is not necessary to allege a wrongful taking,[77] unless both are relied upon to state a cause of action.[78] While the allegation of wrongful detention need not be made in express terms,[79] it must be made with reference to defendant,[80] and as of the time when the action is instituted;[81] and this is ordinarily, so far as defendant's connection with the property is concerned, all that is necessary.[82] A complaint which alleges that plaintiff was and is the owner and in possession of the property, alleges that plaintiff was in possession at the time of the action, and hence shows plaintiff had no cause of action.[83] A statute which requires that where the action is founded upon a wrongful detention, the complaint must set out the facts showing that the detention was wrongful must be complied with;[84] but if the complaint alleges a wrongful taking, it is not necessary to set out the facts showing that the detention was wrongful.[85] Where the action is based upon a wrongful detention, allegations as to the circumstances under which defendant obtained possession are mere surplusage.[86] It has been held that averments as to cause of detention are merely formal averments not making an issue.[87] In an action against an officer to recover property under writs of attachment issued in separate suits, the complaint need not state in separate counts what part of the property was taken under each writ.[88]

Officers seeking to replevy property taken from them after seizure under an attachment must allege facts showing that the property was subject to attachment.[89]

[§ 185] **b. Negativing Taking for Tax, Assessment, or under Process.** In the absence of statute, it is not necessary for the complaint to allege that the property in question was not taken for a tax, fine, or assessment or seized under execution, attachment, or other process,[90] and a requirement that such facts shall be stated in the affidavit does not apply to the complaint.[91] In some jurisdictions, however, these allegations are required in actions before a justice of

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Ky.—Staebler v. Anchorage, 186 Ky. 124, 216 SW 348.

Minn.—Tozier v. Merriam, 12 Minn. 87.

Mo.—Barnes v. Plessner, 137 Mo. A. 571, 119 SW 457.

Mont.—Hennessy Co. v. Wagner, 69 Mont. 46, 220 P 101.

Okl.—Wails v. Farrington, 27 Okl. 754, 116 P 428, 35 LRANS 1174.

[a] **The word "wrongful"** (1) is sufficient to characterize the detention of the property, and it is not necessary to allege it to have been illegal or unlawful (Boswell v. Laramie First Nat. Bank, 16 Wyo. 161, 92 P 624, 93 P 661); (2) nevertheless it has been held that if the statute uses the word "unlawful" it should be used in the complaint instead of using the word "wrongful" (Louisville, etc., R. Co. v. Payne, 103 Ind. 183, 2 NE 582).

[b] **Allegations held sufficient.**—Allegations that defendant retained and refused to deliver property to plaintiff, owning and entitled to possession thereof. Lorain County Sav., etc., Co. v. Haynes, 26 Oh. A. 552, 160 NE 516.

[c] **Allegations insufficient.**—(1) A complaint alleging that a person other than defendant took a building from plaintiff's land and put it upon defendant's land, and that defendant has refused to deliver it to plaintiff or to permit him to remove it, but which does not allege or show that defendant, although owner of the land, exercises or can exercise any control over the building, does not show an unlawful detention thereof by defendant. Tozier v. Merriam, 12 Minn. 87. (2) A complaint showing defendant was put in possession of the property under an executory contract to buy, so that his possession was rightful in the first instance, should show possession has become wrongful by breach of the contract by defendant, demand for possession by plaintiff, and refusal by defendant; and allegation merely that defendant owes a balance on the contract is a mere legal conclusion, showing neither of such requisites. Hennessy Co. v. Wagner, 69 Mont. 46, 220 P 101.

77. Denver Onyx, etc., Mfg. Co. v. Reynolds, 72 Fed. 464, 18 CCA 638; Ross v. Menefee, 125 Ind. 432, 25 NE 545; Newell v. Newell, 34 Miss. 385; Hale v. Wigton, 20 Nebr. 83, 29 NW 177.

[a] **How possession was acquired is immaterial** if at the time of the action plaintiff is entitled to the possession of the property and it is wrongfully detained by defendant. Denver Onyx, etc., Mfg. Co. v. Reynolds, 72 Fed. 464, 18 CCA 638; Ross v. Menefee, 125 Ind. 432, 25 NE 545.

78. Chestnut v. Sales, 44 Mont. 534, 121 P 481.

79. Visher v. Smith, 91 Cal. 260, 27 P 650 (holding that allegations showing plaintiff's right to possession and alleging a refusal by defendant to surrender the property to plaintiff sufficiently show a wrongful detention); Adams v. Corriston, 7 Minn. 456.

[a] **An allegation that defendant "unlawfully holds"** the property is equivalent to an allegation that it is unlawfully detained. Gould v. O'Neal, 1 Ind. A. 144, 27 NE 307.

80. Louisville, etc., R. Co. v. Payne, 103 Ind. 188, 2 NE 582; Crawshaw v. Wright, 5 Mo. A. 577.

81. Louisville, etc., R. Co. v. Payne, 103 Ind. 183, 2 NE 582; Burgwald v. Donelson, 2 Kan. A. 301, 43 P 100; Kennel v. Atlas El. Co., 34 S. D. 101, 147 NW 272.

[a] **Allegations held sufficient.**—A petition which shows that defendant obtained a stock of goods from plaintiff by fraud, and further stated that defendant, after rescission and demand for return of the goods, sold and delivered them to codefendant, who "now claims said jewelry or an interest therein," sufficiently shows that codefendant was in possession of the property at the commencement of the action. Wails v. Farrington, 27 Okl. 754, 116 P 428, 35 LRANS 1174.

82. Hale v. Wigton, 20 Nebr. 83, 29 NW 177.

[a] **A specific allegation may overcome** a general allegation of wrongful detention where such specific allegation shows that defendant was rightfully in possession. Thieme v. Zumple, 152 Ind. 359, 52 NE 449.

[b] **In Arkansas,** under a statute providing that where the action is in the detinet the complaint may allege a receipt of the property by defendant from plaintiff or some other person to be delivered to plaintiff, the complaint must follow the statute although the word "may" is used therein. Pirani v. Barden, 5 Ark. 81.

83. Carman v. Ross, 64 Cal. 249, 29 P 510.

84. Seifret v. Kraft, 13 NYCivProc 321.

[a] **Allegations held sufficient.**—Wagman v. Raynor, 163 App. Div. 68, 148 NYS 471 (an allegation of ownership and a refusal to deliver after due demand was sufficient to maintain action for a wrongful detention); Desbecker v. McFarline, 42 App. Div. 455, 59 NYS 439 [aff 166 N. Y. 625 mem, 60 NE 1110 mem] (allegations that defendant, as sheriff, by virtue of several executions, not against plaintiff but against others, had levied upon the property, and in virtue of such levies insisted upon detaining the property against the rights of plaintiff); Sommer v. Greenberg, 9 Misc. 720, 29 NYS 602 (allegations stating the cause of detention to be an alleged process in the hands of the sheriff against parties other than plaintiff); Scofield v. Valentini, 19 NYS 225 (allegations that defendant holds under a lease, that plaintiff was entitled by covenant therein to possession on default of rent, wrongful transfer of property, and refusal to return on demand).

85. Gowing v. Warner, 30 Misc. 593, 62 NYS 797 [aff 29 Misc. 593, 61 NYS 500].

86. Scognamillo v. Passarelli, 157 App. Div. 428, 142 NYS 382 [rev on other grounds 210 N. Y. 550, 105 NE 199].

87. Banks v. Lohmeier, 188 Iowa 722, 176 NW 789.

83. Glover v. Narey, 92 Iowa 286, 60 NW 531.

89. Tronson v. Union Lumbering Co., 38 Wis. 202.

90. Turpie v. Fagg, 124 Ind. 476, 22 NE 743; Payne v. June, 92 Ind. 252; Andrews v. Sellers, 11 Ind. A. 301, 38 NE 1101; Hoisington v. Armstrong, 22 Kan. 110; Daniels v. Cole, 21 Nebr. 156, 31 NW 491.

91. Ind.—Andrews v. Sellers, 11 Ind. A. 301, 38 NE 1101.

Kan.—Hoisington v. Armstrong, 22 Kan. 110.

the peace.[92]

[§ 186] **5. Demand.** The circumstances under which a demand is or is not a condition precedent to the right to maintain an action of replevin have been stated previously in this title.[93] Where no demand is necessary in order to maintain the action, the complaint need not allege a demand,[94] and a complaint alleging merely a wrongful taking is sufficient.[95] Where, however, a demand is necessary, as where the property came lawfully into defendant's possession, it has ordinarily been held that the complaint must allege a demand,[96] it being insufficient where it is not alleged that the original taking was wrongful, merely to allege a wrongful detention;[97] but on the contrary it has been held that unless the complaint affirmatively shows that defendant came lawfully into possession of the property, it is sufficient to allege a wrongful detention without any allegation of demand.[98] If the allegation of the complaint affirmatively shows that defendant came lawfully into possession of the property, a demand must be alleged.[99]

[§ 187] **6. Damages.** Where the complaint demands a return of the property or its value and states the value, an ad damnum clause is not necessary;[1] but damage cannot be recovered unless there is an allegation of damage.[2] A general allegation of damage is, however, sufficient to authorize a recovery of such damages as are the natural and immediate consequence of the wrongful acts of defendant complained of,[3] such as damages for the value of the use of the property while wrongfully detained by defendant,[4] although there is some authority to the

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Nebr.—Daniels v. Cole, 21 Nebr. 156, 31 NW 491.

N. Y.—Hoffman v. Markham, 88 Hun 18, 34 NYS 508.

Okl.—Thompson v. Grove, 72 Okl. 290, 180 P 553.

[a] **Illustration.**—A petition, alleging that property had been taken from plaintiff by an officer under a writ of attachment, and that the action was decided for defendant, whereupon the attachment was dissolved, and that plaintiff never perfected an appeal, was not demurrable as showing that property was taken by mesne or final process against plaintiff, notwithstanding failure to file affidavit to secure immediate delivery, negativing therein the taking under mesne or final process. Thompson v. Grove, 72 Okl. 290, 180 P 553.

[92] McCoy v. Reck, 50 Ind. 283; Dowell v. Richardson, 10 Ind. 573; Gist v. Loring, 60 Mo. 487.

[93] See supra §§ 68-80.

[94] Chestnut v. Sales, 44 Mont. 534, 121 P 481, 482 [cit Cyc]; Simmons v. Lyons, 55 N. Y. 671 mem [aff 35 N. Y. Super. 554]; Simser v. Cowan, 56 Barb. (N. Y.) 395; Shur v. Statler, 2 Oh. Dec. (Reprint) 70, 2 WestLMonth 317; Ladson v. Mostowitz, 45 S. C. 388, 23 SE 49.

[a] **Thus** a petition which, after showing that property was parted with by plaintiff in a trade to defendant as a result of his fraud, further stated that, after rescission and demand for its return, defendant sold it to his codefendant for the consideration only of a credit on a promissory note, and delivered the jewelry to him, "who now claims said jewelry or an interest therein," sufficiently shows that the codefendant came wrongfully into the possession of the property, so that a demand for its return was unnecessary before commencement of a suit. Wails v. Farrington, 27 Okl. 754, 116 P 428, 35 LRANS 1174.

[95] Chestnut v. Sales, 44 Mont. 534, 121 P 481, 482 [cit Cyc]; Ladson v. Mostowitz, 45 S. C. 388, 23 SE 49.

[96] U. S.—Banque de France v. Equitable Trust Co., 33 F. (2d) 202.

Ind.—Combs v. Bays, 19 Ind. A. 263, 49 NE 358.

Minn.—Stratton v. Allen, 7 Minn. 502.

Mont.—Hennessy Co. v. Wagner, 69 Mont. 46, 220 P 101.

N. Y.—Scofield v. Whitelegge, 49 N. Y. 259, 12 AbbPrNS 320 [aff 33 N. Y. Super. 179, 10 AbbPrNS 104]; Cumiskey v. Lewis, 15 NYSt 364; Fuller v. Lewis, 3 AbbPr 383, 13 How Pr 219.

Oh.—Shur v. Statler, 2 Oh. Dec. (Reprint) 70, 2 WestLMonth 317.

S. C.—Ladson v. Mostowitz, 45 S. C. 388, 23 SE 49.

[a] **Rule applied.**—A complaint in replevin, alleging that defendant, A, wrongfully took a horse from plaintiff, and sold it to defendant, B, and that "defendants still unjustly detain" the property, is good against A but not against B, there being no allegation of a demand on him, nor that he knew A had wrongfully taken the horse. Ladson v. Mostowitz, 45 S. C. 388, 23 SE 49.

[b] **Allegations held sufficient:** (1) As against a general demurrer. Brenot v. Robinson, 108 Cal. 143, 41 P 37 (holding that, where claimant's demand for property, prior to bringing action of claim and delivery, was not in the form prescribed by Code Civ. Proc. § 689, as amended in 1891, for such cases, defendant may set up such fact in his answer, or object to the admission of evidence of demand). (2) Allegation that on the day the complaint was filed plaintiff demanded possession and defendants refused, and now refuse to deliver. Hardison Perforating Co. v. Davies, 33 Cal. A. 738, 166 P 361.

[c] **Allegations held insufficient.**—(1) A complaint, which merely alleged that prior to the commencement of the action demand was made, without showing when respondents obtained possession. Home Payment Jewelry Co. v. Smith, 24 Cal. A. 486, 141 P 933. (2) A complaint showing defendant was put in possession of the property under an executory contract to buy, should show possession has become wrongful by breach of the contract by defendant, demand for possession by plaintiff, and refusal by defendant; and allegation merely that defendant owes a balance on the contract is a mere legal conclusion, showing neither of such requisites. Hennessy Co. v. Wagner, 69 Mont. 46, 220 P 101.

[d] **In an action before a justice of the peace** it has been held that if the affidavit filed is such as the statute requires no other statement of a demand is necessary. Andre v. Johnson, 6 Blackf. (Ind.) 188.

[97] Combs v. Bays, 19 Ind. A. 263, 49 NE 358; Stratton v. Allen, 7 Minn. 502; Scofield v. Whitelegge, 49 N. Y. 259, 12 AbbPrNS 320 [aff 33 N. Y. Super. 179, 10 AbbPrNS 104].

[98] Oleson v. Merrill, 20 Wis. 462, 91 AmD 428. See Simser v. Cowan, 56 Barb. (N. Y.) 395 (holding that, in a complaint under the code for the unlawful detention of personal property, it is unnecessary to allege any demand or refusal, it being enough to charge defendant with taking or having wrongfully detained the property of plaintiff).

[99] Campbell v. Jones, 38 Cal. 507; Hoover v. Lewin, 56 Ind. A. 367, 105 NE 400.

[a] **Although it is alleged that defendant had possession without right,** if there is also a specific allegation showing that defendant had possession under a claim of right which if good would entitle him to the possession, the complaint is bad unless a demand is alleged. Thieme v. Zumpe, 152 Ind. 359, 52 NE 449.

[1] Woods v. Berry, 7 Mont. 195, 14 P 758. But see Faget v. Brayton, 2 Harr. & J. (Md.) 350 (where it is stated generally that an omission to allege damages in the complaint in an action of replevin is fatal).

[2] Tucker v. Parks, 7 Colo. 62, 298, 1 P 427, 3 P 486; Hammond v. Thompson, 54 Mont. 609, 173 P 229; Greenberger v. North Side Storage Warehouse Co., 170 App. Div. 887, 154 NYS 450; Jermyn v. Hunter, 93 App. Div. 175, 87 NYS 546; Gindin v. Gottlieb, 191 NYS 218.

[3] Globe, etc., F. Ins. Co. v. Adams, (Mo. A.) 230 SW 345; Burkeholder v. Rudrow, 19 Mo. A. 60; Hunt v. Cohen, 74 Okl. 248, 179 P 1 [quot Cyc].

[a] **Damages for taking and withholding of property,** are general, not special, having necessarily resulted, and need not be specially pleaded. Dolinsky v. Williams, 56 Utah 186, 189 P 873.

[b] **Construction of allegation.**—Where the complaint demands a return of the property or its value, and a certain sum as damages, the allegation of damages will be deemed to be an allegation of such damages as plaintiff would be entitled to claim for the detention of the property. Hitchcock v. Wimpleberg, 103 App. Div. 53, 92 NYS 997 [aff 45 Misc. 293, 92 NYS 298].

[4] Conn.—Blakeslee Co. v. Rigo, 94 Conn. 481, 109 A 173.

Fla.—Ocala Fdy., etc., Works v. Lester, 49 Fla. 199, 38 S 51.

Mass.—Clark v. Martin, 120 Mass. 543.

Mo.—Burkeholder v. Rudrow, 19 Mo. A. 60.

Okl.—Chilton v. Carpenter, 78 Okl. 210, 189 P 747.

contrary;[5] but special damages cannot be recovered unless specially pleaded,[6] such as damages for an injury to the property while in defendant's possession.[7] Where damages are claimed, a failure to allege in terms the nonpayment of damages does not render the complaint bad.[8] Where plaintiff sues for specific property and damages for its detention, it is not necessary that the complaint should be amended in order to authorize a recovery of damages for the value of the property, where it is taken by the officer and subsequently returned to defendant because no bond is given by plaintiff.[9]

Pleading of depreciation in value. Generally the depreciation in value of the property detained is not a damage to be specially pleaded,[10] but there is some authority for the rule that depreciation in value by injury is not a natural consequence arising from the wrongful detention, so that recovery therefor can be allowed under a general allegation of damages.[11]

Pleading of exemplary damages. The facts upon which a claim for exemplary damages are based must as a rule be specially pleaded,[12] although it has been held that if outrage or oppression attended the wrongful taking, such facts need not be pleaded.[13]

[§ 188] **B. Plea or Answer—1. In General.** As in civil actions generally,[14] in replevin it is necessary that defendant file a plea or answer, or there can be no trial for want of an issue;[15] and such plea must either traverse or confess and avoid the allegations in the complaint.[16] A plea of the general issue or a general denial[17] is not compulsory,[18] but defendant may, if he so desires, plead his defenses specifically,[19] in which case his answer will be subject to the ordinary rules of pleading.[20] The plea or answer must therefore state the facts upon which

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Utah.—Farrand, etc., Organ Co. v. M. E. Church, 18 Utah 29, 54 P 818; Farrand, etc., Organ Co. v. Methodist Episcopal Church Bd. of Extension, 17 Utah 469, 54 P 818.

Wis.—Zitske v. Goldberg, 38 Wis. 216.

"To be sure, these damages must always be the natural and proximate consequence of the wrongful act complained of. What more proximate consequence of the wrongful detention of these mules can there be, than that the plaintiff was deprived of the use of them? It is the immediate and natural consequence of the detention." Morgan v. Reynolds, 1 Mont. 163, 165.

[a] **"General damages,"** provable under a general allegation, are those inferred by the law itself because the immediate, direct, and proximate result of the act complained of, as an injury to the property itself, or to its value by detention. Sizer v. Dopson, 89 S. C. 535, 72 SE 464.

[b] **Allegations held sufficient.**—A complaint alleging that defendant sheriff, holding writ of attachment in suit by defendant company against others, at its direction attached plaintiff's property and took and withheld possession, stated a cause of action for replevin and damages for detention. Northern Timber Products Co. v. Stone-Ordean-Wells Co., 143 Minn. 200, 173 NW 439.

[5] Nash v. Larson, 80 Minn. 458, 83 NW 451, 81 AmSR 272; Qualy v. Johnson, 80 Minn. 408, 83 NW 393; Ferguson v. Hogan, 25 Minn. 135.

[6] Ida.—Stoddard v. Ploeger, 42 Ida. 688, 247 P 791.

Miss.—Burrage v. Melson, 48 Miss. 237.

Mo.—Globe, etc., F. Ins. Co. v. Adams, (A.) 230 SW 345; Cook v. Clary, 48 Mo. A. 166.

Nebr.—Armagost v. Rising, 54 Nebr. 763, 75 NW 534; Rosecrans v. Asay, 49 Nebr. 512, 68 NW 627; Whitney v. Levon, 34 Nebr. 443, 51 NW 972.

N. Y.—Jermyn v. Hunter, 93 App. Div. 175, 87 NYS 546.

Okl.—Hunt v. Cohen, 74 Okl. 248, 179 P 1 [quot Cyc].

[a] **"Special damages,"** not provable without special allegation thereof, are those which, although the natural, are not the necessary, consequences of the act; being outside of the costs and disbursements allowed by law, and consequential in their nature. Sizer v. Dopson, 89 S. C. 535, 72 SE 464.

[b] **Thus** (1) an allegation that an automobile was wrongfully taken on a certain date, and that defendants "unjustly detained the same," and a prayer for damages for the taking and detention, is insufficient to sustain recovery of damages for an injury to the automobile and the detention thereof where it was impossible to ascertain from the evidence the amount of injuries sustained prior to such date. Globe & Rutgers F. Ins. Co. v. Adams, (Mo. A.) 230 SW 345. (2) Expenses for automobile hire and value of time spent in locating and obtaining possession of the property sought to be recovered, as damages for detention of property are special damages, not recoverable unless alleged. Stoddard v. Ploeger, 42 Ida. 688, 247 P 791. (3) If consequential damages are claimed, not necessarily or naturally resulting from the tortious act, they must be specially pleaded. Schofield v. Ferrers, 46 Pa. 438.

[7] Armagost v. Rising, 54 Nebr. 763, 75 NW 534; Whitney v. Levon, 34 Nebr. 443, 51 NW 972.

[a] **Deterioration.**—Allegations that the value of the property was one thousand seven hundred dollars at the commencement of the action, and that he had been damaged in that sum by its detention, are sufficient to require an award of damages for detention, representing the amount of depreciation suffered during the period of detention. Anglo-California Trust Co. v. Collins, 192 Cal. 315, 219 P 982.

[b] **Allegations held sufficient** after judgment to sustain findings of special damage for injury to the property. Rosecrans v. Asay, 49 Nebr. 512, 68 NW 627 (allegations of damage to property as set forth in an exhibit attached to pleading).

[8] Los Angeles Furniture Co. v. Hansen, 46 Cal. A. 5, 188 P 292.

[9] Pugh v. Calloway, 10 Oh. St. 488 (decided under an Ohio statute providing that, where the property has not been taken or has been returned to defendant, the action may proceed as one for damages only, and that plaintiff shall be entitled to such damages as are right and proper).

[10] Berry v. Bakersfield Bank, 177 Cal. 206, 170 P 415; Morris v. Allen, 17 Cal. A. 684, 121 P 690; Crossley v. Hojer, 158 N. Y. 734, 53 NE 1124; Young v. Willet, 21 N. Y. Super. 486.

[11] Whitney v. Levon, 34 Nebr. 443, 51 NW 972.

[12] Cal.—Redd v. Garford Motor Truck Co., 205 Cal. 245, 270 P 447.

Kan.—McCormick Harvesting Co. v. Drake, 5 Kan. A. 882, 48 P 944.

Minn.—Northern Timber Products Co. v. Stone-Ordean-Wells Co., 143 Minn. 200, 173 NW 439.

Miss.—Burrage v. Melson, 48 Miss. 237.

Okl.—Remund v. McCool, 50 Okl. 69, 150 P 1055.

[13] Schofield v. Ferrers, 46 Pa. 438.

[14] **Necessity of plea** see Pleading § 198.

[15] Elsberg v. Maurin, 9 N. M. 645, 43 P 690.

[16] Hanington v. Girouard, 16 N. B. 151.

[17] See infra § 189.

[18] Randall v. Gross, 67 Nebr. 255, 93 NW 223; Westover v. Vandoran, 29 Nebr. 652, 46 NW 47.

[19] Randall v. Gross, 67 Nebr. 255, 93 NW 223; Westover v. Vandoran, 29 Nebr. 652, 46 NW 47.

[20] Randall v. Gross, 67 Nebr. 255, 93 NW 223; Westover v. Vandoran, 29 Nebr. 652, 46 NW 47.

[a] **Plea or answer held sufficient:** (1) Defenses. Commercial Credit Co. v. Stanley, 164 Ark. 473, 262 SW 318 (answer alleging defendant's mechanic's lien for repairs, although a conditional sales contract held by plaintiff antedated it, tenders an issue whether plaintiff authorized the repairs, constitutes a defense); Jones v. Keeby, 159 Ark. 586, 252 SW 591 (an answer, in an action to recover a ring alleged to be unlawfully detained and concealed, alleging that defendant purchased the ring for his wife and that she had left him and that he was unable to obtain the ring, and not denying plaintiff's title thereto); McFadden v. Fritz, 90 Ind. 590 (answer averring void title, and setting out the facts constituting fraud); Barnes v. Tannehill, 7 Blackf. (Ind.) 604 (plea that defendant took possession of horse as an estray, etc.); Heckela v. Coos

defendant relies and not matters of evidence,[21] or legal conclusions,[22] and it need not negative matters of defense to the matter alleged.[23] Unnecessary allegations may be treated as surplusage,[24] and may be stricken out,[25] and a plea which is merely frivolous or impertinent may be disregarded or stricken out on motion.[26] The form and effect of the common-law pleadings in replevin have been considerably modified by the statutes.[27]

Negative pregnant. A denial that defendant took "and" carried away the property is a negative pregnant, and therefore bad;[28] and where plaintiff claims under a chattel mortgage, a denial that he is entitled to possession by virtue of any chattel mortgage executed, acknowledged, or delivered by the owner is a negative pregnant.[29]

Damages. Special damages resulting from plaintiff's seizure of the property must be specially alleged in order for defendant to recover them,[30] and where the right to claim damages depends upon a wrongful seizure by plaintiff, the answer must deny plaintiff's right to possession.[31]

Counterclaim in an answer may be stricken out when not permitted in replevin.[32]

Judgment on pleadings cannot be rendered for plaintiff where the answer raises a material issue,[33] although one denial of the answer may be defective, if there is another which puts in issue a material allegation of the complaint, it is error to render judgment on the pleadings.[34]

[§ 189] **2. General Issues and General Denials.** At common law the general issue was non cepit,[35] which disavows all connection with and claim to the property,[36] admits that the property is in plaintiff,[37] and the capacity of plaintiff to sue,[38] and puts in

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Bay Liquor Co., 71 Or. 149, 142 P 547 (an answer alleging that plaintiff had been placed in possession under a contract whereby title was reserved in defendant until price should be fully paid, and that plaintiff defaulted and voluntarily surrendered possession, stated a complete defense); Roberts v. Johannas, 41 Wis. 616 (a denial that the property ever came into defendant's possession at any time). (2) As a plea in abatément. Rauber v. Whitney, 125 Ind. 216, 25 NE 186.

[b] **Plea or answer held insufficient:** (1) For failing to state facts sufficient to constitute a defense. Davidson Inv. Co. v. Dabney, (Cal. A.) 284 P 673 (allegations justifying detention under contract to purchase on which defendant defaulted); Martz v. Putnam, 117 Ind. 392, 20 NE 270 (an answer failing to negative any allegations in the complaint, but merely attacking the jurisdiction of the court): Roberts v. White, 146 Mass. 256, 15 NE 568 (answer setting up equitable defense); E. R. Darlington Lumber Co. v. Missouri Pac. R. Co., 216 Mo. 658, 116 SW 530 (in replevin against a carrier for freight which it refused to deliver on tender of demurrage, the carrier, in the absence of statute fixing demurrage, should allege that the amount tendered was not reasonable, or, if it relied upon any federal regulation fixing demurrage charges, should allege such regulation, and that the amount tendered was insufficient thereunder); Miller v. Warden, 111 Pa. 300, 2 A 90. (2) As plea in abatement. Bent v. Bent, 43 Vt. 42 (plea that no bond was taken). (3) As plea to jurisdiction. Allen v. St. Louis, etc., R. Co., 38 Mo. A. 294 (failing to allege that suit was not brought in the county in which the said property was to be found).

[c] **Plea in bar or abatement.**—A plea that the property was delivered to defendant under an agreement between plaintiff and defendant, and that at the time of the agreement and delivery defendant was a married woman, is a plea in bar and not in abatement. North v. Downing, 2 Pa. Co. 276.

Plea or answer generally see Pleading §§ 197–379.

[21] Alwood v. Ruckman, 21 Ill. 200.

[22] Weed v. Hill, 2 Miles (Pa.) 122.

[23] Welker v. Appleman, 44 Ind. A. 699, 90 NE 35.

[a] **Rule applied.**—In replevin against a purchasing agent to recover certain wool on which the agent claimed a lien for advances and commissions, the agent was not bound to negative a waiver of his lien in his answer. Welker v. Appleman, 44 Ind. A. 699, 90 NE 35.

[24] Lamping v. Payne, 83 Ill. 463; Bliss v. Badger, 36 Vt. 338.

[a] **Illustrations.**—(1) Where defendant files a plea of justification, alleging that he took the property under an execution and that the judgment and execution were in full force at the time of the levy, an allegation as to the date of the judgment is unnecessary and may be disregarded as surplusage. Lammers v. Meyer, 59 Ill. 214. (2) Where both plaintiff and defendant claim title to the property, and defendant denies plaintiff's right thereto, an allegation by defendant as to his source of title is unnecessary and may be treated as surplusage. Whitaker v. Sigler, 44 Iowa 419.

[b] **A second plea substantially the same as the first** may be rejected on plaintiff's motion. Mann v. Perkins, 4 Blackf. (Ind.) 271.

[25] Fleming v. Hawley, 65 Cal. 492, 4 P 494; Maclary v. Turner, 14 Del. 281, 32 A 325.

[26] Lovett v. Burkhardt, 44 Pa. 173.

[27] Jansen v. Effey, 10 Iowa 227; Gibson v. Mozier, 9 Mo. 256.

[28] Bach v. Montana Lumber, etc., Co., 15 Mont. 345, 39 P 291.

[29] Sargent v. Chapman, 12 Colo. A. 529, 56 P 194.

[30] Sizer v. Dopson, 89 S. C. 535, 72 SE 464.

[a] **Rule applied.**—Damages to defendant because the seizure prevented him from getting money to pay his men, made it necessary for him to mortgage his house to get money for that purpose, and so crippled him financially that he was obliged to suspend his business and turn over his property to plaintiff, who had a mortgage on it, are "special damages," not recoverable unless specially alleged. Sizer v. Dopson, 89 S. C. 535, 72 SE 464.

[31] Stockham v. Leach, 210 Mo. A. 407, 238 SW 853.

[a] **Claim for damages not counterclaim.**—(1) In replevin of a sawmill, where defendants claimed damages on account of being prevented from carrying out a contract with plaintiffs to saw certain timber, designation of the claim as a counterclaim was incorrect, since it was an answer in replevin containing a count for damages based on breach of contract. Stockham v. Leach, 210 Mo. A. 407, 238 SW 853. (2) A demand for damages is not defeated by a misnomer in calling it a further answer, cross complaint, or separate, and further cause of action. Ellison v. Young, 71 Colo. 385, 206 P 802.

[32] Richards v. Hellen, 153 Iowa 66, 133 NW 393.

Counterclaim in replevin see supra § 86.

[33] Martin v. Porter, 84 Cal. 476, 24 P 109.

[a] **An answer denying that defendant ever withheld possession** of the property or refused to deliver it to plaintiff, and further denying that plaintiff is entitled to possession, raises a material issue and plaintiff is not entitled to judgment on the pleadings. Martin v. Porter, 84 Cal. 476, 24 P 109.

[34] Bach v. Montana Lumber, etc., Co., 15 Mont. 345, 39 P 291.

[35] Amos v. Sinnott, 5 Ill. 440; Walpole v. Smith, 4 Blackf. (Ind.) 304; Sayward v. Warren, 27 Me. 453; Gibson v. Mozier, 9 Mo. 256.

"The plea of non cepit, as is said in Wilkinson on Replevin, has been improperly called the general issue in replevin, for it only puts in issue the caption and detention." Mackinley v. McGregor, 3 Whart. (Pa.) 369, 398, 31 AmD 522.

[36] Lewis v. Buck, 7 Minn. 104, 82 AmD 73.

[37] Van Namee v. Bradley, 69 Ill. 299; Chandler v. Lincoln, 52 Ill. 74; Bourk v. Riggs, 38 Ill. 320; Commercial Credit Trust v. Land, 251 Ill. A. 469; Simcoke v. Frederick, Smith (Ind.) 64; Mitchell v. Roberts, 50 N. H. 486.

[a] **Under the statutory system of pleading** the plea of non cepit does not admit the property to be in plaintiff where the plea is accompanied by a brief statement denying that fact. Manufacturers' Finance Trust v. Stone, 251 Ill. A. 414; Cooper v. Bakeman, 32 Me. 192; Dillingham v. Smith, 30 Me. 370.

[38] Pope v. Jackson, 65 Me. 162.

issue only the question of the wrongful taking.[39] As the statutes have enlarged the action to include a wrongful detention[40] where the action is brought for such detention, the general issue is non detinet,[41] which has been held to be the only proper plea,[42] and which admits the wrongful taking if a wrongful taking as well as a wrongful detention is alleged,[43] and also admits that the property is in plaintiff;[44] and in such a case the plea of non cepit is improper,[45] as it tenders an immaterial issue.[46] Where the action is for a wrongful taking non detinet is not a proper plea,[47] but if both a wrongful taking and a wrongful detention are alleged the answer should traverse the taking as well as the detention.[48] Under some statutes the general issue is not guilty,[49] and this is a proper answer,[50] and in some jurisdictions it is held that "not guilty" is the only plea allowable.[51] Under the codes defendant may in a proper case plead the general denial,[52] thereby putting in issue every material allegation of plaintiff.[53] An answer denying generally and specifically each and every allegation of a complaint except that of possession by defendant is in effect a general denial.[54] An affirmative answer is unnecessary after a general denial.[55] Where several defendants are sued for a wrongful detention, each may plead non detinet separately.[56]

[§ 190] **3. Denial of Plaintiff's Title.**[57] While plaintiff's ownership of the property may be put in issue by a general denial,[58] a plea or answer specially denying plaintiff's ownership of the property is not demurrable as failing to state facts sufficient to constitute a defense.[59] This denial must, however, be in such form as to put in issue the allegations as to plaintiff's ownership or right to possession in the complaint,[60] and the plea or answer should allege who is the owner of the property, otherwise it will be insufficient.[61]

[§ 191] **4. Title in Defendant or Third Person.** In an action of replevin a plea of property in defendant or in some third person is a good plea in bar;[62] or in abatement,[63] and a plea and not an

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39. See infra § 215.

40. See supra § 56.

41. Boyd v. McAdams, 16 Ill. 146; Amos v. Sinnott, 5 Ill. 440; Walpole v. Smith, 4 Blackf. (Ind.) 304.

42. Kelley v. Blakeley, 2 Oh. Dec. (Reprint) 251, 2 WestLMonth 151.

43. Simmons v. Jenkins, 76 Ill. 479.

44. Van Namee v. Bradley, 69 Ill. 299; Chandler v. Lincoln, 52 Ill. 74; Bourk v. Riggs, 38 Ill. 320; Ingalls v. Bulkley, 15 Ill. 224; Commercial Credit Trust v. Land, 251 Ill. A. 469; Manufacturers' Finance Trust v. Stone, 251 Ill. A. 414.

45. Amos v. Sinnott, 5 Ill. 440; Lewis v. E. F. Schlichter Co., 137 Md. 217, 112 A 282.

46. Amos v. Sinnott, 5 Ill. 440; Walpole v. Smith, 4 Blackf. (Ind.) 304.

47. Davis v. Calvert, 17 Ark. 85.

48. Simmons v. Jenkins, 76 Ill. 479; Sayward v. Warren, 27 Me. 453; Hiser v. Webster, 139 Md. 236, 114 A 897; Davidson v. Rex, 15 N. B. 526.

49. Gibson v. Mozier, 9 Mo. 256; Campbell v. Camp, 69 Vt. 97, 37 A 238.

50. D'Arcy v. Steuer, 179 Mass. 40, 60 NE 405.

51. Porter Hardware Co. v. Peacock, 129 Miss. 129, 91 S 856.

52. Ida.—Idaho Placer Min. Co. v. Green, 14 Ida. 249, 93 P 954.

Ind.—Indiana Inv., etc., Co. v. Whisman, 85 Ind. A. 109, 138 NE 512.

Kan.—Street v. Morgan, 64 Kan. 85, 67 P 448; White v. Gemeny, 47 Kan. 741, 28 P 1011, 27 AmSR 320.

Mo.—Anthony v. Carp, 90 Mo. A. 387.

Mont.—Kaufman v. Cooper, 38 Mont. 6, 98 P 504, 1135.

Nebr.—Schmitt, etc., Co. v. Mahoney, 60 Nebr. 20, 82 NW 99.

N. Y.—Griffin v. Long Island R. Co., 101 N. Y. 348, 4 NE 740.

N. D.—Russell v. Amundson, 4 N. D. 112, 59 NW 477.

S. D.—Pitts Agricultural Works v. Young, 6 S. D. 557, 62 NW 432.

Wash.—Harvey v. Ivory, 35 Wash. 397, 77 P 725.

Wis.—Delaney v. Canning, 52 Wis. 266, 8 NW 897.

53. See infra § 213.

54. Russell v. Amundson, 4 N. D. 112, 59 NW 477.

55. Indiana Inv., etc., Co. v. Whisman, 85 Ind. A. 109, 138 NE 512.

56. Boyd v. McAdams, 16 Ill. 146.

57. **Where defendant alleges title in himself or a third person** see infra § 191.

Where officer justifies under process see infra § 192.

58. See infra § 214.

59. Carman v. Ross, 64 Cal. 249, 29 P 510; Hill v. Walsh, 6 S. D. 421, 61 NW 440.

60. See cases infra this note.

[a] **Allegations sufficient.**—An allegation that defendant purchased the property in question from a certain third person who was the owner thereof is a sufficient denial that plaintiff was the owner of the property. Litchfield v. Halligan, 48 Iowa 126.

[b] **Answer held insufficient.**—Richardson v. Smith, 29 Cal. 529 (holding that a denial that plaintiff was the owner "and" entitled to the possession of the property is not sufficient, as it is not a denial either that plaintiff was the owner of the property or that he was in possession of it when taken, he being entitled to maintain an action for its recovery as against any one taking and withholding the property from him without right if he was in possession, although not the owner thereof).

61. Anstice v. Holmes, 3 Den. (N. Y.) 244.

62. U. S.—Ingle v. Wallach, 1 Black 96, 17 L. ed. 50.

Ark.—Anderson v. Dunn, 19 Ark. 650.

Ill.—Lamping v. Payne, 83 Ill. 463; Boyd v. McAdams, 16 Ill. 146; Anderson v. Talcott, 6 Ill. 365.

Ind.—Landers v. George, 40 Ind. 160; Simcoke v. Frederick, Smith 64.

Ky.—Tuley v. Mauzey, 4 B. Mon. 5.

N. Y.—Waite v. Sabel, 44 App. Div. 634, 62 NYS 419; Rogers v. Arnold, 12 Wend. 30.

Pa.—McDowell v. Windle, 2 Chest. Co. 477, 2 Del. Co. 356.

Vt.—Boston Type, etc., Fdy. v. Spooner, 5 Vt. 93.

Eng.—Presgrave v. Saunders, 1 Salk. 5, 91 Reprint 5.

[a] **Nature of plea.**—(1) A plea of property in defendant or a stranger is not in confession or avoidance of the action, and does not admit the allegation of the complaint that plaintiff is the owner of the property, but on the contrary denies it. It is in the nature of a special traverse and states by way of inducement that the property belongs to a stranger or defendant and traverses the ownership of plaintiff, which throws the burden of proof upon plaintiff and entitles him to open and close the case to the jury. Gentry v. Bargis, 6 Blackf. (Ind.) 261. (2) Where the answer alleged facts entitling defendant to a lien, it did not amount to an admission of plaintiff's ownership and right of possession since a plea of property in the defendant is not a plea in confession and avoidance. Welker v. Appleman, 44 Ind. A. 699, 90 NE 35.

[b] **The short plea of property in defendant** can be understood only as a claim of the entire property in the thing, and will not justify proof of property in defendant and another. McIlvaine v. Holland, 5 Del. 10.

[c] **By affirmative answer** defendant may plead superior title and right of possession or plaintiff's lack thereof. Munson v. Baldwin, 88 Wash. 379, 153 P 338.

[d] **Although defendant's ownership is not alleged in express terms,** a judgment in his favor cannot be reversed on that ground when no previous objection on that ground was made, and the answer denied plaintiff's ownership and demanded a return of the property and the other allegations clearly showed that defendant claimed to own the property. McIntire v. Eastman, 76 Iowa 455, 41 NW 162.

63. Boston Type, etc., Fdy. v. Spooner, 5 Vt. 93; Presgrave v. Saunders, 1 Salk. 5, 91 Reprint 5.

avowry is the proper means of alleging such a claim,[64] but defendant should in the same plea traverse plaintiff's allegation of ownership or right of property,[65] which traverse raises the material issue to be tried,[66] and should aver property in himself;[67] the averment of property being by way of inducement,[68] and not traversable.[69] Such plea closes the issue as to plaintiff's right and does not require a reply,[70] and it also admits the taking and detention of the property.[71] Special interest in defendant must be specially pleaded.[72] A plea of property in another should state whether it is in defendant or a third person,[73] and if in a third person such person should be named;[74] but where defendant denies plaintiff's title and claims title in himself, he need not set out the source of his title.[75] Where property in a third person is a good defense without defendant connecting himself therewith,[76] a plea of title in a third person need not contain allegations showing the connection between defendant and the title pleaded.[77] A plea of property in a stranger and in plaintiff is a good plea, in bar or in abatement.[78] A plea of property in defendant is improper where he has merely seized the property for nonpayment of rent.[79]

Demurrer to answer setting up a lien does not admit such a lien.[80]

[§ 192] **5. Taking or Detention under Process.** While there is some conflict of authority as to whether in an action against a public officer justification under execution, attachment, or other process must be specially pleaded or may be shown under the general issue,[81] if such a plea is filed it must, in order to be sufficient, set forth facts which if proved will constitute a good defense to the action.[82] Where the property is taken upon execution, the answer must allege the rendition of a judgment against the execution defendant,[83] and that the execution was issued thereon,[84] and was in full force and unsatisfied at the time of the levy,[85] and that the property was taken in pursuance of its authority.[86] The answer must also show that defendant was an officer,[87] and that the process was issued by competent authority,[88] and it must describe such process with sufficient certainty and particularity to show its na-

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64. L. A. W. Acceptance Corp. v. Chernich, 49 R. I. 434, 143 A 783.

65. Ingle v. Wallach, 1 Black (U. S.) 96, 17 L. ed. 50; Atkins v. Byrnes, 71 Ill. 326; Anderson v. Talcott, 6 Ill. 365; Pringle v. Phillips, 3 N. Y. Super. 292; Rogers v. Arnold, 12 Wend. (N. Y.) 30; Prosser v. Woodward, 21 Wend. (N. Y.) 205; L. A. W. Acceptance Corp. v. Chernick, 49 R. I. 434, 143 A 783.

"The form is to plead property in the defendant, or in a stranger, traversing property in the plaintiff, which traverse raises the material issue to be tried—the averment of property in the defendant or a stranger being by way of inducement." Dermott v. Wallach, 1 Black. (U. S.) 96, 97, 17 L. ed. 50.

[a] **The reason that a traverse is indispensable** is that two affirmatives, namely, property in plaintiff and property in defendant, cannot make an issue. Rogers v. Arnold, 12 Wend. (N. Y.) 30.

[b] **Allegations sufficient.**—An answer which alleges that defendant is the owner of the property and denies "the right of plaintiffs to maintain this action" is in substance a traverse of plaintiff's title, and puts in issue plaintiff's right of property. Chase v. Allen, 5 Allen (Mass.) 599.

66. Ingle v. Wallach, 1 Black (U. S.) 96, 17 L. ed. 50; Atkins v. Byrnes, 71 Ill. 326; Anderson v. Talcott, 6 Ill. 365; Chambers v. Hunt, 18 N. J. L. 339; Pringle v. Phillips, 3 N. Y. Super. 292.

67. L. A. W. Acceptance Corp. v. Chernick, 49 R. I. 434, 143 A 783.

68. Ingle v. Wallach, 1 Black (U. S.) 96, 17 L. ed. 50; Atkins v. Byrnes, 71 Ill. 326; Van Namee v. Bradley, 69 Ill. 299; Anderson v. Talcott, 6 Ill. 365; Rogers v. Arnold, 12 Wend. (N. Y.) 30; L. A. W. Acceptance Corp. v. Chernick, 49 R. I. 434, 143 A 783.

69. L. A. W. Acceptance Corp. v. Chernick, supra.

70. Landers v. George, 40 Ind. 160.

71. Kern v. Potter, 71 Ill. 19.

72. Mason Tires Sales Co. v. Mason Tire, etc., Co., 73 Colo. 42, 213 P 117; McKinney v. McLaughlin, 7 Ont WN 21, 17 DomLR 832.

73. Anstice v. Holmes, 3 Den. (N. Y.) 244.

74. Anstice v. Holmes, supra; North v. Firth, 2 Del. Co. (Pa.) 467. But see Anderson v. Dunn, 19 Ark. 650 (holding that a plea alleging property in the "succession" of a certain named decedent is sufficient on demurrer, such allegation of property being merely matter of inducement to the traverse of plaintiff's title and not issuable).

75. Whitaker v. Sigler, 44 Iowa 419; Lehman v. Gill, 12 Pa. Dist. 89.

[a] **General allegations** of ownership or right of possession are sufficient. Summerville v. Stockton Milling Co., 142 Cal. 529, 76 P 243.

76. See supra § 84.

77. Stowell v. Otis, 71 N. Y. 36; Johnson v. Carnley, 10 N. Y. 570, 61 AmD 762; Rockwell v. Saunders, 19 Barb. (N. Y.) 473; McKnight v. Dunlop, 4 Barb. (N. Y.) 36; Wright v. Bennett, 3 Barb. (N. Y.) 451; Pattison v. Adams, Lalor (N. Y.) 426.

78. Phillips v. Townsend, 4 Mo. 101.

79. Fleming v. Heitshu, 8 Pa. Dist. 715.

80. Mauney v. Ingram, 78 N. C. 96 (holding that where the answer sets up a lien on the property, a demurrer to the answer does not admit such lien, but merely admits the facts set out in the answer, denying their sufficiency in law).

81. See infra § 232.

82. See cases infra this note.

[a] **Allegations held sufficient.**—Lammers v. Meyer, 59 Ill. 214 (plea that defendant took property under an execution).

[b] **Allegations held insufficient.**—Belden v. Laing, 8 Mich. 500 (pendency of prior replevin under which property was held by one of defendants who was sheriff).

[c] **Nature of plea.**—A pleading by defendant in replevin admitting the taking and justifying under legal process, and praying for a restitution of the property replevied, is in confession and avoidance, and every material allegation therein is deemed under the practice act to be controverted by plaintiff. Stringer v. Davis, 35 Cal. 25.

[d] **Swearing of deputy.**—In replevin against a county treasurer and his deputy who plead justification under a seizure for the payment of taxes, it is not necessary for the answer to allege that the deputy who made the seizure had been sworn as such. Noland v. Busby, 28 Ind. 154.

[e] **Where property is taken on attachment,** a plea of justification by the officer is insufficient if it fails to allege that the affidavit was made and annexed to the writ as required by statute and without which the latter could not be executed. McCarty v. Gage, 3 Wis. 404.

[f] **In pleading a warrant of distress as justification** for taking property, an officer is not bound to aver that the land for which rent was due was situated in the county. Asbell v. Tipton, 1 B. Mon. (Ky.) 300.

[g] **Plea in abatement.**—Where defendant in an action of replevin brought in a circuit court files a plea in abatement alleging that he took the property as town marshal of the city of Grand Rapids, under a warrant for the collection of a street assessment, he need not allege that the assessment was valid in order to show that the superior court of the city of Grand Rapids has exclusive jurisdiction of the action, under Howell St. Annot. § 6576, providing that such superior court shall have exclusive jurisdiction of all civil actions against the city or any of its officers. Chicago, etc., R. Co. v. Nester, 63 Mich. 657, 30 NW 315.

83. Heyman v. Covell, 36 Mich. 157; McDonald v. Prescott, 2 Nev. 109, 90 AmD 517.

84. Heyman v. Covell, 36 Mich. 157.

85. Dayton v. Fry, 29 Ill. 525.

[a] **Allegations held sufficient upon** this point. Lammers v. Meyer, 59 Ill. 214 (plea alleging date when officer received execution, with allegation that judgment "was then and there in full force and effect").

86. Dayton v. Fry, 29 Ill. 525.

87. McDonald v. Prescott, 2 Nev. 109, 90 AmD 517.

88. Flentge v. Priest, 53 Mo. 540.

ture,[89] and to show whether it was against the person or property of the execution defendant;[90] it has been held, however, that it is not necessary that the execution or other process under which defendant justifies or a copy thereof should be filed with the answer.[91] So it is held that the answer must also allege that the property belonged to the defendant in the process,[92] and was taken as his property,[93] and that it was subject to be so taken,[94] and in addition to these allegations, it should traverse plaintiff's allegation of ownership.[95] If, however, a plea, although insufficient as a plea of justification by reason of the omission of necessary allegations, alleges that the property belonged to a third person and was not the property of plaintiff, it is good as a plea of property in a stranger, and the other allegations may be treated as surplusage.[96] The plea of justification under attachment need not aver a return,[97] although the contrary has been held.[98]

[§ 193] **6. Pleading Different Defenses—a. In General.** As in civil actions generally,[99] defendant in replevin may plead more than one plea,[1] he being entitled to plead as many several matters as he may deem necessary for his defense,[2] but these separate matters of defense should be distinctly and separately pleaded.[3]

[§ 194] **b. Inconsistent Defenses.** Under and subject to the rules governing the pleading of inconsistent defenses in civil actions generally,[4] defendant in replevin may plead both non cepit and property in himself or a stranger,[5] or he may plead both an absolute and a qualified ownership of the property,[6] or no demise and no rent in arrear,[7] or he may set up a general denial and a justification in his answer where they are separately pleaded,[8] notwithstanding the latter might be proved under the general denial.[9] If defendant in addition to the general denial pleads separate defenses in which plaintiff's ownership of the property and the fact of its detention by defendant are admitted, the general denial can be considered only as a denial of plaintiff's right to immediate possession and the wrongfulness of the detention by defendant.[10]

[§ 195] **7. Affidavit of Defense.** In jurisdictions where an affidavit of defense is required to be filed,[11] the fact that the property sought was not found in the possession of defendant or any third person does not relieve defendant of the necessity of filing an affidavit of defense.[12] The affidavit of defense is not necessary if plaintiff fails to state in his declaration the facts upon which he claims title and right to possession.[13] The sufficiency of such an affidavit in an action of replevin must be determined by the same rules that control in other actions where like affidavits are required.[14] The affidavit must state frankly and fairly the facts that support the claim advanced,[15] and any subject of defense set up must be specifically averred and nothing left to inference.[16] The statutory provisions relative to the time for filing an affidavit of defense must be complied with.[17] Where the affidavit of defense is to be filed within a certain time after filing of plaintiff's statement, it need not be filed until such time after notice is given of the filing of the statement after it is filed.[18] Where defendant gives bond and retains the property, his affidavit of defense must allege that he is the owner of the goods.[19]

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[89] Parsley v. Huston, 3 Blackf. (Ind.) 348 (holding that a plea is insufficient which alleges that the property was taken under two executions, but does not state their nature, whether writs of fieri facias or of capias ad satisfaciendum, or what they commanded the officer to do).

[90] Debord v. La Hue, 26 Ind. 212 (holding that an answer alleging that defendant took the property under execution, without stating whether the execution was against the person or property of the execution defendant, is insufficient).

[91] Thurston v. Boardman, Wils. (Ind.) 433; Kingsbury v. Buchanan, 11 Iowa 387. Contra Bridges v. Layman, 31 Ind. 384.

[92] Olds v. Andrews, 66 Ind. 147; Gentry v. Bargis, 6 Blackf. (Ind.) 261; Parsley v. Huston, 3 Blackf. (Ind.) 348; Philips v. Harris, 3 J. J. Marsh. (Ky.) 122, 19 AmD 166; Smith v. Winston, 10 Mo. 299.

[93] Heyman v. Covell, 36 Mich. 157.

[94] Olds v. Andrews, 66 Ind. 147.

[95] Schemerhorn v. Mitchell, 15 Ill. A. 418.

[96] Levi v. Darling, 28 Ind. 497; Parsley v. Huston, 3 Blackf. (Ind.) 348; Dobson v. Owens, 5 Wyo. 325, 40 P 442.

Plea of property in defendant or third person see supra § 191.

[97] McCraw v. Welch, 2 Colo. 284; Levi v. Darling, 28 Ind. 497.

[98] Brown v. Bissett, 21 N. J. L. 46.

[99] **Pleading different defenses generally** see Pleading §§ 248–261.

[1] Davis v. Calvert, 17 Ark. 85; Martin v. Ray, 1 Blackf. (Ind.) 291; Scott v. Hughes, 9 B. Mon. (Ky.) 104; Hackley v. Ogmun, 10 HowPr (N. Y.) 44. But see Bennett v. Holloway, 55 Miss. 211 (holding that, under Code (1871) c 16, "not guilty" is the only plea to an action of replevin, and that any additional plea may be stricken out on motion, section 597 of the code prescribing what pleas may be joined having no reference to actions of replevin); Vaiden v. Bell, 3 Rand. (24 Va.) 448 (holding under a Virginia statute that defendant in replevin could not plead several pleas, but that the error was cured by the statute of jeofails of 1819).

[2] Davis v. Calvert, 17 Ark. 85; Scott v. Hughes, 9 B. Mon. (Ky.) 104.

[3] Martin v. Ray, 1 Blackf. (Ind.) 291.

[a] **Failure to plead separately** should be taken advantage of by special demurrer. Martin v. Ray, 1 Blackf. (Ind.) 291.

[4] **Inconsistent defenses generally** see Pleading §§ 254–255.

[5] U. S.—Dickson v. Mathers, 7 F. Cas. No. 3,898a, Hempst. 65.

Ill.—Amos v. Sinnott, 5 Ill. 440.

Md.—Lamotte v. Wisner, 51 Md. 543; Smith v. Morgan, 8 Gill 133.

Mass.—Whitwell v. Wells, 24 Pick. 25; Simpson v. McFarland, 18 Pick. 427, 29 AmD 602.

N. Y.—Hackley v. Ogmun, 10 How Pr 44; Shuter v. Page, 11 Johns. 196.

Pa.—Cummings v. Gann, 52 Pa. 484.

[a] **Defendant may plead three pleas,** non cepit, property in himself, and property in another. Smith v. Morgan, 8 Gill (Md.) 133.

[6] Hartshorne v. Seeds, 1 Chest. Co. (Pa.) 460 (holding that a plea of a qualified property or right of lien and a plea of absolute ownership are both claims to the right of possession and are not inconsistent according to the rules of pleading).

[7] Van Holten v. Lewis, 12 S. C. L. 12.

[8] Williams v. Eikenberry, 22 Nebr. 210, 34 NW 373 (general denial and plea of justification under attachment process); Hackley v. Ogmun, 10 HowPr (N. Y.) 44 (general denial and justification under execution process).

[9] Williams v. Eikenberry, 22 Nebr. 210, 34 NW 373.

[10] Yandle v. Crane, 13 Kan. 344.

[11] See Pleading §§ 362–379.

[12] Hoyt v. Carson, 60 Pa. Super. 172.

[13] Forsyth v. Stumbaugh, 13 Pa. Dist. 339, 29 Pa. Co. 476.

[14] Miller v. Jackson, 34 Pa. Super. 31.

[a] **Statutory provisions.**—The provisions of Pract. Act May 14, 1915 (P. L. p 483; St. [1920] §§ 17181–17204), do not apply to actions of replevin. The procedure in such case is governed by Replevin Act April 19, 1901 (P. L. p 88; St. § 18965 et seq). There is no provision in the latter act, such as is contained in the Practice Act of 1915, that every allegation of fact in the plaintiff's statement of claim, if not denied specifically or by necessary implication in the affidavit of defense, shall be taken to be admitted. Willys-Overland, Inc. v. Stry, 76 Pa. Super. 315.

[b] **Affidavit held sufficient.**—Uncapher v. Baltimore, etc., R. Co., 112 Fed. 899 (affidavit alleging defendant is in possession as a carrier for hire, and received the goods from a third person, and has no knowledge of who is the owner); Hollander Bros. Drug Co. v. American Surety Co., 47 Pa. Super. 403 (an affidavit which avers that defendant was employed by plaintiff as an agent under an agreement to pay to him for his services twenty five per cent of all sums

[§ 196] **C. Avowry or Cognizance and Plea Thereto—1. Avowry or Cognizance[20]—a. Justifying Distress.** At common law, in replevin of property seized under a distress for rent, an avowry[21] or cognizance[22] must show specifically defendant's title to the demised premises.[23] An early English statute[24] was passed to meet the difficulty of knowing who the tenant was, and dispensed with the naming of any person certain as tenant; but it left the necessity for showing specifically the landlord's title, as at common law.[25] To obviate the difficulty of stating specifically the landlord's title a later statute was enacted[26] which made it sufficient for defendants in replevin to avow or make cognizance generally without setting forth the title of the landlord or lessor,[27] and under similar statutes in many jurisdictions in the United States,[28] a general avowry without setting out title is sufficient;[29] although it must show all the essential facts giving the right

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realized by him, and that at the time of the receipt of the notes and check plaintiff was indebted to him in an amount greatly in excess of the certificates, notes, and check); North v. August Gately, etc., Storage Co., 56 Pa. Super. 267 (in replevin against a husband to recover a piano, an affidavit of defense alleging title in the wife is sufficient); Moore v. Newswanger, 11 Pa. Dist. & Co. 49 (affidavit denying plaintiff's allegation that defendant was a partnership, and alleging it to be a corporation); Jackson v. Blair, Inc., 9 Pa. Dist. & Co. 17 (affidavit drawn in accordance with Philadelphia C. Pl. Ct. Rules, rule 68); Moser v. Roughton, 5 Pa. Dist. & Co. 520 (as setting up lien for repairs); Carnell v. Gorson, 25 Pa. Dist. 189 (affidavit denying plaintiff's ownership and alleging ownership in defendant, and denying knowledge of an alleged lease of property).

[c] **Affidavit held insufficient.**—Hale v. Ashland, 260 Pa. 547, 103 A 1018 (in replevin for fire apparatus motors sold to defendant, an affidavit of defense which set up that the contract of purchase was unauthorized, but in no way denied plaintiff's title or right of possession); Carr v. Hughes, 71 Pa. Super. 412 (an affidavit of defense to a declaration in replevin on a bailment lease, which consists of a general denial of the bailor's title and a further averment that the bailment was entered into for the sole purpose of defrauding defendant's creditors, and that the title never was in the bailor or his assignee); Miller v. Jackson, 34 Pa. Super. 31 (affidavit alleging title in defendant, when annexed papers show only a chattel mortgage); Ramsdell v. Seybert, 27 Pa. Super. 133 (affidavit failing to show compliance with statute on sale for distress for rent); Strafford v. Walter, 24 Pa. Super. 498 (affidavit in action for goods seized in distress proceedings); Hinden v. McClain, 10 Pa. Dist. & Co. 563 (affidavit alleging agreement which attempts to change a written contract by parol); Driscoll v. Waite, 6 Pa. Dist. & Co. 417 (affidavit alleging purchase of lost dog, and lien for its support); Albright v. Lenhart, 2 Pa. Dist. & Co. 21 (as not showing gift inter vivos or donatio causa mortis); Eisele v. Lambert, 1 Pa. Dist. & Co. 26 (affidavit admitting possession, but not denying plaintiff's claims); Patch Mfg. Co. v. Killinger, 26 Pa. Co. 539, 15 YorkLegRec 174 (affidavit alleging set-off).

[d] **Supplemental affidavit of defense** is sufficient, where it avers that, after defendant had received the certificate from plaintiff, plaintiff sold shares of stock in the same company to third persons, and that it was mutually agreed that defendant should hold the certificate and have it divided, so as to give to such third persons the number of shares they had purchased, and that this had been prevented by plaintiff's refusing to permit the reissue of certificates to the parties entitled to the stock and notifying the company not to transfer the certificates. Sulzner v. Cappeau, etc., Co., 223 Pa. 87, 72 A 270.

[15] Miller v. Jackson, 34 Pa. Super. 31 (holding that where defendant claims ownership of the property, he must state fairly the facts in support of his claim and not legal conclusions or inferences).

[16] Ramsdell v. Seybert, 27 Pa. Super. 133; National Cash Register Co. v. Ryder, 22 Pa. Dist. 119; Fox v. Magaw, 12 Pa. Dist. 53.

[17] Griesmer v. Hill, 225 Pa. 545, 74 A 429.

[18] Wildoner v. Dodson, 23 Pa. Dist. 417, 41 Pa. Co. 89.

[19] Wright v. Rooth, 30 Pa. Dist. 296.

[20] **"Avowry" defined** see 6 C. J. p 875.

Avowry in action to recover animals distrained damage feasant see Animals § 444.

Avowry in action to recover animals wrongfully impounded see Animals § 648.

[21] **"Avowry" defined** see 6 C. J. p 875.

[22] **"Cognizance" defined** see 11 C. J. p 948.

[23] Nichols v. Dusenbury, 2 N. Y. 283; Wright v. Williams, 5 Cow. (N. Y.) 338; Bain v. Clark, 10 Johns. (N. Y.) 424; Hopkins v. Hopkins, 10 Johns. (N. Y.) 369; Harrison v. McIntosh, 1 Johns. (N. Y.) 380; Hawkins v. Eckles, 2 B. & P. 359, 126 Reprint 1326; Dally v. Sillby, 1 Bro. P. C. 525, 1 Reprint 733 (holding that in avowries, the commencement of particular estates must be shown, as that such a one was seized in fee and demised, that the estate out of which it was derived may appear sufficient to support it); Pluck v. Digges, 2 Dow. & Cl. 180, 6 Reprint 695; Poole v. Longueville, 2 Saund. 282, 85 Reprint 1063; Reynolds v. Thorpe, 1 Str. 796, 93 Reprint 854; English v. Burnell, 2 Wils. C. P. 258, 95 Reprint 798.

"An avowry as distinguished from a cognizance, imports a taking in one's own right; a cognizance imports a justification under the authority of another." Brown v. Bissett, 21 N. J. L. 46, 49.

"The office of an avowry is not to deny property in the plaintiff, but to set up some legal right in the defendant to take the property in dispute, without regard to its ownership, as that it was subject to distress for rent, damage feasant, etc." Simcoke v. Frederick, Smith (Ind.) 64.

[a] **Rent charge.**—There can be no avowry for a rent charge upon land payable to one who has no reversion. Pluck v. Digges, 2 Dow. & Cl. 180, 6 Reprint 695 (stating this to be true under the English and Irish statutes).

[24] St. 21 Hen. VIII c 19.

[25] Banks v. Angell, 7 A. & E. 843, 34 ECL 439, 112 Reprint 687.

[26] St. 11 Geo. II c XIX.

[27] Banks v. Angell, 7 A. & E. 843, 34 ECL 439, 112 Reprint 687 (avowry held bad); Staniford v. Sinclair, 2 Bing. 193, 9 ECL 541, 130 Reprint 280.

[28] See statutory provisions; and cases infra this note.

[a] **Reënactment of statute.**—(1) The statute of 11 Geo. II has been reënacted in New York (Hill v. Stocking, 6 Hill 277); (2) and in Pennsylvania (Barr v. Hughes, 44 Pa. 516) (3) while in Indiana, although the statute has not been reënacted, a similar statute is in force (Wright v. Mathews, 2 Blackf. 187).

[b] **In South Carolina,** the statute 11 Geo. II c 19, although not expressly made of force, has been adopted in practice. Moorhead v. Barrett, 25 S. C. L. 99.

[c] **In Vermont** it is not necessary for defendant to set forth his title in the avowry. It is enough to state that he was the owner or lawful occupant of the close. That rule in the old English cases only applies to cases of distress for rent, where the landlord who distrained was out of possession and whose right to claim rent and make distress therefor depended wholly on his title. In such cases there was a manifest propriety in requiring him to set out his title. In this state there is no such species of replevin, and there is no propriety in requiring the avowant to set out his title any more than in trespass or ejectment. Gipson v. Bump, 30 Vt. 175.

[d] **In Virginia** the common-law rules, unaffected by statute, have been held to be in force. Southall v. Garner, 2 Leigh (29 Va.) 372 (defective avowry).

[29] Del.—Taylor v. Moore, 3 Del. 6.

Ind.—Wright v. Mathews, 2 Blackf. 187.

N. Y.—Nichols v. Dusenbury, 2 N. Y. 283; Hill v. Stocking, 6 Hill 277.

Pa.—Barr v. Hughes, 44 Pa. 516; Franciscus v. Reigart, 4 Watts 98.

to distrain,[30] and, the existence of a demise at a certain rent mentioned must be averred, as well as enjoyment under it during the time in which the rent accrued, and that such rent remains due,[31] and that the goods were distrained upon the demised premises.[32] But while the rent reserved must be accurately stated, the rent in arrears need not be.[33] Nor need the avowry show that the goods distrained belonged to the tenant.[34] While it is not necessary to set forth the warrant and affidavit in the avowry, a general averment of the distress being sufficient,[35] and the avowry, if defective, cannot be aided by setting forth the distress warrant and affidavit,[36] yet if it sets out a defective affidavit, the avowry is demurrable.[37]

Several avowries may be made by defendant justifying in different rights.[38]

In avowing as executor for a distress for rent, the avowant must show affirmatively that the rent fell due before his testator's death;[39] but it is unnecessary to show the title of the testator.[40]

Husband and wife. A husband may avow in his own name for rent due in right of his wife.[41]

S. C.—Moorhead v. Barrett, 25 S. C. L. 99.

[a] **For example** (1) if defendant be seized in his demesne as of fee, it is enough for him to say so generally. Wright v. Williams, 5 Cow. (N. Y.) 338. (2) Or, if seized or possessed of an inferior estate, he must show the seizin in fee of the one under whom he claims; and then trace the title to himself particularly, down through its different stages. Wright v. Williams, supra. (3) So if the demise was made by another, he must show the lessor's estate, and trace it particularly down to himself. Wright v. Williams, supra.

[b] **Rule applied.**—A general avowry which does not set forth the landlord's title is good when the tenant is in the enjoyment of the premises at the time the distress is made, although the rent is payable in advance, and the tenant leaves the premises before the end of the period for which the rent was to be paid. Nichols v. Dusenbury, 2 N. Y. 283.

[c] **Rule applicable to distress for ground rent.**—Franciscus v. Reigart, 4 Watts (Pa.) 98; McCurdy v. Randolph, 2 PaLJR 323.

[d] **If defendant state the lease specially,** he must state it truly as to its terms. Taylor v. Moore, 3 Del. 6.

[30] Hill v. Stocking, 6 Hill (N. Y.) 277.

[a] **An avowry setting up a distress on parcel of the demised premises** must show the facts essential to the landlord's right to distrain with as much certainty as an avowry relating to the whole. Hill v. Stocking, 6 Hill (N. Y.) 277.

[b] **An avowant for a distress of cattle of a stranger, for rent,** need not show that they were levant et couchant on the demised premises. It is enough to say they were there; and it lies with plaintiff to plead that they were not levant et couchant. Wright v. Williams, 5 Cow. (N. Y.) 338.

[c] **Avowries and cognizances for distresses damage feasant** are not within the statute 11 Geo. II c 19 § 22. They remain therefore as they were at common law, and are regulated by the same principles as avowries for distress for rent before the statute. Wright v. Williams, 5 Cow. (N. Y.) 338; Poole v. Longuevill, 2 Saund. 282, 284c note 3, 85 Reprint 1066.

[d] **One tenant in common** cannot avow alone for taking cattle damage feasant, but he ought also to make cognizance as bailiff of his companion. Culley v. Spearman, 2 H. Bl. 386, 126 Reprint 610.

[e] **An avowry bad in part is bad for the whole.**—Pemberton v. Van Rensselaer, 1 Wend. (N. Y.) 307.

[31] Lavigne v. Russ, 36 Miss. 326; Hill v. Stocking, 6 Hill (N. Y.) 277; Barr v. Hughes, 44 Pa. 516; Thomas v. Pierce, 1 Chest. Co. (Pa.) 403; Banks v. Angell, 7 A. & E. 843, 34 ECL 439, 112 Reprint 687.

[a] **That replevin is brought by a stranger** instead of by a tenant does not change the rules relative to avowries. Lavigne v. Russ, 36 Miss. 326 (holding that the same rule applies where goods distrained for rent are replevied by a stranger).

[b] **A cognizance by defendant as bailiff, for double rent,** under 11 Geo. II c 19 § 18, should show the terms of the tenancy, and of the notice to quit, in order that the tenant's power to determine the tenancy by notice to his landlord, and the sufficiency in law of the notice given, may appear. Humberstone v. Dubois, 10 M. & W. 765, 152 Reprint 681.

[c] **Cause of distress.**—(1) An avowry in replevin that the taking of the goods was on premises leased for which rent was in arrears is sufficient, although it does not allege that the distress was taken for that rent. Baird v. Porter, 67 Pa. 105; Pullen v. Palmer, Carth. 328, 90 Reprint 792. (2) The word because (quia) in the avowry sufficiently shows the cause of the distress, although the taking is not expressly avowed as for and in the name of a distress for the rent due and in arrear. Baird v. Porter, 67 Pa. 105.

[d] **Term for which rent is in arrear.**—A cognizance containing the statement that at the time of the taking plaintiff owed for rent in arrear to his landlord for the premises for the years A. D. 1907 and 1908, which rent is still in arrear and unpaid, was demurrable, as not stating certain term for which the tenant is in arrear for rent. McLain v. Willey, 24 Del. 245, 75 A 786.

[e] **Rent in kind.**—A cognizance stating that defendant took the goods as bailiff, plaintiff being at the time a tenant and owing rent in kind in arrear to the landlord, was demurrable for not stating the nature, quantity, or kind of rent in arrear; it being necessary that the cognizance aver in what crops the rent was to be paid, although the exact value or quantity of the particular crops need not be alleged. McLain v. Willey, 24 Del. 359, 76 A 407.

[32] Thomas v. Pierce, 1 Chest. Co. (Pa.) 403.

[33] Lougee v. Colton, 9 Dana (Ky.) 123; Phipps v. Boyd, 54 Pa. 342; Barr v. Hughes, 44 Pa. 516, 517. But see Thomas v. Pierce, 1 Chest. Co. (Pa.) 403 (holding that an avowry of rent in arrear, in an action of replevin, should state the amount of rent due and unpaid).

"It is the demise at 'such a certain rent,' not the amount of rent unpaid, which is the foundation of his claim. It is that alone which is legally essential to his right. The demise of itself shows how much rent is due." Barr v. Hughes, supra.

[34] Applegate v. Crawford, 2 Ind. 579; Wright v. Mathews, 2 Blackf. (Ind.) 187; Cassidy v. Elias, 90 Pa. 434.

[a] **An avowry admits the ownership of the goods in plaintiff** in the manner in which it is alleged in the declaration. Ball v. Penn, 10 Pa. Super. 544; Clarke v. Davies, 7 Taunt. 72, 2 ECL 265, 129 Reprint 29.

[b] **While the goods were in defendant's possession,** there could be no such thing, at common law, as an avowry or cognizance in an action of replevin for a distress for rent. Cassidy v. Elias, 90 Pa. 434 (holding that if defendant claims as owner, that claim is inconsistent with the allegation that the property was seized as a pledge for rent in arrear, for it is a confession that the goods are owned by the tenant. If, on the other hand, he depends on his own right to distrain, he can have no standing unless he has surrendered the property in obedience to the command of the writ); Baird v. Porter, 67 Pa. 105.

[35] Wright v. Mathews, 2 Blackf. (Ind.) 187; Dudley v. Harvey, 59 Miss. 34; Hill v. Stocking, 6 Hill (N. Y.) 277; Webber v. Shearman, 6 Hill (N. Y.) 20.

[a] **An allegation that the warrant was under seal** or that it was directed to any one is unnecessary, it being alleged to have been duly issued and delivered for execution to defendant. Reid v. McWhinnie, 27 U. C. Q. B. (Ont.) 289.

[b] **To authorize a judgment de retorno habendo,** in favor of an officer who has taken property under a distress warrant, he should aver and prove that rent was due for land in the county, and such other facts as show that the warrant rightfully issued. Asbell v. Tipton, 1 B. Mon. (Ky.) 300.

[36] Hill v. Stocking, 6 Hill (N. Y.) 277.

[37] Dudley v. Harvey, 59 Miss. 34.

[38] Ross v. Holtzman, 20 F. Cas. No. 12,075, 3 Cranch C. C. 391.

[39] Wright v. Williams, 5 Cow. (N. Y.) 338.

[40] Martin v. Burton, 1 B. & B. 279, 5 ECL 635, 129 Reprint 730; Meriton v. Gilbee, 8 Taunt. 159, 4 ECL 89, 129 Reprint 344.

[41] Gravenor v. Woodhouse, 2 Bing. 71, 9 ECL 486, 130 Reprint 231.

Property in defendant cannot be urged as a defense by means of an avowry.[42]

[§ 197] **b. Justifying Taking under Execution.** An avowry justifying taking property under fieri facias must aver that it was the property of defendant in execution and subject to execution.[43]

[§ 198] **2. Plea—a. Requisites and Sufficiency.** A plea in bar to an avowry must be sufficiently certain and specific to demonstrate the insufficiency of the allegations therein.[44] A plea to an avowry is bad if it does not answer all that it professes to answer,[45] or if it tenders an immaterial issue,[46] or where it combines with it a demurrer to the same matter.[47] Plaintiff in replevin may plead several pleas to the avowry or cognizance of defendant;[48] but it seems that a plea which attempts to answer two distinct avowries is bad, although it alleges that the premises and the rent mentioned in both avowries are the same.[49] It has been held that a plea to an avowry or cognizance need not allege any place of taking, but that it is sufficient if it refers to the property mentioned in the declaration and avowry.[50] If plaintiff means to make the place material, he must, in his plea in bar or replication to the avowry, traverse the taking in the place alleged in the avowry, and take issue thereon.[51]

[§ 199] **b. Particular Pleas.** To an avowry in case of distress for rent, plaintiff in replevin may plead no rent in arrear,[52] such a plea being quasi a general issue;[53] or non tenure,[54] or may traverse or deny the title set out in the avowry,[55] or set up new matter in avoidance of the bar interposed by the avowry.[56] Thus plaintiff may plead to defendant's avowry any matter showing an abuse of the distress, or any unlawful or illegal proceedings by defendant, after the taking,[57] as, for example, matter showing defendant to be a trespasser ab initio.[58] So a plea which sets up as an answer to the avowry that the landlord did not have lawful cause to sue out the writ presents an issue which the tenant has a right to propound.[59] But plaintiff cannot plead nil habuit in tenementis;[60] and the plea de injuria sua propria, etc., to an avowry or cognizance, has been held bad upon special demurrer,[61] except where the avowry consists of matter of excuse only.[62] The pendency of an attachment execution must be pleaded in abatement and not in bar.[63] A plea of tender, to an avowry or cognizance, need not say tout temps prist; nor make a profert of the money in court.[64] Where defendant is an officer holding process, if he justifies or avows under that process, the taking of the goods of plaintiff in replevin, plaintiff in such case may deny the writ by nul tiel record, or he may traverse the matter of mere fact alleged in the plea or avowry;[65] but if the process is against a third person not plaintiff, the denial of property becomes the material allegation, and plaintiff will not be permitted to pass by this traverse and deny the matters in the introductory part of the plea, although set out in the form of avowry.[66] A plea that before the taking under a distress the property was seized under a writ of replevin which did not allege delivery of the necessary affidavit and bond to the officer seizing the property is bad.[67]

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[42] Fleming v. Heitshu, 7 Del. Co. (Pa.) 467; L. A. W. Acceptance Corp. v. Chernick, 49 R. I. 434, 143 A 783.

[43] Dillon v. Wright, 4 J. J. Marsh. (Ky.) 254; Whittington v. Deering, 3 J. J. Marsh. (Ky.) 684.

[44] See cases infra this note.

[a] **Plea held sufficient.**—Plea showing plaintiff and defendant derive title from same source. Burn v. Bletcher, 23 U. C. Q. B. (Ont.) 28.

[b] **Plea held insufficient.**—A plea alleging that defendant has parted with all his interest in the premises, but not stating that his interest was an estate for years, is bad on demurrer; for a lessor with an estate in fee may grant it absolutely, and yet retain the right of distress. Manuel v. Reath, 5 Phila. (Pa.) 11.

[45] Nichols v. Dusenbury, 2 N. Y. 283 (holding that where a defendant in replevin avowed the taking of the goods as a distress for a quarter's rent payable in advance, and the plea thereto, professing to be a complete answer, showed that the lessee occupied the premises for a part of the quarter and then abandoned the premises as untenantable in consequence of the landlord not finishing or repairing them according to his agreement, the plea was bad).

[46] James v. Dunlap, 3 Ill. 481.

[a] **Thus** as a distress warrant may be levied anywhere in the county, the common-law doctrine that made the locus in quo traversable is inapplicable; and a plea of "cepit in alio loco" is immaterial. Lougee v. Colton, 9 Dana (Ky.) 123.

[47] Lutz v. Browne, 10 Pa. Dist. 355, 26 Pa. Co. 47.

[48] Roberts v. Tennell, 4 Litt. (Ky.) 286.

[49] Nichols v. Dusenbury, 2 N. Y. 283 (the rule is otherwise, if one of the avowries be bad in substance).

[50] Judd v. Fox, 9 Cow. (N. Y.) 259.

[51] Gardner v. Humphrey, 10 Johns. (N. Y.) 53.

[52] Horne v. Lewin, 1 Ld. Raym. 639, 91 Reprint 1328.

[a] **A plea strictly denying any rent in arrear is necessary** and to say that the tenant was indebted the rents in the avowry mentioned, without denying that any was due, is not good. Lougee v. Colton, 2 B. Mon. (Ky.) 115.

[b] **A plaintiff in replevin may plead a compulsory payment to the ground landlord** or other encumbrancer having claims paramount to those of the immediate landlord making the distress. Under such a state of facts the proper form of plea is riens in arrere, concluding to the country. Johnson v. Jones, 9 A. & E. 809, 36 ECL 423, 112 Reprint 1421; Jones v. Morris, 3 Exch. 742, 154 Reprint 1044; Taylor v. Zamira, 6 Taunt. 524, 1 ECL 736, 128 Reprint 1138; Sapsford v. Fletcher, 4 T. R. 511, 100 Reprint 1147.

[c] **Plea of no rent in arrear admits the demise as set forth in the avowry.**—Alexander v. Harris, 4 Cranch (U. S.) 299, 2 L. ed. 627; Greer v. Nourse, 10 F. Cas. No. 5,793, 4 Cranch C. C. 527; Bloomer v. Juhel, 8 Wend. (N. Y.) 448; Hill v. Wright, 2 Esp. 669, 170 Reprint 491.

[53] Bloomer v. Juhel, 8 Wend. (N. Y.) 448; Horne v. Lewin, 1 Ld. Raym. 639, 91 Reprint 1328.

[54] Bloomer v. Juhel, 8 Wend. (N. Y.) 448 (holding that a plea of non tenure, to an avowry for rent setting forth seizin and deducing title to the avowant, and also showing a reversionary interest in the avowant after the termination of the demise under which the distress was made, admits the seizin and the demise to the avowant from the tenant of the freehold and only puts in issue the demise under which the distress was taken).

[a] **Determination of tenancy must be shown.**—(1) A plea to an avowry alleging a tenancy, which does not show a determination of the tenancy by the expiration of the lease, and how it determined, is not a good plea. Whitney v. Carle, 8 B. Mon. (Ky.) 171. (2) A plea to an avowry of distress made for rent, "that when the distress was made, the relation of landlord and tenant had ceased, the landlord was in possession and the goods were not on the demised premises" is not good. Lougee v. Colton, 2 B. Mon. (Ky.) 115.

[55] Sullivan v. Stradling, 2 Wils. C. P. 208, 95 Reprint 769.

[56] Curtis v. Jones, 3 Den. (N. Y.) 590.

[a] **For this purpose** (1) he may show, in answer to an avowry justifying under a mechanic's lien, that the work was done under an agreement which precluded the party from setting up a lien in his favor, or which was consistent with the existence of such a right. Curtis v. Jones, 3 Den. (N. Y.) 590. (2) But the answer to the avowry, whatever it may be, must be properly pleaded; and when an agreement is set up in a plea, its terms and provisions must be stated with reasonable certainty and precision. Curtis v. Jones, supra.

[57] Osgood v. Green, 30 N. H. 210.

[a] **A plea in bar, setting forth a trespass** by the landlord, but not alleging an eviction, is insufficient. Hunt v. Cope, Cowp. 242, 98 Reprint 1065.

[58] Adams v. Adams, 13 Pick. (Mass.) 384; Osgood v. Green, 30 N. H. 210; Kimball v. Adams, 3 N. H. 182; Hopkins v. Hopkins, 10 Johns. (N. Y.) 369; Jones v. Morris, 3 Exch. 742, 154 Reprint 1044.

[59] Hauser v. Robbins, 61 Miss. 551.

[60] Taylor v. Zamira, 6 Taunt. 524, 1 ECL 736, 128 Reprint 1138; Sullivan v. Stradling, 2 Wils. C. P. 208, 95 Reprint 769; Brown v. Garden, 19 U. C. Q. B. (Ont.) 518.

[61] Hopkins v. Hopkins, 10 Johns. (N. Y.) 369; Wallace v. Hibbs, 4 Phila. (Pa.) 154; Jones v. Kitchin, 1 B. & P. 76, 126 Reprint 787.

[62] Bardons v. Selby, 9 Bing. 756, 23 ECL 791, 131 Reprint 798 [aff 3 B. & Ad. 2, 23 ECL 1, 110 Reprint 1].

[63] Derham v. Berry, 5 Phila. (Pa.) 475.

[64] Hunter v. Le Conte, 6 Cow. (N. Y.) 728.

[§ 200] **D. Subsequent Pleadings—1. Replication or Reply—a. Necessity.** In replevin a general denial closes the issues and a reply is unnecessary.[68] But defendant may, if he so elect, plead the specific facts constituting his defense, and if new matter is pleaded in the answer requiring a reply, such reply must be filed,[69] or the new matter will, for the purposes of the trial, be taken as true.[70] So it is held in some jurisdictions that an answer of property in a third person, or in defendant, in effect denies the property or ownership of plaintiff, and is a good plea in bar, and completes the issue without the necessity of a reply.[71] But where defendant pleads property in himself or in others and also by special traverse denies that the property belongs to plaintiff in manner and form, etc., plaintiff should reply by taking issue on the traverse and reaffirming the property to be in himself in mode and form.[72] If permitted by statute, plaintiff may reply double in an action of replevin.[73] Under the codes in some states, requiring a reply only when a counterclaim is pleaded,[74] no reply is necessary to a plea or answer alleging fraud[75] or partnership,[76] or justification under process.[77]

[§ 201] **b. Requisites and Sufficiency.** The rules relating to the requisites and sufficiency of replications or replies generally[78] are applicable to such pleadings in actions of replevin.[79] Where a reply is necessary, plaintiff may allege therein any new matter not inconsistent with the complaint which constitutes a defense to new matter in the answer;[80] but a reply asserting a new and distinct cause of

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65. Brown v. Bissett, 21 N. J. L. 267.

66. Boswell v. Green, 25 N. J. L. 390; Brown v. Bissett, 21 N. J. L. 267 (holding that a denial in plaintiff's plea of matter alleged in the introductory part of defendant's avowry, such as the existence of the writ of attachment, the proceedings of the sheriff, and levy, etc., renders the plea bad).

67. Milliken v. Selye, 6 Hill (N. Y.) 623.

68. Street v. Morgan, 64 Kan. 85, 67 P 448; White v. Gemeny, 47 Kan. 741, 28 P 1011, 27 AmSR 320; Russell v. Smith, 14 Kan. 366; Craig v. Grant, 6 Mich. 447; Westover v. Vandoran, 29 Nebr. 652, 46 NW 47.

[a] **Additional averments in the answer** that defendant is entitled to the possession of the property because he is the owner thereof, and for the further reason that the property had been delivered to him by an officer who seized it in another replevin action between the same parties, does not enlarge the issues, nor make a reply to the answer necessary. Street v. Morgan, 64 Kan. 85, 67 P 448.

[b] **Answer held general denial.**—An answer setting forth that the property in controversy is the property of a third person, and that defendant as sheriff has levied an attachment on it, and holds it as the property of said third person, is in effect only a general denial, and needs no reply. Wilson v. Fuller, 9 Kan. 176.

69. Westover v. Vandoran, 29 Nebr. 652, 46 NW 47; Ferrell v. Humphrey, 12 Oh. 112 (holding, however, that where defendant is not prejudiced thereby, the want of a replication is not a sufficient ground to reverse the judgment).

[a] **Allegations not requiring reply.**—An allegation that defendant "is rightfully entitled to the property and to the possession thereof," following a denial of all the averments in plaintiff's petition, is cumulative of these denials, and not new matter requiring a denial. Hunt v. Bennett, 4 Greene (Iowa) 512.

[b] **In Pennsylvania.**—(1) Under a statute providing that the declaration and affidavit of defense shall constitute the issues without other pleadings, no reply is allowed. Stern v. Yates, 25 Pa. Dist. 474. (2) But a reply may be required by rules of court where affidavit of defense justifies under a distraint for rent. Jackson v. Blair, Inc., 9 Pa. Dist. & Co. 17. (3) A rule of court providing for a reply to a counterclaim has been held not applicable in an action of replevin. Kurtz v. Herbst, 23 Pa. Dist. 309.

70. Simmons v. Jenkins, 76 Ill. 479; Darter v. Brown, 48 Ind. 395; Lewis v. Buck, 7 Minn. 104, 82 AmD 73; Westover v. Vandoran, 29 Nebr. 652, 46 NW 47.

71. Landers v. George, 40 Ind. 160; Riddle v. Parke, 12 Ind. 89; Williams v. Mathews, 30 Minn. 131, 14 NW 577.

72. Smith v. Morgan, 8 Gill (Md.) 133; Chambers v. Hunt, 18 N. J. L. 339; Prosser v. Woodward, 21 Wend. (N. Y.) 205.

[a] **Property in others.**—Plaintiff is not at liberty to traverse the matter of inducement as to the property being in others. Chambers v. Hunt, 18 N. J. L. 339.

73. Cotter v. Doty, 5 Oh. 393.

[a] **In New York** the general statute (2 Rev. St. p 356 § 27), giving leave to reply double, does not apply to replevin, the pleadings therein being specially regulated by statutory provisions. Calvin v. La Farge, 6 Wend. 505.

74. See codes and statutory provisions.

75. Williams v. Wilcox, 66 Iowa 65, 23 NW 266.

76. Buffkin v. Eason, 110 N. C. 264, 14 SE 749.

77. Carlson v. Small, 32 Minn. 492, 21 NW 737.

78. See Pleading §§ 392-442.

79. See cases infra this note.

[a] **Reply held sufficient.**—(1) In replevin for tools and machinery. Seufert v. Simonton, 75 Or. 422, 146 P 520 (reply consistent with complaint, and showing absolute title in plaintiff at commencement of the action). (2) On demurrer. Lowry v. Kinsey, 26 Ill. A. 309 (as to a plea of justification). (3) A replication alleging that property was subject to lien of chattel mortgage at time of levy and that plaintiff was holder of mortgage notes is not obnoxious to general demurrer because it did not allege that mortgagor was owner of property at date of mortgage. Bailey v. Sullivan, 75 Colo. 346, 225 P 830. (4) Replication to plea to avowry. Burn v. Bletcher, 23 U. C. Q. B. 28; Shaw v. Shaw, 21 U. C. Q. B. 432. (5) Where defendant filed a special traverse, alleging the ownership of the chattels in a stranger, and averring that the property was not in plaintiff, a replication averring that the property was at the time of the taking in plaintiff as alleged in the declaration was proper. Beatty v. Parsons, 25 Del. 134, 78 A 302.

[b] **Replication held insufficient.**—Dixon v. Thatcher, 14 Ark. 141 (holding that when defendant, in an action of replevin, pleads property in himself, he avoids the injustice of the taking; and plaintiff in his replication must set forth such facts as will give him the right of dominion and control, even against him who has the legal title); Hoke v. Applegate, 92 Ind. 570 (in action by guardian of insane ward); Powell v. Triplett, 6 B. Mon. (Ky.) 420 (replication to plea of taking under distress warrant); Lisher v. Pierson, 2 Wend. (N. Y.) 345, 20 AmD 612 (replication to plea of taking by officer under writ or plaint in replevin); Harrison v. McIntosh, 1 Johns. (N. Y.) 380 (replication to a plea of property in a stranger, that defendant entered the house of plaintiff in the nighttime and took the goods is no answer to the plea); Pattison v. Adams, Lalor (N. Y.) 426 (replication consisting of evidence instead of facts).

80. Menefee v. Scally, (Mo. A.) 247 SW 259; Mayes v. Stephens, 38 Or. 512, 63 P 760, 64 P 319.

[a] **Plaintiff may plead fraud** as new matter in avoidance of the defensive matter of the answer. Menefee v. Scally, (Mo. A.) 247 SW 259.

action is improper.[81] If a counterclaim may be set up in a reply, it can be only to defeat a recovery on a counterclaim in the answer, and not for an affirmative judgment on it.[82] There can be no counterclaim or set-off to a mere defense.[83] A replication or reply must answer the whole plea,[84] and should not tender a collateral issue, or it will be demurrable.[85] A general averment of fraud in a replication in replevin is sufficient, it being unnecessary to give the history and details of the fraud.[86]

[§ 202] **2. Rejoinder.** Rejoinders in replevin are governed by the rules applicable in civil actions generally.[87] Where the defense to an action of replevin was ownership of land from which the property was taken, and plaintiff's reply alleged adverse possession of said land, it has been held unnecessary that defendant by rejoinder deny the adverse possession.[88]

[§ 203] **E. Amended and Supplemental Pleadings—1. Amended Pleadings—a. In General.** Under and subject to the rules of amendment of pleadings in civil actions generally[89] the right to amend is as liberally accorded in replevin actions as in other causes.[90] Thus plaintiff may amend his declaration, petition, or complaint so as to include therein certain articles omitted,[91] or to exclude a portion of the property originally claimed,[92] and may amend a complaint defective in not alleging any interest in plaintiff,[93] or so as to change his allegations of ownership from absolute or general to special[94] or vice versa;[95] or to tender the issue of right to possession as administrator of the owner,[96] or to show plaintiff's official capacity instead of his individual capacity,[97] or to describe the property with greater particularity,[98] or to omit the claim for damages.[99] Where the cause of action is not thereby changed, the complaint may be amended to conform to the evidence as to the time of the taking,[1] and the value of the property,[2] or so as to set up fraud.[3] Likewise, allegations of value may be changed by amendment so as to allege a value larger than that stated in the affidavit,[4] or smaller,[5] and amendment of excessive allegations of value should be allowed when it can be done without prejudice.[6] Plaintiff generally may not amend so as to set up a new cause of action.[7]

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[81] Head v. Hale, 178 Iowa 69, 159 NW 598.

[a] **Thus** in replevin for mules, the pleading of a conversion by defendant was not appropriate to the function of a reply. Head v. Hale, 178 Iowa 69, 159 NW 598 (under Code § 4164, relating to joinder of causes in replevin, a reply pleading a conversion by defendant and praying for the recovery of damages without withdrawing or modifying the allegations of the petition is not allowable).

[82] Townsend v. Minneapolis Cold-Storage, etc., Co., 46 Minn. 121, 48 NW 682; Collins v. John Pfingsten Leather Co., 196 Mo. A. 611, 190 SW 990, 993 [quot Cyc].

[83] Townsend v. Minneapolis Cold-Storage, etc., Co., 46 Minn. 121, 48 NW 682.

[84] Phillips v. Townsend, 4 Mo. 101.

[85] Mt. Carbon Coal, etc., Co. v. Andrews, 53 Ill. 176; Kendal v. Fitzgerald, 21 U. C. Q. B. 585.

[86] Fox v. Webster, 46 Mo. 181.

[87] See Pleading §§ 443–450.

[88] Tinsley v. Ross, 22 SW 313, 15 KyL 44.

[89] See Pleading §§ 581–782.

[90] Pekin Plow Co. v. Wilson, 66 Nebr. 115, 92 NW 176; Hudelson v. Tobias First Nat. Bank, 56 Nebr. 247, 76 NW 570; Atlantic Motor Truck Co. v. Kachel, 30 Pa. Dist. 364.

[91] Donnel v. Drake, 16 Montg. Co. (Pa.) 114.

[92] Mills v. Jackson, 19 Cal. A. 695, 127 P 655.

[93] Stenson v. Lancaster, 178 Mo. A. 340, 165 SW 1158.

[94] Strode v. Holland, 150 Ark. 122, 233 SW 1073; Gray v. Doty, 77 Kan. 446, 94 P 1008; Tackaberry v. Gilmore, 57 Nebr. 450, 78 NW 32; Weich v. Milliken, 57 Nebr. 86, 77 NW 363; Swain v. Savage, 55 Nebr. 687, 77 NW 362; Continental Gin Co. v. Pannell, 61 Okl. 102, 160 P 598; Swope v. Burnham, 6 Okl. 736, 52 P 924.

[95] Pekin Plow Co. v. Wilson, 66 Nebr. 115, 92 NW 176; Suckstorf v. Butterfield, 4 Nebr. (Unoff.) 808, 96 NW 654.

[96] Brandenburg v. Carmichael, 192 Iowa 694, 185 NW 486.

[97] Newman v. Globe Indemn. Co., 275 Pa. 374, 119 A 488.

[a] **Execution of affidavit and bond** by plaintiff in his individual capacity will not justify a refusal to allow an amendment of his pleading to state his official capacity. Newman v. Globe Indemn. Co., 275 Pa. 374, 119 A 488.

[98] Nollkamper v. Wyatt, 27 Nebr. 565, 43 NW 357.

[99] Bensch v. Farnsworth, 9 Ind. A. 547, 34 NE 751, 37 NE 284.

[a] **Refusal to allow amendment** of a claim and delivery complaint against the administrator of an estate, by eliminating any damage claim against the estate, is not erroneous, since the amendment would leave the estate liable for costs, whereas only the representative individually is liable. Sweat v. Wolfe, 106 S. C. 512, 91 SE 799.

[1] Wadleigh v. Buckingham, 80 Wis. 230, 49 NW 745.

[2] Cain v. Cody, (Cal.) 29 P 778; Larson v. Johnson, 83 Minn. 351, 86 NW 350.

[3] Kocher v. Palmetier, 112 Iowa 84, 83 NW 816; Joyner v. Early, 139 N. C. 49, 51 SE 778.

[4] Bierce v. Hutchins, 18 Hawaii 511; Leek v. Chesley, 98 Iowa 593, 67 NW 580; Chandler v. Parker, 65 Kan. 860, 70 P 368; McKesson v. Sherman, 51 Wis. 303, 8 NW 200.

[5] Autrey v. Bowen, 7 Colo. A. 408, 43 P 908.

[6] McManus v. Walters, 62 Kan. 128, 61 P 686.

[a] **Effect of laches.**—(1) It is proper to refuse leave to amend pleadings as to value when asked for by negligent suitors, if the acts of negligence and the amendments in correction of them will be to the material disadvantage of the one who is without fault (McManus v. Walters, 62 Kan. 128, 61 P 686); (2) but unless such is the case a party should not be compelled to suffer for his laches. (McManus v. Walters, supra).

[7] See Pleading § 685; and cases infra this note.

[a] **Amendments held proper.**—(1) Amendment to show that the party who sold truck to plaintiff was the representative of a third party. Atlantic Motor Truck Co. v. Kachel, 30 Pa. Dist. 364. (2) Where the affidavit alleged generally a specific ownership and interest in, and that plaintiff was entitled to immediate possession of, certain chattels, and the petition set up a special ownership in the chattels, specifically pleading such ownership by virtue of two mortgages, and described a portion of the indebtedness secured by such mortgages, it was error to strike from the files an amended petition which did not change the chattels sought to be recovered nor the parties, but in stating the special ownership and wrongful detention, pleaded two additional mortgages held by plaintiff at the beginning of the action covering the same property, the indebtedness secured thereby then due, and default as to payment and demand for possession having been made at such time. Robinson v. Stiner, 26 Okl. 272, 109 P 238. (3) Amendment, to a complaint alleging a special ownership in property, which merely asserts as a ground of such ownership a landlord's furnisher's lien. Jackson v. Croom, 155 Ark. 216, 244 SW 40. (4) Amendment stating more fully a wrongful taking without changing the form of action. Button v. Lusk, 10 NYS 582; Willis v. De Witt, 3 S. D. 281, 52 NW 1090. (5) Amendment claiming, in a different capacity, only a part of the property the whole of which was originally claimed in another capacity. King v. Dudley, 113 N. C. 167, 18 SE 110. (6) Where defendant justified under an attachment, an amendment to the replication so as to allege a complete settlement of the suit in which the attachment issued does not set up a new cause of action. Wise v. Jefferis, 51 Fed. 641, 2 CCA 432.

[b] **Amendments held improper.**—(1) Plaintiff should not be permitted to amend his pleading to embrace a claim for damages where such amendment would make a new cause of action. National SS. Co. v. Sheahan, 122 N. Y. 461, 25 NE 858, 10 LRA 782. (2) Amendment inserting allegations

Where, however, a cause of action in tort may be amended to state a different action ex delicto,[8] a declaration, petition, or complaint in replevin may be amended to one in trover,[9] and it has been held that, where personal service is had and part of the property cannot be found, plaintiff may add a count in trover.[10] If an affidavit which is used as a pleading is defective in respect of the statement of the right of action, it may be amended on motion to quash.[11] Defendant may amend his plea or answer so as to demand a return of the property;[12] or to increase the amount of damages,[13] or to show that plaintiff was represented by counsel in a former attachment suit for the same property and was defeated,[14] or to change the description of an execution relied upon as justification;[15] and where a defective answer is not attacked and is sufficient to inform plaintiff that defendant relies on a general denial, it is proper to permit an amendment properly pleading the general denial.[16] When an amended petition is permitted to be filed, it relates back to the commencement of the action, so that a new action need not be instituted nor a redelivery of the property made, as antecedent to the right to amend.[17]

Statement in justice's court may be amended to state jurisdictional facts where the jurisdiction of the justice attached notwithstanding the defective statement,[18] or so as to introduce, on appeal from a justice of the peace, facts essential to the action.[19]

[§ 204] **b. Conditions on Granting Leave To Amend.** The terms on which an amendment may be permitted rest ordinarily in the sound discretion of the trial court.[20] Thus it is in the discretion of the court to require the payment of all antecedent costs as a condition precedent to the allowance of the amendment.[21] If the party fails to comply with the conditions, he only forfeits his right to amend, and in such event the pleadings in the case remain precisely in the same condition they were before the leave to amend was granted;[22] and, if such pleadings properly present a case, the court should hear and determine the same on the merits, and it is error for the court to make an order dismissing the case for a failure to comply with the conditions attached to the leave to amend.[23]

[§ 205] **c. Time of Amendment.** The general rules as to the time for amendments[24] apply in actions of replevin.[25]

[§ 206] **2. Supplemental Pleadings.** The granting or refusal of leave to file a supplemental pleading is a matter largely within the discretion of the trial court.[26] As plaintiff must show a present right of recovery upon commencing his action,[27] he cannot file a supplemental complaint to show a right of recovery not arising until after the seizure in replevin of the property.[28] Defendant may file a supplemental answer setting out facts, arising since the action was commenced, which would vary the relief to which plaintiff is entitled.[29]

[§ 207] **F. Conclusiveness of Allegations in Pleadings.** The rules relative to conclusiveness of allegations in the pleadings in civil actions gener-

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that, after the demand for the proceeds of the property sold, defendant wrongfully refused to surrender to plaintiff "the moneys received from the sale of said goods or any part thereof"; the effect of the amendment being to add a new cause of action for conversion of the proceeds of that part of the property which had been rightfully sold. Popper v. Seufert, 147 App. Div. 371, 132 NYS 209. (3) A petition brought in the name of a person having no right to possession cannot be amended so as to proceed in the name of plaintiff for the use of the real owner. Mitchell v. Georgia, etc., R. Co., 111 Ga. 760, 36 SE 971, 51 LRA 622.

[8] **Change from one form of action in tort to another** see Pleading § 692.

[9] Henderson v. Hart, 122 Cal. 332, 54 P 1110; Riciotto v. Clement, 94 Cal. 105, 29 P 414; Waterhouse-Wilcox Co. v. Betz, 73 Cal. A. 236, 238 P 763; Goddard v. Cassell, 84 Hun 43, 31 NYS 1044.

[10] Dart v. Horn, 20 Ill. 212.

[11] Perkins v. Smith, 4 Blackf. (Ind.) 299; Dodd v. Skelton, 65 Nebr. 585, 91 NW 543; German Nat. Bank v. Aultman, 63 Nebr. 324, 88 NW 479.

[12] Pico v. Pico, 56 Cal. 453; Aultman v. O'Dowd, 73 Minn. 58, 75 NW 756, 72 AmSR 603.

[13] Forsee v. Zenner, (Mo. A.) 193 SW 975.

[a] **Effect of amendment.**—An answer amended by striking out words "in the sum of $75" damages did not leave it without allegation of damage, where elements of damage were set out. Forsee v. Zenner, (Mo. A.) 193 SW 975.

[14] Case v. Moorman, 25 Ind. A. 293, 58 NE 85.

[15] Smith v. Smith, 3 B. Mon. (Ky.) 295.

[16] Rusho v. Richardson, 77 Nebr. 360, 109 NW 394.

[17] Pekin Plow Co. v. Wilson, 66 Nebr. 115, 92 NW 176; Suckstorf v. Butterfield, 4 Nebr. (Unoff.) 808, 96 NW 654.

[18] Lakey v. Hoops, 80 Mo. A. 508.

[19] Dowdy v. Wamble, 110 Mo. 280, 19 SW 489.

[20] See Pleading § 735 note 70.

[21] Semmes v. Oneale, 21 F. Cas. No. 12,654, 1 Cranch C. C. 246; Wright v. Williams, 5 Cow. (N. Y.) 501.

[22] Bayless v. McFarland, 10 Okl. 747, 63 P 859.

[23] Bayless v. McFarland, supra.

[24] See Pleading §§ 605-627.

[25] See cases infra this note.

[a] **After jury sworn.**—(1) A declaration in the detinuit in replevin may be amended into a declaration in the detinet after the jury is sworn. Jefferson v. Chase, 6 Del. 219. (2) A short plea of property in defendant may not be amended. McIlvaine v. Holland, 5 Del. 10.

[b] **At any time during trial.**—(1) Amendment to add plea of property. Hellings v. Wright, 14 Pa. 373. (2) An answer admitting certain matters and denying others cannot be amended to deny the matters admitted after the close of plaintiff's evidence proving the facts denied. Butler v. Farley, 1 NYS 849.

[c] **After verdict.**—(1) Trial courts have discretionary power to permit amendments of pleadings, even after verdict, in furtherance of justice, but such power should be more cautiously exercised after verdict than in cases where the application is made before verdict. Younglove v. Knox, 44 Fla. 743, 33 S 427. (2) Where an amendment after verdict makes a new issue, a new trial ought ordinarily to be granted, unless under very special circumstances. Younglove v. Knox, 44 Fla. 743, 33 S 427. (3) Thus it is error to permit an amendment of a pleading increasing the amount of the recovery prayed, to conform to the verdict, without setting aside the verdict and granting a new trial on payment of costs. Custer City First Nat. Bank v. Calkins, 16 S. D. 445, 93 NW 646. (4) Affidavit of defense may be amended to conform to verdict. Houghton v. Du Bell, 15 Pa. Dist. 833, 33 Pa. Co. 267.

[d] **After commencement of trial and before judgment.**—Wilson Motor Co. v. Dunn, 129 Okl. 211, 264 P 194, 57 ALR 17.

[e] **At close of trial.**—Conklin v. McCauley, 41 App. Div. 452, 58 NYS 879.

[f] **After trial, judgment, or even appeal.**—Aultman, etc., Co. v. O'Dowd, 73 Minn. 58, 75 NW 756, 72 AmSR 603.

[26] See Pleading § 793.

[27] See supra § 46.

[28] Automobile, etc., Impl. Co. v. Salladay, 55 Cal. A. 219, 203 P 163.

[29] Haltom v. Nichols, etc., Co., 64 Okl. 184, 166 P 745.

ally[30] apply in actions of replevin.[31] Thus it has been held that allegations of value in a complaint under which plaintiff has secured possession of the property are conclusive on plaintiff.[32] Where the allegation of value in a petition in replevin is regarded as unnecessary or a matter of form,[33] such an allegation is not conclusive on the question of value of the property,[34] but where allegations of value are material,[35] such allegations are held conclusive upon the pleader.[36] Allegations of value in a complaint are not binding upon defendant.[37] Where an action has been pending for several years, allegations in the pleadings as to the value of the property are not conclusive.[38]

[§ 208] **G. Defects and Objections—1. Mode of Objection—a. Demurrer.** As in civil actions generally[39] defects in pleadings in replevin may be objected to by demurrer.[40] Thus defendant may demur to a declaration, petition, or complaint which is defective in misstating the form of action,[41] or in failing to allege plaintiff's right to possession,[42] or a wrongful taking[43] or detention,[44] or in failing adequately to describe the property,[45] or in not alleging demand, where defendant obtained possession of the property lawfully,[46] or in failing to allege the illegality of a tax after averring the taking for a tax,[47] or in showing affirmatively that title and right to possession are in defendant.[48] An objection that the declaration, petition, or complaint fails to specify the county in which the property is detained should be presented by demurrer.[49] A failure to allege that the property was in the county in which the action was brought cannot be reached by a general demurrer,[50] but a demurrer on that ground should distinctly specify the objection,[51] and a demurrer on the ground that the complaint fails to state facts sufficient to constitute a cause of action is bad.[52]

Demurrer to writ. In a jurisdiction in which the writ and declaration have been blended, an objection that the writ did not particularly describe the place where the chattels were detained should be raised by demurrer,[53] but the writ is not demurrable for failure to describe all the chattels seized,[54] nor for failure to allege their value.[55] A demurrer challenges the writ and declaration, but not the bond.[56]

Demurrer to plea. A general demurrer does not lie to a plea or answer which presents a good defense merely because it also sets up matters which are irrelevant.[57]

General denial. Since, where the code system of pleading prevails, a general denial in replevin puts in issue every fact contained in the complaint necessary to maintain the action, an answer containing a general denial is not as a whole subject to a general demurrer,[58] but when pleaded plaintiff may demur to a further answer setting up facts which may be proved under the general denial.[59]

On demurrer to amended petition, the original declaration, not having been made a part thereof, cannot be considered.[60]

Judgment on demurrer. Subject to the rules applicable in civil actions generally,[61] final judgment may be entered upon sustaining or overruling a demurrer.[62]

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[30] See Pleading §§ 121-131.

[31] See cases infra this section.

[32] Somers v. Kane, 162 Minn. 40, 202 NW 27; Weyerhaeuser v. Foster, 60 Minn. 223, 61 NW 1129.

[33] See supra § 183.

[34] Tucson Cons. Nat. Bank v. Cunningham, 24 Ariz. 437, 210 P 850; Fergusson v. Comfort, 194 Mo. A. 423, 184 SW 1192; Tillotson v. Delfelder, 40 Wyo. 283, 276 P 935, 277 P 714.

[a] **Rule applied.**—(1) Plaintiff in replevin, who has erroneously alleged the value of the property, should be permitted to testify as to the circumstances under which the affidavit was made and to explain that the value stated was the original purchase price. Fergusson v. Comfort, 194 Mo. A. 423, 184 SW 1192. (2) A statute providing that if plaintiff fails to prosecute his suit diligently the jury shall assess the value of the property, contemplates that plaintiff's statement as to value shall not be conclusive where evidence of value is produced. Fergusson v. Comfort, 194 Mo. A. 423, 184 SW 1192.

[b] **Allegations of value held not conclusive.**—(1) Where value must be stated only for the purpose of fixing the replevin or forthcoming bond. Fergusson v. Comfort, 194 Mo. A. 423, 184 SW 1192. (2) Since the value of property sought to be replevined at the time of trial often varies from its value at the time of commencing the action, and since the material value is that on the date of trial, a statement in the complaint or affidavit of the value at any other time is immaterial and not binding upon the pleader, who should be permitted to show valuation at the time of trial notwithstanding such pleading. Tucson Cons. Nat. Bank v. Cunningham, 24 Ariz. 437, 210 P 850.

[35] See supra § 183.

[36] Tucson Cons. Nat. Bank v. Cunningham, 24 Ariz. 437, 210 P 850.

[37] Esmond v. Richards, 112 Wash. 641, 192 P 917.

[38] American Packing Co. v. Luketa, 115 Wash. 1, 196 P 1, 22 ALR 206.

[a] **Thus** in an action in claim and delivery for a fishing boat, which had been pending for more than four years in various courts, before any finding was made as to the value of the use of the property, the admitted value of such use established by the pleadings is not conclusive, especially where such value was established by the day, and it appeared that the property possessed such use value only during certain seasons. American Packing Co. v. Luketa, 115 Wash. 1, 196 P 1, 22 ALR 206.

[39] See Pleading §§ 452-580.

[40] See cases infra this section.

[41] Jones v. Johnson, 24 Ark. 260.

[42] Entsminger v. Jackson, 73 Ind. 144.

[43] Entsminger v. Jackson, supra.

[44] Entsminger v. Jackson, supra; Draper v. Ellis, 12 Iowa 316.

[45] Entsminger v. Jackson, 73 Ind. 144; Anderson v. Stewart, 108 Md. 340, 70 A 228; American Clay Mach. Co. v. Sedalia Brick, etc., Co., 174 Mo. A. 485, 160 SW 902.

[46] Stratton v. Allen, 7 Minn. 502.

[47] Andrews v. Sellers, 11 Ind. A. 301, 38 NE 1101.

[48] Young v. Terry, 129 Miss. 281, 92 S 76.

[49] Henry v. Spitler, 67 Fla. 146, 64 S 745, AnnCas1916E 1267.

[50] Ward v. Hamlin, 71 Or. 248, 142 P 621.

[51] Marx v. Croisan, 17 Or. 393, 21 P 310.

[52] Marx v. Croisan, supra.

[53] Cate v. Merrill, 116 Me. 432, 102 A 235.

[54] Provost v. Jodoin, 126 Me. 593, 136 A 813.

[55] Provost v. Jodoin, supra.

[a] **Reason for rule.**—Value of chattels is not in issue in replevin. Provost v. Jodoin, 126 Me. 593, 136 A 813.

[56] Provost v. Jodoin, 126 Me. 593, 136 A 813.

[57] Laughlin v. Thompson, 76 Cal. 287, 18 P 330.

[58] Gila Valley, etc., R. Co. v. Gila County, 8 Ariz. 292, 71 P 913.

[59] Idaho Placer Min. Co. v. Green, 14 Ida. 249, 93 P 954.

[60] Young v. Terry, 129 Miss. 281, 92 S 76.

[61] See Pleading §§ 572-580.

[62] See cases infra this note.

[a] **Demurrer to declaration sustained.**—A tenant whose property is attached for arrears in rent disputes the landlord's claim and sues out replevin, must file in the circuit court the proper declaration in the action of replevin; and if the declaration be adjudged insufficient upon demurrer, and plaintiff does not amend or apply for leave to do so, it is not error for the

[§ 209] **b. Motions.** A motion to make more definite, rather than a demurrer, is the proper mode of objecting to a petition to replevy money.[63] Where the complaint does not state the itemized value of the articles sued for, defendant may, by motion to make more definite and certain, require such statement.[64] A motion to dismiss on the ground of failure to state a cause of action cannot be made to serve the purpose of a demurrer.[65] An answer alleging a lien in defendant, but not alleging the date of accrual, can be objected to only by motion to make more specific, and not by demurrer.[66] Where defendant has pleaded the general denial,[67] the court may, upon motion, strike out a special answer setting up property in defendant,[68] or a lien on the goods sued for,[69] or title in a third person,[70] or any affirmative defenses,[71] as under the general denial anything controverting plaintiff's cause of action might be proved.[72] A plea in abatement, and not a motion to quash, is the proper objection to a variance between the writ and declaration.[73]

[§ 210] **2. Waiver of Objections.** As objections in civil actions generally may be waived by pleading over or going to trial without objection,[74] so in replevin defendant may, by pleading over[75] or by filing a redelivery bond,[76] waive an objection to a complaint demurrable for a defective description of the property sought. An objection to a complaint for failure to allege a wrongful detention is waived by failure to object in the trial court at the proper time.[77] An objection that the petition fails to set out or contain a copy of a chattel mortgage under which plaintiff claims a right to possession, which could have been urged by demurrer, is waived by answer.[78] An objection that a count in a declaration is defective for merely referring to another count instead of describing the property is waived by pleading over, and after verdict.[79] An objection to a plea of property in a third person which does not set out his title specially comes too late after verdict.[80] A demurrer to a complaint for not alleging where the property is detained as well as where it was taken being overruled is waived by answering over,[81] and so a demurrer to a plea is waived by going to trial on issues of fact.[82] If plaintiff fails to file and serve his complaint within the time limited by statute, an exception duly taken to a refusal of the court to dismiss upon this ground is not waived by pleading and going to trial.[83] A complaint being defective because showing upon its face that plaintiff did not have exclusive right to possession, such defect is not waived by failure to object to a defect of parties.[84]

[§ 211] **3. Cure or Aider of Defects—a. In General.** The rules applicable to the curing or aider of defects in pleadings in civil actions generally[85] apply to pleadings in actions of replevin.[86] A paragraph of a complaint which is defective in not sufficiently describing the property cannot be aided by reference to another paragraph.[87] While an allegation of venue is generally necessary[88] failure to allege venue in the complaint may be disregarded as a defect when the sheriff's return shows that the property was found and taken by him within the jurisdiction of the court.[89]

Reference to affidavit. Except where the affidavit may be used as a complaint or petition,[90] the affidavit is no part of the pleadings,[91] and a petition, declaration, or complaint, which omits material averments, cannot be aided or supplemented by referring to an affidavit containing the necessary allegations,[92] so that failure to allege a wrongful detention in the complaint is a fatal defect not cured by such an allegation in the affidavit,[93] nor can the affidavit be referred to or otherwise used to supply the necessary allegations of right to possession,[94] or essential allegations of jurisdiction.[95]

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court to render a judgment against plaintiff for double the amount of rent in arrears, to be ascertained by a jury of inquiry. Towns v. Boarman, 23 Miss. 186.

[b] **Overruling demurrer to plea.**—Where a plea in replevin presents a complete bar to the action, and the demurrer thereto is overruled, without issue being taken thereon, the court should render final judgment against plaintiff. Kimball v. Citizens' Sav. Bank, 3 Ill. A. 320 (holding that in such case it is error merely to render judgment for costs).

[c] **Demurrer to petition, and leave to amend.**—Where plaintiff gave a return bond and received the property sued for, and the court sustained a demurrer to the petition, and gave judgment for costs against plaintiff, no assessment of the value of the property, or damages for its detention being made, nor a return of the property awarded, and afterward, at the same term, granted plaintiff leave to amend his petition, it was held that this impliedly set aside the judgment for costs and reinstated the cause. Hansard v. Reed, 29 Mo. 472.

[63] **63.** Knapp v. Springmeier, 7 Oh. Dec. (Reprint) 570, 3 CincLBul 1122.

[64] **64.** Hall v. Law Guarantee, etc., Co., 22 Wash. 305, 60 P 643, 79 AmSR 935.

[65] **65.** Adeimy v. Dleykan, 116 S. C. 159, 107 SE 35.

[66] **66.** Shappendocia v. Spencer, 73 Ind. 128.

[67] **67.** See supra § 189.

[68] **68.** Sparks v. Heritage, 45 Ind. 66.

[69] **69.** Ainsworth v. Love, 12 Pa. Co. 273.

[70] **70.** Davis v. Warfield, 38 Ind. 461.

[71] **71.** Livingston v. Moore, (Nebr.) 89 NW 289.

[72] **72.** See infra § 230.

[73] **73.** Brown v. Peevey, 6 Ark. 37.

[74] **74.** See Pleading §§ 1234–1242.

[75] **75.** Oliver v. Wooley, 68 Mo. A. 304; Burr v. Brantley, 40 S. C. 538, 19 SE 199.

[a] **Where defendant by demurrer** admits the taking of the property, he cannot thereafter complain of insufficiency of description of such property in the petition or complaint. Burr v. Brantley, 40 S. C. 538, 19 SE 199.

[76] **76.** Farmers' Loan, etc., Co. v. Hansen, 123 Or. 72, 260 P 999.

[77] **77.** Kennedy v. Roberts, 105 Iowa 521, 75 NW 363.

[78] **78.** Smith v. McLean, 24 Iowa 322.

[79] **79.** McDonough v. Reilly, 131 Ill. A. 553.

[80] **80.** Wheeler v. Train, 3 Pick. (Mass.) 255.

[81] **81.** Byers v. Ferguson, 41 Or. 77, 65 P 1067, 68 P 5.

[82] **82.** Freas v. Lake, 2 Colo. 480.

[83] **83.** Elmore v. Garvey, 4 Wis. 152.

[84] **84.** Agricultural Credit Co. v. O'Rourke, 65 Mont. 517, 211 P 200.

[85] **85.** See Pleading §§ 1268–1303.

[86] **86.** See cases infra this section; and § 212.

[87] **87.** Entsminger v. Jackson, 73 Ind. 144.

[88] **88.** See supra § 174.

[89] **89.** Stiles v. James, 2 Wash. T. 194, 2 P 188.

[90] **90.** See supra § 172.

[91] **91.** See supra § 172.

[92] **92.** Wilhite v. Williams, 41 Kan. 288, 21 P 256, 13 AmSR 281; Loomis v. Youle, 1 Minn. 175; Hudelson v. Tobias First Nat. Bank, 51 Nebr. 557, 71 NW 304.

[93] **93.** Wilhite v. Williams, 41 Kan. 288, 21 P 256, 13 AmSR 281.

[94] **94.** Loomis v. Youle, 1 Minn. 175.

[95] **95.** Hudelson v. Tobias First Nat. Bank, 51 Nebr. 557, 71 NW 304.

Aider by proof. An answer defective as a justification of the taking and detention under legal process may be aided by the proof.[96]

Pleading of adverse party. An omission of an allegation of venue is cured by defendant's pleading over.[97] A variance between the writ and declaration in describing the property is cured by pleading over.[98] A complaint defective on special demurrer for alleging ownership as on and after a certain date instead of specifically alleging ownership at the time of commencement of the action is sufficient where defendant answers over without demurring.[99] It has been held that an allegation in the answer denying plaintiff's ownership will not cure the omission of an allegation of ownership in the complaint,[1] although it has also been held that a failure of the complaint to allege plaintiff's interest in the property is cured by an answer wherein the nature of his right is asserted.[2] A defect in a complaint, consisting of failure to directly aver title and right to possession at the commencement of the action, is cured by a denial in an answer of plaintiff's ownership at that or any other time.[3] A plea defective in not traversing plaintiff's right of property may be cured by a replication of right of property.[4] Failure of a cognizance justifying under a fieri facias to state the amount of the demand is cured by plaintiff's joining issue.[5]

[§ 212] **b. Aider by Verdict or Judgment.**[6] As in civil actions generally,[7] many defects in pleadings in replevin are cured by verdict.[8] Thus the failure of a declaration, petition, or complaint to allege a wrongful taking,[9] or demand and refusal,[10] or the value of the property,[11] or the place of taking and locating,[12] or that the property was detained in the county where the suit is brought,[13] or to negative a taking under legal process[14] is cured by verdict. In an action for wrongful detention a defect, which consists of a failure to allege that the property which was delivered by plaintiff to defendant was to be redelivered upon request, is cured by verdict.[15] An allegation that plaintiff was owner and entitled to possession at the time the action was commenced is, where the evidence shows that the ownership was the sole issue in the action, sufficient after verdict.[16] A complaint which does not generally allege plaintiff's ownership and right to possession but does specially plead plaintiff's title and the specific facts to which the court will look in determining plaintiff's right to recover is good as against a motion to vacate a judgment.[17] But as a declaration or complaint which entirely fails to state a cause of action cannot be aided by verdict,[18] failure to allege a wrongful detention or such facts from which a wrongful detention may be inferred is such a defect which is not aided by verdict.[19] So a description so defective that identification is impossible is not aided.[20]

Plea of justification under an attachment, if defective for failing to allege a debt due, is cured by verdict.[21]

Avowries. In some jurisdictions it has been held that failure of an avowry to allege the title of defendant, where such allegation is necessary, being a case of defective title, and not of a title defectively set forth, the defect is not cured by verdict.[22] And where the avowry is defective in failing to show the legal issue of the distress warrant, it has been held proper to arrest the judgment,[23] but defendant cannot have arrest of judgment for a mistaken date in his own avowry.[24] An omission to join issue on an avowry for rent in arrear, or otherwise to notice it on the record, is a mere irregularity, and is cured by verdict of "no rent due."[25] An avowry of the taking has been held to cure a defective description after verdict.[26]

[§ 213] **H. Issues, Proof, and Variance—1. Issues Raised and Matters To Be Proved—a. In General.** As in civil actions generally,[27] the issues are confined to those raised by the pleadings.[28] Matters properly pleaded by one party and not denied by the other are deemed to be admitted and need not be proved;[29] but in some instances matters alleged by way of inducement must necessarily be proved.[30] As in other civil actions,[31] the general denial puts in issue and requires proof of every material averment of plaintiff's statement of his cause of action;[32] but only such matters as plaintiff need prove are put in issue by a general denial.[33] A general denial qualified by an admission of possession of the property by defendant puts in issue everything, except plaintiff's allegation that defendant is in possession of such property.[34] A plea of not guilty, where such is authorized or required, puts in issue every material fact.[35]

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[96] Johnson v. Bailey, 17 Colo. 59, 28 P 81.

[97] Gardner v. Humphrey, 10 Johns. (N. Y.) 53.

[98] Reeder v. Moore, 95 Mich. 594, 55 NW 436.

[99] Williams v. Ashe, 111 Cal. 180, 43 P 595.

[1] Scofield v. Whitelegge, 49 N. Y. 259, 12 AbbPrNS 320 [aff 33 N. Y. Super. 179, 10 AbbPrNS 104]; Bush v. Bush, 55 Utah 237, 184 P 823.

[2] Dillard v. McClure, 64 Mo. A. 488.

[3] Beggs v. Smith, 26 Cal. A. 532, 147 P 585. Contra Vanalstine v. Whelan, 135 Cal. 232, 67 P 125.

[4] Anderson v. Talcott, 6 Ill. 365.

[5] Kerley v. Hume, 3 T. B. Mon. (Ky.) 181.

[6] **Defects in avowry for animals taken damage feasant** see Animals § 444.

[7] See Pleading §§ 1280-1303.

[8] See cases infra notes 9-14.

[9] Coit v. Waples, 1 Minn. 134; Keen v. Munger, 52 Mo. A. 660.

[10] Hurd v. Simonton, 10 Minn. 423.

[11] Bales v. Scott, 26 Ind. 202.

[12] Kirk v. Matlock, 12 Or. 319, 7 P 322.

[13] Hoke v. Applegate, 92 Ind. 570.

[14] McPhelomy v. Solomon, 15 Ind. 189.

[15] Wadley v. Harris, 25 Ark. 36.

[16] Pierce v. Langdon, 3 Ida. 141, 28 P 401.

[17] Thompson v. Caddo County Bank, 15 Okl. 615, 82 P 927.

[18] See Pleading § 1286.

[19] Staley House Furnishing Co. v. Wallace, 21 Mo. A. 128.

[20] Lockhart v. Miller, 30 S. C. 326, 9 SE 511.

[21] McCraw v. Welch, 2 Colo. 284.

[22] Bain v. Clark, 10 Johns. (N. Y.) 424; English v. Burnell, 2 Wils. C. P. 258, 95 Reprint 798. Contra Freeman v. Jugg, 3 Salk. 307, 91 Reprint 841.

[23] Whitney v. Carle, 8 B. Mon. (Ky.) 171.

[24] Lewis v. Clagett, Smith (N. H.) 187.

[25] Ingle v. Wallach, 1 Black (U. S.) 96, 17 L. ed. 50.

[26] Lewis v. Clagett, Smith (N. H.) 187.

[27] See Pleading § 1147.

[28] See cases infra this note.

[a] **Declaration and affidavit of defense,** without other pleadings, constitute the issue under which the question of the title to or right of possession of the goods and chattels as between the parties shall be determined by a jury. Hayden v. McMillan, 79 Pa. Super. 1.

[b] **Right to possession between plaintiff and one not party** is not involved. Webster v. McCullough, 45 Ida. 604, 264 P 384.

[c] **Rule in absence of pleadings.**—Where there were no formal pleadings it has been held that upon the affidavit and proof the only issue was the right to immediate possession. McWhirter v. Penny, 82 Ark. 244, 101 SW 742.

[29] Bensley v. McMillan, 49 Iowa 517.

[§ 214] **b. Title and Right to Possession.** Plaintiff's title, and right to possession are put in issue and require proof where defendant pleads a general denial,[36] or not guilty,[37] property in himself,[38] or in a third person;[39] but not where he pleads non cepit,[40] except where such plea is accompanied by a brief statement of property in defendant.[41] Plaintiff's title and right to possession are put in issue by a plea of non detinet,[42] although there is some authority to the contrary.[43] It has been held that a general denial puts in issue only plaintiff's right to possession.[44] A special plea of property in defendant does not raise the issue of absolute ownership.[45] Where plaintiff claims under a special ownership, he must prove the facts pleaded as constituting such ownership.[46] To put special ownership in issue, defendant must deny specially the allegations of fact upon which such special ownership is based.[47] Ownership is not put in issue by an answer or affidavit of defense which does not deny it.[48] Plaintiff's tenure is not in issue where plaintiff replies no rent in arrear to an avowry.[49] Title to realty may become an issue, where the right to possession of the chattels in question depends upon it;[50] but the question whether the chattels are so annexed to the freehold as not to be the subject of replevin is not raised or put in issue by a plea of property.[51]

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[30] Schemerhorn v. Mitchell, 15 Ill. A. 418.

[31] See Pleading §§ 1153–1154.

[32] Idaho Placer Min. Co. v. Green, 14 Ida. 249, 93 P 954; Jansen v. Effey, 10 Iowa 227; Kaufman v. Cooper, 38 Mont. 6, 98 P 504, 1135; Sallisaw First Nat. Bank v. Barbour, 21 Okl. 237, 95 P 790.

"In replevin a general denial closes the issues and puts plaintiff to proof of every fact material to the maintenance of his action." Street v. Morgan, 64 Kan. 85, 67 P 448.

[a] **Facts necessary to establish right.**—A general denial puts in issue not only plaintiff's right to possession, but also every collateral fact necessary to the establishment of the same. Oester v. Sitlington, 115 Mo. 247, 21 SW 820.

[b] **But where a person not actually or constructively in possession** of the property is without objection made a party defendant, because, as alleged, he "claims some interest" in the property, and he answers by a general denial, such answer without more presents no issue for trial. Van Gorder v. Smith, 99 Ind. 404.

[c] **No answer being filed,** the case stands upon a general denial putting in issue every material fact. Ravine House Co. v. Bradstreet, (Vt.) 148 A 481.

[33] Milligan v. Brooklyn Warehouse, etc., Co., 34 Misc. 55, 68 NYS 744.

[34] Russell v. Amundson, 4 N. D. 112, 59 NW 477.

[35] Bell v. Smith, 155 Miss. 227, 124 S 331; Hogan v. Commercial Credit Co., 150 Miss. 653, 116 S 298.

[36] Colo.—Thomas v. Ray, 48 Colo. 423, 110 P 77.

Conn.—Curnane v. Scheidel, 70 Conn. 13, 38 A 875.

Ind.—Jackson v. Morgan, 167 Ind. 528, 78 NE 633; Ashby v. West, 3 Ind. 170.

Mass.—Dunbar-Laporte Motor Co. v. Desrocher, 247 Mass. 292, 142 NE 57; Frisch v. Wells, 200 Mass. 429, 86 NE 775, 23 LRANS 144; D'Arcy v. Steuer, 179 Mass. 40, 60 NE 405.

Mo.—Steffen v. Long, 165 Mo. A. 254, 147 SW 191.

Mont.—Hayes v. Moffatt, 83 Mont. 185, 271 P 452; Hickey v. Breen, 40 Mont. 368, 106 P 881, 20 AnnCas 429; Kaufman v. Cooper, 38 Mont. 6, 98 P 504, 1135.

N. Y.—Seidenbach v. Riley, 111 N. Y. 560, 19 NE 275; Griffin v. Long Island R. Co., 101 N. Y. 348, 4 NE 740; Jacob v. Haefelein, 60 App. Div. 533, 69 NYS 1034; Haas v. Altieri, 2 Misc. 252, 21 NYS 950 [aff 19 NYS 687].

Okl.—Producers' Supply Co. v. Sinclair Oil, etc., Co., 105 Okl. 47, 231 P 279; Francis v. Guaranty State Bank, 44 Okl. 446, 145 P 324; Bancroft-Whitney Co. v. Mayfield, 36 Okl. 535, 129 P 702.

[a] **In replevin for the possession of a county warrant** plaintiff must, when the answer is a general denial, prove title to or right of possession of a specific warrant. Steffen v. Long, 165 Mo. A. 254, 147 SW 191.

[b] **Form of denial.**—A denial by defendant that plaintiff is the owner of the property described in the complaint and an allegation that defendant has not sufficient information or belief upon the subject to enable him to answer plaintiff's allegation as to his right of possession, and that on that ground defendant denies the same, is sufficient to put in issue plaintiff's allegations that he is the owner and entitled to the possession of the property. Cunningham v. Skinner, 65 Cal. 385, 4 P 373.

[37] Costikyan v. Sloan, 33 App. (D. C.) 420; Webster v. Brunswick-Balke-Callender Co., 37 Fla. 433, 20 S 536; Ford v. Ford, 3 Wis. 399; Heeron v. Beckwith, 1 Wis. 17.

[a] **In Florida** (1) before the adoption of the statute, a plea of not guilty denied only the taking and detention. Stewart v. Mills, 18 Fla. 57. (2) Now a plea of not guilty denies plaintiff's right to possession as well as wrongful taking or detention. Delco Light Co. v. John Le Roy Hutchinson Properties, 99 Fla. 410, 128 S 831; Gracy v. Seaboard Air Line R. Co., 69 Fla. 301, 68 S 722 (a plea denying right or title of plaintiff is unnecessary). (3) Such plea denies plaintiff's title to property in a qualified sense only. Delco Light Co. v. John Le Roy Hutchinson Properties, 99 Fla. 410, 128 S 831.

[38] Del.—Stafford v. Williams, 24 Del. 288, 76 A 626.

Ill.—Reynolds v. McCormick, 62 Ill. 412; Underwood v. White, 45 Ill. 437; Commercial Credit Trust v. Land, 251 Ill. A. 469.

Ind.—Callan v. Schwing, 79 Ind. A. 370, 138 NE 265.

N. J.—Harwood v. Smethurst, 29 N. J. L. 195, 80 AmD 207.

Pa.—Strong v. Dinniny, 175 Pa. 586, 34 A 919; Mathias v. Sellers, 86 Pa. 486, 27 AmR 723; Reinheimer v. Hemingway, 35 Pa. 432; Swope v. Crawford, 16 Pa. Super. 474.

R. I.—L. A. W. Acceptance Corp. v. Chernick, 49 R. I. 434, 143 A 783.

[39] Kee, etc., Dairy Co. v. Pennsylvania Co., 291 Ill. 248, 126 NE 179; Krause v. Curtis, 73 Ill. 450; Underwood v. White, 45 Ill. 437; Redman v. Hendricks, 3 N. Y. Super. 32.

[40] Ark.—Carroll v. Harris, 19 Ark. 237.

Fla.—Hopkins v. Burney, 2 Fla. 42.

Ill.—Van Namee v. Bradley, 69 Ill. 299; Chandler v. Lincoln, 52 Ill. 74; Bourk v. Riggs, 38 Ill. 320; Vose v. Hart, 12 Ill. 378; Manufacturers' Finance Trust Co. v. Stone, 251 Ill. A. 414.

Ind.—Simcoke v. Frederick, Smith 64.

Me.—Sawyer v. Huff, 25 Me. 464.

Mo.—Gray v. Parker, 38 Mo. 160.

N. H.—Sinclair v. Wheeler, 69 N. H. 538, 45 A 1085; Mitchell v. Roberts, 50 N. H. 486.

Eng.—Dover v. Rawlings, 2 M. & Rob. 544, 174 Reprint 375.

Can.—Fitzpatrick v. Casselman, 29 U. C. Q. B. (Ont.) 5.

[41] Pope v. Jackson, 65 Me. 162.

[a] **Title only issue** raised by a plea of non cepit accompanied by a brief statement denying title. Cate v. Merrill, 109 Me. 424, 84 A 897; McLeod v. Johnson, 96 Me. 271, 52 A 760.

[42] Patterson v. Fowler, 22 Ark. 396; Moore v. Kepner, 7 Nebr. 291; Rogers v. Arnold, 12 Wend. (N. Y.) 30; Ferrell v. Humphrey, 12 Oh. 112; Kelley v. Blakeley, 2 Oh. Dec. (Reprint) 251, 2 WestLMonth 151 [aff 2 Oh. Dec. (Reprint) 378, 2 WestL Month 550, disappr Shur v. Statler, 2 Oh. Dec. (Reprint) 70, 1 WestL Month 317 (holding only wrongful detention)].

[43] Van Namee v. Bradley, 69 Ill. 299; Chandler v. Lincoln, 52 Ill. 74; Bourk v. Riggs, 38 Ill. 320; Ingalls v. Bulkley, 15 Ill. 224.

[44] Gold Bros. Security Co. v. Hanken, 45 S. D. 363, 187 NW 636.

[45] Perfect Knitting Mills v. Obstfeld, 154 Ill. A. 637.

[46] Scott v. Vulcan Iron Works Co., 31 Okl. 334, 122 P 186.

[47] Perry County Bank v. Rankin, 73 Ark. 589, 84 SW 725, 86 SW 279.

[§ 215] **c. Taking, Detention, and Possession by Defendant.** A plea of non cepit puts in issue the wrongful taking by defendant,[52] but plaintiff need prove a wrongful taking only when a plea of this nature is interposed.[53] A wrongful detention of the property is a material fact to be proved by plaintiff,[54] and is put in issue by a plea of non detinet,[55] and it has been held that such a plea puts in issue only the detention.[56] A general denial puts in issue the wrongful detention.[57] So also does a plea of not guilty, in such jurisdictions as permit or require this plea.[58] The unlawful taking or detention of the goods must always be proved when put in issue by a proper plea;[59] but when detention is proved this is sufficient, although there is an additional allegation of unlawful taking.[60] Under an issue of no rent in arrear defendant need not prove that the distress was laid by himself or by his authority.[61] A plea of not guilty puts in issue defendant's possession of the property,[62] and plaintiff must prove such possession,[63] even where the answer admits the taking, but denies defendant's possession at the time the action was commenced.[64] If defendant pleads purchase in good faith, he must prove the legal right of his vendor to sell.[65] Under the statutes of some jurisdictions plaintiff must prove that the property in controversy was not taken for a tax, assessment, or by virtue of process;[66] but in other jurisdictions an allegation of that fact, when required to be made in the affidavit or complaint, is considered as a mere negative averment to be proved by defendant.[67]

[§ 216] **d. Demand.**[68] Where the action is brought for a wrongful detention without an unlawful taking, a demand must be alleged and proved.[69] The making of a demand by plaintiff prior to the commencement of the suit for the return of the property is not in issue and need not be proved where defendant, either in his pleading or his evidence, asserts ownership or right to possession in himself and demands a return of the property,[70] or where plaintiff's allegation of a demand having been made is not denied.[71] Proof of demand is necessary where defendant pleads the general issue with a statement that he retains possession by the terms of a mortgage to plaintiff and with plaintiff's permission.[72] In some jurisdictions the statutes require defendant to plead the fact that no demand was made if he wishes to raise that issue.[73]

[§ 217] **e. Identity and Location of Property.** It is incumbent upon plaintiff to prove that the property which he claims is identical with that to which he is entitled.[74] Where the declaration describes the property in unnecessarily minute details, plaintiff need not prove more than enough to identify the property with reasonable certainty.[75] Likewise, where defendant asserts a claim to the property in controversy under a mortgage, he must, in order to sustain his claim, prove that the property mortgaged is the same as that sought to be recovered.[76] The plea of non cepit puts in issue the place where the goods were taken,[77] and so also does a plea of cepit in alio loco.[78] In at least one jurisdiction plaintiff need not prove the detention of the property in any particular county, although an allegation of that fact must be made in the affidavit.[79]

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[48] Vitagraph Co. v. Swaab, 248 Pa. 478, 94 A 126, AnnCas1916C 311. But see Erb v. Perkins, 32 Ark. 428 (holding that a bankruptcy assignee's answer in replevin is sufficient to put plaintiff on proof of his alleged title, where it avers that the assignee has no knowledge or information sufficient to form a belief as to plaintiff's title).

[49] Williams v. Smith, 10 Serg. & R. (Pa.) 202.

[50] U. S. v. Steenerson, 50 Fed. 504, 1 CCA 552; McKinnon v. Meston, 104 Mich. 642, 62 NW 1014; Myers v. Gowen, 13 Phila. (Pa.) 162.

[51] Braddock Brewing Co. v. Pfaudler Vacuum Fermentation Co., 106 Fed. 604, 45 CCA 491; Alexander v. Cowie, 19 N. B. 599.

[52] U. S.—Calvert v. Stewart, 4 F. Cas. No. 2,327, 4 Cranch C. C. 728; Meany v. Head, 16 F. Cas. No. 9,379, 1 Mason 319.

Ark.—Carroll v. Harris, 19 Ark. 237; Town v. Evans, 6 Ark. 260.

Me.—Sawyer v. Huff, 25 Me. 464.

N. H.—Carter v. Piper, 57 N. H. 217.

N. J.—Harwood v. Smethurst, 29 N. J. L. 195, 80 AmD 207.

N. Y.—Ely v. Ehle, 3 N. Y. 506.

Wis.—Ronge v. Dawson, 9 Wis. 246.

[53] Kerley v. Hume, 3 T. B. Mon. (Ky.) 181; Harwood v. Smethurst, 29 N. J. L. 195, 80 AmD 207.

[54] Frick v. Miller, 30 Del. 366, 107 A 391 [aff 30 Del. 374, 107 A 394].

[55] Paul v. Luttrell, 1 Colo. 317; Griffin v. Long Island R. Co., 101 N. Y. 348, 4 NE 740.

[56] Simmons v. Jenkins, 76 Ill. 479; Van Namee v. Bradley, 69 Ill. 299; Ingalls v. Bulkley, 15 Ill. 224.

[57] Wilson v. Fuller, 9 Kan. 176; Griffin v. Long Island R. Co., 101 N. Y. 348, 4 NE 740; Jacob v. Haefelein, 60 App. Div. 533, 69 NYS 1034.

[58] Burnett v. Soule, 78 Fla. 507, 83 S 461; Richbourg v. Rose, 53 Fla. 173, 44 S 69, 125 AmSR 1061; Ford v. Ford, 3 Wis. 399; Heeron v. Beckwith, 1 Wis. 17.

[59] Barnes v. Plessner, 137 Mo. A. 571, 119 SW 457; Alexander v. Cowie, 19 N. B. 599.

[a] **Plaintiff not required to prove bailment.**—Phelan v. Bonham, 9 Ark. 389; Beebe v. De Baum, 8 Ark. 510.

[60] Miller v. Hackbarth, 126 Wis. 50, 105 NW 311.

[61] McLaughlin v. Riggs, 16 F. Cas. No. 8,872, 1 Cranch C. C. 410.

[62] Hogan v. Commercial Credit Co., 150 Miss. 653, 116 S 298.

[63] Hogan v. Commercial Credit Co., supra.

[64] Heckela v. Coos Bay Liquor Co., 71 Or. 149, 142 P 547.

[65] Pion v. Scolnick, 177 NYS 872.

[66] Maple v. Vestal, 114 Ind. 325, 16 NE 620; Adams v. Davis, 109 Ind. 10, 9 NE 162.

[67] Hoisington v. Armstrong, 22 Kan. 110; Knoche v. Perry, 90 Mo. A. 483; Carney v. Doyle, 14 Wis. 270.

[68] **As condition precedent to right of action** see supra §§ 68-76.

[69] Peo. v. Lauer, 80 Misc. 436, 141 NYS 299.

[70] Ark.—Russell v. Brooks, 92 Ark. 509, 122 SW 649.

Cal.—California Cured Fruit Assoc. v. Stelling, 141 Cal. 713, 75 P 320.

Ill.—Kingman v. Reinemer, 58 Ill. A. 173.

Kan.—Greenawalt v. Wilson, 52 Kan. 109, 34 P 403; Chapin v. Jenkins, 50 Kan. 385, 31 P 1084; Schmidt v. Bender, 39 Kan. 437, 18 P 491; Raper v. Harrison, 37 Kan. 243, 15 P 219; Fuller v. Torson, 8 Kan. A. 652, 56 P 512.

Me.—Cate v. Merrill, 109 Me. 424, 84 A 897; Lewis v. Smart, 67 Me. 206; Seaver v. Dingley, 4 Me. 306.

Minn.—Guthrie v. Olson, 44 Minn. 404, 46 NW 853; Kellogg v. Olson, 34 Minn. 103, 24 NW 364.

N. D.—Thompson v. Thompson, 11 N. D. 208, 91 NW 44.

[a] **Under general denial** want of demand is not in issue. George v. Hewlett, 70 Miss. 1, 12 S 855, 35 AmSR 626.

[71] Harrison v. Clark, 74 Conn. 18, 49 A 186; Francisco v. Benepe, 6 Mont. 243, 11 P 637.

[72] Cate v. Merrill, 109 Me. 424, 84 A 897.

[73] See statutory provisions.

[74] Stanchfield v. Palmer, 4 Greene (Iowa) 23; Chaffee v. Blaisdell, 142 Mass. 538, 8 NE 435; Ames v. Mississippi Boom Co., 8 Minn. 467; Root v. Hershey, 7 Pa. Dist. & Co. 459. But see Brewster v. Carmichael, 39 Wis. 456 (holding it unnecessary to prove that logs seized in replevin by sheriff are the logs taken by defendant).

[a] **Confusion of goods.**—(1) Although a party does not lose his right of property in goods intermingled with others of the same kind, he must necessarily fail in an action of replevin for their return, if he is unable to establish the identity of the chattels claimed. Ames v. Mississippi Boom Co., 8 Minn. 467; Gray v. Parker, 38 Mo. 160. (2) However,

[§ 218] **f. Value of Property and Damages.** Proof of the value of the property is required, although the allegation thereof in the complaint is not denied;[80] but it has been held that the value of each article need not be proved, provided there is proof of the total value.[81] A general denial puts in issue allegations of value[82] and damages.[83] Allegations of damage must be proved, when damages are sought.[84] Damages for unlawful detention must be proved.[85]

[§ 219] **g. Justification by Seizure under Process.** An officer who, attempting to justify his possession, bases his right to possession on an execution attachment or other process must prove that at the time of the seizure he was an officer,[86] must show the proceedings and process under which he acted and claims possession,[87] and that the process was not only regular on its face but that it was issued by competent authority.[88] Where the property is taken under an execution, defendant must prove that he acted under a valid judgment[89] which has not been satisfied,[90] and that the property seized is the property of the execution debtor;[91] but it has been held that defendant need not prove the judgment where he proves an execution regular on its face and appearing to have been issued by a court having jurisdiction,[92] or where plaintiff introduces the execution and claims exemption against the levy.[93] Where defendant bases his right upon a seizure under a writ of attachment, he must prove not only the existence of the writ, but also that the attachment defendant was indebted to the attachment plaintiff, and that all the jurisdictional steps were taken before the writ issued;[94] but it has been held

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it has been held that he is entitled to replevy a portion of the whole equal to the amount taken by defendant. Schulenberg v. Harriman, 21 Wall. (U. S.) 44, 22 L. ed. 551 [aff 21 F. Cas. No. 12,486, 2 Dill. 398] (construing the statutes of Minnesota).

[b] **The giving of an undertaking by defendant admits the identity** of the property. Martin v. Gilbert, 119 N. Y. 298, 23 NE 813, 24 NE 460, 16 AmSR 823; Hochberger v. Baum, 85 NYS 385.

[c] **The writ need not be put in evidence** for the purpose of identifying the property replevied with that described in the declaration. Davidson v. Rex, 16 N. B. 396.

[75] Hartford F. Ins. Co. v. Stevens, 123 Me. 368, 123 A 38.

[a] **Rule applied.**—In an action to replevy a stolen automobile, plaintiff need not prove the numbers, color of the car, or kind of tire, as stated in the writ, since the words were not necessary to a description with reasonable certainty. Hartford F. Ins. Co. v. Stevens, 123 Me. 368, 123 A 38 (where defendant in his brief statement pleaded property in the stolen automobile in himself, he waived objection to plaintiff's failure to prove such allegations).

[76] Game v. Whaley, 43 Minn. 234, 45 NW 228.

[77] Ely v. Ehle, 3 N. Y. 506; Fitzpatrick v. Casselman, 29 U. C. Q. B. (Ont.) 5.

[78] Williams v. Welch, 5 Wend. (N. Y.) 290.

[a] **Under a plea of property,** the place of taking is not material. Emmett v. Briggs, 21 N. J. L. 53.

[79] Cox v. Albert, 78 Ind. 241; Robinson v. Shatzley, 75 Ind. 461; Buck v. Young, 1 Ind. A. 558, 27 NE 1106.

[80] Jenkins v. Steanka, 19 Wis. 126, 88 AmD 675.

Necessity of valuation in verdict or finding see infra § 306.

[81] Goldsmith v. Willson, 67 Iowa 662, 25 NW 870.

Findings of separate value see infra §§ 307, 308.

[82] Jackson v. Morgan, 167 Ind. 528, 78 NE 633.

[83] Jackson v. Morgan, supra.

[84] Miller v. Baer, 189 NYS 149.

[a] **Failure of proof.**—In replevin of garments, with damages, plaintiff's failure to show that they were sold by him at auction under fair conditions, or to adduce opinion evidence of market value, constituted a failure of proof on issue of damages. Rosenblatt v. Winstanley, (Mo. A.) 186 SW 542.

[85] Gindin v. Gottlieb, 191 NYS 218.

[86] Outhouse v. Allen, 72 Ill. 529; Arn v. Parker, 39 Kan. 338, 18 P 201; Graham v. Shaw, 38 Kan. 734, 17 P 332 (attachment).

[a] **Proof that he was an officer de jure** (1) is necessary (Outhouse v. Allen, 72 Ill. 529; Vaughn v. Owens, 21 Ill. A. 249), (2) although there is authority to the contrary (Dayton v. Wyoming Nat. Bank, 1 Wyo. 263 [holding that it is sufficient to show that an officer claiming under an attachment was a sheriff de facto]).

[b] **Authority of deputy** must be proved. McCarty v. Gage, 3 Wis. 404.

[c] **When admitted by the pleadings** proof of defendant's official character is not required. Alexander v. Burnham, 18 Wis. 199.

[87] Arn v. Parker, 39 Kan. 338, 18 P 201; Graham v. Shaw, 38 Kan. 734, 17 P 332.

[88] Mich.—Andrews v. Smith, 41 Mich. 683, 3 NW 181.

Minn.—Williams v. McGrade, 13 Minn. 46; Clark v. Norton, 6 Minn. 412.

Nebr.—Schars v. Brand, 27 Nebr. 94, 42 NW 906.

N. J.—Bruen v. Ogden, 11 N. J. L. 370, 20 AmD 593.

Wis.—McCarty v. Gage, 3 Wis. 404.

[89] Hawaii.—Consolidated Amusement Co., Ltd. v. Jarrett, 22 Hawaii 537.

Ill.—Schemerhorn v. Mitchell, 15 Ill. A. 418.

Mich.—Andrews v. Smith, 41 Mich. 683, 3 NW 181; Beach v. Botsford, 1 Dougl. 199, 40 AmD 45.

Minn.—Williams v. McGrade, 13 Minn. 46.

N. J.—Bruen v. Ogden, 11 N. J. L. 370, 20 AmD 593.

Utah.—Newton v. Brown, 2 Utah 126.

[a] **The rule has been limited** to cases where the levy was made upon property claimed by someone else than defendant in execution. Johnson v. Holloway, 82 Ill. 334.

[90] Wyatt v. Freeman, 4 Colo. 14; Beach v. Botsford, 1 Dougl. (Mich.) 199, 40 AmD 45.

[91] Bruen v. Ogden, 11 N. J. L. 370, 20 AmD 593 (holding, however, that this is not required where defendant in execution is plaintiff in the replevin suit).

[92] Outhouse v. Allen, 72 Ill. 529; Clay v. Caperton, 1 T. B. Mon. (Ky.) 10, 15 AmD 77.

[93] McGuire v. Galligan, 53 Mich. 453, 19 NW 142.

[94] Mo.—Clarke v. Laird, 60 Mo. A. 289; Kendall Boot, etc., Co. v. Bain, 46 Mo. A. 581.

Nebr.—Spaulding v. Overmire, 40 Nebr. 21, 58 NW 736; Hakanson v. Brodke, 36 Nebr. 42, 53 NW 1033; Gamble v. Williams, 33 Nebr. 270, 50 NW 3; Bartlett v. Cheesebrough, 32 Nebr. 339, 49 NW 360; Paxton v. Moravek, 31 Nebr. 305, 47 NW 919; Williams v. Eikenberry, 25 Nebr. 721, 41 NW 770, 13 AmSR 517, 22 Nebr. 210, 34 NW 373; Oberfelder v. Kavanaugh, 21 Nebr. 483, 32 NW 295.

N. J.—Brown v. Bissett, 21 N. J. L. 46.

Okl.—Marrinan v. Knight, 7 Okl. 419, 54 P 656.

Or.—Taylor v. Brown, 49 Or. 423, 90 P 673.

Utah.—Newton v. Brown, 2 Utah

not necessary to prove the debt of the attaching creditor, except where the property was taken from possession of plaintiff, a stranger to the attachment.[95]

[§ 220] **2. Evidence Admissible under Pleadings—a. In General.** The well-settled principle that evidence which tends to prove or disprove an issue presented by the pleadings should be admitted and that evidence of matters not put in issue by the pleadings should be excluded[96] applies in actions of replevin.[97]

Value. Although there is some authority for the proposition that no evidence of value is admissible unless the allegation of value in the petition is denied in the answer and thereby put in issue,[98] the general rule is that either or both parties may introduce evidence of the true value of the property, regardless of whether plaintiff's allegation in the petition is denied.[99] Upon an issue of use value, evidence of the use value of a different kind of property is inadmissible.[1] Value is immaterial and evidence of it is inadmissible where plaintiff has possession of the property at the time of trial and no damages are claimed.[2]

[§ 221] **b. Under Declaration, Petition, or Complaint—(1) Title or Right to Possession.** Where plaintiff alleges ownership in himself generally, without setting out the source or nature of his title, he may prove a special property entitling him to possession,[3] but having alleged absolute or sole ownership, he cannot prove a special ownership;[4] and if he has stated the nature and source of his title, he is confined in his proof to his allegations.[5] Where plaintiff must allege facts constituting his owner-

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[a] **When not put in issue by the pleadings** the rule is otherwise. Dayton v. Wyoming Nat. Bank, 1 Wyo. 263.

[95] Curtis-Baum Co. v. Lang, 83 Nebr. 728, 120 NW 178, 131 AmSR 660, 86 Nebr. 102, 125 NW 140.

[96] See Pleading § 1167.

[97] Meyer v. Bigham, 16 Ariz. 212, 141 P 726, 727 [quot Cyc]; Cope-Shanks Motor Co. v. Herzig, 33 Oh. A. 345, 169 NE 581.

[a] **Evidence held admissible.**—(1) As to nonexistence of agister's lien. Davey v. Davey, 81 Mont. 375, 263 P 415. (2) Collusion and fraud. Gevers v. Farmer, 109 Iowa 468, 80 NW 535. (3) Negativing that goods were covered by a chattel mortgage. Spiegle v. Fehr, 101 NYS 651. (4) That the property sought had been sold to defendant by plaintiff, and paid for, and was not the property sold under a second contract. Murray v. Lese, 86 NYS 581. (5) That plaintiff was not assessed for personal property taxes may be shown on an issue of ownership. Kastl v. Arthur, 135 Mich. 278, 97 NW 711. (6) The issue being whether defendant was plaintiff's bailee, he may, without pleading to that effect, prove that a stipulation in the nature of a contract in the receipt given by him was inserted without his knowledge and contrary to an oral agreement. Dee v. Sears-Nattinger Automobile Co., 141 Iowa 610, 118 NW 529, 133 AmSR 182.

[b] **Evidence held not admissible.**—Evidence of: (1) Adverse possession of land by third person, in replevin for staves cut therefrom. Rust Land, etc., Co. v. Isom, 70 Ark. 99, 66 SW 434, 91 AmSR 68. (2) Attempt of plaintiff to prosecute defendant's witness criminally. Watkins v. Crenshaw, 59 Mo. A. 183. (3) Average increase in weight cattle would have gained upon first-class feed during a certain period was immaterial under the pleadings and issues where plaintiff replevied cattle which he was pasturing in defendant's pasture on the ground that defendant agreed to sow barley to produce further pasturage but did not do so, and also alleged as special damage that, because of the poor pasturage, the cattle were greatly reduced in flesh. Bouvier v. Brass, 12 Ariz. 310, 100 P 799. (4) Breach of warranty. Michael v. Stuber, 73 Pa. Super. 390. (5) Contract in the nature of a lease, where the issue is whether property was sold to defendant outright or on condition. Norman Printers' Supply Co. v. Ford, 77 Conn. 461, 59 A 499. (6) Coverture of plaintiff. Williams v. Williams, 18 Pa. Dist. 988. (7) Damage to property between the time of demand and time of taking. Rapid Safety Filter Co. v. Wyckoff, 20 Misc. 17, 44 NYS 601. (8) Defendant's former financial standing. Mason v. Partrick, 100 Mich. 577, 59 NW 239. (9) Lien claim on property, which defendant was compelled to pay in order to get possession. Stenson v. Lancaster, 178 Mo. A. 340, 165 SW 1158. (10) Manner or conduct of the person taking the property. Flinn v. Ferry, 127 Cal. 648, 60 P 434. (11) Plaintiff's right to damages on account of a former transaction. Jessen Liquor Co. v. Phœnix Distillery Co., 171 Iowa 505, 153 NW 148. (12) Promissory note which did not appear in any manner to be connected with the note and mortgage on which plaintiff relied for his right of possession. French v. Packer, (Kan. A.) 52 P 910. (13) Property in third persons. Miller v. Darling, 22 Minn. 303. (14) Status of plaintiff as an insolvent debtor. Basford v. Mills, 6 Md. 385. (15) That plaintiff was not the real party in interest. Woods v. Berry, 7 Mont. 195, 14 P 758. (16) Where allegations in a complaint were put in issue by defendant claiming under a bill of sale, the execution of which plaintiff did not deny, a mistake on the part of plaintiff and fraud on the part of defendant by which the instrument intended to be a chattel mortgage became a bill of sale were not within the issues so as to admit proof thereof. Meyer v. Bigham, 16 Ariz. 212, 141 P 726. (17) Where articles were not in the list sued for, nor in the return as having been taken under the writ, and the answer alleged nothing as to them, they were not within the issues, so as to admit proof that they were taken under the writ. American Clay Mach. Co. v. Sedalia Brick, etc., Co., 174 Mo. A. 485, 160 SW 902. (18) Where the issue raised was confined to the title of the property replevied, evidence relating to the declaration by one of the parties, who was a bailor, with respect to the property, was properly excluded. Hayden v. McMillan, 79 Pa. Super. 1. (19) Where partnership of plaintiff is not an issue, whether plaintiffs were partners and whether one plaintiff had paid the other for his interest therein was immaterial. Coody v. Shawyer, (Tex. Civ. A.) 161 SW 935. (20) Whether shippers of milk bottles had made expenditures in reclaiming the bottles from dumping grounds was immaterial; they not being parties to suit against a railroad to replevy bottles. Kee, etc., Dairy Co. v. Pennsylvania Co., 291 Ill. 248, 126 NE 179.

[c] **Under a plea of non cepit** and property in himself, defendant will not be permitted to show that he was not in possession of the chattels at the date of the writ. McLeod v. Johnson, 96 Me. 271, 52 A 760.

[d] **A set-off** (1) cannot be given in evidence when not put in issue by the pleadings (Swing v. Sparks, 7 N. J. L. 59; Anderson v. Reynolds, 14 Serg. & R. (Pa.) 439); (2) but evidence of one is admissible when improperly pleaded, and no objection thereto has been taken by demurrer (Goslin v. Redden, 3 Del. 21).

[98] Tully v. Harloe, 35 Cal. 302, 95 AmD 102; Schmitt v. Mahoney, 60 Nebr. 20, 82 NW 99.

[99] Woodruff v. Cook, 25 Barb. (N. Y.) 505; Susquehanna Boom Co. v. Finney, 58 Pa. 200; Jenkins v. Steanka, 19 Wis. 126, 88 AmD 675.

[1] Ocala Fdy., etc., Works v. Lester, 49 Fla. 199, 38 S 51; Tillotson v. Delfelder, 40 Wyo. 283, 276 P 935, 277 P 714, 715 [quot Cyc].

[2] Foster v. Berkey, 8 Minn. 351.

[3] Crocker v. Burns, 13 Colo. A. 54, 56 P 199; Cumbey v. Lovett, 76 Minn. 227, 79 NW 99; Miller v. Adamson, 45 Minn. 99, 47 NW 452; Briedwell v. Henderson, 99 Or. 506, 195 P 575; Godwin v. Tuttle, 70 Or. 424, 141 P 1120.

[a] **Evidence held admissible.**—Chattel mortgage, and breach of condition entitled plaintiff, as mortgagee, to possession. Miller v. Adamson, 45 Minn. 99, 47 NW 452.

[4] Hall v. Johnson, 21 Colo. 414, 42 P 660; Wilson v. City Nat. Bank, 51 Nebr. 87, 70 NW 501; Randall v. Persons, 42 Nebr. 607, 60 NW 898; Musser v. King, 40 Nebr. 892, 59 NW 744, 42 AmSR 700; Hudson v. Swan, 83 N. Y. 552.

[5] Droge El. Co. v. Jackson, 193 Iowa 949, 185 NW 563; Weaver v. Lake, (Mo. A.) 4 SW (2d) 834; Shellenberger v. Hill, (Mo. A.) 216 SW 542.

[a] **Rule applied.**—(1) The buyer of a car of hay could not refuse to pay a sight draft attached to a bill of lading and bring replevin for such carload, alleging absolute ownership thereof by purchase, and detention because of a dispute as to the amount due, and recover by proving as part of the purchase price paid by him an unliquidated claim for damages for poor quality of previous shipments to him for which he had paid defendant. Droge El. Co. v. Jackson, 193 Iowa 949, 185 NW 563. (2) Having alleged his source of title as being under a

ship and the extent thereof,[6] a mere allegation of absolute ownership cannot be proved by chattel mortgage.[7] Having alleged absolute ownership, but also having set out mortgages and making it apparent that plaintiff claims under them, the mortgages are admissible.[8] A plaintiff who sues in his own name and as owner cannot introduce evidence showing title in a stranger.[9]

[§ 222] **(2) Taking, Detention, and Demand.** Under a declaration or complaint alleging either a wrongful taking or a wrongful detention, plaintiff may prove a wrongful taking,[10] a demand and refusal,[11] or any circumstances warranting the inference that demand and refusal would have been unavailing,[12] although it has been held that demand cannot be proved where not alleged.[13] Where no distinction is recognized between replevin for taking and replevin for detention, plaintiff may prove either taking or detention.[14] Plaintiff may introduce evidence of a wrongful and forcible taking even under issues of property.[15]

Place of taking. An argumentative allegation of the place of taking in the declaration, when not demurred to, authorizes the admission of evidence to sustain it.[16] A declaration in the detinet does not estop plaintiff from showing a taking in a county different from that in which the suit is brought.[17]

Taking under process. A claim that property exempt therefrom was taken under execution cannot be proved by plaintiff when by his pleading he has negatived a taking under process.[18]

[§ 223] **(3) Value.** Where the use value of the property must be specially pleaded,[19] evidence of the use value is inadmissible where it is not so pleaded.[20]

[§ 224] **(4) Fraud.** Under a general allegation of property, plaintiff may give evidence of facts showing defendant's fraud in obtaining possession of the property.[21] Under allegations in a declaration or complaint negativing the validity of a contract of exchange upon which defendant relies, plaintiff may introduce evidence of fraud of defendant inducing plaintiff to make the contract.[22]

[§ 225] **c. Under Plea or Answer—(1) In General—(a) Property in Defendant.** Under a general plea of property in defendant any legal title may be proved,[23] and defendant may prove a joint ownership in himself and plaintiff,[24] or a mortgage to himself from the owner of the property.[25] Under a plea of special ownership defendant cannot introduce evidence to show he is absolute owner.[26] A plea of absolute property in defendant does not prevent him from showing a special property in mitigation of damages.[27] Under a specific denial of plaintiff's title or right to possession, defendant may show a right to possession in himself by virtue of a pledge.[28] An answer alleging a lien, without pleading the facts constituting a special lien, is nevertheless sufficient to admit evidence of a special agreement amounting to a pledge.[29] Under a plea of property in defendant, the record of a prior replevin suit is admissible.[30]

Intervener, having pleaded ownership, cannot rely on possession under a lien or pledge.[31]

Damages. An answer which denies plaintiff's ownership, alleges the value of the property, and claims damages for plaintiff's willful, malicious seizure of property is sufficient to admit proof of both actual and punitive damages.[32]

[§ 226] **(b) Property in Stranger.** Title in a third person may be shown by defendant under a plea setting up such fact,[33] or under a plea or an-

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bill of sale, plaintiff cannot prove an equitable lien. Weaver v. Lake, (Mo. A.) 4 SW (2d) 834. (3) Evidence that plaintiff purchased property from a certain person is inadmissible where his pleadings deny that such person ever owned the property. Simonds v. Wrightman, 36 Or. 120, 58 P 1100.

[6] See supra §§ 179, 180.

[7] Kern v. Wilson, 73 Iowa 490, 35 NW 594.

[8] Darnall v. Bennett, 98 Iowa 410, 67 NW 273.

[9] Ash v. Mathes, 52 Mich. 615, 18 NW 384; Howland v. Fuller, 8 Minn. 50.

[10] Paul v. Luttrell, 1 Colo. 317; Oleson v. Merrill, 20 Wis. 462, 91 AmD 428.

[11] Paul v. Luttrell, 1 Colo. 317; Simser v. Cowan, 56 Barb. (N. Y.) 395; Oleson v. Merrill, 20 Wis. 462, 91 AmD 428.

[12] Paul v. Luttrell, 1 Colo. 317; Oleson v. Merrill, 20 Wis. 462, 91 AmD 428.

[13] Cumiskey v. Lewis, 15 NYSt 364.

[14] Trudo v. Anderson, 10 Mich. 357, 81 AmD 795.

[15] Moore v. Shenk, 3 Pa. 13, 45 AmD 618.

[16] Moorhouse v. Donaca, 14 Or. 430, 13 P 112.

[17] Craig v. Grant, 6 Mich. 447.

[18] Eikenbary v. Clifford, 34 Nebr. 607, 52 NW 377.

[19] See supra § 183.

[20] Ferguson v. Hogan, 25 Minn. 135.

[21] Benesch v. Waggner, 12 Colo. 534, 21 P 706, 13 AmSR 254; Stone v. Barrett, 34 Mo. A. 15; Pekin Plow Co. v. Wilson, 66 Nebr. 115, 92 NW 176; Phenix Iron Works Co. v. McEvony, 47 Nebr. 228, 66 NW 290, 53 AmSR 527.

[22] Nolan v. Jones, 53 Iowa 387, 5 NW 572.

[23] O'Connor v. Union Line Transp. Co., 31 Ill. 230.

[a] **Rule applied.**—(1) Defendant who has for his second plea pleaded property in himself, and for his third plea that he bought the property at an execution sale, is not precluded by his third plea from proving under his second plea any legal title no matter how derived. O'Connor v. Union Line Transp. Co., 31 Ill. 230. (2) Defendant claiming right of possession prior to action was not required to prove claim under title distinct from plaintiff's, although his answer asserted title derived from a different source from that of plaintiff and evidence showed same source. Kenny v. Christianson, 200 Cal. 419, 253 P 715, 50 ALR 1297.

[24] Hunt v. Chambers, 21 N. J. L. 620.

[25] Whitcher v. Shattuck, 3 Allen (Mass.) 319.

[26] International Bank v. Bowser, 33 Okl. 316, 125 P 458, 459 [quot Cyc].

[27] Collins v. Bellefonte Cent. R. Co., 171 Pa. 243, 33 A 331.

[28] Verry v. Small, 16 Gray (Mass.) 121.

[29] Davis v. Morgan Fdy. Co. (Mo. A.) 23 SW (2d) 231.

[30] Lowry v. Hall, 2 Watts & S. (Pa.) 129, 38 AmD 495.

[31] Benish v. Jones, 68 Colo. 484, 190 P 538.

[32] Sizer v. Dopson, 89 S. C. 535, 72 SE 464.

[33] Ingle v. Wallach, 1 Black (U. S.) 96, 17 L. ed. 50; Levy v. Hohweisner, 101 App. Div. 82, 91 NYS 552.

[a] **Rule applied.**—Where defendants in replevin in the municipal court filed an answer alleging title in a third person, they were entitled to offer evidence thereof, and to call the person so alleged to have title as a witness, irrespective of the fact that the latter had not availed himself of Municipal Court Act, § 115a (L. [1903] p 1016 c 431), authorizing a person not a party to the action, claiming the right to the possession of the chattel, to obtain an order per-

swer denying plaintiff's title;[34] and evidence of the manner in which such person acquired title is admissible.[35] A defendant who has pleaded title in a particular third person will not be permitted to show title in another person.[36] Where a plea of property in a third person is merely a matter of inducement to a denial of plaintiff's right of property, testimony to show property in such third person is immaterial.[37] Under an answer denying allegations of ownership in plaintiff on and after a certain date, evidence is inadmissible to show that plaintiff parted with possession prior to that date.[38]

[§ 227] **(c) Return of Property.** Under a plea of non detinet defendant may show that before suit was brought he returned the goods.[39]

[§ 228] **(d) Taking under Process.** Where defendant justifies his taking under process, the judgment and proceedings in the suit in which the process issued are admissible,[40] unless the proper foundation therefor has not been laid in the plea or answer,[41] and evidence of a taking by virtue of an execution is admissible.[42] A void writ cannot be introduced in evidence.[43] Where the answer alleges the taking of the property as stolen goods under a warrant of arrest, defendant may testify that he was an officer, that he took the property under the belief that it was stolen, and he detains it by direction of the magistrate.[44] Where defendant justifies under an attachment, proof that the levy was excessive cannot avail plaintiff where he does not allege an excessive levy in his complaint.[45]

Taking from defendant by sheriff under process in another action may be proved by defendants under an answer so alleging, to establish the defense that the property was seized under a right paramount to plaintiff's.[46]

[§ 229] **(e) Fraud.** Where fraud is specially pleaded by defendant, evidence tending to show fraud is competent,[47] and, while it has been held that fraud must be specially pleaded before evidence of it is admissible,[48] it has been held in most jurisdictions that under denials of ownership and right to possession, defendant may show that the right of plaintiff is based on fraud.[49]

[§ 230] **(2) Under General Issue or General Denial—(a) In General.** In accordance with the general rule,[50] it has been held that, in an action of replevin, a general denial puts in issue all the material allegations in the complaint, and that under it defendant may give in evidence any matter that tends to contradict and defeat plaintiff's claim.[51]

Evidence of special damage is inadmissible un-

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mitting him to appear and defend. Levy v. Hohweisner, 101 App. Div. 82, 91 NYS 552.

[b] **Under Indiana statute** (1835), title in a stranger may be proved without pleading it by a defendant in an action of replevin commenced before a justice of the peace and taken by appeal to the circuit court. Lewis v. Masters, 6 Blackf. (Ind.) 243 (holding that, although the law is not represented in Rev. St. (1838), it has not been repealed).

34. Schulenberg v. Harriman, 21 Wall. (U. S.) 44, 22 L. ed. 551; Driscoll v. Dunwoody, 7 Mont. 394, 16 P 726.

35. Lamotte v. Wisner, 51 Md. 543.

36. McClung v. Bergfeld, 4 Minn. 148.

37. Rosengren v. Manufacturers' Nat. Bank, 220 Ill. A. 608.

38. Dillery v. Borwick, 36 Or. 255, 59 P 183.

39. Paul v. Luttrell, 1 Colo. 317.

40. Gavigan v. Scott, 51 Mich. 373, 16 NW 769; Hines v. Chambers, 29 Minn. 7, 11 NW 129.

41. Taylor v. Brown, 49 Or. 423, 90 P 673.

42. Johnson v. Sommers, 3 Ill. A. 55.

43. Wheaton v. Thompson, 20 Minn. 196.

44. Murray v. Lyon, (Tex. Civ. A.) 95 SW 621.

45. Sexey v. Adkison, 40 Cal. 408.

46. Segars v. Segars, 82 S. C. 196, 63 SE 891.

47. Owen v. Mulkey, (Ark.) 106 SW 937; Gervers v. Farmer, 109 Iowa 468, 80 NW 535; Taylor v. Rice, 1 N. D. 72, 44 NW 1017.

48. Gray v. Earl, 13 Iowa 188; Newell v. Hayden, 8 Iowa 140; Bickle v. Irvine, 9 Mont. 251, 23 P 244; Sapp v. Hartford F. & M. Ins. Co., 86 Okl. 87, 206 P 814; Palmer-Haworth Logging Co. v. Henderson, 90 Or. 192, 174 P 531; Sabin v. Chrisman, 79 Or. 191, 154 P 908; Coos Bay, etc., R., etc., Nav. Co. v. Siglin, 26 Or. 387, 38 P 192.

49. Ill.—Piner v. Cover, 55 Ill. 391.

Ky.—Stephens v. Frazier, 2 B. Mon. 250.

Mass.—Quincy v. Hall, 1 Pick. 357, 11 AmD 198 (such evidence is admissible under a plea of property in a stranger).

Minn.—Kenney v. Goergen, 36 Minn. 190, 31 NW 210; Furman v. Tenny, 28 Minn. 77, 9 NW 172; Tupper v. Thompson, 26 Minn. 385, 4 NW 621.

Nebr.—Gandy v. Pool, 14 Nebr. 98, 15 NW 223 (such evidence is admissible under a denial of unlawful detention).

N. Y.—Levin v. Russell, 42 N. Y. 251.

Oh.—Nenbrand v. Myres, 7 Oh. Dec. (Reprint) 315, 2 CincLBul 97.

Utah.—Munns v. Loveland, 15 Utah 250, 49 P 743; Jones v. McQueen, 13 Utah 178, 45 P 202.

[a] **Reason for rule.**—"This rule is doubtless based on the fact that in replevin the plaintiff is not bound to disclose any source of title, and therefore the defendant is not bound to anticipate the source of title under which the plaintiff may claim." Jones v. McQueen, 13 Utah 178, 185, 45 P 202 [quot Munns v. Loveland, 15 Utah 250, 49 P 743].

50. See Pleading § 1182.

51. Kan.—Dewey v. Bobbitt, 79 Kan. 505, 100 P 77; Street v. Morgan, 64 Kan. 85, 67 P 448; White v. Gemeny, 47 Kan. 741, 28 P 1011, 27 AmSR 320; Bailey v. Bayne, 20 Kan. 657; Shadduck v. Stotts, 9 Kan. A. 776, 59 P 39 [aff 61 P 1131].

Mo.—Gibson v. Mozier, 9 Mo. 256; Advance Thresher Co. v. Pierce, 74 Mo. A. 676.

Mont.—Kaufman v. Cooper, 38 Mont. 6, 98 P 504, 1135; Gallick v. Bordeaux, 22 Mont. 470, 56 P 961.

Nebr.—Schmitt, etc., Co. v. Mahoney, 60 Nebr. 20, 82 NW 99; Davis v. Culver, 58 Nebr. 265, 78 NW 504; Johnston v. Milwaukee, etc., Inv. Co., 49 Nebr. 68, 68 NW 383; Merrill v. Wedgwood, 25 Nebr. 283, 41 NW 149; Richardson v. Steele, 9 Nebr. 483, 4 NW 83.

Okl.—Broyles v. McInteer, 29 Okl. 767, 120 P 283; Sallisaw First Nat. Bank v. Barbour, 21 Okl. 237, 95 P 790.

Wash.—State v. Ronald, 134 Wash. 152, 235 P 21.

[a] **Evidence of estoppel** is admissible under a general denial. Towne v. Sparks, 23 Nebr. 142, 36 NW 375.

[b] **Evidence of absence of a demand** is admissible under a general denial. Burckwalter v. Mitchell, 27 S. C. 240, 3 SE 225.

[c] **Evidence held inadmissible.**—In an action to recover a bank note assigned to plaintiff by one accused of obtaining money by false pretenses, where only defenses pleaded were general denial and that the note belonged to persons whom accused had defrauded, and undisputed evidence shows it belongs to accused, evidence of whether assignment was in good faith is inadmissible. Hickey v. Coffey, 85 Or. 383, 166 P 959.

[d] **In Idaho** it is held that a special denial has the same effect as a general denial. Idaho Placer Min. Co. v. Green, 14 Ida. 249, 93 P 954.

[e] **Matter changing issues.**—In replevin aided by claim and delivery in which defendant pleaded a general denial, the action of the court in permitting defendant, without supplemental pleadings, to prove a recovery for the conversion of the goods by plaintiff pending the action was error. Gold Bros. Security Co. v. Hanken, 45 S. D. 363, 187 NW 636.

[f] **Plaintiff under a general denial** is entitled to the benefit of any evidence tending to show that the intervener, pleading ownership, did not

der the general issue.[52]

[§ 231] **(b) Title and Right to Possession.** Under a general denial defendant may introduce any evidence showing want of title or right of possession in plaintiff,[53] notwithstanding defendant may have attempted to allege additional affirmative defenses.[54] Thus under a general denial, defendant may show title or right to possession in himself,[55] as by an agister's lien;[56] although it has been held that a special interest in defendant must be specially pleaded, and it cannot be shown under general denial.[57] Likewise under a general denial, defendant may show title in a third person.[58] Other illustrations of evidence admissible under the general denial, so as to dispute plaintiff's claim of title or right to possession, may be found in the notes below.[59] So any such evidence is admissible under the

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own the property. Benish v. Jones, 68 Colo. 484, 190 P 538.

52. Bateman v. Blake, 81 Mich. 227, 45 NW 831.

53. Fla.—Stokes v. Humphries, 69 Fla. 468, 68 S 448.

Ind.—Stultz v. Miltenburger, 176 Ind. 561, 96 NE 581; Jackson v. Morgan, 167 Ind. 528, 78 NE 633; People's State Bank v. Hall, 83 Ind. A. 385, 148 NE 486.

Kan.—Woods County Union Bank v. Shore, 87 Kan. 140, 123 P 880.

Mass.—Spooner v. Cummings, 151 Mass. 313, 23 NE 839.

Minn.—Bradshaw v. Langum, 141 Minn. 39, 169 NW 148; Cumbey v. Lovett, 76 Minn. 227, 79 NW 99; Aultman, etc., Co. v. O'Dowd, 73 Minn. 58, 75 NW 756, 72 AmSR 603.

Mo.—Advance Thresher Co. v. Pierce, 74 Mo. A. 676; Pugh v. Williamson, 61 Mo. A. 165.

Mont.—Hickey v. Breen, 40 Mont. 368, 106 P 881, 20 AnnCas 429.

Nebr.—Aultman v. Stichler, 21 Nebr. 72, 31 NW 241.

N. Y.—Griffin v. Long Island R. Co., 101 N. Y. 348, 4 NE 740; Haft v. Schmeltzer, 228 App. Div. 506, 240 NYS 247.

N. D.—Plano Mfg. Co. v. Daley, 6 N. D. 330, 70 NW 277.

Okl.—Wilson Motor Co. v. Dunn, 129 Okl. 211, 264 P 194; Thompson v. Grove, 72 Okl. 290, 180 P 553; French v. Brown, 73 Okl. 32, 174 P 748; Williams v. Gibson Bros., 60 Okl. 147, 159 P 649; Francis v. Guaranty State Bank, 44 Okl. 446, 145 P 324; De Hart Oil Co. v. Smith, 42 Okl. 201, 140 P 1154.

Wash.—State v. Ronald, 134 Wash. 152, 235 P 21.

[a] **Where general issue is only plea allowed** in replevin for property covered by a trust deed, evidence that the trust deed had been extinguished by payment, or was invalid, is admissible. Munn v. Potter, 111 Miss. 180, 71 S 315.

[b] **Rule applied.**—(1) Under a general denial defendant may prove that a chattel mortgage relied on by plaintiff is void under the law of the state where made, without pleading it. Woods County Union Bank v. Shore, 87 Kan. 140, 123 P 880. (2) Where plaintiff alleges ownership generally, defendant need not allege that the bill of sale under which plaintiff claims is only a mortgage in order to introduce evidence to that effect. Francis v. Guaranty State Bank, 44 Okl. 446, 145 P 324. (3) Special plea claiming under sale from plaintiff's alleged vendee may be abandoned and matter proved under general denial. Kaufman v. Cooper, 38 Mont. 6, 98 P 504, 1135.

[c] **Title in others besides plaintiff** may be taken advantage of under general denial. Upham v. Allen, 76 Mo. A. 206 (holding that, where the evidence shows title in a plaintiff in replevin and others not parties, plaintiff cannot recover).

54. French v. Brown, 73 Okl. 32, 174 P 748.

55. Ida.—Lindsay v. Wyatt, 1 Ida. 738.

Ind.—May v. Pavey, 63 Ind. 4; Sparks v. Heritage, 45 Ind. 66; Louchheim v. Gill, 17 Ind. 139.

Minn.—Cumbey v. Lovett, 76 Minn. 227, 79 NW 99; Aultman, etc., Co. v. O'Dowd, 73 Minn. 58, 75 NW 756, 72 AmSR 603.

Mont.—Kaufman v. Cooper, 38 Mont. 6, 98 P 504, 1135.

Nebr.—Schmitt, etc., Co. v. Mahoney, 60 Nebr. 20, 82 NW 99.

N. Y.—Griffin v. Long Island R. Co., 101 N. Y. 348, 4 NE 740; Oakland Mfg. Co. v. F. C. Linde Co., 162 App. Div. 543, 147 NYS 1045.

Okl.—Francis v. Guaranty State Bank, 44 Okl. 446, 145 P 324.

S. D.—Pitts Agricultural Works v. Young, 6 S. D. 557, 62 NW 432.

Wash.—Harvey v. Ivory, 35 Wash. 397, 77 P 725.

Wis.—Delaney v. Canning, 52 Wis. 266, 8 NW 897; Timp v. Dockham, 32 Wis. 146.

Wyo.—Farm, etc., Loan Co. v. Faulkner, 34 Wyo. 199, 242 P 415, 418 [cit Cyc].

[a] **Thus** where defendant has answered by general and specific denials, a certified copy of a chattel mortgage is admissible, it having previously appeared that defendant held possession as agent of the mortgagee, notwithstanding defendant averred ownership in himself. King v. Lacrosse, 42 Minn. 488, 44 NW 517.

[b] **Defendant may rely upon several titles,** such as tax titles, or other titles. Farm, etc., Loan Co. v. Faulkner, 34 Wyo. 199, 242 P 415.

56. Anthony v. Carp, 90 Mo. A. 387.

57. Mason Tires Sales Co. v. Mason Tire, etc., Co., 73 Colo. 42, 213 P 117; Guille v. Fook, 13 Or. 577, 11 P 277.

58. Ala.—Wright v. Bush, 165 Ala. 320, 51 S 635.

Ind.—Kennedy v. Shaw, 38 Ind. 474.

Minn.—Cumbey v. Lovett, 76 Minn. 227, 79 NW 99; Aultman, etc., Co. v. O'Dowd, 73 Minn. 58, 75 NW 756, 72 AmSR 603.

Nebr.—Richardson v. Steele, 9 Nebr. 483, 4 NW 83.

N. Y.—Siedenbach v. Riley, 111 N. Y. 560, 19 NE 275; Griffin v. Long Island R. Co., 101 N. Y. 348, 4 NE 740; Judge v. Continental Bank, 216 App. Div. 818, 215 NYS 624; Oakland Mfg. Co. v. F. C. Linde Co., 162 App. Div. 543, 147 NYS 1045; Jacob v. Haeflein, 60 App. Div. 533, 69 NYS 1034; Stearns v. Early, 49 Misc. 614, 96 NYS 837.

Okl.—McLaughlin v. Dugan, 66 Okl. 28, 166 P 1069; Francis v. Guaranty State Bank, 44 Okl. 446, 145 P 324.

S. D.—Pitts Agricultural Works v. Young, 6 S. D. 557, 62 NW 432.

Wash.—Chamberlin v. Winn, 1 Wash. 501, 20 P 780, 1 Wash. 259, 24 P 446.

Wis.—Delaney v. Canning, 52 Wis. 266, 8 NW 897; Timp v. Dockham, 32 Wis. 146.

[a] **Rule applied.**—Excluding defendant's evidence of an outstanding title in a third person under the general issue is error, although defendant did not connect himself therewith, where plaintiff relies solely upon title. Wright v. Bush, 165 Ala. 320, 51 S 635.

[b] **In justice's court** defendant could prove property in himself or a stranger under the general issue, and as the legislature has enlarged the defense under the general issue, the fact of property in a stranger is admissible without pleading it. Hall v. Henline, 9 Ind. 256; Lewis v. Masters, 6 Blackf. 243.

[c] **Evidence of joint ownership** by plaintiff and a third person is admissible under a general denial. Pulliam v. Burlingame, 81 Mo. 111, 51 AmR 229.

59. [a] **Evidence held admissible:** (1) A waiver of right to possession by plaintiff. Timberlake v. McArthur, 6 Oh. Dec. (Reprint) 925, 8 AmLRec 713. (2) Concealment of terms of mortgage from defendant, who could not read. Plano Mfg. Co. v. Person, 12 S. D. 448, 81 NW 897. (3) Fraud. Smith v. Brockett, 69 Conn. 492, 38 A 57; Cornwall v. Mix, 3 Ida. 687, 34 P 893; Young v. Glascock, 79 Mo. 574; Greenway v. James, 34 Mo. 326; Stern Auction, etc., Co. v. Mason, 16 Mo. A. 473. (4) Fraudulent assignment to plaintiff. Holmberg v. Dean, 21 Kan. 73. (5) Ratification by plaintiff of an unauthorized sale by an agent. Curnane v. Scheidel, 70 Conn. 13, 38 A 875. (6) Sale to plaintiff, and subsequent mortgage and refusal of plaintiff to accept goods. Deford v. Hutchinson, 45 Kan. 332, 26 P 60 [mod 45 Kan. 318, 25 P 641, 11 LRA 257]. (7) That contract upon which plaintiff's right is based never was in effect. Lane v. O'Toole, 8 N. D. 210, 78 NW 77. (8) That plaintiff parted with the ownership and right of possession before commencement of the action. Ely v. Holloway, 95 Kan. 8, 147 P 1128. (9) That defendant bought the property from plaintiff's husband, and that plaintiff authorized or ratified the sale. Wylie v. Marinofsky, 201 Mass. 583, 88 NE 448. (10) That plaintiff's claim of right to possession was made in collusion with another, to defraud the defendant. Warner v. Carter, 109 Kan. 285, 198 P 960. (11) That plaintiff had parted with title. Jackson v. Frier, 146 S. C. 322, 144 SE 66. (12) That the property was deposited as a pledge. Tolbert v. Fouché, 118 S. C. 141, 110 SE 115. (13) That the mortgage under which plaintiff claimed statutory pleas of non detinet,[60] or not guilty;[61] but where defendant pleads the general issue of non cepit, he thereby puts in issue only the unlawful taking, and is precluded from showing title in himself,[62] or in a third person.[63]

Denial to cross complaint which alleges a right of possession, entitles the person so denying to prove a right to possession in himself.[64]

[§ 232] **(c) Taking, Detention, and Possession.** Under a general denial defendant may show that his detention of the property is rightful.[65] While it has been held that, in an action against an officer, a justification of the taking and detention as being under execution, attachment, or other process must be specially pleaded,[66] and cannot be shown under the general issue,[67] the weight of authority is that defendant may justify the taking or detention of the property or show his right to the possession thereof by virtue of such process under a general denial;[68] but that matter in justification or excuse cannot be shown under the common-law general issue of non cepit,[69] unless a notice of such special defense is annexed to the plea.[70] Under the general issue defendant may show that he was not in possession at the commencement of the action.[71]

[§ 233] **(3) Under Avowry or Cognizance and Plea Thereto.** Where defendant has avowed for rent and the issue no rent in arrear has been raised, plaintiff may prove tender by his assignee,[72] or fraud in inducing him to lease his own premises from defendant,[73] but he cannot show himself to be a stranger to the lease,[74] or that prior to the rent becoming in arrear he purchased the premises,[75] nor can he show that defendant had nothing in the tenements.[76] Upon failure of plaintiff to traverse an allegation in an avowry of the place of taking, it becomes immaterial, and a taking in another place than that alleged may be shown.[77] Fraud may be proved by defendant, even though he does not set forth in his avowry the facts constituting the fraud,[78] and he may disprove, without filing a counter affidavit, an account sworn to and attached to the declaration.[79]

[§ 234] **(4) Reply.** Where defendant justifies on ground of a lien, and plaintiff replies that by de-

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possession was obtained by duress, or was without consideration. Iowa Sav. Bank v. Frink, 1 Nebr. (Unoff.) 14, 26, 92 NW 916. (14) That the sale, upon which plaintiff bases his title and right to possession, was absolutely void. Israel v. Day, 17 Colo. A. 200, 68 P 122 (no delivery and actual change of possession); Shipman Coal Min., etc., Co. v. Pfeiffer, 11 Ind. A. 445, 39 NE 291; Merrill v. Wedgwood, 25 Nebr. 283, 41 NW 149. (15) Transfer in fraud of creditors. Pan-American Amusement Co. v. Maguire, 142 Fed. 126, 73 CCA 344. (16) Where vendor of land, with lien on crops, brings action of claim and delivery, and sheriff takes possession of grain, and vendor's evidence shows that it is identical grain grown upon land, defendant may show contrary, thereby broadening issue beyond mere question of title and right to possession. Bentler v. Brynjolfson, 38 N. D. 401, 165 NW 553.

[60] Coverlee v. Warner, 19 Oh. 29; Kelley v. Blakeley, 2 Oh. Dec. (Reprint) 251, 2 WestLMonth 151 [aff 2 Oh. Dec. (Reprint) 378, 2 WestL Month 550 (disappr Shur v. Statler, 2 Oh. Dec. (Reprint) 70, 1 WestL Month 317)].

[61] Delco Light Co. v. John Le Roy Hutchinson Properties, 99 Fla. 410, 128 S 831; Richbourg v. Rose, 53 Fla. 173, 44 S 69, 125 AmSR 1061; Webster v. Brunswick-Balke-Callender Co., 37 Fla. 433, 20 S 536; Holliday v. McKinne, 22 Fla. 153; Scudder v. Worster, 11 Cush. (Mass.) 573; Miller v. Sleeper, 4 Cush. (Mass.) 369; Singer Mfg. Co. v. Benjamin, 55 Mich. 330, 21 NW 358, 23 NW 25; Loomis v. Foster, 1 Mich. 165; Gibson v. Mozier, 9 Mo. 256. But see Williams v. Hampton, 57 Fla. 272, 49 S 506 (holding that the plea of not guilty only puts in issue plaintiff's right to possession, and the wrongful detention thereof, and defendant cannot show under that plea that at the time of the conditional sale to him plaintiff made promises, not contained in the written contract).

[a] **Evidence held admissible.**—Defendant may show incapacity to enter into contract which is basis of action. Bell v. Smith, 155 Miss. 227, 124 S 331.

[62] U. S.—Dickson v. Mathers, 7 F. Cas. No. 3,898a, Hempst. 65.

Ark.—Ringo v. Field, 6 Ark. 43.

N. C.—Rowland v. Mann, 28 N. C. 38.

Pa.—Wiley v. McGrath, 194 Pa. 498, 45 A 331, 75 AmSR 709.

Wis.—Douglass v. Garrett, 5 Wis. 85.

[63] Ark.—Ringo v. Field, 6 Ark. 43; Wilson v. Royston, 2 Ark. 315.

Ill.—Galusha v. Butterfield, 3 Ill. 227.

Ind.—Trotter v. Taylor, 5 Blackf. 431.

Ky.—Harper v. Baker, 3 T. B. Mon. 421, 16 AmD 112.

Me.—Vickery v. Sherburne, 20 Me. 34.

Ont.—Fitzpatrick v. Casselman, 29 U. C. Q. B. 5.

[64] Summerville v. Stockton Milling Co., 142 Cal. 529, 76 P 243.

[65] Yandle v. Crane, 13 Kan. 344; Towne v. Sparks, 23 Nebr. 142, 36 NW 375; Payne v. McCormick Harvesting Mach. Co., 11 Okl. 318, 66 P 287.

[a] **The Connecticut statute** makes the filing of a disclaimer a condition precedent to the right of defendant, under a general denial, to claim or offer evidence to prove that he did not wrongfully detain the chattels described in the declaration. McNamara v. Lyon, 69 Conn. 447, 37 A 981 (where no disclaimer is filed, defendant may be found to have wrongfully detained property).

[66] Daniel v. Hardwick, 88 Ala. 557, 7 S 188; Snell v. Crowe, 3 Utah 26, 5 P 522.

[67] Daniel v. Hardwick, 88 Ala. 557, 7 S 188.

[68] Colo.—Burchinell v. Butters, 7 Colo. A. 294, 43 P 459.

Ind.—Branch v. Wiseman, 51 Ind. 1.

Kan.—Wester v. Long, 63 Kan. 876, 66 P 1032; White v. Gemeny, 47 Kan. 741, 28 P 1011, 27 AmSR 320.

Mich.—Snook v. Davis, 6 Mich. 156.

Mo.—Young v. Glascock, 79 Mo. 574; Bosse v. Thomas, 3 Mo. A. 472.

Nebr.—Horkey v. Kendall, 53 Nebr. 522, 73 NW 953, 68 AmSR 623; Best v. Stewart, 48 Nebr. 859, 67 NW 881; Cool v. Roche, 15 Nebr. 24, 17 NW 119.

Oh.—Bailey v. Swain, 45 Oh. St. 657, 16 NE 370; Oakes v. Wyatt, 10 Oh. 344; Moravec v. Buckley, 9 Oh. Dec. (Reprint) 226, 11 CincLBul 225.

S. D.—Conner v. Knott, 8 S. D. 304, 66 NW 461.

Eng.—Mellor v. Leather, 1 E. & B. 619, 72 ECL 619, 118 Reprint 569.

[a] **But in replevin for animals impounded** defendant can justify only under an avowry setting forth the facts relied on, and not under the statutory plea of not guilty. Howard v. Black, 49 Vt. 9.

[b] **Thus** an officer may prove the attachments under a general denial, and, although he adds to the general denial a special plea of one attachment, he may nevertheless prove other attachments. Horkey v. Kendall, 53 Nebr. 522, 73 NW 953, 68 AmSR 623.

[69] Carroll v. Harris, 19 Ark. 237; Hopkins v. Burney, 2 Fla. 42; McFarland v. Barker, 1 Mass. 153; Ely v. Ehle, 3 N. Y. 506.

[a] **Statutes allowing evidence of matters of excuse** and justification to be shown under the general issue do not apply to actions of replevin where the general issue of non cepit is pleaded. Holmes v. Wood, 6 Mass. 1.

[70] Martin v. Watson, 8 Wis. 315. But see Coon v. Congdon, 12 Wend. (N. Y.) 496 (holding such notice to be unnecessary by virtue of a statutory provision).

[71] Wright v. Bush, 165 Ala. 320, 51 S 635.

[72] Lyon v. Houk, 9 Watts (Pa.) 193.

[73] Robins v. Kitchen, 8 Watts (Pa.) 390.

[74] Kensil v. Chambers, 5 Phila. (Pa.) 64.

[75] Hill v. Miller, 5 Serg. & R. (Pa.) 355.

[76] White v. Cross, 29 F. Cas. No. 17,546, 2 Cranch C. C. 17.

[77] Gardner v. Humphrey, 10 Johns. (N. Y.) 53.

[78] Bliss v. Badger, 36 Vt. 338.

[79] Sprouse v. Davis, 141 Miss. 564, 106 S 824.

fendant's negligence fire has destroyed an amount of the property equal in value to the amount of the lien, evidence of the loss is admissible.[80] Where plaintiff admits in his reply the execution of a written instrument upon which defendant relies for title, but alleges insanity of one of the executing parties, evidence of such insanity is admissible.[81]

[§ 235] **3. Variance.** In replevin as in other civil actions,[82] a material variance between the pleading and proof is fatal,[83] although a slight or immaterial variance may be disregarded,[84] or may be corrected by amendment.[85]

Description of property. A material variance between allegations and proof, as to description of the property, is fatal;[86] but a slight discrepancy is not.[87]

Ownership of property. There is no variance between an allegation of ownership and proof from which ownership can be inferred.[88] Having pleaded special ownership, plaintiff cannot prove general ownership,[89] but where plaintiff has alleged ownership generally, proof of a special ownership is no variance.[90] An allegation of general or absolute ownership cannot be proved by evidence of a mortgage.[91] The variance is fatal between plaintiff's claim by virtue of a chattel mortgage, and proof of his right under another agreement,[92] or between allegations of ownership and proof of a chattel mortgage, not yet due.[93] Proof of joint ownership of plaintiff and defendant does not sustain plaintiff's allegation of ownership and right to exclusive possession.[94] Where the action is brought by partners, and the proof shows property is in one of them only, the variance is fatal.[95] There is no fatal variance between a statement in the notice given by claimant to the sheriff that the goods attached were the property of the claimant, and proof that he was a pledgee.[96]

Property in third person. Where defendant alleges ownership in himself, he cannot show property in a third person.[97]

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[80] Babb v. Talcott, 47 Mo. 343.

[81] St. John State Bank v. Norduff, 2 Kan. A. 55, 43 P 312.

[82] See Pleading §§ 1187–1211.

[83] See cases infra this note.

[a] **Variance held fatal.**—(1) Allegations of wrongful caption and proof of wrongful detention only. Lothrop v. Locke, 59 N. H. 532. (2) Allegations that defendant was in possession, and proof that he was not. Davis v. Randolph, 3 Mo. A. 454. (3) Allegations claiming one piece of property, and proof of right to another. Higashi v. Verstandig, 122 Wash. 265, 210 P 353.

[b] **Matters held not variance.**—(1) The contention that defendants set up title under a contract made in 1911 and undertook to prove title under a contract made in 1912 was not ground for reversal, where both contracts were alleged, with the further allegation that the property was a part of that purchased by the 1912 contract. Chalmers v. J. R., etc., Bowen, 112 Ark. 63, 164 SW 1131. (2) In replevin to recover a note negotiated to defendant bank by plaintiff's agent, proof that plaintiff subsequently ratified the unauthorized act of the agent in taking the note in payment of others was proof of the allegation that on the date of the note he was its owner, and not a variance, since in ratifying the act he adopted it as of the date of the act. Miller v. People's Sav. Bank, 193 Mo. A. 498, 186 SW 547.

[84] Andrews v. Grimes, 148 N. C. 437, 62 SE 519.

[a] **Variance held immaterial:** (1) That replevin was brought against an officer in his individual name, and evidence that he acted in an official capacity under process in seizing the property in controversy. Mann v. Ridenhour, 46 Okl. 565, 149 P 124. (2) Indefinite allegation that property was taken under and by virtue of attachments in certain suits, and proof by introducing the attachments. Blackman v. Wheaton, 13 Minn. 326. (3) Variance between an averment that the pledgor of a stock certificate to defendant was a trustee, and proof that he wrongfully obtained possession of the stock. State Nat. Bank v. Scales, 60 Okl. 225, 159 P 925. (4) Variance between allegations that plaintiff let out the sheep to defendant, to be held on shares and to be returned on demand, and the proof that defendant, acting as plaintiff's agent, delivered the sheep to third persons on partido contracts where ownership of plaintiff, and taking by defendant, was proved. Clay, etc., Co. v. Martinez, 74 Colo. 10, 218 P 903. (5) Where hay in dispute was described as being in stacks on the north tier of 40's in section 21, and evidence tending to show that it was located on the south portion of section 16, which adjoins section 21 on the north. Hickman v. Jones, 106 Nebr. 466, 183 NW 980. (6) Discrepancy between allegations and proof as to the amount of a note secured by mortgage under which plaintiff claims. Shantz v. Shriner, 167 Mo. 635, 150 SW 727.

[85] Andrews v. Grimes, 148 N. C. 437, 62 SE 519.

Amendment to conform to proof see supra § 203.

[86] Taylor v. Riddle, 35 Ill. 567; Hartford F. Ins. Co. v. Stevens, 123 Me. 368, 123 A 38.

[87] Alexander v. Harris, 4 Cranch 299, 2 L. ed. 627; Tsuruda v. Farm, 18 Hawaii 434; Boyle v. Miller, 93 Ill. A. 627.

[a] **Variance held not fatal.**—(1) Allegations of the weight of a diamond to be two and eleven-sixteenths carats, while the proof showed that it weighed two and ten-sixteenths, a sixteenth, a thirty-second, and maybe a sixty-fourth. DeWolff v. Morino, (Mo. A.) 187 SW 620. (2) Clerical error in description in complaint, as compared to that in mortgage introduced as proof. Buck v. Young, 1 Ind. A. 558, 27 NE 1106; Saenz v. Mumme, (Tex. Civ. A.) 85 SW 59.

[88] Anderson v. Stewart, 108 Md. 340, 70 A 228.

[89] Suckstorf v. Butterfield, 54 Nebr. 757, 74 NW 1076.

[90] Woolery v. Barkley, 26 Ariz. 443, 226 P 533; Bailey v. Sullivan, 75 Colo. 346, 225 P 830 [cit Cyc]; Lampman v. Lamping, 70 Colo. 167, 199 P 418; Schmidt v. Denver First Nat. Bank, 10 Colo. A. 261, 50 P 733; Cassel v. Western Stage Co., 12 Iowa 47.

[91] Eakin v. Eakin, 63 Ill. 160; Gevers v. Farmer, 109 Iowa 468, 80 NW 535; Knowlton v. Lendrum, 54 Iowa 756, 7 NW 97; Kennett v. Peters, 54 Kan. 119, 37 P 999, 45 AmSR 274; Parry Mfg. Co. v. Myton, 8 Kan. A. 533, 54 P 291; Paxton v. Learn, 55 Nebr. 459, 75 NW 1096; Robinson v. Kilpatrick-Koch Dry Goods Co., 50 Nebr. 795, 70 NW 378; Strahle v. Stanton First Nat. Bank, 47 Nebr. 319, 66 NW 415; Camp v. Pollock, 45 Nebr. 771, 64 NW 231; Sharp v. Johnson, 44 Nebr. 165, 62 NW 466; Musser v. King, 40 Nebr. 892, 59 NW 744, 42 AmSR 700.

[a] **Rule applied.**—Where plaintiffs claimed title to an automobile under a void sale, they could not recover on the theory of an equitable lien. Weaver v. Lake. (Mo. A.) 4 SW (2d) 834.

[b] **Variance must be misleading.**—Harward v. Davenport, 105 Iowa 592, 75 NW 487 (holding that an allegation of absolute ownership is sufficiently supported by evidence of ownership limited by two chattel mortgages, under Code (1873) § 2686, providing that no variance is to be deemed material unless it has actually misled the opposite party to his prejudice, and Code (1873) § 2729, providing that a party shall not be compelled to prove more than is necessary to entitle him to the relief asked for).

[c] **Where allegation of ownership is conclusion,** a plaintiff, who alleges that his title is sole and absolute, is not precluded from recovering thereon upon a showing that such title was conditional and qualified. Richards v. Hellen, 153 Iowa 66, 133 NW 393.

[d] **An allegation of absolute ownership of property** in an action of replevin has been held to be sustained by evidence which shows plaintiff to be a chattel mortgagee in possession. Falk v. Decou, 8 Kan. A. 765, 61 P 760.

[92] J. E. McMillan Hardware Co. v. Ross, 24 Okl. 696, 104 P 343.

[93] Silsby v. Aldridge, 1 Wash. 117, 23 P 836.

[94] Driggers v. Cannon, 107 S. C. 322, 92 SE 1049.

[95] Deyerle v. Hunt, 50 Mo. A. 541.

[96] Leinkauf Banking Co. v. Grell, 62 App. Div. 275, 70 NYS 1083.

Avowry. As defendant may avow generally for rent in arrear, a lease showing rental of a different piece of land than that referred to in the avowry is not a fatal variance.[98] Although the landlord maw avow generally,[99] he must prove his title to the rent as he alleges it.[1] Allegations in the avowry as to time when rent was due, and the amount due, must be proved as laid.[2] There is no variance between an avowry for rent from plaintiff as tenant of a certain house, and proof that he occupied only the upper part of the house.[3] There is a fatal variance between allegations in an avowry that plaintiff was a tenant for a certain time, and proof of tenancy for less time,[4] or between a plea of nothing in arrear except a sum specified which was tendered, and proof of tender of amount less than that specified.[5] Variance may be corrected by an amendment of an avowry to conform to proof of amount due.[6]

XIII. EVIDENCE

[By Joseph W. Rouse]

[§ 236] **A. Presumptions and Burden of Proof—1. In General.** The rules applicable to presumptions and burden of proof in civil actions generally[7] apply in actions of replevin.[8] Thus the burden is on plaintiff to establish his right to recover.[9] Where plaintiff has made out a prima facie case, the burden of proof is on defendant to show matter in justification or defense.[10] Plaintiff does not assume the burden of proving allegations which, although unnecessary to his recovery, have been made in anticipation of special defenses.[11]

Acts of officer. It is presumed that the officer executing the writ of replevin took the bond required by the statutes[12] and acted regularly.[13]

[§ 237] **2. Title and Right to Possession.** Where ownership is established, in the absence of proof to the contrary, a presumption arises that the owner is entitled to possession;[14] and likewise, in the absence of any direct evidence to the contrary, possession is presumptive evidence of ownership,[15] although the contrary has been held;[16] but when direct evidence is offered, the fact of possession loses its presumptive character,[17] and is to be considered only in connection with other facts at its real probative value,[18] and no presumption arises where there is a conflict of evidence as to ownership.[19] When such matters are properly put in issue,[20] the burden rests on plaintiff to prove his title or ownership,[21] and his right to immediate[22] and exclusive[23] possession at the time the writ issued,[24] or, as otherwise stated, at the time of the commencement of the suit.[25] Thus an answer in replevin denying plaintiff's ownership of the property in controversy casts the burden of proof on him,[26] unless defendant disclaims all right to the property.[27] So in a plea of property in defendant, or a stranger, traversing plaintiff's ownership, the burden of the proof is on plaintiff;[28] but where the averment of property is a mere matter of inducement to the denial of plaintiff's right,[29] a plea of property in defendant or a third person, without a traverse of plaintiff's right, leaves the burden of proof on defendant to establish the truth of his plea.[30] Non cepit accompanied by a brief statement alleging property in defendant places the burden on plaintiff to prove property in himself,[31] but a brief statement merely alleging property in defendant leaves the burden on defendant to establish his affirmative allegation.[32] Where plaintiff has the burden of proving his right to the property and immediate possession thereof, the burden does not shift to defendant upon introduction of evidence tending to break down plaintiff's case.[33] Defendant has the burden of proving affirmative defenses.[34] The burden of proving ownership is not on defendants when

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[97] Jakway v. Rivers, 48 Colo. 49, 108 P 999.

[98] King v. Lambden, 4 Del. 283.

[99] See supra § 196.

[1] Alexander v. Harris, 4 Cranch (U. S.) 299, 2 L. ed. 627 (holding that an averment of a demise for three years is not supported by proof of a lease for one year certain, and two years further possession, on the same terms, by consent of the landlord); Taylor v. Moore, 3 Del. 6; Tice v. Norton, 4 Wend. (N. Y.) 663; Philpott v. Dobbinson, 6 Bing. 104, 19 ECL 55, 130 Reprint 1219. But see Forty v. Imber, 6 East 434, 102 Reprint 1354 (holding a variance between the demise, as stated in the avowry and as proved, was held immaterial, expressly upon the ground that the strictness of the proceedings in this action at common law had been relaxed by the statute of 11 Geo. II c 19 § 22, and that since that statute defendant might recover rent for a less period than he avowed for).

[a] **If defendant set forth the name of the person claimed to be tenant,** instead of availing himself of the statute in this particular, he will be bound to prove the allegation as laid. Hill v. Stocking, 6 Hill (N. Y.) 277.

[2] Waltman v. Allison, 10 Pa. 464; Roskruge v. Caddy, 7 Exch. 840, 155 Reprint 1190; Brown v. Sayce, 4 Taunt. 320, 128 Reprint 353.

[3] Page v. Chuck, 10 Moore C. P. 264, 17 ECL 573.

[4] Tice v. Norton, 4 Wend. (N. Y.) 663.

[5] John v. Jenkins, 1 Cromp. & M. 227, 149 Reprint 384.

[6] Morrow v. Galbraith, 1 Phila. (Pa.) 552.

[a] **Instrument under seal.**—Where it was wholly immaterial whether the instrument in question was under seal, an averment that it was in writing will be supported by the production of a written instrument either with or without a seal attached to the same. Jenkins v. Pell, 20 Wend. (N. Y.) 450 [aff 17 Wend. 417] (warrant of distress in avowry).

[7] See generally Evidence §§ 13–88.

[8] See cases infra this section; and §§ 237–241.

[9] N. Y.—Western Union Sewing-Mach. Co. v. Sachs, 32 Misc. 736, 67 NYS 2.

N. C.—Smith v. Cook, 196 N. C. 558, 146 SE 229.

Okl.—Kerfoot v. Waterloo State Bank, 14 Okl. 104, 77 P 46.

Pa.—Osler v. Bennett, 33 Pa. Co. 193.

S. D.—Quackenbush v. Graf, 37 S. D. 385, 158 NW 409.

[a] **Demand.**—Plaintiff has the burden of proving a demand on defendant, where such demand was necessary. Carstens v. Earles, 26 Wash. 676, 67 P 404.

[b] **Right to order for return.**—The burden is on plaintiff to show that defendant is not entitled to a return of the property. Barry v. O'Brien, 103 Mass. 520.

[10] Cal.—Garcia v. Gunn, 119 Cal. 315, 51 P 684.

Ind.—Ingersoll v. Emmerson, 1 Ind. 76.

Kan.—Clyde First Nat. Bank v. Parkhurst, 54 Kan. 155, 37 P 1001.

Mich.—Loupee v. Michigan Cent. R. Co., 243 Mich. 144, 219 NW 727.

Mont.—Osmers v. Furey, 32 Mont. 581, 81 P 345.

N. Y.—Pierce v. Van Dyke, 6 Hill 613.

S. D.—Quackenbush v. Graf, 37 S. D. 385, 158 NW 409.

[11] Killman v. Young, (Tex. Civ. A.) 171 SW 1065.

[12] Edgecomb v. Lawlis, 126 Me. 550, 140 A 182; Massachusetts Breweries Co. v. Herman, 106 Me. 524, 76 A 943; Shorey v. Hussey, 32 Me. 579.

[13] Edgecomb v. Lawlis, 126 Me. 550, 140 A 182.

[14] Banks v. Lohmeier, 188 Iowa 722, 176 NW 789.

[15] U. S.—Mitchell v. Wilson, 17 F. Cas. No. 9,672, 3 Cranch C. C. 242.

Ark.—Robinson v. Calloway, 4 Ark. 94.

Del.—Stockwell v. Robinson, 14 Del. 313, 32 A 528.

Ind.—McAfee v. Montgomery, 21 Ind. A. 196, 51 NE 957.

Iowa.—Wallace v. Wallace, 62 Iowa 651, 17 NW 905; Rickner v. Dixon, 2 Greene 591.

Mo.—Westbay v. Milligan, 89 Mo. A. 294; Stone v. McNealy, 59 Mo. A. 396; Phillips v. Schall, 21 Mo. A. 38.

Mont.—Gallick v. Bordeaux, 31 Mont. 328, 78 P 583.

Nebr.—Elgin First Nat. Bank v. Adams, 82 Nebr. 805, 118 NW 1057.

S. C.—Jackson v. Frier, 146 S. C. 322, 144 SE 66.

Wis.—Murray v. Norwood, 77 Wis. 405, 46 NW 499.

N. B.—Mitchell v. Davis, 39 N. B. 486.

[16] Red Hawk v. Joines, 129 Or. 620, 278 P 572.

[17] Westbay v. Milligan, 89 Mo. A. 294; Elgin First Nat. Bank v. Adams, 82 Nebr. 805, 118 NW 1057.

[18] Elgin First Nat. Bank v. Adams, supra.

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[19] McElhanon v. McFerron, 36 Ill. A. 22.

[20] **Issues raised and matters to be proved** see supra §§ 213–219.

[21] Ark.—Hall v. Benton, 160 Ark. 254, 254 SW 530; Ellis v. Caruthers, 137 Ark. 134, 208 SW 425; Black v. Roberson, 112 SW 402; Robinson v. Calloway, 4 Ark. 94.

Cal.—Butler v. Estrella Raisin Vineyard Co., 124 Cal. 239, 56 P 1040; Normart v. Safer, 67 Cal. A. 507, 227 P 943.

Colo.—Austin v. Terry, 38 Colo. 407, 88 P 189; Hall v. Johnson, 21 Colo. 414, 42 P 660.

Ida.—Bertleson v. Van Deusen Bros. Co., 37 Ida. 199, 217 P 983.

Ill.—Elvin v. Wuchetich, 326 Ill. 285, 157 NE 243; Commercial Credit Trust v. Land, 251 Ill. A. 469; W. F. Hall Printing Co. v. Wells Warehouse, etc., Co., 241 Ill. A. 146; Perfect Knitting Mills v. Obstfeld, 154 Ill. A. 637; Jackson v. Craw, 149 Ill. A. 559; Monmouth Second Nat. Bank v. Thuet, 124 Ill. A. 501; Hacker v. Munroe, 56 Ill. A. 532.

Ind.—Simcoke v. Frederick, 1 Ind. 54; Central Trust Co. v. Duncan, (A.) 168 NE 506.

Iowa.—Gardner v. Builders' Material Co., 190 Iowa 443, 180 NW 188; Killeen v. Greve, 182 Iowa 1382, 166 NW 731; Hillman v. Brigham, 110 Iowa 220, 81 NW 451; Peake v. Conlan, 43 Iowa 297; Hamilton v. Iowa City Nat. Bank, 40 Iowa 307.

Md.—Lamotte v. Wisner, 51 Md. 543.

Mass.—Jeffery v. Leahy, 258 Mass. 548, 155 NE 638; Dapson v. Daly, 257 Mass. 195, 153 NE 454, 49 ALR 1496; Standard Varnish Works v. Cushing, 202 Mass. 576, 89 NE 163; Wylie v. Marinofsky, 201 Mass. 583, 88 NE 448; Barry v. O'Brien, 103 Mass. 520.

Mich.—Barton v. Trumbull, 226 Mich. 685, 198 NW 186.

Mo.—American Metal Co. v. Daugherty, 204 Mo. 71, 102 SW 538; Gray v. Parker, 38 Mo. 160; Ross v. May, 164 Mo. A. 398, 144 SW 901; Campbell v. Brown, 146 Mo. A. 319, 130 SW 50; Moriund v. Johnson, 140 Mo. A. 345, 124 SW 80; Upham v. Allen, 73 Mo. A. 224.

Mont.—Gallick v. Bordeaux, 31 Mont. 328, 78 P 583.

Nebr.—Gravert v. Goothard, 81 Nebr. 99, 115 NW 559; Northwall Co. v. McCormick Harvester Mach. Co., 2 Nebr. (Unoff.) 699, 89 NW 767.

N. J.—Merchants' Securities Corp. v. Lane, (Sup.) 147 A 385; Chambers v. Hunt, 18 N. J. L. 339.

N. Y.—Root v. Borst, 142 N. Y. 62, 36 NE 814; Edward G. Murray Lighterage, etc., Co. v. Warren, 171 App. Div. 696, 157 NYS 692.

Okl.—Williams v. Williams, 87 Okl. 195, 209 P 769; Tulsa Rig, etc., Co. v. Arnold, 64 Okl. 160, 166 P 135.

Pa.—White Co. v. Union Transfer Co., 270 Pa. 514, 113 A 432; Osler v. Bennett, 33 Pa. Co. 193.

Philippine.—Rivera v. Ong Che, 37 Philippine 355.

S. C.—Peeples v. Warren, 51 S. C. 560, 29 SE 659.

Tenn.—Cryer v. Mayfield, 5 Tenn. Civ. A. 537.

Tex.—Crim v. Lukenbill, (Civ. A.) 21 SW (2d) 83; Atwood v. National Petroleum Co., (Civ. A.) 7 SW (2d) 964; Terrazas v. Holmes, (Civ. A.) 225 SW 848.

Wash.—Curtis Studio v. Lennes, 121 Wash. 32, 208 P 79.

Wis.—Sparks v. Kuss, 195 Wis. 378, 216 NW 929, 218 NW 208.

N. B.—Mitchell v. Davis, 39 N. B. 486.

"Where the plaintiff . . . alleges ownership, and the right of possession, in general terms, he has the burden of proof." Bradshaw v. Langum, 141 Minn. 39, 169 NW 148, 149.

"Replevin is a possessory action, and the burden rests on the plaintiff of showing that he not only has a right to possession of the property, but that he has a title thereto superior to that of the defendant." Farr v. Farmers' Bank, (Mo. A.) 228 SW 1073, 1074.

[a] **Illustrations.**—(1) The burden was on the administrator to show that title in intestate at the time of his death. Ames v. Weston, 128 Me. 545, 148 A 692. (2) Where plaintiff claims property by purchase from a decedent's widow as an individual instead of as administrator of the estate to which the property presumptively belonged, he has the burden of proving that the property belonged to the widow and not to the estate. Austin v. Terry, 38 Colo. 407, 88 P 189. (3) Plaintiff, claiming under a mortgage, has the burden of proving that the mortgage was properly recorded. Kahn v. Hayes, 22 Ind. A. 182, 53 NE 430. (4) Plaintiff had the burden of proving that she did not consent to her daughter's using stock in defendant's possession as collateral to her note to defendant. Peckinpaugh v. Noble, 248 Mich. 668, 227 NW 540. (5) Where defendant claims title under a barter with plaintiff, the burden of proof is still on plaintiff to establish his ownership. Peake v. Conlan, 43 Iowa 297. (6) In replevin for the carcass of a deer, the first step toward showing title was to prove that plaintiff was licensed to hunt, and defendant was not required to allege illegal conduct of plaintiff. Dapson v. Daly, 257 Mass. 195, 153 NE 454, 49 ALR 1496.

[b] **Nontransfer of title or interest.**—Where plaintiff made out a prima facie case he has not the burden of proving further that the property had not been sold by him or through a court having jurisdiction, and that there were no liens against the same in favor of defendant. De Hart Oil Co. v. Smith, 42 Okl. 201, 140 P 1154.

[c] **Failure to sustain burden.**—Plaintiff, having pleaded ownership and right to possession, must prove one or the other; and defendant could rely on a general denial, and, when plaintiff failed to prove his right to recover, defendant need not have attempted to prove title in another, to recover judgment that plaintiff take nothing. Terrazas v. Holmes, (Tex. Civ. A.) 225 SW 848.

[d] **Forthcoming bond does not shift the burden.**—Where defendant gives a forthcoming bond, and secures the release of the property, he is estopped to deny the possession of the property, but is not estopped to deny the ownership or right of possession of plaintiff, who must prove his title and right of possession notwithstanding the bond. Mayhood v. Letender, 4 Alaska 226.

[e] **Interpleader or intervener** in claim and delivery proceeding has burden of establishing his title to property in controversy. Sitterson v. Speller, 190 N. C. 192, 129 SE 191.

[22] Ark.—Hall v. Benton, 160 Ark. 254, 254 SW 530; Ellis v. Caruthers, 137 Ark. 134, 208 SW 425.

Cal.—Honnold v. Pacific Finance Corp., (A.) 286 P 1101; Normart v. Safer, 67 Cal. A. 507, 227 P 943.

Del.—Reynolds v. Donaway, 30 Del. 461, 108 A 139.

Ill.—Perfect Knitting Mills v. Obstfeld, 154 Ill. A. 637; Hacker v. Munroe, 56 Ill. A. 532.

Iowa.—Daniel v. Hammers, 199 Iowa 963, 203 NW 235.

Mass.—Jeffery v. Leahy, 258 Mass. 548, 155 NE 638; Dunbar-Laporte Motor Co. v. Desrocher, 247 Mass. 292, 142 NE 57; Barry v. O'Brien, 103 Mass. 520.

Miss.—Hinman v. Sabin, 147 Miss. 509, 112 S 871; Scarborough v. Lucas, 119 Miss. 128, 80 S 521.

Mo.—American Metal Co. v. Daugherty, 204 Mo. 71, 102 SW 538; Gray v. Parker, 38 Mo. 160; Moriund v. Johnson, 140 Mo. A. 345, 124 SW 80; Phillips v. Schall, 21 Mo. A. 38.

Mont.—Davey v. Davey, 81 Mont. 375, 263 P 415; Woods v. Latta, 35 Mont. 9, 88 P 402.

Okl.—Tulsa Rig, etc., Co. v. Arnold, 64 Okl. 160, 166 P 135.

Or.—Bohart v. Parker, 76 Or. 371, 147 P 188, 149 P 85.

Pa.—Osler v. Bennett, 33 Pa. Co. 193.

Vt.—Luce v. Brown, 96 Vt. 140, 118 A 530.

Wash.—Curtis Studio v. Lennes, 121 Wash. 32, 208 P 79; Dodd v. Williams-Smithson Co., 27 Wash. 89, 67 P 352.

[a] **Even though defendant admitted title,** but pleaded special interest in himself, plaintiff has this burden. Monmouth Second Nat. Bank v. Thuet, 124 Ill. A. 501; Dodd v. Williams-Smithson Co., 27 Wash. 89, 67 P 352.

[23] Ark.—Dixon v. Thatcher, 14 Ark. 141.

Mass.—Jeffery v. Leahy, 258 Mass. 548, 155 NE 638; Barry v. O'Brien, 103 Mass. 520.

Mo.—Gray v. Parker, 38 Mo. 160; Moriund v. Johnson, 140 Mo. A. 345, 124 SW 80; Phillips v. Schall, 21 Mo. A. 38.

Nebr.—Jenkins v. Mitchell, 40 Nebr. 664, 59 NW 90.

N. J.—Merchants' Securities Corp. v. Lane, (Sup.) 147 A 385.

Pa.—McKee v. Ward, 289 Pa. 414, 137 A 599; White Co. v. Union Transfer Co., 270 Pa. 514, 113 A 432; Osler v. Bennett, 33 Pa. Co. 193.

[24] Stafford v. Williams, 24 Del.

288, 76 A 626; Baltimore, etc., R. Co. v. Rueter, 114 Md. 687, 80 A 220; Dunbar-Laporte Motor Co. v. Desrocher, 247 Mass. 292, 142 NE 57.

[25] Del.—Ott v. Specht, 13 Del. 61, 12 A 721.

Mich.—Peckinpaugh v. Noble, 248 Mich. 668, 227 NW 540.

Mo.—Johnston v. Brown Bros. Iron, etc., Co., 208 Mo. A. 189, 231 SW 1011.

Mont.—Woods v. Latta, 35 Mont. 9, 88 P 402.

N. Y.—Oakland Mfg. Co. v. F. C. Linde Co., 162 App. Div. 543, 147 NYS 1045.

Okl.—Key v. London, 119 Okl. 41, 247 P 670; Nelson v. Bradfield, 97 Okl. 259, 223 P 380; Tulsa Rig, etc., Co. v. Arnold, 64 Okl. 160, 166 P 135.

S. C.—Jackson v. Frier, 146 S. C. 322, 144 SE 66.

[a] **Thus,** where a petition alleged that after final judgment for defendant, dissolving an attachment, plaintiff served notice of intention to appeal but never perfected the appeal, and where defendant filed a general denial, whether such appeal was perfected was a material issue, the burden of establishing which was on plaintiff, as if it was, the property was still in custodia legis. Thompson v. Grove, 72 Okl. 290, 180 P 553.

[26] Ark.—Kennedy v. Clayton, 29 Ark. 270.

Conn.—Kavanagh v. Phelps, 36 Conn. 111.

Ill.—Constantine v. Foster, 57 Ill. 36; McLeroth v. Magerstadt, 136 Ill. A. 361.

Mo.—Gartside v. Nixon, 43 Mo. 138; Stone v. McNealy, 59 Mo. A. 396; Andrews v. Costican, 30 Mo. A. 29.

Mont.—Gallick v. Bordeaux, 31 Mont. 328, 78 P 583.

N. H.—Taylor v. True, 27 N. H. 220.

[a] **General denial** has been held sufficient to put plaintiff to proof of title or right of possession without any averments of title in defendant or in a stranger. Hillman v. Brigham, 110 Iowa 220, 81 NW 451; Pulliam v. Burlingame, 81 Mo. 111, 51 AmR 229; Phillips v. Schall, 21 Mo. A. 38; G. T. Northwall Co. v. McCormick Harvester Mach. Co., 2 Nebr. (Unoff.) 699, 89 NW 767.

[b] **Special answer, following general denial, alleging property in defendant,** does not destroy the effect of the general denial, and relieve plaintiff from making all the proofs he would be required to make had the special answer been omitted. Downtain v. Ray, 31 Tex. Civ. A. 298, 71 SW 758; Wheeler, etc., Mfg. Co. v. Teetzlaff, 53 Wis. 211, 10 NW 155.

[c] **Plea of non detinet.**—Where issue is joined on a plea of non detinet in an action to recover personal property, the burden of proof of title is on plaintiff. Beal v. McKee, 145 Ala. 659, 39 S 664.

[27] Kavanagh v. Phelps, 36 Conn. 111.

[28] U. S.—Agency of Canadian Car, etc., Co. v. Pennsylvania Iron Works Co., 256 Fed. 339; Williamson v. Ringgold, 30 F. Cas. No. 17,755, 4 Cranch C. C. 39.

Ark.—Hill v. Fellows, 25 Ark. 11; Patterson v. Fowler, 22 Ark. 396.

Del.—Pennington v. Chandler, 5 Del. 394; McIlvaine v. Holland, 5 Del. 226.

Ill.—Kee, etc., Dairy Co. v. Pennsylvania Co., 291 Ill. 248, 126 NE 179; Atkins v. Byrnes, 71 Ill. 326; Reynolds v. McCormick, 62 Ill. 412; Constantine v. Foster, 57 Ill. 36; Chandler v. Lincoln, 52 Ill. 74; Anderson v. Talcott, 6 Ill. 365; Robinson v. Huschle, 233 Ill. A. 519; Weber Impl. Co. v. Huthmacher, 161 Ill. A. 261; Jones v. Glathart, 100 Ill. A. 630; Pinkstaff v. Cochran, 58 Ill. A. 72; Hacker v. Munroe, 56 Ill. A. 532; McFarlan v. McClellan, 3 Ill. A. 295.

Ind.—Noble v. Epperly, 6 Ind. 414.

Md.—Burrier v. Cunningham Piano Co., 135 Md. 135, 108 A 492; Cullum v. Bevans, 6 Harr. & J. 469.

Mo.—Morgner v. Biggs, 46 Mo. 65.

Mont.—Frank v. Symons, 35 Mont. 56, 88 P 561.

N. J.—Chambers v. Hunt, 22 N. J. L. 552; Hunt v. Chambers, 21 N. J. L. 620; Chambers v. Hunt, 18 N. J. L. 339; Security Credit Corp. v. Whiting Motor Co., 98 N. J. Sup. 45, 118 A 695.

N. D.—Haveron v. Anderson, 3 N. D. 540, 58 NW 340.

R. I.—L. A. W. Acceptance Corp. v. Chernick, 49 R. I. 434, 143 A 783.

[a] **Affirmative plea of property** in defendants amounts to no more than a denial of plaintiff's allegation of ownership, and does not cast on defendants the burden of proof as to such plea. Moore v. Marsh, 59 Wash. 151, 109 P 606.

[b] **Plea of payment** is in effect a plea of property in defendant, under which the burden is on plaintiff to show his title. Johnston v. McCart, 24 Wash. 19, 63 P 1121.

[c] **Answer setting up property in defendant in substance.**—"The pleading thus made, though it does not directly deny that the sheaves of wheat were the property of the plaintiff, does so argumentatively, and therefore rested the burden of the issues on the plaintiff." Turner v. Cool, 23 Ind. 56, 60, 85 AmD 449.

[d] **In New Brunswick.**—Where a defendant in replevin pleads property in himself or a third person, and issue is taken thereon, the onus of proving property is on defendant, and if he fails in doing so, plaintiff is entitled to recover. Ogden v. Bourgeois, 15 N. B. 365; Desbrisay v. Little, 11 N. B. 392; Graham v. Wetmore, 9 N. B. 373.

[29] See supra § 191.

[30] Chandler v. Lincoln, 52 Ill. 74; Pease v. Magill, 17 N. D. 166, 115 NW 260; National Cash Register Co. v. Allen, 9 Pa. Dist. & Co. 552.

[31] Smith v. Deojay, 124 Me. 381, 130 A 130; Pope v. Jackson, 65 Me. 162; Cooper v. Bakeman, 32 Me. 192; Greene v. Dingley, 24 Me. 131; Taylor v. True, 27 N. H. 220.

[32] Pope v. Jackson, 65 Me. 162; Cooper v. Bakeman, 32 Me. 192.

[33] Wylie v. Marinofsky, 201 Mass. 583, 88 NE 448.

[34] Killman v. Young, (Tex. Civ. A.) 171 SW 1065. See Kebabian v. Adams Express Co., 27 R. I. 564, 65 A 271 (holding that, where plaintiff proves his ownership and right to possession, the burden of proving liens set up by pleas is on defendant).

[a] **Burden is on defendant to prove:** (1) Title in himself by virtue of a perfected contract of exchange with plaintiff. Luce v. Brown, 96 Vt. 140, 118 A 530. (2) Bona fide purchase of stolen property. Harter v. People's Bank, 221 App. Div. 122, 223 NYS 118. (3) Receipt of notes in good faith, for value. Cooke v. Reserve Realty, etc., Co., (Mo. A.) 25 SW (2d) 562. (4) Purchase by plaintiff for a third person. Nelson v. Bradfield, 97 Okl. 259, 223 P 380. (5) That plaintiff has no right to maintain the action and that the property was exempt from the mortgage, where plaintiff bases his rights on a mortgage, the execution of which is admitted. Colean Mfg. Co. v. Johnson, 82 Kan. 655, 109 P 403, 20 Ann Cas 296. (6) Title to land, where defendant in replevin admitted the taking of the wood from the premises in plaintiff's possession, but claimed title to the land. Thompson v. Stever, 11 NYSt 784. (7) That he holds under an agreement with plaintiff, where he does not deny plaintiff's title. Crenshaw v. Bradley, 52 Ark. 318, 12 SW 578. (8) Prior payment of a note, where plaintiff claims property in payment of the note. Gravert v. Goothard, 81 Nebr. 99, 115 NW 559. (9) Affirmative allegations of ownership, where he demands a return. Wheeler v. Steadman, 99 Or. 414, 195 P 818. (10) Subsequent title in defendant, where plaintiff's original title is admitted. American Soda Fountain Co. v. Egbert, 14 Pa. Dist. 426. See also G. A. Crancer Co. v. Williams, 191 Ill. A. 451. (11) Right to possession, where plaintiff's title is undisputed. Biograph Co. v. International Film Traders, 76 Misc. 436, 134

they claim merely the right to possession, and ownership is not in issue.[35]

Intervener. The burden of proving ownership is on an intervener.[36] An intervener, claiming the property by purchase, has the burden of proving title in his vendor.[37]

Surreptitious taking of property from plaintiff's possession raises a presumption that plaintiff was the owner and entitled to possession,[38] and the burden is on defendant to prove that he was owner and entitled to possession[39] and that the taking under writ of replevin was wrongful.[40]

[§ 238] **3. Taking, Detention, and Possession by Defendant.** A wrongful taking and detention is not to be presumed,[41] but plaintiff has the burden of establishing it;[42] and such burden is not shifted to defendant by reason of special defenses being interposed as well as the general denial.[43] Where defendant obtained possession of the property lawfully, the burden is on plaintiff to show a termination of his right.[44] Plaintiff has the burden of proving defendant's possession at the time the action was commenced,[45] but the burden is on defendant to show that he had parted with it prior to the beginning of such action,[46] and on failure to do so it must be presumed that he still retains wrongful possession of the property.[47] Where plaintiff establishes a prima facie title and right to the possession of the property, it is incumbent on defendant to show how he came into the possession of it.[48]

Distress. The burden is on defendant to show a taking under distress warrant where the property admittedly belongs to plaintiff,[49] and to show the validity of the distress where it is attacked.[50]

Taking by officer under process is presumed to be lawful until plaintiff proves otherwise,[51] but defendant, seeking to justify a taking on the ground that he was an officer and took the property under an execution, has the burden of proving that he was an officer de jure,[52] that the property was subject to seizure under the execution,[53] and that the execution was supported by a valid[54] unsatisfied[55] judgment. Where, under an attachment writ, he takes property from a stranger, he has the burden of proving not only a writ valid on its face, but the regularity of the attachment proceedings.[56]

[§ 239] **4. Identity of Property.** Where the identity of the property claimed by plaintiff is questioned, the burden is on him to establish that fact.[57] Where, however, plaintiff and defendant claim under dif-

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NYS 1069; Pollard v. Borneman, 47 S. D. 622, 201 NW 525, 36 ALR 954; Killman v. Young, (Tex. Civ. A.) 171 SW 1065. (12) That the chattels are the property of the estate, where defendant claims property in himself as administrator. Rose v. Cash, 58 Ind. 278. (13) That the attaching creditor for whom he took the property was one against whom an unrecorded lien was not valid. Singer Mfg. Co. v. Nash, 70 Vt. 434, 41 A 429.

[b] **Title as against the world.**—Where no right or title whatever appears in plaintiff, defendant, in order to entitle himself to a judgment for the value of the goods, need not, in addition to showing possession under a claim of title, prove that he has a title against all the world. Steere v. Vanderberg, 90 Mich. 187, 51 NW 205.

35. Meyer v. Plattsmouth First Nat. Bank, 63 Nebr. 679, 88 NW 867.

36. Benish v. Jones, 68 Colo. 484, 190 P 538.

37. Roberts v. Bullock, 158 N. C. 210, 73 SE 991.

38. Adamson v. Harper, 162 Iowa 56, 143 NW 844.

39. Adamson v. Harper, supra.

40. Adamson v. Harper, supra.

41. Finnell v. Million, 99 Mo. A. 552, 74 SW 419.

42. Ind.—Baer v. Martin, 2 Ind. 229; Williams v. Padelinetti, 73 Ind. A. 216, 127 NE 158; Morgan v. Jackson, 32 Ind. A. 169, 69 NE 410.

Mass.—Standard Varnish Works v. Cushing, 202 Mass. 576, 89 NE 163.

Mo.—Finnell v. Million, 99 Mo. A. 552, 74 SW 419.

Okl.—Tulsa Rig, etc., Co. v. Arnold, 64 Okl. 160, 166 P 135.

Wash.—Dodd v. Williams-Smithson Co., 27 Wash. 89, 67 P 352.

43. Dodd v. Williams-Smithson Co., supra.

44. Malone v. Collins, 112 Ark. 269, 165 SW 641; Leisey Brewing Co. v. Cline, (Mo. A.) 211 SW 689.

[a] **Where plaintiff parted with possession,** it cannot be presumed that when possession reached defendant it became wrongful for the reason that defendant was not a party contemplated by plaintiff as being one who could obtain any right of possession through the person to whom possession had originally been given by plaintiff. Leisey Brewing Co. v. Cline, (Mo. A.) 211 SW 689.

45. Hogan v. Commercial Credit Co., 150 Miss. 653, 116 S 298; Sipe v. Groce, (Mo. A.) 1 SW (2d) 1034; Rabenort v. Frazier, (Mo. A.) 238 SW 550; Gibson v. Ball, 159 Mo. A. 345, 141 SW 23; Fries v. Lockwood, 64 Wash. 221, 116 P 640.

46. Waterhouse v. Black, 87 Iowa 317, 54 NW 342; Teel v. Teel, (Mo. A.) 8 SW (2d) 1086; Lacquement v. Bellamy, (Mo. A.) 253 SW 1076; Rabenort v. Frazier, (Mo. A.) 238 SW 550; Nichols v. Dodson Lead, etc., Co., 85 Mo. A. 584.

47. Waterhouse v. Black, 87 Iowa 317, 54 NW 342.

48. Cal.—Garcia v. Gunn, 119 Cal. 315, 51 P 684.

Hawaii.—Consolidated Amusement Co., Ltd. v. Jarrett, 22 Hawaii 537.

Ida.—Webster v. McCullough, 45 Ida. 604, 264 P 384.

Mich.—Conely v. Dudley, 111 Mich. 122, 69 NW 151.

Nebr.—Barkley v. Leiter, 49 Nebr. 123, 68 NW 381.

N. Y.—Bame v. Seykora, 77 Hun 529, 28 NYS 930.

Wyo.—Farm, etc., Loan Co. v. Faulkner, 34 Wyo. 199, 242 P 415, 418 [quot Cyc].

[a] **Purchaser from tortious taker.**—Where the original tortious taking of goods has been proved, the burden of proof is on the purchaser from the wrongful taker, in order to protect himself from liability, to show that he came into possession of the property for a lawful purpose and in good faith, by delivery from the wrongdoer. Ely v. Ehle, 3 N. Y. 506.

49. Robelen v. Wilmington Nat. Bank, 15 Del. 346, 41 A 80.

50. Shaffer v. Seyler, 29 Pa. Dist. 269.

51. Finnell v. Million, 99 Mo. A. 552, 74 SW 419.

52. Larsen v. Ditto, 90 Ill. A. 384.

53. Hobbs v. Myres, 1 B. Mon. (Ky.) 241.

54. Hagen v. Delatine, 254 Ill. A. 211; Shue v. Ingle, 87 Ill. A. 522; Williams v. Foreman, 65 Okl. 304, 166 P 700.

[a] **Judgment in probate court.**—Defendant, relying on purchase at execution sale on judgment rendered in probate court, must establish verity of execution, since probate courts are courts of limited and inferior jurisdiction. Webster v. McCullough, 45 Ida. 604, 264 P 384.

[b] **Judgment of justice of peace.**—(1) Where the validity of an execution, issued by a justice of the peace, under which the property was taken, is questioned, defendant has the burden of proving a valid judgment (Hagen v. Delatine, 254 Ill. A. 211), (2) as a justice of the peace must enter a judgment before execution can issue (see Justices of the Peace § 341).

55. Williams v. Foreman, 65 Okl. 304, 166 P 700.

56. Cheeseman v. Fenton, 13 Wyo. 436, 80 P 823, 110 AmSR 1010.

57. Ill.—Myers v. Van Norman, 87 Ill. A. 500; Schweinfurth v. Matson, 37 Ill. A. 62.

Me.—Webber v. Read, 65 Me. 564.

Minn.—Lohrenz v. Nelson, 123 Minn. 525, 143 NW 268.

Miss.—Johnson v. Sanders, 148 Miss. 472, 114 S 334; Dennis v. Robinson, 104 Miss. 548, 61 S 597; Brunferent mortgages, and plaintiff offers evidence prima facie sufficient to show title in himself, the burden is on defendant to show that the property described in the mortgage under which he claims is the same as that in controversy.[58]

[§ 240] **5. Value and Damages.** The value stated in the affidavit[59] is, in the absence of proof to the contrary, presumed to be the correct value.[60] In the absence of proof of the value of the replevied property at the time of the trial, it will be presumed to be of the same value then as found by the court when replevied,[61] and where the value of the property was agreed on in a contract of exchange, the burden of proving a different value is upon the party asserting it.[62] Where plaintiff gives bond and acquires the possession, it is not his duty to prove the value of the property,[63] and the same is true where he is in possession and does not seek damages.[64] Where plaintiff admits on the record the value of defendant's possession, and no evidence is given as to the general value of the property, it will be presumed that such value is equal to or exceeds the amount admitted by plaintiff as the value of defendant's special interest,[65] but no such presumption arises in the absence of any admission.[66] Plaintiff, having merely a special interest, who seeks to recover usable value of the property, has the burden of proving that the special interest included the right to use.[67] Plaintiff has the burden of proving the value of the property where a forthcoming bond is given.[68]

Where property is replevied from a sheriff, it is ordinarily incumbent upon him to prove the value of the property.[69]

Deprivation of use and depreciation. In the absence of proof that the damages are more or less than the interest on the value, the presumption is that the damages are the interest during the time the successful party was wrongfully deprived of the use.[70] The burden of proving depreciation is on plaintiff.[71]

Damage to defendant. The burden is on defendant to prove damages resulting from the taking of the property under the writ of replevin.[72]

[§ 241] **6. Fraud.** The burden is on the party pleading fraud to prove it.[73] But where plaintiff's title is alleged by defendant to be fraudulent, plaintiff must first show title in himself.[74] Where plaintiff has alleged and proved fraud, the burden is on defendant to prove his defense of innocent purchaser for value.[75]

[§ 242] **B. Admissibility—1. In General.** The rules applicable to the admissibility of evidence in civil actions generally[76] apply in actions of replevin.[77]

[§ 243] **2. Title and Right to Possession.** The subject of inquiry in a replevin action being the right of possession of the property involved,[78] any evidence otherwise competent is admissible which properly determines the ownership and right of posses-

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son v. Volunteer Carriage Co., 93 Miss. 793, 47 S 377.

Mo.—International Indemn. Co. v. Crandall, (A.) 235 SW 460.

N. Y.—Biegeleisen v. Cohen, 192 NYS 321.

N. D.—Russell v. Amundson, 4 N. D. 112, 59 NW 477.

Okl.—Sapp v. Hartford F., & M. Ins. Co., 86 Okl. 87, 206 P 814.

[a] **In Louisiana,** in a possessory action for the recovery of personalty, plaintiff has the burden of identifying the property. Daniels v. Taubenblatt, 120 La. 349, 45 S 273.

[58] Brunswick First Nat. Bank v. Wood, 124 Mo. 72, 27 SW 554; State Bank v. City Nat. Bank, 18 Okl. 10, 89 P 206.

[59] See supra § 109.

[60] Commercial Credit Trust v. Land, 251 Ill. A. 469; Peterson v. Fowler, 76 Mich. 258, 43 NW 10; Carew v. Matthews, 41 Mich. 576, 2 NW 829.

[61] Jennings v. Sparkman, 48 Mo. A. 246; Monday v. Vance, (Tex. Civ. A.) 51 SW 346.

[a] **In replevin for written securities,** they are presumed to be worth the principal and interest indicated on their face, and it is incumbent on defendant to rebut this presumption. Holt v. Van Eps, 1 Dak. 206, 46 NW 689.

[62] Maxson v. Ashland Iron Works, 85 Or. 345, 166 P 37, 167 P 271.

[63] Archer v. Long, 32 S. C. 171, 11 SE 86.

[64] Zederman v. Thomson, 17 N. M. 56, 121 P 609.

[65] Gamble v. Wilson, 33 Nebr. 270, 50 NW 3.

[66] Quinlan v. Jones, (Wyo.) 198 P 352.

[67] Francis v. Guaranty State Bank, 44 Okl. 446, 145 P 324.

[68] Hinman v. Sabin, 147 Miss. 509, 112 S 871.

[69] Gamble v. Wilson, 33 Nebr. 270, 50 NW 3.

[a] **Amount of execution** must be shown. Booth v. Ableman, 20 Wis. 23, 88 AmD 730.

[70] New York Guaranty, etc., Co. v. Flynn, 55 N. Y. 653.

[71] Muzenich v. McCain, (Mo. A.) 274 SW 888; Rosenblatt v. Winstanley, (Mo. A.) 186 SW 542.

[72] Haggerty v. Lash, 34 Mont. 517, 87 P 907; Quinlan v. Jones, 27 Wyo. 410, 198 P 352.

[73] Williams v. Finlayson, 49 Fla. 264, 38 S 50; Hyde v. Shank, 93 Mich. 535, 53 NW 787; Bristol v. Braidwood, 28 Mich. 191.

[a] **Intent to deceive.**—Where actual fraud must be proved, this involves the proof of intent to deceive. Coffin v. Hollister, 124 N. Y. 644 mem, 26 NE 712, 3 Silv. A. 400; Enright v. Fellheimer, 25 Misc. 664, 56 NYS 366.

[74] Hardy v. Moore, 62 Iowa 65, 17 NW 200.

[75] Thompson v. Clark, 74 Okl. 221, 178 P 655.

[76] See Evidence §§ 89-162.

[77] See cases infra this note.

[a] **Evidence held admissible.**—(1) Affidavit and process, with the officer's return, are admissible to show who had possession of the property at the time of trial, in order that verdict, if for plaintiff, need not find the value. Kimmitt v. Deitrich, 22 S. D. 590, 119 NW 986. (2) Process and the return thereon is admissible although the return was not filed within twenty days. Kimmitt v. Deitrich, supra. (3) Replevin bond. Lewter v. Lindley, (Tex. Civ. A.) 121 SW 178.

[b] **Evidence held inadmissible.**—(1) Generally. Writ of replevin. Hirsch v. Butler, 181 Iowa 345, 164 NW 745; Swope v. Crawford, 17 Lanc LRev (Pa.) 196; Woodward v. Garey, 42 LegInt (Pa.) 490. (2) In replevin for slot machines summarily seized and retained by the police commissioners as a measure of prevention against gaming, evidence as to why plaintiff sold the machines out of the state is inadmissible. Soper v. Michal, 123 Md. 542, 91 A 684, LRA1915A 232. (3) In replevin for a stock of goods traded to plaintiff with certain lots for other property, evidence as to defaults of plaintiff in making payments on the lots is properly excluded. Thompson v. Laven, 157 Minn. 333, 196 NW 475. (4) In replevin to determine the ownership of an automobile, defendant is not entitled to introduce evidence as to prior business relations between plaintiff and himself, where such evidence has no possible relations to the issue under the pleadings. McCoy v. Klein, 70 Pa. Super. 269. (5) Admission of writs of replevin issued in other cases by other plaintiffs, but served simultaneously with the writ in the present case, such evidence being offered to show undue oppression and a conspiracy is error where defendant wholly failed to show any connection of plaintiff with any unlawful conspiracy or oppression. Lublin Mfg. Co. v. Swaab, 240 Pa. 182, 87 A 597.

[78] See supra § 4.

sion thereof[79] in plaintiff,[80] and, it is competent for defendant to offer any evidence which may tend to show that plaintiff did not have the title or right of possession at the time the action was commenced.[81] Any proper documentary evidence is admissible on the part of plaintiff to show his title and

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79. Merchants' Nat. Bank v. Frazier, 60 Okl. 156, 159 P 647.

[a] **Rule applied.**—(1) Where both plaintiff and defendant claim property of a third person by virtue of a lien, either party may show any fact which will defeat the other's rights. St. John State Bank v. Norduff, 2 Kan. A. 55, 43 P 312. (2) Defendant may show conversations between the owner and himself, where defendant and plaintiff claim by purchase from the owner. Marthinson v. Wagner, 63 Mich. 543, 30 NW 184. (3) An account, showing that decedent held similar goods of plaintiff for sale on commission, is admissible in evidence where plaintiff claims as owner and defendant as administrator. Lill's Chicago Brewery Co. v. Russell, 22 Wis. 178. (4) As the interest of an officer holding under an attachment is measured by the amount necessary to satisfy the attachment, plaintiff may introduce evidence to show a partial satisfaction of the debts. Kerr v. Drew, 90 Mo. 147, 2 SW 136. (5) Where defendant is a constable, his interest in the property is limited to the execution debtor's interest and plaintiff is entitled to show that the interest of the latter is merely nominal and of no value. Gillham v. Kerone, 45 Mo. 487. (6) Defendant officer, seizing goods under attachment, may show judgment in attachment suit, to show the extent of his lien. Berger v. Clippert, 53 Mich. 468, 19 NW 149.

[b] **In Louisiana,** in an exclusively possessory action, neither party can give evidence of title. An exception would probably take place where the extent of possession was disputed. Sears v. Wilson, 5 La. Ann. 689.

80. [a] **Evidence held admissible.**—(1) That defendant's bill of sale was in fact a mortgage which had been fully paid. Williams v. Griffin, 58 S. C. 370, 36 SE 665. (2) That plaintiffs had insured property immediately after sale, especially in view of their evidence that it was agreed that the property, if burnt, should be plaintiffs' loss. Andrews v. Grimes, 148 N. C. 437, 62 SE 519. (3) That plaintiff was in possession at a specified time. Curtis Studio v. Lennes, 121 Wash. 32, 208 P 79; Trowbridge v. Sickler, 54 Wis. 306, 11 NW 581 (not a conclusion of law). (4) That plaintiff got the property from his comortgagor, where defendant claims as assignee of the mortgagee. Williams v. Weekley, 100 S. C. 28, 84 SE 299 (that money to discharge a chattel mortgage to B, under which defendant claimed, had gone through the hands of C). (5) Purchase by plaintiff of goods and other property for use on the farm with his own money. Albright v. Albright, 151 Wis. 610, 139 NW 413. (6) Explaining bill of sale by showing that it was executed as a mortgage to secure indebtedness of agent. Adder Mach. Co. v. Ross, 184 Ill. A. 293. (7) Evidence refuting defendant's claim that an automobile was sold to his predecessor in title, where he claims by purchase from one who allegedly bought from the owner. Dever v. Girson, 75 Mont. 412, 243 P 812. (8) Testimony as to details of rescission of prior sale to third persons excluded where defendant claims prior sale, and agent testified to return of purchase price. Herman v. Rubin, 167 NYS 1038. (9) That a witness assisted in making inventory of articles involved. Ravine House Co. v. Bradstreet, (Vt.) 148 A 481. (10) A check drawn by plaintiff, payable to a third party to show that defendants' intestate was indebted to plaintiff, and that plaintiff agreed to cancel such indebtedness in payment for property replevied. Cobb v. Holloway, 129 Mo. A. 212, 108 SW 109. (11) Relationship of lessor and lessee between plaintiff and a person from whom defendant obtained the property. United Shoe Mach. Co. v. Bresnahan Shoe Mach. Co., 197 Mass. 206, 83 NE 412. (12) Agreement between owner and plaintiff to furnish the property to plaintiff for certain period. Brooke v. Berry, 1 Gill (Md.) 153. (13) Assumption of liabilities of character naturally expected of a bona fide holder. Hosmer v. Moseley, 11 Cush. (Mass.) 211 (on the issue whether plaintiff's title is real or colorable). (14) Quality of property, as to whether it was cut from logs belonging to plaintiff. Jenkins v. Steanka, 19 Wis. 126, 88 AmD 675. (15) Mortgagor's testimony that the phrase "building and appurtenances thereon" was not in the mortgage when executed, to show that the mortgagee believed he had no lien on articles he considered appurtenances at such time. Arlt v. Langley, (S. D.) 227 NW 469. (16) Testimony, while not responsive nor material, which nevertheless was not prejudicial. Willoughby v. Smith, 26 N. D. 209, 144 NW 79. (17) Plaintiff's knowledge of defendant's financial condition, to show the unreasonableness of defendant's claim that the mules had been bought for him by plaintiff. McKay v. Wishert, (Tex. Civ. A.) 152 SW 508.

[b] **Evidence held inadmissible.**—(1) Oral agreement contradicting the terms of a note. Wilton v. Manitoba Independent Oil Co., 25 Man. 628. (2) That a witness had not heard of sale to defendant's mortgagor. Lansley v. Van Alstyne, 81 Iowa 476, 46 NW 1119. (3) Promise of defendant to give plaintiff cotton in payment of a debt, where not identified and separated. McDaniel v. Allen, 99 N. C. 135, 5 SE 737. (4) Parol evidence of contract of sale, where written evidence was available. Hatch v. Fowler, 28 Mich. 205. (5) Payments to plaintiff by a person having possession under a contract prior to defendant's taking over and assuming such person's obligations. Kaufman v. Cooper, 38 Mont. 6, 98 P 504, 1135. (6) That plaintiff read a certain paper, in defendant's absence, at a meeting of scientists, in which plaintiff claimed the property. Root v. Borst, 142 N. Y. 62, 36 NE 814. (7) Notes signed by defendant and plaintiff's brother, and the testimony of a bank employee that plaintiff's brother had paid the bank a certain sum on notes of himself and defendant. McKay v. Wishert, (Tex. Civ. A.) 152 SW 508. (8) In replevin by a legatee against the executor for a specific bequest, testimony from the legatee tending to show that the property had been promised to him before the testator's death, but not as a gift in præsenti or causa mortis. Eberstein v. Camp, 37 Mich. 176. (9) In claim and delivery for horses agreed to be exchanged for machinery under a contract which was signed by plaintiff, a third person, and defendant, evidence that when the machinery was purchased it was stated that plaintiff was the purchaser, and that the third person did not receive any consideration for signing the contract. Harris v. Lyons, 30 S. D. 272, 138 NW 295.

[c] **Cumulative evidence** is not objectionable. Wiley v. McGrath, 194 Pa. 498, 45 A 331, 75 AmSR 709 (lease of property, assignment to plaintiff, and fire insurance policy, in addition to bill of sale).

[d] **On rebuttal** plaintiff will not be permitted to make out a different right from that on which he rested his case in the first instance. Woolston v. Smead, 42 Mich. 54, 3 NW 251.

81. Schleiff v. McDonald, 41 Ida. 50, 237 P 1108; Idaho Placer Min. Co. v. Green, 14 Ida. 249, 93 P 954; Sorlie v. Manthey, 55 N. D. 71, 212 NW 400.

[a] **Evidence held admissible.**—(1) Assumption of debts of owner by defendant as consideration for a transfer to defendant. Wallace v. Wallace, 62 Iowa 651, 17 NW 905. (2) That defendant elected to purchase goods sent him by plaintiff to buy, or receive on consignment. Yaeger Milling Co. v. Brown, 128 Mass. 171. (3) Showing property in a partnership instead of administrator's decedent. Benar v. Lippus, 18 Pa. Dist. 241. (4) To show payment for automobile. Davenport v. Alexander, 53 Cal. A. 688, 200 P 771. (5) To disprove reservation of house. Cunningham v. Atterbury, 166 Mo. A. 137, 148 SW 176. (6) To show mortgage under which defendant claimed. Schleiff v. McDonald, 41 Ida. 50, 237 P 1108. (7) Identity of corporation, vendor, as bearing on ownership. Churchill v. More, 4 Cal. A. 219, 88 P 290. (8) Parol evidence of mortgage, which defendant claims plaintiff assumed. Peeples v. Warren, 51 S. C. 560, 29 SE 659. (9) Intent of plaintiff on question whether plaintiff had agister's lien. Davey v. Davey, 81 Mont. 375, 263 P 415. (10) That defendants did not owe plaintiff anything. Sorlie v. Manthey, 55 N. D. 71, 212 NW 400.

[b] **Evidence held inadmissible.**—(1) Evidence of defendant to show what induced a surety to sign a replevin bond is irrelevant to the issue of plaintiff's exclusive ownership. Dannels v. Fitch, 8 Pa. 495. (2) Evidence in relation to trial by jury summoned by a constable to try the question of ownership for the constable's protection, it not concluding claimant's right. Hexter v. Schneider, 14 Or. 184, 12 P 668. (3) Evidence that the corporation which defendant alleged as being the owner of the property involved did not exist was immaterial. Curtis Studio v. Lennes, 121 Wash. 32, 208 P 79. (4) Testimony of a sheriff that the execution debtor said nothing when he seized property is inadmissible for defendant to contest plaintiff's claim that he owned the property and the execution debtor had purchased it merely as his agent. Minthon v. Lewis, 78 Iowa 620, 43 NW 465 (the debtor not having testified). (5) Evidence of notes of plaintiff in a bank, and the management of the farm and property by the husband, where property was seized on attachment as property of plaintiff's husband. Gould v. Sanders, 69 Mich. 5, 37 NW 37. (6) Defendant having shown a third person's acts of possession over the same and similar property, evidence of sale of the similar property after the controversy arose is immaterial. Edmunds v. Leavitt, 27 N. H. 198. (7) Evidence, not purporting to contradict plaintiff's

right to possession,[82] unless the genuineness of the instrument is questioned, and no attempt is made to establish the same,[83] and on the part of defendant to show title or right to possession in himself or a third person as against plaintiff,[84] but such evidence must be relevant to, and connected with, the litigation.[85] Where the ownership of the property is in dispute, evidence of performance by the alleged owner of acts of dominion raising a presumption of ownership is admissible.[86] Where defendant has not disputed the character of plaintiff's rights as set out in the pleadings, evidence of reputed ownership in himself is inadmissible.[87] Abandonment or parting with possession by plaintiff may be shown by competent evidence.[88] Evidence of matters occurring after commencement of the action is inadmissible,[89] as plaintiff's right to recover depends on his rights existent at the commencement of the ac-

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testimony showing payment of a note so as to give the right to repossess himself of property pledged as security. Goodell v. Ward, 17 Minn. 17. (8) Evidence that defendants had no knowledge of chattel mortgage under which plaintiff claims. Farrar v. Snyder, 31 Mo. A. 93. (9) Evidence that defendants paid judgment in foreclosure action, where foreclosure judgment determined that defendants had no interest in cattle. Foster v. Fernandes, 205 Cal. 128, 270 P 188. (10) Evidence of failure to pay agreed rental, in action to recover property displayed on defendant's premises, plaintiff retaining title. Buckingham Radio Corp. v. Persion Furniture Co., 191 Wis. 391, 211 NW 269. (11) Execution in which plaintiff was defendant, and under which property was redelivered to him on a forthcoming bond. Lynch v. Welsh, 3 Pa. 294. (12) Excluding testimony as to who paid for the automobile as between plaintiff and her husband is proper, the sole question being who has right of possession. Cope-Shanks Motor Co. v. Herzig, 33 Oh. A. 345, 169 NE 581. (13) Where defendant claimed certain steers sued for under a renewal chattel mortgage, and the first mortgage did not cover such steers, whether plaintiff bought any of the property covered by the first mortgage was immaterial. Kime v. Edgemont Bank, 22 S. D. 630, 119 NW 1003 (evidence as to the amount of stock in the mortgagor's possession a year after the mortgage was given was irrelevant).

[c] **Writ upon which property was attached,** with the officer's return upon it, and the schedule of the attached property, are admissible in evidence, in an action of replevin to recover the property, in justification of defendant's title, and are not rendered incompetent by the fact that, at the time when the replevin suit was brought, execution had been issued and levied upon the property attached. Bray v. Raymond, 166 Mass. 146, 44 NE 131.

[d] **General allegations of ownership entitle defendant to meet the case-made** by plaintiff's evidence by any competent proof that tends to show that such evidence is untrue. Kerron v. North Pacific Lumbering, etc., Co., 1 Wash. 241, 24 P 445.

[82] Delco Light Co. v. John Le Roy Hutchinson Properties, 99 Fla. 410, 128 S 831. See also Haller v. Hopkins, 195 Ill. A. 380.

[a] **Evidence held admissible.**—(1) Affidavit of plaintiff, requisition on sheriff, and sheriff's return, to show that defendant rebonded the property and therefor, plaintiff being a prevailing party, not in possession, the referee should have assessed the value and ordered judgment accordingly. Bennett v. Schuster, 24 Minn. 383. (2) Assignment conveying title to a note and mortgage of property to plaintiff. Flinn v. Ferry, 127 Cal. 648, 60 P 434. (3) Bills of sale. Bonesteel v. Gardner, 1 Dak. 372, 46 NW 590 (holding that a bill of sale to a plaintiff in replevin from a third party through whom he claims title is not inadmissible as res inter alios acta); Benn v. Oliver, (Iowa) 80 NW 392. (4) A deed from defendant to a third person, after an agreement to transfer title to a lot to be exchanged for plaintiff's groceries, is admissible on the part of plaintiff. Crawford v. Hurd, 106 SW 849, 32 KyL 636. (5) Divorce decree, conveyances of the president of plaintiff corporation to her sister, conveyances from the sister to plaintiff, conveyances from the president direct to plaintiff, and the minutes of plaintiff showing an acceptance of the property. Curtis Studio v. Lennes, 121 Wash. 32, 208 P 79. (6) A lease and assignments thereof, to show plaintiff's right to possession and ownership. Churchill v. More, 4 Cal. A. 219, 88 P 290. (7) Mortgages. Lansley v. Van Alstyne, 81 Iowa 476, 46 NW 1119; Shattuck v. Hall, 3 Kan. A. 374, 42 P 1101. (8) Notes. C. I. T. Corp. v. Straub, (Mo. A.) 11 SW (2d) 759 (action based on chattel mortgage securing note). (9) Notes and mortgage bearing notation, "Canceled by foreclosure of security, December 17." Bailey v. Sullivan, 75 Colo. 346, 225 P 830. (10) Note, mortgage, and check, to show real purchase by plaintiff. Haberer v. Walzer, 109 Ill. A. 371. (11) Record indebtedness of defendant's vendor to show absence of title in the vendor or defendant. Keefer v. Keefer, 9 Pa. Super. 53.

[b] **Evidence held inadmissible.**—(1) Where defendant claimed ownership of property by agreement with a third person, a bill of sale of the property from the third person to plaintiff is inadmissible in the absence of a foundation laid impugning defendant's title. Metropolitan Lumber Co. v. McColeman, 140 Mich. 333, 103 NW 809. (2) Plaintiff having alleged absolute ownership, a chattel mortgage is inadmissible to prove his right to possession. Powers v. Benson, 120 Iowa 428, 94 NW 929.

[83] Bray v. Flickinger, 79 Iowa 313, 44 NW 554.

[84] [a] **Evidence held admissible.**—(1) Bill of sale. Adder Mach. Co. v. Ross, 184 Ill. A. 293; Leavitt v. Shook, 47 Or. 239, 83 P 391. (2) A certified copy of the mortage, filed in another county, without proof that it was recorded, where defendant also relied on another mortgage recorded in the county of plaintiff's residence. Parkhurst v. Sharp, 10 Kan. A. 575, 61 P 531. (3) Deeds to land, with proof of adverse possession. Richbourg v. Rose, 53 Fla. 173, 44 S 69, 125 AmSR 1061. (4) A deed to property on which machinery was, and the record of the court quieting title, to show the right in defendant. Fox v. Cox, 20 Ind. A. 61, 50 NE 92. (5) A letter from plaintiff to defendant, to show that defendant obtained title to the property. Cox v. Burdett, 23 Pa. Super. 346. (6) A mortgage to defendant by a third person against whom plaintiff claims adversely. Saenz v. Mumme Co., (Tex. Civ. A.) 85 SW 59 (it is immaterial that plaintiff was not present, or knew of it, or when it was recorded).

[b] **Evidence held inadmissible.**—Where each party claims property through a right to Indian reservation land on which it grew, admission of a permit of a clerk of an Indian agent to defendant is error where it is not shown that the clerk had control of the land, or that plaintiff gave him authority. Snyder v. Anderson, 1 Nebr. (Unoff.) 406, 95 NW 698.

[85] [a] **Evidence held inadmissible.**—(1) A blank order for the shipment of goods, proving nothing on its face, and in no wise connected with the property in controversy, cannot be introduced by plaintiff to show title and right to possession. Northwall Co. v. McCormick Harvester Mach. Co., 2 Nebr. (Unoff.) 699, 89 NW 767. (2) Books of account of a third person, not a party to the suit. Watrous v. Cunningham, 65 Cal. 410, 4 P 408. (3) A chattel mortgage executed by a third party and secured by the cattle and an agreement between plaintiff's husband and such third person under which the husband loaned the cattle to such third person are inadmissible against plaintiff, where there is no evidence that plaintiff was connected with these exhibits or knew of them until the trial. Roberts v. Little, 18 N. D. 608, 120 NW 563. (4) Chattel mortgages held by strangers to record. C. I. T. Corp. v. Straub, (Mo. A.) 11 SW (2d) 759. (5) A promissory note of defendants, admittedly paid, and in no wise connected with plaintiff's claim, is inadmissible on behalf of plaintiff. French v. Parker, (Kan. A.) 52 P 910. (6) In replevin by a father to recover property attached in an action by his daughter-in-law against her husband for support, the petition in her action for support, alleging neglect and ill treatment by her husband, her poverty, and her husband's failure to support her is immaterial and irrelevant. Alborn v. Alborn, 100 Iowa 382, 69 NW 678.

[86] Eames v. Snell, 143 Mass. 165, 9 NE 522; Woolston v. Smead, 42 Mich. 54, 3 NW 251; Cuerth v. Arbogast, 48 Mont. 209, 136 P 383; Wheeler v. Steadman, 99 Or. 414, 195 P 818.

[87] Heckela v. Coos Bay Liquor Co., 71 Or. 149, 142 P 547.

[88] [a] **Evidence held admissible.**—(1) Declarations, showing abandonment of property. United Shoe Mach. Co. v. Bresnahan Shoe Mach. Co., 197 Mass. 206, 83 NE 412. (2) Evidence that the landlord had surrendered or abandoned his title under a contract to purchase under which he claimed when he made the contract with the cropper. Merchants' Nat. Bank v. Frazier, 60 Okl. 156, 159 P 647.

[b] **Evidence held inadmissible.**—(1) Shiftless and questionable business methods of plaintiff. Gumberg v. Goodstein, 95 App. Div. 101, 88 NYS 423. (2) Evidence of agent's attempt to call plaintiff on telephone. L. A. McKean Auto Co. v. O'Marro, 53 S. D. 55, 220 NW 144.

[89] McCraw v. Welch, 2 Colo. 284; Hardwick v. Brookover, 48 Kan. 609, 30 P 21.

tion.[90] Declarations of the parties or of third persons alleged to have an interest in the property, bearing on the question of title or right to possession of the property, are admissible.[91] Evidence of title in plaintiff may be rebutted by showing title in a third person.[92] But evidence on behalf of defendant that persons other than plaintiff claim the property is not admissible unless it is shown, or offered to be shown, that the right claimed is derived through plaintiff or owner of such property.[93]

[§ 244] **3. Taking and Detention.** Any legal evidence tending to prove the wrongful taking or detention of the property replevied,[94] such as proof of demand and refusal,[95] or any evidence tending to justify such taking or detention,[96] is admissible. But evidence showing the intention of defendant in taking and appropriating the property is immaterial, since his liability does not depend upon his intention.[97] Where defendant has given a redelivery bond evidence is inadmissible to show that he did not receive a part of the property described therein.[98]

[§ 245] **4. Identity of Property.** As bearing on the identity of the property, any competent evidence is admissible.[99] Evidence that a thief admitted having stolen the property and took the sheriff to defendant with whom he had disposed of it is

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90. See supra § 46.

91. [a] **Declarations held admissible.**—(1) Declarations of conversations and conduct of parties to sale of realty. Rohrer v. Lockery, 136 Wis. 532, 117 NW 1060. (2) Conversations occurring many years previously between the father and his infant sons, including plaintiff, respecting their working a farm and buying cattle through him on their own account, although the conversations did not occur in defendants' presence, where defendants relied on an intent to defraud the father's creditors by transactions between him and his sons respecting the cattle. Comeau v. Hurley, 22 S. D. 310, 117 NW 371. (3) Conversations between plaintiff and his tenant as to such expenses of raising crop was admissible to show the amount to which plaintiff was entitled, although defendant was not present. Turner v. Morris, 142 Mo. A. 60, 125 SW 238 [transf 222 Mo. 21, 121 SW 9]. (4) Declarations of defendant's alleged vendor. Peoples v. Devault, 11 Heisk. (Tenn.) 431. (5) Declarations of execution defendant, to show property seized was not that of plaintiff. Mitchell v. Sims, 124 N. C. 411, 32 SE 735. (6) Declarations of plaintiff. Doyle v. Dobson, 74 Mich. 562, 42 NW 137; Orner v. Hollman, 4 Whart. (Pa.) 45; Resch v. Senn, 28 Wis. 286. (7) Declaration of plaintiff's vendor, in an action against one claiming title to property. Ross v. Houghton, 54 Mich. 337, 20 NW 67. (8) Third person's declarations as to ownership when property was seized by defendant. Bray v. Raymond, 166 Mass. 146, 44 NE 131. (9) Statement of third person, plaintiff's vendor, that he purchased from defendant as an agent. Siedenbach v. Riley, 111 N. Y. 560, 19 NE 275. (10) Declaration of third person from whom both parties claim. Wallace v. Wallace, 62 Iowa 651, 17 NW 905. (11) Admission by intervener that he held the automobile as security for a debt incurred "in a little game among friends" is competent to show that the transaction was a pledge, and not a sale, as against an objection that it referred to a matter not pleaded. Benish v. Jones, 68 Colo. 484, 190 P 538.

[b] **Declarations held inadmissible.**—In replevin for an automobile sold by plaintiff's son to defendant, evidence of conversations with plaintiff's son as to acts of his, all out of the presence of plaintiff, where the son was a stranger to the suit and no agency with him was established, is inadmissible. Whitten v. Kemp, 77 Ind. A. 615, 134 NE 211.

[c] **Identity of purchaser.**—Where an issue is raised as to the identity of the purchaser of certain property at a given sale, a conversation that took place while the sale was being made, between the seller and other persons present, is admissible. Watrous v. Cunningham, 71 Cal. 30, 11 P 811.

Declarations of husband or wife see Husband and Wife § 788.

92. Brown v. Webster, 4 N. H. 500.

93. Kennett v. Fickel, 41 Kan. 211, 21 P 93.

[a] **Defendant cannot introduce letters** of a person under whom plaintiff claims, to show lack of title in defendant. Halford v. Dillon, 2 B. & B. 12, 6 ECL 16, 129 Reprint 861.

94. Johnson v. Howe, 7 Ill. 342; Black v. Foster, 28 Barb. (N. Y.) 387, 7 AbbPr 406.

[a] **Evidence held admissible or improperly rejected.**—(1) Custom. Hillsburg v. Harrison, 2 Colo. A. 298, 30 P 355 (custom of allowing tailor to inspect coats made from cloth furnished, before payment, in order to show wrongful detention). (2) Evidence of failure to comply with a statute on distress, where defendant avows taking under distress. Joynes v. Wartman, 5 Md. 195. (3) Evidence showing that defendant gave a general order to his servants before the commencement of the suit not to deliver the horse to plaintiff. Johnson v. Howe, 7 Ill. 342. (4) Testimony as to execution of redelivery bond to show admission of taking by defendant. Cothran v. Knight, 45 S. C. 1, 22 SE 596.

[b] **Evidence held inadmissible** to show illegal impounding of animal. Taylor v. Orndoff, 70 Pa. Super. 385 (record of a proceeding in the common pleas setting aside a judgment of a justice of the peace obtained under the Stray Act of April 13, 1807 (4 Smith L. p 472), where the record shows the proceeding was against another person than plaintiff in the replevin, and what was done by the magistrate under the act of 1807 was wholly coram non judice).

95. Belknap Sav. Bank v. Robinson, 66 Conn. 542, 34 A 495; Toomey v. Woodruff, 50 Mich. 31, 14 NW 689.

[a] **Evidence held admissible to show demand.**—Plaintiff may introduce letter to agent, where demand made by agent, to show agent's authority to demand. New York City State Bank v. Waterhouse, 70 Conn. 76, 38 A 904, 66 AmSR 82.

96. Townsend v. Newell, 14 Pick. (Mass.) 332; Hubbardston Lumber Co. v. Covert, 35 Mich. 254.

[a] **Evidence held admissible.**—(1) Evidence that defendant, who originally sold the automobile to plaintiff under a conditional sale contract, but who had transferred the notes and the conditional contract, took possession as agent of the transferee, was admissible to show the taking of possession was lawful. Rapp v. Mabbett Motor Car Co., 201 App. Div. 283, 194 NYS 200. (2) Evidence of an agreement between the lessor and the lessee that part of the lessor's property became the lessee's is admissible to show that such property was subject to execution, in an action by the lessor against defendant sheriff who took the property under execution against the lessee. Lemmon v. Beattie, 41 Colo. 68, 91 P 1102. (3) Defendant may show that he acquired a lawful lien on the horse by reason of its straying on his property and damaging it, and that the owner could not recover possession, with consequent destruction of defendant's lien, except on the conditions contemplated by the statute covering such cases. Taylor v. Orndoff, 70 Pa. Super. 385. (4) An order of a live stock sanitary commission of a sheriff, requiring him to seize cattle, is admissible as a prima facie justification of the taking and detention. Hardwick v. Brookover, 48 Kan. 609, 30 P 21. (5) An execution, regular on its face, is admissible on behalf of an officer without proof of judgment. Kahn v. Hayes, 22 Ind. A. 182, 53 NE 430.

97. Ecker v. Moore, 2 Pinn. (Wis.) 425, 2 Chandl. 85.

98. Gaulden v. Hill, 81 Fla. 251, 87 S 758.

[a] **Rule applied.**—The recital in a forthcoming bond of the amount of property in defendant's possession does not preclude plaintiff from proving that he claims less property than is described in the affidavit or in the bond, and such testimony does not permit defendant to prove that less property was replevied than claimed by plaintiff. Gaulden v. Hill, 81 Fla. 251, 87 S 758.

99. See cases infra this note; and notes 1, 2.

[a] **Evidence held admissible.**—(1) In replevin of a stolen automobile, where the numbers were ground off and some other figures substituted, it is competent to identify by other means, such as marks, scratches, and other peculiarities, if such circumstances sufficiently identify. Wald v. Auto Salvage, etc., Co., 190 Iowa 11, 179 NW 856. (2) Where, in claim and delivery for sheep, the complaint described them with reasonable certainty, and plaintiff's testimony as to the identity of the sheep demanded corresponded with the complaint, additional evidence that the sheep had been marked with paint, and that in defendant's sacks of fleeces taken from yearling sheep fleeces were discovered bearing similar color marks, was admissible as tending further to identify the property. Fox v. Tift, 57 Or. 268, 111 P 51, AnnCas1912D 845.

admissible to identify the property in the hands of defendant.[1] The record of a conviction for larceny is inadmissible to identify property claimed to have been pawned with defendant by the thief.[2]

[§ 246] **5. Value and Damages—a. In General.** It is proper in an action of replevin to allow plaintiff to show the value of the property, to aid the jury in assessing his damages.[3] Evidence is admissible to show that a party has placed a certain value on property.[4] Evidence of the cost of manufacturing an article and transporting it to market,[5] and of the state of the market as to supply and demand,[6] is admissible to show value or to aid in assessing damages, and where the property has no market value, the owner's estimate of its value to him is admissible as evidence of its value.[7] However, estimates in an appraisal of property made by one whose action does not legally affect the party against whom the evidence is offered is incompetent.[8] Evidence is admissible on behalf of defendant to show that an estimate, upon which plaintiff relies to determine the value, extended only to a part of the property;[9] but evidence of the value of property exchanged for that of plaintiff by one having no authority to do so is inadmissible where plaintiff had nothing to do with the property.[10]

The affidavit[11] is competent evidence of the value of the property.[12] Defendant, not being bound by the value set by plaintiff in his affidavit of value, may produce testimony to show a lesser value,[13] but plaintiff cannot introduce evidence to show a different value.[14]

Damages. Plaintiff's testimony as to what damage he suffered is not inadmissible as being a conclusion of law.[15] Evidence of conversion by defendant during the pendency of the action is admissible as a means of estimating damage.[16] In replevin of property wrongfully sold to defendant, evidence that defendant's vendor appropriated the full purchase price is admissible to show the amount of plaintiff's damages.[17] Evidence of the use value of the property during the time of its detention is admissible on behalf of defendant, where plaintiff wrongfully replevied the property.[18] On the question of damages defendant may introduce evidence to show improvements and expenditures on property prior to the action.[19]

On the question of punitive damages, plaintiff may prove the circumstances leading up to the taking by defendant.[20] The giving of a redelivery bond is not admissible to show malice in defendant's taking of property,[21] and evidence of indebtedness of plaintiff to defendant is inadmissible to show defendant's want of malice.[22]

In mitigation of damages it has been held that plaintiff in replevin may prove a return of the property, or a part of it, to defendant,[23] or payments on the judgment under which the property replevied was seized,[24] after the commencement of the replevin suit, and before judgment. And after plaintiff in replevin has been nonsuited, he may still show that defendant has sustained no substantial damages, for the reason that he was not the owner of the property.[25]

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[1] Morris v. Shuttles Bros., (Tex. Civ. A.) 139 SW 1053.

[2] Sapo v. Simpson, 117 NYS 105.

[3] Ill.—Mattoon Heat, etc., Co. v. Walker, 134 Ill. A. 414 (holding, however, that it is not competent to show by evidence the value of the property involved in an action of replevin merely to lay the foundation of an appeal to the supreme, rather than to the appellate, court).

Iowa.—Minthon v. Lewis, 78 Iowa 620, 43 NW 465.

Mo.—Gurley v. Bunch, 130 Mo. A. 665, 108 SW 1109.

N. Y.—Hoffman v. Gundrum, 15 NYS 98 (holding that in replevin for goods sold under execution against a third person, the price which the goods brought at the execution sale is not conclusive, and evidence is admissible to show their actual value).

N. C.—Miller v. Hahn, 84 N. C. 226.

[a] **Evidence held admissible.**—(1) Value of the use of the property from the time of taking to the time of trial. Benjamin v. Houston, 16 S. D. 569, 94 NW 584. (2) Cost price of article. Osmers v. Furey, 32 Mont. 581, 81 P 345. (3) Value of component parts of property. Indiana Union Tract. Co. v. Bick, 40 Ind. A. 451, 81 NE 617. (4) Probable earnings of property during period detained. Arnold v. Rudolph Wurlitzer Co., 31 Oh. Cir. Ct. 491. (5) Quality of the property. Jenkins v. Steanka, 19 Wis. 126, 88 AmD 675. (6) Stallion's pedigree, and reputation of that blood as fast horses. Ellis v. Simpkins, 81 Mich. 1, 45 NW 646. (7) Stallion's racing history and that of progeny, as basis for determining "peculiar value." Drinkhouse v. Van Ness, 202 Cal. 359, 260 P 869. (8) Testimony of the assignor of the goods as to their value when he was in possession is competent. Gevers v. Farmer, 109 Iowa 468, 80 NW 535.

[b] **Evidence held inadmissible.**—(1) Speed of particular horses of same blood as stallion. Ellis v. Simpkins, 81 Mich. 1, 45 NW 646 (where defendant had been permitted to show the speed of certain horses of the blood of the one sued for, it was error not to allow plaintiff, on rebuttal, to show that certain horses of the same blood had not developed into fast trotters). (2) Value of other property described in a bill of sale under which plaintiff claims. Burrill v. Wilcox Lumber Co., 65 Mich. 571, 32 NW 824.

[c] **Place of valuation.**—In an action against a sheriff in replevin for certain property seized by such sheriff while the property was in transit, evidence as to the market value of such property at the place of shipment is admissible, as tending to show, in connection with other testimony, its market value at the place of detention. Newton v. Brown, 1 Utah 287.

[d] **Where property cannot be delivered in specie,** it is not error to permit plaintiff to show the value to aid the jury in assessing his damages. Miller v. Hahn, 84 N. C. 226.

[e] **Parol evidence of appraised value.**—To show value, the appraisement is the best evidence to prove its contents so that parol evidence is inadmissible in the absence of a proper foundation. Dempster Mill Mfg. Co. v. Holdrige First Nat. Bank, 49 Nebr. 321, 68 NW 477.

[4] Curme v. Rauh, 100 Ind. 247; Duroth Mfg. Co. v. Cauffiel, 243 Pa. 24, 89 A 798, 800 [cit Cyc].

[a] **A bailment lease** is competent evidence of the value of the leased property. Stern v. Martin, 76 Pa. Super. 164.

[5] Brizsee v. Maybee, 21 Wend. (N. Y.) 144.

[6] Washington Ice Co. v. Webster, 68 Me. 449.

[a] **Thus** testimony of public sale of property after due notice and of the price which the property brought is admissible to show the value of liquor sold under execution. Jennings v. Prentice, 39 Mich. 421.

[7] Drake v. Auerbach, 37 Minn. 505, 35 NW 367.

[8] Cassidy v. Elias, 90 Pa. 434.

[9] Itasca Cedar, etc., Co. v. McKinley, 124 Minn. 183, 144 NW 768.

[10] Whitten v. Kemp, 77 Ind. A. 615, 134 NE 211.

[11] See supra §§ 98-115.

[12] Hays City First Nat. Bank v. Staab, 102 Kan. 369, 171 P 3; Lamy v. Remuson, 2 N. M. 245; American Box Ball Co. v. Wood, 50 Okl. 242, 150 P 1047.

[13] Automobile Finance Co. v. Reese, 73 Pa. Super. 550.

[14] Automobile Finance Co. v. Reese, supra; May v. Lintner, 67 Pa. Super. 422.

[15] Goodell v. Ward, 17 Minn. 17.

[16] Deck v. Smith, 12 Nebr. 389, 11 NW 852.

[17] Raleigh Mfg. Co. v. Great Western Smelting, etc., Co., 227 Ill. A. 221.

[18] Ætna Ins. Co. v. Mills, 176 Ark. 684, 3 SW (2d) 999; Kieselhorst Piano Co. v. Porter, 185 Mo. A. 676, 171 SW 949.

[19] Canadian Car, etc., Co.'s Agency v. Pennsylvania Iron Works Co., 256 Fed. 339; Veazie v. Somerby, 5 Allen (Mass.) 280; Guinn v. Vitte, 63 Pa. Super. 611.

[20] Williams v. Weekley, 100 S. C. 28, 84 SE 299.

[21] Scanlan v. La Coste, 59 Colo. 449, 149 P 835, LRA1915F 664, Ann Cas1917A 254.

[22] Ray v. Navarre, 47 Okl. 438, 147 P 1019.

[§ 247] **b. Time of Valuation.** Evidence showing the value of the property some time previous to the bringing of an action for its recovery or the value thereof is admissible, having some bearing upon the value at the date of the suit,[26] and where the value is determined as of the time of the taking[27] evidence of value a reasonable time before or after the taking is admissible;[28] but evidence of value at a time too remote from the time of the trial to have any bearing on the value then has been held inadmissible.[29] So it is competent to show the condition of the property at any time after the commencement of the action and before judgment, such condition being a result of the detention,[30] although evidence of an increased value at the date of trial as compared with the value when the action was commenced has been held inadmissible,[31] but under a statute requiring the assessment of value as of the date of the trial when the verdict is for plaintiff and defendant is in possession[32] it has been held improper to admit evidence of payment by defendant of a mortgage on the property after commencement of the action.[33]

[§ 248] **6. Fraud.** Any competent evidence is admissible in behalf of either party to prove fraud or bad faith in the acquisition of the property.[34] Evidence that plaintiff, who claimed the property by purchase from the judgment debtor, kept a house of ill fame at the time of the purchase, is not admissible as bearing upon the question of bad faith in such purchase.[35]

[§ 249] **C. Weight and Sufficiency of Evidence—1. In General.** In accordance with the rules governing the weight and sufficiency of evidence in civil actions generally,[36] plaintiff must establish his right to recover by a preponderance of the evidence,[37] but it is not necessary to prove material facts beyond a reasonable doubt.[38] Defendant must establish his defense by a preponderance of the evidence.[39] A rule of court providing that statements of fact in pleading verified by affidavits shall be conclusive if not denied by a verified plea has been held not to apply to an action of replevin.[40]

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[23] De Witt v. Morris, 13 Wend. (N. Y.) 496.

[24] Booth v. Ableman, 20 Wis. 21, 88 AmD 730.

[25] Harman v. Goodrich, 1 Greene (Iowa) 13.

[26] Denton v. Smith, 61 Mich. 431, 28 NW 160; Lacquement v. Bellamy, (Mo. A.) 253 SW 1076; Brewster v. Silliman, 38 N. Y. 423.

[a] **Thus:** (1) Evidence of the value of the property when turned over to defendant a year before trial was competent, as tending to show its value at the time of trial. Lacquement v. Bellamy, (Mo. A.) 253 SW 1076. (2) Evidence of value of property when taken is competent on issue of value at time of trial. Brunke v. Salinger, (Mo. A.) 8 SW (2d) 88. (3) Where property replevied has been lost or destroyed at time of trial, evidence of value at time of taking will be competent. Yahlem Motor Co. v. McCord, (Mo. A.) 299 SW 49.

[27] See infra § 366 et seq.

[28] Newsom v. Cothran, 185 N. C. 161, 116 SE 415.

[29] Gilroy v. Everson-Hickok Co., 118 App. Div. 733, 103 NYS 620 [aff 190 N. Y. 551, 83 NE 1125]; McKesson v. Sherman, 51 Wis. 303, 8 NW 200.

[30] Miami Powder Co. v. Port Royal, etc., R. Co., 47 S. C. 324, 25 SE 153, 58 AmSR 880.

[31] James v. Weiffenbach, 129 Wash. 682, 225 P 627.

[32] See statutory provisions.

[33] Devlin v. Kosel, 3 Misc. 40, 22 NYS 361 [aff 142 N. Y. 676, 37 NE 824].

[34] Graves v. Mayberry, 137 Okl. 218, 278 P 1111; Cryer v. Mayfield, 5 Tenn. Civ. A. 537.

[a] **Evidence held admissible.**—(1) Inadequacy of consideration of sale. Chamberlain v. Stern, 11 Nev. 268. (2) Mortgages made to plaintiff to defraud creditors of mortgagor. Finnell v. Million, 99 Mo. A. 552, 74 SW 419. (3) Chattel mortgages executed by plaintiff and by plaintiff and her husband. Christian v. Smith, 85 Mo. A. 117. (4) Circumstances under which property was sold, and explanation thereof given by the seller to defendant claiming to be a bona fide purchaser. Dutchess County Mut. Ins. Co. v. Hachfield, 73 N. Y. 226. (5) Judgments against a debtor from whom defendant seized property under execution. Hersey v. Benedict, 15 Hun (N. Y.) 282. (6) Evidence that on the day defendants left plaintiff's home a witness met two men of the description of defendants leading a mule which answered the description of the mule obtained from plaintiff, and that the men were driving at an unusual speed and were cutting the telephone wires as they went. Russell v. Brooks, 92 Ark. 509, 122 SW 649. (7) In replevin by an assignee for creditors of property attached by creditors of the assignor while in the assignee's possession, the creditors may show the fraudulent character of the assignment. Morehead v. Adams, 18 Nebr. 569, 26 NW 242.

[b] **Evidence held inadmissible.**—(1) Affidavits for attachment, not connected with the subject matter of the suit. Price Baking Powder Co. v. Rinear, 17 Wash. 95, 49 P 223. (2) Where the issue was whether plaintiff's animal had been procured from him through the fraud of third persons, who had transferred the same to defendants, the contents of a grip in the possession of the third persons were inadmissible, in the absence of a showing that the articles therein tended to show that the third persons had perpetrated a fraud. Russell v. Brooks, 92 Ark. 509, 122 SW 649.

[c] **Great latitude of proof** is permitted where the question in an action of replevin is one of fraud, and the testimony of a witness which relates to a transaction with one not a party to the suit is competent. Katzenberger v. Leedom, 103 Tenn. 144, 52 SW 35.

[35] Johnson v. Carnley, 10 N. Y. 570, 61 AmD 762.

[36] See Evidence §§ 1730–1806.

[37] McMahon v. Scott, 132 Ill. A. 582; Nelson v. Bradfield, 97 Okl. 259, 223 P 380; Kerfoot v. Waterloo State Bank, 14 Okl. 104, 77 P 46; Quackenbush v. Graf, 37 S. D. 385, 158 NW 409; Dayton v. Wyoming Nat. Bank, 1 Wyo. 263.

[a] **Evidence held to support verdict for plaintiff in replevin.**—Teel v. Teel, (Mo. A.) 8 SW (2d) 1086 (evidence showing ownership, possession by defendant, and demand and refusal).

[38] See cases infra this note.

[a] **Replevin of stolen property.**—(1) In replevin to recover money in the hands of property clerk of police department, claimed to have been stolen from plaintiff by its employee, and which had been taken from employee, by a police officer, where the employee denied that money had been stolen, and claimed that the money taken from him was his own, plaintiff had the burden of proving his case by a fair preponderance of evidence, and was not required to sustain the burden beyond a reasonable doubt. Hecker-Jones-Jewell Milling Co. v. Murray, 178 NYS 335 (evidence held sufficient). (2) Where plaintiff claims property by assignment as attorney for one who bought it with stolen money, a preponderance of evidence is sufficient to establish the larceny of money and subsequent purchase of the property. Masterson v. Union Bank, etc., Co., 86 Wash. 560, 150 P 1126, LRA1918A 531 (evidence of delivery to client, failure of client to deliver, quitting job, purchase of bank drafts and jewelry, etc., and ticket to Japan, totalling the amount stolen).

[39] See cases infra this note.

[a] **Evidence held sufficient** to sustain avowry. Haines v. Wise, 4 Del. 243 (evidence sustaining an avowry that cow was taken damage feasant); Gladman v. Plumer, 10 Jur. 109 (attornment signed by plaintiff).

[b] **Evidence held insufficient** to sustain avowry. Ewing v. Vanars-

[§ 250] **2. Title and Right to Possession.** The burden of proving title and right to immediate possession at the time the action was commenced being upon plaintiff,[41] he must establish this by a preponderance of the evidence.[42] Defendant, seeking to

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dall, 1 Serg. & R. (Pa.) 370 (proof of suit due only one of four avowments).

[40] May v. Newingham, 17 Pa. Super. 469.

[41] See supra § 237.

[42] Del.—Hitch v. Riggin, 26 Del. 84, 80 A 975.

Ill.—Adder Mach. Co. v. Ross, 184 Ill. A. 293; Weber Impl. Co. v. Huthmacher, 161 Ill. A. 261. See also West Side Brewery Co. v. Sorensen, 208 Ill. A. 128; Calabrese v. Cermak, 198 Ill. A. 418; Ianni v. Caros, 192 Ill. A. 541; George P. Bent Co. v. Zimmer, 190 Ill. A. 119.

Iowa.—Daniel v. Hammers, 199 Iowa 963, 203 NW 235.

Mass.—Wylie v. Marinofsky, 201 Mass. 583, 88 NE 448.

Mont.—Stephenson v. Combination Leasing, etc., Co., 86 Mont. 322, 283 P 1110; Davey v. Davey, 81 Mont. 375, 263 P 415; Woods v. Latta, 35 Mont. 9, 88 P 402.

Nebr.—Gravert v. Goothard, 81 Nebr. 99, 115 NW 559.

"Property in a chattel, whether it be the property required to be proved by the plaintiff or that which may be proved by the defendant, is established by direct evidence, when the case is susceptible of it, as by contracts of sale, admissions against interests, and the like, or by evidence of the acts and relation of the parties from which property and the right of possession in one or the other may reasonably be inferred." Hitch v. Riggin, 26 Del. 84, 80 A 975, 976.

[a] **Evidence held sufficient to show:** (1) Division of crops, and that plaintiff was entitled to recover his share. Keplinger v. Peterson, 46 N. D. 215, 180 NW 803 (evidence that plaintiff's share was put in a lien to secure plowing of more land for defendant). (2) Ownership. Morrilton First Nat. Bank v. Godbey, 181 Ark. 1004, 29 SW (2d) 272 (evidence of marking of bales of cotton, and the furnishing of money by plaintiff for their purchase); Ellis v. Caruthers, 137 Ark. 134, 208 SW 425 (evidence that notes were payable to plaintiff's ward was sufficient to warrant inferences by the jury that she was the owner of the notes and entitled to possession); Russell v. Warren, 127 Ark. 617, 192 SW 190 (testimony showing that plaintiff's intestate parted with horse to a person from whom defendant got it, for the purpose of trying it, the sale to be complete if he liked it, and his failure to return it); Peterson v. Bay Point First Nat. Bank, 101 Cal. A. 532, 281 P 1104 (evidence of minutes of meeting and agreement among directors that plaintiff's assignor agreed to loan credit, evidenced by a note sued for, to establish defendant bank's credit, and evidence that a bank director delivered collateral to a trustee for satisfaction of unpaid directors' notes); Mariotte v. Bremer, 33 Ind. A. 701, 71 NE 250 (testimony that plaintiff was the owner, and had so informed defendant); Rose v. Eggers, 148 Iowa 306, 127 NW 196 (evidence of tender of property exchanged by defendant for that of plaintiff); Graham v. Strawsburg, 91 SW 737, 28 KyL 1204 (evidence that plaintiff incurred expense of cutting timber and placing it on land afterward conveyed by defendant to plaintiff's wife); Gleason v. Sanborn, 122 Me. 147, 119 A. 200 (evidence that one on whose land logging operations were contemplated, upon the inability of consignors to pay for a sawmill intended for such use, agreed to pay the draft attached to the bill of lading and take title to the mill). Thompson v. Laven, 157 Minn. 333, 196 NW 475 (evidence of contract of exchange, and completion of transaction by plaintiff); Denison v. Sawyer, 95 Minn. 417, 104 NW 305 (evidence showing contract under which plaintiff was entitled to property); Dorris v. Dorris, 149 Mo. A. 107, 129 SW 979 (evidence that plaintiff owned property, and that a third person from whom defendant claimed by purchase never had title); Boatman v. Coverdale, 80 Okl. 9, 193 P 874 (evidence showing defendant held car for a gambling debt of plaintiff's brother, who had sold the car to plaintiff); Vitagragh Co. v. Swaab, 248 Pa. 478, 94 A 126, AnnCas1916C 311 (evidence to show that defendant had received the films from plaintiff under a lease, and that plaintiff owned same, and not that ownership was transferred); Reber v. Schroeder, 221 Pa. 152, 70 A 556 (evidence showing stock certificates were in a sealed envelope in decedent's safe, with power of attorney transferring them to plaintiff, and statements on envelope that they were plaintiff's property); Craig v. Atkinson, 72 Pa. Super. 120 (evidence of title by possession corroborated by other evidence as to care and maintenance of property); McCole v. Varnum, 64 Vt. 163, 23 A 635 (evidence of quitclaim deeds to plaintiff, and contract between him and persons in possession, on attachment against whom defendant seized property); MacCallum-Donahoe Finance Co. v. Leiendecker, 128 Wash. 138, 222 P 215 (evidence of ownership by a third person, and delivery to plaintiff under a financial arrangement upon dissolution of the third person's business); Brill v. Ryan, 172 Wis. 600, 179 NW 750 (evidence showing contract of plaintiff with persons to conduct sales in his store, such persons unbeknown to plaintiff forming a corporation and in its name buying the goods in question, put into the store with plaintiff's goods, plaintiff taking exclusive possession of the goods and paying the purchase price money due on them, and acquiring any interest of the corporation by purchase at execution sale under judgment against it). (3) Ownership by purchase. Gray v. Headley, (Ariz.) 276 P 523; Day v. Ferguson, 74 Ark. 298, 85 SW 771; Moran v. Lennon, 6 Cal. Unrep. Cas. 382, 59 P 941; Valentine v. G. S. Donaldson Inv. Co., 86 Cal. A. 142, 260 P 305; Waterhouse-Wilcox Co. v. Betz, 73 Cal. A. 236, 238 P 763; Taylor v. Bernheim, 58 Cal. A. 404, 209 P 55; Harmon v. Keough, 41 Cal. A. 773, 183 P 201; Beggs v. Smith, 26 Cal. A. 532, 147 P 585; Webster v. McCullough, 45 Ida. 604, 264 P 384; Phenix v. Wilson, 179 Ill. A. 443; Illinois Cent. R. Co. v. Chicago, etc., R. Co., 177 Ill. A. 431; Elliott v. Elliott, 137 Iowa 290, 114 NW 1074; Maslof v. Christian, 166 Minn. 408, 208 NW 135; Jones v. Minnesota, etc., R. Co., 97 Minn. 232, 106 NW 1048; Western Realty Co. v. Musser, 97 Mo. A. 114, 71 SW 100; Sutton v. Masterson, 86 Mont. 530, 284 P 264; Robertson v. Walker, 108 Nebr. 786, 189 NW 165; Byrnes v. Eley, 70 Nebr. 283, 97 NW 298; Rahis v. McLeod, 45 Nev. 380, 204 P 501; Beidleman v. Barry, 104 Okl. 288, 231 P 276; Nelson v. Bradfield, 97 Okl. 259, 223 P 380; Church v. Foley, 10 S. D. 74, 71 NW 759; Hyde v. Clausin, 82 Wash. 218, 144 P 50. (4) That plaintiff had not parted with title. Kee, etc., Dairy Co. v. Pennsylvania Co., 291 Ill. 248, 126 NE 179 [aff 214 Ill. A. 1]; Lowenstine v. Citro, 74 Ind. A. 516, 129 NE 280; Dannenberg v. Teeters, 126 Kan. 28, 266 P 744. (5) Right to possession. Hardison Perforating Co. v. Davies, 33 Cal. A. 738, 166 P 361 (evidence showing lease by plaintiff to tenant of defendant, instead of sale); Shevlin-Mathieu Lumber Co. v. Rainy Lake River Boom Corp., 115 Minn. 533, 132 NW 263; Namakan Lumber Co. v. Rainy Lake River Boom Corp., 115 Minn. 296, 132 NW 259 (in both cases, act and conduct of parties relative to property); Bernick v. McClure, 107 Minn. 9, 119 NW 247 (evidence showing right by virtue of mortgage); St. Victor v. Edwards, 155 Mo. A. 566, 134 SW 1105 (evidence showing that plaintiff was entitled to possession of the note as against the objection that it had been delivered to the maker on the theory that it had been paid by the acceptance of a testamentary gift); Chadwell v. Brown, 88 Okl. 44, 211 P 410 (evidence showing that defendants had converted the property of plaintiffs to their own use prior to the time of the commencement of the replevin action so as to waive their lien); Iowa Nat. Bank v. Woonsocket Citizens' Nat. Bank, 70 Okl. 1, 172 P 924 (evidence of right in plaintiff prior to mortgage to intervener, and notice of such right at time intervener took the mortgage); Kebabian v. Adams Express Co., 28 R. I. 177, 66 A 201 (evidence showing that plaintiff directed a third person to ship goods by defendant). (6) Special interest. Agnew v. Baker, 204 Ill. A. 56 (that plaintiff, as alderman, took possession and delivered car to defendant for repairs; Brunswick-Balke-Collender Co. v. Witt, 112 Kan. 82, 209 P 815 (evidence showing purchase from plaintiff, and giving of chattel mortgage to him).

[b] **Evidence held sufficient to show ownership in assignor of intervener.**—Alper v. Tormey, 3 Cal. A. 396, 85 P 661 (acts of ownership by corporation, of which intervener was assignee).

[c] **Evidence held insufficient** to show: (1) Lien claimed by plaintiff. Samberg v. Kelly, 163 Ill. A. 395; Sullivan v. Hansen, 95 Nebr. 779, 146 NW 983. (2) Ownership. Beal v. McKee, 145 Ala. 659, 39 S 664; Robinson v. Calloway, 4 Ark. 94; Dowd v. Russell, 78 Cal. A. 262, 248 P 293; Austin v. Terry, 38 Colo. 407, 88 P 189; Mountain Home Sheep Co. v. Faraday, 36 Ida. 633, 212 P 970; Dederick v. Brandt, 16 Ind. A. 264, 44 NW 1010 (a claim of individual ownership is not sustained by evidence of title in a corporation of which plaintiff is a member); Nicholson v. Dyer, 45 Mich. 610, 8 NW 515; Jackson v. Columbia, (Mo. A.) 217 SW 869; Cook v. Vaughan, 1 Nebr. (Unoff.) 244, 95 NW 333 (evidence of parol alteration of written contract so as to give plaintiff right to the property); Hoffman House v. Barkley, 111 App. Div. 564, 97 NYS 1095; Shapiro v. Lankay, 35 Misc. 39, 70 NYS 218 (evidence of

disprove plaintiff's case by showing title or right to possession in himself or a third person, must do so by a preponderance of the evidence.[43] Proof by plaintiff of ownership and right to possession makes

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assignment of claim against a third person for conversion to plaintiff by the owner of property); Lindenstein v. Nanes, 164 NYS 690; Jacobowitz v. Gittelson, 159 NYS 796; Dutch v. Parker, 97 NYS 966 (evidence not sufficiently explaining a balance arrived at, according to defendant, by crediting plaintiff with goods replevied); Wagner Typewriter Co. v. Robinson, 84 NYS 281; Inselman v. Cadwell, 140 Okl. 55, 282 P 151; Lucas v. King, 70 Okl. 78, 172 P 939; Dudley v. Fisher, 45 Okl. 709, 146 P 708; Atwood v. National Petroleum Co., (Tex. Civ. A.) 7 SW (2d) 964. (3) Right to possession. Parker v. Foster, 29 Ill. A. 586; Leisey Brewing Co. v. Cline, (Mo. A.) 211 SW 689; Forsee v. Zenner, (Mo. A.) 193 SW 975; Wheeler v. Vanderveer, 88 Hun 233, 34 NYS 799; Klingenstein v. Belainger, 34 Misc. 804, 68 NYS 1130; Klee v. Grant, 2 Misc. 412, 21 NYS 1010 [aff 17 NYS 845]. (4) Levy by officer, giving him right to possession. Hobbs v. Williams, 175 Mo. A. 409, 162 SW 334 (evidence showing resistance to levy, no actual taking by officers, no assertion by them of levy).

[d] **Where the rights of a party are based on written leases** of the parties from whom he claimed, the failure to offer in evidence such written leases will defeat the action. Johannson v. Miller, 45 Nebr. 53, 63 NW 141.

[e] **A purchaser at a sheriff's sale** cannot maintain replevin against a party who subsequently causes the same property to be sold by virtue of a judgment and execution in his favor, without producing the judgment and execution under which his purchase was made. Sandeford v. Hess, 2 Head (Tenn.) 680.

[43] Wheeler v. Steadman, 99 Or. 414, 195 P 818; Quackenbush v. Graf, 37 S. D. 385, 158 NW 409. See also Machelli v. Torrelli, 190 Ill. A. 287; Kelly v. Hakes, 190 Ill. A. 210; Franklin v. Hunter, 184 Ill. A. 431.

[a] **Evidence held sufficient** to show: (1) Joint ownership between defendant and plaintiff. McDowell v. Hollingsworth, (Mo. A.) 10 SW (2d) 314; American Packing Co. v. Luketa, 98 Wash. 6, 167 P 87 (ownership of undivided interest by intervener). (2) Retention of title by defendant although he placed the property in the hands of a third person. Hogan Finance, etc., Co. v. Mead, 205 Cal. 1, 269 P 610 (evidence of agreements, and manner of conducting business). (3) Right to possession in defendant. Hambright, etc., Co. v. Provident Pledge Corp., 25 Cal. A. 600, 144 P 971 (evidence to show that plaintiff delivered the property to the pledgor and agreed to transfer the title to him, and that the pledgor might dispose of the property); Bruce v. Squires, 68 Kan. 199, 74 P 1102 (evidence that attachment was issued at the suit of a bona fide creditor, and that the attachment process is valid, is sufficient to entitle the officer to hold possession until a better right is shown); Eichorn v. Schochie, 154 Minn. 261, 191 NW 737 (evidence that defendant purchaser on deferred payments was never in default, and that he did not put the property to an unlawful use). (4) Title in defendant. Clements v. Terrell, (Ark.) 190 SW 451 (a note retaining title to a mule found among papers of defendant's testator who was the original defendant); Chalmers v. Bowen, 112 Ark. 63, 164 SW 1131 (evidence showing sale and delivery to defendant by agent of plaintiff); Foster v. Fernandes, 205 Cal. 128, 270 P 188 (evidence showing that defendants were good-faith purchasers from codefendant previously taking possession under claim and delivery process); Keller v. Lile, 91 Cal. A. 585, 267 P 124 (evidence showing that stock certificate transferred by plaintiff to defendant was in payment for defendant's services); Grossman v. Yip Wing, 62 Cal. A. 121, 216 P 634 (evidence as to surveys of large tract containing part leased to defendant, although no direct or positive testimony that the tract was embraced therein); Al G. Barnes Shows Co. v. Toyo Kisen Kaisha Oriental SS. Co., 61 Cal. A. 304, 214 P 1015 (evidence that defendant bought animals in his own name, paid export duties, arranged transportation, etc.); Bradley v. McDonald, 36 Cal. A. 807, 169 P 427 (evidence showing payment under contract of sale); Parker v. Freeman, 11 Colo. 576, 19 P 601 (evidence showing that plaintiff intrusted property to an agent, giving him full control over it, and that defendant purchased from the agent); Lewis County v. Peck State Bank, 31 Ida. 244, 170 P 98 (evidence showing that notes were never delivered to plaintiff county nor to its treasurer, the payee in the note, nor to any one else on its behalf); Killeen v. Greve, 182 Iowa 1382, 166 NW 731 (evidence showing that defendant had never agreed to sell the colt in controversy to plaintiff); Canfield Lumber Co. v. Nan M. Canfield Security Storage Co., (Iowa) 133 NW 323 (evidence showing defendant was given piano as wedding gift, and was her property and not that of plaintiff); Le Pak v. Hedberg, 170 Minn. 495, 213 NW 40 (evidence that logs were removed from premises described in defendants' logging permit); Dalton Adding Mach. Co. v. Bailey, 137 Minn. 61, 162 NW 1059 (evidence that a person from whom defendant purchased was sales agent of plaintiff, authorized to sell goods, and that a valid sale existed); Koelling v. August Gas Bank Note, etc., Co., 97 Mo. A. 664, 71 SW 728 (evidence that purchaser at mortgage sale acted as agent of defendant's grantor); Warrick v. Rasmussen, 112 Nebr. 299, 199 NW 544 (evidence of purchase by defendant and ratification by plaintiff mortgagee); Gravert v. Goothard, 81 Nebr. 99, 115 NW 559 (prior payment of note, in action for corn alleged by plaintiff to be his in payment of note); May v. Mendota First Nat. Bank, 74 Nebr. 251, 104 NW 184 (evidence showing plaintiffs estopped to maintain action against defendant, an innocent purchaser); Allen Clark Co. v. Francovich, 42 Nev. 321, 176 P 259 (deed whereby heir conveyed all the interest "he may now hold" or "may now have" in the estate where prior thereto he had conveyed to third party all his right, title, and interest to all property which he had received, or which he was to receive, from the estate); Vig v. Hustel, 50 S. D. 364, 210 NW 156 (evidence of positive identification of turkeys by defendant's wife); Kimball v. Donohue, 124 Wash. 505, 214 P 1045, 217 P 37 (evidence showing that defendant negotiated the purchase and made all payments except one, receipt for which was found among decedent's papers, in replevin by decedent's representative); Masterson v. Union Bank, etc., Co., 86 Wash. 560, 150 P 1126, LRA 1918A 531 (evidence that plaintiff, when he received the bill of sale, knew that the articles had been purchased with stolen funds); Nelson v. Consolidated El., etc., Co., 32 Wyo. 181, 231 P 397 (that stored wheat replevied by plaintiffs belonged to interveners). (5) Right to possession in third person. Chandless v. Globe Storage, etc., Co., 49 Misc. 562, 98 NYS 511.

[b] **Evidence held insufficient to show:** (1) Lien in defendant. Canadian Car, etc., Co. v. Pennsylvania Iron Works Co., 256 Fed. 339 (notice by defendant to plaintiff that it would charge storage unless plaintiff removed property, but no contract). (2) Right to possession in corporate defendant. New York City Public Bank v. Rosendorf, 166 NYS 734 (evidence showing corporate defendant was not in existence at the time of delivery to defendant, and no evidence to show any transfer to the corporation). (3) Right to possession under a mortgage. Roberts v. Little, 18 N. D. 608, 120 NW 563; Kime v. Edgmont Bank, 22 S. D. 630, 119 NW 1003 (where defendant claimed steers under a renewal chattel mortgage from the sellers to plaintiff, but which were not covered by the original mortgage, but the renewal mortgage purported to cover thirty one two-year-old steers of a certain brand and declared the property to be all the stock the mortgagors then owned, without proof that the sellers of the steers to plaintiff did not own and have in their possession thirty one two-year-old steers at the time they executed the renewal mortgage, in addition to those plaintiff had purchased and of which he had not yet taken possession, the defense was not established). (4) Title in defendant. Jordan v. Walker, 197 Ind. 365, 151 NE 2 (belief of defendant as ownership of cattle is insufficient to show right to keep possession); Cosgrove v. Kohler, 45 Minn. 148, 47 NW 539 (evidence that third person took note for price of the property, and negotiated it); Schlitz Brewing Co. v. Grimmon, 28 Nev. 235, 81 P 43; Porzio v. Murray, 182 NYS 817 (evidence supporting merely the conclusion that the property claimed by plaintiff and property claimed by defendant were not necessarily different); Pierce v. Van Dyke, 6 Hill (N. Y.) 613 (receipt signed by defendant stating note was left with him for collection); Lucas v. King, 64 Okl. 18, 165 P 165 (evidence of accounts, mortgage sales, etc.); Harrison Bank v. Porter, 17 Okl. 256, 87 P 585 (evidence not showing that property claimed was not property to which plaintiff was entitled); Hayden v. McMillan, 79 Pa. Super. 1 (evidence that defendant bought from plaintiff's bailee, who had merely possession of the property, is insufficient where plaintiff's evidence shows title); Eisenberger v. Auto Maintenance Co., 48 Pa. Super. 476; Hydraulic Cement Block Co. v. Christensen, 38 Utah 525, 114 P 524 (where all defendant shows is a bill of sale unconnected with plaintiff's title, there being uncontradicted evidence that plaintiff had previously bought the property, and no evidence that it had parted with its title); McRorie v. Seward, 3 Sask. L. 69 (evidence not showing bona fide purchase). (5) Title in a company in which defendant was interested as a partner. Adder Mach. Co. v. Ross, 184 Ill. A. 293. (6)

a prima facie case.[44] Proof of actual possession of property makes a prima facie case of title and right to possession,[45] and is presumptive evidence that the possession is rightful.[46] An admission that defendant holds property pursuant to an execution establishes a prima facie case for defendant's right to possession.[47] Proof that property was levied on and sold under a valid execution, issued on a valid judgment, and that defendant became the purchaser, is sufficient to sustain a plea of ownership in himself.[48] In some jurisdictions it is held that a finding in replevin of a general ownership in a party to the action is not sustained by proof of a special interest in the property.[49]

[§ 251] **3. Taking, Detention, and Possession by Defendant.** Plaintiff, having the burden of proving a wrongful taking or detention,[50] must do so by a preponderance of the evidence;[51] or, it has been held, by proof of any circumstances which go to satisfy the jury.[52] Thus proof of a demand and refusal,[53] or any circumstances going to show that a demand would have been unavailing, or a refusal to

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Title in third person. Marigliano v. O'Connor, 99 NYS 544 (evidence insufficient to show holding by third person under execution); Androvitch v. Fowler, 54 Utah 506, 182 P 222 (evidence of declarations of employee of plaintiff that employee owned property, seized for his debt by defendant constable).

[c] **Proof showing a tenancy in common** between plaintiff and a third person does not support a plea of property in such third person. Under such a plea, it is incumbent upon defendant to show not only property in a third person, but also that there was no property in plaintiff. Godard v. Tuck, 11 N. B. 370.

44. Consolidated Amusement Co., Ltd. v. Jarrett, 22 Hawaii 537; Kebabian v. Adams Express Co., 27 R. I. 564, 65 A 271.

[a] **Evidence held to make prima facie case.**—Evidence showing: (1) Bill of lading for goods shipped. Sanitary Can Co. v. Hines, 149 Ill. A. 244. (2) Bill of sale to plaintiff from owner. Rosenthal v. Rapaport, 115 NYS 1073. (3) Certificates of deposit, indorsed by the payee to plaintiff. Sather v. Sexton, 93 Minn. 480, 101 NW 654. (4) Contract for construction of property by plaintiff, and use by defendant. Charlotte Furnace Co. v. Stouffer, 127 Pa. 336, 17 A 994. (5) Purchase by, delivery to, and control by, plaintiff of property. Lowary v. Tuttle, 36 Ida. 363, 210 P 1006. (6) Manufacture of goods by plaintiff, and shipment to agent through whom defendant claims, for sale. Warder, etc., Co. v. Ingli, 1 S. D. 155, 46 NW 181. (7) Note and mortgage, under which plaintiff claims. National Brewery Co. v. Lindsay, 72 Mo. A. 591. (8) Possession of property by a corporation taking possession of leasehold, where the property was placed therein by lessee under a lease authorizing him to remove it. Churchill v. More, 4 Cal. A. 219, 88 P 290. (9) Purchase by mortgagee at foreclosure sale, and subsequent sale to plaintiff. Sharp v. McBride, 69 Ind. 396. (10) Purchase of notes from one having possession for sale thereof, with redelivery only for purpose of collection. Cooke v. Reserve Realty, etc., Co., (Mo. A.) 25 SW (2d) 562. (11) That, after verdict and judgment for plaintiff in an action for conversion, defendant retained the property under an attachment until it was paid and discharged by plaintiff. Krebs Lith. Co. v. Studor, 7 Oh. Dec. (Reprint) 199, 11 CincLBul 170. (12) Title to land, and that property grew thereon. Oxley Stave Co. v. Staggs, 59 Ark. 370, 37 SW 241; Youmans v. Caldwell, 4 Oh. St. 71. (13) Written document expressly stating title in plaintiff. Govin v. De Miranda, 140 N. Y. 474, 35 NE 626.

45. Cullum v. Bevans, 6 Harr. & J. (Md.) 469; Springfield Grocer Co. v. Shackelford, 56 Mo. A. 642; Phillips v. Schall, 21 Mo. A. 38; Ravine House Co. v. Bradstreet, (Vt.) 148 A 481; Cheeseman v. Fenton, 13 Wyo. 436, 80 P 823, 110 AmSR 1010. See also Simer v. Hults, 194 Ill. A. 240. But see Killeen v. Greve, 182 Iowa 1382, 166 NW 731 (the presumption of ownership of a colt from its being in the pasture of plaintiff is insufficient to establish the ownership of plaintiff by purchase from defendant as alleged).

[a] **Proof of actual possession of land** (1) make a prima facie case for plaintiff for property grown thereon. (Webb v. Phillips, 80 Fed. 954, 26 CCA 272), (2) but proof of a short possession, at a remote time, by plaintiff or his predecessor in title, is insufficient for that purpose (Webb v. Phillips, supra).

[b] **Possession, coupled with strong proof of ownership,** is sufficient as against one who cannot show a superior right. Barkley v. Leiter, 49 Nebr. 123, 68 NW 381.

46. Phillips v. Schall, 21 Mo. A. 38.

47. Gruber v. Janns, 84 NYS 882.

48. O'Connor v. Union Line Transp. Co., 31 Ill. 230; Graham v. Carpenter, 35 Nebr. 782, 53 NW 992.

49. Schmitt, etc., Co. v. Mahoney, 60 Nebr. 20, 82 NW 99.

[a] **Finding of special ownership sustained by evidence of lien.**—Schrandt v. Young, 62 Nebr. 254, 86 NW 1085.

50. See supra § 238.

51. [a] **Evidence held sufficient to show wrongful taking or detention.**—Nix v. Watts, 121 Ark. 346, 181 SW 127 (evidence that plaintiff's cotton was delivered to and sold by defendant); Drinkhouse v. Van Ness, 202 Cal. 359, 260 P 869 (evidence showing sale of half interest to each of two plaintiffs secretly, retaining possession under plaintiff's mistaken belief that defendant still owned one-half interest, training and handling horse, and taking from plaintiffs after they discovered the deal and took possession); More v. Finger, 58 P 322 [aff 128 Cal. 313, 60 P 933] (evidence showing acquisition by defendants of note from plaintiff's husband while he was intoxicated, and knowledge that the note belonged to plaintiff); Ruzanoff v. Sacramento Retailers Credit Assoc., 97 Cal. A. 682, 276 P 156 (evidence that defendant, who purchased at sheriff's sale, was told of plaintiff's interest); Gross v. Watkins, 11 Colo. 550, 19 P 539 (evidence showing defendant wrongfully took cattle from plaintiff); Dougherty v. Bliss, 244 Ill. A. 282 (evidence showing purchase of negative, thereby showing ownership); Dugan v. Nichols, 125 Mass. 576 (testimony of defendant that even if demanded he would not have given up the property after being told it belonged to plaintiff); Goodell v. Ward, 17 Minn. 17 (that property was in a public street, in front of plaintiff's house, and defendant took it and refused to give it up); Viviano v. Columbia Can Co., 183 Mo. A. 281, 166 SW 1082 (letters of defendant indicating that plaintiff owned property; wrongful charges by defendant); Knapp v. Mahurin, 72 N. H. 595, 56 A 315; Oyler v. Dautoff, 36 Or. 357, 59 P 474 (evidence showing possession by defendant and refusal to surrender property upon demand and tender of amount due thereon); Deal v. Potter, 26 U. C. Q. B. (Ont.) 578 (evidence of acts and declarations showing taking, and detention jointly). See Haller v. Hopkins, 195 Ill. A. 380.

[b] **Evidence held insufficient to show wrongful detention.**—Grossman v. Yip Wing, 62 Cal. A. 121, 216 P 634 (evidence that defendants were in possession of land before plaintiff ordered them off without laying claim to ownership of the land, in replevin for crops); Wooley v. Williams, 105 Conn. 671, 136 A 583 (evidence of taking is insufficient to show that officer assumed control of records by virtue of a writ of replevin covering a grafanola, where he might have been justified under the contract); Brand v. Hedwick, 43 Kan. 131, 23 P 111 (evidence showing control of property by plaintiff and no interference therewith); Preziaso v. Union City Cleaning, etc., Co., 6 N. J. Misc. 171, 140 A 394 (defendant's refusal to return a coat is sufficiently shown by the return of a coat other than the one delivered); Howe Sewing Mach. Co. v. Haupt, 7 Daly (N. Y.) 108 (evidence of conversations in which demand was made, but no refusal); Welton v. Holmes, 6 NYSt 546 (evidence that plaintiff took for another, and had no possession except while moving the property).

[c] **Prima facie evidence.**—Upon the plea of non cepit proof that defendant had the goods at the place alleged is prima facie sufficient to entitle plaintiff to recover. McLeod v. McMillan, 5 N. B. 64.

[d] **Conclusive evidence.**—Return of writ by defendant marshal is conclusive proof of the caption. De Wolf v. Harris, 8 F. Cas. No. 4,221, 4 Mason 515 [aff 4 Pet. 147, 7 L. ed. 811].

[e] **Evidence sufficient to show place of taking.**—Evidence showing taking in street in front of plaintiff's house is sufficient to sustain an allegation of taking from the house of plaintiff in that street. Faget v. Brayton, 2 Harr. & J. (Md.) 350.

[f] **Evidence sufficient to show place of detention.**—The place where the property is detained need not be proved by direct evidence, but it may be inferred from other circumstances appearing in evidence. Louthain v. May, 77 Ind. 109.

52. Cranz v. Kroger, 22 Ill. 74.

53. Cranz v. Kroger, supra; Kelly v. Burchfield, 27 Kan. 700.

[a] **Evidence held sufficient to show demand and refusal.**—Spear v.

listen to a demand,[54] would be sufficient. It has been held that in an action of replevin in the detinet alone, the same proof of demand and refusal is required as in an action of trover and conversion,[55] although it has been held that the proof of refusal need not be as strong in replevin as in trover.[56] An officer's return showing seizure of the property is prima facie evidence of the seizure.[57] It has been held that any evidence showing that defendant obtained possession from one who had no authority to give that possession is sufficient to show an unlawful taking.[58] As it is necessary that defendant have actual or constructive possession of the property at the time the action was commenced,[59] such possession must be established by a preponderance of the evidence.[60] A defendant seeking to justify his taking or detention must sustain his defense by a preponderance of the evidence.[61] It has been held unnecessary for an officer to produce in evidence the judgment on which the execution, under which he took the property, was founded.[62] Prima facie evidence of the officer's right to hold office is sufficient in the absence of contrary evidence.[63] The burden of proving that the taking was not for taxes, fines, or on judicial process is amply discharged by evidence showing how defendant obtained the property.[64] An affidavit so reciting is not conclusive of the fact that the property was not taken for a tax, when the facts on the trial show otherwise.[65]

[§ 252] **4. Identity of Property.** Where the burden is on plaintiff to establish the identity of the property[66] he must do so by a preponderance of the evidence.[67]

Scott, 142 Ark. 372, 219 SW 322 (letter showing defendant's refusal to deliver, and claimed property); General Motors Acceptance Corp. v. Littlefield, etc., Co., 128 Me. 388, 147 A 868 (evidence that sheriff first demanded the property and waited for a refusal before serving the writ); Caldwell v. Bruggerman, 8 Minn. 286 (evidence from which the jury might infer demand and refusal); Taylor v. Embury, 187 NYS 138 (evidence that plaintiff, farming on shares, asked for his share of cut hay, and was refused). See also Machelli v. Torrelli, 190 Ill. A. 287.

[b] **Evidence held insufficient to show demand and refusal.**—Detroit Safe Co. v. Myer, 192 Mich. 215, 158 NW 860 (no evidence showing that the person whom plaintiff talked to had any interest in the property or any control as agent or representative); Jumiska v. Andrews, 87 Minn. 515, 92 NW 470 (evidence that plaintiff talked to agent of defendants).

[54] Cranz v. Kroger, 22 Ill. 74.

[55] Ingalls v. Bulkley, 13 Ill. 315.

Demand and refusal in trover and conversion generally see Trover and Conversion [38 Cyc 2031–2037].

Weight and sufficiency of evidence in trover and conversion generally see Trover and Conversion [38 Cyc 2084–2088].

[56] Holbrook v. Wight, 24 Wend. (N. Y.) 169, 35 AmD 607.

[57] Boesker v. Pickett, 81 Ind. 554.

[58] Gray v. Nations, 1 Ark. 557.

[59] See supra §§ 58, 59.

[60] [a] **Evidence held sufficient to show possession.**—(1) An affidavit that property was detained by one defendant is evidence that plaintiff did not know he had transferred it to another person. Anderson v. Boneman, 199 Mich. 532, 165 NW 830. (2) Defendant's testimony that he could return property, and other statements. Maloney v. Neville, 128 Mo. A. 616, 107 SW 4. (3) Evidence showing that defendant was sheriff and through his deputy took and controlled property. Crum v. Elliston, 33 Mo. A. 591. (4) Evidence showing service of summons on defendant prior to his selling the property. Longerbeam v. Huston, 20 S. D. 254, 105 NW 743. (5) Seizure under attachment, and exercise of control over property, and refusal to deliver up on demand. Aman v. Mottweiler, 15 Ind. A. 405, 44 NE 63. (6) That when replevined the wagon was standing where it was left two days previous, without change in its location. Kimble v. McDermott, 154 Mo. A. 209, 134 SW 72.

[b] **Evidence held insufficient to show possession.**—(1) That property was seen in defendant's possession "probably a month before this suit was instituted." Leisey Brewing Co. v. Cline, (Mo. A.) 211 SW 689. (2) Redelivery bond. Jetton v. Smead, 29 Ark. 372.

[c] **Prima facie evidence.**—(1) Testimony that defendant took possession of the goods at a date previous to the institution of the suit, and that he still has possession of the goods. Rabenort v. Frazier, (Mo. A.) 238 SW 550. (2) Evidence showing that defendant claimed land and personalty, ordered plaintiff off land, and prevented use of personalty, made a prima facie case of possession, although plaintiff was on the land whereon the personalty was located when the action was commenced. Hayes v. Moffatt, 83 Mont. 185, 271 P 452. (3) In view of the rule making admissions of defendants, that they had the property in question on the day before suit was brought and on the day of bringing suit, but before it was brought, evidence of such possession during the day suit was brought, and Rev. Codes § 7962 subd 20, making it a disputable presumption that the ordinary course of business has been followed, the admissions were prima facie evidence of the present actual possession by defendants when the action was commenced. Sullivan v. Girson, 39 Mont. 274, 102 P 320.

[d] **Conclusive evidence.**—Defendant's return is conclusive in an action against a constable to recover goods claimed as exempt but taken under an attachment. Martin v. Barnett, 158 Mo. A. 375, 138 SW 538.

[e] **Evidence sufficient** to sustain verdict for defendant. Couch v. Starks, 120 Ark. 631, 179 SW 995 (evidence showing defendant was never in possession).

[f] **Evidence held insufficient to show plaintiff knew defendant was not in possession.**—Benzler v. Van Fleet, 28 Cal. A. 389, 152 P 736.

[61] Fon v. Chambers, 68 Cal. A. 244, 228 P 865.

[a] **Evidence held sufficient.**—Baldwin v. Scott, 65 Colo. 53, 173 P 716 (evidence of third person's control over property sufficient to justify assumption that it was his); Truitt v. Revell, 4 Del. 71 (original execution, or a copy thereof, is sufficient evidence of taking under execution); Sattley Co. v. Hansen, 84 Nebr. 525, 121 NW 573 (that defendant was an innocent purchaser of the property for a valuable consideration).

[b] **Evidence held insufficient.**—(1) To show a right to detain. Lester v. Columbia Storage Warehouses, 130 App. Div. 551, 115 NYS 61. (2) To sustain defense that goods replevied were in the custody of the law. Reeside v. Fischer, 2 Harr. & G. (Md.) 320 (evidence of taking under fieri facias, but no evidence as to the time of seizure, or whether defendant still held under writ).

[c] **Preponderance of evidence sufficient.**—An action of claim and delivery for leaflets seized by police officers as intended to be used in a Chinese lottery, is a civil case in which the issues are determined according to the preponderance of evidence, and is not criminal and does not require proof beyond a reasonable doubt that the papers were in fact blank lottery tickets. Fon v. Chambers, 68 Cal. A. 244, 228 P 865.

[62] Pugh v. Calloway, 10 Oh. St. 488.

[63] Schemerhorn v. Mitchell, 15 Ill. A. 418.

[64] Williams v. Hampton, 57 Fla. 272, 49 S 506.

[65] Wisconsin Oak Lumber Co. v. Laursen, 126 Wis. 484, 105 NW 906; Kaehler v. Dobberpuhl, 60 Wis. 256, 18 NW 841.

[66] See supra § 239.

[67] [a] **Evidence held sufficiently to identify property.**—Alexander v. Martz, (Cal. A.) 290 P 300 (evidence of registration, alteration of numbers, etc.); Reed v. Olson, 83 Colo. 595, 267 P 610 (statements as to purchase of diamonds from deceased, although disbelieved, were sufficient to show identity); Crowley v. Shepard, 38 Colo. 345, 88 P 177 (evidence describing mare as to color, markings, and brand); Gunn v. Williams, 246 Ill. A. 494 (evidence that plaintiff saw his car in defendant's possession is prima facie sufficient on identity); Kee, etc., Dairy Co. v. Pennsylvania Co., 214 Ill. A. 1 [aff 291 Ill. 248, 126 NE 179] (milk bottles are sufficiently identified by evidence that bottles marked with plaintiff's name as were those taken on the writ were manufactured for the plaintiff, and that plaintiff had never parted with title to them); Wald v. Auto Salvage, etc., Co., 190 Iowa 11, 179 NW 856 (evidence describing marks, scratches, and peculiarities of parts of car); Cohen v.

[§ 253] **5. Value and Damages.** Where recovery of the value of the property is sought, the value of the property must be established by sufficient evidence.[68] The value found by appraisers appointed by the sheriff when he levied attachments on the property is prima facie evidence of the value as against the sheriff.[69] Where the statutes so provide[70] a levying officer's valuation is prima facie evidence of the value of the property.[71] Plaintiff's affidavit, made in suing out the writ, has been held not conclusive evidence of the value as against plaintiff,[72] although it has been held that such allegations will be taken as true in the absence of evidence of a different value.[73] Allegations of value in the writ are not conclusive evidence of the value.[74] Where plaintiff seeks damages for a wrongful taking or detention he must establish his right by a preponderance of the evidence;[75] and so also must defendant, who wishes to recover for the detention of the property under the writ of replevin.[76] To support a ver-

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Seashore, 159 Minn. 345, 198 NW 1009 (identity of stolen jewels by size and appearance, and by settings); Graves v. Dudley, 20 N. Y. 76 (proof that part of the bills are of a certain bank and denomination is prima facie sufficient, in the absence of evidence that the bank had ever issued any others of the same denomination or that defendant had in his possession any other bills of similar denomination upon that bank); Simers v. Kellogg, 178 App. Div. 881, 164 NYS 161 (evidence that property was in transit to defendant, who agreed to turn it over to plaintiff, and that goods were the only ones in transit); Hall v. Collier, (Tex. Civ. A.) 200 SW 880 (testimony as to imperfection in jewel); California Ins. Co. v. Aplin, 117 Wash. 159, 200 P 1079 (serial numbers on car); Murray v. Norwood, 77 Wis. 405, 46 NW 499 (evidence of numbers on bonds and bank bills).

[b] **Evidence held insufficient to identify property.**—Petey Mfg. Co. v. Morris, 119 Md. 91, 84 A 238, 47 LRANS 882 (testimony of witness as to logs); Brunson v. Volunteer Carriage Co., 93 Miss. 793, 47 S 377 (evidence showing note under which plaintiff claims his right to possession was not for property sued); Meyer v. Smith, 148 App. Div. 840, 133 NYS 531 (evidence showing pearl as property of defendant, against plaintiff's claim that the pearl could not be identified); Biegeleisen v. Cohen, 192 NYS 321 (identity of ring); Ehrman v. Simpson, 110 NYS 481 (evidence showing different setting and stone in ring replevied and the one stolen, and no evidence of any identifying marks); Sapp v. Hartford F. & M. Ins. Co., 86 Okl. 87, 206 P 814 (no evidence showing change of motor number, where plaintiff's car bore a different number from the one replevied).

68. [a] **Evidence held sufficient** on which to fix value. Bridgeman v. Augusta Cooperage Co., 147 Ark. 378, 227 SW 602 (evidence of feet of lumber and value thereof, and cost of hauling); Hall v. Benton, 160 Ark. 254, 254 SW 530 (evidence of sale of hogs for ten dollars); Gunter v. Williams, 137 Ark. 530, 210 SW 136 (testimony of defendant that he could have sold the tank for one hundred and fifty or two hundred dollars was sufficient to warrant a finding that the value of the tank was one hundred and seventy-five dollars); Roberts v. Burr, 135 Cal. 156, 67 P 46 (evidence of two witnesses that the goods were worth four thousand five hundred and thirty-seven dollars, to some extent corroborated by a third witness, although there was evidence introduced by defendant tending to show that the goods were of a less value); Seligman v. Armando, 94 Cal. 314, 29 P 710 (evidence of original value, value of goods sold, and amount paid by defendant); Black v. Black, 74 Cal. 520, 16 P 311 (undisputed testimony of one witness); Lundblade v. Pierce, 95 Cal. A. 192, 272 P 329 (evidence showing that at the time defendants took possession, the automobile was worth four hundred and thirty-two dollars market value); Brunswick-Balke-Collender Co. v. Witt, 112 Kan. 82, 209 P 815 (price at which property sold a short time before the suit, and the amount then paid and the amount due); Eichorn v. Schochie, 154 Minn. 261, 191 NW 737 (admissions in pleadings, and evidence); Brunke v. Salinger, (Mo. A.) 8 SW (2d) 88 (evidence of value at the time of taking, and no evidence to show depreciation from then to the time of trial); Feil v. Wells, (Mo. A.) 268 SW 893 (evidence that face value of bonds was three hundred dollars and defendant had offered to return the bonds or three hundred dollars on certain conditions); Reynolds v. Hanson, (Mo. A.) 199 SW 279 (evidence of the purchase price, and time the property was used, the rental value, and the appraised value on the death of the supposed owner); Davenport v. Abbott, (Tex. Civ. A.) 28 SW 218 (evidence of weight of diamond, and testimony as to value of diamonds as determined by weight); Spencer v. Summerhays, (Utah) 280 P 720 (testimony showing that wool was worth thirty cents per pound); Babare v. Rodman, 127 Wash. 436, 221 P 292 (admission of value higher than that assessed by jury, and time net was taken).

[b] **Evidence held insufficient** to warrant finding of value. Day v. Ferguson, 74 Ark. 298, 85 SW 771 (no evidence as to value of certain items); National Cash Register Co. v. Agne, 43 App. Div. 605, 60 NYS 348 (evidence of purchase price); Ehrenreich v. Knudsen, 157 NYS 1082 (evidence of value of several articles, some of which were not delivered to defendant); Gross v. Lincoln, 81 Okl. 87, 196 P 960 (allegations of value or damages not being considered true by failure to controvert them); Gregory v. Newsom, (Tex. Civ. A.) 279 SW 912 (plaintiff's evidence of price at which he would sell, and price defendant paid a third person claiming as owner); Adler, etc., Clothing Co. v. Thorp, 102 Wis. 70, 78 NW 184 (evidence not showing decrease in value, on directed verdict for plaintiff).

[c] **Submission of question to jury.**—In replevin for a piano sold to defendant on credit, evidence of the amount it was sold for, and that it had since been damaged in a certain amount, is sufficient to authorize the court in submitting the question of value to the jury. Story, etc., Piano Co. v. Gibbons, 96 Mo. A. 218, 70 SW 168.

69. Carson v. Golden, 36 Kan. 705, 14 P 166.

70. See statutory and code provisions.

71. Wilburn v. Cologero, 97 Miss. 511, 52 S 794.

72. Muzenich v. McCain, (Mo. A.) 274 SW 888; Lamy v. Remuson, 2 N. M. 245.

73. Winton Motor Carriage Co. v. Blomberg, 84 Wash. 451, 147 P 21.

74. Briggs v. Wiswell, 56 N. H. 319.

75. Lumsden v. Howard, 210 Mo. A. 645, 236 SW 420.

[a] **Evidence held sufficient.**—(1) To sustain finding of damages for wrongful detention. Lundblade v. Pierce, 95 Cal. A. 192, 272 P 329; Bonestell v. Western Auto-Motive Finance Corp., 69 Cal. A. 719, 232 P 734; Wellman v. Forster, 46 Cal. A. 359, 189 P 128; Lacquement v. Bellamy, (Mo. A.) 253 SW 1076. (2) To sustain award of punitive damages. Manley v. Bailey, 151 S. C. 366, 149 SE 119 (evidence showing willful refusal to return property to plaintiff after notice).

[b] **Evidence held insufficient.**—Wheeler v. Kassabaum, 76 Cal. 90, 18 P 119 (sole evidence being testimony of plaintiff); Aultman v. Richardson, 21 Ind. A. 211, 52 NE 86 (mere evidence of breach of warranty, without damage); Muzenich v. McCain, (Mo. A.) 274 SW 888; Webb v. Warren, 129 Okl. 151, 264 P 180 (evidence not showing owner of premises was party to contract of rental of furniture, or authorized others to make contract); Hunt v. Cohen, 74 Okl. 248, 179 P 1; Duroth Mfg. Co. v. Cauffiel, 243 Pa. 24, 89 A 798; Shieder v. Southern R. Co., 83 S. C. 455, 65 SE 631 (where there was no evidence reasonably tending to show that defendant wantonly disregarded any right of plaintiff, punitive damages are not recoverable); Oliver v. Morris, 125 Wash. 561, 216 P 846 (no evidence of any damage).

[c] **Evidence held sufficient to preclude plaintiff from damages for taking.**—Martin v. Feigenberg, 203 Cal. 347, 264 P 477 (evidence of conduct and acquiescence in taking after sale, no objection to sale, and actually helping defendant to take by assisting in loading property).

76. [a] **Evidence held sufficient.**—Ætna Ins. Co. v. Mills, 176 Ark. 684, 3 SW (2d) 999 (testimony of defendant as to purpose for which he used property, and testimony of witnesses as to its value per day for such use); Lake Mills Farmers' State Bank v. Hammond, 170 Minn. 313, 212 NW 593 (evidence that sheriff took property under attachment, leaving it in custody for him, and later, having received a writ of replevin, refused to part with it even after attachment was released); Edwards v. Eveler, 84 Mo. A. 405 (testimony of defendant as to damages); Shawnee Nat. Bank v. Perry, 136 Okl. 60, 276 P 230 (evidence showing seizure of property under writ in accordance with a plan of persecution).

[b] **Evidence held insufficient.**—Hammond v. Thompson, 54 Mont. 609, 173 P 229 (evidence of gross receipts and profits of hotel and saloon, property seized being only a portion of the furnishings); Roth v. Yara, 19 N. M. 8, 140 P 1071 (only evidence was defendant's own testimony);

dict for damages for detention, it is essential that there should be proof that such damages were in fact sustained.[77]

[§ 254] **6. Fraud.** Where plaintiff seeks to recover property on the ground that it was secured from him by fraud, he must establish this by full, clear, and satisfactory evidence,[78] and where defendant relies upon fraud as a defense, he must prove it by evidence showing more than a mere suspicion of fraud.[79]

XIV. TRIAL, JUDGMENT,[80] ENFORCEMENT OF JUDGMENT, AND REVIEW*

[§ 255] **A. Dismissal and Nonsuit[81]—1. Voluntary[82]—a. Where Plaintiff Obtains Possession of Property—(1) In General.** In an action of replevin both parties are regarded as equally actors;[83] and, where plaintiff in replevin has been put in possession of property under his writ, he cannot be permitted to escape liability to defendant by suffering a nonsuit or dismissing his action,[84] except with the consent of the latter.[85] Such consent must be actual, not constructive,[86] and, if made by an agent of defendant without special authority therefor,[87] or by one of several defendants having interests adverse to the others,[88] is not sufficient. But an order of dismissal of an action of replevin against a constable

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Lindenkohl v. Weber, 3 Misc. 27, 21 NYS 1079 (evidence showing no interference with defendant's property during detention); Vitagraph Co. v. Swaab, 248 Pa. 478, 94 A 126, Ann Cas1916C 311 (no evidence of conspiracy).

[77] Alexander v. Busch, 66 Okl. 17, 166 P 900, LRA1918E 125; Mann v. Grove, 4 Heisk. (Tenn.) 403 (holding that a verdict in replevin will be set aside, where damages are assessed in favor of defendant without proof of damages other than the value of the property at an indefinite time, and the fact and time of replevin).

[78] Karpas v. Brussel, 217 App. Div. 550, 217 NYS 373; Quinlan v. Rundle, 273 Pa. 479, 117 A 208.

[a] **Rule applied.**—A plaintiff, who seeks to recover on the ground of conspiracy between defendant and intervener, has the burden of establishing by full, clear, and satisfactory evidence that defendant and intervener had combined to do an unlawful thing, or to do a lawful thing in an unlawful manner, and that each had the intent to defraud and understood the other had such intent. Quinlan v. Rundle, 273 Pa. 479, 117 A 208.

[b] **Evidence held sufficient.**—Crawford v. Hurd, 106 SW 849, 32 KyL 636 (fraudulent representations of title of defendant to secure possession of plaintiff's goods in exchange for a lot).

[c] **Evidence held insufficient.**—Jumiska v. Andrews, 87 Minn. 515, 92 NW 470 (evidence that plaintiff signed a mortgage without reading it); Heyward v. Maynard, 119 App. Div. 66, 103 NYS 1028 (in securing possession of securities).

[79] Alderson v. Hume, 40 Okl. 533, 139 P 955.

[a] **Evidence held sufficient.**—Ackerman v. Schultz, 178 Cal. 190, 172 P 609 (fraud between plaintiff and other defendants; plaintiff falsely claiming interest, as against defendant filing cross complaint); Jordan v. Crickett, 123 Iowa 576, 99 NW 163 (evidence showing fraudulent transfer of property of debtor to plaintiff); Beaver Creek First Nat. Bank v. Wiggins, 154 Minn. 84, 191 NW 264 (evidence showing that a mortgage was not bona fide, mortgagor being in possession and doing business as if there were no mortgage); Forsee v. Zenner, (Mo. A.) 193 SW 975 (evidence showing fraudulent alteration of mortgage so as to include property claimed).

[80] **Cross references:**

Admissions on trial see Trial [38 Cyc 1327].
Consolidation of actions see Actions §§ 308–367.
Order of trial see Trial [38 Cyc 1238].
Reception of evidence see Trial [38 Cyc 1326 et seq].
Review and inspection of property by jury see Trial [38 Cyc 1313].
Transfer of particular issues to equity docket see Trial [38 Cyc 1292].
Trial docket see Trial [38 Cyc 1278 et seq].

[81] **Generally** see Dismissal and Nonsuit 18 C. J. p 1142.

Dismissal as to one or more codefendants see Dismissal and Nonsuit §§ 37–49, 101.

Harmless error in dismissal or nonsuit see Dismissal and Nonsuit §§ 3005, 3007.

[82] **Procedure to effect** see generally Dismissal and Nonsuit §§ 50–55.

[83] Crump v. Branning, 74 Fla. 522, 77 S 228; Barrett v. Forrester, 1 Johns. Cas. (N. Y.) 247; Manix v. Howard, 82 N. C. 125; Pee Dee River Lumber Co. v. Fountain, 90 S. C. 122, 72 SE 885 [quot Cyc].

[84] U. S.—Jumeau v. Brooks, 109 Fed. 353, 48 CCA 397.

Fla.—Crump v. Branning, 74 Fla. 522, 77 S 228.

Ky.—Rogers v. Bradford, 8 Bush 163.

Nebr.—Vose v. Muller, 48 Nebr. 602, 67 NW 598; Garber v. Palmer, 47 Nebr. 699, 66 NW 656; Ahlman v. Meyer, 19 Nebr. 63, 26 NE 584; Moore v. Herron, 17 Nebr. 697, 703, 24 NE 425, 451; Aultman v. Reams, 9 Nebr. 487, 4 NW 81; Cook v. Vaughn, 1 Nebr. (Unoff.) 244, 95 NW 333.

N. M.—Abren v. Brown, 2 N. M. 11.

N. Y.—Lamkin v. Rosenthal, 5 App. Div. 532, 39 NYS 483.

N. C.—Manix v. Howard, 82 N. C. 125.

Pa.—Broom v. Fox, 2 Yeates 530.

S. C.—Pee Dee River Lumber Co. v. Fountain, 90 S. C. 122, 72 SE 885 [quot Cyc]; Younger v. Massey, 41 S. C. 50, 19 SE 125.

Tex.—Brooks v. Taylor, (Civ. A.) 214 SW 361.

N. S.—Passarini v. Martin, [1925] 2 DomLR 914.

[a] **Rule in ordinary action at law,** that plaintiff, without defendant's consent, may generally dismiss his case before it has been submitted on the merits does not obtain in replevin. Crump v. Branning, 74 Fla. 522, 77 S 228.

[b] **In Mississippi** a tenant who, under Hemingway Code Annot. (1917) §§ 2354, 2371, replevies property distrained for rent, may dismiss the action without leave of court. The statutes provide that, if plaintiff in a writ of replevin of property distrained for rent makes default or fails to prosecute the same, like judgment shall be entered against him and his sureties as on an issue found against him, and no new replevin or writ shall be allowed. Maxey v. White, 53 Miss. 80.

[c] **Irrespective of where actual title resides.**—In action for possession of certain oats, claimed as rent, where petition, affidavit and bond for sequestration, writ, and replevy bond showed conclusively that plaintiff took or caused the oats to be taken from defendant's possession, and it was alleged by plaintiff that oats were a part of crop raised by defendant, defendant was entitled to judgment, without reference to where actual title was, plaintiff having voluntarily discontinued action. Brooks v. Taylor, (Tex. Civ. A.) 214 SW 361.

[85] Corbett v. Pond, 10 App. (D. C.) 17; Hall v. Smith, 10 Iowa 45; Houck v. Linn, 56 Nebr. 743, 77 NW 51; Saussay v. W. J. Lemp Brewing Co., 52 Nebr. 627, 72 NW 1026; Garber v. Palmer, etc., Co., 47 Nebr. 699, 66 NW 656; Abren v. Brown, 2 N. M. 11.

[a] **Neither party** can withdraw without the consent of the other. Abren v. Brown, 2 N. M. 11.

[b] **Effect of consent.**—Dismissal of discontinuance with the consent of defendant does not waive his right to sue upon the bond and recover damages. Hall v. Smith, 10 Iowa 45.

[86] Williams v. McGrade, 18 Minn. 82.

[a] **Written consent** is required. Williams v. McGrade, 18 Minn. 82.

[b] **Failure to return notice of dismissal** by attorneys of defendant does not amount to consent thereto. Williams v. McGrade, 18 Minn. 82.

[87] Lamkin v. Rosenthal, 5 App. Div. 532, 39 NYS 483.

[a] **Agent with power to purchase and ship the goods** has no power to consent to dismissal in the absence of special authority to do so. Lamkin v. Rosenthal, 5 App. Div. 532, 39 NYS 483.

[88] Saunders v. Closs, 117 Mich.

*By GILBERT G. FINLEY (§§ 255–310).

levying upon personal property will not be set aside on the mere ground that a stipulation for such dismissal signed by the constable was not signed or consented to by the execution plaintiff, where no application was made to substitute him in the action as defendant in lieu of the constable.[89] After the property has been seized and delivered to plaintiff defendant becomes the virtual plaintiff in the case.[90] Plaintiff cannot and does not thereby deprive defendant of his right to establish his title and right to possession, and obtain a judgment for the return of the property or its value,[91] and damages for the taking and withholding of the property.[92] If the rule were otherwise plaintiff, under color of legal process, would perpetrate a fraud on the law and be allowed to keep property, the title to which was prima facie in defendant from whom it was taken at the beginning of the suit.[93]

Reinstatement. The court has power to set aside a voluntary nonsuit and reinstate the case on the docket for the next term.[94]

[§ 256] **(2) Character of Judgment Rendered.** In most jurisdictions if the property shall have been delivered to plaintiff, and defendant recover judgment by discontinuance or nonsuit, such judgment shall be that defendant have return of the property replevied, with damages for the detention,[95] or for the value of the property replevied, in which case such value shall be assessed upon the trial, or upon assessment of damages,[96] or defendant may sue upon the bond and recover his damages including the val-

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130, 75 NW 295; Fowler v. Hosmer, 105 Mich. 90, 62 NW 1028.

[89] Aydelotte v. Brittain, 29 Kan. 98.

[90] Corbett v. Pond, 10 App. (D. C.) 17.

[91] Kan.—McVey v. Burns, 14 Kan. 291.

Ky.—Rogers v. Bradford, 8 Bush 163.

Mich.—Griggs v. De Young, 205 Mich. 627, 172 NW 433.

Mo.—Nelson v. Luchtemeyer, 49 Mo. 56; Berghoff v. Heckwolf, 26 Mo. 511; Collins v. Hough, 26 Mo. 149; Smith v. Winston, 10 Mo. 299.

Nebr.—Vose v. Muller, 48 Nebr. 602, 67 NW 598; Moore v. Herron, 17 Nebr. 697, 703, 24 NW 425, 451; Aultman v. Reams, 9 Nebr. 487, 4 NW 81.

N. M.—Enfield v. Stewart, 24 N. M. 472, 174 P 428; Brannin v. Bremen, 2 N. M. 40.

N. Y.—Lamkin v. Rosenthal, 5 App. Div. 532, 39 NYS 483; Rosenberg v. Flack, 57 Hun 587, 10 NYS 759.

N. C.—Manix v. Howard, 82 N. C. 125.

Okl.—Roberts v. Wilkins, 40 Okl. 138, 137 P 111.

Pa.—Brom v. Fox, 2 Yeates 530.

S. C.—Pee Dee River Lumber Co. v. Fountain, 90 S. C. 122, 72 SE 885 [quot Cyc].

Tenn.—Nashville Ins., etc., Co. v. Alexander, 10 Humphr. 378.

Wash.—Liebmann v. McGraw, 3 Wash. 520, 28 P 1107.

[92] Rogers v. Bradford, 8 Bush (Ky.) 163.

[a] **Thus,** where replevin against a sheriff to recover goods levied on as the property of the execution debtor is discontinued by plaintiff without returning the goods to the sheriff, the discontinuance will be set aside, and the execution debtor allowed to contest the claim of plaintiff in replevin. Rosenberg v. Flack, 57 Hun 587, 10 NYS 759.

[b] **Filing of discontinuance** does not deprive the justice of the right to proceed to hear the evidence of defendant as to the value of the property taken under the writ, where defendant has waived a return of the property. Griggs v. De Young, 205 Mich. 627, 172 NW 433.

[93] Manix v. Howard, 82 N. C. 125.

[94] Heilman v. McKinstry, 24 Pa. Co. 185.

[a] **Ample protection** is provided defendant, even though an action has accrued on the replevin bond, since, if on the trial the judgment is for defendant for the possession of the goods, he is protected from loss by his bond, and if judgment is against him, he would suffer no loss by their detention. Heilman v. McKinstry, 24 Pa. Co. 185.

[95] U. S.—Cammeyer v. Durham House Drainage Co., 35 Fed. 51.

Conn.—Persse v. Watrous, 30 Conn. 139.

Ga.—Smith v. Adams, 79 Ga. 802, 5 SE 242; Glover v. Gore, 74 Ga. 680.

Iowa.—Crist v. Francis, 50 Iowa 257; Marshall v. Bunker, 40 Iowa 121; Chadwick v. Miller, 6 Iowa 34.

Kan.—Lake v. Stahl, 79 Kan. 854, 99 P 275; Hines v. Stahl, 79 Kan. 88, 99 P 273, 131 AmSR 280, 20 LRANS 1118, 17 AnnCas 298.

Ky.—Rogers v. Bradford, 8 Bush 163; Kerley v. Hume, 3 T. B. Mon. 181.

Me.—Washington Ice Co. v. Webster, 68 Me. 449.

Mich.—United Shoe Repairing Mach. Co. v. Kowalsky, 229 Mich. 97, 200 NW 949.

Minn.—Bradshaw v. Langum, 141 Minn. 39, 169 NW 148.

Miss.—Bernheimer v. Martin, 66 Miss. 486, 6 S 326.

Mo.—Nelson v. Luchtemeyer, 49 Mo. 56; Berghoff v. Heckwolf, 26 Mo. 511; Smith v. Winston, 10 Mo. 299.

Mont.—Dahler v. Steele, 1 Mont. 206.

N. M.—Enfield v. Stewart, 24 N. M. 472, 174 P 428.

N. Y.—Rosenberg v. Flack, 57 Hun 587, 10 NYS 759.

Okl.—Thomas v. Tecumseh First Nat. Bank, 32 Okl. 115, 121 P 272, AnnCas1914A 376.

S. C.—Pee Dee River Lumber Co. v. Fountain, 90 S. C. 122, 72 SE 885.

Tenn.—Nashville Ins., etc., Co. v. Alexander, 10 Humphr. 378.

Wash.—Liebmann v. McGraw, 3 Wash. 520, 20 P 1107.

Wis.—Saunderson v. Lace, 2 Pinn. 257, 1 Chandl. 231.

N. S.—Passarini v. Martin, [1925] 2 DomLR 914.

See also Bledsoe v. Ziegenhein Bros. Furniture Co., 161 Ill. A. 146 (holding judgment "that a writ of retorno habendo issue as the law directs for the return of the property mentioned and described in the writ of replevin" sufficient).

[a] **Defendant can proceed** to have his rights of property and right of possession determined, and the court may order a return of the property to him. Thomas v. Tecumseh First Nat. Bank, 32 Okl. 115, 121 P 272, AnnCas1914A 376.

[b] **Plaintiff cannot** by a discontinuance of the action or by suffering a nonsuit, prevent a judgment being rendered against him for damages or for a return of the property. Enfield v. Stewart, 24 N. M. 472, 174 P 428.

[c] **Expired term of office.**—Where, in replevin against an officer, it is found that he is entitled to return of the property, recovery is not defeated by the fact that his term of office has expired. Lake v. Stahl, 79 Kan. 854, 99 P 275; Hines v. Stahl, 79 Kan. 88, 99 P 273, 131 AmSR 280, 20 LRANS 1118, 17 AnnCas 298.

[96] Kan.—Lake v. Stahl, 79 Kan. 854, 99 P 275; Hines v. Stahl, 79 Kan. 88, 99 P 273, 131 AmSR 280, 20 LRA NS 1118, 17 AnnCas 298; Blake v. Powell, 26 Kan. 320; McVey v. Burns, 14 Kan. 291.

Mich.—Treadwell v. Paddock, 75 Mich. 286, 42 NW 820; Stack v. Smith, 54 Mich. 238, 19 NW 968; Peo. v. Tripp, 15 Mich. 518.

Minn.—Bradshaw v. Langum, 141 Minn. 39, 169 NW 148.

Miss.—Bernheimer v. Martin, 66 Miss. 486, 6 S 326.

Mo.—Berghoff v. Heckwolf, 26 Mo. 511; Collins v. Hough, 26 Mo. 149; Smith v. Winston, 10 Mo. 299.

Nebr.—Garber v. Palmer, 47 Nebr. 699, 66 NW 656.

N. M.—Enfield v. Stewart, 24 N. M. 472, 174 P 428.

Okl.—Roberts v. Wilkins, 40 Okl. 138, 137 P 111; Thomas v. Tecumseh First Nat. Bank, 32 Okl. 115, 121 P 272, AnnCas1914A 376.

S. C.—Pee Dee River Lumber Co. v. Fountain, 90 S. C. 122, 72 SE 885.

[a] **Full value of property.**—(1) If defendant is found entitled to return of the property, he is also entitled to judgment for its whole value if return cannot be had. Lake v. Stahl, 79 Kan. 854, 99 P 275; Hines v. Stahl, 79 Kan. 88, 99 P 273, 131 AmSR 280, 20 LRANS 1118, 17 AnnCas 298. (2) Where plaintiff is a stranger to the title and defendant has only a special interest the entire value may be recovered by the special owner, who is answerable to the general owner for any interest remaining after the special claim is satisfied. Enfield v. Stewart, 24 N. M. 472, 174 P 428.

[b] **Time within which right ex-**

ue of the property, if his, taken from him by the writ.[97] The judgment, it has been held, should be in the alternative—for the specific property if it can be had and if not for their value as assessed by the jury.[98] However, in some jurisdictions judgment on a discontinuance of replevin is for costs only, and not for a return, the remedy by action on the bond being held exclusive.[99] If the action is brought to recover property from an officer who had attached it, and the claim of plaintiff in attachment was satisfied before the return day in the attachment suit, and on that day the suit was entered, settled, and discontinued, defendant in replevin is not entitled to a return of the property attached, regardless of its ownership or attachability.[1–21]

[§ 257] **b. Where Property Not Taken under Writ, or Returned to Defendant.** It has been held that the action may be dismissed if the property has not been taken under the writ,[22] or if taken has been returned to defendant on the failure of plaintiff to furnish the requisite bond,[23] or on restoration of the property to defendant on his giving the requisite bond.[24] But in such case plaintiff cannot deprive defendant of his right to have the question of his damages and costs passed upon,[25] although defendant cannot recover damages to the extent of the value of the goods.[26]

[§ 258] **2. Involuntary—a. Grounds—(1) Want of Prosecution.** The common-law rule is that in replevin defendant cannot move for judgment as in case of nonsuit for failure of plaintiff to proceed to trial,[27] both parties being regarded as actors in such action and either having the right to bring the case to trial.[28] Now, however, in some jurisdictions, actions of replevin present no exception to the general rule authorizing nonsuit or dismissal for failure to prosecute actions.[29] So the failure to file a declaration or complaint, when not taken advantage of at the proper time,[30] has been held to authorize a dismissal;[31] but although, upon failure to file a declaration in the time prescribed by statute, a judgment of discontinuance, but not a nonsuit, has been

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ists.—If on the adjourned day of the suit defendant appears and, when plaintiff discontinues, elects to take judgment for the value of the property, he is entitled to it, but if he does not appear he cannot afterward demand that judgment. Stack v. Smith, 54 Mich. 238, 19 NW 968.

[c] **Damages included.**—Where defendant establishes his right of property and of possession, he is entitled to judgment for its value, together with his damages for its wrongful detention. Roberts v. Wilkins, 40 Okl. 138, 137 P 111.

[97] Hall v. Smith, 10 Iowa 45; Thomas v. Tecumseh First Nat. Bank, 32 Okl. 115, 121 P 272, AnnCas1914A 376.

[98] Rogers v. Bradford, 8 Bush (Ky.) 163; Manix v. Howard, 82 N. C. 125.

[99] Lapp v. Ritter, 88 Fed. 108; McIlvaine v. Holland, 5 Del. 226; Hulman v. Benighof, 125 Ind. 481, 25 NE 549; Wiseman v. Lynn, 39 Ind. 250 (explaining the contra case of Mikesill v. Chaney, 6 Ind. 52, as being based on a statute since repealed).

[1–21] Gowan v. Stevens, 83 Vt. 358, 76 A 147.

[22] Blandy v. Raquet, 14 Minn. 491; Saussay v. W. J. Lemp Brewing Co., 52 Nebr. 627, 72 NW 1026.

[23] Saussay v. W. J. Lemp Brewing Co., supra.

[24] Rhoades v. McNulty, 52 Mo. A. 301; Dawson v. Thigpen, 137 N. C. 462, 49 SE 959; Hackett v. Bonnell, 16 Wis. 471.

[a] **Rights of interpleader.**—Where defendant in claim and delivery retains the property by filing an undertaking for plaintiff's benefit, a claimant who interpleads may, by filing the affidavit and undertaking required by Code § 331, either secure possession of the property, or an undertaking for its delivery or the value thereof, and is not entitled to any judgment other than for costs against plaintiff, who may therefore take a nonsuit. Dawson v. Thigpen, 137 N. C. 462, 49 SE 959.

[b] **Order for return** is unnecessary. Hackett v. Bonnell, 16 Wis. 471.

[25] Crump v. Branning, 74 Fla. 522, 77 S 228.

[a] **Inquest.**—Defendant, being entitled to the goods, is entitled to an inquest as to his damages and for his costs. Crump v. Branning, 74 Fla. 522, 77 S 228.

[b] **Unauthorized act of clerk of court** in entering an order dismissing an action of replevin will not deprive defendant of right to judgment for damages and costs. Crump v. Branning, 74 Fla. 522, 77 S 228.

[26] Harrow v. Ryan, 31 Iowa 156 (if defendant or intervener is restored to possession of property in any manner on plaintiff's dismissal, defendant or intervener on inquiry for assessment of damages cannot recover the value since he is in possession).

[a] **Intervener,** who obtained possession of the goods by a subsequent replevin action and then lost them to another by a still later replevin action, cannot recover their value upon dismissal by the plaintiff. Harrow v. Ryan, 31 Iowa 156.

[27] Harwood v. Smethurst, 30 N. J. L. 230; Ames v. Broderick, 18 N. J. L. 297; Schroeder v. Kahelenback, 6 AbbPr (N. Y.) 66; Barrett v. Forrester, 1 Johns. Cas. (N. Y.) 247; Eggleton v. Smart, W. Bl. 375, 96 Reprint 211; Shortridge v. Hiern, 5 T. R. 400, 101 Reprint 224; Jones v. Concannon, 3 T. R. 661, 100 Reprint 790. But see Snow v. Roy, 22 Wend. (N. Y.) 602 (where a default of plaintiffs for not declaring, and execution of a writ of inquiry, although held regular, were set aside because the practice was new and unsettled).

[28] See cases supra note 27.

[29] Ill.—McCrory v. Hamilton, 39 Ill. A. 490.

Mich.—Hill v. Webber, 50 Mich. 142, 15 NW 52.

N. J.—Stein v. Goodenough, 73 N. J. L. 812, 64 A 961.

N. Y.—Fort v. Smalley, 6 Cow. 439; Ex p. Fort, 6 Cow. 43.

Or.—Capital Lumbering Co. v. Hall, 10 Or. 202.

Pa.—Lackawanna Lumber Co. v. McCormick, 28 Pa. Co. 398.

Utah.—Bankers' Commercial Security Co. v. Box Elder County Dist. Ct., 60 Utah 601, 211 P 187.

[a] **Neglect to prosecute,** either by a dismissal of the action after it has been filed, by abandonment, or by any failure to proceed, of necessity deprives the parties of any opportunity to test the title to the property in that proceeding. Bankers' Commercial Security Co. v. Box Elder County Dist. Ct., 60 Utah 601, 211 P 187.

[b] **Withdrawal of plaint.**—Defendant may non pros. plaintiff, although the plaint has not been returned by the sheriff but has been withdrawn from his hands by plaintiff. Fort v. Smalley, 6 Cow. (N. Y.) 439.

[c] **Nonsuit held proper:** (1) Where plaintiff failed to bring on his case for trial pursuant to his own notice, even though he had not filed his replication. Stein v. Goodenough, 73 N. J. L. 812, 64 A 961. (2) Where plaintiff made default after the case had been duly noticed for trial. Anderson v. Henderson, 167 Mich. 425, 133 NW 14. (3) Where plaintiff to whom the property has been delivered, fails to prosecute, the suit will be dismissed with costs. Capital Lumbering Co. v. Hall, 10 Or. 202.

[30] Joseph Marrone Contracting Co. v. Monahan, 88 N. J. L. 238, 95 A 984.

[a] **Proper time** is before or at the term next after such failure, and if the parties do not do so they cannot afterward have judgment of non prosequi unless they rule plaintiff to plead. Joseph Marrone Contracting Co. v. Monahan, 88 N. J. L. 238, 95 A 984.

[31] Bankers' Commercial Security Co. v. Box Elder County Dist. Ct., 60 Utah 601, 211 P 187. See Aultman v. Becker, 10 S. D. 58, 71 NW 753 (where action was dismissed for the failure of plaintiff, after demand, to serve on defendant within the statutory time, a copy of the complaint).

[a] **In Pennsylvania** the act of April 19, 1901, which provides for a judgment of non prosequi when plaintiff has failed to file a declaration after a rule taken, superseded and did away with a rule of court which provided that a judgment of non prosequi could be entered as of course if no declaration was filed within a year. Lackawanna Lumber Co. v. McCormick, 28 Pa. Co. 398.

held proper,[32] it has been held that the failure to file a declaration at the first term is no cause for discontinuance,[33] although, if not filed ten days before the second term of the court, defendant is entitled to judgment as in case of a nonsuit.[34]

Intervener. A non prosequi on the ground that plaintiff has not filed his writ and complaint in time cannot be granted on the motion of a party who, by reason of his interest, was admitted as a party defendant at the time of the hearing of the motion.[35]

[§ 259] **(2) Failure To Give Bond, or Defective Bond.** Failure to give a replevin bond within the time designated by the court,[36] or within a reasonable time after seizure of the property under the writ,[37] or the failure of a nonresident plaintiff to give a bond for costs,[38] has been held sufficient ground in some jurisdictions for a dismissal of the action. And in some jurisdictions the failure to comply with an order of court to furnish an additional bond,[39] or the filing of a defective bond,[40] where the motion to dismiss has been made at the proper time,[41] is sufficient ground for dismissal. But if plaintiff is ready and willing to give a new bond the action should not be dismissed for insufficiency of the bond.[42] Also where the action can be prosecuted without a bond,[43] the fact that a bond given is insufficient,[44] or that plaintiff is unable to give bond,[45] furnishes no ground for the dismissal of the action, but at most for an order that the property be restored to defendant, leaving the issues of wrongful detention and damages sustained thereby to be tried. Where the property is not delivered to plaintiff, it is of course no ground to dismiss that the bond is inoperative, because defendant is not entitled to a bond.[46]

[§ 260] **(3) Failure or Insufficiency of Evidence.** Where the evidence introduced by plaintiff shows that he is not entitled to recover,[47] or plaintiff fails to make out a prima facie case,[48] or his witnesses are impeached so that their testimony may be disregarded,[49] or the evidence shows a cause other than that charged,[50] a judgment of nonsuit may be entered on defendant's motion. It is otherwise, however, if a prima facie case has been made out, no matter how insufficient, conflicting, and unsatisfactory the testimony may be,[51] or if defendant, by his pleadings and evidence, establishes his own liabili-

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32. Hiles v. McFarland, 3 Pinn. (Wis.) 365.

33. Amos v. Sinnott, 5 Ill. 440.

[a] **The case should be continued** at plaintiff's cost until the next succeeding term. Amos v. Sinnott, 5 Ill. 440.

34. See Hanson v. Egan, 228 Ill. A. 329 (statutory provision applied).

35. Joseph Marrone Contracting Co. v. Monahan, 88 N. J. L. 238, 95 A 984.

36. Town v. Evans, 11 Ark. 9; Smith v. Roby, 6 Heisk. (Tenn.) 546.

37. Morris v. Baker, 5 Wis. 389.

[a] **Laches.**—The failure to take a bond or the taking of an insufficient bond must be taken advantage of at the earliest opportunity, and by neglecting this and pleading the opportunity is lost. Roberts v. Perrine, 247 Ill. A. 259.

38. Fleet v. Lockwood, 17 Conn. 233.

39. R. W. Wilson Motor Co. v. Hoover, 222 Mo. A. 570, 293 SW 61.

40. Houghton v. Ware, 113 Mass. 49; Lowe v. Brigham, 3 Allen (Mass.) 429; Clark v. Connecticut River Co., 6 Gray (Mass.) 363; Case v. Pettee, 5 Gray (Mass.) 27; Weed v. Hinton, 7 Hill (N. Y.) 157; Whaling v. Shales, 20 Wend. (N. Y.) 673; Thurber v. Richmond, 46 Vt. 395; Bent v. Bent, 43 Vt. 42; Bennett v. Allen, 30 Vt. 684.

[a] **Failure of officer** to take a replevin bond such as is required by statute is ground for dismissal of the action. Bent v. Bent, 43 Vt. 42.

[b] **Sureties described as partnerships and signing in partnership names.**—It is no ground for dismissing an action of replevin that in the replevin bond taken by the officer serving the writ the sureties are described as partnerships, and have signed and sealed the same in their partnership names; it is not to be assumed that the bond has been executed without authority and does not bind all whom it purports to bind. Judson v. Adams, 8 Cush. (Mass.) 556.

Remedies for defective bonds see supra § 130.

Requisites, validity, and sufficiency of bonds generally see supra §§ 120-128.

41. Lathrop v. Bowen, 121 Mass. 107; Claflin v. Thayer, 13 Gray (Mass.) 459; Clark v. Connecticut River Co., 6 Gray (Mass.) 363; Case v. Pettee, 5 Gray (Mass.) 27; Bacon v. Weston, 11 Cush. (Mass.) 164; Wolcott v. Mead, 12 Metc. (Mass.) 516; Simonds v. Parker, 1 Metc. (Mass.) 508; Bennett v. Allen, 30 Vt. 684.

42. Branch v. Branch, 6 Fla. 314.

New or additional bond generally see supra § 133.

43. **Necessity for bond** see supra §§ 117-119.

44. Bloomer v. Craig, 6 Dana (Ky.) 310; South Missouri Land Co. v. Jeffries, 40 Mo. A. 360.

45. Varner v. Bolin, 54 Kan. 380, 38 P 481.

46. Baker v. Harper, 1 J. J. Marsh. (Ky.) 103.

47. Ga.—Lauchheimer v. Jacobs, 126 Ga. 261, 55 SE 55.

N. Y.—Black River Ins. Co. v. New York State L. & T. Co., 73 N. Y. 282.

Or.—Stout v. Watson, 19 Or. 251, 24 P 230.

S. C.—Norris v. Clinkscales, 44 S. C. 315, 22 SE 1.

Wis.—Gaynor v. Blewitt, 69 Wis. 582, 34 NW 725.

[a] **It is not necessary** to determine that there was not a scintilla of evidence to sustain plaintiff's case, but it is sufficient to say that there was not any evidence upon which a jury could properly base a verdict. Black River Ins. Co. v. New York State L. & T. Co., 73 N. Y. 282.

[b] **Defendant's motion for nonsuit** (1) sustained where the evidence showed the appointment under which plaintiff claimed title to the property to be void (Stout v. Watson, 19 Or. 251, 24 P 230), (2) is proper where the real question litigated is the right of possession, if plaintiff's evidence shows simply that he was the owner and that defendant was rightfully in possession as his bailee (Gaynor v. Blewitt, 69 Wis. 582, 34 NW 725).

48. Levy v. Kelter, 63 App. Div. 392, 71 NYS 509; Stone v. Rogers, 17 Pa. Super. 358; Wright v. Carp, 16 R. I. 719, 19 A 709; Dodd v. Williams-Smithson Co., 27 Wash. 89, 67 P 352.

[a] **Illustration.**—In replevin for certain sheep alleged to be the increment of five sheep claimed by plaintiff, under an alleged agreement in writing, by which the five sheep had been delivered on condition that the increment should be delivered to plaintiff when he became of age, the court commits no error in entering a compulsory nonsuit where the alleged written agreement is not proved and the identity of the original sheep and their certain increase is a matter of mere speculation. Stone v. Rogers, 17 Pa. Super. 358.

49. Yalovitz v. Schutz, 115 NYS 1080.

[a] **Rule applies** where testimony of plaintiff's witnesses is uncontradicted, but the defendant seriously impeaches their veracity. Yalovitz v. Schutz, 115 NYS 1080.

50. Hymann v. Cook, How. A. Cas. (N. Y.) 419.

[a] **Thus,** where an action of replevin is for wrongful taking, and there is no evidence that defendant was chargeable with such act, plaintiff should be nonsuited, although the evidence shows defendant chargeable with a wrongful detention. Hymann v. Cook, How. A. Cas. (N. Y.) 419.

51. Lowary v. Tuttle, 36 Ida. 363, 210 P 1006; Sawyer v. Brailove, 6 N. J. Misc. 1015, 143 A 734; Norris v. Clinkscales, 44 S. C. 315, 22 SE 1; Drummond v. Nicholls, 43 S. C. 486, 21 SE 322; Spencer v. Summerhays, (Utah) 280 P 720.

[a] **Thus,** in an action for wool for its value, a nonsuit is properly denied on the ground that plaintiff has failed to establish the value of the wool where testimony as to its value was introduced. Spencer v. Summerhays, (Utah) 280 P 720.

ty,[52] or transforms the identity of the original action by tendering new issues to which a replication is filed, even though there is no evidence to sustain the original action of replevin.[53] When there is any competent, pertinent and relevant testimony offered to the facts in dispute, the case passes into the hands of the jury, and beyond the judge.[54] So if the evidence shows that plaintiffs are entitled to recover a part of the property sued for and that they are not entitled to recover the balance,[55] or if a case is made out as to one only of several defendants,[56] there is no ground for nonsuit.

[§ 261] **(4) Miscellaneous.** It is a good ground for dismissal that the pleadings show on their face that the action cannot be sustained,[57] or that the plaintiff's affidavit is defective and insufficient;[58] but in jurisdictions where ultimate delivery is claimed by the complaint and immediate delivery by affidavit, a motion to set aside the proceedings because the complaint does not state a cause of action cannot, so far as the claim to immediate delivery is concerned, be sustained.[59] Where plaintiff upon the court's order to so do, fails to return the goods to defendant who had been holding them under a writ of attachment, the court may properly dismiss the replevin action.[60] It is not a ground for dismissal that plaintiff failed to prove the value of the goods, it being shown that he was entitled to them;[61] that the money paid by plaintiff for the property was not her own;[62] that the officer who seized the property neglected to allow defendant an opportunity to execute a bond and retain the property;[63] that the sheriff failed to file plaintiff's papers within the time required by statute where defendant was not injured by the delay;[64] that the service of the writ was irregular in that the officer, without being directed to do so in writing by plaintiff or his attorney, did not take the goods into his possession;[65] that, of two spans of mules replevied, the sheriff seized one team in the county in which the action was brought, and the other team in another county to which it had been brought after the commencement of the action;[66] that defendant disclaims title to the property;[67] that two animals included in the writ were appraised at one sum in the appraiser's certificate;[68] that an animal described in the writ as a heifer is described in the certificate of appraisement as a cow;[69] that plaintiff as executor has commenced an action against defendant and his officer for the conversion of the replevied property if it does not appear that the conversion relied on was the same act for which the replevin was brought;[70] or that plaintiff has caused the officer, to whom the writ was committed, to bring an action against defendant and another officer for taking the replevied property out of his hands, before its delivery to plaintiff.[71] It has been held that the dismissal of a writ of replevin on motion based on affidavits, on the grounds that defendant was a deputy sheriff and the writ was directed to the sheriff and served by another deputy, that the writ was issued without authority of law, and that the service was unlawful and irregular and gave the court no jurisdiction, is error.[72] Where the action was dismissed for want of jurisdiction, on appeal, in determining whether a want of jurisdiction was shown plaintiff's motion for a new trial alleging that the property had been seized on a void execution and judgment, would tend, if considered

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52. Brewster v. Silliman, 38 N. Y. 423.

[a] **Thus** it is not error to refuse to dismiss the action as to certain of defendants, although plaintiff failed to introduce evidence sufficient to charge them, where defendants in their answer jointly justified the taking by virtue of an attachment issued against all the defendants. Brewster v. Silliman, 38 N. Y. 423.

53. Meyers v. Hart, 3 Colo. A. 392, 33 P 647.

54. Norris v. Clinkscales, 44 S. C. 315, 22 SE 1.

55. Bell v. G. Ober, etc., Co., 111 Ga. 668, 36 SE 904.

56. Woodburn v. Chamberlin, 17 Barb. (N. Y.) 446. Contra Shreck v. Bittles, 19 Pa. Dist. 734.

[a] **Thus** a motion to nonsuit plaintiffs generally as to all the defendants is properly denied. Woodburn v. Chamberlin, 17 Barb. (N. Y.) 446.

57. Reigert v. Voelker, 6 Mo. A. 53; American Tool Co. v. Smith, 14 AbbNCas (N. Y.) 378.

[a] **Failure to state jurisdictional facts.**—Detention of the property by defendant authorizes a dismissal of the action. Reigert v. Voelker, 6 Mo. A. 53.

58. McArthur v. Hogan, 15 F. Cas. No. 8,659a, Hempst. 286; Barruel v. Irwin, 2 N. M. 223.

[a] **Failure to state:** (1) That plaintiff was possessed of the property, or that it was unlawfully taken from his possession. McArthur v. Hogan, 15 F. Cas. No. 8,659*a*, Hempst. 286. (2) The value of the property. Barruel v. Irwin, 2 N. M. 223.

59. Adeimy v. Dleykan, 116 S. C. 159, 164, 107 SE 35, 37.

"The right to the ultimate delivery, tested by the sufficiency of the complaint, and the right to immediate delivery, tested by the sufficiency of the affidavit, move upon different lines, and must be determined by the appropriate remedy; a demurrer in the one case; and a motion to set aside in the other." Adeimy v. Dleykan, supra.

60. Rice v. Thayer, (Mo. A.) 217 SW 576.

61. Banfield v. Haeger, 45 N. Y. Super. 428; Hay v. Muller, 7 Misc. 670, 28 NYS 57.

62. West v. O'Leary, 56 N. J. L. 699, 29 A 427.

[a] **"As between vendor and vendee** the legal title would pass according to the intention of the parties. Upon the question of title whether the vendor came by the cash she paid honestly or dishonestly is without significance. If she had stolen the money, she could, by its use, acquire legal title to property as against a vendor or his creditors." West v. O'Leary, 56 N. J. L. 699, 29 A 427.

63. Wyatt v. Freeman, 4 Colo. 14; Robinson v. Austin, 3 Colo. 375; Parlin v. Austin, 3 Colo. 337.

[a] **Defendant's remedy** (1) is to move for restoration of the property on giving bond. Wyatt v. Freeman, 4 Colo. 14; Robinson v. Austin, 3 Colo. 375. (2) Or he may have his action against the delinquent official. Robinson v. Austin, supra.

64. Behling v. Posorske, 172 Wis. 608, 179 NW 738.

65. Pedrick v. Kuemmell, (N. J. Sup.) 65 A 906.

66. Rummelhart v. Boone, 147 Iowa 390, 126 NW 338.

67. Choen v. Porter, 66 Ind. 194; Smith v. Emerson, 16 Ind. 355.

[a] **Reason for rule.**—"He is liable for damages and costs if he wrongfully and unlawfully detained it, and for the value of the property unless it is restored to the plaintiff." Choen v. Porter, 66 Ind. 194, 197.

68. Mansir v. Crosby, 6 Gray (Mass.) 334.

[a] **Upon amendment of the writ** by inserting the value of the property in terms corresponding to those of the appraiser's certificate, the motion to dismiss is rightly overruled. Mansir v. Crosby, 6 Gray (Mass.) 334.

69. Pomeroy v. Trimper, 8 Allen (Mass.) 398, 85 AmD 714.

70. Pomeroy v. Trimper, supra.

71. Pomeroy v. Trimper, supra.

72. Jewell v. Lamoreaux, 30 Mich. 155.

[a] **Proper method.**—The questions sought to be determined were not properly triable on affidavits, but should have been in some way brought to trial on evidence upon issue of fact. Jewell v. Lamoreaux, 30 Mich. 155.

at all, to show that the motion to dismiss should have been denied.[73]

[§ 262] **b. Proceedings To Dismiss.**[74] In proceedings to dismiss the action, the statutory requirements must be strictly followed, and the motion therefor must contain all the requisites necessary to justify the court in granting such motion.[75]

Waiver of motion. A motion to dismiss an action of replevin for want of a sufficient replevin bond is not waived by subsequently, and before the motion has been decided, filing an affidavit of defense and an answer to the merits.[76]

Right to appear to move for dismissal. After his property has been taken on a writ of replevin, defendant is not bound to wait until he is served with summons before appearing, but has a right to appear immediately and move for a discontinuance.[77]

[§ 263] **c. Character of Judgment Rendered—(1) General Rule.** A judgment of nonsuit is a judgment for defendant[78] and entitles him to the full benefit of statutory provisions relative to a judgment for defendant.[79] On a judgment of involuntary dismissal or nonsuit, defendant is ordinarily entitled to a judgment for the return of the property,[80] or for its value in case it cannot be returned;[81]

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[73] Lamb v. Stubblefield, (Mo. A.) 186 SW 730.

[74] **Generally** see Dismissal and Nonsuit §§ 124-134.

[75] Claflin v. Thayer, 13 Gray (Mass.) 459; Vinnedge v. Nicholai, 28 Nebr. 133, 44 NW 89; Elsberg v. Maurin, 9 N. M. 645, 43 P 690.

[a] **Illustration.**—In replevin against a sheriff, a third party appointed by the clerk of court served the process, defendant appeared generally and moved the court for leave to make proof of the value of the property seized and his damages by reason thereof, and for a dismissal of the case, and it was held that the motion was properly overruled, the jurisdiction of the court not having been questioned or attacked, although defendant alleged that the appointment of the person who served the process was irregular. Vinnedge v. Nicholai, 28 Nebr. 133, 44 NW 89.

[b] **In Pennsylvania,** to obtain judgment of non prosequi for failure to file the declaration, defendant must first rule plaintiff to file his declaration as provided by statute. Ott v. Miller, 16 Pa. Dist. 140, 33 Pa. Co. 304.

[76] Clark v. Connecticut River Co., 6 Gray (Mass.) 363.

[77] Clinton v. King, 3 HowPr (N. Y.) 55.

[78] Skaggs v. Taylor, 77 Cal. A. 519, 247 P 218.

[79] Skaggs v. Taylor, supra.

[80] U. S.—McArthur v. Hogan, 15 F. Cas. No. 8,659a, Hempst. 286.

Ark.—Town v. Evans, 11 Ark. 9.

Cal.—Skaggs v. Taylor, 77 Cal. A. 519, 247 P 218; Kowalsky v. Nicholson, 23 Cal. A. 160, 137 P 607.

Conn.—Fleet v. Lockwood, 17 Conn. 233.

Fla.—Branch v. Branch, 5 Fla. 447.

Ill.—Hanson v. Egan, 228 Ill. A. 329; Luthy v. Kline, 56 Ill. A. 314; McCrory v. Hamilton, 39 Ill. A. 490; Fowler v. Richardson, 32 Ill. A. 252.

Iowa.—Funk v. Israel, 5 Iowa 438.

Me.—Bettinson v. Lowery, 86 Me. 218, 29 A 1003; Greely v. Currier, 39 Me. 516.

Mass.—Sullivan v. Martinelli, 261 Mass. 261, 158 NE 662; Lowe v. Brigham, 3 Allen 429; Walbridge v. Shaw, 7 Cush. 560.

Mich.—Humphrey v. Bayn, 45 Mich. 565, 8 NW 556.

Minn.—Pabst Brewing Co. v. Butchart, 68 Minn. 303, 71 NW 273; Terryll v. Bailey, 27 Minn. 304, 7 NW 261.

Mont.—Barrett v. Shipley, 63 Mont. 152, 206 P 430.

Nebr.—McAvoy v. Osborn, 99 Nebr. 608, 157 NW 333; Garber v. Palmer, 47 Nebr. 699, 66 NW 656.

N. M.—Barruel v. Irwin, 2 N. M. 223.

N. Y.—Van Alstine v. Kittle, 18 Wend. 524.

N. C.—Eborn v. Waldo, 51 N. C. 438.

S. D.—Aultman v. Becker, 10 S. D. 58, 71 NW 753.

Utah.—Bankers' Commercial Security Co. v. Box Elder County Dist. Ct., 60 Utah 601, 211 P 187.

Vt.—Thurber v. Richmond, 46 Vt. 395; Collamer v. Page, 35 Vt. 387.

Eng.—Salkold v. Skelton, Cro. Jac. 519, 79 Reprint 443.

"In all cases of abatement or nonsuit in replevin except where non cepit alone is pleaded, the order for return goes as a matter of course, and becomes a part of the judgment to be formulated by the clerk without further order." Bettinson v. Lowery, 86 Me. 218, 224, 29 A 1003.

"This must be so, or the plaintiff, by putting in an insufficient affidavit and bond, might obtain possession of the property, accomplish the object of his suit, and perhaps leave the defendant remediless, or if not entirely remediless, he would entail upon him a long and tedious litigation to obtain the possession of his property, of which he had been wrongfully dispossessed, through the instrumentality of the law, or the value thereof." Branch v. Branch, 5 Fla. 447, 451.

[a] **Rule not unconditional.**—Statutes requiring a return of the property in all cases of nonsuit are not unconditional, but are subject to the proviso that if plaintiff, between the time of the commencement of the suit and suffering nonsuit, shall become entitled to the possession of the property, judgment may be given against him for costs and such damages as defendant shall have sustained. Lane v. Kohn, 79 Ill. A. 396.

[b] **Right depends** not on defendant's proof of title to the property, but upon his obtaining a judgment in his favor and upon having made a claim for return of the property. Skaggs v. Taylor, 77 Cal. A. 519, 247 P 218.

[c] **On failure to establish case.**—Where no evidence was introduced the return of the property and the award of costs follow as incidents of plaintiff's failure to establish his case. Barrett v. Shipley, 63 Mont. 152, 206 P 430.

[d] **Upon quashal of writ and discontinuance of action** defendant is entitled to a return of the property. Bettinson v. Lowery, 86 Me. 218, 29 A 1003; Greeley v. Currier, 39 Me. 516; Humphrey v. Bayn, 45 Mich. 565, 8 NW 556.

[e] **Where the property is in the hands of the officer** executing the writ, on dismissal of the suit for want of a proper bond, defendant is entitled to an order that the officer return the property to defendant at the place where he took it. Thurber v. Richmond, 46 Vt. 395.

[f] **It is error** for the court to find that the parties should be left as they were at the commencement of the action, because of fraud in the bill of sale under which plaintiff claims. McAvoy v. Osborn, 99 Nebr. 608, 157 NW 333.

[g] **Form of judgment.**—(1) A judgment of dismissal for want of prosecution that defendant have a writ of retorno habendo and not that the property be returned, while informal, is not so defective as to be a nullity. Luthy v. Kline, 56 Ill. A. 314; McCrory v. Hamilton, 39 Ill. A. 490; Fowler v. Richardson, 32 Ill. A. 252. (2) It has been held that a judgment that plaintiff take nothing by his writ, and that defendant have a return of the property so replevied as aforesaid is substantially, although not formally, correct. McArthur v. Hogan, 15 F. Cas. No. 8,659a, Hempst. 286.

[81] Ark.—Town v. Evans, 11 Ark. 9.

Cal.—Skaggs v. Taylor, 77 Cal. A. 519, 247 P 218; Kowalsky v. Nicholson, 23 Cal. A. 160, 137 P 607.

Ill.—Hanson v. Egan, 228 Ill. A. 329.

Iowa.—Funk v. Israel, 5 Iowa 438.

Mass.—Sullivan v. Martinelli, 261 Mass. 261, 158 NE 662.

Mich.—Brown v. Horning, 76 Mich. 542, 43 NW 453.

Minn.—Pabst Brewing Co. v. Butchart, 68 Minn. 303, 71 NW 273; Terryll v. Bailey, 27 Minn. 304, 7 NW 261.

S. D.—Aultman v. Becker, 10 S. D. 58, 71 NW 753.

Wis.—Gaynor v. Blewitt, 69 Wis. 582, 34 NW 725.

Contra Barruel v. Irwin, 2 N. M. 223.

[a] **Rule applies** upon dismissal for want of prosecution. Sullivan v. Martinelli, 261 Mass. 261, 158 NE 662.

[b] **Alternative judgment.**—(1) Defendant is entitled to an alternative judgment for the return of the property, or for its value if a return cannot be had. Hanson v. Egan, 228 Ill. A. 329; Pabst Brewing Co. v. Butchart, 68 Minn. 303, 71 NW 273. (2) If return cannot be had, judgment need not be in alternative, but may properly be for its value alone. Skaggs v. Taylor, 77 Cal. A. 519, 247 P 218.

[c] **Limiting value to defendant's**

and by some statutes it is expressly provided that, where defendant is entitled to return of the property, he may instead of taking judgment for a return of the property take judgment for the value of the property.[82] However, in some jurisdictions, although where plaintiff's case fails because of his failure to introduce any evidence defendant is entitled to a judgment for the return of the property,[83] he is not entitled to an alternative judgment for the value thereof.[84] If the court disregards the uncontradicted testimony of the plaintiff's witnesses because it has been impeached and dismisses the complaint, judgment on the merits cannot be awarded.[85]

[§ 264] **(2) On Dismissal for Want of Jurisdiction.** As a general rule, if the action is dismissed for want of jurisdiction of the subject matter of the suit, the rule stated above[86] has no application, and the court is without power to order a return of the property,[87] or a judgment for its value.[88] However, it has been held that where the court does not have jurisdiction of defendant or of the property, it may properly order it returned to defendant and upon failure to do so award execution for its value;[89] but it cannot render an absolute and unqualified judgment and direct execution to issue for the value of defendant's interest in the property.[90] And where the action was dismissed simply for want of jurisdiction it has been held that defendant is entitled to an alternative judgment for the return of the property or payment of its value.[91]

[§ 265] **(3) Want of, or Insufficient, Service.** Where service is set aside after the return-day, there can be no new service, and it operates as a discontinuance; and a defendant whose property has been taken may have a return or waive it and require an assessment of damages.[92] But it has been held that no judgment for return can be given if the writ is abated on defendant's motion for want of service on him,[93] or where the replevin bond being defective the writ has not been served by the officer nor returned to the court issuing the writ.[94]

[§ 266] **(4) As Affected by Defendant's Plead-**

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special interest.—Where plaintiff is nonsuited because his evidence shows that defendant is entitled to possession as plaintiff's bailee, the court should assess and enter in the alternative judgment the value of defendant's special interest only and not the value of the whole property. Gaynor v. Blewitt, 69 Wis. 582, 34 NW 725.

[d] **Time of election to take value.**—(1) If after plaintiffs have sold the goods replevied beyond the jurisdiction of the court, they submit to a nonsuit, on proceedings at a subsequent term to assess damages, defendant's election to take the value of the goods made after the jury was sworn is in due time. Brown v. Horning, 76 Mich. 542, 43 NW 453. (2) Defendant is not required to file a written waiver of return, and elect to take judgment for the value of the property, before trial, but may do so at the trial without any formal entry or writing beyond a proper recital in the judgment. Brown v. Horning, supra.

[e] **In justice's court** waiver of the return, entered at defendant's request in open court, by the justice, authorizes judgment for value instead of for return. Humphrey v. Bayn, 45 Mich. 565, 8 NW 556.

[82] See statutory provisions.

[a] **In Arkansas** Dig. c 136 §§ 44, 45 were construed in Town v. Evans, 11 Ark. 9, 11 [dist Dickinson v. Noland, 7 Ark. 25; Hartgraves v. Duval, 6 Ark. 506].

[b] **Judgment entered** is not final judgment, but it is interlocutory and merely decides the right and refers the ascertainment of the value to a future inquiry. Hill v. Webber, 50 Mich. 142, 15 NW 52.

[83] See cases supra note 80.

[84] Barrett v. Shipley, 63 Mont. 152, 206 P 430.

[a] **Alternative judgment is necessary** only where the case is tried on the merits. Barrett v. Shipley, 63 Mont. 152, 206 P 430.

[85] Yalovitz v. Schutz, 115 NYS 1080.

[86] See supra § 263.

[87] U. S.—Burdett v. Doty, 38 Fed. 491.

Ark.—Ware v. Shoemaker-Bale Auto Co., 177 Ark. 227, 6 SW (2d) 285.

Ill.—Christenson v. Hanna, 183 Ill. A. 115.

Mass.—Gray v. Dean, 136 Mass. 128; Jordan v. Dennis, 7 Metc. 590.

Nebr.—State v. Letton, 56 Nebr. 158, 78 NW 533.

S. C.—Elder v. Greene, 34 S. C. 154, 13 SE 323.

Vt.—Widber v. Benjamin, 75 Vt. 152, 53 A 1071; Collamer v. Page, 35 Vt. 387.

But see Horowitz v. Decker, 88 NYS 217 (holding that, where replevin was erroneously brought in the municipal court to recover chattels mortgaged to secure the purchase price on an alleged breach of condition, and, after an attempted amendment of the summons so as to change the action to one to foreclose a lien, an inquest was taken, without an attachment of the property, an order entered directing a sale of the chattels "replevied at the commencement of the action" was erroneous, since the replevied chattels had been taken without jurisdiction, and they should be returned to defendant).

[a] **Rule applies** where the value of the property is below the jurisdictional amount. Burdett v. Doty, 38 Fed. 491; Gray v. Dean, 136 Mass. 128; Widber v. Benjamin, 75 Vt. 152, 53 A 1071.

[b] **What not want of jurisdiction of subject matter.**—An action of replevin was brought in a county where one of the parties resided, but not the county where the property replevied was detained, and for this reason the action was dismissed on motion. It was held that, notwithstanding this disposition of the cause, the court had jurisdiction, and it was its duty, to render a judgment for a return to defendant of the property replevied, without any proof of his right to have the property restored, and without any formal plea or avowry by defendant; and that plaintiff had no right to contest such a judgment on the ground that he owned the property. Collamer v. Page, 35 Vt. 387.

[c] **In Connecticut** (1) a motion to erase is the only remedy for securing the dismissal of an action for want of jurisdiction apparent on the face of the pleadings. Galvin v. Birch, 97 Conn. 399, 118 A 826. (2) In such case, upon dismissal of the action, the court has no further jurisdiction over the case and defendant cannot, by an answer in the nature of an avowry and counterclaim after nonsuit, obtain a judgment for the return of the property and damages. Galvin v. Birch, supra. (3) But he is not remediless for he has a remedy by an action for conversion. Galvin v. Birch, supra.

[88] Ware v. Shoemaker-Bale Auto Co., 177 Ark. 227, 6 SW (2d) 285.

[a] **When statute applicable.**—Statute authorizing judgment for defendant for value of property taken under order of delivery and damages contemplates a trial on the merits and is inapplicable, where replevin action is dismissed for want of jurisdiction of subject-matter. Ware v. Shoemaker-Bale Auto Co., 177 Ark. 227, 6 SW (2d) 285.

[89] Williams v. Chapman, 60 Iowa 57, 14 NW 89.

[a] **Rule applied** where plaintiff brought replevin in state court to secure property from United States marshal which had been seized under process issued from federal court. Williams v. Chapman, 60 Iowa 57, 14 NW 89.

[90] Williams v. Chapman, supra.

[a] **Application of statute.**—A statute providing that the person found to be entitled to the possession of property replevied may, at his option, have execution for its specific delivery or its value applies only to a case where the court has jurisdiction and power to determine on the merits who is entitled to the possession of the property in controversy. Williams v. Chapman, 60 Iowa 57, 14 NW 89.

[91] Lee v. Bandimere, (Ark.) 204 SW 307.

[92] Peo. v. Judge Washtenaw Cir. Ct., 23 Mich. 497.

[93] Smith v. Fisher, 13 R. I. 624.

[94] Adams v. McGlinchy, 62 Me. 533.

ings or Absence of Pleadings. Where defendant obtains a judgment of dismissal or nonsuit on failure of plaintiff's evidence to make out his case, he is not entitled to a judgment for a return of the property or its value, unless his pleadings would entitle him to such judgment.[95] He is not entitled to such judgment on a plea of non cepit or non detinet.[96] Nor, in some jurisdictions, is he entitled to a judgment for return of the property or its value where there is no prayer, claim, or demand of any kind in the answer for a return of the property or its value.[97] But if defendant in his pleading makes a claim for the return of the property or its value he is entitled to such a judgment when plaintiff is nonsuited.[98] Also, where, defendant obtains a judgment of dismissal or nonsuit before pleading, he is entitled to a return of the goods.[99] Thus it has been held that an avowry is not necessary to authorize the court to render a judgment for return of the goods where the writ is abated for irregularity in the replevin process.[1]

[§ 267] **(5) Miscellaneous.** Defendant is not entitled to a return of the property where the complaint is dismissed on defendant's showing no right of property or possession in himself and alleging possession in another;[2] where plaintiff is nonsuited on the ground that the goods had never been in defendant's possession;[3] or where it appears, on dismissal of the suit, that plaintiff never obtained possession of the property under the writ.[4] Also it has been held that no judgment for return can be given if the writ is abated on account of variance between the writ and the declaration,[5] or where the action is dismissed because the writ is void.[6]

[§ 268] **d. Operation and Effect of Judgment.** A judgment of dismissal or nonsuit for return of the property where not on the merits is not conclusive of defendant's ownership or right of possession.[7] Plaintiff's case is left as it was when he instituted his action,[8] and he may bring another action of replevin for the same property.[9]

[§ 269] **e. Assessment of Value.** The method of assessing the value of the property is a matter of statutory regulation,[10] the mode of which varies widely in the different jurisdictions.[11]

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[95] Cal.—Gould v. Scannell, 13 Cal. 430.

Me.—Millett v. Soule, 125 Me. 188, 132 A 216.

Mass.—Gould v. Barnard, 3 Mass. 199.

N. Y.—Pierce v. Van Dyke, 6 Hill 613.

Or.—Capital Lumbering Co. v. Hall, 10 Or. 202.

S. C.—Summer v. Kelly, 38 S. C. 507, 17 SE 364.

Wis.—Douglass v. Garrett, 5 Wis. 85.

[a] **Reasons for rule.**—(1) "Judgment for the return of the property, or its value, is affirmative relief, and the defendant must allege and prove himself entitled to it, if his right is put in issue, or it will not be awarded him." Capital Lumbering Co. v. Hall, 10 Or. 202, 205. (2) "This judgment of return is in the nature of a cross judgment, and there must be some appropriate averments in the pleadings to put in issue the facts upon which the relief is given." Gould v. Scannell, 13 Cal. 430, 431.

[b] **General rule is** that, whenever upon the pleadings it appears that a defendant is so entitled, he will have judgment for restoration; otherwise he will not. Millett v. Soule, 125 Me. 188, 132 A 216.

[c] **At common law,** when the writ was abated or quashed on the plea or motion of defendant, he was entitled to a judgment for the return of the property only when he avowed, made conusance, or put in a plea showing that he was entitled to possession. Gould v. Barnard, 3 Mass. 199.

[96] Millett v. Soule, 125 Me. 188, 132 A 216; Bettinson v. Lowery, 86 Me. 218, 29 A 1003; Pierce v. Van Dyke, 6 Hill 613; Peo. v. Niagara Ct. C. Pl., 4 Wend. 217; Summer v. Kelly, 38 S. C. 507, 17 SE 364; Douglass v. Garrett, 5 Wis. 85; 1 Chitty Pl. p 490. But see Eborn v. Waldo, 51 N. C. 438 (where it was held, under a statute providing that, when the property shall have been delivered to a plaintiff and he shall fail to return by being nonsuited, there shall be an inquiry of the value of the property and of the damage by his detention, that a nonsuit is conclusive at least to the extent of defendant's right to a return of the property and to damages during the pendency of the action in which plaintiff failed; the act makes the nonsuit conclusive to the extent mentioned, whatever the ground of nonsuit, and it is immaterial that the plea was non cepit. It makes no difference whether a nonsuit was ordered because there had been no taking or because property of defendant was not proved); Saunderson v. Lace, 2 Pinn. (Wis.) 257, 1 Chandl. 231 (holding that under the territorial statute, defendant in replevin, under the plea of non detinet, in case he succeeds, is entitled to a return of the property replevied and damages).

[a] **"Non cepit** is a plea in bar, not involving the merits of the action; and if a defendant claims a return of the goods, he must add an avowry or cognizance inducing a return, or he is not entitled to judgment for a return." Peo. v. Niagara Ct. C. Pl., 4 Wend. (N. Y.) 217.

[97] Skaggs v. Taylor, 77 Cal. A. 519, 247 P 218.

[98] Skaggs v. Taylor, supra.

[a] **Pleadings sufficient.**—Where defendant made claim for return of the property pleading circumstances under which he had been deprived of it which were uncontradicted. Skaggs v. Taylor, 77 Cal. A. 519, 247 P 218.

[99] Pierce v. Van Dyke, 6 Hill (N. Y.) 613; Collamer v. Page, 35 Vt. 387.

[1] Fleet v. Lockwood, 17 Conn. 233; Lowe v. Brigham, 3 Allen (Mass.) 429. Contra Hill v. Bloomer, 1 Pinn. (Wis.) 463.

[2] Millett v. Soule, 125 Me. 188, 132 A 216; Nichols v. Potts, 35 Misc. 273, 275, 71 NYS 765.

"At the most the judgment should have gone no further than to dismiss the complaint, leaving the question of ownership, as between Bacon and the plaintiff [whom defendant alleges is the owner of the property] to be determined in an appropriate action." Nichols v. Potts, supra.

[a] **Illustration.**—Where a wife left her husband taking the household goods to a rented room, and he replevied them from the house owner, it was error to order their return to the house owner on nonsuit. Millett v. Soule, 125 Me. 188, 132 A 216.

[3] Gallagher v. Bishop, 15 Wis. 276.

[4] Prentiss v. Moore, 3 Ill. A. 539.

[5] Dickinson v. Noland, 7 Ark. 25; Hartgraves v. Duval, 6 Ark. 506.

[6] Bolin v. Fines, 60 Nebr. 443, 83 NW 740; Reid v. Panska, 56 Nebr. 195, 78 NW 534; Hill v. Bloomer, 1 Pinn. (Wis.) 463, 467. But see Barruel v. Irwin, 2 N. M. 223 (where it was held that, if the suit is dismissed for failure of the affidavit to state the value of the property, defendant is entitled to a return of the property).

"Where a writ is adjudged to be void or voidable, the parties are not considered to have been legally in court. The court refuses to take cognizance of the cause, or to recognize the parties, as being legally upon the record. The court in such case, cannot make any other order, than to dismiss the suit at the cost of the plaintiff." Hill v. Bloomer, supra.

[7] Peterson v. Kissell, 148 Iowa 516, 125 NW 808; Walbridge v. Shaw, 7 Cush. (Mass.) 560; Barruel v. Irwin, 2 N. M. 223; Collamer v. Page, 35 Vt. 387.

[8] Walbridge v. Shaw, 7 Cush. (Mass.) 560.

[9] Peterson v. Kissell, 148 Iowa 516, 125 NW 808; Morton v. Sweetser, 12 Allen (Mass.) 134; Walbridge v. Shaw, 7 Cush. (Mass.) 560; Hackett v. Bonnell, 16 Wis. 471.

[a] **Thus,** where plaintiff's first action was dismissed for his failure to make the petition more specific he was not thereby precluded from bringing a second action to determine the title to the property. Peterson v. Kissell, 148 Iowa 516, 125 NW 808.

[b] **That defendant had not in fact taken out any writ of return,** or actually received the property into his custody under that judgment, is no valid objection where the judgment for a return was ordered upon the motion to dismiss the writ, and plaintiff yielded to it, and returned the property to the place from which he had taken it under his defective proceedings. Walbridge v. Shaw, 7 Cush. (Mass.) 560.

[10] See statutory provisions.

[§ 270] **f. Damages.** In the absence of some statutory provision to the contrary,[12] on a dismissal of the action for some ground not relating to the merits, ordinarily there can be no judgment for damages,[13] except perhaps mere nominal damages.[14] However, it has been held that where plaintiff makes default after the case has been duly noticed for trial, the defendant upon having the plaintiff nonsuited may at that time take judgment for damages arising from the replevin.[15]

[§ 271] **g. Reinstatement.** Ordinarily the court will not reinstate at a subsequent term an action of replevin which has been discontinued,[16] or non prossed[17] at a preceding term. This may be done, however, if the discontinuance was the result of an error of the clerk.[18] And where a nonsuit is granted for nonappearance of plaintiff at the trial, and he appears a few minutes after opening of the court, and defendant in open court consents to a vacation of the judgment, it is an abuse of discretion for the court to refuse to do so.[19]

[§ 272] **B. Scope of Inquiry—1. In General.** The general rule that the scope of inquiry in a proceeding is limited to the issues as made by the pleadings[20] applies to an action of replevin.[21] The subject matter of litigation necessarily consists only of the property mentioned in the complaint, and it is not competent for defendant by his answer to introduce a new and distinct subject matter by claiming the release and return of other and distinct personal property,[22] even though he present such a case as would have enabled him to recover in an independent action;[23] nor can a claim for damages for taking or withholding such property or the value of its use be litigated;[24] but the rule does not exclude litigation in the action of the right to the increase of the disputed property.[25] It is proper to determine whether the property replevied was subject to an action of replevin.[26] Where an affidavit, although defective, is not assailed, it is the duty of the court to decide the issue presented by the pleadings.[27] The taking and detention of property mentioned in the body of the writ but not replevied cannot be considered.[28]

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[11] [a] **In Arkansas,** if the suit is dismissed for some irregularity or defect in the procedure, and defendant elects to take the value of the property, the court must order a jury to assess the value. Town v. Evans, 11 Ark. 9.

[b] **In Massachusetts** a reference may properly be ordered to determine the value of an automobile at the time it was seized under a replevin writ, in an action on a replevin bond. Sullivan v. Martinelli, 261 Mass. 261, 158 NE 662.

[c] **In Michigan** it has been held that, where defendant in replevin recovers judgment by nonsuit or discontinuance and elects to take judgment for the value of the property taken, he may, under a notice of trial, have the value of the property assessed by the court. The intervention of a jury is required only when damages are to be assessed. Johnson v. Disk, 69 Mich. 108, 36 NW 738; Pearsons v. Eaton, 18 Mich. 79.

[d] **In New York** (1) it has been held that, where there is a dismissal or nonsuit during the trial, the value of the property may be assessed by the jury impaneled in the cause, and that a writ of inquiry need not issue for that purpose. But if there is a dismissal or nonsuit before trial, such value should be assessed on a writ of inquiry. Murphy v. Jenkins, 1 Den. 669; Van Alstine v. Kittle, 18 Wend. 524. (2) Where, however, plaintiff in replevin is nonsuited at a trial on his opening proof, and defendant gives no evidence, if defendant has put in an avowry claiming the property under distress for rent, or if it appears that the property was distrained for rent, defendant cannot take the alternative judgment for its value, and have such value ascertained on a writ of inquiry, as the statute of replevin expressly excepts cases where the goods replevied were distrained from the provision for ascertaining their value by writ of inquiry after nonsuit. Redman v. Hendricks, 3 N. Y. Super. 32.

[e] **In Wyoming,** where judgment of nonsuit is awarded defendant on failure of proof, he may proceed to impanel a new jury to assess the value of the property. Bath v. Ingersoll, 1 Wyo. 280.

[12] See statutory provisions.

[a] **In Nebraska.**—Under the statute, when a plaintiff in replevin who has obtained the property fails in his proof or fails to prosecute the action, defendant is entitled to judgment, and to a trial of his right of property or possession, for the purpose of establishing his damages. Pennington County Bank v. Bauman, 87 Nebr. 25, 126 NW 654 [rev on reh 85 Nebr. 226, 122 NW 848]; Garber v. Palmer, 47 Nebr. 699, 66 NW 656.

[b] **In Vermont** (1) where the suit is dismissed on grounds not going to the merits, defendant cannot recover damages for that which is a material part of the property replevied. Collamer v. Page, 35 Vt. 387. (2) But he can recover damages for the vexation of being dispossessed by the taking of it on the writ. Thurber v. Richmond, 46 Vt. 395.

[13] Ware v. Shoemaker-Bale Auto Co., 177 Ark. 227, 6 SW (2d) 285; McArthur v. Lane, 15 Me. 245; Barruel v. Irwin, 2 N. M. 223; Pannell v. Hampton, 32 N. C. 463. But see McArthur v. Howett, 72 Ill. 358 (where, in reversing dismissal of suit, the court said that, in assessing damages upon dismissal, evidence that defendant is a mere pledgee of the property is admissible, as in such case she, having no right to use the property, cannot recover damages for the loss of its use); Wood v. Braynard, 9 Pick. (Mass.) 322 (where the court held, in a case not within the provisions of the statute regulating the amount, that defendant should recover at common law his reasonable damages).

[a] **Want of jurisdiction of subject matter.**—On dismissal therefor since the court has no jurisdiction to determine the issue of right of property and right of possession it does not have jurisdiction to try the issue of damages which is necessarily subsidiary to and grows out of the issue of ownership and right to possession. Ware v. Shoemaker-Bale Auto Co., 177 Ark. 227, 6 SW (2d) 285.

[14] Barruel v. Irwin, 2 N. M. 223.

[15] Anderson v. Henderson, 167 Mich. 425, 133 NW 14.

[16] Mitchell v. Wilson, 17 F. Cas. No. 9,671, 3 Cranch C. C. 92; Thompson v. Wells, 23 F. Cas. No. 13,980, 3 Cranch C. C. 5.

[17] McDaniel v. Fish, 16 F. Cas. No. 8,744, 2 Cranch C. C. 160.

[18] Sherburne v. King, 21 F. Cas. No. 12,759, 2 Cranch C. C. 205.

[19] Bank of Commerce v. Warren, 8 Wash. 477, 36 P 440.

[20] See Pleading § 1144.

[21] See cases infra this section; and infra §§ 272–274.

[22] Lovensohn v. Wild, 45 Cal. 8; Lindley v. Miller, 67 Ill. 244; Buckley v. Buckley, 12 Nev. 423.

[a] **Illustration.**—On trial of a tenant's replevin of live stock distrained for rent, whatever liability may have been incurred by the landlord's permitting animals not distrained to follow and remain with the others, but without any refusal to surrender them, cannot be settled in the action. Lindley v. Miller, 67 Ill. 244.

[23] Lovensohn v. Ward, 45 Cal. 8.

[24] Buckley v. Buckley, 12 Nev. 423.

[25] Buckley v. Buckley, supra.

[a] **Illustration.**—In an action brought to recover a flock of ewe sheep or their value, the right to their increase and the wool subsequently shorn from the flock are proper subjects of litigation in the same action, the rights of the parties relative to the increase being precisely the same as their rights to the original flock. Buckley v. Buckley, 12 Nev. 423.

[26] Wallingsford v. Bennett, 12 D. C. 303.

[a] **Question of exempt character of property** taken upon a distress for rent may be raised in replevin against the constable for taking the goods, where the magistrate in the attachment proceeding did not finally adjudicate it. Wallingsford v. Bennett, 12 D. C. 303.

Property subject to replevin see supra §§ 7–17.

[27] Dodd v. Skelton, 65 Nebr. 585, 91 NW 543.

[a] **Where special proceeding in replevin is not assailed,** the only duty of the court is to decide the issue presented by the pleadings. Dodd v. Skelton, 65 Nebr. 585, 91 NW 543.

Order to surrender goods. The court from which the writ issues has no power, in case the officer fails to find the property therein described, to compel defendant by order to surrender it.[29]

Goods distrained. In replevin, to recover goods distrained,[30] the only question involved is whether the levy was lawfully made.[31] Thus the legality of the distress may be tried provided there is no rent due, but if there is rent due, however small, it may not be.[32]

[§ 273] **2. Adjudication of Title and Other Rights.**[33] At common law the only relief obtained in a replevin action was an adjudication as to the right of possession of the chattel at the time of the commencement of the action,[34] and in several jurisdictions it is still held that in replevin nothing can be determined but the right of possession of the property replevied.[35] Under such rule the title of the property may be investigated if the right of possession depends thereon[36] and the existence and amount of a lien claimed by defendant can be considered in a replevin action of the goods subject thereto;[37] but a defect in the affidavit of justification of the sureties on the replevin bond cannot be reached in the replevin action,[38] nor can plaintiff be held liable for wrongful acts of the sheriff in seizing the property,[39] nor a dispute between defendant and the sheriff over feed consumed by the stock replevied while in the sheriff's official custody;[40] nor can the right to the return of any money paid on a conditional sale contract be investigated in an action of replevin for the goods, unless the return of such money is a condition precedent to plaintiff's right to possession of the goods in question.[41]

In other jurisdictions, however, matters other than the right to possession of the chattel replevied may be determined even though they are not necessary or do not aid in the determination of the right to possession.[42] In some it is held that the court may determine not only the question of the right of possession, but also the right of property,[43] and in determining whether or not there shall be a return, the power of the court and the extent of inquiry are as unlimited in an action of replevin as in a suit in equity.[44] Thus it has been held that under a statute requiring judgment according to the respective rights and interests of the parties,[45] the exact extent of the special property of either party may be shown.[46] In others it is stated that defendant may set up a claim of title to the chattel in question and obtain an adjudication thereof;[47] but he cannot obtain an adjudication of the question of a third party's alleged lien as against plaintiff,[48] and in such action, no accounting can be had, the action involving only the legal rights of the parties.[49] In still others the policy of the law is to settle in one action all the conflicting claims of the parties for the possession of the property or for damages for detention or loss,[50] and the action, although primarily one for the possession of personal property,[51] is held sufficiently flexible to authorize a settlement of all the equities between the parties arising from or growing out of the main controversy[52] which exist at the time of the trial.[53] However, if the only issue made by the pleadings is title, other rights of the parties will not be determined even though all parties and subject matter are before the court;[54] but if the parties and the subject matter are both before the court, issues made by the pleadings, even though they be between parties defendant, may be determined.[55]

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[28] Frick v. Miller, 30 Del. 366, 107 A 391 [aff 107 A 394].

[29] Yott v. Peo., 91 Ill. 11.

[30] **Right to replevy property distrained for rent** see supra § 15.

[31] Lindley v. Miller, 67 Ill. 244.

[32] Whitcomb v. Brant, 76 N. J. L. 201, 68 A 1102.

[33] **Necessity of title as determining right to possession** see supra §§ 47-49.

When title in issue see supra § 214.

[34] Budracco v. National Surety Co., 112 Misc. 133, 182 NYS 590.

[35] Stockton Commercial, etc., Bank v. Foster, (Cal.) 290 P 583; Richards v. Hellen, 153 Iowa 66, 133 NW 393; Gillespie v. Brown, 16 Nebr. 457, 20 NW 632; Mitchell v. Standard Repair Co., 273 Pa. 328, 119 A 410; Nicollette Lumber Co. v. People's Coal Co., 213 Pa. 379, 62 A 1060, 110 AmSR 550, 3 LRANS 327, 5 AnnCas 387.

[a] **Replevin action involves** the sole question as to plaintiff's right to possession of the chattels claimed. Stockton Commercial, etc., Bank v. Foster, (Cal.) 290 P 583.

[b] **Controlling question** is plaintiff's right to possession of the property at the time the action is brought. Richards v. Hellen, 153 Iowa 66, 133 NW 393.

[c] **Illustration.**—In replevin by plaintiff claiming under a mortgage of goods levied on by defendant under subsequent attachment proceedings against the mortgagor, the question whether defendant is entitled to a lien on the excess of the property over the amount secured cannot be tried, as replevin determines only the right to possession. Gillespie v. Brown, 16 Nebr. 457, 20 NW 632.

[36] Normart v. Safer, 67 Cal. A. 507, 227 P 943; Salant v. Richfield Shirt Co., 29 Pa. Dist. 651.

[37] Lewis v. Best-By-Test Garage, 200 Iowa 1051, 205 NW 983; Mitchell v. Standard Repair Co., 273 Pa. 328, 119 A 410.

[a] **Basis of rule.**—Either the right to retain possession given by the lien or a statute permitting conditional verdicts for the purpose of enforcing liens is sufficient warrant for raising the question of the nature and extent of defendant's claim. Mitchell v. Standard Repair Co., 273 Pa. 328, 119 A 410.

[b] **Rule applied:** (1) Albeit ordinarily no set-off can be pleaded or allowed in replevin. Mitchell v. Standard Repair Co., 273 Pa. 328, 119 A 410. (2) Under a statute authorizing the owner of property to release it from a lien claimed thereon by filing an appropriate bond and to replevy the same if the person in possession refuses to surrender it. Lewis v. Best-By-Test Garage, 200 Iowa 1051, 205 NW 983.

[38] Stockton Commercial, etc., Bank v. Foster, (Cal.) 290 P 583.

[39] Stockton Commercial, etc., Bank v. Foster, supra.

[40] Stockton Commercial, etc., Bank v. Foster, supra.

[41] Richards v. Hellen, 153 Iowa 66, 133 NW 393.

[42] See statutory provisions; and cases infra this section.

[43] Del.—Clark v. Wilmington Trust Co., 30 Del. 287, 105 A 834.

D. C.—Costikyan v. Sloan, 33 App. 420.

Ill.—Boyden v. Frank, 20 Ill. A. 169.

Me.—Bath v. Miller, 53 Me. 308; Thomas v. Spofford, 46 Me. 408.

Mich.—Burke v. Murray, 236 Mich. 290, 210 NW 321.

N. J.—Kett v. Masker, 86 N. J. L. 97, 90 A 243.

Oh.—Tibbott v. Cadisch, 28 O. C. A. 481.

[a] **Rule applied** in replevin by an assignee for the benefit of creditors to recover property claimed as part of the assigned estate. Boyden v. Frank, 20 Ill. A. 169.

[b] **On judgment for defendant.**—When it is determined that the action cannot be maintained it is always necessary to inquire and determine and to have a distinct adjudication, whether or not the property shall be returned to defendant, which involves an inquiry into the title and the right of possession, of the broadest and most unlimited character. Bath v. Miller, 53 Me. 308.

[c] **Validity of sale** of goods in bulk may be inquired into in replevin by the vendee, claiming title against the levy of a constable under an attachment against the vendor. Kett v. Masker, 86 N. J. L. 97, 90 A 243.

[44] Bath v. Miller, 53 Me. 308; Burke v. Murray, 236 Mich. 290, 210 NW 321.

[a] **Illustration.**—In replevin by lessor of dishes purchased by a tenant with money advanced by the lessor, the court may consider the details of the entire business transactions between the parties in a manner which practically resolves itself into an accounting, where it will aid in a determination of title to the property. Burke v. Murray, 236 Mich. 290, 210 NW 321.

[45] See statutory provisions.

[46] Kohl v. Lynn, 34 Mich. 360.

[a] **Illustration.**—Mortgagee is entitled to show to what extent the mortgagor's claim has been reduced, and to pay it and redeem the property. Kohl v. Lynn, 34 Mich. 360.

[b] **Under statute** requiring judgment according to the respective rights and interests of the parties in the property, the exact extent of the subsisting claim of a mortgagor who brings replevin is a legitimate subject of inquiry. Kohl v. Lynn, 34 Mich. 360.

[§ 274] **3. Trial of Title to Real Property.** While the title to land cannot be tried directly in replevin for property severed from the freehold,[56] title to land may indirectly be brought in question and admitted in evidence where the party's right to the property in dispute depends on his ownership or right to possession of the premises;[57] but proof of the title is admitted not for the purpose of trying the title but for the purpose of proving possession of the land from which the property sought to be replevied was taken, and therefore to prove constructive possession of the personal property.[58] Thus the title to land cannot be litigated in an action to recover growing crops or emblements as against one actually seized or in possession in good faith under claim of right or color of title,[59] nor can the right of possession of the land be determined in such an action if defendant's possession thereof is adverse;[60] and where the issues are not framed to try title to land but to the personal property only, and the ownership of the personal property cannot be established by the ownership of the land, trial of title to the land cannot be had.[61]

[§ 275] **C. Mode and Conduct of Trial.**[62] The general rules applicable to the mode and conduct of civil actions generally[63] apply in actions of replevin.[64]

[§ 276] **D. Questions for Court and Jury—1. In**

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[47] Budracco v. National Surety Co., 112 Misc. 133, 182 NYS 590.

[a] **Election of defendant.**—Defendant is not compelled to avail himself of this new remedy. Budracco v. National Surety Co., 112 Misc. 133, 182 NYS 590.

[48] Petit Bldg. Co. v. Merck, 169 NYS 496.

[a] **Illustration.**—Where a corporation president, acting within his powers, purchased awnings from defendant, and the corporation affixed them to its buildings, and agreed to pay its president therefor, and defendant removed them, and the corporation brought replevin, defendant had no standing to try the question of the corporation president's alleged purchase-money lien against the corporation. Petit Bldg. Co. v. Merck, 169 NYS 496.

[49] Kert v. Endelman, 202 Mich. 289, 168 NW 423; Denison v. Sawyer, 95 Minn. 417, 104 NW 305; Botassis v. Thanasules, 171 App. Div. 893, 155 NYS 405.

[50] Brown v. Chowning, 59 Okl. 278, 159 P 323.

[51] Mercantile Trust Co. v. Roland, (Okl.) 288 P 300; Graves v. Mayberry, 137 Okl. 218, 278 P 1111; Emerson-Brantingham Impl. Co. v. Ritter, 69 Okl. 95, 170 P 482; Holmberg v. Will, 52 Okl. 745, 153 P 832.

[52] Etheridge v. Terry, (Mo. A.) 278 SW 1052; McWherter v. Randall, 207 Mo. A. 465, 232 SW 1070; Mercantile Trust Co. v. Roland, (Okl.) 288 P 300; Graves v. Mayberry, 137 Okl. 218, 278 P 1111; Emerson-Brantingham Impl. Co. v. Ritter, 69 Okl. 95, 170 P 482; Holmberg v. Will, 52 Okl. 745, 153 P 832; Stone v. American Nat. Bank, 34 Okl. 786, 127 P 393; Broyles v. McInteer, 29 Okl. 767, 120 P 283; McFadyen v. Masters, 11 Okl. 16, 66 P 284. But see Miles v. Walther, 3 Mo. A. 96 (holding that the title to the property is not passed upon, but the question of possession only).

[a] **Trial court** may adjust all rights and equities of parties concerning property involved in replevin action. Etheridge v. Terry, (Mo. A.) 278 SW 1052.

[b] **Damages suffered** from trespassing animals may be recovered in a replevin action brought by the owner of the animals against the party impounding such animals. Holmberg v. Will, 52 Okl. 745, 153 P 832.

[c] **Special interest** of plaintiff in the property may be determined and defendant authorized to pay plaintiff the amount thereof and recover the property. Emerson-Brantingham Impl. Co. v. Ritter, 69 Okl. 95, 170 P 482.

Recoupment, set-off, and counterclaim in replevin action see supra § 86.

[53] McWherter v. Randall, 207 Mo. A. 465, 232 SW 1070.

[54] American Packing Co. v. Luketa, 98 Wash. 6, 167 P 87.

[55] Grote-Rankin Co. v. Brownell, 76 Wash. 335, 136 P 145.

[56] Jordan v. Johnson, 1 Kan. A. 656, 42 P 415; Washburn v. Cutter, 17 Minn. 361; Walden v. Feller, 99 Misc. 576, 164 NYS 493. See Clark v. Nevill, 1 Phila. (Pa.) 28 (verdict in replevin for lease of oyster cellar merely settled the right to possession of the piece of paper on which the lease was written, and that no writ of replevin can turn a man out of his house).

[a] **Replevin will not lie** to determine title to realty. Walden v. Feller, 99 Misc. 576, 164 NYS 493.

[57] Cal.—Halleck v. Mixer, 16 Cal. 574.

Ind.—Bowen v. Roach, 78 Ind. 361.

Mich.—Cutter v. Wait, 131 Mich. 508, 91 NW 753, 100 AmSR 619.

Pa.—Clement v. Wright, 40 Pa. 250; Elliott v. Power, 10 Watts 453, 36 AmD 200.

Wash.—Laurendeau v. Fugelli, 5 Wash. 94, 31 P 421, 5 Wash. 632, 32 P 465, 1 Wash. 559, 21 P 29.

Wis.—Stahl v. Lynn, 81 Wis. 668, 51 NW 879.

Ont.—O'Brien v. Welsh, 28 U. C. Q. B. 394.

[58] Clement v. Wright, 40 Pa. 250.

[59] Grossman v. Yip Wing, 62 Cal. A. 121, 216 P 634.

[60] Doebbeling v. Quimby, 221 Mo. A. 1178, 299 SW 629.

[61] Wilson v. Panne, 1 Kan. A. 721, 41 P 984; Clement v. Wright, 40 Pa. 250.

[62] **Generally** see Trial [38 Cyc 1296 et seq].

[63] **Cross references:**

Consolidation with suit in equity see Actions § 329 note 91 [c].

Right to open and close see Trial [38 Cyc 1300 et seq].

Taking inventory to jury room see Trial [38 Cyc 1828 et seq].

Trial of issues together see Trial [38 Cyc 1269].

[64] See cases infra this note.

[a] **Adjournment.**—(1) Adjournment of a replevin action in a justice's court on a return day, without a return having been made, is unauthorized where the statute only empowered the justice to adjourn at the time of the return. Harbour v. Eldred, 107 Mich. 95, 64 NW 1054. (2) Where a replevin action was called for a second trial on the merits after the filing of an amended petition, omitting parties named in the original petition as plaintiffs, including the one who had made the affidavit on which the bond was given and the writ issued, and adding others as plaintiffs, and the parties were ready, and the witnesses had been summoned to testify at the trial, which was to be had after a change of venue, the court properly denied the motion to postpone the trial until the property had been redelivered to defendant. Meeks v. Clear Jack Mining Co., 141 Mo. A. 648, 124 SW 1084. (3) Continuance and adjournment in courts of justices of the peace generally see Justices of the Peace §§ 260-269.

[b] **Postponement of hearing on counterclaim.**—The hearing on an extended counterclaim for damages set up by defendant may, at the discre-

General. The general rules applicable in other actions as to questions of law and fact, and the necessity of their determination by the court or by a jury, apply in actions of replevin.[65] If a question of fact is presented upon conflicting evidence it is the province of the jury to determine it,[66] and although, if there is no conflict in the evidence, the court ordinarily has the right to peremptorily instruct a verdict,[67] yet if the only evidence in the case is that of one of the parties to the suit, a directed verdict has been held unauthorized.[68] Thus, on an issue of fact as to the right of possession of the property involved, if the facts are uncertain or there is conflict in the evidence, it has been held that the question of plaintiff's right to possession must be submitted to the jury,[69] as should other controverted questions bearing on plaintiff's or defendant's right to possession;[70] also, if the evidence tends to show that defendant has no interest in the property whatever, it is a question for the jury to determine whether plaintiff is entitled to the sole possession of the property;[71] but where plaintiff not only fails to produce evidence in support of his claim, but, on the contrary, admits that he had leased the property from defendant and defaulted in his obligations under the lease, the judge should give binding instructions to the jury and not submit to it the question of the right of possession.[72] It is for the jury to determine, under instructions from the court, the weight of the testimony and the credibility of the witnesses.[73] So, whether defendant's evidence is sufficient to overcome plaintiff's prima facie case that defendant was in possession of the property replevied at the time suit was commenced,[74] or whether the evidence produced by one party is sufficient to overcome certain presumptions in favor of the other,[75] is for the jury. Questions imma-

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tion of the court, be postponed until after plaintiff's right to possession of the goods has been determined. Upton v. Pendry, 109 Kan. 744, 202 P 73 [reh den 110 Kan. 191, 203 P 300].

[c] **Moving cause on calendar.**—Defendant cannot bring the cause to trial out of its regular order on the calendar, and plaintiff need not file an affidavit of merits in order to prevent it. Regan v. Priest, 3 Den. (N. Y.) 163.

[d] **Cross-examination.**—The trial court may refuse to allow plaintiff to cross-examine witness as to a subject about which he did not testify in chief, upon which plaintiff introduced no testimony in the opening of his case, and which does not go to the bias or interest of the witness. Carey v. Hart, 63 Vt. 424, 21 A 537.

[e] **Introduction of evidence** (1) under the code provision requiring that plaintiff's affidavit, with the accompanying affidavit and the return, be made a part of the judgment roll in an action to recover a chattel, and that a copy of each of them be furnished to the court or referee on the trial, it is not necessary to formally introduce the affidavit, the requisition, or the return, in order to have such papers considered by the trial court. Martin v. Gilbert, 119 N. Y. 298, 23 NE 813, 24 NE 460, 16 AmSR 823. (2) In replevin for goods distrained for rent, if the jury find for defendant, the landlord, evidence may be introduced upon the trial and after the verdict that more rent was distrained for than was due, in order to avoid entry of judgment for double the value of the rent. Maxwell v. Light, 1 Call. (5 Va.) 117. (3) Where the case stands on a general denial, plaintiff, in presenting his case, is properly prevented from asking defendant by what claim of right he took the goods in question, since defendant is not required to disclose his defense until he takes the case. Ravine House Co. v. Bradstreet, (Vt.) 148 A 481. (4) Reception of evidence see Trial [38 Cyc 1326 et seq].

[f] **Objections to testimony** which may be obviated by the production of further testimony should be distinctly stated at the time the objectionable testimony is offered. McCraw v. Welch, 2 Colo. 284.

[g] **On motion to set aside verdict** an ex parte affidavit was allowed to be read. Smethurst v. Harwood, 40 N. J. L. 230.

[h] **Failure of plaintiff to appear** when the case is called for trial: (1) Defendant is entitled to have a jury and proceed with the trial to prove ownership and value of the property replevied and damages. Clark v. Wilmington Trust Co., 30 Del. 287, 105 A 834. (2) If no replication has been filed, the court may have plaintiff called and if he fails to appear, give judgment as in case of nonsuit (Peck v. Hubbard, 4 Ill. A. 566), (3) or if the case is properly on the trial calendar, defendant may rule plaintiff to reply instanter, and in default of compliance give a like judgment (Peck v. Hubbard, supra); (4) but it is error to have a jury called and sworn to try the issues joined since no issue has been joined by plaintiff (Peck v. Hubbard, supra).

[i] **Proceedings under early statutes.**—Where provision was made for quick trial of the validity of the claim, if defendant or person in possession of the goods claimed property therein and paid the sheriff his fees and the fees of the jury trying the claim, defendant must not only claim property in the goods, but also demand a trial of its validity, and tender the necessary fees prior to the delivery of the property to plaintiff. Miller v. Franklin, 17 Wend. (N. Y.) 278.

[65] See generally Trial [38 Cyc 1511 et seq].

[66] Gottesman v. Chipman, 125 Mich. 60, 83 NW 1026; Carlin v. Draper, 104 Wash. 29, 175 P 571.

[a] **Questions held for jury.**—(1) In an action to recover lumber, whether defendants purchased with knowledge of plaintiff's claim, there being substantial evidence on each side of such point of fact. Carlin v. Draper, 104 Wash. 29, 175 P 571. (2) Whether all the goods were of the recent invoice in replevin of property attached to satisfy claims for the purchase price, on evidence by the seller that all the goods levied on had been sold to plaintiff within sixty days of the levy, and by plaintiff, that a part of the goods were bought the previous year. Gottesman v. Jackson, 125 Mich. 60, 83 NW 1026.

[67] See infra § 285.

[68] Goppelt v. Burgess, 132 Mich. 28, 92 NW 497; Pounds v. Farmers' Mercantile Co., (Mo. A.) 190 SW 374; Dysart v. Terrell, (Tex. Civ. A.) 70 SW 986.

[a] **Which version of conflicting testimony** of a party is correct, it being the sole testimony in the case, is for the jury. Pounds v. Farmers' Mercantile Co., (Mo. A.) 190 SW 374.

[b] **Credibility of plaintiff's testimony** as to a transfer of the property to him is for the determination of the jury, when it is unsupported by the testimony of other witnesses and is not so clear and certain in itself as to be conclusive. Goppelt v. Burgess, 132 Mich. 28, 92 NW 497.

[69] Damerson v. McClaren, 29 Okl. 340, 116 P 792; Lubin Mfg. Co. v. Swaab, 240 Pa. 182, 87 A 597.

[a] **Illustration.**—In replevin of moving picture films leased to defendant, because of a subletting by defendant after annulment of his license, where plaintiff failed to prove beyond controversy that defendant had sublet any licensed films after such annulment, or that the films sublet after revocation were among those covered by plaintiff's writ, the question of plaintiff's right to immediate possession of the films was for the jury. Lubin Mfg. Co. v. Swaab, 240 Pa. 182, 87 A 597.

[70] Forsee v. Zenner, (Mo. A.) 193 SW 975; Loucks v. Winne, 127 App. Div. 460, 111 NYS 485; Merritt v. Lyon, 3 Barb. (N. Y.) 110; Shaffer Bros. v. Seyler, 29 Pa. Dist. 269; Bourne v. Merritt, 22 Vt. 429.

[a] **Illustration.**—On conflicting evidence in replevin by landlord against tenant for a mule team, questions were for the jury as to whether there was a sale of tenant's interest to landlord, and a cancellation of tenant's debt and existence of tenant's agreement to leave mules as security. Forsee v. Zenner, (Mo. A.) 193 SW 975.

[b] **Replevin of goods taken on distress.**—Where the issue of whether the rent was due upon which the right to distrain depended turned upon the question of whether there was a removal or attempt to remove by the lessee, that question was properly submitted to the jury. Shaffer Bros. v. Seyler, 29 Pa. Dist. 269.

[71] Beatty v. Clarkson, 110 Mo. A. 1, 83 SW 1033.

[72] Bertalott v. Automobile Securities Co., 79 Pa. Super. 443.

[73] Sherman Mercantile Co. v. Mountain Ice, etc., Co., (Colo.) 290 P 276; Baldwin v. Scott, 65 Colo. 53, 173 P 716.

[74] Sullivan v. Gibson, 39 Mont. 274, 102 P 320.

[75] Pounds v. Farmers' Mercantile Co., (Mo. A.) 190 SW 374.

terial to the issues involved[76] or other matters not within the issues as made by the pleadings,[77] should not be submitted to the jury; nor should estoppel of plaintiff to maintain the action be submitted where evidence of facts essential to an estoppel are lacking.[78]

Trial by court. In a replevin action tried by the court without a jury, it is for the trial court to try and decide the issues[79] and determine the credibility of the witnesses and the weight to be given their testimony.[80]

[§ 277] **2. Ownership.** The question of ownership, when it is put in issue by the pleadings and the evidence is uncertain or conflicting, should be submitted to the jury,[81] as also should issues of fact which are determinative of the question of ownership;[82] but if the evidence is not conflicting,[83] or if the evidence of the one party conclusively overcomes that of the other,[84] or if defendant concedes in his answer the ownership of the property to be in plain-

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76. Dieter v. Coyne, 201 Iowa 823, 208 NW 359.

[a] **Illustration.**—Question of existence of a partnership between plaintiff and defendant should not be submitted to the jury where there was no evidence that the property replevied at any time belonged to the partnership and the ownership of such property was not essential to the existence of the partnership. Dieter v. Coyne, 201 Iowa 823, 208 NW 359.

77. Hickey v. Coffey, 85 Or. 383, 166 P 959.

[a] **Thus,** in an action to recover a bank note which plaintiff claimed was assigned to him where the only defenses pleaded were general denial and that the money belonged to persons whom assignor had defrauded, it is error to submit to the jury the question of whether assignment was made in good faith. Hickey v. Coffey, 85 Or. 383, 166 P 959.

78. Carrico v. Shepherd, 26 Ind. A. 207, 59 NE 347.

79. Davey v. Davey, 81 Mont. 375, 263 P 415.

[a] **Illustration.**—Where the right to possession depended on whether plaintiff had an agister's lien on cattle replevied, the court must decide that issue. Davey v. Davey, 81 Mont. 375, 263 P 415.

80. Normart v. Safer, 67 Cal. A. 507, 227 P 943. See generally Trial [38 Cyc 1944].

[a] **Matter considered.**—In a claim and delivery against one joint owner, based on a sale of property by a person acting under alleged authority, notwithstanding no issue of fraud was tendered by answer, the court was authorized, in determining the credibility of witnesses, and the weight to be given testimony, and whether the sale was bona fide or mere pretext to secure advantage of defendant, to take into account all circumstances characterizing the carrying out thereof. Normart v. Safer, 67 Cal. A. 507, 227 P 943.

81. Ark.—Free v. Jordan, 178 Ark. 168, 10 SW (2d) 19; Carden v. Swagger, 238 SW 31; Forrest v. Benson, 150 Ark. 89, 233 SW 916; Fox v. Delaney, 111 Ark. 640, 163 SW 157; Holbrook v. Neely, 93 Ark. 272, 124 SW 1025.

Cal.—Smith v. Arnold, 56 Cal. 640.

Del.—McClemy v. Brown, 29 Del. 253, 99 A 48.

Iowa.—Nodle v. Hawthorne, 107 Iowa 380, 77 NW 1062.

Ky.—Million v. Beeding, 49 SW 437, 20 KyL 1428.

Mich.—Opsomere v. Opsomere, 162 Mich. 65, 127 NW 15; Anderson v. Pendl, 153 Mich. 693, 117 NW 326.

Minn.—Johnson v. Stone, 111 Minn. 228, 126 NW 720; Honeywell v. Norby, 61 Minn. 188, 63 NW 488.

Miss.—Gilchrist-Fordney Co. v. Ford, 68 S 854.

Mo.—Calderwood v. Robertson, 112 Mo. A. 103, 86 SW 879.

N. Y.—Morss v. Stone, 5 Barb. 516.

N. D.—Southall v. Herring, 47 N. D. 535, 182 NW 753.

Pa.—Swartz v. Stein, 78 Pa. Super. 515; Sahm v. Bair, 56 Pa. Super. 108; Cox v. Burdett, 23 Pa. Super. 346. See also Loughry v. Fisher, 5 Pa. Dist. & Co. 324, 328 (holding statute mandatory in its requirement that "the issues," "the question of the title to, or the right of possession of, the goods and chattels, as between all the parties shall be determined by a jury").

R. I.—Lewis v. Bull, 48 R. I. 166, 136 A 443.

S. D.—Van Brunt v. Blackmer, 46 S. D. 224, 191 NW 838.

Tex.—Hernandez v. Garcia, (Civ. A.) 216 SW 477.

[a] **Questions held for jury.**—(1) Under the evidence, the question whether the chattels involved belonged to a partnership consisting of plaintiff and defendant. Calderwood v. Robertson, 112 Mo. A. 103, 86 SW 879. (2) Whether plaintiff had title to a mare replevied and a right to recover her. Holbrook v. Neely, 93 Ark. 272, 124 SW 1025. (3) Landlord's ownership of one third of the small grain raised under a lease entitling the lessee to two-thirds of the small grain upon a division and the performance of the contract on his part, the other one third to be the property of the landlord, in replevin by an assignee of the landlord. Johnson v. Stone, 111 Minn. 228, 126 NW 720. (4) Ownership of goats where defendant claimed they had been stolen from him by another and plaintiff that he had raised them on his ranch. Hernandez v. Garcia, (Tex. Civ. A.) 216 SW 477. (5) Ownership of automobile which plaintiff claimed defendant's predecessor in interest had sold plaintiff, and that plaintiff had permitted defendant's predecessor to use the car at the time of the sale to third party, who in turn sold to defendant. Forrest v. Benson, 150 Ark. 89, 233 SW 916. (6) Whether plaintiff's intestate obtained the property through theft or robbery, and so acquired no title. Carden v. Swagger, (Ark.) 238 SW 31. (7) In an action to determine the right to possession to a promissory note and mortgage, evidence did not show conclusively that the sale of the note to plaintiff was subject to a condition which had not been performed, but to raise a question for the jury as to whether the sale had been consummated. Van Brunt v. Blackmer, 46 S. D. 224, 191 NW 838. (8) Ownership, possession, and value of cattle, attached by his creditors, where plaintiff bought them in his own name and paid with his own checks, and then filled up J's blank check and deposited it, it having been given him with which to buy cattle, and after that drove the cattle to J's farm and left them when J was not there, the evidence showing that J's check was protested and that in similar dealings J could refuse the cattle, and if he did, plaintiff sold them as his own. Million v. Beeding, 49 SW 437, 20 KyL 1428.

[b] **Evidence considered.**—In replevin for an automobile sold to defendants by a third person who purchased it with funds furnished by plaintiff, the jury, in determining whether funds were furnished to buy a car for plaintiff or for himself, should consider all the evidence, including receipts, insurance policy, and the relation between such person and plaintiff. McClemy v. Brown, 29 Del. 253, 99 A 48.

82. Carrico v. Shepherd, 26 Ind. A. 207, 59 NE 347; Edward G. Murray Lighterage, etc., Co. v. Warren, 171 App. Div. 696, 157 NYS 692; Andrews v. Grimes, 148 N. C. 437, 62 SE 519; Jackson v. Frier, 146 S. C. 322, 144 SE 66.

[a] **Illustrations.**—(1) Whether a trade of an automobile for land was consummated and the car delivered to defendant as part of the purchase price was an issue for the jury in a claim and delivery action for the automobile. Jackson v. Frier, 146 S. C. 322, 144 SE 66. (2) Whether plaintiff consented to the sale made by her husband of the property replevied, held for jury. Carrico v. Shepherd, 26 Ind. A. 207, 59 NE 347. (3) On replevin by a lighterage company for a canal boat seized by defendant sheriff on execution against a transportation company, whether the lighterage company and the transportation company were in fact one and the same concern was a question for the jury. Edward G. Murray Lighterage, etc., Co. v. Warren, 171 App. Div. 696, 157 NYS 692.

[b] **Issue as to agreement between parties.**—An allegation in the complaint that the property in question was at the time of the alleged sale by defendant on his premises and that it was to be hauled to plaintiff's warehouse as rapidly as it could be prepared, justifies the submission of an issue to the jury as to whether defendant subsequently agreed with plaintiff that the property should remain on the land of defendant as the property of plaintiff. Andrews v. Grimes, 148 N. C. 437, 62 SE 519.

83. Haveron v. Anderson, 3 N. D. 540, 58 NW 340.

84. Gunn v. Mumford, 74 N. J. L. 601, 65 A 989; Merinella v. Swartz, 123 Wash. 521, 212 P 1052.

[a] **Rule applied:** (1) Where the only evidence indicating that plaintiff is not the owner of the property in question is so slight as to be entirely insufficient to support a finding that she is not such owner. Gunn v. Mumford, 74 N. J. L. 601, 65 A 989. (2) Where evidence of defendants' ownership of a stolen automobile is suffi-

tiff, but claims a lien thereon for his services,[85] the question of ownership need not be submitted to the jury. However, if the ownership of plaintiff depends upon oral testimony, the question is for the jury.[86] It has been held that if there is a contest as to whether certain acts have been done essential to pass the title of the property, ownership is a question of law to be determined by the finding of certain facts[87] and the jury are to find the facts and the court to state the conclusion or the law.[88] A case in which plaintiff avers ownership and defendant alleges that he purchased a car from plaintiff's bailee after plaintiff had refused to pay a repair bill for which the bailee had a lien, is for the jury.[89]

[§ 278] **3. Liens and Other Interests.** Questions determinative of the existence of a lien or other interest in the property replevied set up by plaintiff or defendant to show his right to possession thereof may properly be submitted to the jury.[90] In replevin by a wife for goods seized on execution under a judgment against her husband, the extent and validity of the lien claimed under the execution are for the jury.[91] Where property subject to a deed of trust is replevied, an issue as to whether or not the debt was fully paid is, on conflicting evidence, for the jury.[92] The sufficiency of a given description in a mortgage to pass the title to the property is for the court and not the jury to decide.[93]

[§ 279] **4. Demand for Goods.** Controverted questions determinative of the necessity of the plaintiff demanding possession of the goods prior to his bringing the action should be submitted to the jury,[94] and where a demand for the return of the goods is required of plaintiff,[95] whether it was made at a proper time and in a proper manner,[96] or whether had a demand been made it would have been unavailing,[97] are questions of fact for the court or jury trying the cause. However, if goods are sold for cash on delivery, and on delivery the buyer fails to pay, if the seller does not immediately demand the goods, but waits for a time in reliance upon a promise to pay therefor, the court must declare as a matter of law that the seller waived his right to a return of the goods and the title therein passed to the buyer.[98]

[§ 280] **5. Taking and Detention.** Controverted questions concerning the taking and detention of the property,[99] as whether or not the goods were taken by defendant with plaintiff's consent,[1] whether the evidence established a partnership between plaintiff and defendant,[2] whether logs replevied were taken from plaintiff's land by defendant or from other land from which defendant had a right to take logs,[3] or whether defendant concealed merchandise from the sheriff so as to prevent his levying thereon

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cient conclusively to overcome plaintiff's prima facie ownership arising from his possession of the property. Merinella v. Swartz, 123 Wash. 521, 212 P 1052.

[85] Brown v. Truax, 58 Or. 572, 115 P 597.

[a] **Ownership in administrator.**—The ownership of the property being conceded to be in deceased, and the appointment of plaintiff as administrator being shown by proper record evidence, it is the duty of the court to interpret the documents and ascertain their legal effect. Brown v. Truax, 58 Or. 572, 115 P 597.

[86] Brown v. Judge, 77 Pa. Super. 106.

[a] **Credibility of witnesses** is for the jury, and it is error for the judge to give binding instructions in favor of plaintiff. Brown v. Judge, 77 Pa. Super. 106.

[87] Ware v. Sanders, 120 Ill. A. 209; Charles v. Lasher, 20 Ill. A. 36.

[a] **What constitutes ownership** is a question of law. Ware v. Sanders, 120 Ill. A. 209.

[88] Charles v. Lasher, 20 Ill. A. 36.

[89] Renner v. Stephens, 76 Pa. Super. 596.

[90] Clark v. Thompson, (Ark.) 289 SW 760; Wolverton v. Morgan, 132 Okl. 55, 269 P 314.

[a] **Illustration.**—Whether a second deed of trust was to discharge the old one so that the purchaser who purchased the property at a time between the execution of the deeds was properly submitted. Clark v. Thompson, 172 Ark. 1176, 289 SW 760.

[b] **Tender of amount due on note and mortgage.**—On conflicting evidence, whether defendant or those acting for him made a sufficient tender prior to the commencement of the replevin suit is for the jury. Wolverton v. Morgan, 132 Okl. 55, 269 P 314.

[c] **In Pennsylvania,** in replevin from a person having possession by virtue of a claim of lien, whether or not such lien exists must be settled by the jury, and a judgment for want of a sufficient affidavit of defense cannot be entered before trial, for the bond stands for the property replevied and if the lien is found to be in favor of the defendant he can in this way recover the amount of it. Evans v. Witman, 10 Pa. Dist. & Co. 719.

[91] O'Connor v. Gidday, 63 Mich. 630, 30 NW 313.

[92] Snowden v. Collins, 112 Miss. 801, 73 S 793.

[93] Hallagan v. Johnston, 55 Ind. A. 509, 104 NE 91.

[94] Reeder v. Moore, 95 Mich. 594, 55 NW 436; Sizer v. Dopson, 89 S. C. 535, 72 SE 464.

[a] **Thus** (1) where defendant's act in shipping the property to other persons was a distinct conversion of it, if plaintiff was the owner thereof, the issue of conversion made by the evidence should be submitted to the jury, for if conversion occurred it was not necessary for plaintiff to demand possession before bringing the action. Sizer v. Dopson, 89 S. C. 535, 72 SE 464. (2) In replevin against husband and wife for goods purchased by the husband through false representations, whether the wife's possession was collusive, she having a bill of sale of, or mortgage on, the goods, is for the jury. Reeder v. Moore, 95 Mich. 594, 55 NW 436 [dist Pangborn v. Ruemenapp, 74 Mich. 572, 42 NW 78 (where defendant was in possession under a purchase made in good faith)].

[95] Ingalls v. Bulkley, 13 Ill. 315; Jordan v. Jordan, 78 Ind. A. 617, 136 NE 866; Meeker Hotel Co. v. Forgan, 71 Ind. A. 199, 124 NE 505; Burckhalter v. Mitchell, 27 S. C. 240, 3 SE 225; Harby v. Byers Lumber Co., 95 S. C. 33, 78 SE 522.

[a] **Illustration.**—Where the complaint alleged a wrongful detention after demand, and the answer alleged that defendant was a purchaser in the open market for value without notice, and a witness testified that plaintiff authorized the sale, the issue of demand was properly submitted to the jury. Harby v. Byers Lumber Co., 95 S. C. 33, 78 SE 522.

[b] **Authority of agent** to demand the property is for the jury. Ingalls v. Bulkley, 13 Ill. 315.

[96] Kane v. Reid, 33 Misc. 802, 68 NYS 623.

[97] Jordan v. Jordan, 78 Ind. A. 617, 136 NE 866.

[98] Frech v. Lewis, 218 Pa. 141, 67 A 45, 11 LRANS 948 [rev 32 Pa. Super. 279].

[99] Sherman Mercantile Co. v. Mountain Ice, etc., Co., (Colo.) 290 P 276; Patterson v. Spooner, 143 Mich. 698, 107 NW 450; Clute v. Everhart, 137 Mich. 5, 100 NW 124; O'Connor v. Gidday, 63 Mich. 630, 30 NW 313; Barnes v. Plessner, 121 Mo. A. 677, 97 SW 626; Burckhalter v. Mitchell, 27 S. C. 240, 3 SE 225.

[a] **Questions held for jury.**—(1) Unlawful taking of defendant's property by plaintiff on writ of replevin. Patterson v. Spooner, 143 Mich. 698, 107 NW 450. (2) Where defendant obtained possession of eggs replevied on an unauthorized order. Sherman Mercantile Co. v. Mountain Ice, etc., Co., (Colo.) 290 P 276.

[1] Dreimuller v. Rogow, 93 N. J. L. 1, 107 A 144; Parks v. McCormick Farmers' Bank, 122 S. C. 516, 115 SE 810.

[a] **What constitutes consent.**—Whether failure of the owner to object to the taking of her cow by one claiming under a mortgage amounted to consent was for the jury. Parks v. McCormick Farmers' Bank, 122 S. C. 516, 115 SE 810.

[2] Belcher v. Van Duzen, 37 Ill. 281.

[3] Bridgeman v. Augusta Cooperage Co., 147 Ark. 378, 227 SW 602.

and with intent to deprive plaintiff thereof,[4] are for the determination of the jury under proper instruction by the court. Evidence that defendant was in possession of the property replevied prior to the bringing of the action is sufficient to carry to the jury the issue of whether he had parted with his possession prior to the commencement of the action.[5]

[§ 281] **6. Fraud.** Evidence tending to show fraud or bad faith presents an issue of fact, the determination of which is within the province of the jury.[6]

[§ 282] **7. Value and Identity.** When disputed, the question as to the value of the property,[7] the amount thereof,[8] its identity,[9] and the correctness of its description,[10] should be submitted to the jury; but the rule is otherwise where the evidence is clear and undisputed.[11] However, if the only evidence in the case is that of one of the parties to the suit, questions of value should be submitted to the jury.[12] The failure of defendant to deny plaintiff's allegation of value does not prevent that question from being submitted to the jury.[13] If the value of the property is immaterial under the issues as framed, it need not be submitted to the jury.[14] It has been held that where, under the pleadings, the title and right to possession are not in dispute, it is for the jury to determine the value of a portion of the property replevied which is conceded to belong to an intervener.[15] The time at which the value of the property should be fixed in order to determine the measure of damages is a rule of law for the determination of the court, and not a question of fact for the jury.[16]

Special ownership. In replevin by one having only a special interest under a mortgage, it is for the jury to determine the value of such interest.[17]

[§ 283] **8. Return of Goods.** It is not within the province of the jury to decide the ultimate question of a return of the property to defendant;[18] the facts may properly be submitted to the jury for determination,[19] but it is for the court to make such order and render such judgment as the facts found require.[20]

[§ 284] **9. Miscellaneous.** Other controverted questions which have been held for the determination of the jury are: whether a distress warrant for rent was properly served;[21] whether in replevin by a creditor against a purchaser from the debtor, all the remaining assets of the debtor were turned over to the creditor on an oral agreement that the latter should dispose of them and apply the proceeds to the debt;[22] or whether in replevin of coins taken from a mass owned by several parties there was a severance between the money of plaintiff and of the others so that only plaintiff's money was taken.[23] If there is sufficient evidence upon which a verdict for punitive damages can be based, the right thereto is for the jury to decide.[24]

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[4] Karpas v. Brussel, 217 App. Div. 550, 217 NYS 373.

[5] Bardon v. Endejan, 128 Okl. 293, 262 P 693.

[a] **Reason for rule.**—Possession being a fact continuous in its nature, when its existence is once shown it will continue until the contrary is proved. Bardon v. Endejan, 128 Okl. 293, 262 P 693.

[6] U. S.—Cloquet Lumber Co. v. Burns, 207 Fed. 40, 124 CCA 600.

Ark.—Russell v. Brooks, 92 Ark. 509, 122 SW 649.

Kan.—Campbell v. Mowrer, 97 Kan. 496, 155 P 956.

Mich.—Pinkerton Bros. Co. v. Bromley, 128 Mich. 236, 87 NW 200.

Minn.—Blackman v. Wheaton, 13 Minn. 326.

N. Y.—Harter v. People's Bank, 221 App. Div. 122, 223 NYS 118; Merritt v. Lyon, 3 Barb. 110; Estey Mfg. Co. v. Waring, 7 NYSt 775.

Pa.—Johnson v. Groff, 22 Pa. Super. 85.

[a] **Illustrations.**—(1) In replevin for an animal claimed to have been fraudulently obtained, it is for the jury to determine from the nature of the representations themselves and the other circumstances in proof whether such representations were made in good faith and for an honest purpose, or whether they were made to defraud plaintiff of his animal. Russell v. Brooks, 92 Ark. 509, 122 SW 649. (2) In replevin to recover stolen negotiable bonds, evidence on the issue of the good faith of defendant bank's branch manager in purchasing the bonds was for the jury. Harter v. People's Bank, 221 App. Div. 122, 223 NYS 118.

[b] **Matters considered.**—Whether or not defendant was a willful trespasser, as regards the damages which plaintiff is entitled to recover, where defendant having cut down trees on plaintiff's land, plaintiff brought replevin for the logs, and defendant gave a bond and converted the logs, must be determined by what it knew or ought to have known, at the time of the cutting, and what it thereafter learned, though before the conversion, is immaterial. Cloquet Lumber Co. v. Burns, 207 Fed. 40, 124 CCA 600.

[c] **In Missouri** (1) it is held that the jury must find the facts that constitute the fraud and the court must determine whether such facts constitute fraud. Kean v. Newell, 2 Mo. 9. (2) In replevin of goods sold by the seller against an officer attaching at suit of the buyer's creditor, whether the buyer, who was insolvent, never intended to pay for the goods is for the jury. Stein v. Hill, 100 Mo. A. 38, 71 SW 1107. (3) Whether plaintiff, after delivery of a chattel mortgage given by defendant as security for the purchase price of mules, altered it so as to include the faithful performance of a farming contract, is for the jury. Forsee v. Zenner, (A.) 193 SW 975.

[7] Beene v. Green, 127 Ark. 119, 191 SW 915; Haveron v. Anderson, 3 N. D. 540, 58 NW 340; Mitchelson v. Commercial Inv. Trust, 97 Okl. 98, 222 P 663; Griswold v. Sundback, 6 S. D. 269, 60 NW 1068.

[a] **Thus** the value of the property at the commencement of the suit and its usable value during the time plaintiff was kept out of possession raises a question of fact for the jury. Mitchelson v. Commercial Inv. Trust, 97 Okl. 98, 222 P 663.

[8] Beene v. Green, 127 Ark. 119, 191 SW 915.

[9] Ark.—Edwards v. Thompson, 208 SW 582.

Ill.—Vennum v. Thompson, 38 Ill. 143.

Ind.—Hallagan v. Johnston, 55 Ind. A. 509, 104 NE 91.

Iowa.—Stephens v. Williams, 46 Iowa 540.

Ky.—Sawyer v. Middlesborough Town Co., 17 SW 444, 13 KyL 550.

Mich.—Gottesman v. Chipman, 125 Mich. 60, 83 NW 1026.

Mo.—Miller v. Marks, 20 Mo. A. 369.

[10] Hallagan v. Johnston, 55 Ind. A. 509, 104 NE 91.

Sufficiency of description to pass title see supra § 277.

[11] Griswold v. Sundback, 6 S. D. 269, 60 NW 1068.

[12] Dysart v. Terrell, (Tex. Civ. A.) 70 SW 986.

[a] **Value of each item** of the property claimed should be submitted to the jury. Dysart v. Terrell, (Tex. Civ. A.) 70 SW 986.

[13] Chicago, etc., R. Co. v. Northwestern Union Packet Co., 38 Iowa 377.

[14] Johnson v. Wagner, 42 N. D. 542, 174 NW 73.

[a] **Rule applied** where plaintiff had possession of the property at the trial, and the pleadings admitted his right of possession. Johnson v. Wagner, 42 N. D. 542, 174 NW 73.

[15] U. S.—Circle Swing Co. v. Reynolds, 224 Pa. 577, 73 A 982.

[16] Barnard v. Corlett, 62 Colo. 226, 161 P 156.

[17] Emerson-Brantingham Impl. Co. v. Ritter, 69 Okl. 95, 170 P 482.

[18] James Smith Woolen Mach. Co. v. Holden, 73 Vt. 396, 51 A 2.

[19] James Smith Woolen Mach. Co. v. Holden, supra.

[20] James Smith Woolen Mach. Co. v. Holden, supra.

[21] McCraw v. Killian, 100 S. C. 320, 84 SE 868.

[a] **Thus** whether the seizure of the property was complete, peaceable, and effective, or whether it was unlawful and wrongful was for the jury. McCraw v. Killian, 100 S. C. 320, 84 SE 868.

[§ 285] **E. Taking Case from Jury.** The rules applicable to the trial of civil actions generally govern in the determination of the propriety of taking a case from, or submitting it to, the jury.[25] If the evidence is conflicting as to a material issue, or if there is evidence which, although slight, would justify a finding in favor of either party, such evidence should be submitted to the jury with proper instructions, and it is error to direct a verdict,[26] sustain a demurrer to the evidence,[27] or order a dismissal or nonsuit;[28] but if the pleadings and proof fail to show that plaintiff is entitled to possession of the property, or that he has an interest therein, it is proper to direct a verdict for defendant,[29] sustain a demurrer to the evidence,[30] or order a dismissal or nonsuit.[31] Also, if the uncontradicted evidence establishes plaintiff's[32] or defendant's[33] or an intervener's[34] right to recovery, or defendant's right to judgment,[35] or if the pleadings amount to an admission of plaintiff's right to possession,[36] it is proper to direct a verdict in his favor. If plaintiff offers evidence tending to show his ownership of the property replevied and his right to the possession thereof, and no evidence is offered tending to show defendant's title thereto or any interest in or lien thereon, it is error for the court to sustain a demurrer to plaintiff's evidence;[37] and if the only evidence to indicate that plaintiff is not the owner is entirely insufficient to support a finding to that effect, the question of ownership should not be submitted to the jury.[38] If the pleadings present no issue of fact upon which plaintiff's right of possession depends, the court may direct a verdict.[39] So, if defendant admits the general ownership to be in plaintiff and attempts to set up as his only defense a special interest, which as his pleadings stand cannot be shown, the court should direct a verdict for plaintiff.[40] Where defendants have filed a counterclaim alleging ownership of the articles replevied, they are not entitled to a directed verdict on a motion based merely on the fact that they were not in possession thereof when the action was commenced;[41] nor does the fact that plaintiff before trial obtained possession of the property, thus putting defendant in a position where he cannot respond to a judgment for possession, entitle defendant to a directed verdict.[42] If the affidavit and writ of replevin do not identify the property replevied and there is no evidence identifying the property taken under the writ as the property claimed by plaintiff, the court should direct a ver-

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[22] Consolidated Nat. Bank v. Cunningham, 28 Ariz. 518, 238 P 332.

[23] Griffith v. Bogardus, 14 Cal. 410.

[24] Manley v. Bailey, 151 S. C. 366, 149 SE 119.

Right to damages see infra §§ 359-393.

[25] See Trial [38 Cyc 1532 et seq.].

[26] Ariz.—Consolidated Nat. Bank v. Cunningham, 28 Ariz. 518, 238 P 332.

Ark.—Fox v. Delaney, 111 Ark. 640, 163 SW 157; Holbrook v. Neely, 93 Ark. 272, 124 SW 1025.

Colo.—Sherman Mercantile Co. v. Mountain Ice, etc., Co., 290 P 276; Buchanan v. Scandia Plow Co., 6 Colo. A. 334, 39 P 899.

Ga.—Bell v. G. Ober, etc., Co., 111 Ga. 668, 36 SE 904.

Iowa.—Bray v. Flickinger, 79 Iowa 313, 44 NW 554.

Kan.—Parkhurst v. Sharp, (A.) 61 P 531.

Ky.—Million v. Beeding, 49 SW 437, 20 KyL 1428.

Me.—Hartford F. Ins. Co. v. Stevens, 123 Me. 368, 123 A 38.

Md.—Chappellear v. Harrison, 1 Gill & J. 477.

Mich.—Loupee v. Michigan Cent. R. Co., 243 Mich. 144, 219 NW 727; Opsomere v. Opsomere, 162 Mich. 65, 127 NW 15.

Minn.—Walker v. Ward, 104 Minn. 386, 116 NW 647; Pound v. Pound, 60 Minn. 214, 62 NW 264.

Miss.—Snowden v. Collins, 112 Miss. 801, 73 S 793.

Mo.—Harvey v. Stephens, 159 Mo. 486, 60 SW 1055.

Nebr.—Westover v. Vandoran, 29 Nebr. 652, 46 NW 47.

N. Y.—Siedenbach v. Riley, 36 Hun 211.

Okl.—Jones v. Bristow First State Bank, 39 Okl. 784, 136 P 737; Damerson v. McClaren, 29 Okl. 340, 116 P 792.

Or.—Moorhouse v. Donaca, 14 Or. 430, 13 P 112.

Pa.—Quinlan v. Rundle, 273 Pa. 479, 117 A 208; Johnson v. Whiteside, 79 Pa. Super. 447.

S. D.—Arlt v. Langley, 227 NW 469; L. A. McKean Auto Co. v. O'Marro, 54 S. D. 435, 223 NW 354 [rev on other grounds 53 S. D. 55, 220 NW 144]; Van Brunt v. Blackmer, 46 S. D. 224, 191 NW 838; Abel v. Teets, 28 S. D. 633, 134 NW 817.

Tex.—Hernandez v. Garcia, (Civ. A.) 216 SW 477.

Wis.—Fitzgerald v. Anderson, 81 Wis. 341, 51 NW 554.

See Hartley v. Blauvelt, 208 Ill. A. 550; Machelli v. Torrelli, 190 Ill. A. 287.

[a] **Refusal to direct verdict held proper.**—Abel v. Teets, 28 S. D. 633, 134 NW 817.

[b] **Submission to jury held proper.**—Where plaintiff charged a conspiracy between defendant and an intervener, the fact that the intervener went with defendant when the property was surrendered to the lessor and when it was agreed it should be resold to defendant and by defendant to intervener, does not necessarily show that the intervener had a wrongful motive so as to warrant a binding instruction for plaintiff on the theory of conspiracy. Quinlan v. Rundle, 273 Pa. 479, 117 A 208.

[c] **Defendant held not entitled to directed verdict.**—Loupee v. Michigan Cent. R. Co., 243 Mich. 144, 219 NW 727.

[d] **Direction of verdict held error.**—(1) Where defendant in his answer justified the seizure and detention of the property as sheriff by virtue of an execution against a third person who it was alleged had an interest therein, it was a question for the jury whether the judgment debtor had any interest in the property at the time when levied on, and it was error to direct a verdict for plaintiff. Walker v. Ward, 104 Minn. 386, 116 NW 647. (2) Where evidence was conflicting as to plaintiff's title. Holbrook v. Neely, 93 Ark. 272, 124 SW 1025; Opsomere v. Opsomere, 162 Mich. 65, 127 NW 15; Hernandez v. Garcia, (Tex. Civ. A.) 216 SW 477. (3) Where the entire evidence was such that the court would not have been compelled to set aside a verdict for the other party. Jones v. Bristow First State Bank, 39 Okl. 784, 136 P 737. (4) Where there was evidence supporting the theories of both parties on the question of ownership and possession of the property. Fox v. Delaney, 111 Ark. 640, 163 SW 157. (5) In an action for property subject to a deed of trust where the evidence is conflicting on the issue of whether the debt had been fully paid. Snowden v. Collins, 112 Miss. 801, 73 S 793. (6) In an action to replevy a stolen automobile from one to whom it had been transferred, testimony of the former owner as to several distinguishing marks, and positively identifying it as the one stolen, is sufficient to render a directed verdict for defendant improper. Hartford F. Ins. Co. v. Stevens, 123 Me. 386, 123 A 38.

[e] **Conflict as to value.**—Where the testimony is conflicting as to the value of the property, the court must refuse to direct a verdict even though there is no question as to the ownership and right to possession. L. A. McKean Auto Co. v. O'Marro, 54 S. D. 435, 223 NW 354 [rev on other grounds 53 S. D. 55, 220 NW 144].

[27] Cooke v. Reserve Realty, etc., Co., (Mo. A.) 25 SW (2d) 562; Sawyers v. Schuler, 31 Okl. 634, 122 P 199.

[28] See supra § 260.

[29] Ark.—Haney v. Haney, 132 Ark. 166, 200 SW 788.

Colo.—Austin v. Terry, 38 Colo. 407, 88 P 189.

Ky.—Kentucky Portland Cement, etc., Co. v. Steckel, 164 Ky. 420, 175 SW 663.

Mass.—Hayes v. Tidsbury, 181 Mass. 292, 63 NE 890.

Mich.—Le Duc v. Schnepp, 249 Mich. 622, 229 NW 455.

Minn.—Warren v. Driscoll, 178 Minn. 344, 227 NW 199; Foley v. Richter, 134 Minn. 472, 159 NW 129.

Miss.—Anderson Tully Co. v. C. M. Gooch Hardwood Co., 157 Miss. 380, 128 S 104; Johnson v. Sanders, 148 Miss. 472, 114 S 334.

Mo.—Leisey Brewing Co. v. Cline, (A.) 211 SW 689.

Nebr.—Sullivan v. Hansen, 95 Nebr. 779, 146 NW 983; Warner v. Sohn, 86 Nebr. 519, 125 NW 1072, 21 Ann Cas 427 [aff on reh 85 Nebr. 571, 123 NW 1054]; Dillrance v. Murphy, 1 Nebr. (Unoff.) 298, 95 NW 608.

N. Y.—Dillingham v. Flack, 17 NYS 879.

N. D.—Sylvester v. Mackey, 48 N. D. 256, 183 NW 1019.

[a] **Illustrations.**—(1) Direction of a verdict for defendant is proper where, after the commencement of the action, plaintiffs assigned their claim and were no longer the real parties in interest. Sylvester v. Mackey, 48 N. D. 256, 183 NW 1019. (2) In an action to recover timber cut from land, the direction of a verdict for defendants is proper where the only evidence of plaintiff's title is an executory contract for the sale of the land to him by one not shown in any way to have title. Foley v. Richter, 134 Minn. 472, 159 NW 129. (3) In replevin for berries purchased by defendant from pickers, a verdict for defendant is proper where plaintiff did not show what portion, if any, of the berries seized came from lands in which he claimed berry rights. Le Duc v. Schnepp, 249 Mich. 622, 229 NW 455.

[b] **Value of property.**—It is proper for the court to include the amount in directing verdict for defendant, where plaintiff in his petition sworn to stated that amount was the value. Leisey Brewing Co. v. Cline, (Mo. A.) 211 SW 689.

[c] **It is not error to direct a verdict** for defendant, where the evidence is insufficient to sustain a judgment for plaintiff. Warner v. Sohn, 86 Nebr. 519, 125 NW 1072, 21 AnnCas 427 [aff on reh 85 Nebr. 571, 123 NW 1054].

[d] **Failure to identify property.**

—Where the affidavit and writ of replevin fail to identify the property replevined, and there is no evidence identifying it, a verdict should be directed for defendant, although the affidavit and writ are not objected to. Sullivan v. Hansen, 95 Nebr. 779, 146 NW 983.

30. Key v. London, 119 Okl. 41, 247 P 670.

[a] **Judgment sustaining demurrer** to plaintiff's evidence, failing to establish either title or right to possession, is not erroneous. Key v. London, 119 Okl. 41, 247 P 670.

31. See supra § 260.

32. Ark.—Moseley v. Riddle, 23 SW (2d) 631.

Colo.—Mason Tires Sales Co. v. Mason Tire, etc., Co., 73 Colo. 42, 213 P 117.

D. C.—Costikyan v. Sloan, 33 App. 420.

Fla.—Bell v. Niles, 61 Fla. 114, 55 S 392.

Ida.—Leaf v. Reynolds, 34 Ida. 643, 203 P 458.

Ill.—Smeeth v. Zimmer, 182 Ill. A. 374.

Iowa.—Cook v. Milliman, 198 Iowa 1081, 198 NW 42.

Kan.—Goodwin v. Sutheimer, 8 Kan. A. 212, 55 P 486.

Mich.—Kert v. Endelman, 202 Mich. 289, 168 NW 423.

Miss.—Ainsworth v. Smith, 157 Miss. 202, 127 S 771.

N. Y.—Hay v. Muller, 28 NYS 57, 23 NYCivProc 321 [aff 6 Misc. 621, 26 NYS 1135].

N. D.—Wadsworth v. Owens, 21 N. D. 255, 130 NW 932.

Okl.—Hussey v. Blaylock, 21 Okl. 220, 95 P 773.

Wis.—Zahl v. Billings, 118 Wis. 459, 95 NW 374; Brewster v. Carmichael, 39 Wis. 456.

[a] **Illustrations.**—(1) The owner of live stock unlawfully seized for the purpose of dipping them was entitled to a directed verdict against the sheriff in replevin. Ainsworth v. Smith, 157 Miss. 202, 127 S 771. (2) Where defendant to show a special interest introduced and relied on a contract between the parties which provided that the goods should at all times be the property of plaintiff and that "at the termination of the contract for any reason whatever" defendant should "account for and turn over to" plaintiff all goods remaining unsold. The court should have directed a verdict for plaintiff. Mason Tires Sales Co. v. Mason Tire, etc., Co., 73 Colo. 42, 213 P 117. (3) Where, in replevin by consignors, who shipped to dealers in such goods, against an auctioneer to whom the dealers had pledged them for advances to them personally, plaintiffs' evidence tends to show that they had sent the goods to the dealers for sale, that they were to account promptly for them at prices fixed in memorandum invoice bills sent with them, retaining all the selling price received in excess of such invoice price, and that the understanding was that the goods were the property of the shippers, and such as were unsold were to be returned on demand, and defendant's evidence tends to show a lien for auctioneer's charges, the court should instruct the jury to return a verdict for plaintiff unless they find the lien claimed actually to exist. Costikyan v. Sloan, 33 App. (D. C.) 420. (4) Where plaintiff offered evidence tending to sustain his case and defendant offers evidence tending to show that he holds by virtue of an order of attachment, and no copy of the order appears in the record, and no statement that one was issued appears in the transcripts of the justices of the peace, and nothing appears to show the possession of defendant legal, it is not error to instruct for plaintiff. Goodwin v. Sutheimer, 8 Kan. A. 212, 55 P 486. (5) Where plaintiff's ownership is shown, and defendant, who was plaintiff's agent to purchase, shows general accounts between the parties but no lien on the goods, a verdict for plaintiff is proper as the state of the accounts should be disposed of in some other appropriate proceeding. Kert v. Endelman, 202 Mich. 289, 168 NW 423. (6) Where the evidence showed as a matter of law that defendant owed plaintiffs more than the value of the mortgaged property seized under writ of replevin, it was held that the verdict should have been entered for plaintiff. Moseley v. Riddle, (Ark.) 23 SW (2d) 631. (7) Where the evidence showed that plaintiff had never parted with title to the property, but only the possession thereof to another, it was error to refuse to instruct for plaintiff, although the evidence showed defendant to be an innocent purchaser for value from such possessor. Hussey v. Blaylock, 21 Okl. 220, 95 P 773.

33. Miller Pasteurizing Mach. Co. v. Conway, 214 Fed. 485; American R. Express Co. v. Gallant Loan, etc., Co., (Mo. A.) 259 SW 828; Haveron v. Anderson, 3 N. D. 540, 58 NW 340; Bertalott v. Automobile Securities Co., 79 Pa. Super. 443.

[a] **Thus** (1) in replevin for stolen bonds, where defendant showed that he obtained them in due course for a valuable consideration, he was entitled to a directed verdict. American R. Express Co. v. Gallant Loan, etc., Co., (Mo. A.) 259 SW 828. (2) Where, in replevin to recover machinery transferred under a conditional contract of sale, plaintiff, as part of its main case, proved that defendant was an innocent purchaser for value, the court properly determined that plaintiff could not recover as a matter of law. Miller Pasteurizing Mach. Co. v. Conway, 214 Fed. 485.

34. Metropolitan Music Co. v. Shirtly, 98 Minn. 292, 108 NW 271.

35. Harris Bros. Co. v. Nichols, 247 Mich. 89, 225 NW 525.

[a] **Thus** undisputed proof that defendant was not in possession of the house when replevin suit was begun, that he never occupied it, and claims no interest therein, entitles him to a directed verdict. Harris Bros. Co. v. Nichols, 247 Mich. 89, 225 NW 525.

36. Johnson v. Wagner, 42 N. D. 542, 174 NW 73.

[a] **Instruction to find** plaintiff entitled to possession is not error. Johnson v. Wagner, 42 N. D. 542, 174 NW 73.

37. Edel v. McKenzie, 114 Kan. 49, 216 P 823.

38. Gunn v. Mumford, 74 N. J. L. 601, 65 A 989.

39. Johnson v. Wagner, 42 N. D. 542, 174 NW 73.

40. Mason Tires Sales Co. v. Mason Tire, etc., Co., 73 Colo. 42, 213 P 117.

41. Arlt v. Langley, (S. D.) 227 NW 469.

42. Kimmitt v. Deitrich, 22 S. D. 590, 119 NW 986.

[a] **Reason for rule.**—The action must proceed to determine who is entitled to costs, and whether or not defendant is entitled to have the property returned to him. Kimmitt v. Deitrich, 22 S. D. 590, 119 NW 986.

dict for defendant although no objection is made to the affidavit and writ in that regard.[43] An instruction directing a verdict for plaintiffs without requiring a finding of their right to possession of the goods replevied is erroneous.[44] In any event the court may direct the proper form of the verdict.[45]

[§ 286] **F. Instructions[46]—1. In General.** The rules governing instructions in civil actions generally[47] apply to actions of replevin.[48] The parties are entitled to full instructions correctly stating the law.[49] The issues presented must be instructed upon[50] but instructions on issues not in the particular case should not be given.[51] The instructions must be applicable to the facts which there is evidence tending to prove,[52] and competent evidence which has been introduced must not be disregarded or ignored.[53] The instructions must not invade the

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43. Sullivan v. Hansen, 95 Nebr. 779, 146 NW 983.

44. Bentley v. Hurley, 222 Mo. A. 51, 299 SW 604.

45. Owens v. Gentry, 30 S. C. 490, 9 SE 525.

46. **Cross references:**
Application to pleadings and evidence generally see Trial [38 Cyc 1612 et seq].
Error cured by other instructions see Trial [38 Cyc 1653, 1782].
Instructions:
  As to burden of proof see Trial [38 Cyc 1748].
  On weight of evidence see Trial [38 Cyc 1641 et seq].

47. See Trial [38 Cyc 1594 et seq].

48. See cases infra this section; and infra §§ 287-289.

49. Gavigan v. Evans, 45 Mich. 597, 8 NW 545.

[a] **Instructions held proper.**—(1) In replevin for a horse, claimed by plaintiff as the widow of the owner, and for a saddle and bridle claimed under an alleged gift from a third person, an instruction that, if defendant purchased the horse from the plaintiff's husband during his lifetime, plaintiff could not recover the horse, was not erroneous in failing to include the saddle. Dorris v. Dorris, 149 Mo. A. 107, 129 SW 979. (2) Instructions held full, fair, and covering the substance of all the instructions asked in respect of all matters of law material and pertinent to the case. McKesson v. Sherman, 51 Wis. 303, 8 NW 200. (3) Instruction that if anything was due on a mule replevied, the verdict must be for plaintiff where the mule was sold by plaintiff upon the condition that the title remain in him until the purchase price was paid. King v. Black, 92 Ark. 598, 124 SW 237.

50. See cases infra this note.

[a] **Instructions covering several theories.**—It is error to refuse instructions embracing the several theories of the transaction under which the wife claims title, and to leave to the jury, in a general way, the mere question of the bona fides of the transaction. Goeschel v. Fisher, 108 Mich. 212, 65 NW 965.

[b] **Ignoring issues.**—Where both parties claimed that a purchaser of the property at a chattel mortgage foreclosure was acting as the agent of its grantor, instructions ignoring such controlling issue are properly refused. Koelling v. August Gast Bank Note, etc., Co., 97 Mo. A. 664, 71 SW 728.

[c] **Detention of property.**—Where the only material issue is whether or not defendant had lawful possession, and the evidence thereon is conflicting, a failure to properly instruct the jury upon the question of possession is reversible error. Clark v. Sublette, 117 Mo. A. 519, 94 SW 733.

[d] **Fraud.**—Pleading and proof held to present the issue of fraud so as to warrant an instruction thereon. Burdett v. Surdez, 94 Kan. 494, 146 P 1025.

[e] **Burden of proof.**—Refusal to instruct that the party alleging fraud in the purchase of goods has the burden of proof thereof was error. Williams v. Finlayson, 49 Fla. 264, 38 S 50.

51. See cases infra this note.

[a] **Giving of abstract proposition of law** is error when the question instructed on is not in issue and there is no evidence upon which to base it. Gray v. Sharp, 17 Colo. A. 139, 67 P 351; Webster v. Sherman, 33 Mont. 448, 84 P 878.

[b] **Persons entitled to hold possession.**—Modification of plaintiff's instruction, that there was no law authorizing an officer of a city to hold intoxicating liquor as against the true owner or rightful possessor, by striking out all qualifying language, is not reversible error where it has the effect to show that judgment was not based on any theory that defendant city and its officer were entitled to hold the liquors and there was no evidence of the circumstances in the part stricken out. Jackson v. Columbia, (Mo. A.) 217 SW 869.

[c] **Demand.**—Instruction that no demand had been proved was properly refused where defendant did not plead that no demand was made, and did not tender the property as required by law. Lacquement v. Bellamy, (Mo. A.) 253 SW 1073.

[d] **Effect of intervener's rights.**—In a triangular contest between plaintiff, defendant, and the state as intervener, in which it is agreed to first submit to the jury the issue between plaintiffs and defendants and subsequently to determine the state's rights, it is proper upon the trial of the first issue to refuse to charge as to the effect upon the rights of plaintiff and defendant if the issues should ultimately be decided in favor of the state. Winchester v. Bryant, 65 Ark. 116, 44 SW 1124.

[e] **Forms of action.**—Refusal to instruct the jury as to the different forms of action which might have been brought by plaintiff is proper. Hardy v. Clendening, 25 Ark. 436.

[f] **Fraud.**—(1) Where the question in issue is whether there was a sale or only a loan of the property replevied, an instruction on the question of fraudulent intent in making the sale is error. Gray v. Sharp, 17 Colo. A. 139, 67 P 351. (2) Instruction as to whether inspection of goods was fair and honest is properly refused where there was no allegation of fraud in the pleadings. Dunham v. H. D. Williams Cooperage Co., 83 Ark. 395, 103 SW 386.

[g] **Illegal consideration.**—An instruction to the effect that the contract is void where the consideration is illicit cohabitation or in furtherance of immorality should not be given where the party does not base his alleged rights on any such claim of title or right to possession. Woods v. Latta, 35 Mont. 9, 88 P 402.

[h] **Insecurity clause in mortgage.**—A charge in a replevin suit omitting reference to insecurity clause of chattel mortgage to justify seizure, as to which there was no pleading or sufficient evidence, was not error. Wolverton v. Morgan, 132 Okl. 55, 269 P 314.

[i] **Possession.**—Where the question of possession is unimportant it is not error to refuse to instruct the jury that continued possession created a presumption of ownership to be rebutted by a preponderance of evidence. Gavigan v. Evans, 45 Mich. 597, 8 NW 545.

[j] **Presumptions.**—In replevin for a mare stolen and sold by plaintiff's son, an instruction on presumption arising from delay in bringing suit is erroneous where the time elapsed was not long enough to raise any presumption against plaintiff's rights. Watkins v. White, 4 Ill. 549.

[k] **Set-off.**—A refusal to instruct on the subject of set-off is proper when it is entirely outside the issue being tried. Bellow v. Lintott, 68 Pa. Super. 452.

52. Ark.—Rust Land, etc., Co. v. Isom, 70 Ark. 99, 66 SW 434, 91 AmSR 68.

Fla.—Williams v. Finlayson, 49 Fla. 264, 38 S 50.

Kan.—Brown v. Morris, 3 Kan. A. 86, 45 P 98.

Mich.—Nitz v. Bolton, 80 Mich. 470, 45 NW 189.

Miss.—Gulledge v. Slayden-Kirksey Woolen Mills Co., 75 Miss. 297, 22 S 952.

Mo.—Forsee v. Zenner, (A.) 193 SW 975.

N. Y.—Francese v. Geraty, 104 NYS 358.

[a] **Instruction held proper.**—In replevin by a landlord against a tenant for a mule team, an instruction was not erroneous for ignoring the tenant's agreement to leave the mules on the farm, in view of the testimony. Forsee v. Zenner, (Mo. A.) 193 SW 975.

[b] **Collusion and fraud.**—Evidence held sufficient to support instructions regarding collusion and fraud. Warner v. Carter, 109 Kan. 285, 198 P 960.

[c] **Adverse possession.**—In replevin for staves cut from plaintiff's land shown to be wild and unoccupied, it is error to instruct the jury to find for defendant if his vendor had held adverse possession of the land for the statutory period. Rust Land, etc., Co. v. Isom, 70 Ark. 99, 66 SW 434, 91 AmSR 68.

53. Ill.—Holliday v. Burgess, 34 Ill. 193.

Iowa.—Wendell v. Mallory Commission Co., 122 Iowa 712, 98 NW 612.

Miss.—Peterson v. Polk, 67 Miss. 163, 6 S 615.

N. Y.—Morss v. Stone, 5 Barb. 516.

N. C.—Spencer v. Bell, 109 N. C. 39, 13 SE 704.

province of the jury.[54] An instruction should not be entirely abstract, but should be applied to the facts in evidence.[55] Instructions must not be vague, inconsistent, or misleading in point of law or of fact;[56] but must be considered as a whole.[57] If instructions substantially embody those requested it is not error to fail to use the exact language requested,[58] nor is it error for the court to add further and additional instructions to those requested.[59] Instructions charging on the weight of the evidence should not be given.[60]

[§ 287] **2. Title and Right to Possession.** The court must properly instruct on the issues of ownership and right of possession,[61] and an instruction

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[54] Watkins v. White, 4 Ill. 549; Gilbert v. Forest City Furniture Co., 72 Ill. A. 186; Poe v. Stockton, 39 Mo. A. 550; Griswold v. Nichols, 117 Wis. 267, 94 NW 33; Kaufer v. Walsh, 88 Wis. 63, 59 NW 460.

[a] **Instruction erroneous** which, without proof, assumed that certain defendants were parties to a conspiracy with other defendants in acquiring the goods. Poe v. Stockton, 39 Mo. A. 550.

[55] Hopper v. Callahan, 78 Md. 529, 28 A 385; Lockhart v. Luker, 36 Miss. 68.

[a] **Thus** (1) where the jury is told that plaintiff can recover on a temporary right of possession, although the title to the property is in another person, they ought further to be informed what facts in evidence will establish a temporary right of possession against the owner. Hopper v. Callahan, 78 Md. 529, 28 A 385. (2) Where the possession was originally by bailment, it is improper to leave the question of adverse possession to the jury without instructing them as what would amount to adverse possession under the circumstances of the case. Lockhart v. Luker, 36 Miss. 68.

[56] Ark.—Dunham v. H. D. Williams Cooperage Co., 83 Ark. 395, 103 SW 386; Roach v. Johnson, 71 Ark. 344, 74 SW 299; Pyburne v. Moses, 54 Ark. 121, 15 SW 84.

Colo.—Roach v. Binder, 1 Colo. 322.

Conn.—Ladany v. Assad, 91 Conn. 316, 99 A 762.

Fla.—Jeffreys v. Greeley, 20 Fla. 819.

Ill.—Mathews v. Granger, 71 Ill. A. 467.

Iowa.—Miller v. Bryan, 3 Iowa 58.

Md.—Hopper v. Callahan, 78 Md. 529, 28 A 385.

Mich.—Gustin v. Embury-Clark Lumber Co., 145 Mich. 101, 108 NW 650.

Miss.—Jamison v. Acker, 14 S 691.

Mo.—Forsee v. Zenner, (A.) 193 SW 975.

Mont.—Woods v. Latta, 35 Mont. 9, 88 P 402; Chan v. Slater, 33 Mont. 155, 82 P 657.

Nebr.—Morehead v. Adams, 18 Nebr. 569, 26 NW 242.

Wash.—Reed v. Bank of Commerce, 8 Wash. 539, 36 P 484.

Wis.—Kaufer v. Walsh, 88 Wis. 63, 59 NW 460; Connolly v. Straw, 53 Wis. 645, 11 NW 17.

[a] **Instructions held inconsistent** with each other and with the evidence in replevin by an insurance company to recover a premium note negotiated by its agent. St. Louis Nat. L. Ins. Co. v. St. Louis International Bank, 148 Mo. A. 551, 128 SW 761.

[b] **Instructions held misleading.**—(1) An instruction that a demand may be inferred from the actions, conduct, and conversation of the parties is misleading in that it comprehends conduct and conversation in the absence of the other party. Roach v. Binder, 1 Colo. 322. (2) Instruction that if "you find the evidence for and against any material allegation of plaintiff's complaint to be evenly balanced, then plaintiff has failed to prove her case, and your verdict should be for the defendant," is likely to mislead the jury into believing a balance of evidence on one allegation sufficient to defeat the entire cause of action, and it should have added thereto "as to the property described in that allegation." Webster v. Sherman, 33 Mont. 448, 461, 84 P 878. (3) Instruction to find for defendant if at the time defendant, as sheriff, seized the goods as the property of B, B was interested in the profits to be realized from the sale thereof, authorized the jury to found their verdict upon an immaterial issue since plaintiff may have been the owner and entitled to the possession of the goods notwithstanding B's interest in the profits of sales. Rapp v. Vogel, 45 Mo. 524. (4) An instruction which did not show that as between the parties title to personal property passes without any delivery whenever the sale is completed, but assumed that under the evidence an agreement to sell was not and could not be a complete sale. Holliday v. Burgess, 34 Ill. 193. (5) In replevin to recover property taken under an execution against the plaintiff's vendor, where the sale is claimed to be within the statute of frauds, an instruction stating the question to be whether the plaintiff or his debtor owned the property is misleading for failing to point out the distinction between a title good as against all the world, and a title good as between the parties but invalid as against creditors. Israel v. Day, 17 Colo. A. 200, 68 P 122.

[c] **Instructions held not misleading.**—(1) In stating necessity for a demand of the property replevied. Carstens v. Earles, 26 Wash. 676, 67 P 404. (2) In replevin against a sheriff where the issue was as to fraud in the sale of property by X, execution defendant, to M, the plaintiff, an instruction that if the sale of the property from X to M was made to defraud the creditors of A the sale was fraudulent and void, even though it would have more fully stated the law if it had stated that it would not be void as to M unless he had knowledge of the fraud. Miller v. Bryan, 3 Iowa 58. (3) A charge that plaintiff must prove "absolute" ownership of the property, and the use of the words "absolute owner" and "owner" as meaning the same was not misleading. Harward v. Davenport, 105 Iowa 592, 75 NW 487. (4) Instruction to assess the damages at the value of the property as proven was an instruction to find the value and could not have misled the jury. Jeffreys v. Greeley, 20 Fla. 819. (5) In suit to replevy Liberty bonds which were originally coupon bonds, but later recalled by the government and others issued, there being no evidence that the coupon bonds were in existence at the time of trial, plaintiff's instruction referring to bonds as those "mentioned in evidence" was not misleading. Feil v. Wells, (Mo. A.) 268 SW 893. (6) Instruction held not to give the jury to understand that they were finding issues of ownership and possession later than the date of the beginning of the action. Ladany v. Assad, 91 Conn. 316, 99 A 762. See also Trial [38 Cyc 1598 et seq].

[57] Ill.—Chicago Title, etc., Co. v. Goldsmith, 173 Ill. 326, 50 NE 676 [aff 69 Ill. A. 22].

N. Y.—Morss v. Stone, 5 Barb. 516.

Or.—Silsby v. Strong, 38 Or. 36, 62 P 633.

Wash.—Carstens v. Earles, 26 Wash. 676, 67 P 404.

Wis.—McKesson v. Sherman, 51 Wis. 303, 8 NW 200.

[a] **Instruction held proper.**—An instruction assuming the necessity for plaintiff to prove a demand where a prior instruction fully stated the law as to the necessity for demand and the instruction complained of, when properly construed related to the possession required to be in defendant at the commencement of the action. Dow v. Dempsey, 21 Wash. 86, 57 P 355.

[58] Minthon v. Lewis, 78 Iowa 620, 43 NW 465; Simpson v. Mauldin, 61 Okl. 92, 160 P 481.

[59] Eldred v. Oconto Co., 33 Wis. 133.

[a] **Statute providing that judge shall give without change each instruction** asked, or shall refuse it in full, is not violated where it appears that plaintiff's logs had been mixed with defendants and there was no evidence that they differed in description, quality, or value, and plaintiff was unable to identify his own, by an instruction of the law at defendant's request, "if the logs taken from the plaintiff could be identified," adding of its own motion a statement of the law "if the logs could not be identified." Eldred v. Oconto Co., 33 Wis. 133.

[60] Carter-Battle Grocer Co. v. Rushing, (Tex. Civ. A.) 85 SW 449.

[a] **Estoppel.**—(1) In an action to recover goods attached as those of a third person, an instruction that if defendant's agent was not deceived by statements made to him by plaintiff's agent as to the true ownership of the goods, but relied on his own judgment or other information, defendant's plea of estoppel by reason of the statements of plaintiff's agent would not be a good defense, was erroneous as a charge on the weight of evidence (Carter-Battle Grocer Co. v. Rushing, (Tex. Civ. A.) 85 SW 449), (2) and the error is emphasized by the erroneous refusal of the court to charge that, if plaintiff's agent did not make the statements to defendant's attorney as testified to by the latter, the jury should find for plaintiff on the issue of estoppel raised on account of such alleged representations (Carter-Battle Grocer Co. v. Rushing, supra).

Instructions on credibility of witnesses see Trial [38 Cyc 1724 et seq].

[61] Harrell v. Tripp, 197 N. C. 426, 149 SE 548.

is clearly erroneous which leaves out questions as to the ownership or right to possession of plaintiff, and confines itself to the question of the detention of the property in dispute.[62]

[§ 288] **3. Value.** The jury should be instructed as to the various matters which should be considered in determining the value of the property replevied,[63] and upon what conditions they should find the value for the one or the other party;[64] but if there is no evidence as to value, instructions thereon should not be given.[65] If only one witness has testified it is error to refuse to charge that if the jury believed the testimony of that witness they should accept his valuation.[66]

[§ 289] **4. Damages.** The sole purpose of an instruction upon the question of damages is to furnish the jury a rule by which to estimate them.[67] Where there is an entire absence of any evidence tending to show that plaintiff has sustained any damages by reason of the unlawful detention of his property, no instruction should be given on that point,[68] nor should punitive damages be defined where the evidence does not show any willful wrong or malice on the part of defendant.[69]

[§ 290] **G. Verdict and Findings[70]—1. In General—a. Requisites and Sufficiency in General.** Statutes in the various jurisdictions have provided certain requisites for verdicts in replevin actions.[71] Verdicts therein are to follow and be controlled by such statutes,[72] and if in disregard thereof are not authorized;[73] but a verdict which contains all that the statute prescribes must be held sufficient.[74] A verdict or finding must be so definite, special, and full that the court may ascertain from its terms what judgment to render thereon,[75] must be supported by the weight of the evidence,[76] and must not be repugnant or inconsistent.[77] If a verdict can be un-

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[a] **Instruction held erroneous.**—An instruction, in an action of claim and delivery for an automobile claimed as a gift, was held erroneous as requiring undue immediacy of delivery to donee. Harrell v. Tripp, 197 N. C. 426, 149 SE 548.

62. Chamberlin v. Winn, 1 Wash. 259, 24 P 446, 1 Wash. 501, 20 P 780.

63. Meyer v. Michaels, 69 Nebr. 138, 95 NW 63, 97 NW 817.

[a] **Instruction held proper.**—Instruction held not to authorize the jury to disregard the opinion of witnesses as to the value of the goods, but when properly construed required such opinions to be considered in connection with the other evidence and in the right of the jurors' own experience. Meyer v. Michaels, 69 Nebr. 138, 95 NW 63, 97 NW 817.

64. Morss v. Stone, 5 Barb. (N. Y.) 516 (if there is any evidence tending to show that a part of the goods replevied belonged to a third person, the jury ought to be charged, that if they find this to be a fact, to give a verdict for the value thereof to defendant).

65. Yahlem Motor Co. v. McCord, (Mo. A.) 299 SW 49.

[a] **Value at specified time.**—Instructions authorizing a verdict for defendant for the value of an automobile replevied when seized, there being no evidence of its value at that time, is erroneous. Yahlem Motor Co. v. McCord, (Mo. A.) 299 SW 49.

66. Spencer v. Bell, 109 N. C. 39, 13 SE 704.

67. Morehead v. Adams, 18 Nebr. 569, 26 NW 242.

68. Brown v. Morris, 3 Kan. A. 86, 45 P 98; Hanlon v. Goodyear, 103 Mo. A. 416, 77 SW 481.

[a] **Instruction held improper.**—An instruction authorizing the jury to determine the value of the use of the property by the common knowledge possessed by them with reference thereto, there being an entire absence of any evidence to show that plaintiff suffered any loss because of the unlawful detention of his property. Brown v. Morris, 3 Kan. A. 86, 45 P 98.

69. Gregory v. Woodbery, 53 Fla. 566, 43 S 504.

70. **Cross references:**

Amendment see Trial [38 Cyc 1892 et seq].

Appeal from justice see Justices of the Peace §§ 386-698.

Construction of special findings see Trial [38 Cyc 1930 et seq].

Time of raising objection to verdict see Trial [38 Cyc 1904].

Verdict generally see Trial [38 Cyc 1868].

71. See statutory provisions.

72. Spence v. Holman, 30 Ga. 646; Fulkerson v. Dinkins, 28 Mo. A. 160; Heffley v. Hunger, 54 Nebr. 776, 75 NW 53; Connelly v. Edgerton, 22 Nebr. 82, 34 NW 76.

[a] **Substantial compliance** with the terms of the statute is required. Fulkerson v. Dinkins, 28 Mo. A. 160.

[b] **Verdicts held sufficient.**—(1) In form and substance. Connelly v. Edgerton, 22 Nebr. 82, 34 NW 76. (2) Verdict finding right of property and right of possession in defendant, and assessing the value of defendant's interest and also his damages. Heffley v. Hunger, 54 Nebr. 776, 75 NW 53.

[c] **Forms of verdict.**—Wilkins v. Willimon, 128 S. C. 509, 122 SE 503.

73. McCargar v. Wiley, 112 Or. 215, 229 P 665; Beemis v. Wylie, 19 Wis. 318.

[a] **In replevin before justice,** if he finds for plaintiff, he should find the value of the property, and that plaintiff is entitled to the possession, and should assess his damages for the unjust taking and detention, and should then enter an order on his docket that the officer deliver the property to plaintiff. Beemis v. Wylie, 19 Wis. 318.

[b] **Verdict in form as if action were on case** is wholly unwarranted in an action of claim and delivery of personal property. Wheeler v. Allen, 49 Barb. 460 [aff 51 N. Y. 37].

74. Corbell v. Childers, 17 Or. 528, 21 P 670.

75. Alderman v. Manchester, 49 Mich. 48, 12 NW 905; Smith v. Dinneen, 61 App. Div. 264, 70 NYS 477; Hewson v. Saffin, 7 Oh. Pt. II 232.

[a] **Judgment cannot be sustained** by a verdict so indefinite and uncertain that it is impossible to tell therefrom the conclusion of the jury as to a material issue. Smith v. Dinneen, 61 App. Div. 264, 70 NYS 477.

[b] **Special interest.**—Under statutes providing that when either party has a lien or special property in the property replevied, and is not the general owner, the finding shall be in accordance with such fact, a special verdict full enough to enable the trial court to render a proper judgment is required. Alderman v. Manchester, 49 Mich. 48, 12 NW 905.

[c] **Verdict held not indefinite and uncertain.**—Crawford v. Meadows, 55 Cal. A. 4, 203 P 428.

76. Ill.—Shelton v. Franklin, 68 Ill. 333; Dobbins v. Hanchett, 20 Ill. A. 396. See also Thanapoulos v. Boumboulos, 182 Ill. A. 424.

Ind.—Edmundson v. Friedell, 199 Ind. 582, 159 NE 428; Sharp v. McBride, 69 Ind. 396.

Nebr.—Williams v. Eckenberry, 22 Nebr. 210, 34 NW 373.

N. Y.—Burdsall v. Kiehl, 157 NYS 383; Hedges v. Payne, 17 NYS 809; Green v. Burke, 23 Wend. 490.

Oh.—Gallipolis Furniture Co. v. Symmes, 19 Oh. Cir. Ct. 659, 10 Oh. Cir. Dec. 514.

[a] **Illustrations.**—(1) Where defendant pleads property in several persons, and the jury returns a verdict of not guilty and property in a certain one of the parties, but the evidence shows title to have been in a certain other party, a judgment thereon will be reversed. Dobbins v. Hanchett, 20 Ill. A. 396. (2) In replevin for goods sold under a conditional contract of sale, where defendant admitted he had not paid for the goods, verdict for defendant is erroneous. Burdsall v. Kiehl, 157 NYS 383.

[b] **Verdict manifestly against weight of evidence** should be set aside. Gallipolis Furniture Co. v. Symmes, 19 Oh. Cir. Ct. 659, 10 Oh. Cir. Dec. 514.

[c] **Absence of evidence.**—Findings are not required as to matters upon which there is no evidence. Edmundson v. Friedell, 199 Ind. 582, 159 NE 428.

77. Tardy v. Howard, 12 Ind. 404; Nottingham v. Vincent, 50 Mich. 461, 15 NW 551; Stockham v. Leach, 210 Mo. A. 407, 238 SW 853; Hewson v. Saffin, 7 Oh. Pt. II 232.

[a] **Illustration.**—In an action for replevin of a sawmill, in which defendants claimed damages on account of wrongful taking and preventing their carrying out a contract with plaintiff to use the sawmill in sawing timber, a verdict giving plaintiffs possession of the sawmill and for damages for defendants for the wrongful taking, was contradictory, and requires reversal of the entire

derstood it will be sustained although informal[78] and will not be set aside for formal defects or omissions therein, if it is supported by special findings and the evidence in the case.[79] The verdict need not show on what ground the jury reached their conclusion,[80] and the findings should state the ultimate facts pleaded, and not the probative facts.[81] Although it is the better form to embrace all the findings in one verdict, the fact that the findings are embraced in separate verdicts is merely an informality which will not vitiate the verdict.[82]

[§ 291] b. Responsiveness to Issues in General.[83]

The verdict and findings in an action of replevin must be responsive to all the material issues of fact raised by the pleadings and proof,[84] and are generally sufficient if they follow the pleadings.[85] If a verdict is responsive to the issues it will not be rejected because of immaterial findings,[86] nor will a verdict responsive to the paramount issues of the case be held insufficient because of a failure to find on an immaterial issue;[87] but if it varies from the issues in a substantial matter, as where it finds only a part of that which is in issue, a judgment thereon cannot be sustained.[88] It is not required, however, that the

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judgment based thereon. Stockham v. Leach, 210 Mo. A. 407, 238 SW 853.

[b] **Verdict which finds two inconsistent material facts** is void and cannot be the foundation of a legal judgment. Hewson v. Saffin, 7 Oh. Pt II 232.

[78] Dupuis v. Dupuis, 100 Conn. 96, 122 A 904; Mitchell v. Burch, 36 Ind. 529; Exchange Nat. Bank v. McCaffery, 175 Iowa 451, 157 NW 209.

[a] **Misuse of word.**—Where the form of the verdict is clear, and shows that the interest of plaintiff who replevied the goods is qualified, the improper use of the word "bailee" will not invalidate the verdict. Exchange Nat. Bank v. McCaffery, 175 Iowa 451, 157 NW 209.

[79] Hershiser v. Delone, 24 Nebr. 380, 38 NW 863.

[80] Standard Varnish Works v. Cushing, 202 Mass. 576, 89 NE 163.

[81] Peerless Ins., etc., Co. v. Dwyer Equipment Co., 78 Cal. A. 141, 248 P 303; Vasey v. Campbell, 4 Cal. A. 451, 88 P 509.

[a] **Findings as to ultimate facts control** as against findings of probative facts. Vasey v. Campbell, 4 Cal. A. 451, 88 P 509.

[82] Dupuis v. Dupuis, 100 Conn. 96, 122 A 904 [quot Cyc]; Mitchell v. Burch, 36 Ind. 529. But see Williams v. Devine, 52 Miss. 139 (holding that, where there is but one declaration with but one plea, against two persons jointly, two verdicts against such persons are void, as there should be either two declarations or only one verdict).

[83] **Conformity of judgment to verdict in general** see infra §§ 316, 317.

Sufficiency of verdict as to title and right to possession see infra § 293.

[84] Ark.—Smith v. Houston, 25 Ark. 183.

Cal.—Pratt v. Welcome, 6 Cal. A. 475, 92 P 500.

Colo.—Sears v. Andrews, 1 Colo. 88.

Dak.—Rudolph v. North, 6 Dak. 79, 50 NW 487.

Ida.—Campbell v. Rexburg First Nat. Bank, 13 Ida. 95, 88 P 639.

Ill.—Shelton v. Franklin, 68 Ill. 333.

Ind.—Washburn v. Roberts, 72 Ind. 213; Keller v. Boatman, 49 Ind. 101; Wilhelm v. Scott, 14 Ind. A. 275, 40 NE 537, 42 NE 827.

Ky.—Lyon v. Stewart, 5 J. J. Marsh. 676; Gambrell v. Gambrell, 130 Ky. 714, 113 SW 885.

Mich.—Congdon v. Bailey, 121 Mich. 570, 80 NW 369; Moore v. Vrooman, 32 Mich. 526.

N. J.—Middleton v. Quigley, 12 N. J. L. 352.

N. D.—Johnson v. Glaspey, 16 N. D. 335, 113 NW 602.

Or.—McCargar v. Wiley, 112 Or. 215, 229 P 665; Freeman v. Trummer, 50 Or. 287, 91 P 1077; Nunn v. Bird, 36 Or. 515, 59 P 808; Yick Kee v. Dunbar, 20 Or. 416, 26 P 275.

S. D.—Hormann v. Sherin, 6 S. D. 82, 60 NW 145.

Wis.—De Groot v. Veldboom, 167 Wis. 107, 166 NW 662; Feder v. Daniels, 79 Wis. 578, 48 NW 799; Hass v. Prescott, 38 Wis. 146; Everit v. Walworth County Bank, 13 Wis. 419; Smith v. Phelps, 7 Wis. 211.

[a] **Verdict held sufficient.**—Where plaintiff's right to possession depends upon the validity of a note and mortgage to which defendant pleads payment and usury, a verdict that the chattels are the property of defendant and that he is entitled to possession thereof is tantamount to a general verdict upon the issues of usury and payment and is sufficient to support a judgment for defendant. Nunn v. Bird, 36 Or. 515, 59 P 808.

[b] **Verdicts held insufficient.**—(1) Where defendant in replevin for personalty exchanged for realty counterclaimed, asserting that plaintiff through fraud inserted in the deed a clause obligating him to assume a mortgage, a finding for defendant was fatally defective, where it did not contain a finding exonerating him from negligence in accepting a conveyance containing an assumption clause. De Groot v. Veldboom, 167 Wis. 107, 166 NW 662. (2) A verdict finding that at the time the suit was filed defendant wrongfully detained the property from plaintiff and that the same has not been delivered to plaintiff held in effect to find that plaintiff was entitled to possession of the property when the suit was filed. Teel v. Teel, (Mo. A.) 8 SW (2d) 1086.

[c] **Findings held sufficient.**—(1) If they support the judgment and conform to the theory of the prevailing party. Freeman v. Trummer, 50 Or. 287, 91 P 1077. (2) Where they conform to the new matter averred in the answer and disprove plaintiff's right, although there are no findings conformable to the complaint, no request having been made therefor. Freeman v. Trummer, supra.

[d] **Findings held insufficient.**—In an action of replevin for clover seed raised on certain land, a special finding showing that plaintiff had leased the land for one year and as much longer as he desired to retain it, will not support a conclusion of law that he is entitled to clover seed produced upon the land in the third year after the lease was executed, unless there is also a finding that the tenancy continued up to that time. Hess v. Hess, 119 Ind. 66, 21 NW 339.

[e] **Finding a conclusion of law.**—A special finding that "We the jury find that the plaintiff had a right to replevy the mill," amounts to no more than a conclusion of law, which the jury cannot decide and will not authorize a judgment for the possession of the property. Keller v. Boatman, 49 Ind. 101.

[f] **Verdict must dispose of all the issues,** and if special it must find every fact in issue essential to support the judgment. Everit v. Walworth County Bank, 13 Wis. 419.

[g] **Presumptions.**—Where there are no written pleadings and the record does not disclose the issue tried, and the verdict is sufficient as to some issues which may arise in an action of replevin, it will be presumed that it is responsive to the issue which was tried. Sears v. Andrews, 1 Colo. 88.

[85] Peerless Ins., etc., Co. v. Dwyer Equipment Co., 78 Cal. A. 141, 248 P 303; Beggs v. Smith, 26 Cal. A. 532, 147 P 585; Vasey v. Campbell, 4 Cal. A. 451, 88 P 509.

[a] **Findings of fact** which follow the pleadings in the statement of ultimate facts are sufficient. Peerless Ins., etc., Co. v. Dwyer Equipment Co., 78 Cal. A. 141, 248 P 303.

[86] Baum Iron Co. v. Union Sav. Bank, 50 Nebr. 387, 69 NW 939.

[87] Faure v. Drollinger, 60 Cal. A. 594, 213 P 724; International Text-Book Co. v. Holmes, 25 Cal. A. 474, 144 P 146.

[a] **Thus,** in claim and delivery for certain books, where there was a finding that defendant was not guilty, supporting a judgment for defendant, a finding as to value and the conclusion of law that plaintiff has no capacity to sue in the state because it had not complied with Civ. Code §§ 405, 408, 410, is immaterial and unnecessary. International Text-Book Co. v. Holmes, 25 Cal. A. 474, 144 P 146.

[88] Ark.—Smith v. Houston, 25 Ark. 183.

Dak.—Holt v. Van Eps, 1 Dak. 206, 46 NW 689.

Ill.—Goldstein v. Smith, 85 Ill. A. 588; Nelson v. Bowen, 15 Ill. A. 477.

Nebr.—Hayes v. Slobodny, 54 Nebr. 511, 74 NW 961.

N. J.—Middleton v. Quigley, 12 N. J. L. 352.

R. I.—Leiter v. Lyons, 24 R. I. 42, 52 A 78.

[a] **Where there is a substantial difference between issues joined** (1) a verdict finding on only one of the issues is insufficient. Middleton v. Quigley, 12 N. J. L. 352. (2) In replevin for goods seized in distress for rent, the pleas of "non tenuit" and "nothing in arrear" are substantially different, and a verdict finding for plaintiff on the issue of "nothing in arrear," without any finding on the issue of "non tenuit" will not support

verdict shall be expressed formally and precisely in the words of the issues, or that it shall find affirmatively or negatively on every issue;[89] but it will be liberally construed as to matters of form, and although it is expressed in an informal manner, if it contains sufficient to show the intention of the jury, the court may correct the informalities and put the verdict into proper form so as to make it serve as a basis for a judgment.[90] A verdict in replevin ordinarily sufficiently covers all the issues, where it finds for plaintiff or defendant, as the case may be, and that he is entitled to the immediate possession of the property described and sets out the property and its value, and assesses damages for the detention.[91]

[§ 292] **c. General Verdict or Finding.**[92] As a general rule, in the absence of a request for a special finding, a general verdict or finding for plaintiff or defendant responds to all the issues as to which the law does not require a special verdict and is a sufficient finding in favor of the prevailing party,[93] unless such verdict or finding is contrary to the evidence[94] or is repugnant or inconsistent,[95] as where it is upon different and inconsistent pleas;[96] and such general verdict or finding is sufficient to support a judgment ordering a return of the property.[97] Thus a general verdict or finding of the issues in plaintiff's favor includes all the issues, except that of value.[98] Likewise a general verdict for defendant, and assessing damages, is as against plaintiff a sufficient finding on all the issues.[99] Under some statutes, however, a general verdict for plaintiff in an action for the recovery of specific personal property is not sufficient, but it must specify the property to which he is entitled and its value.[1] Special findings control a general verdict if inconsistent therewith,[2] but all doubts as to their meaning will be resolved in favor of upholding the general verdict,[3] and if not inconsistent therewith a general finding is not cut down by special matters stated in the verdict.[4]

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a judgment for him. Middleton v. Quigley, supra.

[89] Payne v. June, 92 Ind. 252; Lindauer v. Teeter, 41 N. J. L. 255; Corbell v. Childers, 17 Or. 528, 21 P 670.

[90] Nebr.—Degering v. Flick, 14 Nebr. 448, 16 NW 824.

N. J.—Lindauer v. Teeter, 41 N. J. L. 255.

N. M.—Brannin v. Bremen, 2 N. M. 40.

N. Y.—Thompson v. Button, 14 Johns. 84.

Pa.—Park v. Holmes, 147 Pa. 497, 23 A 769.

R. I.—Kebabian v. Adams Express Co., 28 R. I. 177, 66 A 201.

[91] Washburn v. Roberts, 72 Ind. 213; Clerk v. Heck, 17 Ind. 281; Corbell v. Childers, 17 Or. 528, 21 P 670.

[92] **General verdict or finding as determining:**
Ownership and right to possession of:
  Defendant see infra § 293 note 19.
  Plaintiff see infra § 293 note 18.
Wrongful taking or detention see infra § 294.

[93] Cal.—Cain v. Cody, 29 P 778.

Colo.—Freas v. Lake, 2 Colo. 480.

Fla.—Burnett v. Soule, 78 Fla. 507, 83 S 461 [cit Cyc].

Ida.—Tannahill v. Lydon, 31 Ida. 608, 173 P 1146; Johnson v. Fraser, 2 Ida. (Hasb.) 371, 18 P 48.

Ill.—Underwood v. White, 45 Ill. 437; Atlas Sewer Pipe Co. v. Stickney, 70 Ill. A. 176.

Ind.—Clark v. Heck, 17 Ind. 281.

Mich.—Harris v. O'Gorman, 118 Mich. 553, 77 NW 12.

Nebr.—Degering v. Flick, 14 Nebr. 448, 16 NW 824.

N. M.—Gallegos v. Lopez, 27 N. M. 603, 204 P 71.

N. Y.—Thompson v. Button, 14 Johns. 84.

Or.—Yick Kee v. Dunbar, 20 Or. 416, 26 P 275.

S. C.—Harry L. Hussman Refrigerator, etc., Co. v. Cash, etc., Grocer, Inc., 134 S. C. 191, 132 SE 173.

S. D.—Gaines v. White, 1 S. D. 434, 47 NW 524.

Wis.—Krause v. Cutting, 32 Wis. 687, 28 Wis. 655.

[a] **Thus** (1) in an action of claim and delivery, a general verdict finding for or against either party is sufficient to enable the court to enter judgment thereon for the return of the property, when such return is the appropriate remedy. Johnson v. Fraser, 2 Ida. (Hasb.) 404, 18 P 48. (2) Where a counterclaim was interposed, a finding for plaintiff for possession was a sufficient finding against the counterclaim. Harry L. Hussmann Refrigerator, etc., Co. v. Cash, etc., Grocer, 134 S. C. 191, 132 SE 173.

[94] Green v. Burke, 23 Wend. (N. Y.) 490.

[95] Tardy v. Howard, 12 Ind. 404.

[96] Hewson v. Saffin, 7 Oh. Pt. II, 232.

[97] Underwood v. White, 45 Ill. 437; Harris v. O'Gorman, 118 Mich. 553, 77 NW 12.

[98] Sullivan v. Girson, 39 Mont. 274, 102 P 320.

[a] **Compliance with statute.**—Requirements of Rev. Code (1921) § 9363 are substantially conformed to where the verdict contains a general finding for plaintiff, together with a finding of value. Sullivan v. Girson, 39 Mont. 274, 102 P 320.

Finding as to value see infra §§ 305-309.

[99] Ill.—Holmes v. Tarble, 77 Ill. A. 114; Atlas Sewer Pipe Co. v. Stickney, 70 Ill. A. 176.

Ind.—Baldwin v. Burrows, 95 Ind. 81; Brunk v. Champ, 88 Ind. 188; Wheat v. Catterlin, 23 Ind. 85.

Ky.—Baldwin v. Dewitt, 43 SW 246, 19 KyL 1248.

N. M.—Gallegos v. Lopez, 27 N. M. 603, 204 P 71.

Pa.—Huston v. Wilson, 3 Watts 287.

Wis.—Blakeslee v. Rossman, 44 Wis. 550.

Wyo.—Jones v. Parker, 39 Wyo. 423, 273 P 687; Gregory v. Morris, 1 Wyo. 213 [aff 96 U. S. 619, 24 L. ed. 740].

[a] **Thus** (1) a verdict "for defendant" is in effect a finding that plaintiff unlawfully took the property, and that defendant is entitled to the possession. Wheat v. Catterlin, 23 Ind. 85. (2) In an action of replevin against a sheriff and execution plaintiffs, a verdict for defendants generally as to part of the property, instead of for the sheriff alone, is good. Brunk v. Champ, 88 Ind. 188. (3) A general finding "for defendant" is sufficient to support a judgment for defendant, without fixing the amount recoverable, where defendant by his pleading asks judgment for a specified amount, paid by him on the property which plaintiff seeks to recover, and of which plaintiff has taken possession under an order of delivery. Baldwin v. Dewitt, 43 SW 246, 19 KyL 1248.

[1] Gulath v. Waldstein, 7 Mo. A. 66.

[2] Mauney v. Millar, 117 Ark. 633, 175 SW 402; Jarrett v. Cauldwell, 47 Ind. A. 478, 94 NE 790; Wyandotte Nat. Bank v. Simpson, 8 Kan. A. 748, 55 P 347; Joiner v. Bevier, 155 S. C. 340, 152 SE 652.

[a] **Answers to interrogatories** held to prevail over an inconsistent general verdict. Mauney v. Millar, 117 Ark. 633, 175 SW 402.

[b] **Special finding** (1) of five thousand five hundred dollars damages controls as against no finding of general damages in the verdict. Joiner v. Bevier, 155 S. C. 340, 152 SE 652. (2) In replevin to recover property fraudulently obtained in an exchange of personalty, the fact that plaintiff did not return or offer to return everything received in the trade before suing, while not in itself sufficient to overthrow a general verdict for him, defeats the verdict in connection with special findings to the effect that defendant did not prevent such offer or advise plaintiff that he would not accept it. Jarrett v. Cauldwell, 47 Ind. A. 478, 94 NE 790.

[c] **Verdict for plaintiff** may be set aside and judgment given for defendant where special findings entitle him thereto. Wyandotte Nat. Bank v. Simpson, 8 Kan. A. 748, 55 P 347.

[3] Welker v. Appleman, 44 Ind. A. 699, 90 NE 35.

[a] **Illustration.**—In replevin for wool on which defendant claimed a lien for commissions, answers to special interrogatories that the wool was delivered on cars for plaintiff, and that plaintiff was the owner, but that defendant retained possession, were not in irreconcilable conflict with a general verdict for defendant, on the theory that defendant, although loading the wool on the cars for plaintiff, intended to retain control under his lien until his claim was paid. Welker v. Appleman, 44 Ind. A. 699, 90 NE 35.

[4] Washburn v. Roberts, 72 Ind. 213; Lyman v. Goll, 111 Kan. 530, 207

[§ 293] **d. Title and Right to Possession.**[5] The verdict in an action of replevin must be responsive to the issue of title or right to possession, or both, according as such issues are raised by the pleadings,[6] and must not be contradictory or inconsistent,[7] although an informality or defect in such a verdict will not be fatal, if it is sufficient when aided by special findings and the evidence.[8] Thus, where the question of the ownership of the property is in issue, the verdict must contain a finding on such question in accordance with the pleadings,[9] and must decide the ownership or right to possession of all the property in issue.[10] Ordinarily if the verdict is silent as to a portion of the property in dispute, it is defective and insufficient.[11] The verdict need not show the general ownership of the property if the only issue is as to whether one or the other party has a special interest therein.[12] Thus, where plaintiff sues claiming a special ownership, a finding for plaintiff and that the property be returned to defendant, stating its value, is sufficient,[13] but a verdict that he is entitled to the possession thereof of a value which is the full value of the property and damages is erroneous;[14] and where defendant claims a special interest, a general verdict for him which does not show whether he is a general or special owner is irregular and insufficient.[15] It has been held, that under statutes providing that, where the property has been delivered to plaintiff and the jury find for defendant, they shall also find whether defendant had the right of property or the right of possession only at the time of the commencement of the action, a special verdict specifically stating the finding on such

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P 817; Dalke v. Pancoast, 63 Mont. 524, 208 P 589.

[a] **Special finding** (1) which is consistent with the general verdict does not impair the verdict in the least, and may be disregarded. Dalke v. Pancoast, 63 Mont. 524, 208 P 589. (2) Findings as to the recording of a release of a chattel mortgage on property claimed by defendant as a gift held not to require a judgment for the plaintiff, and not inconsistent with the general verdict for defendant. Lyman v. Goll, 111 Kan. 530, 207 P 817.

[5] **Requisites and sufficiency as to the title and right to possession considered with other findings** see supra § 290.

[6] Cal.—Pratt v. Welcome, 6 Cal. A. 475, 92 P 500.

Fla.—Bell v. Niles, 61 Fla. 114, 55 S 392.

Ill.—Nelson v. Bowen, 15 Ill. A. 477.

Iowa.—Morris v. Burley, 74 Iowa 45, 36 NW 882.

N. J.—Chambers v. Hunt, 18 N. J. L. 339.

Or.—McCargar v. Wiley, 112 Or. 215, 229 P 665.

Wis.—Appleton v. Barrett, 22 Wis. 568; Smith v. Phelps, 7 Wis. 211; Heeron v. Beckwith, 1 Wis. 17.

[a] **Payment of property purchased.**—On the issue of payment by plaintiff who purchased the property replevied from defendant, a finding that plaintiff paid a third party for the benefit of defendant is material and within the issues. Faure v. Drollinger, 60 Cal. A. 594, 213 P 724.

[b] **Right of possession.**—Ordinarily the verdict rendered should find and determine the right of possession to the property in dispute. Bell v. Niles, 61 Fla. 114, 55 S 392.

[7] Nottingham v. Vincent, 50 Mich. 461, 15 NW 551; Alderman v. Manchester, 49 Mich. 48, 12 NW 905.

[a] **Illustrations.**—(1) A special finding involving the conclusion that a third person is holding chattels under an unexpired lease is inconsistent with a general verdict for the lessor, in replevin by him against an officer who has levied on the chattels under an execution against the lessee, as it negatives plaintiff's possessory right. Nottingham v. Vincent, 50 Mich. 461, 15 NW 551. (2) In an action of replevin for property levied on as that of a person other than plaintiff, a verdict that plaintiff is the general owner, and that defendant has a lien to the amount of his levy, is contradictory, and insufficient to sustain a judgment. Alderman v. Manchester, 49 Mich. 48, 12 NW 905.

[8] Hershiser v. Delone, 24 Nebr. 380, 28 NW 863.

[a] **Thus** the omission of the word "possession" in the verdict is not a fatal defect, where the special findings and the evidence show that plaintiff is the owner of the property and entitled to its possession. Hershiser v. Delone, 24 Nebr. 380, 28 NW 863.

[9] Cal.—Stanley W. Smith, Inc. v. Pilgrim, 93 Cal. A. 539, 269 P 765.

Dak.—Holt v. Van Eps, 1 Dak. 206, 46 NW 689.

Ill.—Shelton v. Franklin, 68 Ill. 333.

Mo.—Ramsey v. Waters, 1 Mo. 406.

N. J.—Boswell v. Green, 25 N. J. L. 390; Chambers v. Hunt, 18 N. J. L. 339.

Or.—Wheeler v. Steadman, 99 Or. 414, 195 P 818.

R. I.—Thompson v. Dyer, 25 R. I. 321, 55 A 824, 25 R. I. 421, 56 A 446.

Wis.—Smith v. Phelps, 7 Wis. 211.

[a] **Illustrations.**—(1) A verdict finding the issues for defendant, but finding that the property is in a person not named in any one of the pleas, cannot be sustained. Shelton v. Franklin, 68 Ill. 333. (2) Plaintiff cannot have judgment on an issue of property in him, unless the jury find the property to be in him as alleged, and a verdict that the property is not in defendant or in those in whom he alleges it to be by way of inducement is not sufficient. Chambers v. Hunt, 18 N. J. L. 339.

[b] **Where defendant pleads title in another,** a verdict that the property was in plaintiff is responsive to the plea and covers the issues, although it omits the converse of the finding—that the property was not in the party set up as owner in the plea. Thompson v. Dyer, 25 R. I. 321, 55 A 824, 25 R. I. 421, 56 A 446.

[c] **Verdict must settle** the issue of ownership. Wheeler v. Steadman, 99 Or. 414, 195 P 818.

[d] **Time of ownership.**—Failure to find that plaintiff owned automobile when the complaint was filed is fatal to judgment for plaintiff. Stanley W. Smith, Inc. v. Pilgrim, 93 Cal. A. 539, 269 P 765.

[e] **In replevin against sheriff** a finding that, at the time alleged in the declaration, the property and the goods were in plaintiff is sufficient in replevin against a sheriff. Boswell v. Green, 25 N. J. L. 390.

[10] Feder v. Daniels, 79 Wis. 578, 48 NW 799; Carrier v. Carrier, 71 Wis. 111, 36 NW 626; Young v. Lego, 38 Wis. 206.

[11] Carrier v. Carrier, 71 Wis. 111, 36 NW 626; Young v. Lego, 38 Wis. 206.

[a] **Thus** (1) a verdict finding plaintiff to be entitled to part of the property, and silent as to the rest, is fatally defective, although the omitted property has not been taken from defendant's possession and his answer asks for no return. Carrier v. Carrier, 71 Wis. 111, 36 NW 626. (2) For a failure of the verdict to determine the right to the possession of one article in question there must be a new trial. Young v. Lego, 38 Wis. 206.

[b] **Exception to rule.**—Where plaintiff has possession of the property and the case is tried on the question as to what portion defendants are entitled to have returned to them, a verdict finding defendants entitled to a specified part is inferentially a finding that plaintiff is entitled to the remainder, and is sufficient; but plaintiff is entitled, if he claims it, to have the jury also specifically state in their verdict the portion he is entitled to. Campbell v. Rexburg First Nat. Bank, 13 Ida. 95, 88 P 639.

Silence of verdict as to portion of property replevied as showing only partial recovery see infra § 296.

[12] Single v. Barnard, 29 Wis. 463.

[b] **In Illinois** (1) where the pleas are non cepit, property in defendant, property in a third person, and justification of the taking under an execution against such third person, a verdict for defendant should contain a finding of the issue for defendant, that the property is the property of the party defendant in the execution; and a finding that defendant is not guilty and that the right of special property is in defendant is not sufficient. Hanford v. Obrecht, 49 Ill. 146. (2) Under a plea of property in defendant as sheriff under an execution, and in the judgment debtor, a verdict for defendant should find the issue for defendant and that the property in question was the property of the judgment debtor. Gilligan v. Stevens, 4 Ill. A. 401.

[13] Rogers v. Sample, 28 Nebr. 141, 44 NW 86.

[14] Kaufer v. Walsh, 88 Wis. 63, 59 NW 460.

[15] Cary Mfg. Co. v. Malone, 131 App. Div. 287, 115 NYS 632.

matters is required,[16] but the majority rule holds that ordinarily it is not necessary that there shall be an express finding that plaintiff or defendant, as the case may be, was the owner or entitled to the possession of the property at the time of the commencement of the action.[17] Thus, where his title and right of possession are in issue, a general finding for plaintiff is equivalent to a finding that he is the owner and entitled to the possession of the property which is the subject matter of the suit.[18] Likewise, a general verdict or finding for defendant determines against plaintiff an issue of property in defendant[19] or a stranger.[20] Also a verdict which finds facts from which ownership results as a matter of law is sufficient,[21] so that, where the only issue is whether or not plaintiff gave the property to defendant, plaintiff's instructions are not erroneous for failure to require the jury to find that plaintiff is entitled to the immediate and exclusive possession of the property.[22] A verdict which passes on the right of possession only does not ordinarily,[23] although there is some authority to the contrary,[24] sufficiently respond to an issue of ownership. However, if each party claims the right of possession by virtue of absolute ownership so that the party entitled to possession is necessarily the owner, a verdict which finds either party entitled to the possession of the property and the value thereof is a sufficient finding of ownership.[25] Verdicts such as not guilty,[26] or that defendant did or did not unlawfully take,[27] or did or did not unlawfully detain[28] the property, which are responsive to the issues of non cepit and non detinet, or which find only on the issue of damages,[29] are not responsive to an issue of ownership. However, it has been held that, where the evidence supports a plea of special property and the right of possession, a verdict finding defendant not guilty, assessing damages, and directing a return of the goods, although incorrect in form in failing directly to decide the issue of special property, is substantially right, and the court can correct the error in entering judgment.[30] And, where defendant pleads non cepit and non tenuit and property in himself, a verdict finding him guilty, and assessing damages, has been held equivalent to a finding of the property in plaintiff.[31] In some jurisdictions the issue of right of possession is sufficiently covered by a verdict finding the right of property in plaintiff or defendant and assessing damages for its detention,[32] but a verdict for defendant on the ground that plaintiff failed to show any title to the property in dispute does not settle the right of possession,[33] and after such a verdict it becomes the duty of the court to inquire further and determine who is entitled to the possession.[34] Upon a plea of not guilty a verdict is not sufficient which fails to find who is entitled to the right of possession of the property.[35] A verdict finding title and the right to immediate possession in defendants is sufficient to support a judgment dismissing the action.[36] A finding that plaintiff is the absolute owner of the property determines defendant's contention that a particular ownership existed between plaintiff and defendant therein.[37] On a trial by the court without a jury, a finding on the issues of ownership and right to possession may be made by a recital in the judgment rendered.[38]

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[16] Wolf v. Meyer, 12 Oh. St. 432.

[a] **In Nebraska** (1) a general verdict for plaintiff has been held responsive to an issue of ownership and of the right to possession. Baum Iron Co. v. Union Sav. Bank, 50 Nebr. 387, 69 NW 939; Degering v. Flick, 14 Nebr. 448, 16 NW 824. (2) Properly the finding should find the right of property and the right of possession. Degering v. Flick, supra. (3) And whenever the findings required by the code can or may be of practical worth to any party in the cause, whenever the interest of the prevailing party is an issue, the findings there prescribed must be made. Ulrich v. McConaughey, 63 Nebr. 10, 88 NW 150, 69 Nebr. 773, 96 NW 645. (4) But where there is no issue and the finding when made would be of no substantial utility to anyone in the cause, a judgment will not be reversed at the suit of one who is in no way prejudiced by the informality. Ulrich v. McConaughey, supra.

[17] McGregor v. Lang, 32 Mont. 568, 81 P 343. And see cases infra notes 18–20.

[18] Cal.—Cain v. Cody, 29 P 778; Yraceburn v. Cape, 60 Cal. A. 374, 212 P 938.

Conn.—McNamara v. Lyon, 69 Conn. 447, 37 A 981.

Fla.—Burnett v. Soule, 78 Fla. 507, 83 S 461.

Ind.—Payne v. June, 92 Ind. 252; Washburn v. Roberts, 72 Ind. 213; Crocker v. Hoffman, 48 Ind. 207; Rowan v. Teague, 24 Ind. 304; Thurman v. Miller, 50 Ind. A. 372, 98 NE 379; McAfee v. Montgomery, 21 Ind. A. 196, 51 NE 957; Van Gundy v. Carrigan, 4 Ind. A. 333, 30 NE 933.

Iowa.—Newlien v. Reed, 30 Iowa 496.

Kan.—O'Farrel v. McClure, (A.) 47 P 160.

Minn.—Coit v. Waples, 1 Minn. 134.

Mont.—Dalke v. Pancoast, 63 Mont. 524, 208 P 589; McGregor v. Lang, 32 Mont. 568, 81 P 343.

N. Y.—Thompson v. Button, 14 Johns. 84.

Or.—Yick Kee v. Dunbar, 20 Or. 416, 26 P 275; Corbell v. Childers, 17 Or. 528, 21 P 670. But see Wheeler v. Steadman, 99 Or. 414, 195 P 818 (where a verdict "for the defendant" was held insufficient in that it did not state who was the owner and entitled to the possession of the property); Smith v. Smith, 17 Or. 444, 21 P 439 (holding a verdict which simply finds for plaintiff in the sum of five hundred and twelve dollars insufficient); Jones v. Snider, 8 Or. 127 (where a verdict finding for plaintiff and assessing damages was held insufficient on the ground that the statute required a special verdict, specifically finding plaintiff the owner of the property or entitled to the possession).

S. D.—Towne v. Liedle, 10 S. D. 460, 74 NW 232; Gaines v. White, 1 S. D. 434, 47 NW 524.

Wis.—Krause v. Cutting, 32 Wis. 687, 28 Wis. 655; Everit v. Walworth County Bank, 13 Wis. 419 [cit and in effect overr Donalson v. Johnson, 2 Pinn. 482, 2 Chandl. 160].

[a] **Illustrations.**—(1) Finding "that possession of the property mentioned in the complaint be given to the plaintiff" held equivalent to finding the property in plaintiff, and that he is entitled to possession of the property. Robertson v. Caldwell, 9 Ind. 514. (2) Finding by the court sitting without a jury "that all of the allegations in plaintiffs' complaint are true and sustained by the evidence" is sufficient in form to cover every issue of fact presented by its averments, and amounts to a finding that plaintiffs' possession of the property sought to be replevied was rightful at the time of defendant's taking of the same into his possession. Yraceburn v. Cape, 60 Cal. A. 374, 212 P 938. (3) Finding of the issue for plaintiff with an express finding of ownership in plaintiff, but with no express finding as to the right of immediate possession, is sufficient, for the general finding is equivalent to an express finding that plaintiff is entitled to immediate possession. McNamara v. Lyon, 69 Conn. 447, 37 A 981.

[b] **Where there is but one issue made by pleadings** which is as to the title of the property, if the jury find for plaintiff and find the value and assess the damages, such finding is sufficient. Everit v. Walworth County Bank, 13 Wis. 419.

[c] **"It was never intended . . .** to hold that the verdict in this class of cases should follow the pleadings, and find affirmatively or negatively on every issue contained therein." Corbell v. Childers, 17 Or. 528, 530, 21 P 670.

[19] Ill.—Holmes v. Tarble, 77 Ill. A. 114.

Ind.—Baldwin v. Burrows, 95 Ind. 81.

Mo.—American Alliance Ins. Co. v. Mead, (A.) 242 SW 1005. Contra Fulkerson v. Dinkins, 28 Mo. A. 160.

N. M.—Gallegos v. Lopez, 27 N. M. 603, 204 P 71.

Pa.—Huston v. Wilson, 3 Watts 287.

Wyo.—Jones v. Parker, 39 Wyo. 423, 273 P 687; Gregory v. Morris, 1 Wyo. 213.

[a] **Thus,** where the only issues under the pleadings are as to ownership on which the right of possession depends and damages, a finding of the court merely for defendant is equivalent to a direct finding that defendant is the owner. American Alliance Ins. Co. v. Mead, (Mo. A.) 242 SW 1005.

[b] **Prejudicial error.**—Verdict will not be disturbed by informality which does not injuriously affect either party. Gregory v. Morris, 1 Wyo. 213.

[c] **Effect of statute.**—A statute requiring the jury to find whether defendant had the right to property, or the right of possession, relates to the consideration of the grounds upon which the verdict is based and not to the returning of a verdict, and does not prevent the return of a general verdict. Jones v. Parker, 39 Wyo. 423, 273 P 687; Gregory v. Morris, 1 Wyo. 213 [aff 96 U. S. 619, 24 L. ed. 740].

[20] Freas v. Lake, 2 Colo. 480.

[21] National Cash Register Co. v. Booneville, 119 Wis. 222, 96 NW 558.

[a] **Ownership legal conclusion from facts found.**—A verdict to the effect that defendant is entitled to possession, and that plaintiff unjustly took and detained the property, from which facts ownership results as a matter of law, is sufficient, although it does not expressly determine the ownership of the property. National Cash Register Co. v. Booneville, 119 Wis. 222, 96 NW 558.

[22] Feil v. Wells, (Mo. A.) 268 SW 893.

[a] **Reason for rule.**—"If the jury found the facts placed before them in these instructions, they necessarily found that plaintiff was entitled to the immediate and exclusive possession of the bonds. Feil v. Wells, (Mo. A.) 268 SW 893.

[23] Holt v. Van Eps, 1 Dak. 206, 46 NW 689; Feller v. Feller, 40 Or. 73, 66 P 468; Yick Kee v. Dunbar, 20 Or. 416, 26 P 275; Appleton v. Barrett, 22 Wis. 568; Child v. Child, 13 Wis. 17 [overr on other grounds Hass v. Prescott, 38 Wis. 146].

[a] **Thus,** where plaintiff alleges that he is the owner and entitled to the possession of specified property, a verdict that plaintiff is entitled to the possession of such property as described in the complaint is insufficient to sustain a judgment for plaintiff, because of its not finding on the issue of ownership. Feller v. Feller, 40 Or. 73, 66 P 468; Yick Kee v. Dunbar, 20 Or. 416, 26 P 275.

[24] Robertson v. Caldwell, 9 Ind. 514.

[a] **Finding** "that the possession of the property mentioned in the complaint be given to the plaintiff" is equivalent to a finding of property in plaintiff, and that he is entitled to possession. Robertson v. Caldwell, 9 Ind. 514.

[b] **In justice's court.**—Plaintiff being able to prove either a general or special ownership in himself with the right of possession, a verdict that plaintiff is entitled to the possession of the property without finding that he is the owner thereof is sufficient to sustain a judgment for him. Buck v. Young, 1 Ind. A. 558, 27 NE 1106.

[§ 294] **e. Taking or Detention by Defendant.** A verdict in an action of replevin should also be responsive to the question of unlawful taking or unlawful detention, or both, when in issue, otherwise a judgment on the verdict cannot be sustained.[39] As a general rule the verdict should either in general or specific terms pass on the question of unlawful detention;[40] but where the verdict, when construed in the light of the issues and evidence, shows beyond all question the fact of unlawful detention, it is not fatally defective because it does not expressly state such fact.[41] Such issues are responded to by a general verdict or finding,[42] or by a verdict of guilty or not guilty,[43] but not by a special verdict specifically finding on other issues, but silent as to whether or not the property was unlawfully taken or detained;[44] nor does a verdict of unjust detention respond to an issue of unlawful taking.[45] However, where the verdict in form is on other issues, but the jury in finding them indirectly, although not in terms, passes on the question of unlawful detention, it is not fatally defective because it does not expressly state such fact.[46]

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[25] Branstetter v. Morgan, 3 N. D. 290, 35 NW 758.

[26] Rohe v. Pease, 189 Ill. 207, 59 NE 520; Hanford v. Obrecht, 38 Ill. 493; Faxon v. Monser, 125 Ill. A. 328; Hackett v. Jones, 34 Ill. A. 562.

[a] **Verdict of not guilty is responsive** to those issues only under which plaintiff is admitted to be the owner of the property. Rohe v. Pease, 189 Ill. 207, 59 NE 520 [rev 89 Ill. A. 657].

[b] **Writ of retorno habendo** cannot be awarded upon such a verdict. Rohe v. Pease, 189 Ill. 207, 59 NE 520 [rev 89 Ill. A. 657].

[27] Boynton v. Page, 13 Wend. (N. Y.) 425; Sprague v. Kneeland, 12 Wend. (N. Y.) 161; Bemus v. Beekman, 3 Wend. (N. Y.) 667.

[a] **Thus,** where there is a plea of property as well as a plea of non cepit and the jury find only the taking, a venire de novo will be awarded. Sprague v. Kneeland, 12 Wend. (N. Y.) 161.

[28] Harris v. O'Gorman, 118 Mich. 553, 77 NW 12; Page v. Ramsdell, 59 N. H. 575; Emmons v. Dowe, 2 Wis. 322.

[29] Smith v. Smith, 17 Or. 444, 21 P 439.

[30] Kebabian v. Adams Express Co., 28 R. I. 177, 66 A 201.

[31] Goldstein v. Smith, 85 Ill. A. 588.

[32] Stephens v. Scott, 13 Ind. 515; Cassel v. Western Stage Co., 12 Iowa 47.

[33] Standard Varnish Works v. Cushing, 202 Mass. 576, 89 NE 163.

[34] Standard Varnish Works v. Cushing, supra.

[35] Ford v. Ford, 3 Wis. 399; Heeron v. Beckwith, 1 Wis. 17.

[a] **Finding of "no cause of action"** is not a finding on the right of possession. Ford v. Ford, 3 Wis. 399.

[b] **Finding of judge** is not complete on the plea of not guilty unless it embraces the right of possession. Heeron v. Beckwith, 1 Wis. 17.

Issues raised by plea of not guilty see supra §§ 213-219.

[36] Lovette v. Morris, 138 Wash. 557, 244 P 977.

[37] Dieter v. Coyne, 201 Iowa 823, 208 NW 359.

[38] Sims v. Hunter, 44 Ida. 505, 258 P 550.

[39] Cal.—Williamson v. Strong, 68 P 486; Laughlin v. Thompson, 76 Cal. 287, 18 P 330.

Ill.—Nelson v. Bowen, 15 Ill. A. 477.

Ind.—Ridenour v. Beekman, 68 Ind. 236.

Kan.—Leroy v. McConnell, 8 Kan. 273.

Mo.—De Wolff v. Morino, (A.) 187 SW 620.

[a] **In replevin under code,** the wrongful detention is the gist of the action, and a verdict that finds that there was no wrongful detention is sufficient. Leroy v. McConnell, 8 Kan. 273.

[b] **Ordinarily fatal.**—Omission of findings of fact to find that defendant was in possession of the property when the action was instituted is ordinarily fatal. De Wolff v. Morino, (Mo. A.) 187 SW 620.

Harmless error see infra § 347.

[40] Eiseley v. Malchow, 9 Nebr. 174, 2 NW 372.

[a] **"Ordinarily** this is done in general terms, as for example: 'We find the issues in favor of the plaintiff.'" Eiseley v. Malchow, 9 Nebr. 174, 181, 2 NW 372.

[41] Clouston v. Gray, 48 Kan. 31, 28 P 983; Hormann v. Sherin, 6 S. D. 82, 60 NW 145; Nebeker v. Harvey, 21 Utah 363, 60 P 1029.

[a] **Thus** (1) a verdict for "plaintiff on all the issues," and that "plaintiff is entitled to the immediate possession" of the property, is sufficient, if no objection thereto is made, when rendered, without expressly finding ownership in plaintiff, and that it was wrongfully detained by defendant. Hormann v. Sherin, 6 S. D. 82, 60 NW 145. (2) The fact that the complaint contains an allegation of "wrongful taking" does not furnish a sufficient reason for setting aside a verdict for wrongful detention, when such detention is not only the main issue, but is the gravamen of the action, and when the case is tried mainly on that theory, and no objection to the complaint, based on such allegation, is raised by special plea, and the verdict is supported by the evidence. Nebeker v. Harvey, 21 Utah 363, 60 P 1029.

[42] Ark.—Smith v. Houston, 25 Ark. 183.

Cal.—Yraceburn v. Cape, 60 Cal. A. 374, 212 P 938.

Colo.—Freas v. Lake, 2 Colo. 480.

Fla.—Burnett v. Soule, 78 Fla. 507, 83 S 461.

Ind.—Wheat v. Catterlin, 23 Ind. 85; McAfee v. Montgomery, 21 Ind. A. 196, 51 NE 957.

Kan.—O'Farrel v. McClure, (A.) 47 P 160.

Md.—Hiser v. Webster, 139 Md. 236, 114 A 897.

Mo.—Rogers v. Davis, 194 Mo. A. 378, 184 SW 151.

Mont.—Dalke v. Pancoast, 63 Mont. 524, 208 P 589; Sullivan v. Girson, 39 Mont. 274, 102 P 320.

Wis.—Eldred v. Oconto County, 33 Wis. 133.

[a] **Illustration.**—Verdict held to amount to a finding that defendant's taking possession and detention of property replevied were and each of them was wrongful, and, being wrongful, such taking could not become a foundation for that portion of defendant's counterclaim based on the provisions of the estray laws, since

Possession of sheriff as detention. A finding that defendants are illegally withholding possession of the property is proper although the actual possession is in the sheriff under the writ.[47]

[§ 295] **f. Possession at Commencement of Action.** If defendant's possession at the time the writ was issued is in issue, a special verdict should specifically find thereon,[48] but, if it is not in issue, a finding as to such fact is not essential.[49] Thus, it has been held, under the statutes in some states that, in order to sustain a judgment for plaintiff, the verdict or special finding must show that defendant was in possession of the property when the writ of replevin was issued or at some time thereafter;[50] and in others that findings which fail to find that at the time the demand was made plaintiff had the right to possession of the property in dispute are insufficient to support a judgment for plaintiff.[51] But, where judgment is for defendant for a stipulated sum, an omission to make a finding as to the right of possession at the time of the commencement of the action is immaterial.[52] However, since the gist of the action is unlawful detention, a finding merely that plaintiff had possession of the property at the commencement of the action will not sustain a judgment against defendant for unlawfully detaining it.[53]

[§ 296] **g. Partial Recovery.** The verdict in replevin may be for plaintiff as to a part of the property claimed, and for defendant as to the rest.[54] If it is silent as to a part of the property claimed, its silence is equivalent to a verdict in favor of defendant as to such property.[55] However, the verdict should apply to each article mentioned in the pleadings,[56] and if plaintiff is entitled to only a partial recovery, it should expressly be for plaintiff as to the specific articles to which he is entitled, and for de-

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it amounted in fact to a finding that plaintiff's sheep, when taken by defendant, were not estrays. Yraceburn v. Cape, 60 Cal. A. 374, 212 P 938.

[b] **Form of verdict.**—Under plea denying the wrongful taking and wrongful detention, if defendant be successful, the verdict should be not for the return of the property, but simply "for defendant"; this would settle plaintiff's right to the chattel, but require him to pay the costs. Hiser v. Webster, 139 Md. 236, 114 A 897.

[c] **Court sitting without jury.**—A general finding of the issues in replevin for plaintiff is sufficient. Rogers v. Davis, 194 Mo. A. 378, 184 SW 151.

[43] Bourk v. Riggs, 38 Ill. 320; Nelson v. Bowen, 15 Ill. A. 477. See also Hanford v. Obrecht, 49 Ill. 146 (holding that a verdict of not guilty has been allowed by the court, although it is not technically a response to a plea of non cepit).

[44] Ark.—Smith v. Houston, 25 Ark. 183.

Ind.—Huff v. Gilbert, 4 Blackf. 19.

Mo.—Grant v. Stubblefield, 138 Mo. A. 555, 120 SW 647; Barnes v. Plessner, 137 Mo. A. 571, 119 SW 457.

Mont.—Olcott v. Gebo, 54 Mont. 35, 166 P 300; Hickey v. Breen, 40 Mont. 368, 106 P 881, 20 AnnCas 429.

Wis.—Swain v. Roys, 4 Wis. 150.

[a] **Illustrations.**—(1) A verdict that plaintiff was entitled to the property is not responsive to the issues on the pleas of non cepit and property in defendant. Smith v. Houston, 25 Ark. 183. (2) A verdict finding the property to be in plaintiff is not responsive to unlawful taking or detention. Huff v. Gilbert, 4 Blackf. (Ind.) 19. (3) A verdict finding the property to be in plaintiff and awarding damages for its detention is defective in not finding that the detention was unjust on the part of defendant. Swain v. Roys, 4 Wis. 150. (4) A verdict that plaintiff was the owner and entitled to the possession of the property, and fixing the value thereof, is insufficient for failure to find on the issues whether defendant took the property from plaintiff or detained it. Hickey v. Breen, 40 Mont. 368, 106 P 881, 20 AnnCas 429; Olcott v. Gebo, 54 Mont. 35, 166 P 300. (5) Where the evidence proving that the property was in the possession and control of defendant was weak, a verdict finding that plaintiff was at the institution of the suit the owner and entitled to the possession of the property, but failing to find whether defendant detained it, is insufficient, although the court submitted the issue of unlawful detention in its instructions. Barnes v. Plessner, 137 Mo. A. 571, 119 SW 457.

[45] Ronge v. Dawson, 9 Wis. 246.

[a] **Thus** in replevin in the cepit, a verdict of "unjust detention" does not dispose of the material issue raised by the allegation of taking, and is therefore bad. Ronge v. Dawson, 9 Wis. 246.

[46] Kluse v. Sparks, 10 Ind. A. 444, 36 NE 914, 37 NE 1047; Eiseley v. Malchow, 9 Nebr. 174, 2 NW 372.

[a] **Thus,** where the question of unlawful detention is controlled entirely by that of ownership, which is expressly covered by the finding, a judgment on such a verdict will not be reversed on the ground that it does not contain general or specific findings on the question of unlawful detention. Eiseley v. Malchow, 9 Nebr. 174, 2 NW 372.

[b] **Where defendants have admitted detention** by denying plaintiff's ownership, a verdict finding plaintiff the owner, and entitled to possession, implies that the detention was wrongful. Kluse v. Sparks, 10 Ind. A. 444, 36 NE 914, 37 NE 1047.

[47] Lundblade v. Pierce, 95 Cal. A. 192, 272 P 329.

[48] Long v. Hickey, 206 Mo. A. 92, 221 SW 757.

[49] Brown v. Shaw, (Mo. A.) 12 SW (2d) 508.

[50] Krosmopolski v. Paxton, 58 Miss. 581; McCormick v. McCormick, 40 Miss. 760.

[51] Davenport v. Alexander, 53 Cal. A. 688, 200 P 771.

[52] Banning v. Marleau, 133 Cal. 485, 65 P 964.

[53] Degering v. Flick, 14 Nebr. 450, 16 NW 825.

[54] Ill.—O'Keefe v. Kellogg, 15 Ill. 347.

Iowa.—Becker v. Staab, 114 Iowa 319, 86 NW 305.

Md.—Edelen v. Thompson, 2 Harr. & G. 31.

Mo.—Updyke v. Wheeler, 37 Mo. A. 680.

Mont.—Hayes v. Moffatt, 83 Mont. 185, 271 P 452; Collier v. Fitzpatrick, 19 Mont. 562, 48 P 1103.

N. H.—Williams v. Beede, 15 N. H. 483.

Pa.—Vansciver v. Churchill, 16 Pa. Dist. 362, 34 Pa. Co. 111.

Tex.—Elliott v. Long, 77 Tex. 467, 14 SW 145.

Vt.—Hotchkiss v. Ashley, 44 Vt. 195.

N. B.—Hanington v. Cormier, 16 N. B. 212.

Ont.—Haggart v. Kernahan, 17 U. C. Q. B. 341; Sills v. Hunt, 16 U. C. Q. B. 521; Henderson v. Sills, 8 U. C. C. P. 68.

[a] "**Verdict should be** for the plaintiff for the articles he proves are his and that are improperly detained by the defendant, and against him for the things that he fails to prove are his, or, even if his, are not proven to be improperly detained by the one he sues." Vansciver v. Churchill, 16 Pa. Dist. 362, 363, 34 Pa. Co. 111.

[b] **Where plaintiff disclaims ownership of part** of the property, a verdict for him for that part cannot be sustained. Updyke v. Wheeler, 37 Mo. A. 680.

[55] Hayes v. Moffatt, 83 Mont. 185. 271 P 452.

[a] **Defendant's right to return** of such property then becomes but a question of law for the court to declare as a legal conclusion in its judgment. Hayes v. Moffatt, 83 Mont. 185, 271 P 452.

[b] **Such verdict is sufficiently responsive** to the issues. Hayes v. Moffatt, 83 Mont. 185, 271 P 452.

[56] Vansciver v. Churchill, 16 Pa. Dist. 362, 34 Pa. Co. 111.

fendant as to the rest.[57] If the evidence shows that defendant and plaintiff are joint owners of the property, a verdict for defendant does not determine their rights therein.[58] Where the action is against two or more defendants, one may be found guilty and the others not guilty.[59]

[§ 297] **h. Return of Property.**[60] If the articles replevied have been disposed of, it is needless for the jury to award them specifically to the prevailing party,[61] but if the evidence is such that the jury should have found for a deliverance of the property, the failure to do so is a matter of complaint on the part of the prevailing party.[62] The verdict need not find for the return of property on which there is no issue;[63] and where plaintiff has obtained possession of the property under the writ, a verdict finding the issues for plaintiff for the return of the property is improper in form.[64]

[§ 298] **i. Alternative Verdict.**[65] The statutes usually require that a verdict in favor of a party for a return of the property should be in the alternative for the possession of the property or for the value thereof in case it cannot be returned.[66] Such statutes are mandatory,[67] and failure to comply therewith renders the verdict insufficient.[68] If the action is against codefendants not jointly liable, the verdict should not be general in form and against both defendants, but should be against each defendant separately for the specific property, or its value, wrongfully in his possession,[69] but an alternative verdict is not necessary upon such issues, where it is in favor of the party who has the possession of the property,[70] or where there cannot be a return of the property,[71] or if at the time of the trial the property has become worthless.[72] In some jurisdictions the verdict need not be in the alternative,[73] but may

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57. Vansciver v. Churchill, supra.

58. Reynolds v. McCormick, 62 Ill. 412.

[a] **Thus,** where defendant pleads property in himself, and the evidence shows that defendant and plaintiff owned the property jointly, a verdict for defendant on such issue does not determine judicially that the property belongs to him exclusively, so as to prevent plaintiff from recovering his individual share at a future period in some appropriate action. Reynolds v. McCormick,. 62 Ill. 412.

59. Wall v. De Mitkiewicz, 9 App. (D. C.) 109; Carothers v. Van Hagan, 2 Greene (Iowa) 481; Woodburn v. Chamberlin, 17 Barb. (N. Y.) 446.

[a] **In action against several defendants** to recover possession of personal property, if the jury find exclusive right of possession of the property to be in one of the defendants, they are not bound to render a general verdict in favor of all the defendants. Woodburn v. Chamberlin, 17 Barb. (N. Y.) 446.

60. **Alternative verdict** see infra § 298.

61. Gambrell v. Gambrell, 130 Ky. 714, 113 SW 885.

62. Gambrell v. Gambrell, supra. See also Spence v. Holman, 30 Ga. 646 (holding verdict for the return of the specific property sued for proper).

63. Mills v. Jackson, 19 Cal. A. 695, 127 P 655.

[a] **Issue.**—Where the answer did not ask for the return of property included in the original but omitted from the amended complaint, there is no issue as to such property. Mills v. Jackson, 19 Cal. A. 695, 127 P 655.

64. Stockham v. Leach, 210 Mo. A. 407, 238 SW 853.

65. **Alternative judgment** see infra § 325.

66. See statutory provisions.

67. Johnson v. Clutter Music House, 55 Fla. 385, 46 S 1; Archer v. Long, 32 S. C. 171, 11 SE 86.

68. Fla.—Johnson v. Clutter Music House, 55 Fla. 385, 46 S 1.

Miss.—Evans v. Junius Hart Piano House, 140 Miss. 467, 106 S 9.

Mo.—State v. Dunn, 60 Mo. 64; Fulkerson v. Dinkins, 28 Mo. A. 160; Gulath v. Waldstein, 7 Mo. A. 66.

Nev.—Carson v. Applegarth, 6 Nev. 187.

N. Y.—Goldstein v. Michaelson, 198 NYS 868; Lewisohn v. Apple, 12 NY CivProc 274.

Or.—Smith v. Smith, 17 Or. 444, 21 P 439.

S. C.—Manley v. Bailey, 151 S. C. 366, 149 SE 119; Davis-McGee Mule Co. v. Marett, 129 S. C. 36, 123 SE 323; Archer v. Long, 32 S. C. 171, 11 SE 86; Thompson v. Lee, 19 S. C. 489; Eason v. Miller, 18 S. C. 381; Bardin v. Drafts, 10 S. C. 493.

Wis.—Beemis v. Wylie, 19 Wis. 318.

[a] **Verdict held insufficient.**—(1) Verdict failing to identify the property to be returned is nothing more than a verdict for the value, and therefore void. Eason v. Miller, 18 S. C. 381. (2) Where plaintiff gave a bond and obtained the property, a verdict, "We find for defendant," is insufficient in that it did not call for a return to defendant of the property in dispute, and, if a return thereof cannot be had, for the value thereof. Davis-McGee Mule Co. v. Marett, 129 S. C. 36, 123 SE 323; Archer v. Long, 32 S. C. 171, 11 SE 86.

[b] **Verdict fatally defective.**—Johnson v. Clutter Music House, 55 Fla. 385, 46 S 1.

[c] **Verdict held to be in alternative.**—(1) "We find for the plaintiff for property in question, one cow and calf or the value thereof, twenty dollars." Bossard v. Vaughn, 68 S. C. 96, 46 SE 523. (2) "We find for the defendant the return of the property or $507.95." Bardin v. Drafts, 10 S. C. 493, 497. (3) Verdict in favor of the "plaintiffs for the full value of the goods not returned, and assessing their value at the sum of $11,164.27." Lewisohn v. Apple, 12 NYCivProc 274. (4) Verdict for plaintiff for possession of personalty or its specified value, with specified punitive damages, is correct in form. Manley v. Bailey, 151 S. C. 366, 149 SE 119.

[d] **Awarding money damages** (1) instead of possession of the property or its value is improper. Goldstein v. Michaelson, 198 NYS 868. (2) In replevin for property sold under a conditional sales contract, the verdict, if for plaintiff, should not be for the amount of defendant's debt, but should find for plaintiff the property, describing it, and its value or the value of plaintiff's interest therein. Evans v. Junius Hart Piano House, 140 Miss. 467, 106 S 9.

[e] **In replevin before justice,** the justice, if he finds for plaintiff, should find the value of the property and that plaintiff is entitled to the possession. Beemis v. Wylie, 19 Wis. 318.

[f] **In California** (1) under Code Civ. Proc. §§ 627, 667, in an action of claim and delivery, a verdict for the possession of the property or its value is sufficient, and it is not necessary that the verdict should provide for any delivery of the property; and, where the verdict finds a right of possession, the right to a delivery, if it can be had, or if not, the value of the property, in the alternative, is a conclusion of law which the judgment must contain, but not the verdict. Ryan v. Fitzgerald, 87 Cal. 345, 25 P 546. (2) It is essential to sustain a judgment for plaintiff that the court shall find that he is entitled to a recovery of the property sued for, and that a finding that he is entitled to judgment for a particular amount is not a compliance with the statute. Washburn v. Huntington, 78 Cal. 573, 21 P 305. (3) But a verdict which fails to find the value of the property is informal and insufficient. Stewart v. Taylor, 68 Cal. 5, 8 P 605.

69. Norris v. Clinkscales, 47 S. C. 488, 25 SE 797.

70. Hennessey v. Barnett, 12 Colo. A. 254, 55 P 197; Finley v. Cudd, 42 S. C. 121, 20 SE 32.

71. Noble v. Worthy, 1 Ind. T. 458, 45 SW 137; Richey v. Du Pre, 20 S. C. 6; McGraw v. Franklin, 2 Wash. 17, 25 P 911, 26 P 810. Contra Smith v. Smith, 17 Or. 444, 21 P 439.

[a] **Illustration.**—Money judgment is sufficient in replevin for cotton which defendant had sold. Richey v. Du Pre, 20 S. C. 6.

72. Duc v. Seel, 134 S. C. 10, 131 SE 778.

[a] **Party entitled to recover** may waive a verdict for the return of the property and accept a verdict for the recovery of money only. Duc v. Seel, 134 S. C. 10, 131 SE 778.

73. Smith v. Kemether, 24 Del. 572, 76 A 482; Tannahill v. Lydon, 31 Ida. 608, 173 P 1146; Johnson v. Fraser, 2 Ida. (Hasb.) 404, 18 P 48; Hynes v. Barnes, 30 Mont. 25, 75 P 523. See Anderson v. O'Laughlin, 1 Mont. 81 (defendant might complain that the jury failed to find, in their verdict, the value of the property, that he was entitled to a return thereof, and to assess damages, but plain-be either for the return of the property or for the value thereof.[74]

[§ 299] **j. Description of Property.** As a general rule a verdict in an action of replevin must describe the property involved with such definiteness and certainty that it may be clearly identified;[75] but if the parties by their pleadings and proof seem to understand thoroughly just what articles are in dispute, objection cannot be made to a verdict describing the property in the same language as used in the petition;[76] and, where the property is specifically described in the pleadings, the description in the verdict may be made certain by a reference therein to the pleadings.[77] Also, it has been held that a repetition in a general verdict for defendant of the description furnished by plaintiff in the replevin affidavit is both unnecessary and improper.[78] Where, however, the description of the property in the pleadings is insufficient, a verdict which refers only to the property described in the pleadings is fatally defective.[79] If the property involved consists of a number of articles or animals, some description more precise than merely their number is necessary,[80] and a verdict from which it is impossible to tell whether the jury found plaintiff entitled to all, or a part of the property, and if but to a part, to what part is so indefinite and uncertain that no judgment can be rendered upon it.[81]

[§ 300] **k. Submission of Special Interrogatories.**[82] Under some statutes the court may, in its discretion, submit questions for special findings, in an action of replevin, in addition to the usual findings in such an action,[83] but only controverted issues of fact may be so submitted.[84] As a general rule, however, a general verdict which disposes of all the issues is sufficient to support a judgment in such an action,[85] although some of the specific questions which are submitted to the jury are returned unanswered, particularly where no objection is made at the time of the return of the verdict, or until after the jury is discharged.[86]

[§ 301] **l. Construction and Operation.**[87] The

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tiff cannot).

[a] **In Indiana,** in actions originating before justices of the peace, a verdict for defendant should be for the return of the property only, and not in the alternative, but, if it is, the finding of value will be treated as surplusage. Van Meter v. Barnett, 119 Ind. 35, 20 NE 426.

74. Smith v. Kemether, 24 Del. 572, 76 A 482.

75. Ind.—Dowell v. Richardson, 10 Ind. 573.

Mo.—Lacquement v. Bellamy, (A.) 253 SW 1073.

N. Y.—Lehman v. Mayer, 68 App. Div. 12, 74 NYS 194.

N. D.—Smith v. Willoughby, 24 N. D. 1, 138 NW 7.

Okl.—McConnell v. Watkins, 42 Okl. 214, 140 P 1167.

Or.—Guille v. Fook, 13 Or. 577, 11 P 277.

S. C.—Bossard v. Vaughn, 68 S. C. 96, 46 SE 523; Eason v. Miller, 18 S. C. 381.

Tenn.—Harris v. Austell, 2 Baxt. 148.

[a] **Thus** (1) where plaintiff before trial sold at public auction the goods seized, but he himself bid in the most of them, a verdict for defendant should specifically describe the several articles of property. Smith v. Willoughby, 24 N. D. 1, 138 NW 7. (2) Verdict for plaintiff is bad for uncertainty if the court cannot determine therefrom what property the jury intended to find belonged to him. Dowell v. Richardson, 10 Ind. 573.

[b] **Description held sufficient.**—(1) A description of an animal giving its age, sex, and color is all that is required. McConnell v. Watkns, 42 Okl. 214, 140 P 1167. (2) A horse described as "one three year old dark gray filly." McConnell v. Watkins, supra. (3) Verdict in replevin was not ambiguous, indefinite, and unintelligible, nor bad as varying in description of property in judgment, which followed substantially the description of the petition. Lacquement v. Bellamy, (Mo. A.) 253 SW 1073.

76. Atkinson v. Lawrence, 161 Ky. 166, 170 SW 528.

[a] **Failure to object to petition.**—Where defendants made no motion for a bill of particulars, or a more definite description of the property, they cannot object to a verdict describing the property in the same language as used in the petition. Atkinson v. Lawrence, 161 Ky. 166, 170 SW 528.

77. Ark.—Hobbs v. Clark, 53 Ark. 411, 14 SW 652, 9 LRA 526.

Ind.—Anderson v. Lane, 32 Ind. 102.

Okl.—Dalton v. Bilbo, 126 Okl. 139, 258 P 274.

S. C.—Reardon v. Averbuck, 92 S. C. 569, 75 SE 959; Phœnix Furniture Co. v. Jaudon, 75 S. C. 229, 55 SE 308; Bossard v. Vaughn, 68 S. C. 96, 46 SE 523.

Vt.—Hotchkiss v. Ashley, 44 Vt. 195.

[a] **Rule applicable.**—The rule that that is certain which can be made so applies to verdicts. Hobbs v. Clark, 53 Ark. 411, 14 SW 652, 9 LRA 526.

[b] **Illustrations.**—(1) In an action to recover possession of a stock of goods covered by a mortgage, where no other goods were referred to in the pleadings or evidence, a verdict for "the recovery of the possession of the goods or the sum of $200" sufficiently identified the property. Reardon v. Averbuck, 92 S. C. 569, 75 SE 959. (2) Verdict in replevin awarding plaintiff property sued for was held sufficient as to description of property. Dalton v. Bilbo, 126 Okl. 139, 258 P 274. (3) A reference to the property in the verdict as "said property" is sufficient. Anderson v. Lane, 32 Ind. 102. (4) Verdict "that the defendant is not guilty in manner and form as the plaintiff in his declaration hath alleged" is sufficient under the general issue. Hotchkiss v. Ashley, 44 Vt. 195.

[c] **Where the answer puts in issue only the title** to, and not the identity of, the article described in the complaint, a verdict that "we the jury find for the plaintiff and the value of the property taken to be $72.05 and interest" is sufficiently definite, where the undisputed averments of the complaint show what property is referred to. Hobbs v. Clark, 53 Ark. 411, 14 SW 652, 9 LRA 526.

78. Gallegos v. Lopez, 27 N. M. 603, 204 P 71.

79. Pierce v. Langdon, 3 Ida. 141, 28 P 401.

80. Dowell v. Richardson, 10 Ind. 573; Guille v. Fook, 13 Or. 577, 11 P 277.

[a] **Thus** (1) a verdict which finds plaintiff entitled to that portion of the property described in the complaint, to wit, forty-nine hogs, is too indefinite where the complaint described sixty-six hogs. Guille v. Fook, 13 Or. 577, 11 P 277. (2) A verdict that two of the four hogs replevied were the property of plaintiff, and two were the property of defendant, is too uncertain. Dowell v. Richardson, 10 Ind. 573.

81. Richardson v. McCormick, 47 Iowa 80. See Gulath v. Waldstein, 7 Mo. A. 66 (holding that in replevin for tools and shed it is impossible to say what property plaintiff is entitled to where the jury merely "find for the plaintiff and assess his damages").

[a] **Thus** a verdict declaring plaintiff "entitled to the following property described in her petition viz: (naming the articles)," but which fails to enumerate the articles, is so indefinite and uncertain that no judgment can be rendered thereon. Richardson v. McCormick, 47 Iowa 80.

82. Effect of special finding on general verdict inconsistent therewith see supra § 292.

83. Singer Mfg. Co. v. Sammons, 49 Wis. 316, 5 NW 788.

[a] **No error exists** for refusal to submit questions, where a majority of the questions propounded are answered by a verdict in the usual form in such cases, and the others are immaterial, in view of the verdict rendered. Singer Mfg. Co. v. Sammons, 49 Wis. 316, 5 NW 788.

84. Stringham v. Cook, 75 Wis. 589, 44 NW 777.

[a] **It is not error** to refuse to submit questions, which on the evidence can be answered only in one way. Stringham v. Cook, 75 Wis. 589, 44 NW 777.

85. See supra § 292.

86. Faulkner v. Meyers, 6 Nebr. 414.

87. Construction and operation generally see Trial [38 Cyc 1901 et seq].

verdict or findings in an action of replevin, as in civil cases generally, should be construed to uphold rather than to defeat the verdict or the judgment thereon,[88] and should be construed in connection with the issues and proof, and, although informal or irregular, will generally be held sufficient if, when so construed, the intention of the jury is clear and covers all the issues in the case.[89] Findings are to be read and considered together, and, if possible, reconciled so as to prevent any conflict on material points.[90] A verdict may be construed with reference to the presumption that in replevin, where the property is taken under process, it will be presumed, in the absence of evidence to the contrary, that it was taken from the possession of defendant.[91] If no one is injured or prejudiced thereby, mere inaccuracies in the verdict,[92] as surplusage,[93] will not invalidate it. But where the verdict points specifically to one issue and omits others, it cannot be aided by intendment,[94] except where material or immaterial issues are joined and the material issue is passed upon by the jury.[95] A finding that plaintiff or defendant is the owner, etc., should be construed as relating to his title or possession at the time the action was commenced.[96]

[§ 302] **m. Amendment or Correction.** As a general rule, in replevin as in other civil actions,[97] where the findings of the jury are free from ambiguity and their intention can be ascertained from the data given in the verdict or referred to in the pleadings, the court may amend the verdict in point of form or language so as to give the real intention full expression in proper legal terms,[98] as by rejecting surplusage from the verdict,[99] or where the jury find for plaintiff but award no damages for the detention, by adding nominal damages.[1] But the court cannot amend or change the verdict of the jury in matters of substance,[2] as where the verdict finds damages only, it cannot be amended by the court by entering both debt and damages without the consent of the jury or of proper counsel;[3] nor can a verdict be amended so as to find the value of the property, where such value is not assessed by the jury;[4] nor can a verdict, defective in substance, be amended by adding nominal damages.[5] The jury may, before a delivery and record of the verdict, correct it to state separately where required by the statute, the value of the goods replevied, and the damages;[6] or the court may, of its own motion, remand the verdict to the jury, with instructions to find separately the value of each article replevied,[7] or to find the value of the property and damages for its detention;[8] but after the jury have been discharged, it is improper to recall them at a later day, and, upon further evidence submitted, allow them to return a verdict assessing the separate value of each article in controversy.[9]

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[88] Beggs v. Smith, 26 Cal. A. 532, 147 P 585; Vasey v. Campbell, 4 Cal. A. 451, 88 P 509; Blackfoot Stock Co. v. Delamue, 3 Ida. 291, 29 P 97; Bardin v. Drafts, 10 S. C. 493.

[a] **Rule applied** to findings of trial court. Beggs v. Smith, 26 Cal. A. 532, 147 P 585.

[b] **Every reasonable presumption** must be made in favor of the verdict. Bardin v. Drafts, 10 S. C. 493.

[89] Cal.—Faure v. Drollinger, 60 Cal. A. 594, 213 P 724; Beggs v. Smith, 26 Cal. A. 532, 147 P 585.

Fla.—Burnett v. Soule, 78 Fla. 507, 83 S 461.

Ind.—Kluse v. Sparks, 10 Ind. A. 444, 36 NE 914, 37 NE 1047.

N. J.—Lindauer v. Teeter, 41 N. J. L. 255.

Wis.—Blakeslee v. Rossman, 44 Wis. 550; Everit v. Walworth County Bank, 13 Wis. 419.

[a] **Illustration.**—Finding that allegations of answer were untrue, when considered and construed in connection with the pleadings and issues, was held a sufficient finding of plaintiff's ownership and right to possession when action was commenced. Beggs v. Smith, 26 Cal. A. 532, 147 P 585.

[b] **Every verdict** must be construed with reference to the issues tried. Everit v. Walworth County Bank, 13 Wis. 419.

[c] **Joint defendants.**—Where, under the pleadings and proof, the verdict if for plaintiff must be against defendants jointly, a verdict against "defendant" will be so understood. Kluse v. Sparks, 10 Ind. A. 444, 36 NE 914, 37 NE 1047.

[90] Faure v. Drollinger, 60 Cal. A. 594, 213 P 724.

[91] Pitts Agricultural Works v. Young, 6 S. D. 557, 62 NW 432.

[a] **Presumption.**—Verdict finding all the issues for defendant will ordinarily be construed with reference to this presumption, and not as finding that defendant was not in possession at the commencement of the action. Pitts Agricultural Works v. Young, 6 S. D. 557, 62 NW 432.

[92] Blakeslee v. Rossman, 44 Wis. 553.

[93] Van Meter v. Barnett, 119 Ind. 35, 20 NE 426; Kluse v. Sparks, 10 Ind. A. 444, 36 NE 914, 37 NE 1047; Lindauer v. Teeter, 41 N. J. L. 255.

[a] **Illustration.**—Finding of the value of the property in an action before a justice of the peace will be treated as surplusage. Van Meter v. Barnett, 119 Ind. 35, 20 NE 426.

[b] **If verdict** sufficiently covers the issues of the case, mere surplusage therein should be disregarded. Van Meter v. Barnett, 119 Ind. 35, 20 NE 426.

[94] Hackett v. Jones, 34 Ill. A. 562; Middleton v. Quigley, 12 N. J. L. 352.

[a] **Construction whereby verdict expressed in the terms of one issue** is extended to another issue is not admissible, unless it appears to be the necessary conclusion upon the whole record. Middleton v. Quigley, 12 N. J. L. 352.

[95] Ronge v. Dawson, 9 Wis. 246.

[96] Riess v. Delles, 45 Wis. 662.

[97] See Trial [38 Cyc 1892, 1931, 1987].

[98] U. S.—Arguellas v. Wood, 1 F. Cas. No. 520, 2 Cranch C. C. 579.

Kan.—Pope v. Bowzer, 1 Kan. A. 727, 41 P 1048.

Minn.—Coit v. Waples, 1 Minn. 134.

N. Y.—Emerson v. Bleakley, 2 Abb. Dec. 22, 2 Transcr. A. 171, 3 Transcr. A. 100, 5 AbbPrNS 350, 41 HowPr 511; Segelke v. Finan, 48 Hun 310, 1 NYS 381, 15 NYCivProc 1; Von Schoening v. Buchanan, 14 AbbPr 185, 468.

Wis.—Wallace v. Hilliard, 7 Wis. 627.

See Baxter v. Johnston, 10 N. B. 350.

[a] **Time of amendment.**—Where, in replevin for goods distrained for rent, the jury find the amount of the rent arrear in damages without stating it to be the amount of the rent, the court will permit the verdict to be so amended by the clerk after the jury have rendered their verdict and retired from the bar, and even after another cause has been tried. Arguellas v. Wood, 1 F. Cas. No. 520, 2 Cranch C. C. 579.

[99] Coit v. Waples, 1 Minn. 134.

[1] Coit v. Waples, supra; Segelke v. Finan, 48 Hun 310, 1 NYS 381, 15 NYCivProc 1; Von Schoening v. Buchanan, 14 AbbPr (N. Y.) 185, 468. But see Frey v. Drahos, 7 Nebr. 194 (holding that, under Code Civ. Proc. § 191, providing that in case either the right of property or right of possession be found in defendant's favor, his damages shall be assessed, the failure of the court on trial without a jury to assess at least nominal damages, where the right of possession is found in defendant, can be corrected only by a motion for a new trial, and preservation of all the testimony bearing on the question). And see infra § 310.

[2] Bodine v. Swisher, 66 Ill. 536; Moore v. Devol, 14 Iowa 112; Eaton v. Caldwell, 3 Minn. 134; Coit v. Waples, 1 Minn. 134; Wallace v. Hilliard, 7 Wis. 627.

[3] Bodine v. Swisher, 66 Ill. 536.

[4] Eaton v. Caldwell, 3 Minn. 134; Wallace v. Hilliard, 7 Wis. 627. But see Archer v. Boudinet, CodeRepNS (N. Y.) 372 (holding a finding of value immaterial, but stating that if it was necessary to be ascertained it could be done by the court which rendered the judgment).

[5] Bemus v. Beekman, 3 Wend. (N. Y.) 667 [rev. 7 Cow. 29].

[6] Farmers' Packing Co. v. Brown, 87 Md. 1, 39 A 625.

[a] **At any time** before it is recorded, a verdict may be varied by the jury. Farmers' Packing Co. v. Brown, 87 Md. 1, 39 A 625.

Amendment of verdict after jury separates see Trial [38 Cyc 1896].

[§ 303] **n. Objections.**[10] An objection to the form of the verdict comes too late if made after the jury have been dismissed.[11]

[§ 304] **o. Waiver or Curing Defective Verdict.** Where the verdict is defective in substance, as to some matter required by law, it cannot be cured by a waiver of one of the parties;[12] but mere inaccuracies or informalities will be regarded as waived if no objection is made thereto, before the jury are discharged.[13] Thus, where the statute requires that in the event of the jury making a certain finding they shall assess the value of the property, a failure to make such an assessment is not cured by an assessment in the judgment,[14] or by a waiver of such defect by one of the parties only.[15]

[§ 305] **2. Value of Property**[16]**—a. In General.** A finding in a verdict in replevin as to the value of the property must ordinarily be supported by the evidence;[17] but, although it has been held error for the court to find the value solely on the complaint and affidavit of plaintiff supporting the writ,[18] in other jurisdictions it is held that, where there is no evidence as to the value of the property,[19] or where defendant waives submission to the jury of the value of the property,[20] the jury may adopt as such value the amount alleged in the complaint. It is competent for the jury to base their finding of value on an affidavit of the goods under a delivery bond,[21] but they are not controlled by the amount stated in such an affidavit;[22] and, if it was made so long before the trial as to be no evidence of the present value of the goods, it cannot be used for the basis of their finding;[23] nor is the sheriff's estimate of value made for the purpose of fixing the amount of the bond to be given by claimant conclusive on the issues;[24] nor does the fact that an offer of judgment has been made, but refused, control the jury or make it erroneous for them to return a finding for a less amount than that contained in the offer.[25] In assessing the value of the property involved, the jury ordinarily should not award a greater amount than that stated in the pleadings and included in the issues of the action;[26] and it has been held error to direct the jury to find the value of property seized at a sum different from that stated in the pleadings of both parties.[27] If defendant prevails plaintiff cannot object to a verdict fixing the value at an amount less than that stated in his affidavit.[28] The parties may determine the value of the property by stipulation.[29] The value of the property and damages for its taking and detention constitute separate and independent items and should be found separately.[30] However, if the parties so agree they may be found in one sum which is to settle all further claim to the property.[31] Also, where a portion of the goods cannot be returned, it has been held that damages may be included in the general award of money;[31½] and in jurisdictions where the prevailing party cannot obtain possession of the property if it is in the possession of the other party, but is limited to a money judgment, the verdict may combine value and damages in one sum.[32]

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[7] Hanf v. Ford, 37 Ark. 544.

[8] Noble v. Epperly, 6 Ind. 468.

[9] Dearing v. Ford, 21 Miss. 269.

[10] **Generally** see Trial [38 Cyc 1904, 1932, 1990].

Failure to object at proper time as waiving defect see infra § 304.

[11] Gambrell v. Gambrell, 130 Ky. 714, 113 SW 885.

[12] Archer v. Long, 32 S. C. 171, 11 SE 86; Thompson v. Lee, 19 S. C. 489.

[a] **Thus** a verdict for defendant in replevin for one dollar, in disregard of a positive instruction that the jury must find for plaintiff the property in dispute, and must disregard defendant's counterclaim, cannot be cured by defendant's releasing his claim to the property. Thompson v. Lee, 19 S. C. 489.

[13] Blackfoot Stock Co. v. Delamue, 3 Ida. 291, 29 P 97; Kluse v. Sparks, 10 Ind. A. 444, 36 NE 914, 37 NE 1047; Gaines v. Tibbs, 6 Dana (Ky.) 143; Swaydan v. Ellis, 59 Okl. 175, 158 P 434; Davis v. Gray, 39 Okl. 386, 134 P 1100.

[a] **It is too late** if objection is made after the jury have been discharged and on motion for a new trial. Swaydan v. Ellis, 59 Okl. 175, 158 P 434; Davis v. Gray, 39 Okl. 386, 134 P 1100.

[b] **Before judgment.**—Objections to the form of the verdict should be made before judgment. Blackfoot Stock Co. v. Delamue, 3 Ida. 291, 29 P 97.

[14] Clinton v. Stovall, 45 Mo. A. 642.

[15] Archer v. Long, 32 S. C. 171, 11 SE 86. But see Dixon v. Atkinson, 86 Mo. A. 24 (holding that, where the property is in plaintiff's possession, defendant can waive his right to have its value assessed and accept the verdict as rendered).

[16] **Cross references:**

Amendment or correction of verdict as to assessment of value see supra § 302.

Compromise verdict see Trial [38 Cyc 1846].

Curing defective verdict see supra § 304.

On dismissal or nonsuit see supra § 269.

Time as of which valuation is made see infra §§ 366–368.

[17] Ark.—Bailey v. Ellis, 21 Ark. 488.

Cal.—Pratt v. Welcome, 6 Cal. A. 475, 92 P 500.

Iowa.—Wald v. Auto Salvage, etc., Co., 190 Iowa 11, 179 NW 856.

Minn.—Engeln Electric Co. v. Kolling, 180 Minn. 264, 230 NW 778.

Mo.—McWherter v. Randell, (A.) 247 SW 467; Ascher v. Schaeper, 25 Mo. A. 1.

See also Harington v. Neely, 7 Baxt. (Tenn.) 442 (holding judge's action in telling jury that there was evidence as to value, but refusing to state what it was, and sending them back to find the value, to be proper).

[a] **Valuation held excessive.**—In replevin to recover goods, including groceries, sold by plaintiff to defendant for three thousand three hundred nineteen dollars and thirty-five cents, where no one testified to the value thereof when taken by plaintiff under the writ, and defendant testified that the grocery stock had been increased from one thousand three hundred dollars to one thousand six hundred dollars or one thousand seven hundred dollars, a verdict for defendant, assessing the value of the property at four thousand one hundred twenty-four dollars and eighty-six cents, was excessive by four hundred and five dollars and fifty-one cents. McWherter v. Randell, (Mo. A.) 247 SW 467.

[b] **Valuation held not excessive.**—(1) In replevin of a stolen automobile, a verdict for four hundred and fifty dollars, which was twenty-five dollars more than the value of the car as shown by the evidence, was not so excessive as to indicate passion or prejudice. Wald v. Auto Salvage, etc., Co., 190 Iowa 11, 179 NW 856. (2) The retail price placed by the owner on property did not conclude the jury in a replevin action as to its value. Engeln Electric Co. v. Kolling, 180 Minn. 264, 230 NW 778.

[18] Wilson v. Kellerd, 189 NYS 161. But see Archer v. Boudinet, CodeRepNS (N. Y.) 372 (holding that, where the statement of the value of the property contained in the complaint is not denied, and the jury omit to pass on the value of the property, the court may decide on its value for the purpose of making an allowance, in addition to costs).

[19] Lillie v. McMillan, 52 Iowa 463, 3 NW 601; North Star House Furnishing Co. v. Rinkey, 92 Minn. 80, 99 NW 429.

[a] **Thus,** where the petition states the value of the property in controversy and the answer is a general denial, and no evidence of value is offered, it is proper for the jury to find for the value stated in the petition. Lillie v. McMillan, 52 Iowa 463, 3 NW 601.

[20] Summit First State Bank v. Braden, 39 S. D. 53, 162 NW 929.

[a] **Thus,** where plaintiff, "for the purpose of showing the value of property did not exceed the value of property fixed in the affidavit," offered evidence to show that the property was worth less than alleged in its complaint and in its affidavit in claim and delivery, it was proper for the court to direct the jury to find the value at the amount named in the complaint and affidavit, where defendant waived the submission to the jury of the property's value. Summit First State Bank v. Braden, 39 S. D. 53, 162 NW 929.

[21] Schultz v. Hickman, 27 Mo. A. 21.

[22] Mills v. Mills, 39 Kan. 455, 18 P 521.

[a] **Affidavit not conclusive.**—The value stated in the affidavit is not conclusive, but the jury may assess the value at any amount which the proof may show, within the value alleged in the petition, as the affidavit in such courts does not stand as the bill of particulars. Mills v. Mills, 39 Kan. 455, 18 P 521.

Affidavit as limiting amount see cases infra note 26 [b], 28.

[23] Gilroy v. Everson-Hickok, 103 App. Div. 574, 93 NYS 132.

[a] **Illustration.**—A statute requiring a verdict in replevin to find the value of the chattel at the time of trial is not satisfied by finding it, without any evidence, as stated in plaintiff's affidavit, made twenty-seven months before the trial. Gilroy v. Everson-Hickok, 103 App. Div. 574, 93 NYS 132.

Presumption. In jurisdictions requiring the value to be assessed as of the date of trial, a sum fixed by the jury as to the value of the property will be conclusively presumed to be its value at the time of the trial.[33]

[§ 306] **b. Necessity of Assessing Value.** At common law the value of the property was immaterial, and no method was provided whereby it could be determined;[34] and if there is no statutory provision which allows the jury to find the value of the goods replevied, they are without jurisdiction to do so.[35] However, under most statutes,[36] where the effect of the verdict is to change the possession of the property from one party to another, as where the property has not been delivered to plaintiff and the verdict is in his favor, or where the property has been delivered to him and the verdict is for defendant, for its return, there must be a finding of the value of the property,[37] or the value of the right of possession, if it is found.[38] However, where the value of the property is stated in the affidavit attached to the petition, the omission of the jury to find the value is not an incurable error;[39] nor is it necessary if it was stated in the writ and plaintiff did not request an instruction that the jury find the value,[40] or where the pleadings make no issue on the matter,[41] or where the parties agree by a stipulation entered into during the trial on the value of the property.[42] Also, an assessment of the value of the property is not necessary as to property, whether a part or the whole thereof, which is in possession of the prevailing party at the time the verdict is returned.[43] It has also been held that the jury

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[24] Linn v. Wright, 18 Tex. 317, 70 AmD 282.

[25] Bourda v. Jones, 110 Wis. 52, 85 NW 671.

[26] Ward v. Masterson, 10 Kan. 77; Kentucky Portland Cement, etc., Co. v. Steckel, 164 Ky. 420, 175 SW 663; Peterson v. Hall, 61 Minn. 268, 63 NW 733; Tiedman v. O'Brien, 36 N. Y. Super. 539. Contra Singer Mfg. Co. v. Doxey, 65 Ind. 65 (holding that, in an action to recover the possession of personal property, the value placed on the property by plaintiff in his complaint is not to be regarded as a limitation upon the amount of plaintiff's recovery, if the property cannot be found, or if, from any other cause, having obtained a judgment for its recovery, he should fail to get possession thereof; in this case it was further held that, if such value were an absolute limitation on the amount of plaintiff's recovery, then the complaint might have been so amended, on trial in the court below, as to make the averment of the value of the property correspond with the proof of its value; and therefore, in this court, it will be deemed and taken to have been thus amended).

[a] **Complaint.**—In replevin for a note and mortgage, where the actual value is stated in the complaint to be the principal of the note, it is error to charge that in fixing the value the jury may consider the interest on the note which had accrued prior to the action. Peterson v. Hall, 61 Minn. 268, 63 NW 733.

[b] **Affidavit.**—Plaintiff's recovery cannot exceed the value stated in the affidavit for the order of delivery, even though defendant's answer states the value at a sum in excess thereof. Kentucky Portland Cement, etc., Co. v. Steckel, 164 Ky. 420, 175 SW 663.

[27] Houston v. Smythe, 66 Miss. 118, 5 S 520.

[28] Weil v. Ryus, 39 Kan. 564, 18 P 524.

[a] **Option.**—If the value fixed is more than the goods are worth, plaintiff has the option to return them. Weil v. Ryus, 39 Kan. 564, 18 P 524.

[29] Barton v. Trumbull, 226 Mich. 685, 198 NW 186; Commerce Trust, etc., Bank v. Schuler, (Mo. A.) 27 SW (2d) 492.

[a] **Finding held sufficient.**—A finding that "the stipulation of facts agreed upon by counsel and filed, including all exhibits attached thereto, and the files and records of the cause, are found in the facts," and that the value of the property was as stated in the appraisal is sufficient as a basis for judgment, in the absence of a proposal of an amendment to secure a more definite finding as to the value of the property. Barton v. Trumbull, 226 Mich. 685, 198 NW 186.

[b] **Defendants are entitled** to have the amount agreed on at the opening of the trial assessed as the value of the property. Commerce Trust, etc., Bank v. Schuler, (Mo. A.) 27 SW (2d) 492.

[30] Mix v. Kepner, 81 Mo. 93; Chapman v. Kerr, 80 Mo. 158; Phillips v. Melville, 10 Hun (N. Y.) 211; Simper v. White, 7 Oh. Cir. Ct. 303, 4 Oh. Cir. Dec. 607; Sayers v. Holmes, 2 Coldw. (Tenn.) 259. See Thompson v. Carbery, 23 F. Cas. No. 13,946, 2 Cranch C. C. 39 (granting a new trial, where the jury gave defendant a verdict for the value of the goods, and damages for taking them in one sum).

[31] McCabe v. Morehead, 1 Watts & S. (Pa.) 513.

[31½] Gambrell v. Gambrell, 130 Ky. 714, 113 SW 885.

[32] Quinlan v. Jones, 27 Wyo. 410, 198 P 352.

Right to obtain return of property see infra §§ 323, 324.

[a] **Merger of value and damages.**—Where plaintiff obtains possession of the property, if defendant prevails, he must be awarded such damages as are right and proper, consisting of the value of the property plus interest, or plus the value of the use thereof, in case that value exceeds the interest, so that the value of the property is merged as it were in the damages to be awarded, and it is not necessary specifically to find, in the verdict or judgment, the value of the property as a separate item from the damages awarded. Quinlan v. Jones, 27 Wyo. 410, 198 P 352.

[33] Pabst Brewing Co. v. Rapid Safety Filter Co., 56 Misc. 445, 107 NYS 163.

[34] Humphrey v. Baker, 71 Okl. 272, 176 P 896 (dictum); Quinlan v. Jones, 27 Wyo. 410, 198 P 352.

[35] Warren v. Leiter, 24 R. I. 36, 52 A 76.

[a] **Jury cannot find** for plaintiff in the value of the goods replevied. Warren v. Leiter, 24 R. I. 36, 52 A 76

[36] See statutory provisions.

[37] U. S.—Williams v. Morrison, 28 Fed. 872, 29 Fed. 282.

Ala.—Levy v. Moog, 69 Ala. 63.

Ark.—Keller v. Sawyer, 104 Ark. 375, 149 SW 334. See Feldman v. Feldman, 171 Ark. 1097, 287 SW 384 (not error to ascertain the value of property and return a verdict for possession of the property or its value).

Cal.—Etchepare v. Aguirre, 91 Cal. 288, 27 P 668, 929, 25 AmSR 180; Stewart v. Taylor, 68 Cal. 5, 8 P 605.

Ind.—Jackson v. Morgan, 167 Ind. 528, 78 NE 633; Tardy v. Howard, 12 Ind. 404; Given v. Blann, 3 Blackf. 64; Farrar v. Eash, 5 Ind. A. 238, 31 NE 1125.

Ky.—Young v. Parsons, 2 Metc. 499.

Miss.—Bedon v. Alexander, 47 Miss. 254; Pearce v. Twichell, 41 Miss. 344.

Mo.—Caldwell v. Ryan, 210 Mo. 17, 108 SW 533, 124 AmSR 717, 16 LRANS 494; Hohenthal v. Watson, 28 Mo. 360; Major v. Hast, (A.) 263 SW 466; Dixon v. Atkinson, 86 Mo. A. 24.

Mont.—Anderson v. O'Laughlin, 1 Mont. 81.

Nebr.—Brownell v. Fuller, 57 Nebr. 368, 77 NW 775; Foss v. Marr, 40 Nebr. 559, 59 NW 122; Goodwin v. Potter, 40 Nebr. 553, 58 NW 1128; Search v. Miller, 9 Nebr. 26, 1 NW 975.

Nev.—Carson v. Applegarth, 6 Nev.

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N. J.—Frazier v. Fredericks, 24 N. J. L. 162.

N. Y.—Ellis v. Berndt, 223 App. Div. 421, 228 NYS 487; O'Reilly v. Erlanger, 108 App. Div. 318, 95 NYS 760; Hitchcock v. Wimpleberg, 103 App. Div. 53, 92 NYS 997; Conklin v. McCauley, 41 App. Div. 452, 58 NYS 879; Phillips v. Melville, 10 Hun 211; Raynore v. Drake, 116 Misc. 307, 190 NYS 436; Wilson v. Kellerd, 189 NYS 161; Archer v. Boudinet, CodeRepNS 372.

N. C.—Hendricks v. Ireland, 162 N. C. 523, 77 SE 1011; Penny v. Ludwick, 152 N. C. 375, 67 SE 919; Globe Oil Co. v. Meesick Grocery Co., 136 N. C. 354, 48 SE 781.

Oh.—Sperry v. Allen, 15 Oh. Cir. Ct. N. S. 225, 34 Oh. Cir. Ct. 302.

Okl.—McFadyen v. Masters, 8 Okl. 174, 56 P 1059, 11 Okl. 16, 66 P 284.

Or.—Nunn v. Bird, 36 Or. 515, 59 P 808.

Pa.—Warner v. Aughenbaugh, 15 Serg. & R. 9; Jacobs v. Krieger, 87 Pa. Super. 448.

S. C.—Archer v. Long, 32 S. C. 171, 11 SE 86.

S. D.—Murphy v. Eraas, 41 S. D. 500, 171 NW 326.

Tenn.—Harington v. Neely, 7 Baxt. 442.

Tex.—Linn v. Wright, 18 Tex. 317, 70 AmD 282.

Wash.—Armour v. Seixas, 80 Wash. 181, 141 P 308; Hall v. Law Guarantee, etc., Soc., 22 Wash. 305, 60 P 643, 79 AmSR 935; Quinn v. Parke, etc., Mach. Co., 5 Wash. 276, 31 P 866; Meeker v. Johnson, 3 Wash. 247, 28 P 542.

Wis.—Coyne v. Coyne, 199 Wis. 263, 225 NW 138, 935; Aultman Co. v. McDonough, 110 Wis. 263, 85 NW 980; Rose v. Tolly, 15 Wis. 443; Wallace v. Hilliard, 7 Wis. 627.

[a] **Illustrations.**—(1) Where property is claimed as exempt from attachment and a replevin bond is given therefor, the jury shall find the value of the property in case the verdict is rendered against claimant. Levy v. Moog, 69 Ala. 63. (2) A verdict for plaintiff which merely assesses damages without assessing the value of the property is erroneous. Quinn v. Parke, etc., Mach. Co., 5 Wash. 276, 31 P 866. (3) Issues were properly submitted to the jury to ascertain the value of the property, when there was evidence that it had been wrongfully converted by plaintiff. Penny v. Ludwick, 152 N. C. 375, 67 SE 919. (4) A verdict that the property be returned or its value, without assessing its value, is defective. Keller v. Sawyer, 104 Ark. 375, 149 SW 334.

[b] **Statute is mandatory.**—(1) Ellis v. Berndt, 223 App. Div. 421, 228 NYS 487. (2) The statute requires the jury to assess the value of the property, even though there is no testimony as to the value. Archer v. Long, 32 S. C. 71, 11 SE 86.

[c] **Effect of failure to find.**—A verdict does not authorize a judgment for a return of the property where it does not determine the value of the property. Tardy v. Howard, 12 Ind. 404.

[d] **Party entitled to complain.**—(1) Where the property has been delivered to plaintiff and the jury find for defendant, plaintiff cannot complain of a failure to find the value of the property. Anderson v. O'Laughlin, 1 Mont. 81. (2) Where the verdict is for plaintiff, failure of the jury to assess the value is not an error of which defendant can complain. Coyne v. Coyne, 199 Wis. 263, 225 NW 138, 935.

[e] **Verdict for a sum certain.**—In such a case a verdict for a certain sum of money is reversible error, although there is no proof that the chattel could be returned, or in whose possession it is. Conklin v. McCauley, 41 App. Div. 452, 58 NYS 879.

[f] **It is proper** for the jury to assess the value of the property in replevin, if defendant prevails and plaintiff has taken the property. Major v. Hast, (Mo. A.) 263 SW 466.

[g] **Situations in which value assessed.**—(1) First, where there has not been a delivery of the property to plaintiff; second, where the property has been delivered to plaintiff and defendant by his answer claims a redelivery; in other cases a special finding as to the value is unnecessary. Archer v. Boudinet, CodeRepNS (N. Y.) 372. (2) In an action of replevin where the record shows that a bond was given and the property retained by defendant, the court properly refused a request to charge that, there being no testimony as to the present custody of the goods, the most plaintiff would be entitled to recover would be damages for detention of the property, and submitted the question of the value of the property to the jury. McCrary Refrigerator Co. v. Basco, 79 Pa. Super. 185.

[h] **Trial by court.**—A finding of value is essential to sustain the judgment where the cause is tried to the court without a jury as well as where it is tried to a jury. Armour v. Seixas, 80 Wash. 181, 141 P 308.

[i] **In justice's court.**—Under Rev. St. (1881) § 1550, where the cause originates before a justice, and the verdict is that defendant have return of the property, the jury need not assess the value, or the damages. Burket v. Pheister, 114 Ind. 503, 16 NE 813.

38. See infra § 309.

39. Schaffer v. Faldwesch, 16 Mo. 337.

40. Heald v. Cushman, 30 Me. 461.

[a] **Reason for rule.**—Ascertainment of value was required merely to regulate the cost, and plaintiff, having made his own estimation and not having requested the jury to pass on it, is bound by it. Heald v. Cushman, 30 Me. 461.

41. Curtis v. North American Indian, Inc., 277 Fed. 909; Dalke v. Pancoast, 63 Mont. 524, 208 P 589. See Logan v. Cross, 101 Or. 85, 198 P 1097, 26 ALR 1009 (where the complaint and answer stated the value of the hay as of the same value, a verdict finding that plaintiffs were the owners and entitled to the possession of such amount of hay was both definite and certain as to the value of the hay, although it did not state the value thereof).

[a] **Construction of statute.**—A statute requiring the jury to find the value means only that the value shall be found whenever it is in issue. Dalke v. Pancoast, 63 Mont. 524, 208 P 589.

Pleadings as determining value see supra §§ 207, 305.

42. Lyons v. Archer, 32 S. D. 314, 143 NW 286.

43. Ariz.—Smith v. Southwest Lumber Co., 23 Ariz. 271, 203 P 336.

Ida.—Stoddard v. Ploeger, 42 Ida. 688, 247 P 791.

Ind.—Indiana Union Tract. Co. v. Bick, 40 Ind. A. 451, 81 NE 617; Busching v. Sunman, 19 Ind. A. 683, 49 NE 1091; Van Gundy v. Carrigan, 4 Ind. A. 333, 30 NE 933.

Iowa.—Williams v. Wilcox, 66 Iowa 65, 23 NW 266.

Kan.—Samuels v. Burnham, (A.) 61 P 755.

Ky.—Morgan v. Williams, 179 Ky. 428, 200 SW 650.

Mich.—Merrill v. Butler, 18 Mich. 294.

Minn.—Cumbey v. Lovett, 76 Minn. 227, 79 NW 99; Hecklin v. Ess, 16 Minn. 51; Coit v. Waples, 1 Minn. 134.

Nebr.—Hanscom v. Burmwood, 35 Nebr. 504, 53 NW 371; Kellar v. Van Brunt, 1 Nebr. (Unoff.) 301, 95 NW 668.

N. Y.—Woodburn v. Chamberlin, 17 Barb. 446. But see Tracy v. New York, etc., R. Co., 22 N. Y. Super. 396 (holding it proper for the jury to assess the value of the property recovered as it affects the question of costs).

Or.—McCargar v. Wiley, 112 Or. 215, 229 P 665; Prescott v. Heilner, 13 Or. 200, 9 P 403.

[a] **Time possession obtained.**—Where an auto was delivered to plaintiffs during the progress of the action, they were not entitled to have the value assessed. McCargar v. Wiley, 112 Or. 215, 229 P 665.

[b] **Portion of property.**—A valuation is not necessary as to a specific part of the property in the prevailing party's possession. Woodburn v. Chamberlin, 17 Barb. (N. Y.) 446.

[c] **Special property.**—(1) A statute providing that the value shall be found where the verdict is in favor of the party having possession of the property applies whether the right of property of the party, in whose favor the verdict is, is general or special. Cumbey v. Lovett, 76 Minn. 227, 79 NW 99. (2) Where plaintiff has possession, and claims a special ownership, a verdict is not contrary to law because it does not find the value of plaintiff's ownership, or the value of the property. Kellar v. Van Brunt, 1 Nebr. (Unoff.) 301, 95 NW 668.

[d] **Surplusage.**—It is not necessary for the jury to assess the value of the property when the prevailing

need not assess the value of the property where the action is for specific property, and not in alternative of damages, and the property remains in the possession of the sheriff.[44] Also, if there is no alternative judgment for the value of the property and none for damages, defendant, in case of a verdict for plaintiff, is not prejudiced by a failure to find the value of the property.[45] In some jurisdictions it is held that, where the property has been disposed of, the verdict may be for damages only, and not for the value of the goods.[46] If the verdict assesses damages, or a single sum, which is evidently the amount of the value of the property, it is sufficient.[47]

Value of money. In replevin of lawful money of the United States, it is unnecessary for the jury to find the value of such money.[48]

[§ 307] **c. Separate Value of Each Article—(1) In General.** In some jurisdictions, under the statutes existing therein, the value of each article need not be assessed separately, but a finding of the total aggregate value of the property is ordinarily sufficient;[49] but if a part only of the property can be recovered, the prevailing party is allowed to elect to take that part and a judgment for the value of the remainder, and may demand that the jury assess the value of the property separately.[50] In others a finding of the value of any specific portion of the property is necessary only where there is an instruction to that effect by the court, and, in the absence of such an instruction or a demand therefor, a failure so to find will not invalidate the verdict,[51] and if the finding is by the court it is not error for it to find the aggregate value, particularly where issue is taken only upon the aggregate value.[52] In still others, the jury must, as far as practicable, assess the value of each article separately;[53] particularly where the party against whom the verdict is found and who is in possession has the privilege of returning all or any number of the articles in satisfaction of the judgment pro tanto, and the articles sought to be recovered are distinct and separate,[54] although whatever,

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party has possession, but if they do, such assessment should be treated as surplusage not vitiating the verdict or preventing a proper judgment. Smith v. Southwest Lumber Co., 23 Ariz. 271, 203 P 336.

44. Avery v. Avery, 12 Tex. 54, 62 AmD 513.

45. Kennedy v. Clayton, 29 Ark. 270.

46. Dillard v. McClure, 64 Mo. A. 488; McGraw v. Franklin, 2 Wash. 17, 25 P 911, 26 P 810. See Gambrell v. Gambrell, 130 Ky. 714, 113 SW 885 (holding that the verdict may be for the value of the articles not to be had).

"In a case where the defendant has not the possession there cannot be any necessity or utility in finding the value. The whole case is resolved into one of damages." Dillard v. McClure, supra.

[a] **Thus,** where it is shown that some of the goods have been sold to third persons, and so cannot be returned, a verdict for damages only, and not in the alternative for the value of the goods, is not erroneous, especially where the point is not raised below. McGraw v. Franklin, 2 Wash. 17, 25 P 911, 26 P 810.

47. U. S.—Canadian Car, etc., Co. v. Pennsylvania Iron Works Co., 256 Fed. 393, 167 CCA 509.

Fla.—Jeffreys v. Greeley, 20 Fla. 819.

Iowa.—Western Stage Co. v. Walker, 2 Iowa 504, 65 AmD 789.

N. M.—Brannin v. Bremen, 2 N. M. 40.

S. D.—Svendsen v. Ketchmark, 39 S. D. 61, 162 NW 932.

But see Eaton v. Caldwell, 3 Minn. 134 (holding that, where the value has not been assessed by the jury, it cannot be assumed to be the amount of damages found).

[a] **Illustrations.**—(1) A verdict for defendant in replevin need not find the value of the property, if it find damages which are evidently the amount of the value of the property, with interest, which finding is not complained of as to the amount by either side. Western Stage Co. v. Walker, 2 Iowa 504, 65 AmD 789. (2) A verdict that plaintiff was entitled to immediate possession, concluding, "and in case such possession cannot be had we assess her damages at $75," was a finding of the value of the property, and was sufficient to support judgment for plaintiff. Svendsen v. Ketchmark, 39 S. D. 61, 162 NW 932.

[b] **Rule applicable under statute and at common law.**—A verdict for defendant for a sum of money only, where the goods were taken by plaintiff on the writ and disposed of, must be construed as for the value of the goods, where there was no evidence of damages for caption and detention, and is equally good at common law and under Pa. Act April 19, 1901 (P. L. p 90) § 7. Canadian Car, etc., Co. v. Pennsylvania Iron Works Co., 256 Fed. 339.

[c] **It is unimportant** that the finding be shown in words to be the value of the chattels if the evidence shows that fact. Canadian Car, etc., Co. v. Pennsylvania Iron Works Co., 256 Fed. 339, 167 CCA 509.

48. Thurman v. Miller, 50 Ind. A. 372, 98 NE 379.

49. Copeland v. Kilpatrick, 38 Colo. 208, 88 P 472; Stevenson v. Lord, 15 Colo. 131, 25 P 313; Ward v. Masterson, 10 Kan. 77; Caldwell v. Bruggerman, 4 Minn. 270; Hutchinson Gin Co. v. Latimer County Nat. Bank, 106 Okl. 159, 233 P 438; Humphrey v. Baker, 71 Okl. 272, 176 P 896. See Woodburn v. Chamberlin, 17 Barb. (N. Y.) 446 (where a portion of the defendants claim the entire possession by virtue of a chattel mortgage in hostility to both their codefendants, the sheriff, and plaintiffs, and the proof shows that the sheriff holds it in subserviency to the mortgage, it is unnecessary to determine the value of the property admitted by the mortgagees to be in their possession, a general assessment of the whole value being sufficient).

[a] **Thus** the value of bales of cotton need not be separately assessed. Hutchinson Gin Co. v. Latimer County Nat. Bank, 106 Okl. 159, 233 P 438.

50. Caldwell v. Bruggerman, 4 Minn. 270.

51. Kellogg v. Burr, 126 Cal. 38, 58 P 306; Whetmore v. Rupe, 65 Cal. 237, 3 P 851; Johnson v. Fraser, 2 Ida. 404, 18 P 48; Smith v. Willoughby, 24 N. D. 1, 138 NW 7; Bank v. Calkins, 16 S. D. 445, 93 NW 646.

[a] **An error can arise in such a case** only where such an instruction will be pertinent and proper, and the instruction is asked and refused. Whetmore v. Rupe, 65 Cal. 237, 3 P 851.

[b] **Discretion of court.**—The statute places the finding of the value of specific articles within the discretion of the court; it may require it or dispense with it, according to the circumstances of the case as shown by the evidence. Johnson v. Fraser, 2 Ida. 404, 18 P 48.

[c] **Purpose of rule** is to enable the court by its judgment to afford the party entitled to the property a complete remedy in case the property cannot be obtained on execution, and also to enable the wrongdoer to return what he can of the property and reduce the judgment pro tanto by a return of a portion thereof. Smith v. Willoughby, 24 N. D. 1, 138 NW 7.

52. Black v. Hilliker, 130 Cal. 190, 62 P 481; Kellogg v. Burr, 126 Cal. 38, 58 P 306; Brenot v. Robinson, 108 Cal. 143, 41 P 37; Whetmore v. Rupe, 65 Cal. 237, 3 P 851.

[a] **Thus** the failure of the trial court, without a jury, in finding for defendant, to find the separate value of each article involved, is not ground for a reversal where plaintiff has only alleged in his complaint their aggregate value. Black v. Hilliker, 130 Cal. 190, 62 P 481.

53. Avary v. Perry Stove Mfg. Co., 96 Ala. 406, 11 S 417.

[a] **Sufficiency.**—A verdict in a trial of title to a stock of goods, which states the number and value of each of the different articles composing the stock, the value of each lot separately, and then the aggregate value of the whole stock, substantially complies with such statute. Avary v. Perry Stove Mfg. Co., 96 Ala. 406, 11 S 417.

54. Ark.—Neal v. Cole, 144 Ark. 547, 223 SW 18; Hobbs v. Clark, 53 Ark. 411, 14 SW 652, 9 LRA 526; Hanf v. Ford, 37 Ark. 544; Noland v. Leech, 10 Ark. 504.

Miss.—Oppenheimer v. Telhiard, 123 Miss. 111, 85 S 134; Brady v. Cook, 68 Miss. 636, 10 S 56; Spratley in common understanding, are parts of one whole may be treated in the verdict as one article and valued accordingly.[55] However, the requirement for fixing the value of each special article replevied is not jurisdictional and may be waived.[56] Thus, it has been held that it is not necessary that the jury should assess the value of the articles separately where a return thereof is not possible;[57] where a portion of the goods has been disposed of;[58] where the separate articles are of the same kind and class;[59] where there is no allegation or proof to support such a finding;[60] where no demand is made at the time of the verdict for a separate valuation;[61] or where the judgment rendered is for the return of the property and not for any money demand if it cannot be found.[62] Also, the right to a separate valuation is waived where the property replevied is treated as parts of a single unit,[63] or where a party makes no request for such valuation before verdict, or fails to object to a verdict in solido before the jury is discharged.[64] The losing party has been held not prejudiced by the failure of the court to assess the value of each article in accordance with his request.[65] Where plaintiff in his petition described each article replevied and the value thereof, together with the aggregate value of all the articles, a verdict for the total sum fixed by him is in effect a finding that the separate values of the various articles are the same as fixed by plaintiff.[66]

[§ 308] **(2) Remedy for Failure To Find.** Where the value of each separate article is not found, as required, the remedy of the aggrieved party is by motion for a venire de novo before the jury are discharged,[67] or by a new trial;[68] or, under some statutes, if the verdict is valid in other respects it may be remanded to the inferior court, with an order to award a writ of inquiry to ascertain such separate values.[69]

[§ 309] **d. Value of Special Interest.** As a general rule, where the verdict for the return of the property or its value is in favor of a party who has only a special or limited interest therein, it must find and specify the nature, extent, and amount or value of such special interest,[70] which finding must not

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v. Kitchens, 55 Miss. 578; Whitfield v. Whitfield, 40 Miss. 352; Drane v. Hilzheim, 21 Miss. 336; Dearing v. Ford, 21 Miss. 269.

N. C.—Rowland v. Mann, 28 N. C. 38.

Tenn.—Sayers v. Holmes, 2 Coldw. 259; Nashville Ins., etc., Co. v. Alexander, 10 Humphr. 378; Pickett v. Bridges, 10 Humphr. 171.

Tex.—Cole v. Crawford, 69 Tex. 124, 5 SW 646; Cook v. Halsell, 65 Tex. 1; Hoeser v. Kraeka, 29 Tex. 450; Blakeley v. Duncan, 4 Tex. 184; Live Oak Ranch Co. v. Ingraham, (Civ. A.) 44 SW 588; Bowman v. Weber, (Civ. A.) 41 SW 493.

[a] **Purpose of assessment.**—Defendant has an election to return any of the property or its value and is entitled for this purpose to have the value fixed by the jury. Hanf v. Ford, 37 Ark. 544.

[b] **Reason for rule.**—(1) It is the privilege of defendant to return any one or more of the articles recovered in satisfaction pro tanto of the judgment, and he is deprived of his right by a verdict of the value in gross. Cole v. Crawford, 69 Tex. 124, 5 SW 646. (2) Defendant should have the privilege to return any one or more of the articles in satisfaction pro tanto of the judgment. Live Oak Ranch Co. v. Ingraham, (Tex. Civ. A.) 44 SW 588.

[c] **Verdict in solido** is erroneous and should not be received by the court if objection is made thereto at the time of its rendition, or the court may of its own motion decline to receive it and send the jury back with instructions to find separately the value of each separate and distinct piece of property. Hanf v. Ford, 37 Ark. 544.

[d] **Parties entitled.**—The rule is purely for the benefit of defendant, and if he does not complain a verdict finding the value in gross is sufficient. Cole v. Crawford, 69 Tex. 124, 5 SW 646.

[e] **Property applied to.**—(1) If the action be for distinct and separate articles having no identity of character, the value ought to be assessed for each distinct and separate article. Pickett v. Bridges, 10 Humphr. (Tenn.) 171. (2) Articles of furniture. Oppenheimer v. Telhiard, 123 Miss. 111, 85 S 134.

[55] Henry v. Dillard, 68 Miss. 536, 9 S 298; Drane v. Hilzheim, 21 Miss. 336.

[a] **For example,** mare and young colt are so intimately connected as to constitute one whole. Henry v. Dillard, 68 Miss. 536, 9 S 298.

[56] Taylor v. Walker, 149 Ark. 134, 231 SW 550.

[57] Neal v. Cole, 144 Ark. 547, 223 SW 18; Samuels v. Burham, (Kan. A.) 61 P 755; Brady v. Cook, 68 Miss. 636, 10 S 56.

[58] Burke v. Koch, 75 Cal. 356, 17 P 228.

[59] Fox v. Tift, 57 Or. 268, 111 P 51, AnnCas1912D 845; Pickett v. Bridges, 10 Humphr. (Tenn.) 171, 173.

"If all the property replevied be alike in its character, and not possessed of a distinct and separate quality, and be so described in the proceedings to be, a general assessment of value ought to be made." Pickett v. Bridges, supra.

[a] **For example,** yearling sheep. Fox v. Tift, 57 Or. 268, 111 P 51, AnnCas1912D 845.

[60] Knox v. Noble, 25 Kan. 449; Byrne v. Lynn, 18 Tex. Civ. A. 252, 44 SW 311, 544.

[61] Blake v. Powell, 26 Kan. 320; Farmers' Loan, etc., Co. v. Hansen, 123 Or. 72, 260 P 999; Avery v. Popper, (Tex. Civ. A.) 45 SW 951.

[a] **Thus,** in a claim and delivery action the verdict need not specify the value of each article, where the property replevied is all alike in character and of about the same value, and defendant has not requested separate valuation. Farmers' Loan, etc., Co. v. Hansen, 123 Or. 72, 260 P 999.

[62] Live Oak Ranch Co. v. Ingraham, (Tex. Civ. A.) 44 SW 588.

[a] **Rule for separate valuation** applies only in cases where there is a judgment for the value of the property in case it is not returned. Live Oak Ranch Co. v. Ingraham, (Tex. Civ. A.) 44 SW 588.

[63] Taylor v. Walker, 149 Ark. 134, 231 SW 550.

[64] Neal v. Cole, 144 Ark. 547, 223 SW 18; Hobbs v. Clark, 53 Ark. 411, 14 SW 652, 9 LRA 526; Johnson v. Fraser, 2 Ida. (Hasb.) 404, 18 P 48; Dunlap v. Flowers, 21 Okl. 600, 96 P 643; Avery v. Popper, (Tex. Civ. A.) 45 SW 951.

[a] **If either party** desires a finding of the value of each article, he should request that such a finding be made or he cannot take advantage of the jury's failure to do so. Johnson v. Fraser, 2 Ida. (Hasb.) 404, 18 P 48.

[65] Williams v. Wilcox, 66 Iowa 65, 23 NW 266.

[66] Black Raven Coal Co. v. Edmonson, 108 SW 955, 33 KyL 3.

[67] Hanf v. Ford, 37 Ark. 544.

[68] Hanf v. Ford, supra.

[69] Spratley v. Kitchens, 55 Miss. 578; Drane v. Hilzheim, 21 Miss. 336.

[70] Cal.—Campbell v. Smith, 96 Cal. A. 689, 274 P 758; Haley v. Traeger, 92 Cal. A. 360, 268 P 459; Griffith v. Reddick, 41 Cal. A. 458, 182 P 984.

Mich.—Alderman v. Manchester, 49 Mich. 48, 12 NW 905; Farmers' L. & T. Co. v. St. Clair, 34 Mich. 518.

Mo.—McDowell v. Hollingsworth, (A.) 10 SW (2d) 314; Dixon v. Atkinson, 86 Mo. A. 24.

Nebr.—Tyson v. Bryan, 84 Nebr. 202, 120 NW 940; Mueller v. Parcel, 71 Nebr. 795, 99 NW 684; Creighton v. Haythorn, 49 Nebr. 526, 68 NW 934; Search v. Miller, 9 Nebr. 26, 1 NW 975.

N. Y.—Wood v. Orser, 25 N. Y. 348; Ellis v. Berndt, 223 App. Div. 421, 228 NYS 487.

Okl.—Chandler v. Colcord, 1 Okl. 260, 32 P 330.

Wis.—Warner v. Hunt, 30 Wis. 200; Fitzpatrick v. Warren, 1 Pinn. 541.

See Lebb v. Peabody, 103 Or. 405, 205 P 819 (holding that, although plaintiff, who replevied an automobile containing a battery rented by defendant, would be liable to defendant only for the reasonable rental value of the battery during the period of detention, not for the rental defendant agreed to pay, a finding by the trial court that the rental value of the battery was the amount agreed to be paid was a sufficient finding of its reasonable rental value to support a exceed the amount or value of such interest;[71] and where there is a finding of such special interest and it is within the value of the property as proved, it is not necessary that there shall be a general finding of the value of the property.[72] It has been held, however, that this doctrine is applicable only where a return of the property may be awarded as an alternative with judgment for its value,[73] and hence does not apply to a verdict in favor of a party who is in possession under a chattel mortgage, with authority to dispose of the property according to the terms of the mortgage, and according to law, to satisfy the mortgage debt or any part thereof;[74] nor in case of replevin by one partner against another partner for the possession of partnership property need there be a finding of the value of the successful partner's special interest in the property.[75] It has also been held in an action of replevin for goods distrained, on an issue of no rent in arrear, that the jury may fix the amount of rent due with interest from the time the writ of replevin is sued out, and are not confined to the value of the goods distrained.[76]

[§ 310] **3. Damages.**[77] As a general rule the question of damages is one of the issues in the case, and if there is any proof to support it there should be a finding assessing them.[78] Thus as a general rule a verdict for the recovery or return of the property to plaintiff or defendant as the case may be should assess damages in his favor for the taking or detention, or both,[79] and such verdict may be for

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judgment).

[a] **Lien** (1) in replevin by a mortgagee of a railroad company against a town treasurer, to recover possession of cars and locomotive seized by defendant for taxes assessed on the railroad company's lands, a verdict for defendant is fatally defective if it fails to specify defendant's interest. Farmers' L. & T. Co. v. St. Clair, 34 Mich. 518. (2) A verdict for defendant whose claim arises from a lien on the property, without a finding as to the value of his possession, is not responsive to the issues and is contrary to law. Creighton v. Haythorn, 49 Nebr. 526, 68 NW 934. (3) When one claims possession by virtue of a lien, the measure of his recovery in the event his possession cannot be restored is the amount of his lien, and it is therefore necessary for the court to find that amount which is not necessarily what he claims is due him, but only what is actually due. Griffith v. Reddick, 41 Cal. A. 458, 182 P 984.

[b] **Jury should adjust** the respective interests of the parties. Dixon v. Atkinson, 86 Mo. A. 24.

[c] **Finding of value held sufficient.**—Finding held not objectionable because the value of the interest of a third party in property he was purchasing under agreements was not found, where the interest was determinable by calculation. Haley v. Traeger, 92 Cal. A. 360, 268 P 459.

[d] **Form of finding improper.**—A verdict in a replevin action "for plaintiff for $750, representing the difference between the purchase price of the diamond, less $352 paid on account, plus $350 damages, making a total of $1,100," was not in proper form. Gindin v. Gottlieb, 191 NYS 218.

[e] **Joint ownership.**—Where plaintiff and defendant had equal interest in property, on a verdict for defendant the assessment of the value of his interest was proper. McDowell v. Hollingsworth, (Mo. A.) 10 SW (2d) 314.

[f] **Right of possession.**—(1) Where the evidence establishes title in plaintiff and the right of possession in defendant, the court should submit to the jury, not the value of the property, but the value of defendant's possession. Tyson v. Bryan, 84 Nebr. 202, 120 NW 940. (2) A verdict which finds the right of possession in defendant, but does not find the value of such right, and proceeds to find the value of the property, is insufficient and will not support a judgment. Search v. Miller, 9 Nebr. 26, 1 NW 975.

[71] Cal.—Pico v. Martinez, 55 Cal. 148.

Colo.—Witkowski v. Hill, 17 Colo. 372, 30 P 55.

Ga.—Ray v. Byrd, 118 Ga. 86, 44 SE 818.

Mich.—Kennedy v. Dawson, 96 Mich. 79, 55 NW 616.

Miss.—Lloyd v. Goodwin, 20 Miss. 223.

N. Y.—Townsend v. Bargy, 57 N. Y. 665; Rhoads v. Woods, 41 Barb. 471; Cochran v. Gottwald, 40 N. Y. Super. 442.

[a] **Where interest of party entitled to possession is of limited nature,** less than the actual value of the property replevied, the jury should be directed to assess the value of the property, as against the actual owner, only at a sum which will be equivalent to such limited interest. Rhoads v. Woods, 41 Barb. (N. Y.) 471.

[72] Campbell v. Smith, 96 Cal. A. 689, 274 P 758, 760; Earle v. Burch, 21 Nebr. 702, 33 NW 254; Search v. Miller, 9 Nebr. 26, 1 NW 975; Ellis v. Berndt, 223 App. Div. 421, 228 NYS 487; Single v. Barnard, 29 Wis. 463.

"If he (defendant) had only a special interest in the property which entitled him to the possession thereof then the verdict should have been for the return of the property or for the value of such special interest, not the whole value of the property." Campbell v. Smith, supra.

[a] **Value of property** can be found only where the jury find the right of property, as distinguished from the right of possession, in the prevailing party. Search v. Miller, 9 Nebr. 26, 1 NW 975.

[b] **Special property.**—Where defendant is not in possession and claims a special property, a verdict for him must fix the value of the special property, and if the value of the chattels is greater than the value of the special property, the value of the chattels need not be found, but the verdict must set forth the reason why the value of the chattels was not fixed. Ellis v. Berndt, 223 App. Div. 421, 228 NYS 487.

[73] Woodruff v. King, 47 Wis. 261, 2 NW 452.

[74] Woodruff v. King, supra.

[75] Jenkins v. Mitchell, 40 Nebr. 664, 59 NW 90.

[a] **Reason for rule.**—No accounting can be had in an action of replevin to determine actual interest. Jenkins v. Mitchell, 40 Nebr. 664, 59 NW 90.

[76] Albright v. Pickle, 4 Yeates (Pa.) 264; Howard v. Johnson, 1 Ashm. (Pa.) 58. See Arguelles v. Wood, 1 F. Cas. No. 520, 2 Cranch C. C. 579 (if the jury find the amount of the rent arrear in damages without stating it to be the amount of the rent, the court will permit the verdict to be so amended).

[a] **Finding for defendants** with damages and costs is insufficient. Howard v. Johnson, 1 Ashm. (Pa.) 58.

[77] **Amendment of verdict by adding nominal damages** see supra § 302.

Amount of damages and elements considered see infra §§ 359, 393.

[78] Kendall v. Fitts, 22 N. H. 1; Smith v. Aurand, 10 Serg. & R. (Pa.) 92; Newton v. Brown, 1 Utah 287.

[a] **On issue of no rent in arrear** a finding that defendant have damages and costs is regular. Smith v. Aurand, 10 Serg. & R. (Pa.) 92.

[79] Cal.—Ryan v. Fitzgerald, 87 Cal. 345, 25 P 546.

Ind.—Jackson v. Morgan, 167 Ind. 528, 78 NE 633; Crocker v. Hoffman, 48 Ind. 207; Farrar v. Eash, 5 Ind. A. 238, 31 NE 1125.

Minn.—Leonard v. Maginnis, 34 Minn. 506, 26 NW 733.

Miss.—Ainsworth v. Smith, 157 Miss. 202, 127 S 771.

Mo.—Hohenthal v. Watson, 28 Mo. 360; Dixon v. Atkinson, 86 Mo. A. 24.

Nebr.—Search v. Miller, 9 Nebr. 26, 1 NW 975.

N. H.—Messer v. Bailey, 31 N. H. 9; Kendall v. Fitts, 22 N. H. 1.

N. J.—Frazier v. Fredericks, 24 N. J. L. 162.

N. Y.—O'Reilly v. Erlanger, 108 App. Div. 318, 95 NYS 760; Hitchcock v. Wimpleberg, 103 App. Div. 53, 92 NYS 997 [aff 45 Misc. 293, 92 NYS 291]; Phillips v. Melville, 10 Hun 211.

Pa.—Warner v. Aughenbaugh, 15 Serg. & R. 9.

S. C.—Norris v. Clinkscales, 47 S. C. 488, 25 SE 797.

Tenn.—Parham v. Riley, 4 Coldw. 5.

Wis.—Aultman Co. v. McDonough, 110 Wis. 263, 85 NW 980.

N. B.—McLaughlin v. Tompkins, 44 N. B. 249.

[a] **Separate assessment.**—In replevin for property which has not been delivered to plaintiff, the jury should assess its value, and damages for its detention, and not simply ren-

a certain sum as damages without specifying whether for the taking or detention.[80] But since the question of damages is not the prime object of an action of replevin, it is not essential, in the absence of allegations and proof, to the validity of a verdict therein that they shall be assessed in favor of the prevailing party,[81] and the omission to so find is not such a defect as may be complained of by the party against whom the verdict is rendered.[82] In order to warrant a judgment for damages, the verdict must assess damages as such,[83] but a finding of interest on the value found may be construed as the damages sustained.[84] Where a special verdict for damages is inconsistent with a general verdict therefor, the former controls.[85] A finding of damages must be supported by the evidence and cannot be based on mere conjecture.[86]

[§ 311] **H. Judgment***[87]**—1. Form and Requisites—a. In General.** The statutes generally provide for the judgment to be entered in replevin;[88] and while a judgment is fatally defective which is not entered in substantial compliance with the statute,[88½] if the entry is sufficient in substance, mere want of technical form will not render it void.[89] The judgment should not be uncertain,[90] and should determine the rights of the parties with respect to

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der a general verdict for damages. Phillips v. Melville, 10 Hun (N. Y.) 211.

[b] **Verdict against two defendants not jointly liable,** and having no privity of interest upon which to base a joint responsibility, should find against each for such damages as are proved for the detention by him. Norris v. Clinkscales, 47 S. C. 488, 25 SE 797.

[c] **In Delaware,** where plaintiff has possession of the property, a verdict in his favor should not be for the return of the property, but for nominal damages because of its unlawful detention. Hitch v. Riggin, 26 Del. 84, 80 A 975.

[80] Ryan v. Fitzgerald, 87 Cal. 345, 25 P 546; Witcher v. Watkins, 11 Colo. 548, 19 P 540.

[a] **Presumptions.**—Where the verdict is for a certain sum as damages, it will be presumed to cover both the taking and detention, where both are alleged in the complaint. Ryan v. Fitzgerald, 87 Cal. 345, 25 P 546.

[81] Conn.—Norman Printers' Supply Co. v. Ford, 77 Conn. 461, 59 A 499.

Ind.—Buck v. Young, 1 Ind. A. 558, 27 NE 1106.

Mo.—Hopper v. Hopper, 84 Mo. A. 117.

N. H.—McKean v. Cutler, 48 N. H. 370 [overr Kendall v. Fitts, 22 N. H. 1].

N. B.—Fearon v. Murray, 10 N. B. 11.

[a] **It is error,** where it is open for the jury to find that defendants had never taken possession of any of the goods, for the court to direct the jury after they have found for plaintiff "to retain said goods and to recover of defendants no damages," that they must award "some damages" to plaintiff. Norman Printers' Supply Co. v. Ford, 77 Conn. 461, 59 A 499.

[b] **Necessity for proof.**—Although damages are claimed, if none are proved, none need be found in the verdict. Buck v. Young, 1 Ind. A. 558, 27 NE 1106.

[c] **Right to waive.**—A verdict in replevin which finds for plaintiff will support a judgment, although it does not assess the damages, since the statute requiring such an assessment is for the benefit of plaintiff, and he may waive compliance therewith. Hopper v. Hopper, 84 Mo. A. 117.

[82] Moorhouse v. Donaca, 14 Or. 430, 13 P 112; Gaines v. White, 1 S. D. 434, 47 NW 524; Parham v. Riley, 4 Coldw. (Tenn.) 5.

[a] **Explanation of rule.**—Since damages are not the prime object of an action of claim and delivery, but are the nominal issue only, a general verdict for plaintiff without assessing damages will not be set aside at defendant's instance. Gaines v. White, 1 S. D. 434, 47 NW 524.

[83] Cary v. Hyer, 91 Fla. 322, 107 S 684; Black v. Winterstein, 6 Nebr. 224. See also Ruzanoff v. Retailers Credit Assoc., 97 Cal. A. 682, 276 P 156 (holding findings sufficient to support judgment for damages); Wolf v. Meyer, 12 Oh. St. 432 (holding it error for the court to assess defendants damages without the intervention of a jury).

[a] **Assessment of the value** of the property will not answer this purpose. Black v. Winterstein, 6 Nebr. 224.

[b] **Assessment by jury.**—In replevin, interest on the value of property or its equivalent, if the latter is a measure appropriate to the property in controversy, is to be ascertained by the jury and assessed in verdict, and, in the absence of an appropriate finding by the jury, including interest in an alternative money judgment is error under Rev. Gen. St. (1920) § 2918. Cary v. Hyer, 91 Fla. 322, 107 S 684.

Necessity to assess separately from value see supra § 305.

[84] Crawford v. Meadows, 55 Cal. A. 4, 203 P 428.

[85] Jones v. Ft. Smith Bank of Commerce, 131 Ark. 362, 199 SW 103; Joiner v. Bevier, 155 S. C. 340, 152 SE 652.

[a] **Illustration.**—Where a verdict for damages for detention is five dollars per month or one hundred and eighty-five dollars, the total sum is unauthorized where the property was detained less than five months. Jones v. Ft. Smith Bank of Commerce, 131 Ark. 362, 199 SW 103.

[b] **Interpretation.**—Verdict held to mean that defendant should have property or value and five thousand five hundred dollars damages. Joiner v. Bevier, 155 S. C. 340, 152 SE 652.

[86] Muzenich v. McCain, 220 Mo. A. 502, 274 SW 888; Ascher v. Schaeper, 25 Mo. A. 1; Com. v. Schroeder, 18 Pa. Dist. 929; Norris v. Clinkscales, 47 S. C. 488, 25 SE 797. See also Best Brewing Co. v. Sachs, 151 Ill. A. 547.

[a] **Thus** a verdict assessing damages for depreciation is erroneous where there is no finding of depreciation. Muzenich v. McCain, 220 Mo. A. 502, 274 SW 888.

[87] See generally Judgments 33 C. J. p 1042.

On dismissal or nonsuit see supra §§ 256, 257, 263–267.

Summary judgment on bond see infra § 429.

[88] See statutory provisions.

[88½] Fariss v. Holly, 95 Fla. 360, 116 S 763; Hickson v. Osteen, 83 Fla. 336, 91 S 331; Johnson v. Clutter Music House, 55 Fla. 385, 46 S 1; Harrell v. Tripp, 197 N. C. 426, 149 SE 548; McCargar v. Wiley, 112 Or. 215, 229 P 665; Hoeffler Mfg. Co. v. Machajewski, 163 Wis. 184, 157 NW 702.

[a] **In replevin before justice of peace,** where the chattel is not taken the judgment should award possession to plaintiff and fix the value of the chattel and declare plaintiff entitled to such value unless the property is delivered to him. Delin v. Stohl, 2 NYCivProc 222.

[b] **Where plaintiff dies and the suit is revived** by the heir under Code § 2849, because no one would administer on the estate, a personal judgment against the heir is not absolutely void but is merely reversible error, the proper judgment under Code § 2257 being that the creditor have judgment and execution against the land descended. Edgington v. Jamison, 2 Lea (Tenn.) 569.

Alternative judgment see infra § 325.

[89] See cases infra this note.

[a] **Illustrations.**—(1) That the record entry of judgment for defendant in replevin was labeled a "decree" was held immaterial. Jessen Liquor Co. v. Phœnix Distillery Co., 171 Iowa 505, 153 NW 148. (2) A judgment in replevin as follows: "Judgment property entered November 15, 1912" will not be set aside as irregular as to form, where it appears that plaintiff was legally entitled to the judgment, and no objection to the judgment was raised, except on an appeal from orders awarding inquisition and assessing damages. Hoyt v. Carson, 60 Pa. Super. 172.

[b] **Form in justice's court.**—Where, in replevin, a justice of the peace entered judgment finding the right of property and possession in plaintiff, "and I do assess his damages in the premises $125.00 and costs of suit," the judgment, although informal, was sufficient as a basis for an action on the redelivery bond. Green v. Farrin, 11 Oh. Cir. Ct. 294, 5 Oh. Cir. Dec. 181.

[90] See cases infra this note.

[a] **Certainty as to performance.**—In claim and delivery, judgment for plaintiff for delivery of securities sued for, or for their value if delivery could not be had, was held not re-

*By Bernard J. Kenny (§§ 311–338).

every part of the property in controversy.[91] Where the verdict is erroneous,[92] judgment should not be entered thereon.[93] A judgment similar to that rendered in assumpsit is not proper;[94] nor can a recovery as for money had and received be had when the action is in the form of replevin to recover money not specifically described.[95] Where there is a failure to recover for the property not seized because it is not shown to have been in the possession of defendant at the time of the institution of the action, care should be taken to embody this fact in the verdict or judgment so as to avoid a plea of res judicata in any subsequent proceedings to recover it.[96]

[§ 312] **b. Scope of Relief.** While certain statutory provisions contemplate that the judgment should be confined solely to a determination of the right of possession of the property, its value, and damages for its detention,[97] under other statutes great latitude is allowed in actions of replevin, and the statutory action is considered sufficiently flexible to authorize a determination of both legal and equitable rights, as it is the policy to settle in one action all the equities in the property which is the subject of the controversy.[98] In accord with such principle, it has been held that, if the title or right to possession changes pending trial, the replevin judgment should adjust the equities of the parties as of the time of trial,[99] and such principle is also reflected in the adjustment of the special interests of the parties to the property.[1] Affirmative relief has been awarded by the judgment to plaintiff[2] and

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versible, for failure to specify clearly what was to be done, on account of recitals as to proceeds of certain bonds which it was stipulated might be sold pending litigation. Grange v. American Nat. Bank, 37 Cal. A. 432, 174 P 75.

[b] **For purpose of allowing interest,** a judgment was not indefinite which awarded plaintiff the return of property or its value and an additional sum as damages. Tannahill v. Lydon, 31 Ida. 608, 173 P 1146.

[91] Rose v. Tolley, 15 Wis. 443.

[a] **Docket entry made by clerk** by direction of the judge of a finding for defendant in replevin is not a final judgment but rather in the nature of a memorandum of his decision upon the question which party was entitled to prevail, and the court may afterward order a return of the property and assess the damages on defendant's motion. Ashcroft v. Simmons, 163 Mass. 437, 40 NE 171.

[92] **Verdicts** see supra §§ 290-310.

[93] Ridenour v. Beekman, 68 Ind. 236; Welton v. Baltezore, 17 Nebr. 399, 21 NW 1; McCargar v. Wiley, 112 Or. 215, 229 P 665.

[a] **Verdict wrong in form.**—A judgment is good although based upon a verdict wrong in form but right in substance. Leonard v. Maginnis, 34 Minn. 506, 23 NW 733.

[94] Nichols v. Dodson Lead, etc., Co., 85 Mo. A. 584; Hamilton v. Clark, 25 Mo. A. 428; Hall v. Irvine, 23 Pa. Dist. 968.

[95] Sager v. Blain, 44 N. Y. 445.

[96] Krosmopolski v. Paxton, 58 Miss. 581.

[97] Porter Hardware Co. v. Peacock, 129 Miss. 129, 91 S 856; Rose v. Tolly, 15 Wis. 443.

[a] **Conditional sales vendee,** on a finding for vendor for possession, was not entitled to judgment for money paid on the contract even though the property was defective. Porter Hardware Co. v. Peacock, 129 Miss. 129, 91 S 856.

[b] **Conditional judgment** that plaintiff recover possession unless within ten days defendant satisfied the mortgage on the property was held erroneous. Rose v. Tolly, 15 Wis. 443.

[98] Ark.—U. S. Automobile Co. v. Deshong, 134 Ark. 392, 204 SW 103.

Cal.—Wildman v. Radenaker, 20 Cal. 615.

Colo.—Clay v. Martinez, 74 Colo. 10, 218 P 903.

Ida.—Bates v. Capital State Bank, 21 Ida. 141, 121 P 561.

Kan.—Lehman-Higginson Grocer Co. v. McClain, 63 Kan. 881, 64 P 1029.

Mass.—Wheeler v. Train, 4 Pick. 168.

Mich.—Barton v. Trumbull, 226 Mich. 685, 198 NW 186.

Minn.—Deal v. Osborne, 42 Minn. 102, 43 NW 835.

Mo.—Dilworth v. McKelvy, 30 Mo. 149; McWherter v. Randall, 207 Mo. A. 465, 232 SW 1070; Dillard v. McClure, 64 Mo. A. 488; Willison v. Smith, 60 Mo. A. 469; Dodd v. Wilson, 26 Mo. A. 462.

N. Y.—National Bank of Deposit v. Rogers, 166 N. Y. 380, 59 NE 922.

N. C.—Cooper v. Evans, 174 N. C. 412, 93 SE 897; Smith v. French, 141 N. C. 1, 53 SE 435.

N. D.—Angell v. Egger, 6 N. D. 391, 71 NW 547.

Okl.—Jarecki Mfg. Co. v. Fleming, 130 Okl. 95, 265 P 628, 57 ALR 802; Emerson-Brantingham Impl. Co. v. Ritter, 69 Okl. 95, 170 P 482; Holmberg v. Will, 52 Okl. 745, 153 P 832; Bottoms v. Clark, 38 Okl. 243, 132 P 903; Stone v. American Nat. Bank, 34 Okl. 786, 127 P 393.

Or.—Lind v. Boulin, 97 Or. 232, 190 P 1103.

Wash.—Standard Furniture House v. Burrows, 59 Wash. 455, 110 P 13.

Sask.—Hart v. Johnston, 9 Sask. L. 201, 27 DomLR 450, 34 WestLR 225.

[a] **Equitable title to property.**—Where plaintiff was adjudged to have no legal title to goods or proceeds thereof, its equitable title thereto, being found, will be confirmed, and thus bar resort by defendants to their legal remedy for the proceeds or on the replevin bond. National Bank of Deposit v. Rogers, 166 N. Y. 380, 59 NE 922.

[b] **Undivided interest.**—Judgment awarding plaintiff property on payment to defendant of his undivided half interest, or that defendant pay plaintiff his undivided interest and take possession, was held erroneous under Rev. St. (1919) § 2083, providing judgment shall be against plaintiff and his sureties, that plaintiff return the property or pay its value with damages for its detention. Schwettman v. Sander, (Mo. A.) 7 SW (2d) 301.

[c] **Effect of stipulation releasing sheriff.**—A stipulation by parties in replevin that the attached property shall be turned over to a third person to await final judgment releases the sheriff, and judgment in form only can be taken against him. Temple v. Alexander, 53 Cal. 3.

[99] Cal.—Wildman v. Radenaker, 20 Cal. 615.

Ill.—Braender Rubber, etc., Co. v. Dueth-Henes Corporation, 207 Ill. A. 155.

Mass.—Wheeler v. Train, 4 Pick. 168.

Minn.—Deal v. Osborne, 42 Minn. 102, 43 NW 835.

Mo.—McWherter v. Randall, 207 Mo. A. 465, 232 SW 1070.

N. D.—Smythe v. Muri, 34 N. D. 242, 158 NW 264.

Okl.—McDonald v. Schantz, 44 Okl. 648, 146 P 36; Brook v. Bayless, 6 Okl. 568, 52 P 738.

[a] **Rule restated.**—"True, the gist of the action is the right of the plaintiff to the immediate possession of the property at the commencement of the action, but if the title or right of possession to the property changes subsequent to the commencement of the action, and prior to the date of the trial, the judgment should adjust the equities between the parties as such equities exist at the time of the trial; the adjustment of such equities being necessary for a final and complete determination of the controversy." McDonald v. Schantz, 44 Okl. 648, 650, 146 P 36, 37.

[b] **Plaintiff's title divested pending trial.**—Where plaintiff's title or right of possession is legally divested after suit is brought and before trial, judgment should be only for damages for detention up to the time his right of possession ceased and not for a return of the property or its value. Deal v. Osborne, 42 Minn. 102, 43 NW 835.

[c] **Defendant's right to possession divested.**—Where the action for possession of mortgaged property was prematurely commenced, but at the time of trial defendant's right of possession had ceased due to the maturity of the mortgage, the verdict and judgment should adjust the equities as of the time of trial so that defendant will recover not more than damages for the detention prior to the maturity of the mortgage. Smythe v. Muri, 34 N. D. 242, 158 NW 264.

[1] **Enhancement of value by wrongdoer** see infra § 373.

Special interest of party see infra §§ 371, 372.

[2] U. S. Automobile Co. v. Deshong, 134 Ark. 392, 204 SW 103; McFayden v. Masters, 11 Okl. 16, 66 P 284, 8 Okl. 174, 56 P 1059.

[a] **Judgment for amount of check**

to defendant[3] where the relief sought is incident to the contest over the possession of the property. Such rule permitting the equities of the parties to be adjusted by the replevin judgment has reference, however, only to the equities arising out of the contest over the property itself,[4] and unless the damages claimed do so arise, they are generally not recoverable.[5] Nor does such rule permit judgment to be entered for a return of the property, and, in addition thereto, a judgment for the value of the property;[6] and the judgment need not settle the equities between plaintiff and defendant where plaintiff is adjudged to have no title or right of possession to the property and judgment is rendered for a codefendant.[7]

On counterclaim. While in some jurisdictions the courts have refused to grant defendant affirmative relief by judgment on a counterclaim,[8] in other jurisdictions judgment on a counterclaim may be rendered where the counterclaim is connected with, or arises out of, the contest in replevin for the property.[9]

[§ 313] **c. Separate Valuations.**[10] In some jurisdictions, where the evidence has established that the property in controversy consists of separate articles which are in no way dependent on one another for their value, in order to permit the unsuccessful party to return what property he can in pro tanto satisfaction of the judgment,[11] the judgment must state separately the value of each article sued for,[12] while in other jurisdictions judgment for the aggregate value of the property is sufficient,[13] at least where the prevailing party failed at the trial to demand separate valuations.[14] It has also been held unnecessary to specify separately the amounts awarded as the value of the property and as damages.[15]

[§ 314] **d. Description of Property.** A judgment in replevin must describe with reasonable certainty the particular property sought to be recovered,[16] but the recitals or descriptions in the judgment may be aided by the entire record comprising the judgment roll.[17] Thus the judgment is sufficient where there is a reference to a sufficient description in the complaint[18] or in the findings or verdict,[19] and a judgment is not invalidated by uncertainty of description caused by a mistake where from the whole of the record it can easily be known what was intended.[20] But a judgment is bad where it fails to describe the property with reasonable certainty,[21] or does not

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was proper where, in replevin by the buyer for an automobile purchased, the seller refused to apply the check in payment of the property. U. S. Automobile Co. v. Deshong, 134 Ark. 392, 204 SW 103.

[b] **No affirmative relief** should be granted plaintiff where defendant is rightfully in possession. Kerman v. Leeper, 172 Mo. A. 286, 157 SW 984.

3. Kan.—Lehman-Higginson Grocer Co. v. McClain, 63 Kan. 881, 64 P 1029.

Mich.—Barton v. Trumbull, 226 Mich. 685, 198 NW 186; Luce v. Stott Realty Co., 201 Mich. 587, 167 NW 869.

Okl.—Stone v. American Nat. Bank, 34 Okl. 786, 127 P 393.

Or.—Lind v. Boulin, 97 Or. 232, 190 P 1103.

Wash.—Standard Furniture House v. Burrows, 59 Wash. 455, 110 P 13; Kulzer v. Simonton, 41 Wash. 587, 84 P 582.

[a] **Conditional sales vendee** was entitled to judgment that on payment of the balance of the purchase price of the property replevied he should be entitled to possession. Lind v. Boulin, 97 Or. 232, 190 P 1103; Standard Furniture House v. Burrows, 59 Wash. 455, 110 P 13.

[b] **Purchaser** of lumber was entitled to judgment for freight charges advanced for hauling before plaintiff may recover possession. Kulzer v. Simonton, 41 Wash. 587, 84 P 582.

[c] **Amount due on note** and mortgage which covered the replevied property was awarded defendant although judgment for possession of property was for plaintiff. Lehman-Higginson Grocer Co. v. McClain, (Kan.) 64 P 1029; Stone v. American Nat. Bank, 34 Okl. 786, 127 P 393.

[d] **Change in form of action.**—Where the property was not taken from defendant's possession by the writ, and the parties changed the replevin action into one for an accounting to determine the amount of defendant's lien, the proper judgment should have been for plaintiff for possession of the property on payment to defendant of the amount of his lien, or, in case possession could not be had, for the value of the property less the amount of defendant's lien. Bassett v. Haren, 61 Minn. 346, 63 NW 713.

4. Russe v. Hendricks, 75 Mo. A. 386.

5. **Damages as incident to suit for possession** see infra §§ 361, 362.

6. Britton v. Johnson-McQuity Motor Co., 120 Okl. 221, 251 P 74; De Groff v. Carhart, 97 Okl. 145, 223 P 180.

7. Financial Ins. Corp. v. Brockton, 96 Cal. A. 179, 273 P 829.

8. Porter Hardware Co. v. Peacock, 129 Miss. 129, 91 S 856.

9. Kan.—Deford v. Hutchison, 45 Kan. 318, 25 P 641, 11 LRA 257.

N. Y.—Cooper v. Kipp, 52 App. Div. 250, 65 NYS 379.

N. C.—Wilson v. Hughes, 94 N. C. 182.

N. D.—Johnson v. Wagner, 42 N. D. 542, 174 NW 73.

Wis.—De Groot v. Veldboom, 167 Wis. 107, 166 NW 662; Aultman Co. v. McDonough, 110 Wis. 263, 85 NW 980.

[a] **Claim for repairs** made on property replevied was sufficiently connected with the subject matter of the action to authorize judgment on the counterclaim. Cooper v. Kipp, 52 App. Div. 250, 65 NYS 379.

Counterclaim as defense see supra § 86.

10. **In verdict** see supra §§ 307, 308.

11. **Pro tanto satisfaction** see infra §§ 330, 331.

12. Stokes v. Humphries, 69 Fla. 468, 68 S 448; Williams v. Williams, 117 Miss. 251, 78 S 152; Mulligan v. McConnell Bros., (Tex. Civ. A.) 242 SW 512.

[a] **Value of lot of goods,** wares, or merchandise need not be stated separately in the judgment. Stokes v. Humphries, 69 Fla. 468, 68 S 448.

13. Whetmore v. Rupe, 65 Cal. 237, 3 P 851; Jones v. Messenger, 40 Colo. 37, 90 P 64; Hallidie Mach. Co. v. Whidbey Island Sand, etc., Co., 73 Wash. 403, 131 P 1156, 45 LRANS 40.

14. Steidl v. Aitken, 30 N. D. 281, 152 NW 276, LRA1915E 192 [cit Cyc]; Smith v. Willoughby, 24 N. D. 1, 138 NW 7.

15. Nelson v. Bock, 84 N. J. L. 123, 85 A 1009.

16. Karpas v. Brussel, 224 App. Div. 33, 229 NYS 528.

[a] **Reason for rule.**—"As a judgment in replevin is the warrant of the sheriff for the replevy of the chattels for which the action is brought, the chattels must be adequately described in the judgment in order to protect not only the person against whom the judgment runs, but also the sheriff." Karpas v. Brussel, 224 App. Div. 33, 34, 229 NYS 529.

17. Hill v. Walsh, (Cal. A.) 287 P 119.

[a] **Property in controversy.**—A judgment that plaintiff recover "the property in controversy" is not bad for uncertainty where, although the petition claims several articles, the record shows that the controversy is reduced to a specific number of them. Coleman v. Reel, 75 Iowa 304, 39 NW 510, 9 AmSR 484.

18. Hill v. Walsh, (Cal. A.) 287 P 119.

19. Kelly v. McKibben, 54 Cal. 192; Hill v. Walsh, (Cal. A.) 287 P 119; McGregor v. Lang, 32 Mont. 568, 81 P 343.

[a] **Reference to finding and complaint** for a description of the property, was inexcusably circuitous, but not ambiguous, even though the complaint was amended. Kelly v. McKibben, 54 Cal. 192.

20. Mullaney v. Humes, 48 Kan. 368, 29 P 691, 47 Kan. 99, 27 P 817.

21. Cooke v. Aguirre, 86 Cal. 479, 25 P 5; Pierce v. Langdon, 3 Ida. 141, 28 P 401; Harris v. Austell, 2 Baxt. (Tenn.) 148.

[a] **Illustration.**—Description of property as "two stallion horses" in a judgment was insufficient. Cooke v. Aguirre, 86 Cal. 479, 25 P 5.

[b] **Chattels in question.**—Judg-

refer to any other pleading or paper which contains a sufficiently definite description,[22] so as to render it possible to identify the property and guide the party ordered to deliver it,[23] or to inform the sheriff serving the execution what property is included and what excluded.[23½] A judgment which refers to the property described in the complaint is fatally defective if the description in the complaint is defective.[24]

[§ 315] **e. Parties.** A judgment in replevin may not be rendered against one not a party to the action;[25] and where property sought to be replevied has never been delivered to one who interpleads in the replevin suit, no verdict or judgment can be rendered against him for either the property or the money.[26] Nor can judgment for a return be rendered against part of several defendants who never claimed or held possession,[27] or against a defendant in favor of plaintiff and a codefendant;[28] but where defendants have a joint possession, a joint judgment against them is proper.[29] Where two defendants are sued jointly, and judgment goes against plaintiff, it is proper to render a joint judgment in favor of defendants,[30] unless one defendant fails to claim any interest in the property,[31] or unless the interest of each defendant is separate,[32] and in a joint replevin suit there may be judgment for one plaintiff and against another.[33] Conversely, in replevin against several defendants, the court may adjudge the return of the goods in favor of such of defendants as are entitled to a return and refuse it as to the others,[34] so that on a verdict for defendants in replevin, where one of several defendants disclaims, the judgment may be for the other defendants;[35] or the judgment may award a part of the property to each of two or more defendants.[36]

[§ 316] **f. Conformity to Pleadings, Issues, Verdict, and Findings—(1) In General.** In compliance with general rules,[37] a judgment in replevin must conform in all substantial particulars to the pleadings,[38] issues,[39] and proof,[40] and also to the verdict[41]

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ment identifying chattels as "the chattels in question" was held insufficient as to description. Karpas v. Brussel, 224 App. Div. 33, 229 NYS 528.

[22] Cooke v. Aguirre, 86 Cal. 479, 25 P 5.

[23] Harris v. Austell, 2 Baxt. (Tenn.) 148.

[23½] Karpas v. Brussel, 224 App. Div. 33, 229 NYS 528; Carrier v. Carrier, 71 Wis. 111, 36 NW 626.

[24] Welch v. Smith, 45 Cal. 230; Lamus v. Engwicht, 39 Cal. A. 523, 179 P 435; Pierce v. Langdon, 3 Ida. 141, 28 P 401.

[25] Palmer v. Meiners, 17 Kan. 478.

[a] **Attachment creditors.**—In replevin against a sheriff and undersheriff for property seized in attachment, where plaintiffs in the attachment proceedings were not parties defendant, a judgment rendered jointly against such officers and the attaching creditors was erroneous as to the latter. Palmer v. Meiners, 17 Kan. 478.

[26] Chandler v. Smith, 34 Ark. 527; Meyer v. White, 4 Colo. A. 342, 35 P 879.

[27] Ream v. McElhone, 50 Kan. 409, 31 P 1075; Hulett v. Patterson, 6 Pa. Cas. 22, 8 A 917.

[28] Lenau v. Hobart Home State Bank, 91 Okl. 227, 216 P 893.

[a] **Illustration.**—Where A sued B and C in replevin, and obtained a verdict against B for money due, and against B and C both for possession of personal property or its value, and in the same action defendant B obtained a verdict on cross petition against his codefendant C for possession of the property or its value, the court was not authorized to render a judgment in favor of plaintiff A for the return of the property or its value, and also a judgment in favor of defendant B against C for the return of the property or its value, as such judgment would render defendant C doubly liable. Lenau v. Hobart Home State Bank, 91 Okl. 227, 216 P 893.

[29] Damm v. Bowman, 172 Ill. A. 546; West Michigan Sav. Bank v. Howard, 52 Mich. 423, 18 NW 199.

[30] Myers v. Moulton, 71 Cal. 498, 12 P 505; Watson v. Buckler, 29 Or. 235, 45 P 765.

[a] **Where defendants claim title, one as assignee and the other as purchaser from him,** it is error to enter a money judgment in their favor jointly. Redpath v. Brown, 71 Mich. 258, 39 NW 51.

[31] Jandt v. Potthast, 102 Iowa 223, 71 NW 216.

[32] Sweetzer v. Mead, 5 Mich. 107.

[33] Hamilton v. Browning, 94 Ind. 242.

[34] Wall v. De Mitkiewicz, 9 App. (D. C.) 109; Woodburn v. Chamberlin, 17 Barb. (N. Y.) 446.

[a] **But one part owner of a chattel** cannot have judgment against another part owner for possession, one having as much right to possession as the other, nor can defendant have judgment for the possession of the part owned by him, nor for the value thereof, if possession be not given by plaintiff. Mills v. Malott, 43 Ind. 248.

[35] Fischer v. Johnson, 74 Mo. A. 64.

[36] Pilger v. Marder, 55 Nebr. 113, 75 NW 559.

[37] See Judgments §§ 87-117.

[38] Morris v. Allen, 17 Cal. A. 684, 121 P 690; Hamilton v. Clark, 25 Mo. A. 428; Willys-Overland Co. v. Chapman, (Tex. Civ. A.) 206 SW 978.

[a] **Where judgment was confined to the pleadings** and was for property described therein and in the levy and did not embrace other property, it will not be disturbed. Pease v. Trench, 197 Ill. 101, 64 NE 368 [aff 98 Ill. A. 24].

[39] Stevenson v. Brott, 46 Colo. 58, 102 P 514; Horn v. Margolis, 153 NYS 674; Child v. Child, 13 Wis. 17.

[a] **Illustration.**—Where plaintiff claimed an automobile under a chattel mortgage, and defendant claimed a lien for repairs at the request of the mortgagor, and made no claim of personal indebtedness by plaintiff, and the sole issue was the right to possession, although the verdict assessed defendant's damages, a judgment for defendant against plaintiff for such damages was invalid. Stevenson v. Brott, 46 Colo. 58, 102 P 514.

[40] Whittaker v. Godwin, 97 Miss. 663, 53 S 413; Hamilton v. Clark, 25 Mo. A. 428; Goyena v. Berdoulay, 154 NYS 103; McCarty v. Hudsons, 24 Wend. (N. Y.) 291; Beard v. Herndon, 84 Okl. 142, 203 P 226; Wills v. Fuller, 47 Okl. 720, 150 P 693.

[a] **Judgment for value** in the alternative cannot be rendered in the absence of proof or admission of its value. Sauer v. Traeger, 56 Minn. 364, 57 NW 933; Griffith v. Richmond, 126 N. C. 377, 35 SE 620; Britton v. Johnson-McQuity Motor Co., 120 Okl. 221, 251 P 74; Beard v. Herndon, 84 Okl. 142, 203 P 226; Wills v. Fuller, 47 Okl. 720, 150 P 693.

[b] **Stipulation of value** by parties was sufficient to authorize judgment for the amount specified. France v. Larkin. 96 Nebr. 365, 148 NW 86.

[c] **Allegation of value in complaint** (1) in absence of other evidence, was sufficient to support judgment for the amount stated therein. Barrett v. Shipley, 63 Mont. 152, 206 P 430. (2) Allegations of a complaint in replevin as to the value of property do not determine its value, but under Remington & B. Code § 434 the court must determine the value. Southwestern Surety Ins. Co. v. Pacific Coast Casualty Co., 92 Wash. 654, 159 P 788.

[d] **Price paid** for property will not support judgment for its value. Wagner Typewriter Co. v. Robinson, 84 NYS 281.

[41] Colo.—Wigton v. Wigton, 169 P 133.

Fla.—Bell v. Niles, 61 Fla. 114, 55 S 392; McGriff v. Ried, 37 Fla. 51, 19 S 339; Holliday v. McKinne, 22 Fla. 153.

Iowa.—Moore v. Devol, 14 Iowa 112; Hunt v. Bennett, 4 Greene 512.

Miss.—Whitfield v. Whitfield, 40 Miss. 352.

Mo.—Schwettman v. Sander, (A.) 7 SW (2d) 301.

N. Y.—Hammond v. Morgan, 101 N. Y. 179, 4 NE 328, 3 HowPrNS 438; Walsh v. Kelly, 40 N. Y. 556 [aff 42 Barb. 98, 27 HowPr 359].

Okl.—Everett v. Akins, 8 Okl. 184, 56 P 1062.

Tex.—Ratliff v. Gordon, (Civ. A.) 149 SW 196.

Vt.—Poor v. Woodburn, 25 Va. 234.

Wis.—Young v. Lego, 38 Wis. 206; Child v. Child, 13 Wis. 17.

[a] **Verdict for damages and costs** for defendant authorized a judgment

and findings.[42] Generally, the judgment is limited to the relief claimed in the pleadings,[43] so that under a declaration in replevin alleging a stated amount to be the value of the property, it is error to enter judgment for a greater sum,[44] and where the verdict assesses the value of the property replevied or the damages for its detention at a sum greater than that alleged in the petition, and no amendment is made or asked, the judgment should be entered only for the sum stated in the petition.[45] In some jurisdictions the court is empowered, under a prayer for general relief and for special relief as well, to extend the relief specifically prayed for or to give such other relief as is warranted by the allegations of the complaint.[46] Where the relief awarded exceeds that claimed in the pleadings, plaintiff, by consenting to a reduction, may have judgment entered in form producing the same result as if the verdict had been correctly rendered.[47] While a judgment for the return of property in a replevin suit, under a verdict which fails to find the value of the property to be returned, is erroneous, yet, in the absence of an appeal therefrom, it is not void, and in such case, if the party recovering elects to have the property returned and demands the same, he is entitled to receive it;[48] and where an error has been made in the form of a judgment, by which its scope has been enlarged, or its amount increased beyond that plainly authorized by a verdict, referee's report, or decision of court, the judgment is not void or inoperative, the error being an irregularity merely which must be corrected, if at all, by motion in the court of original jurisdiction.[49]

[§ 317] **(2) Pleas Necessary for Return or Dam-**

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for a return with damages and costs. Smith v. Aurand, 10 Serg. & R. (Pa.) 92.

[b] **Verdict for damages** for detention did not authorize a judgment for the value of the property. Eaton v. Caldwell, 3 Minn. 80.

[c] **Verdict for value** (1) of the property for plaintiff authorized a judgment for a return, or, if a return could not be had, for the value. Lewisohn v. Apple, 12 NYCivProc 274. (2) Verdict for value and damages did not authorize a judgment for a return. Holliday v. McKinne, 22 Fla. 153.

[d] **General verdict for plaintiff** in replevin, fixing the sum due under a contract of sale of a piano, and giving plaintiff a lien for that amount, did not warrant the entry of a judgment that the jury assess such amount as damages for detention. Guerold v. Holtz, 103 Mich. 118, 61 NW 278.

[e] **Verdict of not guilty** in replevin, based on defendants' taking and detention, was held not to authorize a judgment for the return of the property to defendants (Replevin Act § 22). Lucas v. Gansler, 335 Ill. 274, 167 NE 23 [rev 248 Ill. A. 227].

[f] **Finding of jury** that they "fixed the value at $1,000" authorized judgment for plaintiff for recovery of property or its value as found. Weill v. Gusdorf, 230 Ky. 64, 18 SW (2d) 879.

[g] **Where verdict did not find separate values** of the property, it was erroneous to enter a judgment fixing separate values although the pleadings and evidence showed the separate values. Ratliff v. Gordon, (Tex. Civ. A.) 149 SW 196.

[h] **Judgment for aggregate value** of the property does not conform to a verdict finding the value of each separately. Blankenship v. Berry, 28 Tex. 448.

[i] **Judgment for possession** (1) for plaintiff was not warranted where it did not appear from the special verdict that defendant was in possession of the goods or claiming title thereto. Peninsular Stove Co. v. Ellis, 20 Ind. A. 491, 51 NE 105. (2) Where the jury found that the intervener was not the owner, nor entitled to possession of the property seized under claim and delivery proceedings, and found the value of the property or proceeds thereof received by the intervener, the court did not err in signing judgment for plaintiff against the intervener. Cotter-Underwood Co. v. Wise, 190 N. C. 861, 129 SE 591.

[42] Cal.—Cooke v. Aguirre, 86 Cal. 479, 25 P 5.

Mich.—Guerold v. Holtz, 103 Mich. 118, 61 NW 278; Gidday v. Witherspoon, 35 Mich. 368; Sweetzer v. Mead, 5 Mich. 107.

Nebr.—Leighton v. Stuart, 10 Nebr. 224, 4 NW 1051.

N. J.—Tumulty v. Jordan, 67 N. J. L. 509, 51 A 466.

N. C.—Spencer v. Bell, 109 N. C. 39, 13 SE 704.

Wis.—Young v. Lego, 38 Wis. 206.

[a] **Illustrations.**—(1) Judgment for value was defective which included all the goods found to be plaintiff's, not excepting those not found to have been in the possession of defendants. Tumulty v. Jordan, 67 N. J. L. 509, 51 A 466. (2) Judgment for a return to plaintiff of part of the property, to which the jury did no find plaintiff entitled, was erroneous. Young v. Lego, 38 Wis. 206.

[b] **Judgment for return** of the property was held erroneous where there was no finding as to plaintiff's right to possession. Cooke v. Aguirre, 86 Cal. 479, 25 P 5; Heeron v. Beckwith, 1 Wis. 17.

[c] **Judgment for damages** for detention should have been rendered against defendant where the record conclusively showed that he was a joint tort-feasor. Ammex Motion Picture Mfg. Co. v. Ervay, 41 Cal. A. 156, 182 P 312.

[d] **Judgment for possession** was supported by the findings. Sidney v. Wilson, 67 Cal. A. 282, 227 P 672.

[43] Burke v. Koch, 75 Cal. 356, 17 P 228; Truitt v. Revill, 4 Del. 71; Eaton v. Caldwell, 3 Minn. 134; Smith v. Mallory, (Mo. A.) 188 SW 934.

[a] **Where defendant prayed only for return of property,** it was sufficient in case he prevailed in the suit to justify a judgment awarding him the value of the property in case a return thereof could not be had. Myers v. Moulton, 71 Cal. 498, 12 P 505.

[b] **Where no damages are alleged,** the amount of the recovery cannot exceed the alleged value of the property. Hotchkiss v. Jones, 4 Ind. 260.

[c] **If plaintiff count in detinuit,** he can recover damages for the detention only until replevin, although he should prove the property still in defendant's possession. Plaintiff can recover no more than he seeks. Truitt v. Revill, 4 Del. 71.

[d] **In Mississippi** it was held, Hutchinson Code p 818, that the rule that damages in excess of the amount laid in the declaration are not recoverable did not apply to actions in replevin. White v. Graves, 24 Miss. 166.

[44] Hibbard v. Estridge, 156 Ky. 122, 160 SW 746; Gray v. Jones, 1 Head (Tenn.) 542.

[a] **In replevin before justice of peace,** if plaintiff fixes a value within the jurisdiction of the justice, but less than the real value, he is bound by the valuation; and if the property is not restored by the writ, he cannot recover a greater amount than the value fixed. Gray v. Jones, 1 Head (Tenn.) 542.

[b] **Where value of replevied property is fixed by special finding on sufficient evidence,** a judgment rendered on a general verdict limited to the same amount will not be disturbed. Citizens' Nat. Bank v. Wedgwood, 45 Nebr. 143, 63 NW 375.

[c] **Judgment for less** than the value of chattels mentioned in the verdict was not erroneous. In re Kalk, 270 Fed. 627.

[d] **In Florida** (1) plaintiff could not, without amendment of the declaration with respect to value, obtain judgment for a greater sum than that alleged. Ocala Fdy., etc., Works v. Lester, 49 Fla. 199, 38 S 51. (2) Ad damnum clause in the declaration refers to damages to be recovered for detention and not to the value of the goods, and judgment under an election statute for the value will not be reversed because it exceeds the amount of such ad damnum. Younglove v. Knox, 44 Fla. 743, 33 S 427; Anderson v. Carlin, 24 Fla. 199, 3 S 577.

[45] Ward v. Masterson, 10 Kan. 77; Kersenbrock v. Martin, 12 Nebr. 374, 11 NW 462; Brook v. Bayless, 6 Okl. 568, 52 P 738.

[a] **In Indiana** (1) the value placed on property in the complaint ought not be regarded as a limitation on the amount of plaintiff's recovery, but if it were an absolute limitation, the appellate court will deem that the complaint was amended as respects the value. Singer Mfg. Co. v. Doxey, 65 Ind. 65. (2) Damages cannot be in excess of the amount laid in the declaration. O'Neal v. Wade, 3 Ind. 410.

[46] Kerschner v. Smith, 121 Or. 469, 256 P 195; Mission Auto Co. v. Aldape, (Civ. A.) 206 SW 223 [aff 109 Tex. 185, 203 SW 41].

[47] Young v. Willet, 21 N. Y. Super. 486.

[48] State v. Dunn, 60 Mo. 64.

[49] Corn Exch. Bank v. Blye, 119 N. Y. 414, 23 NE 805.

ages.[50] Although a plea of property in a third person has been held to justify judgment for a return,[51] as a general rule it is error to render judgment awarding a return of the property to defendant under a plea of non cepit alone,[52] or of non detinet alone,[53] or on issue joined on pleas of non cepit and non detinet;[54] but under some statutes the plea of non detinet puts in issue not only the detention of the goods, but also the property of plaintiff therein, and justifies a return.[55] If the right of property is put in issue by defendant,[56] on issue being found for him, he is entitled, whether prayed for by the plea or not, to a judgment for a return,[57] or an alternative judgment for a return of the property or its value;[58] but under some statutes, unless defendant claims a return of the property in his plea or answer, he cannot have judgment for a return of the property,[59] or an alternative judgment for a return of the property or its value,[60] or a judgment for its value.[61] Where the property has been taken from defendant and delivered to plaintiff, and judgment is rendered for defendant, it has been held that he cannot recover damages unless a claim therefor is set up in the answer;[62] but under some of the statutes the rule is otherwise.[63] Where the evidence fails to show the delivery of the property to plaintiff,

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50. **Matters put in issue by pleas** see supra §§ 213–219.

51. **Property belonging to third persons** see infra § 324.

52. Fla.—Hopkins v. Burney, 2 Fla. 42.

Ill.—Underwood v. White, 45 Ill. 437; Vose v. Hart, 12 Ill. 378; Anderson v. Talcott, 6 Ill. 365.

Ky.—Bonner v. Coleman, 3 B. Mon. 464.

Me.—Bath v. Miller, 53 Me. 308.

Mass.—Whitwell v. Wells, 24 Pick. 25; Simpson v. McFarland, 18 Pick. 427, 29 AmD 602.

N. Y.—Peo. v. Niagara Ct. C. Pl., 4 Wend. 217.

Eng.—Anonymous, 2 Mod. 199, 86 Reprint 1024.

[a] **Non cepit and other pleas.**—Where, in replevin, the pleas were non cepit, property in defendant, property in a third person, and justification of the taking under an execution against such third person, and it was held to be an error to award a retorno habendo upon merely a verdict of not guilty. Hanford v. Obrecht, 38 Ill. 493.

[b] **But where, with plea of non cepit, brief statement was filed** by defendant that the property was in a third person, that defendant, being an officer, had attached it as the property of such third person, and that the property was not in plaintiff, and it was held that on a verdict that defendant "did not take," defendant was entitled to a judgment of return. Moulton v. Bird, 31 Me. 296.

53. Neis v. Gillen, 27 Ark. 184; Brown v. Sanford, 22 Ark. 76; Johnson v. Howe, 7 Ill. 342; Dyer v. Brown, 71 Ill. A. 317.

54. Lucas v. Gansler, 335 Ill. 274, 167 NE 23 [rev 248 Ill. A. 227]; Chandler v. Lincoln, 52 Ill. 74; Bourk v. Riggs, 38 Ill. 320; National Cash Register Co. v. Wait, 158 Ill. A. 168; Mattson v. Hanisch, 5 Ill. A. 102.

55. Noble v. Epperly, 6 Ind. 414; McKnight v. Dunlop, 4 Barb. 36 [aff 5 N. Y. 537, 55 AmD 370]; Ford v. Ford, 3 Wis. 399.

56. **Issues, proof, and variance** see supra §§ 213–235.

57. Ill.—Lucas v. Gansler, 335 Ill. 274, 167 NE 23 [rev 248 Ill. A. 227]; King v. Ramsay, 13 Ill. 619; Harris v. McCasland, 29 Ill. A. 430.

Ind.—Williams v. Kessler, 82 Ind. 183; Matlock v. Straughn, 21 Ind. 128; Conner v. Comstock, 17 Ind. 90.

Ky.—Kerley v. Hume, 3 T. B. Mon. 181; Stephens v. Frazier, 2 B. Mon. 250.

Me.—Hoeffner v. Stratton, 57 Me. 360.

Mass.—D'Arcy v. Steuer, 179 Mass. 40, 60 NE 405; Hoffman v. Noble, 6 Metc. 68, 39 AmD 711.

Minn.—Adamson v. Sundby, 51 Minn. 460, 53 NW 761.

Okl.—Kuhlman v. Williams, 1 Okl. 136, 28 P 867.

Pa.—Weidel v. Roseberry, 13 Serg. & R. 178.

But see Hunt v. Bennett, 4 Greene (Iowa) 512 (where, in a replevin suit, the jury found "for the defendant $50.00," and it was held that the judgment rendered on the verdict should not be for a return of the property, and that the verdict implied that plaintiff was entitled to the property by paying the fifty dollars).

[a] **General denial** puts plaintiff's right of possession in issue, and on finding for defendant justifies a return without a plea therefor. D'Arcy v. Steuer, 179 Mass. 40, 60 NE 405.

[b] **Where plea of general issue only is interposed,** return of the property may not be ordered where judgment is rendered for defendant on the sole ground that he had lawful possession at the time the writ issued, because no demand had been made. Farrah v. Bursley, 100 Mich. 547, 59 NW 245.

[c] **Avowry** under a tax warrant was in the nature of a declaration and sufficient to entitle defendant to a return. Brackett v. Whidden, 3 N. H. 17.

[d] **In Ohio,** on plaintiff's failure to file a petition, judgment on default may be rendered for defendant for a restoration of the property without an answer having been filed. Wellman v. Wellman, 11 Oh. Dec. (Reprint) 815, 30 CincLBul 19 [rev on other grounds 9 Oh. Cir. Ct. 72, 6 Oh. Cir. Dec. 61].

58. Deford v. Hutchison, 45 Kan. 332, 2 P 60; Bates v. Buchanan, 2 Bush (Ky.) 117.

59. Pico v. Pico, 56 Cal. 453; Lee v. De La Motte, 47 Cal. A. 23, 189 P 1034; Levy v. Hohweisner, 101 App. Div. 82, 91 NYS 552; Powers v. De Cesare, 193 NYS 294.

[a] **Statute is complied with** by pleading facts showing defendant's right to retain possession, as such pleading is regarded as equivalent to a demand for a return. Pico v. Pico, 56 Cal. 453; Keller Mercantile Co. v. Holmes, 163 Mo. A. 149, 147 SW 146.

[b] **In Montana** (1) under Rev. Code (1921) §§ 9363, 9406, defendant must claim a return in his answer, and on failure to demand a return he cannot have judgment for a return of part of the property which the verdict failed to award to plaintiff. Hayes v. Moffatt, 83 Mont. 185, 271 P 452. (2) Judgment for the return of property on finding of defendant's right to possession follows as a matter of course. Barrett v. Shipley, 63 Mont. 152, 206 P 430; Wheeler v. Jones, 16 Mont. 87, 40 P 77; Levelle v. Lowry, 5 Mont. 498, 6 P 337; Anderson v. O'Laughlin, 1 Mont. 81.

60. Banning v. Marleau, 101 Cal. 238, 35 P 772; Imperial Valley Auto Co. v. Toney, 47 Cal. A. 541, 190 P 1043; Durham v. Wilson, 68 Colo. 430, 190 P 525; Gallup v. Wortmann, 11 Colo. A. 308, 53 P 247.

[a] **Answer held sufficient.**—Skaggs v. Taylor, 77 Cal. A. 519, 247 P 218.

[b] **Judgment for costs** may only be rendered in such a case. Imperial Valley Auto Co. v. Toney, 47 Cal. A. 541, 190 P 1043.

[c] **In Missouri** (1) alternative judgment for a return of the property or its value may not be rendered in the absence of a demand for a return in the answer. Fowler v. Carr, 55 Mo. A. 145. (2) Where there is no demand for a return in the answer, judgment may be for a return and damages, but not for the value of the property. Stockham v. Leach, 210 Mo. A. 407, 238 SW 853; Willow Springs Bank v. Utterman, (A.) 184 SW 1171; Keller Bros. Mercantile Co. v. Holmes, 163 Mo. A. 149, 147 SW 146.

61. Cable v. Duke, 208 Mo. 557, 106 SW 643; Stockham v. Leach, 210 Mo. A. 407, 238 SW 853; Willow Springs Bank v. Utterman, (Mo. A.) 184 SW 1171; Keller Bros. Mercantile Co. v. Holmes, 163 Mo. A. 149, 147 SW 146; Wm. S. Merrill Chemical Co. v. Nickells, 66 Mo. A. 678; Puller v. Thomas, 36 Mo. A. 105.

[a] **Answer held sufficient.**—Brunke v. Salinger, (Mo. A.) 8 SW (2d) 88.

62. Durham v. Wilson, 68 Colo. 430, 190 P 525; Gallup v. Wortmann, 11 Colo. A. 308, 53 P 247; Powers v. De Cesare, 193 NYS 294; Whitcomb v. Hoffman, 14 Hun (N. Y.) 335; Shafer v. Russell, 28 Utah 444, 79 P 559 (holding further that, under Rev. St. [1898] §§ 2960, 2968, such claim must be set up by a statement of facts, and a mere clause in the prayer for relief asking for damages is insufficient).

[a] **Where taking was accompanied with wrong and outrage,** although the declaration contain no count claiming special damages, nor any averment that the taking was accompanied with circumstances of outrage and oppression, damages beyond the value of the property taken may be given. Schofield v. Ferrers, 46 Pa. 438.

63. Schrandt v. Young, 62 Nebr. 254, 86 NW 1085; Creighton v. Newton, 5 Nebr. 100.

[a] **General denial** will permit defendant to recover every item of damage allowable to him for the deten-

a general finding for defendant will not support a judgment for the return of the property;[64] but the general rule is that in replevin, where a plea in abatement is sustained, defendant is entitled to judgment for the return of the property.[65]

[§ 318] **g. Amendment and Correction.** The rules relating to amendment and correction of judgments in actions generally[66] apply to judgments in replevin.[67] Thus the court may, on proper notice to the parties,[68] modify or correct the judgment so as to mold it in conformity with the verdict or findings,[69] or with the sheriff's return,[70] so that a judgment absolute for the value of the property may be amended into a judgment in the alternative;[71] or a judgment simply for costs into a judgment for a return of the property and costs;[72] or into an alternative judgment;[73] or a judgment for a return modified into one affirming plaintiff's possession;[74] or a money judgment into one for possession of the property.[75] Where plaintiff does not claim delivery of the property, and, notwithstanding, a judgment in the alternative for a return or for the value is entered, plaintiff will be permitted to amend the judgment.[76] An amendment will not be allowed where the judgment in its resulting form would be unwarranted by the verdict or not in accordance with the statute in force at the time of rendition of the original judgment;[77] and where defendant waived a return of the property and took judgment for its value, he cannot subsequently be permitted to have the judgment amended to include an award for the return of the property.[78]

At a subsequent term of court the judgment may not be amended as to make substantial changes,[79] although the court may correct mere matters of form at a subsequent term on notice to the opposing party.[80]

Proper mode of correcting a judgment is by motion and not by appeal,[81] although under certain statutory provisions such correction may be made on appeal.[82]

[§ 319] **2. By Default.** As in the case of other civil actions,[83] judgment by default may be had in replevin,[84] and generally may, for good cause, be set aside.[85] A judgment by default may be rendered for want of a sufficient affidavit of defense,[86] and may be entered before the return day of the writ;[87] but to authorize a default judgment for failure to file an affidavit of defense plaintiff must proceed as authorized by statute.[88] A default judgment may

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tion of the property. Schrandt v. Young, 62 Nebr. 254, 86 NW 1085.

[b] **Whether defendant pleads general denial,** new matters as a defense, or a demand for damages, the jury must assess such damages for defendant as are just and proper. Merrick County School Dist. No. 2 v. Shoemaker, 5 Nebr. 36.

[64] McKeal v. Freeman, 25 Ind. 151; Conner v. Comstock, 17 Ind. 90.

[65] Walko v. Walko, 64 Conn. 74, 29 A 243; Kendrick v. Watkins, 54 Miss. 495. But see Gould v. Barnard, 3 Mass. 199 (holding that, where defendant in replevin pleads a want of an indorser in abatement of the writ, without any suggestion entitling him to the possession of the goods, and the writ is abated, he is entitled to a judgment for costs, but not for a return).

[66] See Judgments §§ 436–483.

[67] See infra text and notes 68–82.

[68] Brown v. Hardie, 28 N. Y. Super. 678.

[69] Reilly v. Maryman, 20 F. Cas. No. 11,672, 1 Hayw. & H. 9; Hart v. Wood, 202 Iowa 58, 209 NW 430.

[70] Dare v. Hall, 141 Wash. 389, 250 P 106.

[71] Meads v. Seaman, 92 Cal. 221, 28 P 935; Clark v. Dreyer, 9 Colo. A. 453, 48 P 818; Berthold v. Fox, 21 Minn. 51; Cincinnati First Nat. Bank v. Kelly, 57 N. Y. 34; Fitzhugh v. Wiman, 9 N. Y. 559; Scherl v. Flam, 136 App. Div. 753, 121 NYS 522; Hitchcock v. Wimpleberg, 103 App. Div. 53, 92 NYS 997; Stauff v. Maher, 2 Daly (N. Y.) 142; Cochran v. Gottwald, 41 N. Y. Super. 317; Wolf v. Farley, 16 NYS 168.

[a] **Illustration.**—Where the clerk, through mistake, entered an absolute money judgment, such judgment could properly be amended in conformity with the verdict to read in the alternative for a return of the property. Berthold v. Fox, 21 Minn. 51.

[72] Sumner v. Cook, 12 Kan. 162.

[73] Oklahoma State Bank v. Hicklin, 100 Kan. 301, 164 P 257.

[74] Fischer v. Cohen, 22 Misc. 117, 48 NYS 775, 27 NYCivProc 139.

[75] Beinert v. Tivoli, 62 Misc. 616, 116 NYS 4.

[76] Aldrich v. Thiel, 3 CodeRep (N. Y.) 91.

[77] McGriff v. Reid, 37 Fla. 51, 19 S 339.

[78] Miller v. Daly, 55 Nebr. 771, 76 NW 447.

[79] Lill v. Stookey, 72 Ill. 495.

[a] **Right of possession.**—Where a replevin suit is dismissed for the want of a declaration and a judgment given against plaintiff for costs, the court cannot, at a subsequent term on a notice to plaintiff that a writ of retorno habendo will be applied for, so amend the record as to find the property in question, and determine that he recover it from plaintiff, the failure to award such writ on the dismissal of the replevin suit not authorizing the court to review its own judgment at a subsequent term and then enter a judgment which should have been entered in the first instance. Lill v. Stookey, 72 Ill. 495.

[80] McGriff v. Reid, 37 Fla. 51, 19 S 339; Bledsoe v. Ziegenhein Bros. Furniture Co., 161 Ill. A. 146; Oklahoma State Bank v. Hicklin, 100 Kan. 301, 164 P 257; Farmers Loan, etc., Co. v. Hansen, 123 Or. 72, 260 P 999.

[a] **Judgment for costs** may be modified into an alternative judgment at a subsequent term. Oklahoma State Bank v. Hicklin, 100 Kan. 301, 164 P 257.

[81] Ingersoll v. Bostwick, 22 N. Y. 425; Young v. Atwood, 5 Hun (N. Y.) 234.

[82] Levy v. Hohweisner, 101 App. Div. 82, 91 NYS 552; Fischer v. Cohen, 22 Misc. 120, 48 NYS 775, 27 NYCivProc 132; Mendel v. Herling, 116 NYS 661; Dunn v. Field, 113 NYS 485; Cassidy v. Elias, 90 Pa. 434.

[a] **Illustration.**—Where, in replevin in the municipal court, a judgment in favor of defendants erroneously awarded them possession of the chattel, it might be properly modified by striking out such provision on appeal, as authorized by Municipal Ct. Act § 310 (L. [1902] p 1578 c 580). Levy v. Hohweisner, 101 App. Div. 82, 91 NYS 552.

[83] See Judgments §§ 349–420.

[84] Kehoe v. Rounds, 69 Ill. 351; Todor v. Coatesville, 28 Pa. Dist. 168.

[a] **Claimant who intervened** but without being made defendant was not entitled to judgment by default against the original plaintiff, as no issue can properly be made until the settlement of the suit between the original parties. Ettringham v. Handy, 60 Miss. 334.

[85] Colvard v. Clute, 6 Wend. (N. Y.) 540; Slicing Mach. Co. v. Sturtz, 25 Pa. Dist. 1099; Wildoner v. Dodson, 41 Pa. Co. 89.

[86] See cases infra this note.

[a] **In Pennsylvania** (1) under the act of June 13, 1836 a judgment by default for want of an appearance was not authorized in replevin, as such act related to actions commenced by summons, and the writ of replevin was not regarded as a summons. Ogilbe v. Bennett, 1 Pa. Co. 575; Crofut v. Chichester, 3 Phila. 457. (2) Under the act of April 19, 1901 (P. L. p 88), a default judgment for plaintiff may be entered upon defendant's failure to file within fifteen days an affidavit of defense. Painter v. Snyder, 22 Pa. Super. 603; Patch Mfg. Co. v. Killinger, 12 Pa. Dist. 6, 26 Pa. Co. 539; Juniata, etc., Tel. Co. v. Haines, 26 Pa. Co. 55.

[b] **Opening default.**—Where a statute provided that plaintiff may take a default judgment upon defendant's failure to file an affidavit of defense within fifteen days of service of plaintiff's declaration, the court cannot open the judgment to curtail plaintiff's statutory right. Chestnut v. Reese, 16 Pa. Dist. 511.

[87] Griesmer v. Hill, 225 Pa. 545, 74 A 429.

[88] See cases infra this note.

[a] **Fifteen days' notice** to defend-

also be rendered for failure to amend a pleading within the time allowed by statute.[89] A judgment by default cannot be entered where the court has no jurisdiction of defendant,[90] and in some jurisdictions may not be entered against a party who has entered an appearance,[91] and under some statutes, in order to sustain a default judgment, the affidavit in the cause must appear to have been verified.[92] In the absence of a statute to the contrary, in replevin against several defendants, some of whom were not served and none of whom appeared, final judgment cannot be entered against defendants in default until the issue as to the other defendants is disposed of.[93] A judgment by default in replevin for more than the amount claimed in the petition and indorsed on the summons is erroneous,[94] but may be permitted to stand upon remission of the surplus.[95]

Effect of.[96] Although defendant's default operates as an admission of plaintiff's cause of action,[97] and as a forfeiture of any counterbond given by defendant,[98] plaintiff is not entitled to any particular money judgment thereby, but must either proceed to recover the goods by a writ of return or sue out a writ of inquiry for an assessment of damages.[99] A judgment by default is of no effect as against one who was neither a party to the action nor in possession of the property to be replevied.[1]

[§ 320] **3. On Offer.** The statutory provisions relating to judgments on offer[2] have been held applicable to an action of replevin.[3] An offer of judgment and its acceptance constitute a contract,[4] and the acceptance and entry of a judgment on a general offer concludes plaintiff from bringing a new action for any part of the property embraced in the judgment.[5] A mere nominal defendant has no right, without the knowledge or consent of the real party in interest, to make a stipulation for dismissal of the suit without judgment, unless the real party in interest has refused to indemnify him;[6] and when he is indemnified a judgment awarding the property to claimant, entered in pursuance of an offer by the nominal party at claimant's instance, without the knowledge of the real party in interest, will be set aside on motion.[7] An offer made after a return of the property to plaintiff, to allow judgment for damages for detention, with costs, without adjudging the title to the property, is insufficient for any purpose.[8]

[§ 321] **4. Partial Recovery.**[9] Plaintiff may have judgment according to the extent of his title proved,[10] and if, on an issue as to plaintiff's title, he proves title to only a part of the property, he is entitled to a judgment for such part and defendant may have judgment for a return of the other part,[11] and the

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ant to file an affidavit of defense, under Act (1901) § 4 (P. L. p 88), means fifteen days after plaintiff's statement is actually filed. Wildoner v. Dodson, 41 Pa. Co. 89.

[b] **Substituted service** of plaintiff's declaration on an adult member of defendant's family at his dwelling house was a sufficient compliance with the statute requiring service on defendant or his attorney. Hoyt v. Carson, 40 Pa. Co. 556 [aff 60 Pa. Super. 172].

[c] **Service on adult member of defendant's family** at his residence is not a compliance with the statute. Smith v. Smith, 17 Pa. Dist. 380.

[89] Peterson v. Kissell, 148 Iowa 516, 125 NW 808.

[90] Hart v. Pacaud, 28 U. C. Q. B. (Ont.) 390.

[91] Barlow v. Serio, 129 Miss. 875, 93 S 356; Slicing Mach. Co. v. Sturtz, 25 Pa. Dist. 1099; Evans v. Witman, 10 Pa. Dist. & Co. 719.

[a] **Filing of counterbond is appearance in action,** and judgment by default cannot be entered thereafter. Slicing Mach. Co. v. Sturtz, 25 Pa. Dist. 1099.

[b] **If clerk fails to enter appearance** of defendant as required by statute, the latter cannot avail himself of the omission upon motion to set aside a default entered. Kesler v. Haynes, 6 Wend. (N. Y.) 547.

[c] **Where defendant set up counterclaim for damages accruing from seizure** of the property which he alleged to be wrongful, and plaintiff failed to file a reply thereto, it was error to order judgment by default, and an inquiry in favor of defendant on the counterclaim, as the issue raised as to the lawfulness of the seizure was undetermined. Phipps v. Wilson, 125 N. C. 106, 34 SE 227.

[92] Kehoe v. Rounds, 69 Ill. 351.

[93] Ouly v. Dickinson, 5 Coldw. (Tenn.) 486.

[94] Rhodenbaugh v. Carey, 2 Oh. Dec. (Reprint) 162, 1 WestLMonth 599 (although the surplus be for interest accruing since the filing of the petition, there being no prayer for interest).

[95] Rhodenbaugh v. Carey, supra.

[96] **Generally** see Judgments §§ 385-389.

[97] Standard Varnish Works v. Cushing, 202 Mass. 576, 89 NE 163; Chestnut v. Reese, 16 Pa. Dist. 511.

[98] Chestnut v. Reese, supra.

[99] Wilburn v. Cologero, 97 Miss. 511, 52 S 794; Wildoner v. Dodson, 41 Pa. Co. 89.

[1] Packard Motor Car Co. v. Mazer, 77 Pa. Super. 348.

[2] See Judgments §§ 339-345.

[3] Shepherd v. Moodhe, 150 N. Y. 183, 44 NE 963.

[4] Shepherd v. Moodhe, supra.

[5] Shepherd v. Moodhe, supra.

[a] **Chattel not mentioned in offer or judgment.**—Where defendant in his answer claimed title to one of several chattels replevied and offered judgment for the other chattels and costs, an acceptance and entry of judgment on such offer by implication precluded a subsequent action for the chattel claimed by defendant, although neither the offer nor judgment expressly included the particular chattel. Shepherd v. Moodhe, 150 N. Y. 183, 44 NE 963.

[6] Casper v. Judge Kent Cir. Ct., 45 Mich. 251, 7 NW 816.

[a] **Constable as mortgagee's agent** for the purpose of foreclosing a mortgage by notice and sale could not, after the property was replevied from him, stipulate for the entry of judgment against him without the mortgagee's consent. Casper v. Judge Kent Cir. Ct., 45 Mich. 251, 7 NW 816.

[7] Carter v. Stevens, 4 Silv. Sup. 4, 8 NYS 217 (a constable who has levied on personal property, under an execution, being the agent of the execution creditor, has no power when indemnified by him to release the property to a claimant thereof).

[8] Oleson v. Newell, 12 Minn. 186.

[9] **Value recoverable by one having special interest** see infra §§ 371, 372.

[10] Walker v. Hunter, 29 F. Cas. No. 17,072, 5 Cranch C. C. 462; Collier v. Fitzpatrick, 19 Mont. 562, 48 P 1103; Clark v. Keith, 9 Oh. 72 (where the jury find for plaintiff as to a part of the articles replevied and for defendant as to a part, assessing to each the proper damages, separate judgments will be entered in favor of each with full costs).

[a] **Illustration.**—In replevin for certain property, including two horses, where the evidence showed ownership of the horses in plaintiff, he can recover judgment for them or their value, although not entitled to the other property. Collier v. Fitzpatrick, 19 Mont. 562, 48 P 1103.

[11] Ill.—Pratt v. Tucker, 67 Ill. 346.

Ind.—Wright v. Mathews, 2 Blackf. 187.

Mass.—Cronin v. Barry, 200 Mass. 563, 86 NE 953.

Mont.—Hayes v. Moffatt, 83 Mont. 185, 271 P 452.

N. Y.—Brachfeld v. Harlem Terminal Storage, etc., Co., 133 NYS 421.

Oh.—Clark v. Keith, 9 Oh. 72.

Or.—Lebb v. Peabody, 103 Or. 405, 205 P 819.

[a] **Illustrations.**—(1) In replevin of an automobile, an answer alleging that defendant purchased it in good faith, and had since placed thereon certain extra parts, and tendering judgment that plaintiff recover possession of the automobile

damages will be apportioned between them.[12] But a plaintiff in replevin to whom chattels are delivered, having established title to a portion thereof only, is not entitled to judgment, upon surrendering the remainder to persons found by the jury to be owners, who are not made parties;[13] and where the property replevied has been delivered to plaintiff under the writ, it is error to render judgment for him for part of the property, leaving defendant to his remedy on the bond as to the rest, in regard to which the court finds that for want of testimony it is unable to determine the rights of the parties.[14]

[§ 322] **5. Election between Recovery of Property or Value.**[15] Where defendant retains possession of the property, plaintiff, on a finding in his favor, may, under statutes in some jurisdictions,[16] either take a judgment for a return only,[17] or waive a return of the property and elect to take a judgment for its value,[18] and on plaintiff's election the court may properly render a simple money judgment in pursuance of such election.[19] But where plaintiff is in possession of the property at the time final judgment is rendered, he cannot, under such statutes, elect to take a judgment for value, but is confined to a judgment affirming his right of possession.[20] Where plaintiff is in possession of the property, defendant, on a finding in his favor, may also, under statutory provisions in some jurisdictions,[21] elect to take a judgment for a return of the property or waive a return and take a judgment for its value,[22] and such right to a money judgment in lieu of the property is absolute.[23] The statute permitting an election by defendant has been held inapplicable to a defendant who has but a special interest in the property.[24] It is not necessary that a party exercise his option before the finding is made, it being sufficient if he exercises it when judgment is taken;[25] and it has been held that the waiver of the right to have a return of the property need not appear of record, the acceptance of a verdict for its value being in effect an election,[26] but other authority is to the contrary.[27] In some jurisdictions, where the property is delivered to plaintiff and he fails in the

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except such extra parts for detention of which defendant asked damages, and findings by the court conforming with the answer, authorized judgment for defendant for recovery of the spare parts or their value. Lebb v. Peabody, 103 Or. 405, 205 P 819. (2) Judgment in replevin between separated husband and wife for household goods stored by her may award some chattels to one and some to the other. Brachfeld v. Harlem Terminal Storage, etc., Co., 133 NYS 421.

[12] **Apportionment of damages** see infra § 388.

[13] Wilde v. Paschen, 67 Wis. 90, 30 NW 279.

[14] Jandt v. South, 2 Dak. 46, 47 NW 779.

[15] **Cross references:**
On dismissal or nonsuit see supra §§ 256, 257, 263-267.
Operation and effect of election as to title see infra § 327.
Option to return property or pay its value in satisfaction see infra § 328.
Time of valuation of property see infra §§ 366-368.

[16] See statutory provisions.

[17] St. Louis Union Trust Co. v. Merritt, 158 Mo. A. 648, 139 SW 824.

[18] Ariz.—Consolidated Nat. Bank v. Cunningham, 24 Ariz. 437, 210 P 850.

Ark.—Hill v. Fellows, 25 Ark. 11 (under Gould Dig. c 145 §§ 44, 45).

Iowa.—Wald v. Auto Salvage, etc., Co., 190 Iowa 11, 179 NW 856; Clark v. Warner, 32 Iowa 219.

Ky.—Hibbard v. Estridge, 156 Ky. 122, 160 SW 746.

Mo.—Wooldridge v. Quinn, 70 Mo. 370; White v. Graves, 68 Mo. 218; Hays v. Hulet, (A.) 14 SW (2d) 699; Smith v. Mallory, (A.) 188 SW 934; Seegall v. Trares, (A.) 181 SW 1070; Viviano v. Columbia Can Co., 183 Mo. A. 281, 166 SW 1082.

Nebr.—Singer Sewing Mach. Co. v. Robertson, 87 Nebr. 542, 127 NW 866, 34 LRANS 887.

Wis.—Reiss v. Delles, 45 Wis. 662.

[a] **If part of goods can be returned,** plaintiff can elect to take that part, and a judgment for the value of the remainder to be assessed by the jury. Caldwell v. Bruggerman, 4 Minn. 270.

[b] **Where plaintiff in replevin takes mere personal judgment,** he loses his remedy against the property, the levy being held to be abandoned. Toland v. Swearingen, 39 Tex. 447.

[c] **Fact that execution issued and defendant paid sheriff** the assessed value does not constitute an election by plaintiff unless he accepts the amount collected. Hanlon v. O'Keefe, 55 Mo. A. 528.

[d] **Where writ has been by mistake levied on property to which plaintiff has no claim,** but which is of a like description as that mentioned in the writ, a defendant, on waiving a return of the property, is entitled to a verdict for its value, and is not remitted to a separate action. Dewey v. Hastings, 79 Mich. 263, 44 NW 607.

[e] **In South Carolina** Code (1902) § 299 (Code [1920] c VI § 4) does not change the right of the parties as it previously existed to demand either damages for the taking and detention as in trover for conversion or the return of the property with damages. Richey v. Du Pre, 20 S. C. 6; Williams v. Irby, 16 S. C. 371; Joplin v. Carrier, 11 S. C. 327.

[19] Wooldridge v. Quinn, 70 Mo. 370.

[20] Smith v. Southwest Lumber Co., 23 Ariz. 271, 203 P 336.

[21] See statutory provisions.

[22] Ariz.—Consolidated Nat. Bank v. Cunningham, 24 Ariz. 437, 210 P 850.

Del.—Reynolds v. Donaway, 30 Del. 461, 108 A 139.

Iowa.—McNorton v. Akers, 24 Iowa 369.

Mich.—Le Duc v. Schnepp, 249 Mich. 622, 229 NW 455; Brewster Loud Lumber Co. v. General Builders' Supply Co., 233 Mich. 633, 208 NW 28; Barton v. Trumbull, 226 Mich. 685, 198 NW 186; Adams v. Champion, 31 Mich. 332.

Mo.—Kronck v. Reid, 105 Mo. A. 430, 79 SW 1001; Caldwell v. Ryan, (A.) 79 SW 743; Herring v. Corder, 49 Mo. A. 378.

N. M.—Cochrane v. Stevenson, 32 N. M. 264, 255 P 404; Roth v. Yara, 19 N. M. 8, 140 P 1071.

Wis.—Farmers' L. & T. Co. v. Commercial Bank, 15 Wis. 424, 82 AmD 689; Pratt v. Donovan, 10 Wis. 378.

[a] **That sheriff was proceeding to collect judgment for value of property** is no preclusion of the right of defendant to exercise his election to take the specific property where it nowhere appears that the property was ever delivered to the sheriff under the judgment in the replevin suit. Harris v. Hitt, 58 Mo. A. 459.

[b] **Although officer made no return of writ** of replevin showing that plaintiff was in possession, an election to take judgment for the value was proper upon other proof of plaintiff's possession. Frank v. Brown, 119 Mich. 631, 78 NW 670.

[c] **Defendant was entitled to the full value** of the property even though such value was more than he paid for the property prior to the replevin action. Snider v. Davidson, 105 Kan. 661, 185 P 724.

[23] Cable Co. v. Miller, 173 Iowa 384, 155 NW 820.

[24] Schnitzer v. Russell, 81 N. J. L. 146, 80 A 938.

[25] Riess v. Delles, 45 Wis. 662.

[a] **In Missouri** (1) the successful party need not make his election until after judgment the unsuccessful party has delivered the property to the officer. Wooldridge v. Quinn, 70 Mo. 370; White v. Graves, 68 Mo. 218; Koelling v. August Gast Bank Note, etc., Co., 103 Mo. A. 98, 77 SW 474. (2) But where the property has been disposed of before judgment, an election to take its value before judgment is not improper. White v. Graves, supra.

[26] Hill v. Fellows, 25 Ark. 11.

[27] Adams v. Champion, 31 Mich. 233 (it is essential to a judgment for defendant for the value of the property that the record should affirmatively and distinctly show the election to take the value, instead of a return of the property, and the statute does not intend that a matter of such importance should be left to inference).

[a] **No entry or writing** is necessary beyond a proper recital in the judgment. Kline v. Kline, 49 Mich. 419, 13 NW 800.

action, defendant cannot have judgment for a return or for the value, at his election, but he must take a judgment in the alternative for the return of the property, or, if a return cannot be had, for the value as assessed.[28]

[§ 323] **6. Return of Property[29]—a. In General.** Unless there has been a waiver of the right to a return of the property,[30] ordinarily, on a finding in favor of plaintiff[31] or defendant,[32] a judgment for either should include an order for the return of the property,[33] and at least nominal damages.[34] A plaintiff in replevin found to be without title may be ordered to return the property to the one from whom it was taken, although the latter was holding simply in the right of the owner.[35] Although defendant's interest is special or limited, on plaintiff's failure to sustain the action, he is entitled to a judgment for the return of the property.[36] Thus an officer is entitled to a judgment for a return of the property replevied from him while holding it under a distress warrant for rent,[37] or under an execu-

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28. French v. Ginsburg, 57 Minn. 264, 59 NW 189.

[a] **In Florida** the election given by L. (1879) c 3133 (McClellan Dig. pp 862, 863 § 17) to plaintiff where defendant retained possession was superseded by Rev. St. (1892) § 1724; L. (1903) c 5159 (Gen. St. [1906] § 2188), requiring judgment in the alternative. Evans v. Kloeppel, 72 Fla. 267, 73 S 180; Johnson v. Clutter Music House, 55 Fla. 385, 46 S 1; McGriff v. Ried, 37 Fla. 51, 19 S 339.

[b] **In New York** the election given under 2 Rev. St. p 531 § 55 was repealed by Code § 277, so that neither plaintiff nor defendant may elect to take judgment for a return or its value, but judgment must be in the alternative for a return of the property, or the value thereof, in case a return cannot be had. Allen v. Fox, 51 N. Y. 562, 10 AmR 641; Dwight v. Enos, 9 N. Y. 470; Glann v. Younglove, 27 Barb. 480; Seaman v. Luce, 23 Barb. 240; Rockwell v. Saunders, 19 Barb. 473; Brown v. Hardie, 28 N. Y. Super. 678.

Alternative judgments see infra § 325.

29. Cross references:

Judgment for, as essential to liability on bond see infra §§ 408, 414.

Necessity of plea for return see supra § 317.

On dismissal or nonsuit see supra §§ 256, 257, 263-267.

Right to writ of return see infra § 334.

Satisfaction of judgment for see infra §§ 329-331.

30. See supra § 322.

31. Devine v. Gilmore, 192 Ill. A. 625; Altmark v. Gelfand, 133 NYS 443.

[a] **Judgment need not order** that articles removed from a building be restored by defendant by attaching them to the building where it appeared that the articles had only junk value. A judgment that defendant restore them in substantially as good condition as when taken was sufficient. Nearhoff v. Rucker, (Wash.) 287 P 658.

[b] **In New Jersey** (1) although judgment is for the value of the property where defendant is in possession, application may be made for an order that the goods be restored, and it shall be lawful for the court in its discretion to make an order that the goods be restored to the prevailing party. 2 Comp. St. (1910) p 1996; 3 Comp. St. p 4375. (2) A trial judge may order defendant to deliver replevied goods and chattels although defendant rebonded the property. Johnson v. Mason, 64 N. J. L. 258, 45 A 618; Gropper v. Hoover, 5 N. J. Misc. 649, 137 A 837 [aff 104 N. J. L. 436, 140 A 919].

[c] **In Pennsylvania.**—(1) At common law, where defendant retained possession, plaintiff could not have judgment de retorno habendo. Fisher v. Whoollery, 25 Pa. 197; Moore v. Shenk, 3 Pa. 13, 45 AmD 618. (2) The rule has been changed by statute so that on a finding for plaintiff he may have judgment for a return. Act of April 19, 1901 (P. L. p 88); Reber v. Schroeder, 221 Pa. 152, 70 A 556.

32. U. S.—Hemstead v. Colburn, 11 F. Cas. No. 6,347, 5 Cranch C. C. 655; Fields v. Crawford, 30 F. Cas. No. 18,296, 2 Hayw. & H. 256.

Cal.—Al G. Barnes Shows Co. v. Toyo Kisen Kaisha Oriental SS. Co., 61 Cal. A. 304, 214 P 1015.

Conn.—Hall v. Smedley Co., 151 A 321.

Ill.—Merrimac Paper Co. v. Illinois Trust, etc., Bank, 129 Ill. 296, 21 NE 787; MacLachlan v. Pease, 66 Ill. A. 634 [aff 171 Ill. 527, 49 NE 714]; Lochnitt v. Stockton, 31 Ill. A. 217.

Kan.—Wester v. Long, 63 Kan. 876, 66 P 1032; Sumner v. Cook, 12 Kan. 162.

Ky.—Stephens v. Frazier, 2 B. Mon. 250; Gaines v. Tibbs, 6 Dana 143.

Mass.—Giroux v. Wheeler, 163 Mass. 48, 39 NE 470.

Mich.—Metropolitan Lumber Co. v. McColeman, 140 Mich. 333, 103 NW 809; Salter v. Sutterland, 125 Mich. 662, 85 NW 112.

Mo.—Ingals v. Ferguson, 138 Mo. 358, 39 SW 801.

Mont.—Barrett v. Shipley, 63 Mont. 152, 206 P 430.

N. Y.—Brooklyn Ash Removal Co. v. Connell, 175 App. Div. 182, 161 NYS 1006 [rev on other grounds 225 N. Y. 503, 122 NE 620]; New York, etc., Brewing Co. v. Angelo, 144 App. Div. 655, 129 NYS 713 [rearg den 145 App. Div. 940 mem, 130 NYS 1122 mem].

Tenn.—Fugate v. Stapleton, 6 Baxt. 321.

[a] **Common-law judgment** for a return of the property may be rendered if the jury do not render such a verdict as will enable the court to render a statutory judgment for defendant. Wood v. May, 30 F. Cas. No. 17,956, 3 Cranch C. C. 172.

[b] **Although plaintiff conceded** property belonged to defendant, judgment for a return to defendant was proper upon plaintiff's failure to redeliver. Hall v. Smedley Co., (Conn.) 151 A 321.

[c] **If writ be returned "executed"** and defendant succeed in the action, a judgment de retorno is proper, the presumption being on this return that the property had been returned to plaintiff, that being the command of the writ. Stephens v. Frazier, 2 B. Mon. (Ky.) 250.

[d] **Condition of property.**—Under Gen. L. (1909) c 336, providing judgment for defendant shall be entered for the return and restoration of the property, it was not necessary to specify in the judgment that such property was to be returned in like good order and condition as when taken. Fitzgerald v. Nickerson, (R. I.) 113 A 674.

[e] **On motion for return** of the property after judgment for defendant in replevin in which title to the property was tried, it was too late for plaintiff, in order to prevent entry of judgment for a return, to allege and prove facts which were known to him at the trial for the purpose of defeating defendant's title. McNeal v. Leonard, 3 Allen (Mass.) 268.

[f] **It is irregularity for court to order return before final judgment;** the order for return should be made a part of the final judgment. Branch v. Branch, 5 Fla. 447.

[g] **Judgment for return, not technically conforming to statute,** but substantially correct, will be affirmed. McArthur v. Homan, 15 F. Cas. No. 8,659a, Hempst. 286.

[h] **Plaintiff cannot complain** of judgment against him because it does not provide for a return of the property. Branch v. Wiseman, 51 Ind. 1.

[i] **In New Hampshire** (1) defendant on a verdict in his favor is entitled to judgment for the value of the property and not to a return. Dickinson v. Lovell, 35 N. H. 9; Messer v. Bailey, 31 N. H. 9; Kendall v. Fitts, 22 N. H. 1; Bell v. Bartlett, 7 N. H. 178. (2) Plaintiff, however, cannot complain of judgment for defendant for value of the goods. Canney v. Emerson, 82 N. H. 487, 136 A 139; Ramsey v. Landry, 78 N. H. 612, 102 A 531.

[j] **In Wisconsin,** in replevin before a justice of the peace, judgment for defendant must be for the value of the property and damages. Fitzpatrick v. Warren, 1 Pinn. 541.

33. See cases supra notes 31, 32.

34. Nominal damages see infra § 364.

35. Lochnitt v. Stockton, 31 Ill. A. 217.

36. Witham v. Witham, 57 Me. 447, 99 AmD 787; Hoffman v. Noble, 6 Metc. (Mass.) 68, 39 AmD 711; Charpentier v. Bresnahan, 74 Mich. 48, 41 NW 856.

[a] **While one tenant in common** cannot as a general rule maintain replevin against his cotenant, if plaintiff, having replevied his cotenant's property, fails in his action, his cotenant is entitled to a judgment for return. Witham v. Witham, 57 Me. 477, 99 AmD 787; Ingalls v. Ferguson, 138 Mo. 358, 39 SW 801 [rev 59 Mo. A. 299].

37. Applegate v. Crawford, 2 Ind. 579.

[a] **There must have been rent in arrears** at the time the writ issued to justify a return to the officer. Powell v. Triplett, 6 B. Mon. (Ky.) 420.

tion[38] or attachment,[39] unless pending the action the debtor's interest in the property expires.[40] There are, however, exceptions[41] to the general rule providing for a judgment for a return of the property to the prevailing party;[42] thus a judgment for a return is improper,[43] and a judgment affirming the right of possession proper,[44] where there has been no actual change of possession or at the time of judgment the prevailing party is already in possession.[45] Subject to an exception hereinafter considered,[46] a judgment for defendant for a return should not be entered where he has no interest in the property,[47] or where plaintiff's action is defeated solely by reason of its premature commencement,[48] or where in equity it ought not to be rendered.[49] Although a return cannot generally be ordered to one from whom the property was not taken,[50] it has been held that a defendant is entitled to a return where he was not only entitled to possession, but would have been in possession in a short time but for the issuance of the writ.[51]

[§ 324] **b. Property Belonging to Third Persons.** The general rule is that the plea of property in a stranger is good,[52] and on issue being found for defendant, he is generally entitled to a return of the property,[53] without connecting himself with the right of such person,[54] and on a general verdict for defendants in replevin, an order of the court for the restoration to him of the property replevied is correct, although plaintiff may have produced evidence that it was owned by a third person, not a party to the suit, jointly with himself.[55]

[§ 325] **7. Alternative Judgments.**[56] Statutes ordinarily provide that judgments in replevin shall be entered in the alternative for a return of the property or its value and damages for its detention.[57] Where the prevailing party is not in possession of the property and it does not appear that a return cannot be had, the judgment should follow the statute in providing for a return of the property as well as for its value,[58] and likewise judgment for the value in the alternative as well as for a return should be rendered in pursuance of the statute.[59] In some jurisdictions the alternative judgment for the value of the property is for the benefit of the prevailing party which he may waive.[60] The provision for an alternative judgment does not change the action into one of trover or trespass,[61] but where the action is changed into one for damages under statutes authorizing such change, an alternative judgment is not necessary.[62] Such judgment does not necessarily decide that the successful party is the absolute and unconditional owner of the property.[63] To warrant the entry of such judgment, however, it is necessary that the party be entitled to the possession of the property;[64] but it is not necessary that the property be delivered to plaintiff at the institution of the action to entitle him to such a judgment.[65] In form the alternative judgment should be at least in substantial compliance with the form prescribed by statute.[66] While it appears that some

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[38] Kerley v. Hume, 3 T. B. Mon. (Ky.) 181; Philips v. Harriss, 3 J. J. Marsh. (Ky.) 122, 19 AmD 166; Gaines v. Tibbs, 6 Dana (Ky.) 143.

[a] **Exempt property.**—An officer from whom exempt property under execution had been replevied was not entitled to a return. Saffell v. Wash, 4 B. Mon. (Ky.) 92.

[39] Dawson v. Wetherbee, 2 Allen (Mass.) 461; Frederick v. Judge Mecosta Cir. Ct., 52 Mich. 529, 18 NW 343.

[a] **Although attachment had been dissolved** since the rendition of the verdict, judgment for a return was proper. Dawson v. Wetherbee, 2 Allen (Mass.) 461.

[b] **Although debtor became insolvent** and the attachment was thereby dissolved, defendant was entitled to a judgment for a return. Kimball v. Thompson, 4 Cush. (Mass.) 441, 50 AmD 799.

[40] Wheeler v. Train, 4 Pick. (Mass.) 168.

[a] **Expiration of lease.**—Where an officer attached property which was replevied from him and it appeared that the property was in the attachment debtor's possession under a lease which had since expired, the officer was not entitled to a judgment for a return but for costs only. Wheeler v. Train, 4 Pick. (Mass.) 168.

[41] See infra text and notes 43–51.

[42] See supra text and notes 30–32.

[43] Colo.—Durham v. Wilson, 68 Colo. 430, 190 P 525; Gallup v. Wortmann, 11 Colo. A. 308, 53 P 247.

Ind.—Baldwin v. Burrows, 95 Ind. 81; Manufacturers' Discount Co. v. American Security Co., 87 Ind. A. 446, 161 NE 660.

Iowa.—Clapp v. Trowbridge, 74 Iowa 550, 38 NW 411.

Ky.—Harrod v. Hill, 2 Dana 165; Greenwade v. Fisher, 5 B. Mon. 167.

Mass.—Ware River R. Co. v. Vibbard, 114 Mass. 458.

Mich.—Smith v. Dodge, 37 Mich. 354; Gidday v. Witherspoon, 35 Mich. 368.

Okl.—Marrinan v. Knight, 7 Okl. 419, 54 P 656.

Or.—Phipps v. Taylor, 15 Or. 484, 16 P 171.

But see Young v. Lego, 38 Wis. 206 (statute providing for a judgment for a return for defendant seemed imperative although defendant already had possession).

[44] Cal.—Claudius v. Aguirre, 89 Cal. 501, 26 P 1077.

Ind.—Chissom v. Lamcool, 9 Ind. 530.

Iowa.—Clapp v. Trowbridge, 74 Iowa 550, 38 NW 411.

Mass.—Ware River R. Co. v. Vibbard, 114 Mass. 458.

Mich.—Smith v. Dodge, 37 Mich. 354.

Minn.—Leonard v. Maginnis, 34 Minn. 506, 26 NW 733.

Mo.—Baird v. Taylor, 30 Mo. A. 580.

Okl.—Marrinan v. Knight, 7 Okl. 419, 54 P 656.

[a] **Where plaintiff reacquired possession** by purchase after defendant had rebonded the property, judgment affirming his possession would have been proper. Leonard v. Maginnis, 34 Minn. 506, 26 NW 733.

[45] See cases supra notes 43, 44.

[46] **Property belonging to third persons** see infra § 324.

[47] Gunter v. Williams, 137 Ark. 530, 210 SW 136; Kerley v. Hume, 3 T. B. Mon. (Ky.) 181 (dictum); Farrah v. Bursley, 100 Mich. 547, 59 NW 245; Hinchman v. Doak, 48 Mich. 168, 12 NW 39; Young v. Lego, 38 Wis. 206.

[48] Martin v. Bayley, 1 Allen (Mass.) 381.

[49] Bath v. Miller, 53 Me. 308.

[50] Whitwell v. Wells, 24 Pick. (Mass.) 25; Hinchman v. Doak, 48 Mich. 168, 12 NW 39.

[51] Standard Varnish Works v. Cushing, 202 Mass. 576, 89 NE 163.

[a] **Mortgagee of property.**—Where the person in possession of the property defaulted, and plaintiff ordered no evidence of its title or right of possession, the court might return the property to the possession of a mortgagee, who had appeared in the action, such mortgagee having a right to the possession of the property, although he was not in possession at the time the writ was served, as the disposition of the property was according to the rights of the parties at the time of making the order, and in accordance with the replevin bond, which recites a taking of the property from the joint defendants and is conditioned in part upon a return of it to them, if such is the order of the court. Standard Varnish Works v. Cushing, 202 Mass. 576, 89 NE 163.

[52] See supra §§ 84, 191.

[53] Ky.—Tuley v. Mauzey, 4 B. Mon. 5.

Me.—Moulton v. Bird, 31 Me. 296.

Mass.—Quincy v. Hall, 1 Pick. 357, 11 AmD 198.

Minn.—Loomis v. Youle, 1 Minn. 175.

N. Y.—Ingraham v. Hammond, 1 Hill 353; Rhodes v. Bunts, 21 Wend. 19; Harrison v. McIntosh, 1 Johns. 380.

Pa.—McDowell v. Windle, 2 Chest. Co. 477, 2 Del. Co. 356.

Eng.—Butcher v. Porter, 1 Salk. 94, 91 Reprint 87; Wildman v. North, 2 Lev. 92, 83 Reprint 465; Parker v. Mellor, 1 Ld. Raym. 217, 91 Reprint 1041.

[54] Loomis v. Youle, 1 Minn. 175.

[55] Waldman v. Broder, 10 Cal. 378.

[56] **Cross references:**
As essential to liability on bond see infra §§ 408, 414.
On dismissal or nonsuit see supra §§ 256, 257, 263–267.
Operation and effect see infra §§ 326, 327.
Satisfaction of see infra § 328.
Time of valuation of property see infra §§ 366–368.

[57] See statutory provisions.

[a] **In Illinois** (1) it is provided by statute that if the property is held for the payment of any money, judgment may be in the alternative that plaintiff pay the amount for which the same was rightfully held, with proper damages, within a given time, or make return of the property. Smith-Hurd Rev. St. (1925) c 119. (2) Such provision only applies where plaintiff has a general property and defendant shows a special property which entitles him as against plaintiff to hold the property for a certain sum due. Lamping v. Payne, 83 Ill. 463; Cermak v. Chicago Bonding, etc., Co., 211 Ill. A. 337; Maplewood Colliery Co. v. Siebenmann, 182 Ill. A. 452 (labor performed); Clow v. Yount, 93 Ill. A. 112 (pledge). (3) The property must have been held rightfully for the payment of money. Smith v. Nyberg Auto. Works, 177 Ill. A. 18. (4) Form of judgment was sufficient although it failed to recite that defendant held the property by virtue of an execution for the payment of money. MacLachlan v. Pease, 171 Ill. 527, 49 NE 714 [aff 66 Ill. A. 634]. (5) It was not essential that the money for which the property was held by defendant

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should be owed by plaintiff himself. Janes v. Gilbert, 168 Ill. 627, 48 NE 177 [aff 68 Ill. A. 611]. (6) The statute does not authorize entry of judgment for the amount of executions without proof that the property was worth such amount. Talty v. Schoenholz, 323 Ill. 232, 154 NE 139, 49 ALR 1487 [rev 238 Ill. A. 635].

[b] **In Indiana** under Rev. St. (1881) §§ 1550, 1571, in replevin before a justice of the peace, if defendant prevails, judgment should not be in the alternative, but merely for a return of the property and costs. Van Meter v. Barnett, 119 Ind. 35, 20 NE 426; Woodward v. Myers, 15 Ind. A. 42, 43 NE 573; Everman v. Hyman, 3 Ind. A. 459, 29 NE 1140.

[c] **In Wyoming**, when plaintiff is in possession judgment for defendant should be for damages and costs and not in the alternative for a return of the property or its value. Montana, etc., Oil Co. v. Gibson, 19 Wyo. 1, 113 P 784 (Comp. St. [1920] § 6287).

[58] U. S.—Hanchett v. Humphreys, 84 Fed. 862.

Ark.—Jetton v. Smead, 29 Ark. 372; Rowark v. Lee, 14 Ark. 425.

Cal.—Washburn v. Huntington, 78 Cal. 573, 21 P 305; Stewart v. Taylor, 68 Cal. 5, 8 P 605; McCue v. Tunstead, 66 Cal. 486, 6 P 316; Holmberg v. Hendy, 10 P 394; Al G. Barnes Shows Co. v. Toyo Kisen Kaisha Oriental SS. Co., 61 Cal. A. 304, 214 P 1015.

Ida.—Bates v. Capital State Bank, 21 Ida. 141, 121 P 561.

Ind.—Bales v. Scott, 26 Ind. 202.

Kan.—Ward v. Masterson, 10 Kan. 77; Wilson v. Fuller, 9 Kan. 176; Hall v. Jenness, 6 Kan. 356.

Ky.—Rogers v. Bradford, 8 Bush 163.

Miss.—Johnson v. Ferguson, 144 Miss. 464, 110 S 230; Miller v. Griffin, 110 Miss. 535, 70 S 699; Anderson v. Tyson, 14 Miss. 244.

Mo.—Smith v. Mallory, (A.) 188 SW 934.

Mont.—Kelsey v. Yadish, 66 Mont. 23, 212 P 495; Hynes v. Barnes, 30 Mont. 25, 75 P 523.

Nebr.—Heidiman-Benoist Saddlery Co. v. Schott, 59 Nebr. 20, 80 NW 47; Martin v. Foltz, 54 Nebr. 162, 74 NW 418; Goodwin v. Potter, 40 Nebr. 553, 58 NW 1128; Roberson v. Reiter, 38 Nebr. 198, 56 NW 877; Manker v. Sine, 35 Nebr. 746, 53 NW 734; Singer Mfg. Co. v. Dunham, 33 Nebr. 686, 50 NW 1122; Hooker v. Hammill, 7 Nebr. 231.

Nev.—Lambert v. McFarland, 2 Nev. 58.

N. Y.—Gallarati v. Orser, 27 N. Y. 324 [rev 17 N. Y. Super. 94]; Wood v. Orser, 25 N. Y. 348; Ingersoll v. Bostwick, 22 N. Y. 425; Karpas v. Brussel, 217 App. Div. 550, 217 NYS 373; Retter v. Webber, 217 App. Div. 193, 216 NYS 500; Burman v. Michaels, 184 NYS 474; Ehrenreich v. Knudsen, 157 NYS 1082; Horn v. Margolis, 153 NYS 674; Amendola v. Ruggiero, 149 NYS 907.

N. C.—Harrell v. Tripp, 197 N. C. 426, 149 SE 548; Spencer v. Bell, 109 N. C. 39, 13 SE 704; Horton v. Horne, 99 N. C. 219, 5 SE 927; Council v. Averett, 90 N. C. 168; Manix v. Howard, 82 N. C. 125.

S. D.—Pitts Agricultural Works v. Young, 6 S. D. 557, 62 NW 432.

Tenn.—Creamer v. Ford, 1 Heisk. 307.

Tex.—Lang v. Dougherty, 74 Tex. 226, 12 SW 29; Pridgin v. Strickland, 8 Tex. 427, 58 AmD 124; Clopton v. Goodbar, (Civ. A.) 55 SW 972; Jackson v. Phillips, (Civ. A.) 35 SW 745.

Wash.—Conway v. Sunset Motor Co., 144 Wash. 373, 258 P 31; National Bread Wrapping Mach. Co. v. Crowl, 246 P 754 [mod on reh 137 Wash. 621, 243 P 840]; Harvey v. Ivory, 35 Wash. 397, 77 P 725; Hall v. Law Guarantee, etc., Soc., 22 Wash. 305, 60 P 643, 79 AmSR 935.

Wis.—Baxter v. Berg, 88 Wis. 399, 60 NW 711; Mayhew v. Mather, 82 Wis. 355, 52 NW 436; Rose v. Tolly, 15 Wis. 443.

[59] Cal.—Cooke v. Aguirre, 86 Cal. 479, 25 P 5.

Mont.—Hennessy Co. v. Wagner, 69 Mont. 46, 220 P 101.

Okl.—Humphrey v. Baker, 71 Okl. 272, 176 P 896.

S. C.—Yarborough v. Dickerson, 132 S. C. 168, 129 SE 136.

Wis.—Booth v. Ableman, 18 Wis. 495.

[60] Cal.—Waldman v. Broder, 10 Cal. 378; Peterson v. Bay Point First Nat. Bank, 101 Cal. A. 532, 281 P 1104; Griffith v. Reddick, 41 Cal. A. 458, 182 P 984; Bradley v. McDonald, 36 Cal. A. 807, 169 P 427.

Colo.—Copeland v. Kilpatrick, 38 Colo. 208, 88 P 472.

Minn.—Cohen v. Seashore, 159 Minn. 345, 198 NW 1009; Thompson v. Scheid, 39 Minn. 102, 38 NW 801, 12 AmSR 619; Stevens v. McMillin, 37 Minn. 509, 35 NW 372.

Mo.—Caldwell v. Ryan, 210 Mo. 17, 108 SW 533, 124 AmSR 717, 16 LRANS 494, 14 AnnCas 314; Central Missouri Trust Co. v. Wulfert, 198 Mo. A. 85, 199 SW 724; Stroud v. Morton, 70 Mo. A. 647.

Mont.—Wheeler v. Jones, 16 Mont. 87, 40 P 77.

Wis.—Morrison v. Austin, 14 Wis. 601.

[61] Steidl v. Aitken, 30 N. D. 281, 152 NW 276, LRA1915E 192.

[62] McCarty v. Morgan, 2 Nebr. (Unoff.) 274, 96 NW 489; Sloan v. Fist, 2 Nebr. (Unoff.) 664, 89 NW 760.

[63] Armel v. Layton, 33 Kan. 41, 5 P 441.

[64] Washburn v. Huntington, 78 Cal. 573, 21 P 305.

[65] Gulath v. Waldstein, 7 Mo. A. 66.

[66] See cases infra this note.

[a] **Sufficiency in form.**—(1) A judgment "that the defendant recover of plaintiff the said ninety-one hogs and three calves, or, at his election, take judgment for the sum of $442, the value of said property so adjudged to be returned to him," was a substantial compliance with the statute requiring judgment in the alternative "that the plaintiff return the property or pay the value so assessed at the election of defendant." Herring v. Carder, 49 Mo. A. 378. (2) Judgment in replevin declaring that plaintiff should recover the property, and, in event that it should not be returned, should receive a sum of money, was sufficient under Code Civ. Proc. § 667, being in the alternative. Orchardson v. Christie, 30 Cal. A. 8, 157 P 547. (3) Recital in judgment "that the plaintiff do have and recover of the defendant the possession of the mules [describing them] and in case delivery cannot be had of said property, then that plaintiff do have and recover of the defendant the sum of $440, the value of the property" complied with Rev. Code § 6760 providing for alternative judgments. Chestnut v. Sales, 44 Mont. 534, 121 P 481. (4) Judgment that defendant have and recover of and from the plaintiff the property heretofore replevied, or the sum of seven hundred ninety-four dollars, and the further sum of thirty-nine dollars and ninety-nine cents as damages, together with costs, was not open to the objection that it was not in the alternative. Skow v. Locke, 3 Nebr. (Unoff.) 176, 91 NW 204. (5) Under Revisal (1905) § 570 judgment for plaintiff for the return of the property, if to be had, and, if not then for its value and damages for deterioration and detention was correct in form. Hendricks v. Ireland, 162 N. C. 523, 77 SE 1011.

[b] **Insufficiency in form.**—(1) Judgment that defendant have and recover from plaintiff the sum of fifteen hundred dollars or the return of the property was not in compliance with the statute requiring that judgment should be "for the return of the property or the value thereof in case a return cannot be had." Etchepare v. Aguirre, 91 Cal. 288; 27 P 668, 929, 25 AmSR 180. (2) A money judgment to be satisfied by a return of the property within thirty days was not an alternative judgment as contemplated by the statute. Bowser Furniture Co. v. Johnson, 117 Ark. 496, 175 SW 516.

statutes are mandatory so that a judgment in the alternative must in all cases be entered,[67] other statutes are regarded as being merely permissive[68] so that a judgment not in the alternative is not void if the particular circumstances warrant its rendition.[69] Thus it has been held that an absolute money judgment is warranted where at the time of trial it is shown that the property cannot be returned[70] for the reason that the property has been disposed of by the unsuccessful party,[71] or has been destroyed,[72] or is not in a proper condition to be returned.[73] Likewise, an alternative judgment for the value of the property is unnecessary where the property is in possession of the court,[74] or in the possession of the prevailing party,[75] and the rule has been extended so that if it appears that the property is capable of delivery to the prevailing party, an alternative judgment for its value is not necessary.[76]

[§ 326] **8. Construction, Operation, and Effect[77] —a. In General.** The legal operation and effect of a judgment in replevin must be ascertained by a construction and interpretation of it.[78] Under some statutes the liability of defendants to a replevin judgment is joint and not several,[79] while in other

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[c] **In justice court** strict formality is not required so if the alternative judgment is in substantially the form required by statute, it is sufficient. Garrett v. Wood, 3 Kan. 231.

[67] Johnson v. Clutter Music House, 55 Fla. 385, 46 S 1.

[68] Barnard First Nat. Bank v. Venard, 109 Kan. 15, 197 P 877; Johnson v. Boehme, 66 Kan. 72, 71 P 243, 97 AmSR 357; Wilkins v. Willimon, 128 S. C. 509, 122 SE 503; Hallidie Mach. Co. v. Whidbey Island Sand, etc., Co., 73 Wash. 403, 131 P 1156, 45 LRANS 40.

[a] **Alternative judgment is not exclusive remedy** for defendant in replevin, and, if he did not avail himself of it, he might maintain a separate action and accomplish the same result. Johnson v. Boehme, 66 Kan. 72, 71 P 243, 97 AmSR 357.

[69] Erreca v. Meyer, 142 Cal. 308, 75 P 826; Orchardson v. Christie, 30 Cal. A. 8, 157 P 547; Keiser v. Levering, 29 Cal. A. 41, 154 P 281; Barnard First Nat. Bank v. Venard, 109 Kan. 15, 197 P 877.

[70] U. S.—Boley v. Griswold, 20 Wall. 486, 22 L. ed. 375; Burton v. Platter, 53 Fed. 901, 4 CCA 95.

Ark.—Miller v. Gordon, 172 Ark. 1, 285 SW 359.

Cal.—Faulkner v. Santa Barbara First Nat. Bank, 130 Cal. 258, 62 P 463; Brown v. Johnson, 45 Cal. 76; Financial Ins. Corp. v. Brockton, 96 Cal. A. 179, 273 P 829.

Del.—Clark v. Adair, 3 Del. 113.

Ida.—Johnson v. Fraser, 2 Ida. (Hasb.) 404, 18 P 48.

Kan.—Clouston v. Gray, 48 Kan. 31, 28 P 983; Garrett v. Wood, 3 Kan. 231.

Nebr.—Ulrich v. McConaughey, 63 Nebr. 10, 88 NW 150; Selby v. McQuillan, 59 Nebr. 158, 80 NW 504; Goodman v. Kennedy, 10 Nebr. 270, 4 NW 987.

N. C.—Holmes v. Godwin, 69 N. C. 467.

Or.—Wheeler v. Steadman, 99 Or. 414, 195 P 818.

Wis.—Pranke v. Herman, 76 Wis. 428, 45 NW 312.

"It would be idle to provide for the return of property shown to have been destroyed or which could not be returned in specie, and other instances may be conceived of where the order of a return would be futile." Barnard First Nat. Bank v. Venard, 109 Kan. 15, 16, 197 P 877.

[a] **Better practice, however,** is to enter judgment in the alternative although it appears that the property cannot be redelivered. Farmers' Nat. Bank v. Ferguson, 28 N. D. 347, 148 NW 1049.

[b] **Regularity of judgment presumed** as against the principal in the absence of evidence showing that the property could have been returned. Boley v. Griswold, 20 Wall. (U. S.) 486, 22 L. ed. 375; Miller v. Gordon, 172 Ark. 1, 285 SW 359; Brown v. Johnson, 45 Cal. 76.

[71] Ark.—Cathey v. Bowen, 70 Ark. 348, 68 SW 31.

Cal.—Erreca v. Meyer, 142 Cal. 308, 75 P 826; Burke v. Koch, 75 Cal. 356, 17 P 228; Peterson v. Bay Point First Nat. Bank, 101 Cal. A. 532, 281 P 1104.

Colo.—McCarthy v. Strait, 7 Colo. A. 59, 42 P 189.

Kan.—Clouston v. Gray, 48 Kan. 31, 28 P 983.

Minn.—Sherman v. Clark, 24 Minn. 37.

Okl.—Keen v. Fletcher, 31 Okl. 791, 123 P 842.

S. C.—Wilkins v. Willimon, 128 S. C. 509, 122 SE 503.

S. D.—Park v. Robinson, 15 S. D. 551, 91 NW 344.

Utah.—Dolinsky v. Williams, 56 Utah 186, 189 P 873.

Wyo.—Boswell v. Laramie First Nat. Bank, 16 Wyo. 161, 92 P 624, 93 P 661.

[a] **Sale of property before judgment** warranted an absolute money judgment. Cathey v. Bowen, 70 Ark. 348, 68 SW 31; Peterson v. Bay Point First Nat. Bank, 101 Cal. A. 532, 281 P 1104; Keen v. Fletcher, 31 Okl. 791, 123 P 842; Dolinsky v. Williams, 56 Utah 186, 189 P 873.

[b] **But where plaintiff reacquired possession** before judgment of property sold at a public sale, judgment should be in the alternative. Smith v. Willoughby, 24 N. D. 1, 138 NW 7.

[c] **In New York** (1) judgment for a return of the property has been held to be proper where the jury have failed to find the value of the property. Hammond v. Morgan, 101 N. Y. 179, 4 NE 328, 3 HowPrNS 438; Johnstone v. Weibel, 131 App. Div. 166, 115 NYS 255; Hay v. Muller, 28 NYS 57, 23 NYCivProc 321 [aff 6 Misc. 621, 26 NYS 1135]. (2) Although the property has been lost or disposed of, judgment must be in the alternative. Fitzhugh v. Wiman, 9 N. Y. 559; Cochran v. Gottwald, 41 N. Y. Super. 317; McNamara v. Eisenleff, 14 Abb PrNS 25.

[72] Richardson Drug Co. v. Teasdall, 59 Nebr. 150, 80 NW 488.

[73] Seligman v. Armando, 94 Cal. 314, 29 P 710; Atlantic Refining Co. v. Feinberg, 31 Del. 183, 112 A 685.

[a] **Where goods are so intermingled** with goods of defendant that they are not distinguishable, judgment for return is unnecessary. Seligman v. Armando, 94 Cal. 314, 29 P 710.

[74] Harris v. Harris, 43 Ark. 535.

[75] Cal.—Erreca v. Meyer, 142 Cal. 308, 75 P 826; Caruthers v. Hensley, 90 Cal. 559, 27 P 411; Claudius v. Aguirre, 89 Cal. 501, 26 P 1077 [disappr Brichman v. Ross, 67 Cal. 601, 8 P 316]; Bradley v. McDonald, 36 Cal. A. 807, 169 P 427.

Kan.—Colean Mfg. Co. v. Johnson, 82 Kan. 655, 109 P 403, 20 AnnCas 296.

Md.—Burrier v. Cunningham Piano Co., 135 Md. 135, 108 A 492.

Mo.—Baird v. Taylor, 30 Mo. A. 580.

Mont.—Hayes v. Moffatt, 83 Mont. 185, 271 P 452.

Okl.—Marrinan v. Knight, 7 Okl. 419, 54 P 656.

Or.—McCargar v. Wiley, 112 Or. 215, 229 P 665.

S. C.—Wilkins v. Willimon, 128 S. C. 509, 122 SE 503.

Wyo.—State Finance Corp. v. Commercial Credit Co., 41 Wyo. 198, 283 P 1100.

[76] Peterson v. Bay Point First Nat. Bank, 101 Cal. A. 532, 281 P 1104; Beggs v. Smith, 26 Cal. A. 532, 147 P 585; Beard v. Herndon, 84 Okl. 142, 203 P 226; Wills v. Fuller, 47 Okl. 720, 150 P 693.

[a] **Illustration.**—Where property seized under execution was left by the sheriff in plaintiff's physical possession as his representative, a failure to render an alternative judgment for the value was not erroneous. Beggs v. Smith, 26 Cal. A. 532, 147 P 585.

[77] **Cross references:**
Generally see Judgments §§ 794-814.
Conclusiveness of judgment in action on bond see infra §§ 426, 427.
Judgment by default see supra § 319.
Judgment on offer see supra § 320.
On dismissal or nonsuit see supra §§ 256, 257, 268.

[78] See Judgments § 331.

[a] **Alternative judgment construed.**—(1) Judgment for possession, of property or the value thereof, if delivery could not be had, and for damages for detention, was construed as a judgment for damages for detention, if defendant returned the car, and for the value thereof and damages for detention if he failed to return it. Applegarth v. Weintraub, 60 Cal. A. 24, 212 P 36; Morris v. Allen, 17 Cal. A. 684, 121 P 690. (2) In a replevin action, where the court found that title was in defendant notwithstanding his failure to pay the price owing to plaintiff, a judgment awarding defendant possession or value, with damages for detention during pendency of the trial, was not an adjudication that plaintiff was no longer entitled to payment for the property as an offset against the award of damages. Esmond v. Richards, 112 Wash. 641, 192 P 917.

[79] Eastern Outfitting Co. v. San Francisco Super. Ct., 38 Cal. A. 374, 176 P 366.

jurisdictions it is considered as joint and several.[80] A replevin judgment is not subject to a collateral attack for irregularities,[81] or for matters properly adjudicated therein.[82] Since the action of replevin is primarily possessory in its character,[83] a judgment in such action ordinarily determines nothing beyond the right to possession.[84] However, where the question of title may be[85] and is adjudicated, such an adjudication is conclusive.[86]

Effect of alternative judgment.[87] The effect of an alternative judgment as to the right of the unsuccessful party to satisfy such judgment by a return of the property or its value at his option[88] and the effect of such judgment so as to entitle the prevailing party to the choice of suing out a writ of return or an execution for the value of the property are elsewhere considered.[89] On failure of the unsuccessful party to return the property, the alternative judgment for its value becomes a definite and unconditional indebtedness[90] on which an execution may issue.[91] Although an action of debt cannot be maintained on a foreign alternative judgment where the right to return the property has not expired,[92] such an action will lie on such a judgment where a reasonable time has elapsed in which to comply with the alternative provision for a return of the property,[93] or it is an established fact that the property cannot be returned.[94]

Judgment for damages is payable independently of the judgment for a return of the property.[95]

[§ 327] **b. Effect on Title to Property.**[96] While title to the property will vest in the defeated party on rendition of judgment for the value of the property under statutes authorizing an election to take judgment for the value,[97] a judgment for the value entered in pursuance of an unauthorized election will not vest title in the unsuccessful party.[98] Likewise, where a judgment for the value of the property only is authorized, title will vest in the unsuccessful party on rendition of such judgment.[99] A judgment that plaintiff is entitled to possession of the property without an alternative judgment for its value will not vest title in defendant.[1] It has been held that the effect of an alternative judgment for a return of the property or its value is to vest title in the unsuccessful party subject, however, to the right of the prevailing party to take the property in discharge of so much of the judgment as is made up by the assessed value of the property.[2]

[§ 328] **9. Satisfaction and Discharge**[3]**—a. In General.** An alternative judgment in replevin for a return of the property or its value[4] ordinarily may be satisfied by the unsuccessful party by returning in the proper manner, condition, and quantity[5] the property sued for,[6] or by paying its value when a return is impossible.[7] In some jurisdictions the effect of such a judgment is to give an unsuccessful plaintiff[8] or defendant the choice as to which alternative he will adopt,[9] while in other jurisdictions the alternative character of the judgment is considered such that neither an unsuccessful defendant[10] nor plaintiff[11] has the right to keep the property and pay its assessed value.

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[80] National Surety Co. v. Austin Mach. Corp., 35 F. (2d) 842 [certiorari den 280 U. S. 614 mem, 50 SCt 162 mem, 74 L. ed. 655 mem].

[81] Ill.—Bryers v. Highland Park Transfer, etc., Co., 245 Ill. A. 400.

Ind.—Fromlet v. Poor, 3 Ind. A. 425, 29 NE 1081.

Miss.—Pearce v. De Graffenreid, 110 Miss. 465, 70 S 561.

Mo.—Hays v. Hulet, (A.) 14 SW (2d) 699,

N. Y.—Kurzweil v. Story, etc., Piano Co., 95 Misc. 484, 159 NYS 231.

Wyo.—Lawer Auto Supply Co. v. Teton Auto Co., 41 Wyo. 263, 284 P 1001.

[a] **Judgment for money value only** in replevin was held not subject to collateral attack by a motion to quash the execution. Hays v. Hulet, (Mo. A.) 14 SW (2d) 699.

[b] **Judgment giving ten days to return property,** if defective, was merely voidable, and not subject to collateral attack by motion to quash the execution. Lawer Auto Supply Co. v. Teton Auto Co., 41 Wyo. 263, 284 P 1001.

[c] **Foreign judgment** in replevin, valid on its face, was conclusive as to all matters except jurisdiction of the subject matter and of the person of defendant. Hays v. Merkle, 70 Mo. A. 509.

Collateral attack generally see Judgments §§ 815-869.

[82] In re Kalk, 270 Fed. 627; Jones v. Messenger, 40 Colo. 37, 90 P 64; Bath v. Miller, 53 Me. 308; Nichols, etc., Co. v. Paulson, 10 N. D. 440, 87 NW 977; Paulson v. Nichols, etc., Co., 8 N. D. 606, 80 SW 765.

[a] **Judgment for return** has been regarded as a direct and conclusive adjudication that defendant's right of possession is superior to plaintiff's. Bath v. Miller, 53 Me. 308.

[83] See supra § 4.

[84] Hall v. Durham, 113 Ind. 327, 15 NE 529; Hoke v. Applegate, 92 Ind. 570; Entsminger v. Jackson, 73 Ind. 144; Highnote v. White, 67 Ind. 596; Miles v. Walther, 3 Mo. A. 96; Houghton v. DuBell, 15 Pa. Dist. 833, 33 Pa. Co. 267.

[85] See supra § 273.

[86] Tibbott v. Cadisch, 28 O. C. A. 481.

In action on bond see infra § 427.

[87] **Alternative judgment** see supra § 325.

[88] See infra § 328.

[89] See infra § 334.

[90] National Surety Co. v. Austin Mach. Corp., 35 F. (2d) 842 [certiorari den 280 U. S. 614 mem, 50 SCt 162, 74 L. ed. 655 mem]; Whetmore v. Rupe, 65 Cal. 237, 3 P 851; Brown Garage Co. v. A. G. Graben Motor Co., 200 Iowa 913, 205 NW 841; Smith v. Kander, 58 Mo. A. 61.

[91] See infra § 334.

[92] Thorner v. Batory, 41 Md. 593, 20 AmR 74.

[93] Smith v. Kander, 58 Mo. A. 61.

[94] National Surety Co. v. Austin Mach. Corp., 35 F. (2d) 842 [certiorari den 280 U. S. 614 mem, 50 SCt 162 mem, 74 L. ed. 655 mem].

[95] Jarecki Mfg. Co. v. Fleming, 130 Okl. 95, 265 P 628.

[96] **Effect of satisfaction of judgment** see infra § 332.

In detinue see Detinue § 93.

In trover and conversion see Trover and Conversion [38 Cyc 2112].

[97] Smith v. Southwest Lumber Co., 23 Ariz. 271, 203 P 336 (under Civ. Code § 1618).

Election to take judgment for value see supra § 322.

[98] Smith v. Southwest Lumber Co., 23 Ariz. 271, 203 P 336.

[a] **Judgment for value is unauthorized** under an election statute where the prevailing party has possession. Smith v. Southwest Lumber Co., 23 Ariz. 271, 203 P 336.

[99] Duroth Mfg. Co. v. Cauffiel, 243 Pa. 24, 89 A 798; Herdic v. Young, 55 Pa. 176, 79 AmD 739.

[1] Cain v. Cain, 20 NYS 45, 28 Abb NCas 423.

[2] Hunt v. Robinson, 11 Cal. 262; Nickerson v. Chatterton, 7 Cal. 568.

[3] **Generally** see Judgments §§ 1118-1128.

[4] **Alternative judgment** see supra § 325.

[5] **Sufficiency of return** see infra § 329.

[6] Cal.—Meads v. Lasar, 92 Cal. 221, 28 P 935; Hunt v. Robinson, 11 Cal. 262; Lundblade v. Pierce, 95 Cal. A. 192, 272 P 329.

Fla.—Evans v. Kloeppel, 72 Fla. 267, 73 S 180; Johnson v. Clutter Music House, 55 Fla. 385, 46 S 1.

Iowa.—Oskaloosa Steam-Engine Works v. Nelson, 54 Iowa 519, 6 NW 718.

Nebr.—White v. Woodruff, 25 Nebr. 797, 41 NW 785.

Nev.—Carson v. Applegarth, 6 Nev. 187.

N. M.—Johnson v. Gallegos, 10 N. M. 1, 60 P 71.

N. Y.—Pabst Brewing Co. v. Rapid Safety Filter Co., 56 Misc. 445, 107 NYS 163.

Or.—McIntosh Livestock Co. v. Buffington, 108 Or. 358, 217 P 635; La Vie v. Crosby, 43 Or. 612, 74 P 220; Leve v. Frazier, 42 Or. 141, 70 P 376; Marks v. Willis, 36 Or. 1, 58

Under statutes authorizing an election to take judgment for a return of the property or its value,[12] if plaintiff elects to take judgment for the property a return or proper tender of the property by defendant discharges the judgment in so far as a return of the property is concerned.[13] Neither an unsuccessful plaintiff[14] nor defendant[15] may satisfy the judgment by payment of the value of the property before the prevailing party has elected to take its value.

Judgment for damages,[16] or for the value of the property absolutely under statutes authorizing such judgments,[17] cannot be satisfied, either wholly or in part, by a return of the property. A judgment for damages cannot be satisfied by a conditional tender of the amount due.[18]

Destruction or loss of property ordinarily does not discharge the judgment for a return of the property or its value,[19] but the prevailing party is still entitled generally to the value of the property,[20] or the value of his special interest.[21]

[§ 329] **b. Sufficiency of Return—(1) In General.** The decisions dealing with the sufficiency of a return in accordance with the replevin judgment to discharge liability on the replevin bond are elsewhere considered in this article.[22] To satisfy a judgment in replevin for a return of the property it is the duty of the unsuccessful party to take active measures to put the prevailing party in possession of the property,[23] and the manner of restoration depends on the circumstances of the particular case.[24] Thus the judgment for a return of the property is satisfied by a delivery,[25] or a proper[26] tender,[27] to the holder of the judgment[28] within a reasonable time,[29] in substantially the same condition as when

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P 526, 78 AmSR 752.

[a] **In Texas,** by statute, defendant is entitled to return the property so that the judgment need not expressly entitle defendant to a return. Mills v. Hackett, 65 Tex. 580; Mulligan v. McConnell Bros., (Civ. A.) 242 SW 512; Rahlmann v. Galveston Auto Sales Co., (Civ. A.) 238 SW 345.

[7] Evans v. Kloeppel, 72 Fla. 267, 73 S 180; Johnson v. Clutter Music House, 55 Fla. 385, 46 S 1; Ramsey v. Landry, 78 N. H. 612, 102 A 531; McIntosh Livestock Co. v. Buffington, 108 Or. 358, 217 P 635, 638.

"If the property recovered has been lost or destroyed, or if it is impossible for any reason to obtain a return of the property, then the judgment will be satisfied by a money payment of the value of the property recovered; but it is only in such a case that the prevailing party on the one hand can enforce satisfaction of the judgment by a recovery of the value, or the losing party on the other hand is entitled to have the judgment satisfied upon payment of such value." McIntosh Livestock Co. v. Buffington, supra.

[8] Reid v. King, 89 Ky. 388, 12 SW 772, 11 KyL 615; Pabst Brewing Co. v. Rapid Safety Filter Co., 56 Misc. 445, 107 NYS 163.

[9] See cases infra this note.

[a] **In California** (1) the unsuccessful party may exercise option to restore property or retain it and pay its reasonable value. Lundblade v. Pierce, 95 Cal. A. 192, 272 P 329. (2) Plaintiff cannot retain property and pay its value on judgment for defendant. Griffith v. Reddick, 41 Cal. A. 458, 182 P 984. (3) Plaintiff cannot retain chosen articles on payment of their value to defendant. Black v. Hilliker, 130 Cal. 190, 62 P 481; Whetmore v. Rupe, 65 Cal. 237, 3 P 851.

[10] Swantz v. Pillow, 50 Ark. 300, 7 SW 167, 7 AmSR 98; Ladd v. Stratton, 122 Kan. 274, 252 P 234; Hutchinson Gin Co. v. Latimer County Nat. Bank, 106 Okl. 159, 233 P 438; Humphrey v. Baker, 71 Okl. 272, 176 P 896.

[11] McIntosh Livestock Co. v. Buffington, 108 Or. 358, 217 P 635.

[12] **Election between recovery of property or value** see supra § 322.

[13] Oskaloosa Steam-Engine Works v. Nelson, 54 Iowa 519, 6 NW 718; Parker v. Oxendine, 85 Mo. A. 212.

[14] Koelling v. Gast Bank Note, etc., Co., 103 Mo. A. 98, 77 SW 474.

[15] Hanlon v. O'Keefe, 55 Mo. A. 528.

[16] N. J.—Field v. Post, 38 N. J. L. 346.

N. D.—Nichols, etc., Co. v. Paulson, 10 N. D. 440, 87 NW 977.

Pa.—Shoemaker v. Shoemaker, 4 Pa. Dist. 398, 16 Pa. Co. 159, 7 Kulp 528.

Tenn.—Mayberry v. Cliffe, 7 Coldw. 117.

Wyo.—Montana, etc., Oil Co. v. Gibson, 19 Wyo. 1, 113 P 784.

[17] Lembeck, etc., Brewing Co. v. Tarrant, 79 N. J. L. 372, 75 A 474; Johnson v. Mason, 64 N. J. L. 258, 45 A 618; Fisher v. Whoollery, 25 Pa. 197.

[18] Jarecki Mfg. Co. v. Fleming, 130 Okl. 95, 265 P 628.

[19] Ewald v. Boyd, 24 S. D. 16, 123 NW 66, 24 LRANS 739.

[20] **Value recoverable where property not available at trial** see infra § 375.

[21] **Value recoverable by one having special interest** see infra §§ 371, 372.

[22] See infra §§ 404-406, 411-412.

[23] Jarecki Mfg. Co. v. Fleming, 130 Okl. 95, 265 P 628; Ewald v. Boyd, 24 S. D. 16, 123 NW 66, 24 LRANS 739; Lawer Auto Supply Co. v. Teton Auto Co., 41 Wyo. 263, 284 P 1001.

[24] Jarecki Mfg. Co. v. Fleming, 130 Okl. 95, 265 P 628, 57 ALR 802.

[25] High v. Emerson, 23 Wash. 103, 62 P 455.

[a] **Agreement** between the attorney for the judgment creditor and the judgment debtor that the latter shall surrender possession of the property in question, and a subsequent written agreement between the attorney and a third person in possession of the goods stipulating that the latter shall ship the property to the judgment creditor, constitutes a sufficient delivery and return of the property to operate as a satisfaction of the judgment. High v. Emerson, 23 Wash. 103, 62 P 455.

[b] **Recovery of possession in another action.**—An alternative judgment is satisfied, except as to unpaid costs and damages, and the right to alternative relief is waived by the act of the prevailing party in recovering possession of the property in another action. Otto v. Burch, 50 Nebr. 894, 70 NW 513.

[26] Irvin v. Smith, 68 Wis. 227, 31 NW 912.

[27] Parker v. Oxendine, 85 Mo. A. 212; Jarecki Mfg. Co. v. Fleming, 130 Okl. 95, 265 P 628, 57 ALR 802; Marks v. Willis, 36 Or. 1, 58 P 526, 78 AmSR 752.

[28] Leve v. Frazier, 42 Or. 141, 7 P 376.

[a] **Delivery to one plaintiff** is a delivery to all, even though they are hostile to each other. Leve v. Frazier, 42 Or. 141, 7 P 376.

[b] **Delivery to duly authorized attorney sufficient.**—High v. Emerson, 23 Wash. 103, 62 P 455.

[c] **Return to officer on execution** would be a sufficient compliance with the statute requiring property to be returned to defendants who were plaintiffs in execution. Osborne v. Banks, 46 Conn. 444.

[d] **In Texas,** by statute, tender or delivery by defendant is to be made to the sheriff or constable of the court in which the judgment was rendered, rather than to plaintiff in replevin. Childs v. Wilkinson, 15 Tex. Civ. A. 687, 40 SW 749.

[29] McClellan v. Marshall, 19 Iowa 561, 87 AmD 454; Archer v. Long, 47 S. C. 556, 25 SE 84; Lawer Auto Supply Co. v. Teton Auto Co., 41 Wyo. 263, 284 P 1001.

[a] **Lapse of thirty days** was reasonable where the parties lived at a distance of forty miles and at the time of judgment the horse, which was the subject matter, had been injured. McClellan v. Marshall, 19 Iowa 561, 87 AmD 454.

[b] **After three years** defendants had no right to return property in satisfaction of judgment, at least without showing that the property had not materially depreciated.

taken, without deterioration in value,[30] of all and not merely a portion[31] of the identical property named in the writ.[32] Where the property is bulky in character, an offer to return the property is sufficient;[33] and where the property has not been removed from the place it was replevied and is bulky, an offer to restore possession at such place is ordinarily sufficient to discharge the judgment for its return.[34] It is immaterial whether the property is returned by the unsuccessful party or his sureties.[35]

[§ 330] **(2) Rejection of Tender of Depreciated Property.** Although it is generally necessary to return the property in substantially the same condition as when taken in order to satisfy the judgment for a return,[36] and to discharge liability on the bond,[37] the decisions are not entirely in harmony as to the right of the prevailing party to reject a tender of the property in pro tanto satisfaction when it has depreciated in value pending the wrongful detention.[38] In some jurisdictions the successful party must accept such a tender in partial satisfaction and is reimbursed for the depreciation by way of damages,[39] and it has been held that a tender of property in a depreciated condition must be accepted where the depreciation was due to no fault of the unsuccessful party, but was a result of natural causes.[40] In other jurisdictions the tendency seems to be that a tender of the property need not be accepted in partial satisfaction of the judgment for a return where the depreciation in value has been substantial,[41] and in some jurisdictions, where the judgment need not specify the separate valuations in the alternative money judgment,[42] the prevailing party may demand a return of not only all of the property, but a return in the same condition, so that unless such a tender is made there is no obligation to accept any part of the property.[43] Where, however, the property is in practically the same condition as when taken,[44] or is not so badly damaged as greatly to impair its value,[45] the tendency is to require the prevailing party to accept it in partial satisfaction of the judgment.

[§ 331] **(3) Rejection of Tender of Partial Return.** There is a difference of opinion as to whether a prevailing party in a replevin action is under an obligation to accept a partial return of the property in pro tanto satisfaction of the judgment for a return.[46] In some jurisdictions, while it appears that a tender of less than a substantial part of the property need not be accepted,[47] when a substantial part of the property, which is in no way dependent on the part not tendered for its use or value, is tendered, the prevailing party must accept such tender and recoup, if necessary, on execution or on the bond, the value of the part not tendered,[48] and such tender will operate as a defense pro tanto in an action on

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Lawer Auto Supply Co. v. Teton Auto Co., 41 Wyo. 263, 284 P 1001.

30. Iowa.—Brown Garage Co. v. A. G. Graben Motor Co., 200 Iowa 913, 205 NW 841.

Kan.—Fair v. Citizens' State Bank, 69 Kan. 353, 76 P 847, 105 AmSR 168.

N. D.—Nichols, etc., Co. v. Paulson, 10 N. D. 440, 87 NW 977.

S. C.—Archer v. Long, 47 S. C. 556, 25 SE 84.

Tex.—Childs v. Wilkinson. 15 Tex. Civ. A. 687, 40 SW 749.

Wis.—Irvin v. Smith, 68 Wis. 227, 31 NW 912.

[a] **Return of worthless promissory note,** made such by deterioration in value caused by the judgment debtor's retention of it, is not a compliance with the judgment. Fair v. Citizens' State Bank, 69 Kan. 353, 76 P 847, 105 AmSR 168.

31. Black v. Black, 74 Cal. 520, 16 P 311; Whetmore v. Rupe, 65 Cal. 237, 3 P 851; Rennebaum v. Atkinson, 52 SW 828, 21 KyL 587; Pauls v. Mundine, 37 Tex. Civ. A. 601, 85 SW 43.

[a] **Acceptance of a part** of the property does not operate as a satisfaction of the whole judgment. Black v. Black, 74 Cal. 520, 16 P 311.

[b] **Acceptance of partial return** works satisfaction of the judgment in the proportion which the value of the returned property bears to the value of all the property as assessed by the jury. Archer v. Long, 47 S. C. 556, 25 SE 84.

32. Richardson Drug Co. v. Teasdell, 59 Nebr. 150, 80 NW 488; Irvin v. Smith, 68 Wis. 227, 31 NW 912.

[a] **Property tendered was identical** where, in replevin for "two hundred and twenty boys' coats," it appeared that the articles were pieces of cloth cut in the shape of coats, but not yet made up, and it was held that the judgment for possession of "the property mentioned in the affidavit and complaint" was so substantially correct as to require the marshal to take the cut goods tendered to him. Monness v. Livingston, 84 NYS 124.

33. Frey v. Drahos, 10 Nebr. 594, 7 NW 319; Jarecki Mfg. Co. v. Fleming, 130 Okl. 95, 265 P 628, 57 ALR 802.

34. Manker v. Sine, 47 Nebr. 736, 66 NW 840; Reavis v. Horner, 11 Nebr. 479, 9 NW 643; Frey v. Drahos, 10 Nebr. 594, 7 NW 319.

35. Johnson v. Gallegos, 10 N. M. 1, 60 P 71.

36. See supra § 329.

37. See infra §§ 404–406, 411–412.

38. See infra text and notes 39–45.

39. Allen v. Fox, 51 N. Y. 562, 565, 10 AmR 641; Pabst Brewing Co. v. Rapid Safety Filter Co., 56 Misc. 445, 107 NYS 163.

"Now, suppose the property has been badly depreciated, intermediate the wrongful taking and trial, still the prevailing party is obliged to take it if he can obtain it, and he is indemnified for the depreciation by the damages assessed to him." Allen v. Fox, supra.

40. Martin v. U. S. Fidelity, etc., Co., 29 Cal. A. 499, 156 P 986.

[a] **Tender in four months** after replevin judgment was held sufficient and defendant in replevin was bound to accept the property although it had depreciated to the extent of five hundred dollars by natural causes. Martin v. U. S. Fidelity, etc., Co., 29 Cal. A. 499, 156 P 986.

41. Ky.—Mounts v. Murphy, 126 Ky. 803, 104 SW 978, 31 KyL 1192 (dictum).

Miss.—Hazlett v. Witherspoon, 25 S 150.

N. D.—Grace City First State Bank v. Bradley, 57 N. D. 159, 220 NW 848; Nichols, etc., Co. v. Paulson, 10 N. D. 440, 87 NW 977. But see Paulson v. Nichols, etc., Co., 8 N. D. 606, 80 NW 765 (holding that the successful party in claim and delivery may not refuse to receive the property in dispute when tendered in satisfaction of the judgment for value, and at the same time bring an action to recover damages to such property, whether accruing before or after the date of the judgment in claim and delivery).

Okl.—Dew v. Hoffman, 130 Okl. 247, 266 P 1107.

Or.—Burkitt v. Vail, 123 Or. 461, 238 P 1114, 260 P 1014.

Wash.—Hallidie Mach. Co. v. Whidbey Island Sand, etc., Co., 73 Wash. 403, 131 P 1156, 45 LRANS 40.

[a] **Return in worthless condition.**—Where the judgment in replevin for plaintiff was for a return of an automobile or its value if a return could be had, plaintiff need not accept a return of the property in such a condition that it was worthless except for junk, but may sue on the bond for its value. Burkitt v. Vail, 123 Or. 461, 238 P 1114, 260 P 1014.

42. **Separate valuations in judgment** see supra § 313.

43. Jones v. Messenger, 40 Colo. 37, 90 P 64.

44. Carpenter v. Gray, 135 Miss. 260, 99 S 561.

45. Wallace v. Cox, 94 Nebr. 194, 142 NW 891, 47 LRANS 835, AnnCas 1914D 109, 92 Nebr. 354, 138 NW 578, AnnCas1913E 1158.

46. See infra text and notes 47–55.

47. Leeper v. Hobart First Nat. Bank, 26 Okl. 707, 110 P 655, 29 LRA NS 747, AnnCas1912B 302.

48. Edwin v. Cox, 61 Ill. A. 567;

the bond.[49] Where, however, the part tendered is of such a nature as to be dependent for its value and usefulness on the part not tendered, the party is not compelled to accept it.[50] In other jurisdictions it has been held that the successful party need not accept apparently any partial return of the property even though accompanied by a sum of money for the part not tendered,[51] on the ground that the judgment in the alternative requires a delivery of the entire property or the payment of its entire value.[52] At least the prevailing party is not compelled to accept the valuation placed by the officer executing the writ of return on the part not tendered.[53] Still in other jurisdictions, unless separate valuations are placed on the articles replevied, the party prevailing need not accept a return of part and a sum in lieu of the part not tendered,[54] although it seems that if the property is of a distinctive separate character, capable of distinctive separate delivery, and the values can definitely be ascertained, the party cast ought to have the right to deliver what he can and pay for what he cannot.[55]

[§ 332] **c. Effect on Title to Property.**[56] As in trover and conversion,[57] ordinarily, title to the property becomes vested in the party against whom judgment was rendered by payment of the value of the property in satisfaction of the judgment for its return,[58] or by payment of damages which include the value,[59] or by payment in other property in lieu of the value of the property replevied.[60]

[§ 333] **10. Enforcement**[61]**—a. In General.** A court on rendering a judgment in replevin has inherent power to enforce such judgment,[62] and the fact that some of the property was delivered to the prevailing party before judgment will not abate the court's power after judgment to compel delivery as to other property still held by the unsuccessful party.[63]

[§ 334] **b. By Writ of Restitution or Execution**[64] **—(1) In General.** Where either a judgment for a return of the property without an alternative judgment for its value,[65] or an alternative judgment for a return of the property or its value is rendered,[66] the prevailing party is entitled to a writ of restitution for the return of the property, or for a return of so much of the property as can be found by the officer;[67] and, since the alternative judgment for the value of the property becomes operative on the failure of the unsuccessful party to return the property,[68] execution for its value may issue or become operative when the property cannot be found by the officer,[69] or is not in a proper condition to be returned.[70] While in some jurisdictions neither a successful plaintiff[71] nor a successful defendant[72] under an alternative judgment has the option to collect the money judgment by execution before a writ of possession is returned unsatisfied, in other jurisdictions either a plaintiff[73] or defendant[74] pre-

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Harts v. Wendell, 26 Ill. A. 274; Leeper v. Hobart First Nat. Bank, 26 Okl. 707, 110 P 665, 29 LRANS 747, Ann Cas1912B 302; Folmer v. Hanson, 44 S. D. 122, 182 NW 633.

[a] **Substantial tender** existed where a tender was made of fifty-six of eighty-two cultivators replevied. Harts v. Wendell, 26 Ill. A. 274.

[b] **Tender of substantial part** of the property and the value of the part which could not be returned was a good defense in an action on a supersedeas bond to the extent of the value of the property fixed by the replevin judgment. Ervin v. Montgomery, 84 Nebr. 107, 120 NW 903; Caldwell v. Whitaker, 4 S. C. Eq. 402.

49. Edwin v. Cox, 61 Ill. 567; Harts v. Wendell, 26 Ill. A. 274.

50. Stevens v. Tuite, 104 Mass. 328.

[a] **Tender of machinery** of a factory with the exception of a steam apparatus which supplied the motive power need not be accepted by the prevailing party, since the property was treated as an organized whole. Stevens v. Tuite, 104 Mass. 328.

51. Jones v. Messenger, 40 Colo. 37, 90 P 64; Kingsley v. Sauer, 17 Misc. 544, 41 NYS 248; Wheeler v. Fidelity, etc., Co., 109 Misc. 302, 179 NYS 685 (dictum); Pauls v. Mundine, 37 Tex. Civ. A. 601, 85 SW 43.

52. Kingsley v. Sauer, 17 Misc. 544, 41 NYS 248; Wheeler v. Fidelity, etc., Co., 179 NYS 685.

53. Wheeler v. Fidelity, etc., Co., 109 Misc. 302, 179 NYS 685.

54. Connor v. Bates, 92 Tenn. 465, 22 SW 4.

55. Reavis v. Horner, 11 Nebr. 479, 9 NW 643; Connor v. Bates, 92 Tenn. 465, 22 SW 4. See Pickett v. Bridges, 10 Humphr. (Tenn.) 171 (dictum).

56. **In detinue** see Detinue § 98.

57. Davidhizar v. Elgin Forwarding Co., 89 Or. 89, 95, 173 P 893. See Trover and Conversion [38 Cyc 2112].

"It is analogous to the situation in actions of trover where the plaintiff seeks to recover damages for the conversion of his property. On satisfaction of a judgment for damages the title to the property passes to the judgment debtor." Davidhizar v. Elgin Forwarding Co., supra.

58. Kayser v. Bauer, 5 Kan. 202; Houston v. Bibb, 50 N. C. 83.

[a] **Increase** of the property, as a slave, pending the action, does not pass to the party upon satisfaction by payment of the value of the property replevied. Houston v. Bibb, 50 N. C. 83.

59. Wilson First Nat. Bank v. Johnston, 161 N. C. 506, 77 SE 404; Davidhizar v. Elgin Forwarding Co., 89 Or. 89, 173 P 893.

60. Archibeque v. Miera, 1 N. M. 419.

61. **Enforcement of judgments generally** see Judgments §§ 1139–1153.

62. Lane v. Alexander, 168 Ark. 700, 271 SW 710.

[a] **Order of sale** of property, adjudged to be rightfully held by defendant as pledgee, was improper, under Civ. Code (1912) § 4105, as defendant must proceed under the statute authorizing foreclosure of pledges. Tolbert v. Fooshe, 124 S. C. 166, 117 SE 354.

63. Lane v. Alexander, 168 Ark. 700, 271 SW 710.

64. **Execution against the person** see Executions § 1112.

Writ de retorno habendo see De Retorno Habendo, 18 C. J. p 787.

65. Hammond v. Morgan, 101 N. Y. 179, 4 NE 328, 3 HowPrNS 438; New York, etc., Brewing Co. v. Angelo, 144 App. Div. 655, 129 NYS 713; Aldridge v. Loftin, 104 N. C. 122, 10 SE 210.

66. Hallagan v. Johnston, 55 Ind. A. 509, 104 NE 91.

67. Penny v. Ludwick, 152 N. C. 375, 67 SE 919.

68. See supra § 326.

69. Evans v. Kloeppel, 72 Fla. 267, 73 S 180; Marks v. Willis, 36 Or. 1, 58 P 526, 78 AmSR 752.

70. Brown Garage Co. v. A. G. Graben Motor Co., 200 Iowa 913, 205 NW 841.

Sufficiency of return see supra § 329.

71. Cal.—Meads v. Lasar, 92 Cal. 221, 28 P 935.

Nev.—Carson v. Applegarth, 6 Nev. 187.

N. M.—Johnson v. Gallegos, 10 N. M. 1, 60 P 71.

N. Y.—Cook v. Freudenthal, 80 N. Y. 202 [aff 14 Hun 542].

Or.—Marks v. Willis, 36 Or. 1, 58 P 526, 78 AmSR 752.

[a] **In Indiana** a plaintiff prevailing in the action must pursue the property by a writ of restitution, and on failing to obtain the property should resort to his remedy on the replevin bond. Hallagan v. Johnston, 55 Ind. A. 509, 104 NE 91.

72. McIntosh Livestock Co. v. Buffington, 108 Or. 358, 217 P 635.

73. Martin v. Ferguson, (Ky.) 111 SW 281 [foll Rennebaum v. Atkinson, 52 SW 828, 21 KyL 587].

[a] **In Pennsylvania,** under the act of April 19, 1901 (P. L. p 88); St. (1920) § 18977, plaintiff, as well as defendant, may have a writ of retorno habendo at his option. Duroth Mfg. Co. v. Cauffiel, 243 Pa. 24, 89 A 798; Reber v. Schroeder, 221 Pa. 152, 70 A 556; Evans-Morrow Motor Co. v. Samuels, 83 Pa. Super. 280.

74. Eickhoff v. Eikenbary, 52 Nebr.

vailing in the action may, on the failure of the unsuccessful party to return the property, sue out an execution for the value of the property before proceeding to enforce the judgment for a return of the property.

Where plaintiff elects to take judgment for return of property under statutes authorizing such election,[75] he is not entitled to an execution for its value unless a recovery of the property cannot be had.[76]

Where judgment is for value of the property without an alternative judgment for a return, execution may issue for such value.[77]

[§ 335] **(2) Requisites, Service, and Return of Writ.**[78] The writ of execution should follow the judgment,[79] and be in the language of the statute,[80] so that, if judgment is in the alternative as required by statute, the writ should command the officer to seize and retain the property, and collect the damages, or in case a delivery of the property cannot be had, to collect the value thereof, together with the damages.[81] Although it has been held that an ordinary execution, as in assumpsit for money, is not the proper execution under a replevin judgment for the value of the property,[82] it also has been held that, where the property could not be returned so as to render an alternative judgment for its return unnecessary, the unsuccessful party cannot complain that the writ was in the ordinary form on a money judgment.[83] Statutes allowing a writ of execution to officers of other counties within the state[84] have been held inapplicable to a writ of return in replevin.[85] General rules governing service[86] and return[87] of executions apply,[88] and accordingly it has been held that an officer who is a party to the replevin action may not execute a writ of return;[89] nor may an officer in executing such writ use improper force.[90] Although the court may cause a return of the writ to be amended, there must be a proper showing to authorize such amendment.[91]

[§ 336] **(3) Relief against.**[92] Equity will afford relief by injunction against an execution under a replevin judgment where the facts are such as to confer equitable jurisdiction for the purpose.[93] Thus an injunction will issue to restrain the prevailing party from collecting by execution the value of the property where the judgment is in the alternative and a proper tender of the property has been made.[94] However, an injunction will not issue where an adequate remedy at law exists,[95] or where the facts are insufficient to justify equitable interference.[96] Thus, where a proper tender of the property was not made, equity will not restrain a sale under the levy of an execution issued in pursuance of the alternative judgment for the value of the property.[97]

Stay of execution[98] may be granted in proper circumstances.[99] Thus, where an execution plaintiff is insolvent, an execution will be stayed to afford the debtor time to have a claim against plaintiff adjudicated for the purpose of setting off the judgment;[1] and on execution stayed, a writ of return, issued during the time for which the stay is effective, will be set aside.[2] A stay will not be granted, however, where the facts necessary to authorize a stay are not shown.[3]

Vacation of a writ of return[4] will not be granted at the instance of a stranger to the record,[5] as his remedy is by an independent action.[6] If an execution is improperly issued, it can only be vacated by motion made for that purpose on papers being prop-

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332, 72 NW 308; Dupree v. Jordan, 123 Okl. 91, 252 P 67.

Execution or demand as condition precedent to action on bond see infra § 434.

Writ of return as condition precedent to action on bond see infra § 435.

[75] **Election between recovery of property or value** see supra § 322.

[76] Oskaloosa Steam-Engine Works v. Nelson, 54 Iowa 519, 6 NW 718.

[77] Field v. Post, 38 N. J. L. 346.

[78] **Form and contents of writ generally** see Executions §§ 178-205.

[79] Marks v. Willis, 36 Or. 1, 58 P 526, 78 AmSR 752.

[80] Bales v. Scott, 26 Ind. 202.

[a] **Departure from statutory form not fatal when not prejudicial.**—Kingsley v. Sauer, 17 Misc. 544, 41 NYS 248.

[81] Bales v. Scott, 26 Ind. 202; Garrett v. Wood, 3 Kan. 231.

[82] Eaton v. Campbell, 2 Mich. N. P. 10.

[83] Eickhoff v. Eikenbary, 52 Nebr. 332, 72 NW 308.

[84] See Executions § 182.

[85] Rathbun v. Ranney, 14 Mich. 382.

[a] **Proper procedure** in such a case is to issue execution for the value of the property out of the goods of the unsuccessful party. Rathbun v. Ranney, 14 Mich. 382.

[86] See Executions §§ 206-291.

[87] See Executions §§ 858-906.

[88] See cases infra notes 89-91.

[89] Snydacker v. Brosse, 51 Ill. 357, 99 AmD 551.

[90] Snydacker v. Brosse, supra.

[a] **Breaking outer door** of a dwelling house was improper in the execution of a writ of retorno habendo. Snydacker v. Brosse, 51 Ill. 357, 99 AmD 551.

[91] Irvin v. Smith, 68 Wis. 220, 31 NW 909.

[a] **No amendment** of the writ can be made after it has been returned unsatisfied and suit has been brought on the replevin bond. Eaton v. Campbell, 2 Mich. N. P. 10.

[92] **Generally** see Executions §§ 382-412.

[93] See cases infra note 94.

Grounds for, and relief by, injunction generally see Injunctions §§ 70-453.

[94] McClellan v. Marshall, 19 Iowa 561, 87 AmD 454; Reavis v. Horner, 11 Nebr. 479, 9 NW 643; Marks v. Willis, 36 Or. 1, 58 P 526, 78 AmSR 752; Caldwell v. Whitaker, 4 S. C. Eq. 402.

Sufficiency of tender see supra §§ 329-331.

[95] Andrews v. McLeod, 66 Miss. 348, 6 S 181.

[96] Jones v. Messenger, 40 Colo. 37, 90 P 64; Davis v. Bayliss, 51 Iowa 435, 1 NW 697; Bowman v. McGregor, 6 Wash. 118, 32 P 1059.

Matters in satisfaction of judgment see supra §§ 328-332.

[a] **If replevin judgment is erroneous,** it should be remedied by appeal and not by injunction to restrain its enforcement. Putnam v. Webb, 15 Or. 440, 15 P 711; Bowman v. McGregor, 6 Wash. 118, 32 P 1059.

[b] **Remedy of third person** is not by injunction but by an independent action. Andrews v. McLeod, 66 Miss. 348, 6 S 181.

[97] Brown Garage Co. v. A. G. Graben Motor Co., 200 Iowa 913, 205 NW 841.

[98] **Generally** see Executions §§ 382-412.

[99] See infra text and notes 1-3.

[1] Kline v. Blaine, 36 Pa. Co. 251.

[a] **Stay pending review not authorized.**—Luckfort v. Keen, 7 Mass. 500.

[2] Roe v. McCrea, 1 Ashm. (Pa.) 16.

[3] Harker v. Arendell, 74 N. C. 85.

[4] **Quashing execution generally** see Executions §§ 413-436.

[5] Veeder v. Fiske, 6 N. M. 288, 27 P 642.

[6] Veeder v. Fiske, supra.

erly served.[7]

[§ 337] **c. By Contempt Proceedings.**[8] Ordinarily, in the absence of statute, a replevin judgment may not be enforced by punishment for contempt,[9] but under some statutes[10] providing for the arrest of defendant at the commencement of the action, where plaintiff has filed an affidavit that defendant has concealed, removed, or disposed of the property,[11] the court has implied power to compel obedience to the replevin judgment by contempt proceedings.[12]

[§ 338] **d. By Independent Action.** A party who has recovered judgment for the value of the property may, in an independent action, pursue the fund realized from its sale pending suit,[13] and one who has been given judgment for the return of the property is entitled to a mandatory injunction for its delivery, after an execution has been returned unauthorized,[14] but he has no right to maintain an action of assumpsit to recover its value.[15]

[§ 339] **I. New Trial.*** The rules relating to new trials in civil actions generally[16] are applicable in actions of replevin.[17] Thus the trial judge in such an action has the right to set aside entirely any verdict rendered by the jury and to order a new trial generally on any of the usual and recognized grounds,[18] but in the absence of legal grounds therefor, no new trial can be granted.[19] Accordingly, it is error, as a matter of law, to order a new trial where plaintiff states in open court that he does not intend to prosecute the case further and that judgment may be rendered for defendant who thereupon introduces evidence as to the value of the property and, without objection, takes alternative judgment for the return or its value.[20]

[§ 340] **J. Appeal and Error—1. In General—a. Right of Appeal.** General rules as to appeal and review[21] are applicable in the action of replevin.[22] Thus appeal can ordinarily be taken only from a final judgment or order.[23] In order to perfect an appeal, a party is not bound to resort to special proceedings prescribed by statute whereby he can obtain possession of the property involved.[24]

Who may appeal. Although the party moving an erroneous order has no right to complain of it,[25] plaintiff in replevin may appeal from a voluntary nonsuit.[26] Defendant is not deprived of his right of appeal by the fact that after judgment the property was seized by a third party under an execution, defendant not voluntarily surrendering possession thereof,[27] nor, although he denies ownership or possession, is he deprived thereof by the fact that judgment for plaintiff was only for recovery of possession without costs.[28]

Time for appeal. A statute limiting the time for taking an appeal cannot be defeated by making a second application to quash the writ based on the same facts and intended to produce the same results as one previously made and from which no appeal was taken.[29]

[§ 341] **b. Jurisdiction.** In determining the jurisdiction of the appellate court, the value of the property must be looked to.[30] It must appear from the record that such value is within the jurisdictional amount;[31] so, where this appears from the affidavit filed by plaintiff to procure the writ of replevin, the court has jurisdiction to hear the case.[32] When the ownership of plaintiff and his right to possession of the property are not denied, the jurisdiction to hear the appeal depends not on the value of the property, but on the amount of defendant's interest therein.[33] A statute providing that the decision of the court below upon "defects of form in process" is final covers a defect apparent on the face of a replevin bond,[34] and an appeal from a decision sustaining a plea in abatement attacking such defect cannot be taken thereunder.[35]

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[7] Harrison v. Wilkin, 78 N. Y. 390.

[8] **Enforcement of judgments generally** see Judgments § 1141.

[9] Imbesi v. Eastern Motor Co., 104 N. J. L. 251, 140 A 31 [aff 105 N. J. L. 490, 144 A 919]; Hammond v. Morgan, 101 N. Y. 179, 4 NE 328, 3 HowPrNS 438.

[10] See statutory provisions.

[11] See Arrest § 102.

[12] Lane v. Alexander, 168 Ark. 700, 271 SW 710.

[a] **Defendant's refusal** in replevin to comply with an order of court to deliver to plaintiff his bonds constituted civil contempt, in view of the implied power conferred on the court by Crawford & M. Dig. §§ 8642, 8644, 8645, providing for arrest of defendant where plaintiff has filed an additional affidavit that defendant has concealed, removed, or disposed of the property with intent to defeat plaintiff's action. Lane v. Alexander, 168 Ark. 700, 271 SW 710.

[13] Lindsay v. Morse, 129 Mich. 350, 88 NW 881.

[14] Cain v. Cain, 20 NYS 45, 28 AbbNCas 423.

[15] McKnight v. Dunlop, 4 Barb. (N. Y.) 36.

[16] See New Trial 46 C. J. p 46 et seq.

[17] See cases infra this section.

[18] Joiner v. Bevier, 155 S. C. 340, 152 SE 652.

Grounds for new trial generally see New Trial §§ 27-243.

[19] Baker v. Van Ness, 37 Okl. 122, 130 P 536.

[20] Baker v. Van Ness, supra.

[21] See Appeal and Error 3 C. J. p 256.

[22] See cases infra this section; and §§ 341-351.

[23] See Appeal and Error § 256; and case infra this note.

[a] **Illustration.**—Where the court determined that the writ was in its inception unauthorized and the court without jurisdiction, and issued judgment of dismissal of plaintiff's action, coupled with an order to impanel a jury to inquire of the right of property and possession of defendants and their damages, this is a final judgment from which plaintiff may appeal. Swain v. Savage, 55 Nebr. 687, 77 NW 362.

[24] Haentze v. Howe, 28 Wis. 293.

[25] Campbell v. Crone, 10 Nebr. 571, 7 NW 334.

[a] **Rule applied** to erroneous dismissal of the action on motion of defendant in the action. Campbell v. Crone, 10 Nebr. 571, 7 NW 334.

[26] Reed v. Carpenter, 2 Oh. 79.

[a] **Reason for rule.**—The action of replevin is one of a peculiar nature, both parties being actors. After plaintiff becomes nonsuit, a judgment is not thereupon, as in ordinary cases, rendered for defendant to recover his costs, but the latter becomes an actor in the case and recovers not only costs, but also the value of the goods replevied, together with damages and interest. This judgment is final and is more like a judgment by default than a judgment of nonsuit, and the reasons for permitting an appeal from a default judgment are, therefore, applicable. Reed v. Carpenter, 2 Oh. 79.

Decisions reviewable generally:
Default judgment see Appeal and Error § 440.
Involuntary dismissal, discontinuance, or nonsuit see Appeal and Error § 332.
Voluntary dismissal, discontinuance, or nonsuit see Appeal and Error § 333.

[27] Culver v. Randle, 45 Or. 491, 78 P 394.

[28] Martin v. Porter, 84 Cal. 476, 24 P 109.

[29] Kaufmann, etc., Co. v. Landau, 93 Pa. Super. 457.

[30] Cummins v. Holmes, 107 Ill. 552; Vaiden v. Bell, 3 Rand. (24 Va.) 448.

[31] Morris v. Preston, 93 Ill. 215; Lewis v. Shear, 93 Ill. 121; Hancock v. Tower, 93 Ill. 150.

[32] Morris v. Preston, 93 Ill. 215.

*By Felix C. Graber (§§ 339-358).

[§ 342] **c. Presentation and Reservation in Lower Court of Grounds of Review.** In accordance with the general rules,[36] an appellate court will not, in an action of replevin, consider questions not brought before it by the record.[37] Thus, where parties have gone to trial on the merits of a cause without objection or remonstrance, an appellate court will not reverse although the pleadings made no issue for the jury.[38] The objection that the petition or complaint did not ask a judgment for possession of the property,[39] did not allege an unlawful taking[40] or unlawful detention,[41] or aver a demand and refusal before suit brought,[42] or did not sufficiently describe the property,[43] cannot be raised on appeal for the first time; nor can the objection that there was a failure to plead a judgment under which defendant seeks to justify, the judgment having been proved below without objection.[44] Likewise, that no affidavit was made,[45] or that the affidavit made was not signed,[46] cannot be raised for the first time in the appellate court except where the defect is jurisdictional;[47] and an objection that a third person as claimant cannot, by interplea, assert his rights to the property replevied cannot so be raised by plaintiff who, in the court below, filed an answer to the interplea and went to trial on the merits.[48] Other objections which cannot be raised for the first time on appeal include objections to the writ,[49] for example, to an uncertainty in description therein,[50] objections to a defect of parties,[51] objections that findings were too general,[52] objections to the form of the verdict[53] or judgment,[54] as that the former did not find the value of the property,[55] or omitted to state whether the damages given were for the taking or detention or both,[56] or that the judgment was for the value of the property instead of for the value of defendant's interest therein,[57] that the judgment for defendant for the value of the property included an amount representing the value of property which plaintiff had not seized but which remained in defendant's possession,[58] or that judgment should have been for defendant as to articles replevied by plaintiff but not recovered by him in the action;[59] but error can be urged for the first time in the appellate court where the judgment is unauthorized,[60] as where all material issues are not disposed of,[61] or the verdict is at variance with the proof.[62] A judgment sustained by the findings will not be reversed notwithstanding there is a discrepancy between them and the petition where the attention of the trial court was in no way called to the variance.[63] Grounds for staying execution other than the taking of an appeal cannot be raised for the first time on motion in the appellate court.[64] The claim that no demand was made is not available on appeal where no objection was taken below, and the evidence shows a demand.[65]

Defenses not interposed below which will not be considered on appeal include the defense of bailment[66] and the defense that no demand was made.[67]

Sufficiency of presentation. The question of error in not having the value of the property replevied fixed as of the date of the trial is sufficiently raised by exception to the direction of the verdict.[68]

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[33] Mohme v. Livingston, 54 Iowa 458, 6 NW 717.

[a] **Illustration.**—Where the amount required to give the court jurisdiction was one hundred dollars, the value of plaintiff's property replevied was two hundred and fifty dollars, and defendant was holding it to secure a debt of twenty-eight dollars and fifty cents, the court has no jurisdiction to hear plaintiff's appeal from a judgment for defendant. Mohme v. Livingston, 54 Iowa 458, 6 NW 717.

[34] Houghton v. Ware, 113 Mass. 49.

[35] Houghton v. Ware, supra.

[36] See Appeal and Error § 580.

[37] Draper v. Ellis, 12 Iowa 316. And see cases infra this section.

[a] **Rule applied** to a defect in a petition going to the foundation of the action. Draper v. Ellis, 12 Iowa 316 (failure to allege wrongful detention).

[38] Mathias v. Sellers, 86 Pa. 486, 27 AmR 723.

[39] Williams v. Wilcox, 66 Iowa 65, 23 NW 266.

[40] Krueger v. Pierce, 37 Wis. 269.

[41] Draper v. Ellis, 12 Iowa 316.

[42] Treat v. Hathorn, 3 Hun (N. Y.) 646.

[43] Seligman v. Armando, 94 Cal. 314, 29 P 710.

[44] Williams v. Mellor, 12 Colo. 1, 19 P 839.

[45] Turron v. Chopin, 13 Kan. 107.

[46] Eddy v. Beal, 34 Ind. 159.

[47] Armour v. Arres, 5 Nebr. (Unoff.) 383, 98 NW 843.

[48] Noble v. Worthy, 1 Ind. T. 458, 45 SW 137.

[49] Eddy v. Beal, 34 Ind. 159.

[50] Hook v. Fenner, 18 Colo. 283, 32 P 614, 36 AmSR 277.

[a] **Thus,** after defendants have pleaded that property is theirs, and have submitted the case to the jury on its merits, it is too late to ask that judgment be reversed for an uncertainty in the description in the writ. Hook v. Fenner, 18 Colo. 283, 32 P 614, 36 AmSR 277.

[51] Seip v. Tilghman, 23 Kan. 289.

[a] **For example,** to the defect that, although the property sought to be replevied was jointly owned by two persons, the action was brought by only one. Seip v. Tilghman, 23 Kan. 289.

[52] Moore v. Vrooman, 32 Mich. 526.

[53] Ryan v. Fitzgerald, 87 Cal. 345, 25 P 546.

[54] Baker v. Horsey, 21 Ind. 246.

[55] Watts v. Green, 30 Ind. 98; Ruger v. Bungan, 10 Ind. 451.

[56] Ryan v. Fitzgerald, 87 Cal. 345, 25 P 546.

[57] Ormsby v. Nolan, 69 Iowa 130, 28 NW 569.

[58] Klotz v. James, 96 Iowa 1, 64 NW 648, 59 AmSR 348.

[59] Beatty v. Clarkson, 110 Mo. A. 1, 83 SW 1033.

[a] **Rule applied** where defendant failed to present his objection either in a motion for new trial or in arrest of judgment. Beatty v. Clarkson, 110 Mo. A. 1, 83 SW 1033.

[60] Holt v. Van Eps, 1 Dak. 206, 46 NW 689; North Star Boot, etc., Co. v. Braithwaite, 4 Dak. 454, 34 NW 68.

[61] Holt v. Van Eps, 1 Dak. 206, 46 NW 689.

[a] **For example,** where the verdict is silent as to the ownership of the property, which was in issue. Holt v. Van Eps, 1 Dak. 206, 46 NW 689.

[62] North Star Boot, etc., Co. v. Braithwaite, 4 Dak. 454, 34 NW 68.

[63] Rucker v. Donovan, 13 Kan. 251, 19 AmR 84.

[a] **Rule applied** where the petition alleges absolute ownership while the findings show only the existence of a lien. Rucker v. Donovan, 13 Kan. 251, 19 AmR 84.

[64] Swasey v. Adair, 88 Cal. 203, 26 P 83.

[65] Govin v. Di Miranda, 140 N. Y. 474, 35 NE 626.

[66] Goldsmith v. Taussig, 60 Mo. A. 460.

[67] Kauffman v. Klang, 16 Misc. 379, 38 NYS 56.

Waiver. Objections taken in the court below to the sufficiency of the replevin bond are waived by pleading in the appellate court the general issue with brief statement justifying the taking;[69] and such an objection cannot be taken by motion to quash the process in the appellate court where defendant waived it by pleading below.[70] By complying with an order requiring plaintiff to give additional security in the action, he admits its correctness[71] and waives the right to object thereto on appeal.[72]

[§ 343] **d. Supersedeas or Stay of Proceedings.**[73] In order to stay judgment pending an appeal, appellant must give the bond or undertaking required by statute;[74] and the fact that defendant in replevin has given a redelivery bond does not entitle him to a stay of execution on appeal without having given the required stay bond.[75] An appeal by defendant stays proceedings on his counterbond in replevin.[76] Where the statute gives a party a specified time to file his security for costs after notice of an order to stay proceedings, the court cannot prescribe a shorter time.[77]

[§ 344] **e. Review—(1) In General.** In accordance with the general rule,[78] in an action of replevin, where there is competent evidence to sustain them, the appellate court will not disturb the finding of facts below[79] or the verdict;[80] but the case will be reversed, and a new trial granted, where the evidence is not sufficient to sustain the verdict,[81] where the jury have failed to give effect to all the material evidence in the case,[82] or where the court below, having heard the evidence, could not find on a material issue.[83] On appeal from a judgment entered at the conclusion of plaintiff's case awarding defendant a writ of retorno habendo for the return of the property replevied, the only question presented for review is whether plaintiff made out a prima facie case on which a finding in its favor, if made, could have been sustained.[84] An appeal from an order for a writ of retorno habendo on the ground that the court failed to render a formal judgment that defendant recover the property is properly dismissed where it appears that such judgment was rendered and that the clerk omitted to set it forth.[85] Failure of the court below to render an alternative judgment is not error requiring reversal where there was no demand for such judgment.[86]

Appeal from judgment of county court to the district court brings the whole case up for trial de novo.[87]

[§ 345] **(2) Theory of Prosecution or Defense.** In accordance with the general rule that the parties are restricted in the appellate court to the theory on which the cause was prosecuted or defended in the lower court,[88] plaintiff, having tried his case on the theory that he was entitled to recover as the individual owner, cannot ask for a reversal of judgment on the ground that, although not the owner, he is entitled to possession as a lienholder.[89] So, where a case was tried on the theory that defendants had possession of the property, on appeal the court will not consider plaintiff's right to maintain the action on the theory that he was a bailee.[90] Where plaintiff's ownership is admitted by not being denied, and possession in defendant is found by the jury on the evidence, the defense of joint ownership by plaintiff and a partner, and of possession under authority of one of the partners, is not available on appeal;[91] and defendant who in the justice's court unsuccessfully contested a case on the merits on a claim of a superior right to the property cannot maintain on appeal that, as an innocent purchaser, replevin will not lie against him without demand and refusal.[92]

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[68] Gilroy v. Everson-Hickok Co., 103 App. Div. 574, 93 NYS 132.

[69] Carnick v. Wilson, 34 Me. 593.

[70] Johnson v. Richards, 11 Me. 49.

[71] Prichard v. Hopkins, 52 Iowa 120, 2 NW 1028.

[72] Prichard v. Hopkins, supra.

[73] **Generally** see Appeal and Error §§ 1391–1460.

[74] Wheeler, etc., Mfg. Co. v. Johns, 37 Fla. 262, 20 S 236; Elliott v. Buckland, Sheld. (N. Y.) 174, 37 HowPr 71. See Scott v. Corveth, 20 U. C. Q. B. (Ont.) 435 (where defendant was successful, and plaintiff served notice of appeal, and applied to stay proceedings for a month to perfect his security, but the court refused to interfere).

[a] **Statutory requisites.**—Under the statute providing that the execution of a judgment in replevin shall not be stayed by appeal unless appellant give an undertaking with sufficient surety and in such amount as the court or a judge thereof may direct to obey the order of the appellate court, it is essential to the efficacy of the undertaking that the amount thereof be fixed by the court or a judge thereof. U. S. Fidelity, etc., Co. v. More, 155 Cal. 415, 101 P 302.

Necessity of providing bond or security to obtain stay pending appeal generally see Appeal and Error § 1420.

[75] Swasey v. Adair, 88 Cal. 203, 26 P 83.

[76] Com. v. Wolle, 19 Pa. Dist. 438.

[77] Shaw v. Webster, 21 Wis. 129.

[78] See Appeal and Error § 2830.

[79] Graves v. Cowan, 43 Ark. 134; Baker v. Riley, 2 Colo. A. 478, 31 P 392.

[a] **Rule applied** as to a finding of defendant's ownership and right of possession of the property in controversy. Robinson v. Cole, 46 Mont. 140, 126 P 850.

[80] Ida.—Friedrich v. Donahue, 20 Ida. 92, 116 P 1029.

Kan.—Lamont v. Williams, 43 Kan. 558, 23 P 592.

Ky.—Mullins v. Bullock, 19 SW 8, 14 KyL 40.

Mont.—Davey v. Davey, 81 Mont. 375, 263 P 415.

Nebr.—Wood v. Advance Rumely Thresher Co., 103 Nebr. 377, 171 NW 919.

Okl.—Kelley v. McKay, 120 Okl. 215, 251 P 82.

[81] Williams v. Eikenberry, 22 Nebr. 210, 34 NW 373; McAnaw v. Williamson, 69 Okl. 200, 171 P 715.

[82] Musgrave v. Farren, 92 Me. 198, 42 A 355.

[83] Jandt v. South, 2 Dak. 46, 47 NW 779.

[84] Lyon v. Walldren, 201 Ill. A. 609.

[85] American Preservers' Co. v. Bishop, 184 Ill. 68, 56 NE 382.

[86] Woodbury v. Tuttle, 26 Ill. A. 211.

Presentation and reservation in lower court of grounds of review see supra § 342.

[87] Bates v. Stanley, 51 Nebr. 252, 70 NW 972.

[a] **Judgment double in form.**—Where the county court found for plaintiff as to certain of the goods taken under the writ, and for defendant as to the residue, and appropriate judgment was entered, such judgment, although double in form, constitutes a single judgment, and an appeal to the district court by plaintiff brings the whole case up for a new trial. Bates v. Stanley, 51 Nebr. 252, 70 NW 972.

Trial de novo of actions appealed from judgment of justice's court see infra § 350.

[88] See Appeal and Error § 2556.

[89] Ballou v. Hushing, 46 Ill. A. 174.

[90] Allen v. Gardner, 47 Kan. 337, 27 P 982.

[91] Tell v. Beyer, 38 N. Y. 161, 6 Transcr. A. 142.

[§ 346] **(3) Presumptions.** In accordance with the general rule,[93] it will be presumed, in favor of the judgment or order appealed from, and in the absence of anything in the record to the contrary, that defendant waived his objection to the sufficiency of the bond by pleading to the merits before his motion to dismiss was heard,[94] that adequate cause was shown to justify the court below in requiring plaintiff to file a new bond[95] or in modifying the judgment,[96] that the error in a judgment modified below arose from a mistake or omission of the clerk which the court had power to correct,[97] and that, where there was no judgment for return after nonsuit, the court was not asked to give such judgment,[98] or, having been requested to do so, it found that plaintiff in some way had become entitled to possession during the time of the pendency of the suit.[99] So there is a presumption on appeal that the officer proceeded legally,[1] as by taking the required bond before executing the writ;[2] and, if necessary to sustain the action of the sheriff in accepting plaintiff's bond and delivering the property to him, the appellate court will presume that defendant waived his right of executing bond and retaining the property.[3] On appeal from a motion to quash an affidavit on the ground that it was not made by plaintiff, if the affidavit is not in the record on appeal, the person making it will be presumed to have possessed the proper qualification.[4] But there can be no application, in an action of replevin, of the rule that, where a demurrer has been sustained to a special plea which set out a good defense, if the action was one which admitted of a general issue under which affirmative defenses and such as were thus specially pleaded might be given in evidence, then the appellate court would presume that defendant had the benefit of such defense under the general issue.[5]

[§ 347] **(4) Harmless Error.** In accordance with the general rule,[6] no reversal can be had for harmless error,[7] as in the pleadings[8] or in the admission[9] or exclusion[10] of evidence. It is not reversible error for the court in its charge to impose a burden on defendant which he has already assumed;[11] and where plaintiff admitted selling the property for a sum greater than the verdict against him, he is not prejudiced by the failure of defendant to prove its value.[12] Where the cause was decided adversely to him, defendant cannot complain that plaintiff's bond was irregular[13] or insufficient;[14] nor will the verdict and judgment be set aside on appeal by plaintiff for error of the court in requiring him to give additional security in the action by increasing the penalty of the bond.[15]

Erroneous instructions are not cause for reversal if the error is not prejudicial,[16] as where the jury were not misled or confused thereby,[17] or where it is clearly shown that the verdict was not based on the proposition announced therein.[18] Accordingly, it is not reversible error to tell the jury, if they find a certain fact, to make an inference therefrom as a matter of law, when this was the only inference that the jury could properly make,[19] to omit from the instructions the element of demand where there was clear proof of a demand before suit brought and the evidence sustains the verdict,[20] or to refuse to give an instruction as to the taking of possession by plaintiff where it appears that plaintiff had no such interest in the property as would authorize him to maintain replevin therefor;[21] and a judgment will not be reversed because an instruction was not very pertinent or helpful.[22] An instruction authorizing the jury to find that defendant unlawfully detained all the property in suit cannot be considered harmless where the undisputed evidence showed that plaintiff was in possession of some of it at the commencement of suit.[23]

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[92] Lamping v. Keenan, 9 Colo. 390, 12 P 434.

[93] See Appeal and Error § 2662 et seq.

[94] Morris v. Hanson, 2 Colo. A. 154, 30 P 139.

[95] Sumner v. Sleeth, 87 Ill. 500.

[96] Sumner v. Cook, 12 Kan. 162.

[97] Sumner v. Cook, supra.

[98] Lane v. Kohn, 79 Ill. A. 396.

[99] Lane v. Kohn, supra.

[1] McGuffie v. Dervine, 1 Greene (Iowa) 251; Shorey v. Hussey, 32 Me. 579.

[2] McGuffie v. Dervine, 1 Greene (Iowa) 251; Shorey v. Hussey, 32 Me. 579.

[3] Hartlep v. Cole, 120 Ind. 247, 22 NE 130.

[4] Miller v. Graf, 14 Colo. A. 167, 59 P 416.

Defects or omissions in evidence in record on appeal generally see Appeal and Error § 2226.

[5] Mann v. Oberne, 15 Ill. A. 35.

[6] See Appeal and Error § 2878.

[7] See cases infra this section.

[8] Tuthill v. Skidmore, 124 N. Y. 148, 26 NE 348.

[a] **Allegation of facts showing special property.**—Where defendant does not move to make the complaint more definite and certain, and it appears affirmatively that defendant was neither harmed nor misled by the omission of plaintiff to set forth all of the facts out of which the special property arose, the judgment will not be reversed for this defect in the complaint. Tuthill v. Skidmore, 124 N. Y. 148, 26 NE 348.

[9] Muir v. Miller, 82 Iowa 700, 47 NW 1011, 48 NW 1032.

[a] **For example,** in: (1) Admitting immaterial evidence of a demand. Tancre v. Reynolds, 35 Minn. 476, 29 NW 171. (2) Permitting testimony in the replevin suit as to an offer to pay the amount due after suit was brought, where the court instructed the jury that the tender relied on, to be effective, must have been made before suit was filed. Wolverton v. Morgan, 132 Okl. 55, 269 P 314.

[10] Merriam v. Lynch, 53 Wis. 82, 10 NW 1.

[a] **Rule applied** to evidence of a judgment in a previous action of replevin between the same parties. Merriam v. Lynch, 53 Wis. 82, 10 NW 1.

[11] Eddings v. Boner, 1 Ind. T. 173, 38 SW 1110.

[12] Keystone Impl. Co. v. Welsheimer, (Ind. A.) 55 P 348.

[13] Pistorius v. Swarthout, 67 Mich. 186, 34 NW 547.

[14] Kennedy v. Roberts, 108 Iowa 521, 75 NW 363.

[15] Prichard v. Hopkins, 52 Iowa 120, 2 NW 1028.

[a] **Reason for rule.**—"The decision of the court in no manner affected the rights of the parties in the trial of the case. The verdict and judgment could not have been different had the motion been overruled. It cannot be said that there is any error in the judgment by reason of the court's ruling." Prichard v. Hopkins, 52 Iowa 120, 2 NW 1028, 1029.

[16] See cases infra notes 17, 18.

Harmless or prejudicial error in instructions generally see Appeal and Error § 3013 et seq.

[17] Simpson v. Mauldin, 61 Okl. 92, 160 P 481.

[a] **Description of property.**—An instruction erroneous only because it misdescribes the property referred to, which misdescription did not mislead or confuse the jury, will be upheld. Simpson v. Mauldin, 61 Okl. 92, 160 P 481.

[18] Gevers v. Farmer, 109 Iowa 468, 80 NW 535.

[19] Eddings v. Boner, 1 Ind. T. 173, 38 SW 1110.

[20] Jarrard v. Harper, 42 Ill. 457, 92 AmD 84.

[21] Gamble v. Wilson, 33 Nebr. 270, 50 NW 3.

[22] Welch v. Miller, 32 Ill. A. 110.

[a] **Rule applied** to an instruction

Verdict, findings, and judgment. A judgment will not be reversed on merely technical grounds where the person complaining of the error has suffered no injury thereby,[24] as where the verdict is informal, it being sufficient to authorize a judgment, and there being no substantial variance between it and the judgment.[25] The judgment will not be reversed on account of a defective description in the verdict where appellant is not prejudiced by the defect;[26] and failure of a verdict for defendant for a portion of the property replevied to specify the property to be returned is not prejudicial where it appears that no portion of the property can be returned.[27] An alternative judgment for plaintiff who was in possession of the property for return of the property or its value is not prejudicially erroneous;[28] neither is the failure of the jury, finding for plaintiff who was in possession of the property, to find the value of the property,[29] nor a judgment against plaintiff for the value of the property only and not in the alternative, where he has admitted he has disposed of the property and is not able to return it.[30] Where plaintiff is not entitled to possession of the property, he is not prejudiced by a finding that it should be returned to defendant, even though plaintiff's assignor may have had the right of possession.[31] Omission of a special verdict to find unlawful detention is not reversible error where it was found that plaintiff was the owner entitled to possession, defendant admitted the taking, and the undisputed evidence showed a demand;[32] and a failure to find that defendant was in possession at the time the writ was served is harmless where such possession was admitted at the trial.[33] A judgment will not be reversed for error in not providing for a return of the property to defendant if the latter would be bound to return the property immediately to plaintiff,[34] or for error in issuing an alias writ where the same judgment would have been rendered had no alias writ issued.[35]

Error in favor of party complaining. Where the only error committed was in favor of appellant, the judgment will be affirmed.[36] Thus, where the verdict is for defendant, plaintiff cannot complain of an instruction that, unless the jury believe that defendant is the owner, they will find for plaintiff,[37] of a failure to submit the question of damages,[38] or of a failure of the jury to find damages against him.[39] Neither can he complain that the verdict did not assess the value of the property,[40] that the judgment for defendant was not in the alternative but only for a return of the property,[41] that it was merely for damages for withholding such property, and costs,[42] that it did not require a return of the goods to defendant,[43] or, where the judgment was for return, that it failed to provide for recovery of the value if return could not be had.[44] Defendant cannot complain of an instruction wrongfully charging plaintiff with the duty to make a demand,[45] nor is he prejudiced by a failure to find the value of the property where judgment was for plaintiff.[46]

Cure of prejudicial error. Prejudicial error in the amount of the verdict may be cured by remittitur.[47]

[§ 348] **f. Determination and Disposition of Cause.**[48] The appellate court may order a judgment of the court below in an action of replevin to be modified so as to make it conform to the prayer of the petition,[49] or the bill of particulars and affi-

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that "it is immaterial how plaintiff knows the sheep, if they in fact belong to him." Welch v. Miller, 32 Ill. A. 110.

[23] Bruce v. Horn, 11 Colo. A. 316, 52 P 1036.

[24] Degering v. Flick, 14 Nebr. 448, 16 NW 824.

[25] Baum Iron Co. v. Union Sav. Bank, 50 Nebr. 387, 69 NW 939.

[26] Asbill v. Standley, (Cal.) 31 P 738; Findlay v. Knickerbocker Ice Co., 104 Wis. 375, 80 NW 436.

[a] **Property not in esse.**—A verdict will not be disturbed for insufficient description of the property not permitting the sheriff to accept delivery where it appeared that the property was not in esse at the time of the trial. Findlay v. Knickerbocker Ice Co., 104 Wis. 375, 80 NW 436 (melted ice).

[27] Richardson Drug Co. v. Teasdall, 59 Nebr. 150, 80 NW 488.

[a] **Rule applied** where the entire property replevied had been destroyed by fire. Richardson Drug Co. v. Teasdall, 59 Nebr. 150, 80 NW 488.

[28] Hanscom v. Burmood, 35 Nebr. 504, 53 NW 371; Webb v. Hecox, 27 Misc. 169, 58 NYS 382.

[a] **Reason for rule.**—The judgment awarding plaintiff the value in case delivery cannot be had cannot be enforced. Webb v. Hecox, 27 Misc. 169, 58 NYS 382.

[29] Garth v. Caldwell, 72 Mo. 622.

[30] Ulrich v. McConaughey, 63 Nebr. 10, 88 NW 150, 69 Nebr. 773, 96 NW 645.

[31] Hyde v. Courtwright, 14 Ind. A. 106, 42 NE 647.

[32] Williams v. Porter, 41 Wis. 422.

[33] Long v. Hickey, 206 Mo. A. 92, 221 SW 757; De Wolff v. Morino, (Mo. A.) 187 SW 620.

[34] Barney v. Brannan, 51 Conn. 175.

[35] Maxon v. Perrott, 17 Mich. 332, 97 AmD 191.

[36] Berry v. Wilson, 64 Mo. 164.

[37] Berry v. Wilson, supra.

[38] Levy v. Leatherwood, 5 Ariz. 244, 52 P 359.

[39] Levy v. Leatherwood, supra; Alling v. Shelton, 16 Conn. 436; Jameson v. Kent, 42 Nebr. 412, 60 NW 879.

[a] **Illustrations.**—(1) Plaintiff is not entitled to a reversal of a judgment on the ground that the jury did not award damages against him, as well as costs. Alling v. Shelton, 16 Conn. 436. (2) Where issues are found in defendant's favor that he had the right of possession of the property merely and that the property cannot be returned, plaintiff cannot complain of a failure to find the value of such right or to render judgment therefor. Jameson v. Kent, 42 Nebr. 412, 60 NW 879.

[40] Stroud v. Morton, 70 Mo. A. 647.

[41] Wheeler v. Jones, 16 Mont. 87, 40 P 77.

[42] Scott v. Burrill, 44 Nebr. 755, 62 NW 1093.

[43] Clarkson v. Jenkins, 48 Mo. A. 221.

[44] Morrison v. Austin, 14 Wis. 601.

[45] Moorhouse v. Donaca, 14 Or. 430, 13 P 112.

[46] Akron Bank v. Dole, 24 Colo. 1, 52 P 673; Van Gundy v. Carrigan, 4 Ind. A. 333, 30 NE 933; Williams v. Wilcox, 66 Iowa 65, 23 NW 266.

[47] St. John v. Swanback, 39 Nebr. 841, 58 NW 288.

[48] **Determination and disposition of cause on appeal generally** see Appeal and Error §§ 3093-3314.

[49] Frankhouser v. Cannon, 50 Kan. 621, 32 P 379.

[a] **Excessive judgment.**—Where plaintiff in a replevin action demands fifty dollars damages for the detention of the property claimed, and, without any amendment to the petition or pleadings before or after the trial, a judgment is rendered for seventy-five dollars for the detention, twenty-five dollars is excessive and erroneous, and the supreme court may order the district court to modify the

davit filed in the case,[50] or to statutory requirements as to form;[51] or it may be changed from a judgment for the value of the property to an alternative judgment for the value or its return.[52] A modification is not necessary, however, in the latter case if the evidence shows that the property cannot be returned.[53] Where, in an action to recover several separate chattels, a general verdict is returned, although it appears that the only error made by the court below was in its instructions as to one chattel, the appellate court cannot permit the judgment to stand as to part of the property and reverse it as to the rest,[54] but must simply remand the case for new trial.[55] On remanding a case the court may limit the issues to be retried.[56] Where the judgment below was alternatively for return of the property or payment of its value, and plaintiff elects to take the money judgment, the appellate court, on affirmation, may render judgment for the amount of the judgment of the court below with costs against defendant and the sureties on his bond.[57] Where the court in a case before the jury erroneously excluded evidence which would justify defendant's detention, and directed a verdict for plaintiff, the appellate court in reversing judgment for the error will remand the cause for new trial[58] and not direct judgment for defendant.[59]

Restitution of property. In the absence of statutory authority therefor, an appellate court cannot, on reversing a judgment, order restitution of the property to the party prevailing on the appeal.[60]

Form of judgment. Where the only object of an inquiry in the court below as to the value of the property is to settle plaintiff's right to costs, and the appellate court reverses the judgment recovered by plaintiff, it should not render judgment for the value of the property as assessed by the jury which tried the issues of fact, but should render judgment that defendant have a return of the property, or, if he shall elect to waive a return, that he have judgment for the value of the property and that such value be assessed by a writ of inquiry issued out of the supreme court.[61]

[§ 349] **2. Proceedings Originating before Justice of Peace[62]—a. In General.** Statutes forbidding appeals from a judgment of a justice in jury trials where neither party claims in his bill of particulars a sum exceeding a certain sum[63] do not apply to actions of replevin.[64] Where plaintiff[65] or defendant[66] in replevin, who appeals from a justice's judgment, is in possession of the property, he has no absolute right to dismiss his appeal, and thereby escape an order for the return of the property or judgment against him and his sureties on the appeal bond. So by dismissing his appeal from a justice's court plaintiff cannot prevent defendant from electing between a return of the property or judgment for its value and damages,[67] and when he elects the latter, the circuit court has jurisdiction to proceed with the assessment.[68] Where a party fails to appeal from a judgment of a justice's court within the time permitted by statute, he cannot, after expiration thereof, avail himself of the proceedings by writ of review.[69]

Objections going to jurisdiction of a justice of the peace, although not presented in a justice's court, may be made in the circuit or district court where the case has been taken on appeal.[70]

[§ 350] **b. Trial de Novo.**[71] Appeal from the order of a justice's court to the district or circuit

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same in accordance with the prayer of the petition. Frankhouser v. Cannon, 50 Kan. 621, 32 P 379.

Modification on appeal generally see Appeal and Error §§ 3157-3173.

[50] Church v. Welch, 69 Okl. 161, 170 P 1168.

[a] **Rule applied** in replevin in a justice's court where the bill of particulars and affidavit fixed the value of the property at a certain sum, and the district court, on appeal, rendered alternative judgment for the property for a sum in excess of its value as so fixed. Church v. Welch, 69 Okl. 161, 170 P 1168.

[51] Fischer v. Cohen, 22 Misc. 117, 48 NYS 775, 27 NYCivProc 139.

[a] **Thus,** where, pending the action, possession has been delivered to plaintiff under the writ, a judgment for the return of the chattels to defendant on his depositing in court the balance due, with costs, may be modified so as to give judgment for plaintiff for possession of the chattels recovered, with costs. Fischer v. Cohen, 22 Misc. 117, 48 NYS 775, 27 NYCiv Proc 139.

[52] Babb v. Aldrich, 45 Kan. 218, 25 P 558.

[53] Babb v. Aldrich, supra.

[54] Hallowell v. Milne, 16 Kan. 65.

[55] Hallowell v. Milne, supra.

[56] Leiter v. Lyons, 24 R. I. 42, 52 A 78.

[a] **Illustration.**—In an action to recover possession of a motor, where defendant filed a plea of title in a third party, a plea of non cepit, and also a plea of non detinet, and the evidence fully sustained the finding of the jury for plaintiff on the question of title, but the court erroneously failed to submit the other issues to the jury, on appeal the court will remand the case with the direction that the only issue which defendant was entitled to have retried was that raised by his plea of non cepit, the plea of non detinet being wholly covered by it. Leiter v. Lyons, 24 R. I. 42, 52 A 78.

[57] Billups v. Freeman, 5 Ariz. 268, 52 P 367.

[58] McDonald v. Fuller, 11 S. D. 355, 77 NW 581, 74 AmSR 815.

[a] **Rule applied** where execution on which defendant relied had been excluded from evidence. McDonald v. Fuller, 11 S. D. 355, 77 NW 581, 74 AmSR 815.

[59] McDonald v. Fuller, supra.

[60] Mead v. Bateman, 9 Daly (N. Y.) 174.

[61] Curtis v. Jones, How. A. Cas. (N. Y.) 137.

[62] **Appeal and review of proceedings before justices of peace generally** see Justices of the Peace § 386 et seq.

[63] See Justices of the Peace § 392 et seq.

[64] Rollston v. Osenbaugh, 2 Oh. Dec. (Reprint) 242, 2 WestLMonth 138.

[65] Strauss v. Smith, 8 N. M. 391, 45 P 930.

[66] Breeding v. Nelson, 142 Mo. A. 685, 121 SW 1080; Munley v. King, 40 Mo. A. 531.

[67] Soper v. Hawkins, 56 Mich. 527, 23 NW 206.

[68] Soper v. Hawkins, supra; Barruel v. Irwin, 2 N. M. 223. But see Peo. v. Judges Jackson Cir. Ct., 1 Dougl. (Mich.) 302 (the circuit court, after reversing on certiorari a justice's court judgment for plaintiff, has no power to assess defendant's damages).

[69] Summers v. Harrington, 14 Or. 480, 13 P 300.

[70] Evans v. Bouton, 85 Ill. 579; Draper v. Ellis, 12 Iowa 316.

[a] **Rule applied** to an objection that a jurisdictional affidavit was not filed. Evans v. Bouton, 85 Ill. 579; Barruel v. Irwin, 2 N. M. 223.

[b] **Intervention of several terms** of the appellate court has been held not to prevent the raising of the objection. Evans v. Bouton, 85 Ill. 579.

[71] **Trial de novo of actions originating in justice's court generally** see Justices of the Peace §§ 532-579.

court brings the whole case up for trial de novo,[72] and such trial, under some statutes, is governed by the practice acts relating to such appellate courts,[73] although under other statutes the appellate court must be governed by the same rules that are prescribed for the government of justices' courts in like causes.[74] In accordance with the general rule,[75] the verdict and judgment on the trial of an appeal from the judgment of a justice's court in replevin must conform to the issues,[76] and a verdict for more than the amount fixed by the pleadings[77] and affidavit,[78] or for more than the amount over which the justice has jurisdiction,[79] is erroneous.

[§ 351] **c. Determination and Disposition of Cause.** The judgment of a justice's court for plaintiff in an action of replevin will be reversed where the complaint states no cause of action.[80] Where, on appeal to the circuit court, a nonsuit is granted, the court may order judgment for the return of the property and damages, or the value.[81] So reversal in the district court of a justice's court judgment on an appeal on questions of law alone has the effect of a dismissal of the action,[82] and defendant is thereupon entitled to a judgment for a return of the property or its value;[83] but this judgment is not a judgment on the merits, so as to bar another action.[84]

[§ 352] **K. Costs[85]—1. Right Dependent on Success or Failure of Party—a. Right of Prevailing Party.** The general rule that the prevailing or successful party in the action is entitled to costs[86] has been frequently applied in actions of replevin,[87] and the right is not affected by waiver of part of the judgment.[88] But under an exception to the rule, where defendant was without fault and no demand for the property was made upon him prior to the suit, he is entitled to costs.[89] The exception does not apply, however, where defendant asserts ownership and right of possession in himself[90] and contests the action,[91] where he did not come into possession of the property rightfully,[92] or where a demand was properly made and he wrongfully retained the goods thereafter.[93] Plaintiff will be awarded costs against defendants who by their answer put in issue plaintiff's title and right of possession, notwithstanding such defendants were not in possession of the property in question at the commencement of the action, and a judgment against them for its return is erroneous;[94] and defendant, although unsuccessful, is, it has been held, entitled to his costs where the value of the property, as shown by the appraisal, is insufficient to confer jurisdiction on the court, and there is no other evidence of its value.[95]

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[72] Bonesteel v. Gardner, 1 Dak. 372, 46 NW 590; Carroll v. Hancock, 57 Mo. A. 228; Clarkson v. Jenkins, 48 Mo. A. 221.

[73] See statutory provisions.

[a] **Judgment** must conform to the practice of the circuit court, and need not comply with requirements of statutes prescribing the form for a justice's court. Clarkson v. Jenkins, 48 Mo. A. 221.

[74] See statutory provisions.

[a] **Jurisdictional amount.**—Where the jurisdiction of the justice's court is limited to controversies over amounts not exceeding one hundred dollars, a verdict for more than that sum is erroneous. Garland v. Bartels, 2 N. M. 1.

[b] **Assessment of damages.**—Where, in a justice's court, the jury are required to assess the value of the property together with damages for its detention, it is error on appeal to the district court to swear the jury to assess the damages only. Garland v. Bartels, 2 N. M. 1.

[75] See Justices of the Peace § 574.

[76] See case infra this note.

[a] **Verdict and judgment held sufficient** as conforming to issues. Witcher v. Watkins, 11 Colo. 548, 19 P 540.

[77] Church v. Welch, 69 Okl. 161, 170 P 1168; People's Second Bank v. Sanderson, 24 S. D. 443, 123 NW 873.

[78] Church v. Welch, 69 Okl. 161, 170 P 1168.

[a] **Thus,** where the bill of particulars and affidavit in a justice's court fixed the value of the property involved at a certain sum, it is error for the district court on appeal to render an alternative judgment for plaintiff for a sum in excess of the value so fixed. Church v. Welch, 69 Okl. 161, 170 P 1168.

[79] Garland v. Bartels, 2 N. M. 1; People's Second Bank v. Sanderson, 24 S. D. 443, 123 NW 873.

[80] Howe Sewing Mach. Co. v. Haupt, 7 Daly (N. Y.) 108.

[81] Fugina v. Brownlie, 65 Wis. 628, 27 NW 408.

[82] Daley v. Mead, 40 Minn. 382, 42 NW 85.

[83] Daley v. Mead, supra.

[84] Daley v. Mead, supra.

[85] **Generally** see Costs 15 C. J. p 1.

[86] See Costs § 10.

[87] U. S.—Crowe v. Peaslee-Gaulbert Co., 37 F. (2d) 216.

Conn.—Walko v. Walko, 64 Conn. 74, 29 A 243.

Fla.—Webster v. Brunswick-Balke-Callender Co., 37 Fla. 433, 20 S 536.

Ind.—Mitchell v. State, 3 Blackf. 391.

Iowa.—Hove v. McHenry, 60 Iowa 227, 14 NW 301.

Kan.—Cowling v. Greenleaf, 32 Kan. 392, 4 P 855; Rucker v. Donovan, 13 Kan. 251, 19 AmR 84.

Ky.—Philips v. Harriss, 3 J. J. Marsh. 122, 19 AmD 166.

Md.—Hiser v. Webster, 139 Md. 236, 114 A 897; Burnett v. Bealmear, 79 Md. 36, 28 A 898.

Mass.—Gould v. Barnard, 3 Mass. 199; Wheeler v. Train, 4 Pick. 168.

Mo.—O'Donniley v. Kinley, 220 Mo. A. 284, 286 SW 140; Hecht v. Heimann, 81 Mo. A. 370.

Mont.—Barrett v. Shipley, 63 Mont. 152, 206 P 430.

Nev.—Lapham v. Osborne, 20 Nev. 168, 18 P 881.

N. J.—Constanzo v. New Jersey Cent. R. Co., 74 N. J. L. 79, 64 A 1067.

N. C.—Rawlings v. Neal, 126 N. C. 271, 35 SE 597.

Oh.—Rowan v. Johnson, 2 Oh. Dec. (Reprint) 254, 2 WestLMonth 155; Shur v. Statler, 2 Oh. Dec. (Reprint) 70, 1 WestLMonth 317.

Pa.—Agricultural Trust Co. v. Eby, 29 Pa. Dist. 816; Shoemaker v. Shoemaker, 4 Pa. Dist. 398, 16 Pa. Co. 159, 7 Kulp 528.

Wash.—Mansfield v. Whatcom First Nat. Bank, 6 Wash. 603, 34 P 143.

[a] **Rule applied.**—Where defendant prevails on his plea of non cepit, he is entitled to costs although the verdict settles plaintiff's right to the chattels. Hiser v. Webster, 139 Md. 236, 114 A 897.

[b] **On abatement** of the writ of replevin, defendant is entitled to a judgment for costs. Walko v. Walko. 64 Conn. 74, 29 A 243; Gould v. Barnard, 3 Mass. 199.

[c] **Statutory applications.**—(1) Although a plaintiff in replevin claiming property is not entitled to costs by the common law, yet, under a statute allowing defendant costs where he prevails, a defendant who obtains a verdict in replevin is entitled to costs, as in all other cases. Mitchell v. State, 3 Blackf. (Ind.) 391. (2) Replevin is an action "not founded on contract," within the statute giving plaintiff costs if he recovers in an action not founded on contract. O'Donniley v. Kinley, 220 Mo. A. 284, 286 SW 140; Hecht v. Heimann, 81 Mo. A. 370.

[88] Cowlings v. Greenleaf, 32 Kan. 392, 4 P 855.

[a] **Illustration.**—The fact that a defendant, in whose favor findings have been rendered, waives or abandons part of the judgment to which the findings entitle him, by not demanding a return of the property, does not bar him of his right to judgment for costs. Cowlings v. Greenleaf, 32 Kan. 392, 4 P 855.

[89] Chipman v. McDonald, (Kan. A.) 57 P 252; Peters v. Parsons, 18 Nebr. 191, 24 NW 687; Littlefield v. Wilson, 1 Nebr. (Unoff.) 581, 95 NW 677; Studebaker Bros. Co. v. Witcher, (Nev.) 199 P 477 [reh den 201 P 322]; Jackson v. Darden, 82 Okl. 256, 200 P 223; Wall v. Rouse, 49 Okl. 544, 153 P 1112; Lawton Citizens' State Bank v. Chattanooga State Bank, 23 Okl. 767, 101 P 1118.

[90] Jordan v. Allen, 102 Nebr. 639, 168 NW 594; Tilden v. Stilson, 49 Nebr. 382, 68 NW 478; Rodgers v. Graham, 36 Nebr. 730, 55 NW 243; Aultman, etc., Co. v. Steinan, 8 Nebr. 109; Homan v. Laboo, 1 Nebr. 204.

[91] Jackson v. Darden, 82 Okl. 256, 200 P 223.

[92] Wilcox v. Beitel, 43 Nebr. 457, 61 NW 722.

[93] Mason v. Rodgers, 116 Mo. A.

Judgment for one only of several defendants was held insufficient to entitle him to recover costs from plaintiff.[96]

[§ 353] **b. Where Each Party Successful in Part.** Although the general rule that plaintiff is to be regarded as the prevailing party and entitled to costs, even though he recovers judgment for only part of the relief demanded and defendant is successful in part,[97] has been followed as to actions of replevin in a few jurisdictions,[98] it has been held that the action of replevin constitutes an exception to the general rule as both parties are actors and claimants,[99] and in most jurisdictions the statutes have been construed to authorize, either expressly or impliedly, an apportionment where plaintiff has recovered judgment for part of the chattels in controversy and defendant part,[1] or where plaintiff was successful in establishing his title, and defendant in imposing a lien on the chattels.[2] Where plaintiff was entitled to judgment for part of the property, and defendant established his right on appeal to the remainder, it was held that the costs of the lower court should have been assessed against defendant and the costs of the appeal should be assessed to plaintiff.[3] A judgment that each party pay his own costs will not be reversed in the absence of any showing as to the amount of costs incurred on either side.[4]

[§ 354] **2. Right Dependent on Amount or Value of Recovery[5]—a. Right To Recover Any Costs.** Statutes providing that there can be no recovery of costs unless the amount of the judgment exceeds a certain specified sum are applicable to actions of replevin.[6] In such cases the value of the property actually recovered determines the right to costs,[7]

611, 92 SW 745.

[94] California Packing Corp. v. Stone, 64 Cal. A. 488, 222 P 193.

[95] Kirby Carpenter Co. v. Trombley, 101 Mich. 447, 59 NW 809. But see Merrill v. Butler, 18 Mich. 294 (where plaintiff brought his action in the circuit court, alleging that the value of the property was within its jurisdiction, and recovered a verdict for it, he was entitled to costs, and the court or jury could not assess the value of the property to show that it was within the exclusive jurisdiction of the justice of the peace, and award defendant his costs).

[96] Kline v. Blaine, 18 Pa. Dist. 852, 36 Pa. Co. 251; Ramsdell v. Owens, 30 WklyNC (Pa.) 174.

[97] See Costs § 13.

[98] Horton v. Horne, 99 N. C. 219, 5 SE 927; Vollum v. Simpson, 2 B. & P. 368, 126 Reprint 1331; Cook v. Green, 5 Taunt. 594, 1 ECL 303, 128 Reprint 822. But see Dodd v. Joddrell, 2 T. R. 235, 100 Reprint 128 (holding defendant entitled to deduct out of the general costs of the verdict found for plaintiff the costs of issues found for him).

[a] **Rule applied** where there was a substantial recovery. Horton v. Horne, 99 N. C. 219, 5 SE 927.

[b] **In New York** (1) there existed at one time considerable confusion in the authorities on this question, due to the fact that the code of civil procedure prescribed a rule different from that of the revised statutes. See cases infra this note. (2) However, it is now settled that there can be no apportionment of costs where the complaint contains but one count and one cause of action, or where the complaint separately sets forth two or more causes of action, upon which issues of fact have been joined, and it is certified that the substantial cause of action was the same upon each issue. Newell Universal Mill Co. v. Muxlow, 115 N. Y. 170, 21 NE 1048 [overr Ackerman v. De Lude, 36 Hun 44]; Mertens v. Fitzwater, 53 Hun 597, 6 NYS 797; Kilburn v. Lowe, 37 Hun 237; Ackerman v. O'Gorman, 2 Silv. Sup. 109, 6 NYS 825, 17 NYCivProc 275; Stoddard v. Clarke, 9 AbbPrNS 310; Vowles v. Murray, 50 HowPr 159. (3) There was authority to the contrary under the code (Porter v. Willet, 14 Abb Pr 319) (4) and under the revised statutes prior to the adoption of the code (Hull v. Halsted, 1 HowPr 174; Johnson v. Fellows, 6 Hill 353; Rogers v. Arnold, 12 Wend. 288 note; Seymour v. Billings, 12 Wend. *285; Wright v. Williams, 2 Wend. 632). (5) Where judgment for defendant with costs is modified on motion, so as to award plaintiff some of the articles for which the action was brought, plaintiff is entitled to costs, based on the agreed value of the articles. Gimbernat v. Gimbernat, 156 NYS 505.

[99] Brown v. Smith, 1 N. H. 36.

[1] Ill.—Lansing v. Bates, 11 Ill. 550. See Kelly v. Hakes, 190 Ill. A. 210.

Ind.—Wright v. Mathews, 2 Blackf. 187.

Iowa.—Whitaker v. Sigler, 44 Iowa 419.

Kan.—Friend v. Green, 43 Kan. 167, 23 P 93; Dresher v. Corson, 23 Kan. 313.

Mass.—Powell v. Hinsdale, 5 Mass. 343.

Nebr.—McGillin v. Gleason, 34 Nebr. 694, 52 NW 287.

N. J.—Field v. Post, 38 N. J. L. 346.

Oh.—Clark v. Keith, 9 Oh. 72. See Rhodenbaugh v. Carey, 2 Oh. Dec. (Reprint) 162, 1 WestLMonth 599 (costs of error divided after the court had allowed an excessive judgment to stand on condition that plaintiff remit the excess).

S. C.—Stoney v. Bailey, 28 S. C. 156, 5 SE 347.

Vt.—Poor v. Woodburn, 25 Vt. 234.

Ont.—Canniff v. Bogart, 6 Can. L. J. 59.

N. B.—Dickinson v. Ketchum, 2 N. B. 120.

[a] **In Connecticut** the court on defendants' appeal will not disturb an allowance to them of the cost of their witnesses upon that part of the case which was decided in their favor, such allowance being "clearly all that they were entitled to if they were entitled to any costs." Cooley v. Gillan, 54 Conn. 80, 6 A 180.

[b] **In Pennsylvania** (1) there is a dictum to the effect that, where goods are replevied and delivered to plaintiff and on trial of the issue the jury find in favor of plaintiff as to some of the articles and in favor of defendant as to the others, the costs would be apportioned. Shoemaker v. Shoemaker, 4 Pa. Dist. 398, 16 Pa. Co. 159, 7 Kulp 528. (2) But under the rule formerly existing that, when defendant gives bond and retains the property, plaintiff's title is extinguished and the case proceeds as an action of trespass, where defendant gives bond and retains the property, a verdict for plaintiff for part of the property carries with it costs. Agricultural Trust Co. v. Eby, 29 Pa. Dist. 816; Shoemaker v. Shoemaker, supra.

[c] **In Wisconsin** (1) although defendant was held entitled to costs in a suit to regain possession of property where the goods were not delivered to plaintiff and the jury found that as to some of them title was in plaintiff and as to others in defendant, and made no finding as to one (Young v. Lego, 38 Wis. 206), (2) in a later case the court, while recognizing the applicability of the rule of apportionment of costs to cases where the property has been delivered to, and retained by, plaintiff under the writ of replevin, and where the value of the property to which the court finds defendant entitled is over fifty dollars, refused to commit itself as to a situation wherein these two elements were not present (Lanyon v. Woodward, 65 Wis. 543, 27 NW 337).

[2] Simmons v. Simmons, 23 Ida. 485, 130 P 784.

[3] Hennessey First Nat. Bank v. Farquharson, 22 Okl. 27, 97 P 559.

[4] Dresher v. Corson, 23 Kan. 313.

[5] **Right as affected by amount of recovery in actions generally** see Costs §§ 41–60.

[6] Rohr v. McCraig, 33 Cal. 309.

[7] Crowe v. Peaslee-Gaulbert Co., 37 F. (2d) 216; Chambers v. Hunt, 20 N. J. L. 109 [rev on other grounds 21 N. J. L. 620].

[a] **Rule applied.**—(1) Under a statute denying costs to a party who recovers less than the sum or value of five hundred dollars exclusive thereof, where plaintiff sought to re-

and the value of the property may be inquired into in the proceedings,[8] but the sheriff's appraisal will be presumed correct until the contrary is shown.[9] Where the value of the property in dispute has been placed by plaintiff in his declaration at a sum exceeding that required by statute, a successful defendant may recover his costs.[10]

[§ 355] **b. Limitations on Costs Recoverable.** The method of determining the amount of costs recoverable in an action of replevin is frequently governed by statutes or rules of courts.[11] In order to recover a full bill of costs a party recovering judgment must show that the damages, added to the value of the property, exceed the sum specified, either under general statutes restricting the amount of costs recoverable to the amount of damages awarded when the latter is under a designated sum,[12] or under statutes specifically providing that, in actions to recover the possession of personal property, the amount of costs is limited to the amount of damages, provided the damages, together with the value of the property recovered, do not exceed a designated sum;[13] but a defendant need not, it has been held, in order to recover full costs, succeed in defending an amount of property that would entitle a plaintiff to costs,[14] and a statute allowing plaintiff in replevin as costs only one fourth the value of his goods found for him, if the value is under a specified amount, does not apply to taxing costs for defendant for whom was found a very small part of the goods replevied.[15] The costs are limited to the amount of damages where the latter are under the statutory sum and the value of the property is not assessed by the jury,[16] and a party recovering the possession of personal property is entitled to no costs where he is not awarded any damages, and the value of the property is not fixed.[17] So, where defendant offers and plaintiff accepts judgment for the return of the chattels in question with damages and costs, but without fixing the value thereof and fixing only a nominal sum as damages, the costs are limited to the amount of the damages.[18] The fact that plaintiff's costs are only nominal, by reason of a statute limiting them to the amount of the damages, does not entitle defendant to any costs.[19] Under the procedure in some jurisdictions a certificate is necessary to obtain full costs in replevin as in other actions, although the affidavit and bond state the goods to be worth a sum above the jurisdiction of the inferior courts.[20]

[§ 356] **3. Persons Liable.** Upon the recovery of judgment in replevin against an officer and attachment or execution creditors, who appear to contest the title to the property, such creditors are solely liable for the costs of the action.[21]

[§ 357] **4. Items Allowable.**[22] In accordance with the rule obtaining in actions generally,[23] it has been held that attorney's fees are not allowable in an action of replevin,[24] except where there is statutory authority therefor.[25] Likewise, time lost in prosecuting or defending the action,[26] and other incidental expenses,[27] cannot be included in the bill of costs. But the costs of seizing,[28] removing,[29] and caring for[30] the property taken under the writ or order are properly included in a bill of costs, as is the premium on the replevin bond furnished[31]

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cover possession of goods of the value of thirty thousand dollars, and the jury awarded the goods to him, he is entitled to his costs notwithstanding the damages for detention were assessed at only one dollar. Crowe v. Peaslee-Gaulbert Co., 37 F. (2d) 216. (2) The same principle is applicable under a statute declaring that plaintiff shall not have costs unless he recovers above two hundred dollars in a case where plaintiff recovered property of a value greater than that sum, but only six cents damages. Chambers v. Hunt, 20 N. J. L. 109 [rev on other grounds 21 N. J. L. 620].

[8] Chambers v. Hunt, supra.

[9] Chambers v. Hunt, supra.

[10] Edgar v. Gray, 5 Cal. 267.

[11] See statutory provisions and court rules. And see Bienvenue v. Stafford, (Alta.) 8 WestWkly 423 (applying general rules of courts as to costs to action of replevin).

[12] Moore v. Ross, Morr. (Iowa) 401; Dempsey v. Hill, 3 Oh. Dec. (Reprint) 260, 5 WklyLGaz 181. See Gaston v. Canty, 48 Conn. 139 (same result reached, although by a different course of reasoning, where it was held that the statute was not intended to make the amount of damages in an action of replevin determine the question of costs).

[13] Harding v. Harris, 2 Me. 162; Corbin v. Milton, 27 HowPr (N. Y.) 76; Minks v. Wolf, 8 HowPr (N. Y.) 238; Hoag v. Moss, 1 NYCityCt 174; Rogers v. Arnold, 12 Wend. (N. Y.) 30; Fitzer v. McCannan, 14 Wis. 63.

[14] Johnson v. Fellows, 6 Hill (N. Y.) 353 [overr Small v. Bixley, 18 Wend. (N. Y.) 514].

[15] Harding v. Harris, 2 Me. 162.

[16] Coit v. Waples, 1 Minn. 134; Wolff v. Moses, 26 Misc. 500, 57 NYS 696 [aff 39 App. Div. 671, 57 NYS 1151]; Rapid Safety Filter Co. v. Wyckoff, 20 Misc. 429, 45 NYS 1028 [rev 19 Misc. 351, 43 NYS 490]; Hawley v. Green, 18 Wend. (N. Y.) 654.

[a] **Sheriff's appraisal** is not sufficient, as when the cause is tried a part of the goods may be awarded to plaintiff and part to defendant. Hawley v. Green, 18 Wend. (N. Y.) 654.

[17] Herman v. Girvin, 8 App. Div. 418, 40 NYS 845 [disappr Claflin v. Davidson, 53 N. Y. Super. 122]; Lockwood v. Waldorf, 91 Hun 281, 36 NYS 199.

[18] Hausauer v. Machawicz, 54 App. Div. 23, 66 NYS 340.

[19] Van Schoning v. Mitchell, 23 HowPr (N. Y.) 44.

[20] Ashton v. McMillan, 3 Ont. Pr. 10; Coleman v. Kerr, 28 U. C. Q. B. (Ont.) 297.

[21] Van Gundy v. Carrigan, 4 Ind. A. 333, 30 NE 933.

[22] **Amount and items allowable in actions generally** see Costs §§ 226-405.

[23] See Costs § 248.

[24] Dak.—Jandt v. South, 2 Dak. 46, 47 NW 779.

Mich.—Hatch v. Hart, 2 Mich. 289.

Miss.—Carraway v. Wallace, 17 S 930; Taylor v. Morton, 61 Miss. 24; Cowden v. Lockridge, 60 Miss. 385.

Mo.—Mix v. Kepner, 81 Mo. 93; Wright v. Broome, 67 Mo. A. 32; Trimble v. Keer, etc., Mercantile Co., 56 Mo. A. 683.

Nev.—Dillon v. Grutt, 38 Nev. 46, 144 P 741.

Utah.—Ryan, etc., Cattle Co. v. Slaughter, 6 Utah 278, 21 P 997.

N. B.—Davis v. Cushing, 10 N. B. 383.

[25] Yantis v. Burditt, 2 Dana (Ky.) 254; Hunton v. Palmer, 67 N. J. L. 94, 50 A 599.

[26] Taylor v. Morton, 61 Miss. 24.

Recovery as costs of personal expenses in attending court see Costs § 329.

[27] Byrnes v. Palmer, 113 Mich. 17, 71 NW 331; Dillon v. Grutt, 38 Nev. 46, 144 P 741.

[a] **Expense of replacing building wrongfully removed** from plaintiff's land by defendant is not part of the taxable costs in replevin, since the officer executing the writ is not authorized to do more than deliver the building to plaintiff. Byrnes v. Palmer, 113 Mich. 17, 71 NW 331.

Expenses as element of damages see infra §§ 383-385.

[28] Hendricks v. Ireland, 162 N. C. 523, 77 SE 1011.

[29] Crowe v. Peaslee-Gaulbert Co., 37 F. (2d) 216.

[30] Crowe v. Peaslee-Gaulbert Co., 37 F. (2d) 216; Hendricks v. Ireland, 162 N. C. 523, 77 SE 1011.

[a] **Keeper's fees** are recoverable as costs. Crowe v. Peaslee-Gaulbert Co., 37 F. (2d) 216.

[31] Stilwell Bros. v. Union Mach., etc., Co., 94 Wash. 61, 161 P 1048.

when such bond is compulsory;[32] and where the verdict is for defendant under a writ de proprietate propanda,[33] jury fees are taxable as part of his costs of the inquisition.[34] Under a statute providing that, where plaintiff fails to comply with an order requiring further bond and surety, defendant may have judgment "with such reasonable costs as shall be adjudged by the court," the word "costs" refers to the reasonable expense incurred by defendant in connection with plaintiff's proceedings before the court.[35]

[§ 358] **5. Effect of Findings.** As regards the question of costs, the jury's finding that there was an unlawful detention is binding on the parties.[36]

XV. DAMAGES[37]

[By Bernard J. Kenny]

[§ 359] **A. Right and Basis of Recovery—1. In General—a. Plaintiff.** The general rule is, sometimes by virtue of express provision of the statutes,[38] that a plaintiff in replevin, if successful, may recover damages for the wrongful taking and detention of the property,[39] together with, where a return of the property is not had, a recovery of its value,[40] or the value of his special interest therein;[41] except as the right to recover both the value of the property and damages for its detention may be controlled by rules hereinafter considered as to the time as of which the value is to be ascertained,[42] and as to the right to recover for depreciation.[43] Damages to the successful party in a replevin suit are ordinarily to compensate him for the loss he has sustained by being wrongfully deprived of the possession of his property,[44] and the award involves a prior finding that he is entitled to the immediate possession of the property at the time the suit was commenced.[45] By the action the law intends to give a complete remedy to the party entitled to possession not only as to the property itself, but also in respect to damages which are the natural result of the wrongful act.[46] Exemplary or punitive damages are recoverable where the peculiar circumstances warrant,[47] but in the absence of circumstances upon which exemplary damages could be awarded just compensation can only be allowed, as the object of the law is to restore the party, so far as possible, to the condition he was in prior to the commission of the wrongful act.[48] These damages are not limited to such as have accrued when the suit is instituted but may be estimated to the date of the verdict.[49]

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[32] Crowe v. Peaslee-Gaulbert Co., 37 F. (2d) 216.

[33] **Writ de proprietate probanda** see De Proprietate Probanda 18 C. J. p 784.

[34] Hale v. Hilyard, 31 N. B. 87.

[35] Valentine v. Knox, 45 R. I. 429, 123 A 600.

[36] Crowe v. Peaslee-Gaulbert Co., 37 F. (2d) 216.

[37] **Cross references:**
Damages generally see Damages 17 C. J. p 699.
In:
  Action on bond see infra §§ 424-425.
  Detinue see Detinue §§ 99-104.
  Trover and conversion see Trover and Conversion [38 Cyc 2088].
Instructions see supra § 289.
On dismissal or nonsuit see supra §§ 256, 270.
Pleading see supra § 187.
Verdict for see supra § 310.

[38] See statutory provisions.

[39] U. S.—Crowe v. Peaslee-Gaulbert Co., 37 F. (2d) 216.

Ark.—Lesser v. Norman, 51 Ark. 301, 11 SW 281; Gray v. Nations, 1 Ark. 557.

Cal.—Ruzanoff v. Retailers Credit Assoc., 97 Cal. A. 682, 276 P 156; Los Angeles Furniture Co. v. Hansen, 46 Cal. A. 5, 188 P 292; Morris v. Allen, 17 Cal. A. 684, 121 P 690.

Colo.—Smith v. Stevens, 14 Colo. A. 491, 60 P 580.

Ill.—Taylor v. Welsh, 138 Ill. A. 190.

Ind.—Mitchell v. Burch, 36 Ind. 529.

Kan.—Chase County Nat. Bank v. Thompson, 54 Kan. 307, 38 P 274.

Ky.—Philips v. Harriss, 3 J. J. Marsh. 122, 19 AmD 166.

Me.—Kimball v. Thompson, 123 Me. 116, 122 A 46.

Md.—Dorsey v. Gassaway, 2 Harr. & J. 402, 3 AmD 557.

Miss.—Burrage v. Melson, 48 Miss. 237.

Mont.—Chestnut v. Sales, 44 Mont. 534, 121 P 481.

Nebr.—Oak Creek Valley Bank v. Hudkins, 115 Nebr. 628, 214 NW 68; Romberg v. Hughes, 18 Nebr. 579, 26 NW 351.

Nev.—Buckley v. Buckley, 12 Nev. 423.

N. J.—Conlen v. Lemmerman, 87 N. J. L. 84, 93 A 722; Pedrick v. Kuemmell, 74 N. J. L. 379, 65 A 846; Bishop, etc., Co. v. Keffer, 69 N. J. L. 47, 54 A 402; Maguire v. Dutton, 54 N. J. L. 597, 25 A 254; Frazier v. Fredericks, 24 N. J. L. 162.

N. M.—Hyde v. Elmer, 14 N. M. 39, 88 P 1132.

N. Y.—Gindin v. Gottlieb, 191 NYS 218.

N. C.—Standard Dry-Kiln Co. v. Ellington, 172 N. C. 481, 90 SE 564.

Okl.—Chilton v. Carpenter, 78 Okl. 210, 189 P 747; Hunt v. Cohen, 74 Okl. 248, 179 P 1.

Or.—Coffin v. Taylor, 16 Or. 375, 18 P 638.

Pa.—Harrisburg Electric Light Co. v. Goodman, 129 Pa. 206, 19 A 844; Brown v. Judge, 80 Pa. Super. 570.

S. C.—Manley v. Bailey, 151 S. C. 366, 149 SE 119.

Tenn.—Parham v. Riley, 4 Coldw. 5.

Wis.—Graves v. Sittig, 5 Wis. 219.

[40] U. S.—Olivier v. Mt. Union Tanning, etc., Co., 253 Fed. 593 [rev on other grounds 264 Fed. 601].

Colo.—Clay v. Martinez, 74 Colo. 10, 218 P 903; Walker v. MacMillan, 62 Colo. 136, 160 P 1062; Smith v. Stevens, 14 Colo. A. 491, 60 P 580.

La.—Freeport, etc., Fuel Oil Corp. v. Lange, 157 La. 217, 102 S 313.

Nev.—Buckley v. Buckley, 12 Nev. 423.

N. C.—Standard Dry-Kiln Co. v. Ellington, 172 N. C. 481, 90 SE 564.

Pa.—Harrisburg Electric Light Co. v. Goodman, 129 Pa. 206, 19 A 844; McDonald v. Scaife, 11 Pa. 381, 51 AmD 556.

Utah.—Dolinsky v. Williams, 56 Utah 186, 189 P 873.

[a] **Pretium affectionis.**—In replevin for a slave, the pretium affectionis is not a proper element to be considered in estimating the value of the slave. Moseley v. Anderson, 40 Miss. 49.

[b] **Judgment for damages** for hauling timber to a river, in addition to an award of the value of the timber at the place it was found, was erroneous where the evidence showed that the value of the timber after having been hauled to the river was increased in an amount equal to the cost of hauling. Bridgeman v. Augusta Cooperage Co., 147 Ark. 378, 227 SW 602.

[c] **In New Jersey** (1) where defendant rebonds the property, judgment under 3 Comp. St. (1910) p 4376 and Replevin Act § 33 shall be for the value of the property. Conlen v. Lemmerman, 87 N. J. L. 84, 93 A 722; Schnitzer v. Russell, 81 N. J. L. 146, 80 A 938; Pedrick v. Kuemmell, 74 N. J. L. 379, 65 A 846; Bishop, etc., Co. v. Keffer, 69 N. J. L. 47, 54 A 402; Johnson v. Mason, 64 N. J. L. 258, 45 A 618; Maguire v. Dutton, 54 N. J. L. 597, 25 A 254; Lindauer v. Teeter, 41 N. J. L. 255; Field v. Post, 38 N. J. L. 346; Harwood v. Smethurst, 29 N. J. L. 195, 80 AmD 207; Frazier v. Fredericks, 24 N. J. L. 162; West v. Caldwell, 23 N. J. L. 736. (2) Although the property was not rebonded by defendant, since at the institution of the action it was lost or destroyed, plaintiff was entitled to the value of the property. Imbesi v. Eastern Motor Co., 104 N. J. L. 251, 140 A 31 [aff 105 N. J. L. 490, 144 A 919]; Preziaso v. Union City Cleaning, etc., Co., 6 N. J. Misc. 171, 140 A 394.

Alternative judgment for value see supra § 325.

Election to take judgment for value see supra § 322.

[41] **Recovery by holder of special interest** see infra §§ 371, 372.

[42] See infra §§ 366-368.

[43] See infra § 370.

[44] Heard v. Hicks, 101 Ala. 102, 13 S 256; Washington Ice Co. v. Webster, 62 Me. 341, 16 AmR 462; Allen v. Fox, 51 N. Y. 562, 10 AmR 641; McMillan Hardware Co. v. Ross, 24 Okl. 696, 104 P 343.

[45] Rahis v. McLeod, 45 Nev. 380, 204 P 501; McMillan Hardware Co. v. Ross, 24 Okl. 696, 104 P 343.

Unreplevied property. In some jurisdictions plaintiff is entitled to damages for the wrongful detention of unreplevied property described in the writ to which the jury finds him entitled,[50] but there is also authority holding that the damages recoverable by a plaintiff for the detention of goods are limited to the goods actually replevied.[51]

Waiver of right. Plaintiff is not deprived of the right to damages for the detention of the property by his failure to require immediate delivery of the property under the writ at the institution of the action,[52] or on appeal by the opposite party.[53]

[§ 360] **b. Defendant.** At common law, damages were not recoverable by a defendant in replevin.[54] The judgment for defendant was for a restoration of the property and costs.[55] Certain English statutes,[56] however, gave damages to avowants, or other persons making conusance, or justifying as bailiffs in replevin for rents or services;[57] and at the present day, either by statute[58] or judicial authority, the general rule is, that defendant, if successful, may recover damages for the wrongful taking and detention of the property,[59] in such amount as will be a fair indemnity to him for the injury he has sustained,[60] and, where he is found to be entitled to a return of the property, and a return cannot be had, he may recover its value,[61] or the value of his special interest therein.[62] Damages should not be allowed, however, where the evidence fails to show that any have been sustained,[63] and there cannot be a judgment for damages where defendant is not entitled to the possession of the property.[64] A judgment rendered for damages for wrongful taking and detention will not be discharged by a return of the property.[65]

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[46] Buckley v. Buckley, 12 Nev. 423; Hunt v. Cohen, 74 Okl. 248, 179 P 1 [cit Cyc].

[47] **Exemplary damages** see infra §§ 386, 387.

[48] Cumberland Coal, etc., Co. v. Tilghman, 13 Md. 74; Hanselman v. Kegel, 60 Mich. 540, 27 NW 678.

[49] Lesser v. Norman, 51 Ark. 301, 11 SW 281; Kelly v. Altemus, 34 Ark. 184, 36 AmR 6.

[50] Ruzanoff v. Retailers Credit Assoc., 97 Cal. A. 682, 276 P 156; Dupuis v. Dupuis, 100 Conn. 96, 122 A 904; Segars v. Segars, 82 S. C. 196, 63 SE 891; Lewis v. Teale, 32 U. C. Q. B. (Ont.) 108.

[51] Bagley v. Cooper, 90 Vt. 576, 99 A 230.

[52] Pedrick v. Kuemmell, 74 N. J. L. 379, 65 A 846.

[53] Williams v. Phelps, 16 Wis. 80.

[a] **Illustration.**—The failure of plaintiff in whose favor judgment was rendered in justice's court, in an action for the recovery of personal property unlawfully detained, to get possession upon an appeal taken by the opposite party, by giving the undertaking mentioned in L. (1859) c 112 § 2, furnishes no reason why he should not recover all the damages he has sustained by the detention of the property pending such appeal. Williams v. Phelps, 16 Wis. 80.

[54] U. S.—Fields v. Crawford, 30 F. Cas. No. 18,296, 2 Hayw. & H. 256.

Ind.—Wolf v. Blue, 5 Blackf. 153; White v. Lloyd, 3 Blackf. 390.

Iowa.—Mason v. Richards, 12 Iowa 73.

Ky.—Philips v. Harriss, 3 J. J. Marsh. 122, 19 AmD 166.

Md.—Hopewell v. Price, 2 Harr. & G. 275.

Nebr.—Schrandt v. Young, 62 Nebr. 254, 86 NW 1085.

[55] Philips v. Harriss, 3 J. J. Marsh. (Ky.) 122, 19 AmD 166. See White v. Lloyd, 3 Blackf. (Ind.) 390 (where it was said that costs could not be allowed at common law or under the English statutes).

[56] St. 7 Hen. VIII c 4; 21 Hen. VIII c 19.

[57] Hopewell v. Price, 2 Harr. & G. (Md.) 275; Turner v. Gallilee, Hardres 153.

[58] See statutory provisions.

[59] Conn.—Hall v. Smedley Co., 151 A 321.

Ill.—Stein v. Traeger, 218 Ill. A. 122; Lorenzo v. Hunter, 185 Ill. A. 574; Clow v. Yount, 93 Ill. A. 112.

Iowa.—McIntire v. Eastman, 76 Iowa 455, 41 NW 162.

Ky.—Rogers v. Bradford, 8 Bush 163; Tuley v. Mauzey, 4 B. Mon. 5.

Me.—Smith v. Deojay, 124 Me. 381, 130 A 130; Washington Ice Co. v. Webster, 62 Me. 341, 16 AmR 462.

Mass.—Guaranty Security Corp. v. Brophy, 243 Mass. 597, 137 NE 751; Boston Loan Co. v. Myers, 143 Mass. 446, 9 NE 805; Stevens v. Tuite, 104 Mass. 328.

Mich.—Burt v. Burt, 41 Mich. 82, 1 NW 936.

Minn.—Qualy v. Johnson, 80 Minn. 408, 83 NW 393.

Miss.—Kendrick v. Watkins, 54 Miss. 495.

Mont.—Hammond v. Thompson, 54 Mont. 609, 173 P 229.

Nebr.—Schrandt v. Young, 62 Nebr. 254, 86 NW 1085; Teel v. Miles, 51 Nebr. 542, 71 NW 296; Creighton v. Newton, 5 Nebr. 100; Merrick County School Dist. No. 2 v. Shoemaker, 5 Nebr. 36.

N. Y.—Woodruff v. Cook, 25 Barb. 505; Rowley v. Gibbs, 14 Johns. 385.

Okl.—Lanyon v. Byus, 81 Okl. 203, 197 P 162; Thomas v. Tecumseh First Nat. Bank, 32 Okl. 115, 121 P 272, Ann Cas1914A 376.

Pa.—Cox v. Burdett, 23 Pa. Super. 346.

Tenn.—Mayberry v. Cliffe, 7 Coldw. 117.

Wis.—Saunderson v. Lace, 2 Pinn. 257, 1 Chandl. 231.

Wyo.—Hunt v. Thompson, 19 Wyo. 523, 120 P 181, 122 P 624.

N. S.—Freeman v. Harrington, 5 N. S. 352.

[a] **"Right and proper" damages.**—Under a statute directing that the jury in replevin "shall assess to him (defendant) such damages as they think right and proper," a successful defendant is entitled to damages for the wrongful detention of his property. Schrandt v. Young, 62 Nebr. 254, 86 NW 1085; Hunt v. Thompson, 19 Wyo. 523, 120 P 181, 122 P 624.

[b] **A statute providing that no counter-claim shall be allowed in an action of replevin** was not meant to prevent defendant from setting up the value of the property and the damages suffered by him on account of its detention under the writ, and recovering the property, or its value, and damages for its wrongful detention, where other statutes specially provide that he may do this. McIntire v. Eastman, 76 Iowa 455, 41 NW 162.

[60] Dupuis v. Dupuis, 100 Conn. 96, 122 A 904; Boston Loan Co. v. Myers, 143 Mass. 446, 9 NE 805.

[a] **Price paid for a new lunch wagon** by defendant could not be awarded defendant in addition to a recovery of the lunch wagon replevied or its value. Adams v. Wright, 74 Conn. 551, 51 A 537.

[61] Hitch v. Riggin, 26 Del. 84, 80 A 975; Taylor v. Richardson, 9 Del. 300.

[a] **In Kansas,** under Comp. L. (1862) p 641 (Justices' Ct. Act § 141), judgment for defendant for the value of the property may not also include damages for detention. Garrett v. Wood, 3 Kan. 231.

[b] **In New Hampshire** defendant, on a verdict in his favor, is entitled to judgment for the value of the property and not for a return. Dickinson v. Lovell, 35 N. H. 9; Messer v. Bailey, 31 N. H. 9; Kendall v. Fitts, 22 N. H. 1; Bell v. Bartlett, 7 N. H. 178.

Alternative judgment for value see supra § 325.

Election to take judgment for value see supra § 322.

[62] **Value recoverable by one having special interest** see infra §§ 371, 372.

[63] Wangler v. Franklin, 70 Mo 659.

[§ 361] **2. Connection with Suit for Possession—a. In General.** The rule that in replevin all the equities of the parties may be adjusted[66] relates only to the adjustment of the rights and interests in the property in controversy,[67] so that the damages recoverable in replevin must be connected with and incident to the contest over the possession of the property[68] and unless they do so arise are not recoverable merely because connected with the transaction by reason or virtue of which plaintiff's alleged right of taking possession accrued.[69] Where the damages claimed arise out of or are connected with the subject matter of the replevin action, they may be recovered in that action.[70] A party cannot recover damages in replevin for breach of contract,[71] or for matters growing out of a prior action.[72]

A lien on the property in controversy, by virtue of which defendant asserts his right to hold the property, may be settled in the replevin action,[73] although it has also been held that defendant's claim under a lien on the property in controversy could not be adjudicated in the replevin as such claim was not damage arising from the contest over the possession of the property.[74]

[§ 362] **b. Injury to Property Other than That in Suit.** Damages for injury to property other than that replevied, as for instance personal effects in a building seized and removed under a writ of replevin, cannot be recovered by defendant.[75] Matters of this character cannot properly be adjudicated in an action which concerns only the claims of the respective parties to the building.[76]

[§ 363] **3. Damages Resulting from Act of Party Claiming.** Where a person permits the mingling of his property with that of another so as to make it impossible for an officer levying an execution against the property of the latter to select the judgment debtor's property and distinguish it from the former's property such officer is not liable in damages.[77] Where plaintiff claims substantial damages for property wrongfully detained the value of which by his own act he has destroyed, no substantial damages are recoverable.[78]

[§ 364] **B. Nominal Damages.** In accordance with well-settled principles governing the law of damages[79] the prevailing party in an action of replevin is, in any event, entitled to nominal damages because his rights have been infringed.[80] To warrant a recovery of nominal damages, no evidence that actual damages have been sustained is necessary.[81] It is equally well settled, however, that in the absence of any evidence to show actual damages noth-

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64. Neis v. Gillen, 27 Ark. 184; Whitwell v. Wells, 24 Pick. (Mass.) 25; J. E. McMillan Hardware Co. v. Ross, 24 Okl. 696, 104 P 343.

65. **Satisfaction of judgment for damages** see supra § 328.

66. **Scope of relief in replevin** see supra § 312.

67. International Hospital Equipment Co. v. St. Louis Fire Door Co., (Mo. A.) 13 SW (2d) 582.

68. Switzer v. Turansky, 101 Conn. 60, 124 A 720; International Hospital Equipment Co. v. St. Louis Fire Door Co., (Mo. A.) 13 SW (2d) 582; Russe v. Hendricks, 75 Mo. A. 386; Schrandt v. Young, 62 Nebr. 254, 86 NW 1085; Thomas v. Mann, 22 Wyo. 99, 135 P 1088.

[a] **The replevin action is primarily to adjudicate the possession of the property.**—Other rights and claims must be determined, as a general rule, in other appropriate proceedings, even though closely connected with the controversy out of which the contest over possession arises. Schrandt v. Young, 62 Nebr. 254, 86 NW 1085.

[b] **Compensation for care of sheep** replevied was not recoverable by defendant in the replevin action. Thomas v. Mann, 22 Wyo. 99, 135 P 1088.

69. Schrandt v. Young, 62 Nebr. 254, 86 NW 1085.

70. Babb v. Talcott, 47 Mo. 343; Holmberg v. Will, 52 Okl. 745, 153 P 832; Bottoms v. Clark, 38 Okl. 243, 132 P 903.

[a] **Where animals were taken damage feasant** and were replevied by the owner, defendant could recover damages suffered by reason of the trespass. Holmberg v. Will, 52 Okl. 745, 153 P 832; Bottoms v. Clark, 38 Okl. 243, 132 P 903.

71. Delaware Mar. Supply Mfg. Co. v. Philadelphia Lamp Mfg. Co., 28 Del. 524, 95 A 235 [aff 28 Del. 81, 90 A 595]; International Hospital Equipment Co. v. St. Louis Fire Door Co., (Mo. A.) 13 SW (2d) 582.

72. Ruggles v. Wilson, 162 Mo. A. 372, 142 SW 772.

[a] **Illustration.**—In replevin for goods held under attachment against a third person, it was error to allow plaintiff damages on account of a levy under a prior attachment, validity of which she recognized by redeeming the property therefrom. Ruggles v. Wilson, 162 Mo. A. 372, 142 SW 772.

73. Thomas v. Merrill, 169 N. C. 623, 86 SE 593.

[a] **Lien for labor performed.**—A defendant's claim for work done in cutting and rafting logs for which the statute gave a lien, may be satisfied and awarded in the replevin suit. Thomas v. Merrill, 169 N. C. 623, 86 SE 593.

74. Switzer v. Turansky, 101 Conn. 60, 124 A 720.

[a] **Illustration.**—Defendants are not entitled to recover value of lining and labor furnished in working on article, since only such damages are recoverable by defendant as arise from act of replevy. Switzer v. Turansky, 101 Conn. 60, 124 A 720.

75. Jameson v. Kent, 42 Nebr. 412, 60 NW 879; Dietrichs v. Lincoln, etc., R. Co., 13 Nebr. 43, 13 NW 13.

76. Jameson v. Kent, 42 Nebr. 412, 60 NW 879; Dietrichs v. Lincoln, etc., R. Co., 13 Nebr. 43, 13 NW 13.

77. Wildman v. Sterritt, 80 Mich. 651, 45 NW 657. And see as supporting this view Shumway v. Ritter, 8 Pick. (Mass.) 443, 19 AmD 340; Lewis v. Whittemore, 5 N. H. 364, 22 AmD 466.

78. Duroth Mfg. Co. v. Cauffiel, 243 Pa. 24, 89 A 798.

[a] **Cancellation of stocks and bonds.**—Where plaintiff delivered certain of its stocks and bonds to defendant to hold and to become the latter's property upon exchange of an electric light plant, and on defendant's refusal to execute the contract of exchange, the plaintiff rescinded the contract and by resolution declared the stocks and bonds cancelled, no damages for their value can be recovered in action of replevin. Duroth Mfg. Co. v. Cauffiel, 243 Pa. 24, 89 A 798.

79. See Damages § 58.

80. U. S.—Ford Motor Co. v. Farrington, 245 Fed. 850, 158 CCA 190; Treat v. Staples, 24 F. Cas. No. 14,162, Holmes 1; Fields v. Crawford, 30 F. Cas. No. 18,296, 2 Hayw. & H. 256.

Del.—Reynolds v. Donaway, 30 Del. 461, 108 A 139; Frick v. Miller, 30 Del. 366, 107 A 391 [aff 107 A 394].

Ind.—Cardwill v. Gilmore, 86 Ind. 428.

Mass.—Jarvis v. De Peza, 251 Mass. 447, 146 NE 662; Smith v. Whiting, 100 Mass. 122.

Mo.—American Alliance Ins. Co. v. Mead, (A.) 242 SW 1005.

Nebr.—Frey v. Drahos, 7 Nebr. 194.

N. H.—Sanborn v. Leavitt, 43 N. H. 473.

Vt.—Starkey v. Waite, 69 Vt. 193, 37 A 292.

Wis.—Booth v. Ableman, 20 Wis. 21, 88 AmD 730.

81. Marks v. Grace, 205 Ky. 456, 266 SW 30; Citizens' Nat. Bank v. Oldham, 136 Mass. 515; Frey v. Drahos, 7 Nebr. 94; Hart v. Johnston, 9 Sask. L. 201, 27 DomLR 450, 34 WestLR 225. And see Damages § 59.

ing beyond nominal damages are recoverable.[82]

[§ 365] **C. Contingent or Speculative Damages.**[83] Damages which cannot be established with reasonable certainty, or which are contingent or speculative, cannot be allowed either party in an action of replevin,[84] and anticipated profits in the ordinary sense of the term are usually within the prohibition,[85] so that damages arising from the possible loss of customers,[86] or the interruption of business,[87] are usually too remote and speculative to warrant a recovery.[88] It has been held, however, that the jury may, and if in their opinion justice demands it, ought to, allow defendant, as damages, the loss of near and probable profits arising from a temporary rise in market value.[89] And where the evidence makes it reasonably certain that the prevailing party would have made a profit but for the wrongful detention the damages resulting are not speculative so as to preclude a recovery.[90] So in an action for the wrongful detention of property, whereby plaintiff was necessarily interrupted in his business for a definite time and to an extent which he could not have lessened by reasonable effort, and that during such time he could have made a certain profit, such loss would be sufficiently certain for consideration and would be a basis for consequential damages.[91]

[§ 366] **D. Value of Property—1. Time of Valuation**[92]**—a. In General.** Due largely to the difference in the statutes,[93] there is a marked diversity of opinion respecting the time when the value of the property sued for in a replevin action should be determined for the purpose of fixing the amount of an alternative money judgment.[94] In some jurisdictions the view has been adopted that in replevin the value of the property is to be measured as of the time of the wrongful taking,[95] or at the time of the

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82. U. S.—Treat v. Staples, 24 F. Cas. No. 14,162, Holmes 1.

Ark.—Smith v. Houston, 25 Ark. 183.

Cal.—Redd v. Garford Motor Truck Co., 205 Cal. 245, 270 P 447.

Colo.—Sopris v. Webster, 1 Colo. 507.

Ill.—Seabury v. Ross, 69 Ill. 533.

Mass.—Whitman v. Merrill, 125 Mass. 127; Bartlett v. Brickett, 14 Allen 62.

Mich.—Phenix v. Clark, 2 Mich. 327.

Miss.—Thornton v. Gardner, 134 Miss. 485, 99 S 131.

N. M.—Hyde v. Elmer, 14 N. M. 39, 88 P 1132.

Tenn.—Mann v. Grove, 4 Heisk. 403.

Utah.—Nielsen v. Hyland, 51 Utah 334, 170 P 778.

Wash.—Babare v. Rodman, 130 Wash. 317, 226 P 1015 [mod on reh 127 Wash. 436, 221 P 292].

[a] **Application of rule.**—Where a plaintiff cancelled stocks and bonds which it sought to replevy, and thereby reduced them to a mere nominal value, he could only recover nominal damages. Duroth Mfg. Co. v. Cauffiel, 243 Pa. 24, 89 A 798.

83. **Generally** see Damages § 86.

84. Ark.—Kelly v. Altemus, 34 Ark. 184, 36 AmR 6.

Cal.—Tucker v. Hagerty, 37 Cal. A. 789, 174 P 908 (dictum).

Ill.—Butler v. Mehrling, 15 Ill. 488.

Iowa.—Wilson v. Hillhouse, 14 Iowa 199.

Kan.—Haas v. Tough, 67 Kan. 253, 72 P 856; Smith v. Bryant, 1 Kan. A. 754, 41 P 1069.

Me.—Washington Ice Co. v. Webster, 62 Me. 341, 16 AmR 462; Brannin v. Johnson, 19 Me. 361.

Mich.—Aber v. Bratton, 60 Mich. 357, 27 NW 564.

Minn.—Northern Timber Products Co. v. Stone-Ordean-Wells Co., 143 Minn. 200, 173 NW 439.

Nebr.—Schrandt v. Young, 62 Nebr. 254, 86 NW 1085.

N. M.—Roth v. Yara, 19 N. M. 8, 140 P 1071.

N. C.—Bowen v. King, 146 N. C. 385, 59 SE 1044; Sledge v. Reid, 73 N. C. 440.

Pa.—Houghton v. Rock, 8 Phila. 42.

S. C.—Loeb v. Mann, 41 S. C. 206, 18 SE 490.

Tenn.—Mayberry v. Cliffe, 7 Coldw. 117.

Wis.—Beveridge v. Welch, 7 Wis. 465.

[a] **Illustrations.**—(1) In replevin against a sheriff, it was not competent for the plaintiff to show, for the purpose of fixing his damages, that he was compelled to deposit with his surety on the replevin bond a sum of money as indemnity. Wilson v. Hillhouse, 14 Iowa 199. (2) In replevin for the recovery of ten horses, the cost of caring for and feeding fifteen other horses belonging to plaintiffs, in another town, during the time the ten were detained, could not be recovered as damages on the ground that plaintiffs in the action intended to ship all of the horses to market in one car, and that all were necessary to make a car-load. Such damages were too remote and speculative. Haas v. Tough, 67 Kan. 253, 72 P 856. (3) The loss of a job by the wrongful taking and detention of one's tools was too remote as an element of damage. Kelly v. Altemus, 34 Ark. 184, 36 AmR 6.

85. Aber v. Bratton, 60 Mich. 357, 27 NW 564; Schrandt v. Young, 62 Nebr. 254, 86 NW 1085; Bowen v. King, 146 N. C. 385, 59 SE 1044.

86. Washington Ice Co. v. Webster, 62 Me. 341, 16 AmR 462.

87. Mich.—Aber v. Bratton, 60 Mich. 357, 27 NW 564.

Minn.—Northern Timber Products Co. v. Stone-Ordean-Wells Co., 143 Minn. 200, 173 NW 439.

N. Y.—Brizsee v. Maybee, 21 Wend. 144.

Pa.—McCabe v. Morehead, 1 Watts & S. 513.

Wis.—Beveridge v. Welch, 7 Wis. 465.

[a] **Illustration.**—In replevin for a boat wrongfully taken, compensation cannot be determined by the prospective profits which the owner would have derived from the use of the boat, contingent upon his chance of business. Aber v. Bratton, 60 Mich. 357, 27 NW 564.

88. See cases supra notes 84–87.

89. Maybury v. Cliffe, 7 Coldw. (Tenn.) 117.

90. Slattery v. Tillman, 197 Mich. 349, 163 NW 938; Eitzen v. Hilbert, 165 Mich. 650, 131 NW 449.

[a] **Illustrations.**—(1) Evidence, in replevin for an auto, as a basis for damages for its unlawful detention, that it had been in use up to the time it was wrongfully detained, and that in the month previous it had earned $300, was not open to the objection of being wholly speculative and conjectural. Slattery v. Tillman, 197 Mich. 349, 163 NW 938. (2) Evidence of probable earnings of certain musical instruments for the period retained was admissible to fix damages for the wrongful detention thereof. Arnold v. Wurlitzer, 31 Oh. Cir. Ct. 491. (3) In replevin to recover sixty-one hens, evidence that the plaintiff might have made twenty-five cents a day in eggs and chickens if the hens had been in his possession was not so speculative as to preclude an allowance for their detention. Eitzen v. Hilbert, 165 Mich. 650, 131 NW 449.

91. Ruzanoff v. Retailers Credit Assoc., 97 Cal. A. 682, 276 P 156; Bowen v. King, 146 N. C. 385, 59 SE 1044.

[a] **Illustrations.**—(1) Plaintiff, in an action to recover personal property and fixtures, was entitled to recover damages for the loss of profits in its business during the time the business was closed on account of the wrongful detention, and the fact that the loss cannot be measured with mathematical accuracy is not a sufficient reason for denying compensation. Ruzanoff v. Retailers Credit Assoc., 97 Cal. A. 682, 276 P 156. (2) Where defendant had wrongfully detained plaintiff's teams so that he was prevented from fulfilling a contract for the delivery of timber at a profit, the damages awarded may be on the basis of profits he could have made during the time his work was necessarily interrupted. Bowen v. King, 146 N. C. 385, 59 SE 1044.

92. **In detinue** see Detinue § 80.

In trover and conversion see Trover and Conversion [38 Cyc 2094].

93. See statutory provisions.

94. See infra text and notes 95–3.

Alternative judgment for value see supra § 325.

Election to take judgment for value see supra § 322.

95. Fla.—Cary v. Hyer, 91 Fla. 322, 107 S 684; Florida Trust, etc., Co. v. Consolidated Title Co., 86 Fla. 317, 98 S 915.

Ida.—Tannahill v. Lydon, 31 Ida. 608, 173 P 1146.

Kan.—Morrison v. Montgomery, 101

wrongful detention where the original taking was lawful,[96] or at the time of the conversion by the wrongdoer,[97] or at the time of the demand for and refusal of possession by the wrongdoer.[98] Other jurisdictions have followed the rule that in assessing the value of the property the value should be that which the property has at the time of the trial, and the depreciation, if any, allowed as damages.[99] In

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Kan. 670, 168 P 674; Werner v. Graley, 54 Kan. 383, 38 P 482; Garrett v. Wood, 3 Kan. 231.

Me.—Washington Ice Co. v. Webster, 68 Me. 449.

Mass.—Sullivan v. Martinelli, 261 Mass. 261, 158 NE 662.

Mich.—Nitz v. Bolton, 71 Mich. 388, 39 NW 15; Hanselman v. Kegel, 60 Mich. 540, 27 NW 678.

Minn.—McLeod v. Capehart, 50 Minn. 101, 52 NW 381; Sherman v. Clark, 24 Minn. 37; Berthold v. Fox, 13 Minn. 501, 97 AmD 243.

Mont.—Osmers v. Furey, 32 Mont. 581, 81 P 345.

Nebr.—Schrandt v. Young, 62 Nebr. 254, 86 NW 1085; Heidiman-Benoist Saddlery Co. v. Schott, 59 Nebr. 20, 80 NW 47; Dodge v. Runels, 20 Nebr. 33, 28 NW 849; Moore v. Kepner, 7 Nebr. 291; Frey v. Drahos, 7 Nebr. 194.

N. J.—Knight v. Huber Inv. Co., 102 N. J. L. 359, 132 A 656; Schnitzer v. Russell, 81 N. J. L. 146, 80 A 938; Maguire v. Dutton, 54 N. J. L. 597, 25 A 254.

S. D.—Benjamin v. Huston, 16 S. D. 569, 94 NW 584.

Tenn.—Mayberry v. Cliffe, 7 Coldw. 117.

Utah.—Newton v. Brown, 1 Utah 287.

Wis.—Findlay v. Knickerbocker Ice Co., 104 Wis. 375, 80 NW 436.

[a] **Illustration.**—On dismissal of replevin action for failure to prosecute, defendant was entitled to the value of the automobile at the time it was taken, the automobile having been disposed of by the wrongdoer. Sullivan v. Martinelli, 261 Mass. 261, 158 NE 662.

[b] **Application of rule.**—Where the defendant purchased wheat upon which the plaintiff claimed a chattel mortgage, the plaintiff could not enhance his damages by delay in bringing an action of replevin and the price of the wheat at the time it was purchased by the defendant was the proper basis of value. Morrison v. Montgomery, 101 Kan. 670, 168 P 674.

[c] **In North Carolina** (1) it was originally held that the value is assessed as of the time of the trial (Holmes v. Godwin, 69 N. C. 467; Scott v. Elliott, 63 N. C. 215), (2) the rule has been changed by statute so that value is assessed as of the time of the taking (Hall v. Tillman, 110 N. C. 220, 14 SE 745).

[d] **In Oklahoma** the value of the property is the price at which the owner might have bought an equivalent thing in the market nearest to the place where the property was wrongfully taken or detained, and at such time after the breach of duty upon which his right to damages is founded as would suffice with reasonable diligence for him to make a purchase. Cook v. Duncan First Nat. Bank, 110 Okl. 111, 236 P 883; Shipman v. Adamson, 96 Okl. 84, 221 P 74; Myers v. Hubbard, 80 Okl. 97, 194 P 433; Leeper v. Hobart First Nat. Bank, 26 Okl. 707, 110 P 655, 29 LRA NS 747, AnnCas1912B 302; Robb v. Dobrinski, 14 Okl. 563, 78 P 101, 1 AnnCas 981; Barse Live-Stock Comn. v. McKinster, 10 Okl. 708, 64 P 14. See Mitchelson v. Commercial Inv. Trust, 97 Okl. 98, 222 P 663 (valuation as of time of wrongful replevy).

[96] **96.** Swift v. Barnes, 16 Pick. (Mass.) 194; McLeod v. Capehart, 50 Minn. 101, 52 NW 381; Mitchelson v. Commercial Inv. Trust, 97 Okl. 98, 222 P 663; Aultman Co. v. McDonough, 110 Wis. 263, 85 NW 980.

[97] **97.** Barnard v. Corlett, 62 Colo. 226, 161 P 156; Imbesi v. Eastern Motor Co., 104 N. J. L. 251, 140 A 31 [aff 105 N. J. L. 490, 144 A 919]; J. I. Case Threshing Mach. Co. v. Scott, 131 Wash. 328, 230 P 151; Armour v. Seixas, 80 Wash. 181, 141 P 308.

[a] **Illustration.**—Where a defendant in replevin, giving a redelivery bond and retaining possession of hay replevied, fed it to his stock, the damages of the plaintiff as owner were the value of the hay at the time of the conversion. Barnard v. Corlett, 62 Colo. 226, 161 P 156.

[98] **98.** American Packing Co. v. Luketa, 115 Wash. 1, 196 P 1, 22 ALR 206. See Hartnett v. Wilson, 31 Cal. A. 678, 161 P 281 (where it was suggested that the value at the time of demand should prevail).

[99] **99.** Ala.—Avary v. Perry Stove Mfg. Co., 96 Ala. 406, 11 S 417.

Ariz.—Consolidated Nat. Bank v. Cunningham, 24 Ariz. 437, 210 P 850; Gray v. Robinson, 4 Ariz. 24, 33 P 712.

Cal.—Phillips v. Sutherland, 2 Cal. Unrep. Cas. 241, 2 P 32; Nelson v. Yonge, 73 Cal. A. 704, 239 P 67. But see Hartnett v. Wilson, 31 Cal. A. 678, 161 P 281 (where the court, after citing Phillips v. Sutherland, supra, intimated that the value of the property at the time demand for its delivery was made should prevail).

Mo.—Richey v. Burnes, 83 Mo. 362; Mix v. Kepner, 81 Mo. 93; Chapman v. Kerr, 80 Mo. 158 [disappr Miller v. Whitson, 40 Mo. 97; Woodburn v. Cogdal, 39 Mo. 222]; Pope v. Jenkins, 30 Mo. 528; Joseph Greenspon's Sons Iron, etc., Co. v. Gerstein, (A.) 27 SW (2d) 487; Brunke v. Salinger, (A.) 8 SW (2d) 88; Yahlem Motor Co. v. McCord, (A.) 299 SW 49; Muzenich v. McCain, (A.) 274 SW 888; Todd v. Fitzpatrick, (A.) 259 SW 490; Lacquement v. Bellamy, (A.) 253 SW 1076; American Alliance Ins. Co. v. Mead, (A.) 242 SW 1005; Smith v. Mallory, (A.) 188 SW 934; Fergusson v. Comfort, 194 Mo. A. 423, 184 SW 1192; Jones v. Jones, 188 Mo. A. 220, 175 SW 227; Standard Oil Co. v. Meyer Bros. Drug Co., 84 Mo. A. 76; Westbay v. Milligan, 74 Mo. A. 179; Merrill Chemical Co. v. Nickells, 66 Mo. A. 678; Kirkendall v. Hartsock, 58 Mo. A. 234; W. W. Kendall Boat, etc., Co. v. Bain, 46 Mo. A. 581; Hinchey v. Koch, 42 Mo. A. 230; Miller v. Bryden, 34 Mo. A. 602; Hoester v. Teppe, 27 Mo. A. 207; Schultz v. Hickman, 27 Mo. A. 21; White v. Storms, 21 Mo. A. 288; Anchor Milling Co. v. Walsh, 20 Mo. A. 107; Burkeholder v. Rudrow, 19 Mo. A. 60.

Nev.—Gardner v. Brown, 22 Nev. 156, 37 P 240; Carson v. Applegarth, 6 Nev. 187.

N. Y.—Commerce Exch. Nat. Bank v. Blye, 123 N. Y. 132, 25 NE 208; Redmond v. American Mfg. Co., 121 N. Y. 415, 24 NE 924; New York Guaranty, etc., Co. v. Flynn, 55 N. Y. 653; Allen v. Fox, 51 N. Y. 562, 10 AmR 641; Brewster v. Silliman, 38 N. Y. 423; Ellis v. Berndt, 223 App. Div. 421, 228 NYS 487; O'Reilley v. Erlanger, 108 App. Div. 318, 95 NYS 760; Gilroy v. Everson-Hickok Co., 103 App. Div. 574, 93 NYS 132; Ditmars v. Sackett, 81 Hun 317, 30 NYS 721; Duffus v. Schwinger, 79 Hun 541, 29 NYS 930; Young v. Willett, 21 N. Y. Super. 486; Raynore v. Drake, 116 Misc. 307, 190 NYS 436; Pabst Brewing Co. v. Rapid Safety Filter Co., 56 Misc. 445, 107 NYS 163; Pabst Brewing Co. v. Rapid Safety Filter Co., 54 Misc. 305, 105 NYS 962; Ehrenreich v. Knudsen, 157 NYS 1082; Button v. Chapin, 7 NYCivProc 278.

Tex.—Morris v. Coburn, 71 Tex. 406, 9 SW 345; Brookmole v. Kinchen, (Civ. A.) 253 SW 953; Nolan v. Sevine, 36 Tex. Civ. A. 489, 81 SW 990; Talcott v. Rose, (Civ. A.) 64 SW 1009; Halbert v. San Saba Springs Land, etc., Assoc., (Civ. A.) 34 SW 636.

[a] **Reasons for rule.**—(1) "The value here intended is the value at the time of the trial. In case the prevailing party can obtain a delivery of the property, he must take it as it then is; if he cannot obtain such delivery, then the value is intended as a substitute and precise equivalent of the property. The damages for detention are the same, whether the party recover the property or its value. Now, suppose the property has been badly depreciated, intermediate the wrongful taking and the trial, still the prevailing party is obliged to take it if he can obtain it, and he is indemnified for the depreciation by the damages assessed to him. But he recovers the same damages if he cannot obtain the property and is obliged to take its value, and then if the value has been assessed as it existed at the time of the taking, before the depreciation, it is clear that he gets more than an indemnity. Hence there is no way of administering this law, except by holding that the value required to be assessed by the jury means the value at the time of the trial (Brewster v. Silliman, 38 N. Y. 423, 429; Young v. Willett, 21 N. Y. Super. 486)." Allen v. Fox, 51 N. Y. 562, 564, 10 AmR 641. (2) "It would seem upon principle that under a statute like ours the jury should determine its value as of the date of their verdict. If assessed at that time, and the value of the property be greater than when it was taken or detained, the prevailing party would secure the advantage of the appreciation; but, if the value were less, damages could be awarded him for the depreciation." La Vie v. Crosby, 43 Or. 612, 617, 74 P 220.

[b] **Criticism of rule.**—"I think the Legislature, in providing that the jury should ascertain the value of the property, and should give interest upon that value, could not have contemplated that the value should be fixed as of the time of the trial; and there are other objections to a rule fixing the value at that time. The time when the property was taken from the defendant, by virtue of the writ of replevin, is naturally suggested as that at which the value of the property should be determined, and

other jurisdictions the value of the property is measured as of the time of the issuance of the writ to recover possession,[1] or of the time of the commencement of the action,[2] and any decrease or difference between the value at the date of the conversion and at the time the writ issued, which is properly attributable to a defendant, can be allowed as damages for detention.[3]

Question of law or fact. The time as of which the value of property taken is to be ascertained is not a question of fact to be determined by the jury,[4] although where the statute is silent in respect to the time at which the value is to be measured, it is within the province of the jury to determine the time.[5]

[§ 367] **b. Where Property Not Available at Trial.** When at the time of the trial the property has been lost or destroyed, the rule that the value is to be assessed as of the time of the trial has been held inapplicable, and in such case the value is measured as of the time of the wrongful taking or detention.[6]

[§ 368] **c. Where Property Fluctuates in Value.** Under rules of general application in other classes of actions for the conversion or detention of personal property,[7] which are equally applicable in actions of replevin,[8] while the value of the property is ordinarily measured as of the time of the wrongful taking or detention,[9] there are decisions announcing a different rule where the property has fluctuated in value during the wrongful detention;[10] the general principle applied being that the prevailing party must be adequately compensated,[11] but that the wrongdoer shall not profit by his wrong.[12] So it has been held that, where it has not been shown that the prevailing party who has, under a statute, elected to take the value of the property is deprived of a higher value than he would have profited by had he retained possession and further, it is not shown that the wrongdoer profited by the higher immediate value, the prevailing party will not be entitled to the highest price available between the time of the wrongful detention and before the entry of judgment.[13] On the other hand, an intermediate higher value may be allowed when the enhanced price has

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we think that is the time which the Legislature contemplated should be adopted for that purpose. This rule is simple, and under it and the provisions of our statutes, there is no difficulty in arriving at substantial justice in any particular case belonging to this perplexing class. The objection to the rule fixing the value at the time of the trial, is, that the statute requires the jury to give interest upon the value fixed, which would, of course, be impossible if the value were fixed at the time of the trial." Mayberry v. Cliffe, 7 Coldw. (Tenn.) 117, 121.

[c] **Illustration.**—In an action to recover possession of an automobile of which defendant came into possession rightfully, but wrongfully withheld upon demand, the value of the property is determined as of the time of the trial and not as of the time of demand. Nelson v. Yonge, 73 Cal. A. 704, 239 P 67.

[1] Duroth Mfg. Co. v. Cauffiel, 243 Pa. 24, 89 A 798; Woods v. Klein, 223 Pa. 257, 72 A 523; Herdic v. Young, 55 Pa. 176, 79 AmD 739; Phillips v. Stroup, 1 Mon. (Pa.) 517, 17 A 220; Johnson v. Groff, 22 Pa. Super. 85; Brindle v. Adams, 33 LegInt (Pa.) 322.

[2] Brown v. Kammerman, 168 Ark. 278, 270 SW 86.

[a] **Illustration.**—In replevin for logs where the owner was prevented from removing them by the purchaser of the property on which they were located and where the evidence showed that the logs had no market value at their location when replevied, but did have value when removed to the nearest market, the value of the logs should be determined as of the time the suit in replevin was instituted rather than at the time defendant claimed the timber. Brown v. Kammerman, 168 Ark. 278, 270 SW 86.

[3] Duroth Mfg. Co. v. Cauffiel, 243 Pa. 24, 89 A 798.

[4] Barnard v. Corlett, 62 Colo. 226, 161 P 156.

[5] Farmers' Loan, etc., Co. v. Hansen, 123 Or. 72, 260 P 999; La Vie v. Crosby, 43 Or. 612, 616, 74 P 220.

"The statute . . . being silent in respect to the time when the value of the property taken from the prevailing party is to be assessed when a return thereof cannot be had, it is susceptible to such construction as will make it the duty of the jury to determine such value either when the property was taken or at the time of the trial, as may best seem to promote substantial justice." La Vie v. Crosby, supra.

[6] Drinkhouse v. Van Ness, 202 Cal. 359, 260 P 869; Hall v. Tillman, 110 N. C. 220, 14 SE 745; Miller v. Hahn, 84 N. C. 226. See Holmes v. Godwin, 69 N. C. 467 (dictum). See also Werner v. Graley, 54 Kan. 383, 38 P 482 (holding testimony as to value should have been confined to the value of the articles at the time they were taken).

[a] **Sale** of property after the commencement of the action, but before trial would necessitate assessing the value at the date of the wrongful taking where the location of the property was unknown. Miller v. Hahn, 84 N. C. 226.

[b] **In Missouri** (1) in such a case, some of the decisions hold that the rule applicable is the value of the property at the time of the unlawful taking or detention (Forsee v. Zenner, (A.) 193 SW 975; Westbay v. Milligan, 74 Mo. A. 179; Rosentreter v. Brady, 63 Mo. A. 398; Willson v. Smith, 60 Mo. A. 469. See Brunke v. Salinger, (A.) 8 SW (2d) 88 [dictum]; Muzenich v. McCain, (A.) 274 SW 888 [dictum]), (2) while in other cases the rule that the value of the property is to be assessed as of the time of the trial is adhered to, but evidence of the value of the property at the time of the wrongful taking or detention (Joseph Greenspon's Sons Iron, etc., Co. v. Gerstein, (A.) 27 SW (2d) 487. See Yahlem Motor Co. v. McCord, (A.) 299 SW 49 [where in replevin for an automobile the evidence as to whether it had value at the time of the trial was conflicting, but there was no evidence of its value at the time of the wrongful taking, it was error to instruct the jury to find the value at the time of the wrongful taking]), (3) or of the value when delivered to the prevailing party under the writ (Lacquement v. Bellamy, (A.) 253 SW 1076; Rosenblatt v. Winstanley, (A.) 186 SW 542), (4) or when last accessible to the prevailing party (Jennings v. Sparkman, 48 Mo. A. 246), (5) or the value at the commencement of the action, as conceded by the parties (Wm. S. Merrill Chemical Co. v. Nickells, 66 Mo. A. 678), (6) or evidence of the value of other property of the same kind and condition at the time of the trial (Schnabel v. Thomas, 98 Mo. A. 197, 71 SW 1076), (7) is admissible to fix the value at the time of the trial and such evidence, in the absence of a contrary showing, is conclusive (Wm. S. Merrill Chemical Co. v. Nickells, supra). (8) Where no depreciation occurred, judgment awarding the value as of the time of the taking will not be disturbed. Joseph Greenspon's Sons Iron, etc., Co. v. Gerstein, (A.) 27 SW (2d) 487.

[7] **Cross references:**
Detinue see Detinue § 80.
Trespass see Trespass [38 Cyc 1132].
Trover and conversion see Trover and Conversion [38 Cyc 2096].

[8] See cases infra this note.

[a] **Form of action** is not material in the determination of this question. Whitfield v. Whitfield, 40 Miss. 352; Baker v. Drake, 53 N. Y. 211, 13 AmR 507; Suydam v. Jenkins, 5 N. Y. Super. 614.

[9] **Time of valuation generally** see supra § 366.

[10] See infra text and notes 11-16; Trover and Conversion [38 Cyc. 2096].

[11] Page v. Fowler, 39 Cal. 412, 2 AmR 462; Suydam v. Jenkins, 5 N. Y. Super. 614.

[12] Suydam v. Jenkins, supra.

[13] Suydam v. Jenkins, supra. See La Vie v. Crosby, 43 Or. 612, 74 P 220 (where property is to be valued at the time of trial, an instruction that the party was entitled to the highest value was harmless where the value at the time of the trial was the highest value).

[a] **Illustration.**—Under a statute permitting a defendant an election to take the value without reference to the time of valuation, in replevin for flour which had fluctuated in value during the detention, the defendant on recovery was not entitled to the highest price intermediate the wrongful taking and the trial, where it is shown that the defendant would have probably sold the flour at a lower price had he retained possession and

been realized by the wrongdoer, or it is reasonable to believe and closely probable that the owner would have realized it had he retained possession.[14] It has been held that this higher value in such a case should be the highest market value within a reasonable time after the property is taken,[15] and not the highest value at any time after the taking.[16]

[§ 369] **2. Depreciation in Value**[17]**—a. In General.** A plaintiff recovering possession of the property is entitled to recover as damages any deterioration or depreciation in the value which has taken place during the wrongful detention,[18] unless the

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that the plaintiff did not profit by the wrongful taking. Suydam v. Jenkins, 5 N. Y. Super. 614.

[b] **Discussion of rule.**—"It seems to us exceedingly clear, that the highest price for which the property could have been sold at any time after the right of action accrued, and before the entry of judgment, cannot, except in special cases, be justly considered as the measure of damages. When the evidence justifies the conclusion that a higher price would have been obtained by the owner had he kept the possession, or has been obtained by the wrong-doer, we have admitted, and shown that it ought to be included in the estimate of damages; in the first case, as a portion of the indemnity to which the owner is entitled, and in the second, as a profit which the wrongdoer cannot be permitted to retain; but we cannot admit that the same rule is to be followed where nothing more is shown than a bare possibility that the highest price would have been realized, and still less where it is proved that it would not have been obtained by the owner, and has not been obtained by the wrongdoer. Its allowance in these cases would in truth impose a penalty upon the wrongdoer and render the damages vindictive, instead of remunerative; and it must be remembered that we are treating exclusively of the cases in which vindictive damages are not claimed, or if claimed, ought not to be given." Suydam v. Jenkins, 5 N. Y. Super. 614, 624.

[14] Page v. Fowler, 39 Cal. 412, 2 AmR 462; Suydam v. Jenkins, 5 N. Y. Super. 614 (dictum).

[15] Page v. Fowler, 39 Cal. 412, 2 AmR 462.

[a] **Reasonable time.**—Where hay was converted, the highest value should be measured as of time the owner would in the course of business have disposed of it, it being known that such a product being raised ordinarily for annual consumption would probably be disposed of within a few months after harvest. Page v. Fowler, 39 Cal. 412, 2 AmR 462.

[16] Page v. Fowler, supra.

[a] **Reason for rule.**—"In the United States, on the other hand, it has always been considered a rule of law, and the jury are allowed no discretion in the matter. The doctrine is, therefore, as I think, of American origin, and it may be remarked that all the cases concur in admitting that the general rule is that the damages are to be measured by the value of the property at the time it was taken, the doctrine in question being an exception to the rule; and though the exception has, perhaps, become the rule, it may be well to bear in mind that it originated in an exception made on the ground that, in certain cases (where the market value is fluctuating) the prevailing rule did not do full justice. The exception ought not, therefore, to be carried beyond the purpose for which it was made. That being accomplished, the ordinary rule should prevail. The reason for it must have been that, in the usual course of trade or business, it was likely that the owner would have realized the enhanced value if he had not been deprived of his property. All the cases are upon the ground that otherwise he would not be completely indemnified. It could not have been intended to give him profits it is certain he would not have realized." Page v. Fowler, 39 Cal. 412, 422, 2 AmR 462.

[17] **In trover and conversion** see Trover and Conversion [38 Cyc 2099].

[18] Ark.—Vanhoozer v. Gattis, 139 Ark. 390, 214 SW 44.

Cal.—Anglo-California Trust Co. v. Collins, 192 Cal. 315, 219 P 982; Berry v. Bakersfield Bank, 177 Cal. 206, 170 P 415; Morris v. Allen, 17 Cal. A. 684, 121 P 690. But see Conroy v. Flint, 5 Cal. 327 (depreciation not allowed where property returned).

Colo.—Rice v. Cassells, 48 Colo. 73, 108 P 1001.

Ill.—Brennan v. Shinkle, 89 Ill. 604; Clow v. Yount, 93 Ill. A. 112.

Kan.—Russell v. Smith, 14 Kan. 366.

Ky.—Philips v. Harriss, 3 J. J. Marsh. 122, 19 AmD 166.

Mich.—Riley v. Littlefield, 84 Mich. 22, 47 NW 576; Aber v. Bratton, 60 Mich. 357, 27 NW 564 (dictum).

Mo.—Mix v. Kepner, 81 Mo. 93; Chapman v. Kerr, 80 Mo. 158; Cummings v. Badger Lumber Co., 130 Mo. A. 557, 109 SW 68; Trimble v. Keer, etc., Mercantile Co., 56 Mo. A. 683; Hinchey v. Koch, 42 Mo. A. 230; Baldridge v. Dawson, 39 Mo. A. 527; Miller v. Bryden, 34 Mo. A. 602.

Nebr.—Moore v. Kepner, 7 Nebr. 291; Hooker v. Hammill, 7 Nebr. 231; Frey v. Drahos, 7 Nebr. 194.

N. Y.—New York Guaranty, etc., Co. v. Flynn, 55 N. Y. 653 mem [aff 65 Barb. 265]; Allen v. Fox, 51 N. Y. 562, 10 AmR 641; Brewster v. Silliman, 38 N. Y. 423; Young v. Willet, 21 N. Y. Super. 486; Pabst Brewing Co. v. Rapid Safety Filter Co., 56 Misc. 445, 107 NYS 163 (dictum); Crossley v. Hojer, 11 Misc. 57, 31 NYS 837 [aff 158 N. Y. 734 mem, 53 NE 1134 mem] (dictum); Rowley v. Gibbs, 14 Johns. 385.

N. C.—Standard Dry-Kiln Co. v. Ellington, 172 N. C. 481, 90 SE 564; Hall v. Tillman, 110 N. C. 220, 14 SE 745; Harrison v. Chappell, 84 N. C. 258; Boylston Ins. Co. v. Davis, 70 N. C. 485; Holmes v. Godwin, 69 N. C. 467.

Pa.—Cox v. Burdett, 23 Pa. Super. 346.

Tenn.—Mayberry v. Cliffe, 7 Coldw. 117.

Tex.—Tinnin v. Williams, (Civ. A.) 8 SW (2d) 757.

Wis.—Commercial Inv. Trust v. William Frankfurth Hardware Co., 179 Wis. 21, 190 NW 1004; Wadleigh v. Buckingham, 80 Wis. 230, 49 NW 745; Zitske v. Goldberg, 38 Wis. 216; Beveridge v. Welch, 7 Wis. 465; Morris v. Baker, 5 Wis. 389.

[a] **Reasons for rule.**—(1) "That rule is eminently just, in that it relieves the innocent owner from the risks of depreciation or destruction, against which he is prevented from guarding by the wrongful detention by another, and requires such risks to be borne by him who illegally withholds the property. The peril should rest upon the guilty, rather than the innocent." Findlay v. Knickerbocker Ice Co., 104 Wis. 375, 379, 80 NW 436. (2) "If the property is damaged or deteriorated in actual value while in the plaintiff's custody in any respect, . . . this damage or deterioration must also be allowed in the calculation; otherwise it would be in the power of the plaintiff, by returning the damaged or deteriorated property, to throw upon the defendant the loss which he himself ought to sustain." Mayberry v. Cliffe, 7 Coldw. (Tenn.) 117, 122. (3) "It would be anything but an act of justice to permit a person who has wrongfully deprived another of his goods, and retained them in his possession until they were nearly destroyed by time and use, afterwards, when judgment was rendered against him for his wrongful act, to save a forfeiture of the bond by an offer to return the article in its depreciated condition." Gibbs v. Bartlett, 2 Watts & S. (Pa.) 29, 34.

[b] **Illustrations.**—(1) Where an agent exchanged an automobile for lots in violation of his authority, which defendant knew, and principal repudiated the transaction and sued for the recovery of possession and for damages, damages were the value of the car at the time of the exchange for the lots less present value. Tinnin v. Williams, (Tex. Civ. A.) 8 SW (2d) 757. (2) Where in claim and delivery for a tractor found to be worth one thousand seven hundred dollars when the action was commenced but which had deteriorated until at the time of judgment it was worth only three hundred and fifty dollars, a judgment requiring the plaintiff to take the tractor or its value on the basis of three hundred and fifty dollars was erroneous as omitting damages for deterioration. Anglo-California Trust Co. v. Collins, 192 Cal. 315, 219 P 982. (3) In actions of replevin for the possession of bonds, plaintiff is entitled to recover any depreciation in the value of the bonds between the time he became entitled to their possession and the time he actually receives them. Clow v. Yount, 93 Ill. A. 112. (4) In replevin for a horse seized by a sheriff on an attachment, plaintiff may recover damages arising from his depreciation in value by reason of not being properly cared for. Riley v. Littlefield, 84 Mich. 22, 47 NW 576.

[c] **Depreciation as "just and proper" damages.**—A statute providing that upon defendant's recovery he is entitled to the value of the property and such damages "as may be just and proper" includes damages for deterioration in value between the time of taking and the day of trial. Hinchey v. Koch, 42 Mo. A. 230.

[d] **Application of rule to specific property.**—This rule has been applied in the case of (1) a farm tractor (Anglo-California Trust Co. v. Collins, 192 Cal. 315, 219 P 982), (2) an

depreciation in value is caused by his own act.[19] The fact that the property depreciates or is injured while in the custody of the officer levying the writ should not alter the rule allowing recovery.[20] If, however, the property has been restored to the successful party before suit, and it is afterward injured or otherwise impaired in value, it must be at his risk.[21] A failure to obtain possession of the property before trial by neglecting to execute a replevin bond has been held to deprive the prevailing party of damages for depreciation in value.[22]

Fault of party cast. Although the damages recoverable for the depreciation in value must be other than for depreciation which would naturally occur through wear and tear,[23] a recovery will not be denied merely on account of the absence of fault on the party cast,[24] although some courts have adhered to a contrary view.[25]

Determination of depreciation. Where the depreciation in the value of the property is allowed as an element of damage in replevin, it is estimated as the difference between its fair market value at the place and time of its wrongful taking or detention and such value at the time of the trial.[26]

[§ 370] **b. Where Value of Property Recovered.** Where property is valued as of the time of trial,[27] and the value of the property rather than its possession is recovered, the depreciation in value is to be included in the damages awarded,[28] but where the property is valued as of the time of the wrongful taking or detention,[29] the prevailing party suffers no damage by virtue of depreciation to the property and as a result this element of damage is not considered in the award.[30]

[§ 371] **3. Value Recoverable by One Having Special Interest[31]—a. In General.** By statutory provision[32] or judicial authority, in an action of replevin where a judgment for the value of the property or alternative judgment for the value is rendered, the general rule is that the prevailing party, having but a special interest in the property in controversy, may recover as against another also having an interest in the property the extent of his special or limited interest,[33] unless such interest expires before judg-

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automobile (Morris v. Allen, 17 Cal. A. 684, 121 P 690), (3) fur garments (Rosenblatt v. Winstanley, (Mo. A.) 186 SW 542), (4) boats (Brewster v. Silliman, 38 N. Y. 423), (5) an engine and boiler (Heard v. Hicks, 101 Ala. 102, 13 S 256), (6) a barn (Vanhoozer v. Gattis, 139 Ark. 390, 214 SW 44), (7) oil stocks (Berry v. Bankerfield Bank, 177 Cal. 206, 170 P 415), (8) a mare (Odell v. Hole, 25 Ill. 204), (9) a press, type, and fixtures (Dalby v. Campbell, 26 Ill. A. 502), (10) bonds (Clow v. Yount, 93 Ill. A. 112), (11) stock of goods (Franks v. Matson, 211 Ill. 338, 71 NE 1011), (12) promissory note (Fair v. Citizens' State Bank, 69 Kan. 353, 76 P 847, 105 AmSR 168, 2 AnnCas 960), (13) cattle (Russell v. Smith, 14 Kan. 366), (14) an automobile truck (Ralph N. Blakeslee Co. v. Rigo, 94 Conn. 481, 109 A 173), (15) hogs (Mix v. Kepner, 81 Mo. 93), (16) a horse (Zitske v. Goldberg, 38 Wis. 216), (17) and ice (Findlay v. Knickerbocker Ice Co., 104 Wis. 375, 80 NW 436).

Necessity for assessment in replevin suit where defendant prevails see infra § 391.

[19] Duroth Mfg. Co. v. Cauffiel, 243 Pa. 24, 89 A 798.

[a] **Illustration.**—Where a plaintiff by its own cancellation destroyed any real value of stocks and bonds which it seeks to recover in replevin from the defendant, the latter is not liable for such depreciation. Duroth Mfg. Co. v. Cauffiel, 243 Pa. 24, 89 A 798.

[20] See Hendricks v. Ireland, 162 N. C. 523, 77 SE 1011 (dictum).

[21] Gordon v. Jenney, 16 Mass. 465.

[22] Graves v. Sittig, 5 Wis. 219.

[23] Odell v. Hole, 25 Ill. 204.

[24] Hazlett v. Witherspoon, (Miss.) 25 S 150; Young v. Willet, 21 N. Y. Super. 486; Findlay v. Knickerbocker Ice Co., 104 Wis. 375, 80 NW 436.

[25] Pope v. Jenkins, 30 Mo. 528; Frey v. Drahos, 7 Nebr. 194.

[26] Cal.—Berry v. Bakersfield Bank, 177 Cal. 206, 170 P 415.

Ill.—Clow v. Yount, 93 Ill. A. 112.

Ind.—Yelton v. Slinkard, 85 Ind. 190.

Ky.—Cooper v. Ratliff, 116 SW 748.

Me.—Kimball **v.** Thompson, 123 Me. 116, 122 A 46.

Mo.—Rosenblatt v. Winstanley, (A.) 186 SW 542.

N. Y.—Brewster v. Silliman, 38 N. Y. 423; Rowley v. Gibbs, 14 Johns. 385.

[a] **Illustration.**—In replevin for oil stocks detained by a bank after a tender of the debt for which they were collateral, the measure of damages for depreciation would be the difference in value between the time the suit to regain possession was commenced and the time of trial. Berry v. Bakersfield Bank, 177 Cal. 206, 170 P 415.

[27] **Time of valuation generally** see supra § 366.

[28] Kimball v. Thompson, 123 Me. 116, 122 A 46; Lacquement v. Bellamy, (Mo. A.) 253 SW 1076; Rosenblatt v. Winstanley, (Mo. A.) 186 SW 542; Hoester v. Teppe, 27 Mo. A. 207; Allen v. Fox, 51 N. Y. 562, 565, 10 AmR 641 (dictum); Holmes v. Godwin, 69 N. C. 467.

"The damages for detention are the same, whether the party recover the property or its value. Now, suppose the property has been badly depreciated, intermediate the wrongful taking and the trial, still the prevailing party is obliged to take it if he can obtain it, and he is indemnified for the depreciation by the damages assessed to him. But he recovers the same damages if he cannot obtain the property and is obliged to take its value, and then if the value has been assessed as it existed at the time of the taking, before the depreciation, it is clear that he gets more than an indemnity. Hence there is no way of administering this law, except by holding that the value required to be assessed by the jury means the value at the time of the trial." Allen v. Fox, supra.

[a] **Illustration.**—In replevin to recover certain fur garments, the plaintiff on recovering the value as of the time of the trial was entitled to the depreciation in value caused by a change in styles. Rosenblatt v. Winstanley, (Mo. A.) 186 SW 542.

[29] **Time of valuation generally** see supra § 366.

[30] Maguire **v.** Pan American Amusement Co., 205 Mass. 64, 91 NE 135, 137 AmSR 422, 18 AnnCas 110; Parker v. Simonds. 8 Metc.. (Mass.) 205; Schrandt v. Young, 62 Nebr. 254, 259, 86 NW 1085; Moore v. Kepner, 7 Nebr. 291; Hall v. Tillman, 110 N. C. 220, 14 SE 745; Findlay v. Knickerbocker Ice Co., 104 Wis. 375, 80 NW 436.

"If the property is injured or deteriorates in value after it is taken, a return does not make the defendant whole, because he does not get it in the condition in which it was, and, in order to be fully restored to his former position, he ought to have the difference in value as damages. This is universally recognized, and such deterioration is considered a proper element of damage. Hooker v. Hammill, 7 Nebr. 231; Shinn, Replevin, § 648. But such damages are allowed upon the theory that the defendant is getting back the property in a damaged or deteriorated condition, or that it is less valuable than when taken from him. If the property is not returned, and the defendant recovers its value at the time it was taken instead, he is fully compensated, and should not be awarded in addition damages for deterioration, meant only to make up deficiencies in the property as returned. Hence it is held properly that damages for deterioration are only recoverable where the property is returned, and may not be had, along with the value at the time of taking, in case no return is made." Schrandt v. Young, supra.

[31] **Cross references:**
Action on bond see infra § 424.
Detinue see Detinue § 81.
Trover and conversion see Trover and Conversion [38 Cyc 2089].

[32] See statutory provisions.

[33] Ark.—Segraves v. Brooks, 123 Ark. 261, 185 SW 260; Shaffstall v. Downey, 87 Ark. 5, 112 SW 176.

Cal.—Connell v. Hogg, 181 Cal. 730, 186 P 134; Wilkerson v. Thorp, 128 Cal. 221, 60 P 679; Pico v. Martinez, 55 Cal. 148; Cline v. Smith, 96 Cal. A. 703, 274 P 763; Campbell v. Smith, 96 Cal. A. 689, 274 P 758; Griffith v. Reddick, 41 Cal. A. 458, 182 P 984; Keiser v. Levering, 29 Cal. A. 41, 154 P 281.

Conn.—Gould v. Hayes, 71 Conn. 86, 40 A 930.

ment.[34] If the party cast, however, has no interest in the property, the prevailing party is entitled to the full value of the property even though his interest is special or limited being held answerable over to the general owner for the balance,[35] and the unsuccessful party cannot complain of such award on the ground that there are liens against the property in favor of third persons,[36] although the party cast has been held entitled to credit on the judgment for the surplus obtained by the party prevailing after sale of the property under the judgment in foreclosure.[37] Where the party cast has no interest, the general value of the property will be assessed without regard to the value of the special interest,[38] and it makes no difference whether the prevailing party is the plaintiff or defendant in the action.[39] However, in no case can the amount awarded for this special interest exceed the value of the property.[40]

[§ 372] **b. Property Taken under Process.** The general rule is that where property seized by an officer on legal process is replevied and he is successful in the replevin suit, he is not entitled to judgment for the full value of the property, if it exceeds the value of his special interest, but to a judgment

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Fla.—Voges v. Ward, 98 Fla. 304, 123 S 785; Bibb v. United Grocery Co., 73 Fla. 589, 74 S 880.

Ind.—Noble v. Epperly, 6 Ind. 468.

Iowa.—Harward v. Davenport, 105 Iowa 592, 75 NW 487; McNorton v. Akers, 24 Iowa 369.

Kan.—Lessert v. Krebs, 108 Kan. 752, 196 P 1070; Guy v. Doak, 47 Kan. 236, 366, 27 P 968; Scott v. Beard, 5 Kan. A. 560, 47 P 986.

Me.—Crabtree v. Clapham, 67 Me. 326.

Mich.—Duke v. Beatty, 147 Mich. 665, 111 NW 176; Upham v. Caldwell, 100 Mich. 264, 38 NW 1001; Williams v. Bresnahan, 66 Mich. 634, 33 NW 739; Darling v. Tegler, 30 Mich. 54.

Minn.—Deal v. Osborne, 42 Minn. 102, 43 NW 835.

Miss.—Bond v. Griffin, 74 Miss. 599, 22 S 187; Bates v. Snider, 59 Miss. 497.

Mo.—Lewis v. Mason, 94 Mo. 551, 5 SW 911, 8 SW 735; Boutell v. Warne, 62 Mo. 350; Dilworth v. McKelvy, 30 Mo. 149; National Theater Supply Co. v. Scovill, (A.) 22 SW (2d) 68; McDowell v. Hollingsworth, (A.) 10 SW (2d) 314; Dolfuss v. Cohen, (A.) 261 SW 754; McWherter v. Randall, 207 Mo. A. 465, 232 SW 1070; Beall v. Ingersoll, 203 Mo. A. 555, 219 SW 672; Smith v. Tucker, (A.) 200 SW 707; Meston v. Crawford, (A.) 190 SW 391; Weber Impl. Co. v. Dunard, 181 Mo. A. 658, 164 SW 685; Gaston v. Johnson, 107 Mo. A. 590, 80 SW 276; Hall v. Bramell, 87 Mo. A. 285; Dixon v. Atkinson, 86 Mo. A. 24; Barnes v. Rawlings, 74 Mo. A. 531; Dillard v. McClure, 64 Mo. A. 488; Gentry v. Templeton, 47 Mo. A. 55; Burt v. Mears, 41 Mo. A. 231; Baldridge v. Dawson, 39 Mo. A. 527; Dodd v. Wilson, 26 Mo. A. 462; Miles v. Walther, 3 Mo. A. 96.

Nebr.—Tyson v. Bryan, 84 Nebr. 202, 120 NW 940; Cruts v. Wray, 19 Nebr. 581, 27 NW 634; Welton v. Beltezore, 17 Nebr. 399, 23 NW 1.

N. Y.—Fowler v. Haynes, 91 N. Y. 346; Allen v. Judson, 71 N. Y. 77; Toledo First Nat. Bank v. Shaw, 61 N. Y. 283; Dows v. Greene, 24 N. Y. 638; Fitzhugh v. Wiman, 9 N. Y. 559; Seaman v. Luce, 23 Barb. 240; Smith v. Keyes, 2 Thomps. & C. 650; Heard v. Brewer, 4 Daly 136; Haehnel v. Trostler, 54 Misc. 262, 104 NYS 533; Sprague v. King, 37 Misc. 792, 76 NYS 897; McCobb v. Christiansen, 28 Misc. 119, 59 NYS 303 [aff 27 Misc. 825, 59 NYS 187]; Russell v. Butterfield, 21 Wend. 300; Dewitt v. Morris, 13 Wend. 496.

N. C.—Barham v. Massey, 27 N. C. 192.

N. D.—Grace City First State Bank v. Bradley, 57 N. D. 159, 220 NW 848; Angell v. Egger, 6 N. D. 391, 71 NW 547.

Oh.—Sutcliffe v. Dohrman, 18 Oh. 181, 51 AmD 450; Adler v. Johnston, 2 Oh. Cir. Ct. 95, 1 Oh. Cir. Dec. 382.

Okl.—Emerson-Brantingham Impl. Co. v. Ritter, 69 Okl. 95, 170 P 482 [quot Cyc]; Nichols, etc., Co. v. Bishop, 12 Okl. 250, 70 P 188.

Or.—Finn v. Erickson, 127 Or. 107, 269 P 232, 270 P 767; Farmers' Loan, etc., Co. v. Hansen, 123 Or. 72, 260 P 999 (dictum).

S. D.—Aalseth v. Simpson, 231 NW 289; National Bank of Commerce v. Feeney, 9 S. D. 550, 70 NW 874, 46 LRA 732.

Wash.—Hallidie Mach. Co. v. Whidbey Island Sand, etc., Co., 62 Wash. 604, 114 P 457 [cit Cyc].

Wis.—Klœtz v. Delles, 45 Wis. 484; Ela v. Bankes, 37 Wis. 89.

Wyo.—Quinlan v. Jones, 27 Wyo. 410, 414, 198 P 352 [cit Cyc].

"Replevin suits are generally flexible enough to permit an adjustment of the real rights of the parties, and where the prevailing party has only a limited or special interest in the property instead of the ownership, and the other party has obtained possession under the writ, the value of such special interest only should be assessed." Smith v. Tucker, (Mo. A.) 200 SW 707, 708.

[a] **Interest of auctioneer.**—Where goods were seized in the hands of the auctioneer by the sheriff, by virtue of a writ of attachment against the vendor of the consignor, and the auctioneer, by replevin, regained possession of them and sold them at auction, the amount of his recovery, under the judgment in the replevin suit, should have been measured by the sum total of his advancements, commissions, and charges, and the residue resulting from the sale should have been adjudged to defendant. Lewis v. Mason, 94 Mo. 551, 5 SW 911, 8 SW 735.

[b] **Interest of bailee.**—Dilworth v. McKelvy, 30 Mo. 149.

[c] **Factor's lien.**—Cline v. Smith, 96 Cal. A. 703, 274 P 763; Bibb v. United Grocery Co., 73 Fla. 589, 74 S 880; Dows v. Greene, 24 N. Y. 638; Heard v. Brewer, 4 Daly (N. Y.) 136.

[d] **Innkeeper's lien.**—Smith v. Keyes, 2 Thomps. & C. (N. Y.) 650.

[e] **Interest of mortgagee.**—A successful chattel mortgagee in replevin from whom the mortgaged property was replevied by the general owner can only recover the amount due on the mortgage. Smith v. Tucker, (Mo. A.) 200 SW 707; Allen v. Judson, 71 N. Y. 77.

[f] **Interest of vendee in a conditional sale contract.**—Where defendant held an automobile under a conditional sales contract on which only one fourth of the purchase price had been paid, it was error to award such defendant the full value of the property in a suit by the conditional vendor in replevin on default in payment of installments. Voges v. Ward, 98 Fla. 304, 123 S 785.

[g] **Landlord's lien.** — National Theater Supply Co. v. Scovill, (Mo. A.) 22 SW (2d) 68.

[h] **Mechanic's lien.**—Connell v. Hogg, 181 Cal. 730, 186 P 134; Griffith v. Reddick, 41 Cal. A. 458, 182 P 984.

[i] **Rule not applied.**—(1) A special owner in replevin is not entitled to his special interest in the value of the property where the general owner is entitled to possession. Fischer v. Cohen, 22 Misc. 119, 48 NYS 775, 27 NYCivProc 139. (2) Where junior lienholder had no right to possession and defendant as senior lienholder was rightfully in possession the rule did not apply. Kerman v. Leeper, 172 Mo. A. 286, 157 SW 984.

[j] **Where parties are joint owners,** judgment in an action for possession of property worth three hundred and twenty-five dollars, which plaintiff obtained by giving a delivery bond, should not in cases of nonsuit be for its full value, but only for half its value in case it is not returned; it appearing that the parties are joint owners, and therefore entitled to joint possession. Kehoe v. McConaghy, 29 Wash. 175, 69 P 742.

[k] **Where special interest is not proved,** the party may recover the full value. Cruse v. Adams, 34 Cal. A. 701, 168 P 390.

[34] Wheeler v. Train, 4 Pick. (Mass.) 168. See Dilworth v. McKelvy, 30 Mo. 149 (dictum).

[35] Kan.—Hall v. Jenness, 6 Kan. 356.

Mo.—Faloln v. Manning, 35 Mo. 271. See Dilworth v. McKelvy, 30 Mo. 149 (dictum); Weber Impl. Co. v. Dunard, 181 Mo. A. 658, 164 SW 685 (dictum).

N. Y.—Fowler v. Haynes, 91 N. Y. 346.

Or.—Farmers' Loan, etc., Co. v. Hansen, 123 Or. 72, 260 P 999.

Wis.—Blakeslee v. Rossman, 44 Wis. 550.

[a] **Mortgagee.**—Farmers' Loan, etc., Co. v. Hansen, 123 Or. 72, 260 P 999.

[36] American Packing Co. v. Luketa, 115 Wash. 1, 196 P 1, 22 ALR 206.

[37] American Packing Co. v. Luketa, 120 Wash. 278, 206 P 965.

[38] Dilworth v. McKelvy, 30 Mo. 149.

[39] Beall v. Ingersoll, 203 Mo. A. 555, 219 SW 672.

[40] Lessert v. Krebs, 108 Kan. 752, 196 P 1070; Cruts v. Wray, 19 Nebr. 581, 27 NW 634.

only for the value of such interest.[41] If, however, the value of the property be less than the amount of this interest, he is entitled to judgment for the full value of the property.[42] If property seized on attachment or execution be replevied, and defendant is successful in the replevin suit, the measure of recovery is the amount necessary to satisfy the lien created by the writ and costs,[43] and according to some decisions interest in addition thereto.[44] So it has been held that, where defendant in replevin lawfully held the property by virtue of a levy for taxes, the measure of damages is the amount of taxes and costs, and charges in making collection.[45]

Where a stranger to the title replevies property seized by an officer under legal process, the latter, if successful, is generally entitled to recover the full value of the property, holding the balance beyond his own interest in trust for the general owner.[46]

[§ 373] **4. Value Recoverable Where Value Enhanced by Wrongdoer.**[47] Where the value of the property has been enhanced by the labor and skill of the wrongdoer, the rules applicable in cases of trespass[48] and of trover[49] are applicable in replevin.[50]

Where the taking is not in good faith or is characterized by malice, in a recovery by the owner in replevin, where the value of the property has been enhanced by the labor and skill of the wrongdoer, such owner is entitled to recover the property as improved or its full value, without any allowance to the wrongdoer for the enhancement in value.[51]

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[41] Colo.—Witkowski v. Hill, 17 Colo. 372, 30 P 55.

Iowa.—Young v. Evans, 118 Iowa 144, 92 NW 111.

Kan.—Friend v. Green, 43 Kan. 167, 23 P 93; Shahan v. Smith, 38 Kan. 474, 16 P 749.

Minn.—La Crosse, etc., Steam Packet Co. v. Robertson, 13 Minn. 291; Dodge v. Chandler, 13 Minn. 114.

Mo.—Kerr v. Drew, 90 Mo. 147, 2 SW 136; Gillham v. Kerone, 45 Mo. 487.

Nebr.—Merchants' Nat. Bank v. McDonald, 63 Nebr. 363, 88 NW 492, 89 NW 770; Gamble v. Wilson, 33 Nebr. 270, 50 NW 3; Gates v. Parrott, 31 Nebr. 581, 48 NW 387; Sloan v. Coburn, 26 Nebr. 607, 42 NW 726, 4 LRA 470; Welton v. Beltezore, 17 Nebr. 399, 23 NW 1; Kersenbrock v. Martin, 12 Nebr. 374, 11 NW 462; Black v. Winterstein, 6 Nebr. 224.

N. Y.—Rhoads v. Woods, 41 Barb. 471; Seaman v. Luce, 23 Barb. 240; Niagara Elevating Co. v. McNamara, 4 Thomps. & C. 604.

Oh.—Jennings v. Johnson, 17 Oh. 154, 49 AmD 451.

Okl.—Nichols, etc., Co. v. Bishop, 12 Okl. 250, 70 P 188.

Utah.—Bolitho v. East, 45 Utah 181, 143 P 584.

Wis.—Bleiler v. Moore, 88 Wis. 438, 60 NW 792; Clark v. Lamoreux, 70 Wis. 508, 36 NW 393; Battis v. Hamlin, 22 Wis. 669; Booth v. Ableman, 20 Wis. 21, 602, 88 AmD 730; Saxton v. Williams, 15 Wis. 292.

See Moore v. Vrooman, 32 Mich. 526 (a finding that a sheriff was in rightful possession under an execution, that plaintiff was owner, subject to the lien of the execution, will authorize a judgment for the sheriff in the amount of the execution, and an objection that the statute requires a more particular finding to warrant such judgment will not prevail where no special findings were requested and no exceptions taken).

But see Bowersock v. Adams, (Kan.) 54 P 1064 (where it was intimated that a sheriff, levying on property to which plaintiff asserted ownership, was entitled to a return of the property or its value the same as when taken from him, although the principal question was the right of the sheriff to damages where he had gone out of office).

[a] **Illustration.**—Where defendant in replevin lawfully held the property by virtue of a levy under an execution, he was not entitled to the full value of the property, where it exceeded his interest, but could recover only the amount due upon the execution with legal costs and charges. Welton v. Beltezore, 17 Nebr. 399, 23 NW 1.

[b] **Interest of copartner.**—Where, in replevin, defendant as constable claimed a lien on partnership property by virtue of a levy under an execution against one of the partners, defendant's interest is limited to the interest of the execution debtor and plaintiff as copartner may show that the debtor's interest was merely nominal in which case defendant's award for the value of his interest should be nominal. Gillham v. Kerone, 45 Mo. 487.

[c] **Expiration of debtor's interest before judgment.**—Where, in replevin against an officer who had attached certain chattels as the property of a lessee, but the right of property to the furniture expired after the commencement of the action and before judgment, a judgment for defendant can be for costs only. Wheeler v. Train, 4 Pick. (Mass.) 168; Dilworth v. McKelvy, 30 Mo. 149.

[d] **In Michigan** it has been held that a judgment for an officer from whom attached property was replevied should be for a return of the property only and not for the value of his special interest. Frederick v. Judge Mecosta Cir. Ct., 52 Mich. 529, 18 NW 343.

[e] **In New York** the rule of the text is generally followed. Rhoads v. Woods, 41 Barb. 471; Seaman v. Luce, 23 Barb. 240; Niagara Elevating Co. v. McNamara, 4 Thomps. & C. 604. But see Empire State Type Founding Co. v. Grant, 44 Hun 434, 9 NYSt 147 [rev on other grounds 114 N. Y. 40, 21 NE 401] (where plaintiff held an equitable mortgage on goods levied on by a sheriff under execution against plaintiff's vendee, it was held that the sheriff could recover the full value of the property).

[42] Jennings v. Johnson, 17 Oh. 154, 49 AmD 451.

[a] **Rule not applied.**—Under a statute allowing "right and proper damages" in replevin, in an action by a trustee of bondholders to recover part of the mortgaged property seized by defendant as constable under an execution, it was error to allow defendant the full value of the mortgaged property where plaintiff's mortgage lien was both superior to the lien of the execution and the interest of the trustee exceeded the value of the property. Coe v. Peacock, 14 Oh. St. 187.

[43] Iowa.—Young v. Evans, 118 Iowa 144, 92 NW 111.

Kan.—Friend v. Green, 43 Kan. 167, 23 P 93; Shahan v. Smith, 38 Kan. 474, 16 P 749.

Nebr.—Gamble v. Wilson, 33 Nebr. 270, 50 NW 3; Gates v. Parrott, 31 Nebr. 581, 48 NW 387; Sloan v. Coburn, 26 Nebr. 607, 42 NW 726, 4 LRA 470; Cruts v. Wray, 19 Nebr. 581, 27 NW 634; Kersenbrock v. Martin, 12 Nebr. 374, 11 NW 462.

N. Y.—Seaman v. Luce, 23 Barb. 240.

Oh.—Jennings v. Johnson, 17 Oh. 154, 49 AmD 451.

Okl.—Nichols, etc., Co. v. Bishop, 12 Okl. 250, 70 P 188.

Wis.—Clark v. Lamoreux, 70 Wis. 508, 36 NW 393; Smith v. Phillips, 47 Wis. 202, 2 NW 285; Booth v. Ableman, 20 Wis. 21, 88 AmD 730.

[a] **Attachments subsequent to replevy.**—Amounts due on attachments which came into the hands of the officer after he had been divested of possession by replevin cannot be included in the judgment. Sloan v. Coburn, 26 Nebr. 607, 42 NW 726, 4 LRA 470.

[44] Shahan v. Smith, 38 Kan. 474, 16 P 749; Merchants' Nat. Bank v. McDonald, 63 Nebr. 363, 88 NW 492, 89 NW 770; Jennings v. Johnson, 17 Oh. 154, 49 AmD 451; Battis v. Hamlin, 22 Wis. 669.

[45] Black v. Winterstein, 6 Nebr. 224.

[46] Atkins v. Moore, 82 Ill. 240; Broadwell v. Paradice, 81 Ill. 474; Wheat v. Bower, 42 Ill. A. 600; Bennet v. Gilbert, 94 Ill. A. 505 [aff 194 Ill. 403, 62 NE 847]; Frei v. Vogel, 40 Mo. 149; Coos Bay R. Co. v. Siglin, 34 Or. 80, 53 P 504.

[a] **Plaintiff as mala fide purchaser.**—Where a sheriff levied on goods under execution against plaintiff's vendor, the sheriff was entitled to the full value of the property on a finding that plaintiff did not take title in good faith. Buck v. Remsen, 34 N. Y. 383.

[b] **Dismissal of action by plaintiff.**—Where, in replevin against a constable, plaintiff dismissed his action, he was treated as a stranger and defendant may recover the full value of the property. Fallon v. Manning, 35 Mo. 271.

[47] **Accession generally** see Accession §§ 7-12, 15.

Net usable value see infra § 382.

[48] See Trespass [38 Cyc 1141].

[49] See Trover and Conversion [38 Cyc 2099].

[50] Eaton v. Langley, 65 Ark. 448, 47 SW 123, 42 LRA 474.

[51] Nashville Lumber Co. v. Barefield, 93 Ark. 353, 124 SW 758, 20 Ann Cas 968; Nicklase v. Morrison, 56 Ark. 553, 20 SW 414; Stotts v. Brookfield, 55 Ark. 307, 18 SW 179; McKin-

Where the taking is in good faith, the general view seems to be that if the value of the property is enhanced by the skill and labor or money of the wrongdoer, the owner is entitled to a recovery of the property or its enhanced value, less an allowance to the innocent wrongdoer of an amount equal to the difference between the original and increased value of the property,[52] or the value of the property in its converted form, less the value of labor expended,[53] with the limitation in some jurisdictions that such expense cannot exceed the increase in the value of the property,[54] but there is also some authority for the doctrine that a wrongdoer cannot recover for labor or money expended in the improvement of the property even though he acted in good faith.[55]

[§ 374] **5. Value Recoverable Where Owner Bids Property in at Judicial Sale.** Where personal property is wrongfully taken by an officer and sold at judicial sale, and the owner buys it in, and thus becomes repossessed of it, he is not entitled as against the officer to judgment for the value of the property, but in lieu thereof is entitled to recover what it cost him to regain possession with interest thereon from date of its payment.[56] The amount thus awarded is not for the value of the property, but is damages for the wrongful detention by the officer,[57] and he cannot object that the sum so paid by the owner at the sale exceeded the actual value of the property for that would permit him to speculate upon his own wrongful act.[58]

[§ 375] **6. Value Recoverable Where Property Not Available at Trial.**[59] The general rule appears to be, either as a result of statute,[60] or judicial authority, that neither a plaintiff who has given bond and taken the property,[61] nor a defendant, who, by giving bond, has retained or repossessed himself of the property,[62] or from whom plaintiff has not tak-

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nis v. Little Rock, etc., R. Co., 44 Ark. 210; Nitz v. Bolton, 71 Mich. 388, 39 NW 15; Heard v. James, 49 Miss. 236.

[a] **Willful trespasser** or vendee on converting timber and making it into cross ties was not entitled to the value of the improvement. McKinnis v. Little Rock, etc., R. Co., 44 Ark. 210.

[b] **Purchaser with knowledge** that seller's title to a homestead was in controversy in the courts was not equitably entitled to repayment from the adjudged rightful owner of a sum expended in cutting logs on the homestead. Cunningham v. Metropolitan Lumber Co., 110 Fed. 332, 49 CCA 72.

[c] **Party with full knowledge of adverse claim** to land, who cut bark from trees thereon in defiance of a notice from the rightful owner, was not entitled to the amount expended therefor. Phillips v. Stroup, (Pa.) 17 A 220.

52. Ark.—Bunch v. Pittman, 123 Ark. 127, 184 SW 850.

Cal.—Ackerman v. Schultz, 178 Cal. 190, 172 P 609.

Minn.—State v. Shevlin-Carpenter Co., 62 Minn. 99, 64 NW 81.

Miss.—Acree v. Bufford, 80 Miss. 565, 31 S 898.

Okl.—Myers v. Hubbard, 80 Okl. 97, 194 P 433.

Wis.—Keystone Lumber Co. v. Kolman, 103 Wis. 300, 79 NW 224; Hungerford v. Redford, 29 Wis. 345; Single v. Schneider, 24 Wis. 299.

[a] **Reason for rule.**—"This modification is based upon the theory that both parties have an interest in the property, or, in other words, that the defendant has an equitable interest in the property, to the extent that he has increased its value by his labor bestowed upon it in good faith." State v. Shevlin-Carpenter Co., 62 Minn. 99, 107, 64 NW 81.

[b] **Repairs** made on automobile by a buyer before knowledge of the fraud of the seller will be compensated for. Ackerman v. Schultz, 178 Cal. 190, 172 P 609.

[c] **Cutting timber** in good faith will permit defendant a recovery of the value of the cutting. Bunch v. Pittman, 123 Ark. 127, 184 SW 850; Acree v. Bufford, 80 Miss. 565, 31 S 898.

[d] **Cutting timber under void permit.**—In replevin by the state for logs cut from state pine lands under a void permit, where it appeared that defendant cut the timber in good faith, relying on the permit, and by his labor and money in cutting the logs and transporting them to a proper market materially enhanced their value, he was liable in the alternative for the value of the logs at the time and place of the original taking with interest from the time of the taking. State v. Shevlin-Carpenter Co., 62 Minn. 99, 64 NW 81.

[e] **Set-off** in the nature of a debt paid by defendant for plaintiff for hauling was allowable as against damages for the detention of the property. Cooper v. Ratliff, (Ky.) 116 SW 748.

53. Thomas v. Merrill, 169 N. C. 623, 86 SE 593; Herdic v. Young, 55 Pa. 176, 93 AmD 739.

[a] **Statutory lien.**—Defendant who contracted to cut and raft logs for a buyer was entitled to the satisfaction of a statutory lien where the unpaid seller replevied the logs. Thomas v. Merrill, 169 N. C. 623, 86 SE 593.

[b] **Mistake as to boundaries.**—The measure of damages in replevin for logs cut from plaintiff's land by mistake as to boundaries, and hauled to a boom, is the value of the logs at the boom less the cost of cutting, hauling, and driving them there. Herdic v. Young, 55 Pa. 176, 93 AmD 739.

54. Randleman v. Taylor, 94 Ark. 511, 127 SW 723, 140 AmSR 141; Nashville Lumber Co. v. Barefield, 93 Ark. 353; Eaton v. Langley, 65 Ark. 448, 47 SW 123, 42 LRA 474.

[a] **Well considered case.**—Eaton v. Langley, 65 Ark. 448, 47 SW 123, 42 LRA 474.

55. Gray v. Robinson, 4 Ariz. 24, 33 P 712; Sims v. Mead, 29 Kan. 124.

[a] **Money expended by a sheriff** for threshing grain he had levied on could not be recovered even though he supposed the grain belonged to the execution debtor. Gray v. Robinson, 4 Ariz. 24, 33 P 712.

56. Leonard v. Maginnis, 34 Minn. 506, 26 NW 733; Northrup v. Cross, 2 N. D. 433, 51 NW 718.

57. Leonard v. Maginnis, 34 Minn. 506, 26 NW 733.

58. Leonard v. Maginnis, supra.

59. **Discharge of surety by loss or destruction of property** see infra § 420.

Usable value on detention see infra § 380.

60. See statutory provisions.

61. U. S.—Three States Lumber Co. v. Blanks, 133 Fed. 479, 66 CCA 353, 69 LRA 283.

Cal.—Drinkhouse v. Van Ness, 202 Cal. 359, 260 P 869; Nahhas v. Browning, 181 Cal. 55, 183 P 442, 6 ALR 476; De Thomas v. Witherby, 61 Cal. 92, 44 AmR 542.

Del.—Clark v. Adair, 3 Del. 113.

Ill.—Schott v. Youree, 142 Ill. 233, 31 NE 591; Suppiger v. Gruaz, 137 Ill. 216, 27 NE 22 [aff 36 Ill. A. 60]; Scott v. Rogers, 56 Ill. A. 571.

Iowa.—Lillie v. McMillan, 52 Iowa 463, 3 NW 601.

Ky.—Dear v. Brannon, 4 Bush 471; Scott v. Hughes, 9 B. Mon. 104; Gentry v. Barnet, 6 J. J. Marsh. 312.

N. Y.—Suydam v. Jenkins, 5 N. Y. Super. 614 [disappr Carpenter v. Stevens, 12 Wend. 589].

N. C.—Holmes v. Godwin, 69 N. C. 467.

[a] **Reason for rule.**—"The obligation of the plaintiff in a replevin suit does not become impossible of performance by the loss or destruction of the goods replevied, because his obligation is an alternative one, and if it has become impossible to return to the defendants the goods wrongfully taken, it is not impossible to pay their value." Three States Lumber Co. v. Blanks, 133 Fed. 479, 483, 66 CCA 353, 69 LRA 283.

[b] **Loss by fire.**—A plaintiff in replevin, detaining property without right and in violation of the rights of defendant, acts at his peril and he is liable in the event the property is destroyed by fire. Suppiger v. Gruaz, 137 Ill. 216, 27 NE 22 [aff 36 Ill. A. 60].

62. Iowa.—Hinkson v. Morrison, 47 Iowa 167.

Kan.—Blaker v. Sands, 29 Kan. 551.

Ky.—Ford Lumber Co. v. Cornett, 146 Ky. 457, 142 SW 718 [reh den 148 Ky. 25, 145 SW 1105].

Miss.—Hazlett v. Witherspoon, 25 S 150; McPherson v. Acme Lumber Co., 70 Miss. 649, 12 S 857; George v. Hewlett, 70 Miss. 1, 12 S 855, 35 AmSR 626 [overr Whitfield v. Whitfield, 44 Miss. 254 (detinue)].

N. C.—Randolph v. McGowans, 174 N. C. 203, 93 SE 730.

en possession,[63] is relieved of liability therefor by its loss or destruction while in his possession pending the action,[64] whether the loss is occasioned by an act of God[65] or through the fault of the unsuccessful party,[66] so that in such a case the prevailing party is entitled to a recovery of the value of the property and damages for the wrongful taking and detention,[67] and this is true notwithstanding the dismissal of the action after the destruction or loss of the property.[68] In this respect the same responsibilities attach as in the case of a bailee who comes rightfully into possession of, and wrongfully detains, the property.[69] A contrary doctrine, however, is maintained in some jurisdictions where the loss or destruction is due to no fault of the party cast,[70] as where performance of the bond is prevented by law,[71] or by an act of God,[72] or the taking under the writ is in good faith.[73] But if the suit by a plaintiff is not instituted in good faith, but is false, groundless, or unlawful, the rule should be otherwise.[74]

[§ 376] **E. Interest.** Except where the property in controversy is shown to have a usable value and damages are estimated on that basis,[75] the prevailing party, upon a recovery either of the possession of the property or of its value, may ordinarily be awarded the interest upon the value of the property during the wrongful detention as damages for such detention.[76] So, in the absence of facts which

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[a] **In Missouri** (1) where the value of the property is ordinarily assessed as of the time of the trial, it has been held that a defendant was liable for the value of furniture accidentally destroyed by fire while in her possession under a statutory delivery bond. Bradley v. Campbell, 132 Mo. A. 78, 111 SW 514. (2) But in an earlier case defendant was held not liable for the death of a slave where the death was not due to any fault of defendant. Pope v. Jenkins, 30 Mo. 528. (3) But where the property has been sold by defendant, he is liable for its value if plaintiff is successful. Dillard v. McClure, 64 Mo. A. 488. (4) And it has been held that, where a mule had died so that it was of no value at the trial, the prevailing party could recover nothing under the head of value, but would be entitled to the value of the use of the mule from the commencement of the action until it died, and damages for a total depreciation in value in case the death happened through the fault of the unsuccessful party. Jennings v. Sparkman, 48 Mo. A. 246.

[63] Miller v. Hahn, 84 N. C. 226; Ewald v. Boyd, 24 S. D. 16, 123 NW 66, 24 LRANS 739.

[64] See cases supra notes 61–63.

[65] De Thomas v. Witherby, 61 Cal. 92, 44 AmR 542; Scott v. Rogers, 56 Ill. A. 571; Blaker v. Sands, 29 Kan. 551; Ewald v. Boyd, 24 S. D. 16, 123 NW 66, 24 LRANS 739.

[66] Three States Lumber Co. v. Blanks, 133 Fed. 479, 66 CCA 353, 69 LRA 283.

[a] **Sale by wrongdoer.**—Where plaintiff replevied lumber on a barge which afterward sank, and on its recovery filed a libel for salvage and under a decree by default sold the lumber, he was liable for its value. Three States Lumber Co. v. Blanks, 133 Fed. 479, 66 CCA 353, 69 LRA 283.

[67] Drinkhouse v. Van Ness, 202 Cal. 359, 260 P 869. And see cases supra notes 61–63.

[68] Nahhas v. Browning, 181 Cal. 55, 183 P 442, 6 ALR 476.

[69] Suppiger v. Gruaz, 137 Ill. 216, 27 NE 22; Scott v. Hughes, 9 B. Mon. (Ky.) 104.

[70] Joyce v. Lande, 6 La. 277; Walker v. Osgood, 53 Me. 422; Melvin v. Winslow, 10 Me. 397; Pait v. McCutchen, 43 Tex. 291.

[a] **In Tennessee** (1) the rule of the text is followed. Bobo v. Patton, 6 Heisk. 172, 19 AmR 593. (2) But the doctrine has received disapproval in the federal court. Three States Lumber Co. v. Blanks, 133 Fed. 479, 66 CCA 353, 69 LRA 283. (3) A statute imposes liability on a defendant in attachment who is unsuccessful in replevin even though the loss of the property is without his fault. Epperson v. Van Pelt, 9 Baxt. 73; Barry v. Frayser, 10 Heisk. 206.

[b] **Reason for rule.**—"The principle is, that if a bond or obligation possible of performance at the time of execution becomes impossible by the act of God, or of the law, or of the obligee himself, the obligation will be saved." Bobo v. Patton, 6 Heisk. (Tenn.) 172, 173, 19 AmR 593.

[71] Glover v. Taylor, 41 Ala. 124.

[72] Kuhn v. Spellacy, 3 Lea (Tenn.) 278.

[73] Walker v. Osgood, 53 Me. 422.

[74] Walker v. Osgood, supra.

[75] Ark.—Vanhoozer v. Gattis, 139 Ark. 390, 214 SW 44.

Me.—Kimball v. Thompson, 123 Me. 116, 122 A 46.

Nebr.—Omaha State Bank v. Murphy, 110 Nebr. 526, 194 NW 442.

Nev.—Dillon v. Grutt, 38 Nev. 46, 144 P 741 [quot Cyc].

N. Y.—Redmond v. American Mfg. Co., 121 N. Y. 415, 24 NE 924.

Pa.—Truck, etc., Co. v. Baker, 281 Pa. 145, 126 A 239; Commercial Motors Mortg. Corp. v. Waters, 280 Pa. 177, 124 A 327; Armstrong v. Philadelphia, 249 Pa. 39, 94 A 455, AnnCas 1917B 1082.

Wash.—Collins v. Warner, 141 Wash. 162, 251 P 288.

"Where plaintiff has sustained no damages because of the deprivation of the use of his property, the measure of damages would be the interest on the value of the property during the time he was deprived of its possession." Thornton v. Gardner, 134 Miss. 485, 99 S 131, 132.

Usable value see infra §§ 377–382.

[76] Cal.—Drinkhouse v. Van Ness, 202 Cal. 359, 260 P 869; Nahhas v. Browning, 181 Cal. 55, 183 P 442, 6 ALR 476; Schmidt v. Nunan, 63 Cal. 371; Kelly v. McKibben, 54 Cal. 192; Freeborn v. Norcross, 49 Cal. 313; Page v. Fowler, 39 Cal. 412, 2 AmR 462; Ruzanoff v. Retailers Credit Assoc., 97 Cal. A. 682, 276 P 156; Waterhouse-Wilcox Co. v. Betz, 73 Cal. A. 236, 238 P 763; Crawford v. Meadows, 55 Cal. A. 4, 203 P 428; Tucker v. Hagerty, 37 Cal. A. 789, 174 P 908.

Colo.—Johnson v. Bailey, 17 Colo. 59, 28 P 81; Hanauer v. Bartels, 2 Colo. 514; Machette v. Wanless, 2 Colo. 169.

Del.—Hitch v. Riggin, 26 Del. 84, 80 A 975.

Fla.—Florida Trust, etc., Co. v. Consolidated Title Co., 86 Fla. 317, 98 S 915.

Ida.—Blackfoot City Bank v. Clements, 39 Ida. 194, 226 P 1079.

Iowa.—Wald v. Auto Salvage, etc., Co., 190 Iowa 11, 179 NW 856; Sheffield v. Hanna, 136 Iowa 579, 114 NW 24; Hurd v. Gallaher, 14 Iowa 394.

Md.—Karthaus v. Owings, 2 Gill & J. 430.

Mich.—Nitz v. Bolton, 71 Mich. 388, 39 NW 15.

Minn.—Berthold v. Fox, 13 Minn. 501, 97 AmD 243.

Nebr.—Oak Creek Valley Bank v. Hudkins, 115 Nebr. 628, 214 NW 68; Dodge v. Runells, 20 Nebr. 33, 28 NW 849; Moore v. Kepner, 7 Nebr. 291.

N. J.—Imbesi v. Eastern Motor Co., 104 N. J. L. 251, 140 A 31 [aff 105 N. J. L. 490, 144 A 919].

N. Y.—Follett Wool Co. v. Utica Trust, etc., Co., 84 App. Div. 151, 82 NYS 597; Ditmars v. Sackett, 81 Hun 317, 30 NYS 721; Keep v. Kauffman, 38 N. Y. Super. 476 [aff 63 N. Y. 643]; Young v. Willet, 21 N. Y. Super. 486; O'Gorman v. Kaplan, 120 Misc. 327, 198 NYS 221 [aff 208 App. Div. 714 mem, 202 NYS 942 mem]; Crossley v. Hojer, 11 Misc. 57, 31 NYS 837; Rowley v. Gibbs, 14 Johns. 385.

N. C.—Burger v. Cooper, 179 N. C. 140, 101 SE 547.

Pa.—Collins v. Houston, 138 Pa. 481, 21 A 234; Cox v. Burdett, 23 Pa. Super. 346.

Tex.—Halbert v. San Seba Springs Land, etc., Assoc., (Civ. A.) 34 SW 636.

Wis.—Commercial Inv. Trust v. William Frankfurth Hardware Co., 179 Wis. 21, 190 NW 1004; Wadleigh v. Buckingham, 80 Wis. 230, 49 NW 745; Beverich v. Welch, 7 Wis. 465; Morris v. Baker, 5 Wis. 389.

And see cases supra note 75.

"Interest as here used is ordinarily the interest on the value, but conditions may arise in which interest would be measured in use value, or in other terms." Florida Trust, etc., Co. v. Consolidated Title Co., 86 Fla. 317, 321, 98 S 915.

"Ordinarily, in replevin, loss of use and other injuries resulting from the taking and withholding of personal property may be compensated by allowing the successful party to recover interest on the value of the property from the time of the taking to the date of the verdict." Drinkhouse v. Van Ness, 202 Cal. 359, 379, 260 P 869; Nahhas v. Browning, 181 Cal. 55, 183 P 442, 6 ALR 476.

"The general rule of damages in actions of this kind when the plaintiff recovers judgment for the value at the time of the taking, is legal interest on such valuation from the date of the taking to the date of trial." Johnson v. Bailey, 17 Colo. 59, 67, 28 P 81.

[a] **Interest allowed as damages only.**—(1) Where the statute does not expressly provide for the recovery

would authorize the application of a different rule of damages,[77] as for instance depreciation in the value of the property,[78] or bad faith, fraud, malice, gross negligence, or oppression on the part of the adverse party,[79] or a special agreement between the parties that the jury might find the value of the property and the damages in one sum,[80] such interest constitutes the measure of damages,[81] and is computed from the date of the wrongful taking or detention to the date of the verdict,[82] or to the first day of the term of court at which the trial is had.[83] Where the prevailing party recovers the value of the property because the property cannot be returned,[84] or because of an election to take the money value of the property,[85] or where the action proceeds as one for damages only,[86] the measure of damages in such case is the value of the property with interest.[86½] The successful party is of course not entitled to interest and an allowance in addition thereto of the value of the use;[87] nor can interest be allowed in addition to a gross sum for damages.[88] Where the judgment awards the return of the proper-

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of interest, it is allowed not eo nomine—that is, not as interest—but must be included in the damages generally. Wellington v. Brooks, (Tex. Civ. A.) 255 SW 1022. (2) Where the statute does not allow interest, it cannot be given as a matter of law but the jury may in their discretion, and as damages, allow interest on the value of the property. American Soda Fountain Co. v. Shell, 160 N. C. 529, 76 SE 631; Patapsco Guano Co. v. Magee, 86 N. C. 350; Holmes v. Godwin, 69 N. C. 467. But see Burger v. Cooper, 179 N. C. 140, 101 SE 547 (where under a more recent statute interest is allowed as such).

[b] **Illustrations.**—(1) Where wool belonging to plaintiff was pledged by plaintiff's bailee, without authority, to defendant, and on demand defendant refused to deliver the wool, which had been stored with a warehouse company, and, after suit brought against the latter to recover the same, it filed an interpleader, when the wool was ordered to be held by the sheriff, subject to an order of the court, plaintiff, on judgment in his favor, was entitled to interest on the value of the wool, as damages for withholding the same from the time of the demand. Follett Wool Co. v. Utica Trust, etc., Co., 84 App. Div. 151, 82 NYS 597. (2) Defendant on recovering logs cut from his land is entitled to recover interest on their value from the time the writ was served dispossessing him. Nitz v. Bolton, 71 Mich. 388, 39 NW 15.

[c] **Change of statutory rate pending trial.**—Where the rate of interest is fixed by statute, the rate of interest being lowered by statute pending a replevin suit; the successful plaintiff may recover as damages interest measured by the old rate up to the time of the change, and by the lower rate thereafter. Saling v. Bolander, 125 Fed. 701, 60 CCA 469.

[d] **Interest on bonds** will be the legal interest on the value of such bonds rather than the lower rate of interest which the bonds bear. Govin v. De Miranda, 140 N. Y. 474, 35 NE 626.

[77] Ark.—Kelly v. Altemus, 34 Ark. 184, 36 AmR 6.

Colo.—Austin v. Terry, 13 Colo. A. 141, 56 P 810.

Fla.—Ocala Foundry, etc., Works v. Lester, 49 Fla. 199, 38 S 51.

Miss.—Taylor v. Morton, 61 Miss. 24.

N. Y.—New York Guaranty, etc., Co. v. Flynn, 55 N. Y. 653; Suydam v. Jenkins, 5 N. Y. Super. 614; Crossley v. Hojer, 11 Misc. 57, 31 NYS 837.

Pa.—McDonald v. Scaife, 11 Pa. 381, 51 AmD 556; McCabe v. Morehead, 1 Watts & S. 513.

[78] See supra § 369.

[79] See infra §§ 386, 387.

[80] McCabe v. Morehead, 1 Watts & S. (Pa.) 513 (holding that, under such agreement, the jury, in assessing damages for defendant, were not confined to interest on the value, but might give more if necessary to compensate defendant).

[81] Colo.—Machette v. Wanless, 2 Colo. 169; Smith v. Stevens, 14 Colo. A. 491, 60 P 680; Austin v. Terry, 13 Colo. A. 141, 56 P 810.

Ill.—Merchants' Sav., etc., Co. v. Goodrich, 75 Ill. 554.

Iowa.—McCoy v. Cornell, 40 Iowa 457.

Kan.—Werner v. Graley, 54 Kan. 383, 38 P 482.

Ky.—Yantis v. Burditt, 2 Dana 254.

Me.—Dore v. Hight, 15 Me. 20.

Mass.—Barnes v. Bartlett, 15 Pick. 71; Pike v. Huckins, 1 Mass. 421.

Nebr.—Schrandt v. Young, 62 Nebr. 254, 86 NW 1085; Dodge v. Runels, 20 Nebr. 33, 28 NW 849; Hainer v. Lee, 12 Nebr. 452, 11 NW 888; Hooker v. Hammill, 7 Nebr. 231.

N. Y.—Allen v. Fox, 51 N. Y. 562, 10 AmR 641; Brizsee v. Maybee, 21 Wend. 144.

Pa.—McCabe v. Morehead, 1 Watts & S. 513.

Wis.—Williams v. Phelps, 16 Wis. 80; Graves v. Sittig, 5 Wis. 219.

[a] **Interest on county warrant.**—The measure of damages in an action of replevin for a county warrant is legal interest thereon for the time of the unlawful detention. McCoy v. Cornell, 40 Iowa 457.

[b] **Interest on bank checks.**—In replevin for the wrongful detention of bank checks, where the checks are recovered and delivered to plaintiff, plaintiff can only recover, as damages for the wrongful detention, interest on the amount of the checks from the time of the demand and refusal until they are replevied. Merchants' Sav., etc., Co. v. Goodrich, 75 Ill. 554.

[c] **Applications of rule.**—The rule is generally applicable in all cases where the property detained was merchandise kept for sale, grain and all other articles of property useful only for sale or consumption. Kelly v. Altemus, 34 Ark. 184, 36 AmR 6; Machette v. Wanless, 2 Colo. 169; Allen v. Fox, 51 N. Y. 562, 10 AmR 641.

[d] **Computation of interest.**—The interest given by the same act is to be computed from the time when the writ of replevin was executed, not from its date. Yantis v. Burditt, 2 Dana (Ky.) 254.

[82] Cal.—Drinkhouse v. Van Ness, 202 Cal. 359, 260 P 869.

Del.—Hitch v. Riggin, 26 Del. 84, 80 A 975.

Me.—Washington Ice Co. v. Webster, 62 Me. 341, 16 AmR 462.

Mich.—Just v. Porter, 64 Mich. 565, 31 NW 444; Hanselman v. Kegel, 60 Mich. 540, 27 NW 678.

Nebr.—Omaha State Bank v. Murphy, 110 Nebr. 526, 194 NW 442.

N. Y.—O'Gorman v. Kaplan, 120 Misc. 327, 198 NYS 221 [aff 208 App. Div. 714 mem, 202 NYS 942 mem].

Pa.—Truck, etc., Co. v. Baker, 281 Pa. 145, 126 A 239; Cox v. Burdett, 23 Pa. Super. 346.

Tenn.—Mayberry v. Cliffe, 7 Coldw. 117.

Wis.—Bigelow v. Doolittle, 36 Wis. 115.

[83] Hainer v. Lee, 12 Nebr. 452, 11 NW 888.

[84] Barnes v. Bartlett, 15 Pick. (Mass.) 71; Dodge v. Runels, 20 Nebr. 33, 28 NW 849; Moore v. Kepner, 7 Nebr. 291; Miller v. Hahn, 84 N. C. 226; Holmes v. Godwin, 69 N. C. 467.

[a] **The measure of damages for a promissory note** is its value when not returned, and interest thereon. Vancleave v. Beach, 110 Ind. 269, 11 NE 228.

[85] Mich.—Ritz v. Bolton, 71 Mich. 388, 39 NW 15; Hanselman v. Kegel, 60 Mich. 540, 27 NW 678.

Minn.—Berthold v. Fox, 13 Minn. 501, 97 AmD 243.

Miss.—Taylor v. Morton, 61 Miss. 24.

Mont.—Webster v. Sherman, 33 Mont. 448, 84 P 878.

N. C.—Hall v. Tillman, 110 N. C. 220, 14 SE 745.

Pa.—McDonald v. Scaife, 11 Pa. 381, 51 AmD 556; Cox v. Burdett, 23 Pa. Super. 346.

Wis.—Findlay v. Knickerbocker Ice Co., 104 Wis. 375, 80 NW 436; Ingram v. Rankin, 47 Wis. 406, 2 NW 755, 32 AmSR 762; Bigelow v. Doolittle, 36 Wis. 115; Bonesteel v. Orvis, 22 Wis. 522.

Wyo.—Boswell v. Laramie First Nat. Bank, 16 Wyo. 161, 92 P 624, 93 P 661.

[86] Honaker v. Vesey, 57 Nebr. 413, 77 NW 1100; Hainer v. Lee, 12 Nebr. 452, 11 NW 888; Bocem Iron Co. v. Union Sav. Bank, (Nebr.) 89 NW 80.

[86½] See cases supra notes 84–86.

[87] See infra § 377.

[88] Garcia v. Gunn, 119 Cal. 315, 51 P 684; Freeborn v. Norcross, 49 Cal. 313; Wilber v. Wilber, 63 Mont. 587, 207 P 1002; Smith v. Roby, 6 Heisk. (Tenn.) 546.

[a] **A judgment for value and interest** plus damages for detention will be discharged as the award of value and interest by a return of the property. Smith v. Roby, 6 Heisk. (Tenn.) 546.

ty or the recovery of a specified sum of money in case it cannot be returned, plaintiff, upon delaying to enforce his judgment and afterward accepting a return of the property, cannot have interest upon the value thereof as fixed by the judgment for the period between the entry of the judgment and the date of the return of the property.[89] Under a statute which gives the prevailing party the option to have an execution for the delivery of the property, or for its value "as determined by the jury," interest on the value of the property can be given only from the entry of judgment.[90] Interest as an award of damages for detention is to be determined by the jury,[91] and if the jury makes no mention of interest in its verdict, the officer entering judgment cannot include interest.[92]

[§ 377] **F. Value of Use of Property—1. In General.** Interest upon the value of the property is not the measure of damages for its wrongful detention[93] where the property has a value for use, or usable value, which exceeds the amount represented by the lawful rate of interest,[94] or where the interest would be an inadequate compensation.[95] In such cases the prevailing party is entitled, sometimes by express statutory provision,[96] to the usable value of the property[97] estimated by the ordinary market price of the use of such property,[98] even though such usable value exceeds the value of the property,[99] and such usable value will constitute the measure of damages in the absence of any other showing.[1] The fact that other property was not hired to take the place of the property wrongfully detained will not alter the rule allowing the recovery of the usable value,[2] nor is it material that the property in question was never rented,[3] or has previously been used by the owner for pleasure purposes only.[4] An intention to sell the property before it was wrongfully taken will not in itself deprive the party of a recovery of its usable value.[5]

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[89] MacDonald v. MacDonald, 71 Misc. 516, 130 NYS 784.

[90] Bonnot Co. v. Newman, 109 Iowa 580, 80 NW 655.

[91] Cary v. Hyer, 91 Fla. 322, 107 S 684.

[92] Cary v. Hyer, supra.

[93] **Interest as measure or element of damages** see supra § 376.

[94] Armstrong v. Philadelphia, 249 Pa. 39, 94 A 455, AnnCas1917B 1082; Dolinsky v. Williams, 56 Utah 186, 189 P 873.

"A successful party in replevin is not confined to interest as damages, if he can establish the fact that the value of the use of the property of which he was deprived exceeded the interest." Drinkhouse v. Van Ness, 202 Cal. 359, 260 P 869.

[95] Dolinsky v. Williams, 56 Utah 186, 189, 189 P 873; Farrand, etc., Organ Co. v. M. E. Church, 18 Utah 29, 54 P 818; Hunt v. Thompson, 19 Wyo. 523, 120 P 181, 122 P 624.

"Interest on the value will not be adequate compensation, and is not the measure of damages where the use of the property detained is valuable. The owner is entitled to recover the value of the use if he prefers it to interest during the time he was deprived of possession." Dolinsky v. Williams, supra.

[96] See statutory provisions.

[97] U. S.—Merchants', etc., Oil Co. v. Kentucky Refining Co., 81 Fed. 821, 26 CCA 639.

Ark.—Minkwitz v. Steen, 36 Ark. 260; Kelly v. Altemus, 34 Ark. 184, 36 AmR 6; Dunnahoe v. Williams, 24 Ark. 264.

Cal.—Drinkhouse v. Van Ness, 202 Cal. 359, 260 P 869; Nahhas v. Browning, 181 Cal. 55, 183 P 442, 6 ALR 476; Ruzanoff v. Retailers Credit Assoc., 97 Cal. A. 682, 276 P 156; Crawford v. Meadows, 55 Cal. A. 4, 203 P 428; Los Angeles Furniture Co. v. Hansen, 46 Cal. A. 5, 188 P 292; Tucker v. Hagerty, 37 Cal. A. 789, 174 P 908.

Colo.—Smith v. Stevens, 33 Colo. 427, 81 P 35; Smith v. Stevens, 14 Colo. A. 491, 60 P 580.

Conn.—Ralph N. Blakeslee Co. v. Rigo, 94 Conn. 481, 109 A 173; Adams v. Wright, 74 Conn. 551, 51 A 537.

Fla.—Voges v. Ward, 98 Fla. 304, 123 S 785.

Ida.—Tannahill v. Lydon, 31 Ida. 608, 173 P 1146; Cunningham v. Stoner, 10 Ida. 549, 79 P 228; Cornwall v. Mix, 3 Ida. 687, 34 P 893; Sebree v. Smith, 2 Ida. (Hasb.) 359, 16 P 915.

Ill.—Broadwell v. Paradice, 81 Ill. 474; Odell v. Hole, 25 Ill. 204; Butler v. Mehrling, 15 Ill. 488; Roberts v. Perrine, 247 Ill. A. 259.

Ind.—Farrar v. Eash, 5 Ind. A. 238, 31 NE 1125.

Kan.—Stockton State Bank v. Showers, 65 Kan. 431, 70 P 332; Barton v. Mulvane, 59 Kan. 313, 52 P 88; Werner v. Graley, 54 Kan. 383, 38 P 482; Kennett v. Feckel, 41 Kan. 211, 21 P 93; Palmer v. Meiners, 17 Kan. 478; Bell v. Campbell, 17 Kan. 211; Ladd v. Brewer, 17 Kan. 204; Yandle v. Kingsbury, 17 Kan. 195, 22 AmR 282.

Ky.—Roach v. Houston, 15 KyL 61.

La.—Dangerfield v. Fauver, 19 La. Ann. 171.

Me.—Kimball v. Thompson, 123 Me. 116, 122 A 46. See Washington Ice Co. v. Webster, 62 Me. 363, 16 AmR 462 (dictum).

Md.—Dorsey v. Gassaway, 2 Harr. & J. 402, 3 AmD 557.

Mass.—Boston Loan Co. v. Myers, 143 Mass. 446, 9 NE 805.

Mich.—Hutchinson v. Hutchinson, 102 Mich. 635, 61 NW 60; Aber v. Bratton, 60 Mich. 357, 27 NW 564; Burt v. Burt, 41 Mich. 82, 1 NW 936.

Minn.—Nash v. Larson, 80 Minn. 458, 83 NW 451, 81 AmSR 272; Qualy v. Johnson, 80 Minn. 408, 83 NW 393; Williams v. Wood, 61 Minn. 194, 63 NW 492; Peerless Mach. Co. v. Gates, 61 Minn. 124, 63 NW 260; Ferguson v. Hogan, 25 Minn. 135; Sherman v. Clark, 24 Minn. 37.

Mo.—Lacquement v. Bellamy, (A.) 253 SW 1076; Knight v. Lauer, (A.) 253 SW 454; Forsee v. Zenner, (A.) 193 SW 975; Kieselhorst Piano Co. v. Porter, 185 Mo. A. 676, 171 SW 949; Baldridge v. Dawson, 39 Mo. A. 527; Anchor Milling Co. v. Walsh, 24 Mo. A. 97.

Mont.—Luther v. Lee, 62 Mont. 174, 204 P 365; Chauvin v. Valiton, 8 Mont. 451, 20 P 658, 3 LRA 194; Morgan v. Reynolds, 1 Mont. 163.

Nebr.—Warrick v. Rasmussen, 112 Nebr. 299, 199 NW 544; Schrandt v. Young, 62 Nebr. 254, 86 NW 1085 [overr Romberg v. Hughes, 18 Nebr. 579, 26 NW 351].

N. H.—Dickinson v. Lovell, 35 N. H. 9.

N. Y.—Allen v. Fox, 51 N. Y. 562, 10 AmR 641; Crossley v. Hojer, 11 Misc. 57, 31 NYS 837.

N. C.—Standard Dry-Kiln Co. v. Ellington, 172 N. C. 481, 90 SE 564; Scott v. Elliott, 63 N. C. 215.

N. D.—Northrup v. Cross, 2 N. D. 433, 51 NW 718.

Okl.—McIver v. Katsiolis, 93 Okl. 49, 217 P 422; Chilton v. Carpenter, 78 Okl. 210, 189 P 747; Hunt v. Cohen, 74 Okl. 248, 179 P 1; Francis v. Guaranty State Bank, 44 Okl. 446, 145 P 324; Weleetka Light, etc., Co. v. Castleberry, 42 Okl. 745, 142 P 1006; Mannsville First State Bank v. Lawson, 41 Okl. 226, 137 P 661; Mannsville First State Bank v. Howell, 41 Okl. 216, 137 P 657; Thomas v. Tecumseh First Nat. Bank, 32 Okl. 115, 121 P 272, AnnCas1914A 376.

Or.—Coffin v. Taylor, 16 Or. 375, 18 P 638.

Pa.—Lubin Mfg. Co. v. Swaab, 240 Pa. 182, 87 A 597.

S. D.—Benjamin v. Huston, 16 S. D. 569, 94 NW 584.

Tenn.—Stanley v. Donoho, 16 Lea 492; Mayberry v. Cliffe, 7 Coldw. 117.

Tex.—Clapp v. Walters, 2 Tex. 130; Hamilton v. Palmer, (Civ. A.) 265 SW 240; Mineralized Rubber Co. v. Cleburne, 22 Tex. Civ. A. 621, 56 SW 220.

Utah.—Rickenberg v. Capitol Garage, 68 Utah 30, 249 P 121, 50 ALR 1303.

Vt.—McGrath v. Wilder, 77 Vt. 431, 60 A 801.

Wash.—Gaffney v. O'Leary, 155 Wash. 171, 283 P 1091; MacKenzie v. Steeves, 98 Wash. 17, 167 P 50.

Wis.—Fernhaber v. Stein, 182 Wis. 61, 195 NW 906; Pfeifer v. Layton Park Oil, etc., Co., 159 Wis. 1, 149 NW 395; Zitske v. Goldberg, 38 Wis. 216; Booth v. Ableman, 20 Wis. 602; Williams v. Phelps, 16 Wis. 83.

Wyo.—Hunt v. Thompson, 19 Wyo. 523, 120 P 181, 122 P 624.

[a] **Reason for rule.**—"In many cases interest on the value from the time of the wrongful taking would be a proper measure. It would be generally in all cases where the property detained was merchandise kept for sale, grain and all other articles of property useful only for sale or consumption. In such cases, if the owner recover the interest on the value of his property from the time he was deprived of it, he will generally have a complete indemnity unless the property has depreciated in value, in which case the depreciation must be added to the interest on the value, taken as it was before the depreciation, and the two items will furnish the amount of the damage. This damage, together with the property or its value at the time of the trial, will give the owner as complete indemnity as the law is generally able to give any person seeking redress for a wrong. But the same measure of damages would not generally furnish the owner an indemnity in case the property claimed had a value for use, or, in other words, a usable value, such as horses, cows, carriages and boats. In such case the direct damage which the owner suffers is the loss of the use, and the value of the use should be the measure of damage. There may be cases in which greater damage would be proper for exceptional reasons growing out of the manner in which the wrong-doer has used and treated the property while in his possession. Suppose the plaintiff had taken defendant's boat, worth

Usable value and interest. Where the prevailing party recovers the usable value of the property in replevin, he is not entitled to interest on the value of the property covering the same period,[6] as this would be compensating him twice for the same injury.[7] Nor may the usable value be recovered in addition to interest where such usable value does not exceed the legal interest on the value of the property.[8]

[§ 378] **2. Limitations of Rule.** The rule allowing the successful party the recovery of the usable value of the property as damages has no application where the right to use the property does not exist,[9] as where the party holds merely a special interest in the property without the right to use it,[10] or where he neither intended, nor was in a position, to use it,[11] or was not prevented from using it by the wrongdoer,[12] or where the property itself could not be rented or used during the period of wrongful de-

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$2,000, and kept it a whole year before it was ordered, as the result of the action, to be returned to the defendant, would the interest be a fair compensation to the defendant for the loss of the use of his boat? Instead of a boat, suppose it had been a carriage, worth $1,000, would the interest be a sufficient allowance for the use of the carriage a whole year? The same supposition may be made as to any article of personal property having a usable value. There would be very few cases where the interest would give the owner a fair or adequate indemnity, and thus two of the fundamental rules of damages would be violated: The owner would not be completely or fully indemnified for the loss of the use of his property, and the wrong-doer who had had the use of it would make a profit out of his own wrong, which the law does not tolerate." Allen v. Fox, 51 N. Y. 562, 565.

[b] **Distinction between replevin and trover.**—"In trover the defendant detains nothing from the plaintiff but the value of the property, that is, money; while in replevin he detains the property itself. In either action the plaintiff is entitled to recover for the use of the exact thing which the defendant detains from him; but the great difference is in the thing detained. In trover, it is substantially money. In replevin, it is not money, but is some kind of property different from money. Now the law fixes the value of the use of money, but it does not fix the value of the use of any other kind of property. Therefore, in trover it would be proper to give the plaintiff seven per cent. interest on the value which he recovers, for that is the legal value of the use of money; but in replevin, the value of the use of the property cannot be known except by evidence. In trover, a plaintiff should not be allowed to recover for the use of the property taken, for the property by his own election does not belong to him, but belongs to the defendant. In trover, he should be allowed to recover merely for the value of the property, and the use of such value. But in replevin it is different. There the plaintiff owns the property itself, and therefore should be entitled to recover for the use of the property, and not merely for the use of the value thereof." Bell v. Campbell, 17 Kan. 211, 215.

[c] **Rule applied to:** (1) Automobiles. Tucker v. Hagerty, 37 Cal. A. 789, 174 P 908; Luther v. Lee, 62 Mont. 174, 204 P 365; Hamilton v. Palmer, (Tex. Civ. A.) 265 SW 240. (2) Boats. Ghio v. Cline, 45 Cal. A. 262, 187 P 433; Aber v. Bratton, 60 Mich. 357, 27 NW 564. (3) Buggies. Clark v. Martin, 120 Mass. 543. (4) Fire hose. Mineralized Rubber Co. v. Cleburne, 22 Tex. Civ. A. 621, 56 SW 220. (5) Horses. Farrar v. Eash, 5 Ind. A. 238, 31 NE 1125; Clark v. Martin, 120 Mass. 543; Hutchinson v. Hutchinson, 102 Mich. 635, 61 NW 60; Allen v. Fox, 51 N. Y. 562, 10 AmR 641; Pfeifer v. Layton Park Oil, etc., Co., 159 Wis. 1, 149 NW 395; Zitske v. Goldberg, 38 Wis. 216; Williams v. Phelps, 16 Wis. 80. (6) Household goods. Boston Loan Co. v. Myers, 143 Mass. 446, 9 NE 805; Knight v. Lauer, (Mo. A.) 253 SW 454; McIver v. Katsiolis, 93 Okl. 49, 217 P 422. (7) Ice wagons. Weleetka Light, etc., Co. v. Castleberry, 42 Okl. 745, 142 P 1006. (8) Milk cows. Smith v. Stevens, 33 Colo. 427, 81 P 35; McGrath v. Wilder, 77 Vt. 431, 60 A 801. (9) Mules. Jennings v. Sparkman, 48 Mo. A. 246; Mannsville First State Bank v. Howell, 41 Okl. 216, 137 P 657. (10) Pianos. Boston Loan Co. v. Myers, 143 Mass. 446, 9 NE 805; Chauvin v. Valiton, 8 Mont. 451, 20 P 658, 3 LRA 194. (11) Threshing machines. Peerless Mach. Co. v. Gates, 61 Minn. 124, 63 NW 260. (12) Sheep. Cunningham v. Stoner, 10 Ida. 549, 79 P 228.

[d] **In New Mexico** by statute double damages are recoverable for the use of the property. Wirt v. Kutz, 15 N. M. 500, 110 P 575.

[e] **In Rhode Island** by statute the damages recoverable are limited to six per cent per annum of the penal sum of the replevin bond. Davis v. Fenner, 12 R. I. 21.

[98] See infra § 381.

[99] Tucker v. Hagerty, 37 Cal. A. 789, 174 P 908.

[1] Ghio v. Cline, 45 Cal. A. 262, 187 P 433.

Exemplary damages see infra § 386.

Limitations on rule see infra § 378.

[2] Ruzanoff v. Retailers Credit Assoc., 97 Cal. A. 682, 276 P 156.

[3] MacKenzie v. Steeves, 98 Wash. 17, 167 P 50.

[4] Consolidated Nat. Bank v. Cunningham, 28 Ariz. 518, 238 P 332; Rapp v. Mabbett Motor Car Co., 201 App. Div. 283, 194 NYS 200.

[5] MacKenzie v. Steeves, 98 Wash. 17, 167 P 50.

[6] Cal.—Nahhas v. Browning, 181 Cal. 55, 183 P 442, 6 ALR 476; Freeborn v. Norcross, 49 Cal. 313.

Mich.—Just v. Porter, 64 Mich. 565, 31 NW 444; McGuire v. Galligan, 53 Mich. 453, 19 NW 142.

Nebr.—Schrandt v. Young, 62 Nebr. 254, 86 NW 1085.

Wash.—American Packing Co. v. Luketa, 115 Wash. 1, 196 P 1, 22 ALR 206.

Wis.—Bigelow v. Doolittle, 36 Wis. 115.

[7] Frey v. Drahos, 7 Nebr. 194.

[8] Smith v. Stevens, 33 Colo. 427, 81 P 35.

[9] United Shoe Mach. Co. v. Ramlose, 231 Mo. 508, 132 SW 1133; Vitagraph Co. v. Swaab, 248 Pa. 478, 94 A 126, AnnCas1916C 311.

[a] **Absence of legal or equitable title.**—Defendant, having no right either legal or equitable in and to property, cannot recover damages in replevin for the value of its use. United Shoe Mach. Co. v. Ramlose, 231 Mo. 508, 132 SW 1133.

[10] Colo.—Johnson v. Bailey, 17 Colo. 59, 28 P 81 (property received in pledge under express contract to sell the same and account for the proceeds).

Ill.—McArthur v. Howett, 72 Ill. 358; Roberts v. Perrine, 247 Ill. A. 259.

Mich.—Tandler v. Saunders, 56 Mich. 142, 22 NW 271 (deputy sheriff who has seized goods under attachment).

Minn.—Thompson v. Scheid, 39 Minn. 102, 38 NW 801, 12 AmSR 619.

Okl.—Francis v. Guaranty State Bank, 44 Okl. 446, 145 P 324.

[a] **Mortgagee** of chattels having right of possession only for the purposes of foreclosure cannot recover the usable value of the property. Roberts v. Perrine, 247 Ill. A. 259; Thompson v. Scheid, 39 Minn. 102, 38 NW 801, 12 AmSR 619.

[11] Smith v. Stevens, 14 Colo. A. 491, 60 P 580; Barney v. Douglass, 22 Wis. 464.

[a] **Illustration.**—Where plaintiff put his cow in pasture with no arrangement for hire or profit and then left the state during which time defendant wrongfully seized her, plaintiff was not entitled to recover the usable value of the cow, there being no evidence that he intended to use her. Smith v. Stevens, 14 Colo. A. 491, 60 P 580.

[12] Smith v. Stevens, supra; Voges v. Ward, 98 Fla. 304, 123 S 785; Hammond v. Thompson, 54 Mont. 609, 173 P 229; Barney v. Douglass, 22 Wis. 464.

tention.[13] There cannot be a recovery for both the value of the use and for depreciation in value caused by such use.[14]

Inconvenience, unaccompanied by any pecuniary loss, is not sufficient to permit a recovery of damages for the deprivation of the use of the property.[15]

[§ 379] **3. Where Value of Property Recovered.** Generally, an election to take judgment for the value of the property,[16] as of the time of the wrongful taking, will preclude the prevailing party from a recovery of the usable value of the property during the detention.[17] And the same rule applies where, under the statute,[18] the action in replevin is changed to trover,[19] on the ground that by such election the party in effect makes a sale of the property as of the date of the taking.[20] In such cases the measure of damages would ordinarily be the value of the property with interest.[21] But where the prevailing party under the statute[22] cannot elect to take judgment for the value of the property in lieu of a return, a recovery of the value will not deprive him of a recovery of the usable value of the property during the wrongful detention.[23]

[§ 380] **4. Where Property Not Available at Time of Trial.** As in the case of a recovery of the value of the property,[24] it is generally held that the loss or destruction of the property will not deprive the prevailing party of a recovery of the usable value during the wrongful detention,[25] even though the loss is occasioned through no fault of the party cast.[26] There are, however, some statements to the contrary.[27] Where, the wrongdoer is deprived of the possession by a third person on the foreclosure of a lien placed on the property by the prevailing party, the latter may not recover the usable value during the period that the wrongdoer did not have possession.[28]

[§ 381] **5. Determination of Usable Value—a. In General.** Ordinarily, the usable value of property recoverable by a successful party in replevin is estimated by the market price of the use of the property replevied during the period of the wrongful detention,[29] or from the time of the wrongful deten-

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13. Vanhoozer v. Gattis, 139 Ark. 390, 214 SW 44; Redmond v. American Mfg. Co., 121 N. Y. 415, 24 NE 924; Armstrong v. Philadelphia, 249 Pa. 39, 94 A 455, AnnCas1917B 1082.

[a] **Inability to use** certain machines pending the wrongful detention would deprive plaintiff of their usable value. Redmond v. American Mfg. Co., 121 N. Y. 415, 24 NE 924.

14. White v. Sheffield, etc., R. Co., 90 Ala. 253, 7 S 910; Ocala Foundry, etc., Works v. Lester, 49 Fla. 199, 38 S 51; Odell v. Hole, 25 Ill. 204; Armstrong v. Philadelphia, 249 Pa. 39, 94 A 455, AnnCas1917B 1082.

15. Detroit Gas Co. v. Moreton Truck, etc., Co., 111 Mich. 401, 69 NW 659.

16. **Election to take judgment for value** see supra § 322.

17. Mich.—Just v. Porter, 64 Mich. 565, 31 NW 444; Hanselman v. Kegel, 60 Mich. 540, 27 NW 678.

N. J.—Schnitzer v. Russell, 81 N. J. L. 146, 80 A 938.

Oh.—Cohen v. Longtin, 21 Oh. Cir. Ct. N. S. 501.

Tex.—Willys-Overland Co. v. Chapman, (Civ. A.) 206 SW 978.

Wis.—Bigelow v. Doolittle, 36 Wis. 115.

[a] **Reason for rule.**—"If the defendant elects to take the value of the property, he, in effect, thereby makes a sale of it to the plaintiff at the date of its taking, and its value at that time, with interest up to the date of the verdict, is certainly a fair compensation. If he prefers to take the property, and the value of its use while detained, he can do so. The option is his, and not the plaintiff's. There is no justice in his taking the value of the property, selling it to the plaintiff against his will, and also charging him with the use of it in addition." Just v. Porter, 64 Mich. 565, 570, 31 NW 444.

[b] **In Iowa** (1) the plaintiff may under the statute elect to treat the property converted either as of the time of the taking or at the time of the trial. Where the conversion is treated as of the time of the taking the usable value may not be recovered. Colean Implement Co. v. Strong, 126 Iowa 598, 102 NW 506; Powers v. Benson, 120 Iowa 428, 94 NW 929 [overr in effect Hartley State Bank v. McCorkell, 91 Iowa 660, 60 NW 197; Cook v. Hamilton, 67 Iowa 394, 25 NW 676]; Hasted v. Dodge, 35 NW 462. (2) But where the party elects to take the value as of the time of the trial because the property is not available, the usable value may be recovered. Newberry v. Gibson, 125 Iowa 575, 101 NW 428.

18. See statutory provisions.

19. McGavock v. Chamberlain, 20 Ill. 219.

20. McGavock v. Chamberlain, supra; Cohen v. Longtin, 21 Oh. Cir. Ct. N. S. 501.

21. Schnitzer v. Russell, 81 N. J. L. 146, 80 A 938; Willys-Overland Co. v. Chapman, (Tex. Civ. A.) 206 SW 978.

22. See statutory provisions.

23. Cal.—Blodgett v. Rheinschild, 56 Cal. A. 728, 206 P 674.

Ind.—Farrar v. Eash, 5 Ind. A. 238, 31 NE 1125.

Minn.—Sherman v. Clark, 24 Minn. 37.

N. D.—Northup v. Cross, 2 N. D. 433, 51 NW 718.

Wyo.—Hunt v. Thompson, 19 Wyo. 523, 534, 120 P 181, 122 P 624.

"It is contended that the rule so adopted should be applied here, since the defendant is not entitled to a return. But there is a substantial difference between our statute and one requiring the defendant to elect whether he will take a judgment for the return of the property or its value. In the latter case, where there is an election to take a judgment for value, the defendant by his own act waives his right to a return, and, therefore, it may be proper to confine his compensation to the value with interest. Under our statute the defendant has no option to exercise. It is true that he is limited in his recovery to damages; but that is because the statute so declares, and it is not dependent upon any act of the defendant. The position of the plaintiff is the result of his own act in taking the property and securing its delivery to him." Hunt v. Thompson, supra.

[a] **In Nebraska** (1) under a statute giving plaintiff an option to return the property or to pay its value, a successful defendant may recover the usable value if it exceeds the interest on the value of the property, even though the value of the property rather than the property itself is recovered. Warrick v. Rasmussen, 112 Nebr. 299, 199 NW 544; Schrandt v. Young, 62 Nebr. 254, 86 NW 1085 (limiting the rule announced in Romberg v. Hughes, 18 Nebr. 579, 26 NW 351). (2) Where the evidence introduced to prove use value was speculative and incompetent, the damages for detention should be limited to interest on the value of the property. Oak Creek Valley Bank v. Hudkins, 115 Nebr. 628, 214 NW 68.

24. See supra § 375.

25. Drinkhouse v. Van Ness, 202 Cal. 359, 260 P 869; Nahhas v. Browning, 181 Cal. 55, 183 P 442, 6 ALR 476; Forsee v. Zenner, (Mo. A.) 193 SW 975; Jennings v. Sparkman, 48 Mo. A. 246. See Bobo v. Patton, 6 Heisk. (Tenn.) 172, 19 AmR 593 (dictum).

26. Nahhas v. Browning, 181 Cal. 55, 183 P 442, 6 ALR 476; Joyce v. Lande, 6 La. 277; Jennings v. Sparkman, 48 Mo. A. 246.

[a] **Destruction by fire.**—Although the property was destroyed by fire pending the action, defendant may recover the usable value where it exceeds the interest on the value of the property. Nahhas v. Browning, 181 Cal. 55, 183 P 442, 6 ALR 476.

27. Puckett v. Hopkins, 63 Mont. 137, 206 P 422; Brunell v. Cook, 13 Mont. 497, 34 P 1015.

28. American Packing Co. v. Luketa, 115 Wash. 1, 196 P 1.

29. Cal.—Drinkhouse v. Van Ness, 202 Cal. 359, 260 P 869; Nahhas v. Browning, 181 Cal. 55, 183 P 442, 6 ALR 476; Chucovich v. San Francisco Securities Corp., 60 Cal. A. 700, 214 P 263; Taylor v. Bernheim, 58 Cal. A. 404, 209 P 55; Los Angeles Furniture Co. v. Hansen, 46 Cal. A. 5, 188 P 292; Tucker v. Hagerty, 37 Cal. A. 789, 174 P 908.

Fla.—Ocala Fdy., etc., Works v. Lester, 49 Fla. 199, 38 S 51.

Mo.—Gurley v. Bunch, 130 Mo. A. 665, 108 SW 1109.

tion to the termination of the trial.[30] In determining the market price of the use of property, it cannot, in the absence of unusual and special circumstances pleaded, be based on the market price of other property hired to take its place,[31] nor on profits made in the business in which the property was used, where the property in controversy constituted only a part of the property used in the business,[32] nor based on profits made by others in the same kind of business in which similar property is used where there is no evidence as to what extent the property in controversy would have been used.[33] It has been held, however, that the probable earnings of musical instruments for the period they are wrongfully detained is admissible to fix the usable value of such property.[34]

[§ 382] **b. Net Usable Value.** The expense of keeping or necessary repairs to the property during the period of detention may be deducted from the amount of the recovery for its usable value.[35] If the property could not have been continually used during the period of its detention, it has been held that this fact should be considered by the jury in estimating the usable value.[36] Where the property was not in fact used, there should be deducted from the market value of the use, taken as the basis for damages, a reasonable sum for deterioration in the condition of the property had it been used, and the necessary repairs and expenses which the other party would have incurred if it had been used during such period of detention.[37]

[§ 383] **G. Expenses Connected with Action[38]—1. Attorney's Fees and Other Expenditures.** In the absence of statutory provision therefor,[39] or in some jurisdictions where circumstances are present authorizing a recovery of exemplary damages,[40] attorney's fees for services rendered in appearing for the prevailing party in the replevin suit are generally not allowed in that action,[41] even though such

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Okl.—Mitchelson v. Commercial Invest. Trust, 97 Okl. 98, 222 P 663; Francis v. Guaranty State Bank, 44 Okl. 446, 145 P 324; Thomas v. Tecumseh First Nat. Bank, 32 Okl. 115, 121 P 272, AnnCas1914A 376.

Tenn.—Stanley v. Donoho, 16 Lea 492.

See Omaha State Bank v. Murphy, 110 Nebr. 526, 194 NW 442 (dictum).

"Ordinarily 'usable value' means the amount for which such property could be hired." Hammond v. Thompson, 54 Mont. 609, 611, 173 P 229.

[a] **Claim against administrator** for loss of use of property dates from the time of taking of property rather than from the time of filing claim against the estate. MacKenzie v. Steeves, 98 Wash. 17, 167 P 50.

[b] **Failure of plaintiff to take possession** of a truck under the writ would entitle him to recover only the loss of its use up to the time the writ was served. Murphy v. Stryker Transp. Co., 6 N. J. Misc. 745, 142 A 670.

30. Tannahill v. Lydon, 31 Ida. 608, 173 P 1146; Chauvin v. Valiton, 8 Mont. 451, 20 P 658, 3 LRA 194; Gans v. Woolfolk, 2 Mont. 458; Morgan v. Reynolds, 1 Mont. 163.

"In the absence of any allegation of special damages, the measure of damages for the wrongful detention of property which has a usable value, . . . is the reasonable value of its use from the date of seizure to the time of the trial." Hammond v. Thompson, 54 Mont. 609, 611, 173 P 229.

31. Ocala Fdy., etc., Works v. Lester, 49 Fla. 199, 211, 38 S 51.

"The right to recover such damages would depend upon special and unusual circumstances such as that the plaintiffs were deprived of the use of the property in some particular business or some special undertaking, and could not procure other means to accomplish the same results without extraordinary expense, that is without paying more than the market value of the use of the property withheld, and this would constitute special damage which could only be recovered under appropriate allegations. . . . Such damages are not the natural and usual consequences of the detention, but arise only because of unusual and special circumstances, and can, therefore, be recovered only under special allegations." Ocala Fdy., etc., Works v. Lester, supra.

32. Hammond v. Thompson, 54 Mont. 609, 173 P 229.

33. Hamilton v. Palmer, (Tex. Civ. A.) 265 SW 240; Babare v. Rodman, 130 Wash. 317, 226 P 1015 [mod on reh 127 Wash. 436, 221 P 292].

34. Arnold v. Rudolph Wurlitzer Co., 31 Oh. Cir. Ct. 491.

35. Cal.—Mutch v. Long Beach Impr. Co., 47 Cal. A. 267, 190 P 638.

Colo.—Legere v. Stewart, 17 Colo. A. 472, 68 P 1059.

Conn.—Ralph N. Blakeslee Co. v. Rigo, 94 Conn. 481, 109 A 173.

Ida.—Cunningham v. Stoner, 10 Ida. 549, 79 P 228; Sebree v. Smith, 2 Ida. (Hasb.) 357, 16 P 477.

Mo.—Forsee v. Zenner, (A.) 193 SW 975; Anchor Milling Co. v. Walsh, 24 Mo. A. 97.

Mont.—Puckett v. Hopkins, 63 Mont. 137, 206 P 422; Haggerty Bros. v. Lash, 34 Mont. 517, 87 P 907.

Enhancement of value see supra § 373.

36. Brunell v. Cook, 13 Mont. 497, 499, 34 P 1015.

"Under ordinary circumstances it would seem to be contrary to practical experience for farmers (as in this case) to keep such property constantly employed at a given rate of earnings, either by letting to others for hire or by employment at home; or to set down the gross earnings as profits, undiminished by any expense for feeding, care, and otherwise. And where the 'value for hire or use' is adopted as the criterion for computation of damage for wrongful detention of personal property, the attention of the jury should be called to those points of consideration, and not directed to the computation of gross earnings for an unbroken period of time, unaccompanied by those other considerations." Brunell v. Cook, supra.

[a] **Failure so to instruct** the jury may be harmless when the fact is taken into consideration. Tannahill v. Lydon, 31 Ida. 608, 173 P 1146.

37. Ocala Fdy., etc., Works v. Lester, 49 Fla. 199, 38 S 51; Peerless Mach. Co. v. Gates, 61 Minn. 124, 63 NW 260; Armstrong v. Philadelphia, 249 Pa. 39, 94 A 455, AnnCas1917B 1082.

38. **Action on bond** see infra § 424.

Attorney's fees as costs see Costs § 248.

39. See statutory provisions.

40. Mars v. Germany, 135 Miss. 387, 100 S 23; Thornton v. Gardner, 134 Miss. 485, 99 S 131; Taylor v. Morton, 61 Miss. 24; Cowden v. Lockridge, 60 Miss. 385. See Knight v. Beckwith Commercial Co., 6 Wyo. 500, 46 P 1094 (where the rule is stated but not applied).

Attorney's fees and expenses in connection with exemplary damages generally see Damages § 134.

Exemplary damages in replevin generally see infra § 386.

41. U. S.—Pacific Ins. Co. v. Conard, 18 F. Cas. No. 10,647, Baldw. 138 [aff 6 Pet. 262, 8 L. ed. 392].

Cal.—Drinkhouse v. Van Ness, 202 Cal. 359, 260 P 869; Harris v. Smith, 132 Cal. 316, 64 P 409; Hays v. Windsor, 130 Cal. 230, 62 P 395; Black v. Hilliker, 130 Cal. 190, 62 P 481; Spooner v. Cady, 5 Cal. Unrep. Cas. 357, 44 P 1018; National City Finance Co. v. Lynch, 94 Cal. A. 557, 271 P 540; Bradshaw v. Eggers, 27 Cal. A. 132, 148 P 961; Martland v. Bekins Van, etc., Co., 19 Cal. A. 283, 125 P 759. See Anglo-California Trust Co. v. Collins, 192 Cal. 315, 219 P 982 (stating the rule and not deciding as to effect of contract).

Dak.—Jandt v. South, 2 Dak. 46, 47 NW 779.

Fla.—Gregory v. Woodbery, 53 Fla. 566, 43 S 504.

Ill.—Roberts v. Perrine, 247 Ill. A. 259.

Iowa.—Becker v. Staab, 114 Iowa 319, 86 NW 305.

Ky.—Kentucky Portland Cement, etc., Co. v. Steckel, 164 Ky. 420, 175 SW 663.

La.—Anders v. Lee-Rogers Chevrolet Co., 7 La. A. 481.

Miss.—Carraway v. Wallace, 17 S 930; Taylor v. Morton, 61 Miss. 24; Cowden v. Lockridge, 60 Miss. 385.

fees were incurred in pursuit of the property in controversy.[42] So also there can be no recovery for time lost[43] or expenses incurred in prosecuting the suit,[44] such as traveling expenses or hotel bills incurred in the prosecution of the action.[45]

[§ 384] **2. Pursuit of Property.** By statute[46] or judicial authority in some jurisdictions, damages are allowable for time and expense incurred in pursuit of the property,[47] while others maintain the contrary doctrine.[48]

[§ 385] **3. Taking and Removing Property.** In an action of replevin the expenses of taking and removing the property are allowed as damages for the detention in some jurisdictions,[49] while in others such expenses are by statute[50] a part of the disbursements in the action and should be added to the costs.[51] But where the party unreasonably incurs expenses in an attempt to remove the property, such expenses should not be allowed.[52]

[§ 386] **H. Exemplary Damages[53]—1. In General.** In the absence of fraud, malice, collusion, gross negligence, or oppression neither plaintiff nor defendant is entitled to exemplary or punitive damages in an action of replevin,[54] so that a taking in a bona fide belief of ownership will preclude the recovery of exemplary damages.[55] On the other hand, damages of this character are allowed by statute[56] or judicial decision where there have been peculiar circumstances of outrage, fraud, malice, oppression or collusion attending the wrongful taking or detention,[57] and it is immaterial with respect to such damages that pending the proceedings, the plaintiff

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Mo.—Mix v. Kepner, 81 Mo. 93; Hodkinson v. McNeal Mach. Co., 161 Mo. A. 87, 142 SW 457; Howard v. Haas, 139 Mo. A. 591, 123 SW 1048.

N. Y.—Sinskie v. Brust, 66 App. Div. 34, 72 NYS 922; Cook v. Gross, 60 App. Div. 446, 69 NYS 924; Hampton, etc., Lumber Co. v. Sizer, 35 Misc. 391, 71 NYS 990.

S. C.—Loeb v. Mann, 39 S. C. 465, 18 SE 1.

Wis.—Commercial Inv. Trust v. William Frankfurth Hardware Co., 179 Wis. 21, 190 NW 1004.

Wyo.—State Finance Corp. v. Commercial Credit Co., 41 Wyo. 198, 283 P 1100; Knight v. Beckwith Commercial Co., 6 Wyo. 500, 46 P 1094.

[a] **Statutory provision for damages.**—"The word 'damages' in paragraph 1 of section 1724 of the Revised Statutes of 1892, is not sufficiently comprehensive to embrace the attorney's fees incurred by the plaintiff in prosecuting his action of replevin." Gregory v. Woodbery, 53 Fla. 566, 569, 43 S 504.

42. Drinkhouse v. Van Ness, 202 Cal. 359, 260 P 869. See Spooner v. Cady, 5 Cal. Unrep. Cas. 357, 44 P 1018 (where question whether attorney's fees can be treated as money expended in pursuit of property was raised, but not decided). But see Davis Sewing-Mach. Co. v. Best, 50 Hun 76, 4 NYS 510 [app dism 117 N. Y. 655 mem, 22 NE 1133 mem] (where plaintiff was allowed expenses incurred in sending an attorney to demand possession of the property).

43. Blackwell v. Acton, 38 Ind. 425; Kentucky Portland Cement, etc., Co. v. Steckel, 164 Ky. 420, 175 SW 663; Taylor v. Morton, 61 Miss. 24; Loeb v. Mann, 39 S. C. 465, 18 SE 1.

44. Pacific Ins. Co. v. Conard, 18 F. Cas. No. 10,647, Baldw. 138 [aff 6 Pet. 262, 8 Fed. 392].

45. Hampton, etc., Lumber Co. v. Sizer, 35 Misc. 391, 71 NYS 990; Loeb v. Mann, 39 S. C. 465, 18 SE 1.

46. See statutory provisions.

47. Mitchell v. Burch, 36 Ind. 529 (where there was some evidence of bad faith and concealment on defendant's property); Newman v. Wilson, 1 La. Ann. 48.

[a] **Promissory note** given by plaintiff to her attorneys for two hundred dollars did not support a finding that such amount was a fair compensation for time and money expended by her in the pursuit of the property. Murphy v. Mulgrew, 102 Cal. 547, 36 P 857, 41 AmSR 200.

[b] **Property fraudulently taken out of officer's possession.**—A sheriff of another state may sue to recover sequestered property fraudulently taken out of his possession, and he will be entitled to recover the amount of the expenses he has been compelled to incur in order to recover it. Newman v. Wilson, 1 La. Ann. 48.

[c] **Verdict will not be disturbed** where there is sufficient evidence to sustain an award for money expended by plaintiff in pursuit of the property, especially where the judgment recited that there was ample evidence to sustain the verdict. Anderson v. Freeman. 40 S. D. 249, 167 NW 143.

[d] **In California,** under a statute providing that "the detriment caused by the wrongful conversion of personal property shall be presumed to be" among other things a fair compensation for the time and money properly expended in pursuit of the property, plaintiff in replevin may recover compensation for the pursuit of the property when he makes proper allegations of damages. Arzaga v. Villalba, 85 Cal. 191 [lim Redington v. Nunan, 60 Cal. 632; Kelly v. McKibben, 54 Cal. 192 (holding the contrary to cases where plaintiff has so framed his complaint as to seek only a recovery of the property and has not alleged any damages)]; Cain v. Cody, 29 P 778; Waterhouse-Wilcox Co. v. Betz, 73 Cal. A. 236, 238 P 763.

[e] **In Illinois** (1) it has been held under a statute providing that "if judgment is given for the plaintiff in replevin, he shall recover damages for the detention while the same was wrongfully detained," that it was proper to allow as damages expenses incurred by plaintiff in searching for the property. Brennan v. Shinkle, 89 Ill. 604. (2) But in a subsequent case such expenses were not allowed and no mention was made of the earlier Illinois case to the contrary. Taylor v. Welsh, 138 Ill. A. 190.

48. Sinskie v. Brust, 66 App. Div. 34, 72 NYS 922.

49. Washington Ice Co. v. Webster, 62 Me. 341, 16 AmR 462; Hendricks v. Ireland, 162 N. C. 523, 77 SE 1011.

50. See statutory provisions.

51. Crowe v. Peaslee-Gaulbert Co., 37 F. (2d) 216; Young v. Atwood, 5 Hun (N. Y.) 234.

Costs in replevin see supra §§ 352-358.

52. Barney v. Douglass, 22 Wis. 464 (where it was said that it is doubtful whether the owner could recover as a part of his damages for the detention his expenses in going some distance with a team to remove the engine, after he knew that it was held by the opposite party, as sheriff, under an attachment, he not having ascertained whether it would be voluntarily delivered to him, nor being prepared to take it by legal proceedings).

53. **Generally** see Damages §§ 268-298.

54. Cal.—Spooner v. Cady, 5 Cal. Unrep. Cas. 357, 44 P 1018.

Conn.—Hall v. Smedley Co., 151 A 321.

Kan.—McCormick Harvesting Mach. Co. v. Drake, (A.) 48 P 944.

Miss.—Acree v. Bufford, 80 Miss. 565, 31 S 898.

Mont.—Luther v. Lee, 62 Mont. 174, 204 P 365.

Okl.—Myers v. Hubbard, 80 Okl. 97, 194 P 433; Remund v. McCool, 50 Okl. 69, 150 P 1055.

Pa.—Armstrong v. Philadelphia, 249 Pa. 39, 94 A 455, AnnCas1917B 1082; Vitagraph Co. v. Swaab, 248 Pa. 478, 94 A 126, AnnCas1916C 311; Lubin Mfg. Co. v. Swaab, 240 Pa. 182, 87 A 597; Cummings v. Gann, 52 Pa. 484; McCabe v. Morehead, 1 Watts & S. 513; Jacobs v. Krieger, 87 Pa. Super. 448; Cox v. Burdett, 23 Pa. Super. 346.

S. C.—Shieder v. Southern R. Co., 83 S. C. 455, 65 SE 631.

Wyo.—Knight v. Beckwith Commercial Co., 6 Wyo. 500, 46 P 1094.

[a] **Illustration.**—Carrier was not liable for punitive damages for the refusal of its agent to deliver damaged cigars to consignee, who declined to attend in person or by a responsible agent to witness the opening of the packages and checking of the loss in view of the rule requiring consignee to be present and open the packages and check the loss in carrier's warehouse. Shieder v. Southern R. Co., 83 S. C. 455. 65 SE 631.

[b] **Cutting logs under void deed.**—A defendant who in good faith purchased and obtained a deed to timbered land, and who found thereon freshly cut logs, which he reasonably believed were cut after his purchase, is not liable for exemplary damages for taking the logs, although it be ascertained that his deed was void on grounds not affecting his integrity, and that he did not purchase the logs. Acree v. Bufford, 80 Miss. 565, 31 S 898.

55. Herdic v. Young, 55 Pa. 176, 79 AmD 739.

56. See statutory provisions.

57. Cal.—Arzaga v. Villalba, 85

obtained possession of the property under the process of the court.[58] Mere inconvenience caused by an officer in replevining property is not sufficient to support an award of exemplary damages.[59]

After execution of bond. Statutory provisions have provided that punitive damages are not allowable after the execution of the bond,[60] but such statutes have been held not to affect a recovery of exemplary or punitive damages for a plaintiff's wilful signing of a false affidavit before the execution of the bond,[61] nor to prevent a recovery of such damages after a nonsuit of the plaintiff in the action in which the bond was executed,[62] since such statutes apply only while the suit is pending and is not a shield from all future actions for punitive damages.[63]

[§ 387] **2. Malicious Prosecution of Writ.** While it has been held that exemplary damages for defendant on account of plaintiff's malicious issuance of the writ are not recoverable in replevin, but must be recovered in an independent action for malicious prosecution,[64] in other jurisdictions it has been at least intimated that exemplary damages for a malicious prosecution of the writ will be allowed in the replevin action.[65]

[§ 388] **I. Apportionment of Damages.** If it be found that part of the goods belonged to plaintiff and part to defendant[66] the damages must be apportioned between them.[67] Plaintiff is entitled to damages for the unlawful capture and detention of such of the goods as are found to be his property, and defendant is entitled to damages for the taking under the writ of the property found to belong to him.[68]

[§ 389] **J. Necessity for Assessment of Damages in Replevin Suit[69]—1. Damages to Plaintiff.** Ordinarily the provisions of the statutes[70] contemplate that where plaintiff is successful all damages to which he is entitled shall be assessed and awarded by the judgment in the replevin suit,[71] which shall conclude him from maintaining any other action for damages,[72] especially as against the sureties on a

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Cal. 191, 24 P 656.

N. J.—Dreimuller v. Rogow, 93 N. J. L. 1, 107 A 144.

Okl.—Ray v. Navarre, 47 Okl. 438, 147 P 1019.

Pa.—Duroth Mfg. Co. v. Cauffiel, 243 Pa. 24, 89 A 798; Wiley v. McGrath, 194 Pa. 498, 45 A 331, 75 AmSR 709; Craig v. Kline, 65 Pa. 399, 3 AmR 636; McDonald v. Scaife, 11 Pa. 381, 51 AmD 556.

S. C.—Manley v. Bailey, 151 S. C. 366, 149 SE 119.

Tenn.—Mayberry v. Cliffe, 7 Coldw. 117.

[a] **Collusion.**—Where plaintiff's husband sold certain property to defendant without plaintiff's consent and the evidence showed the existence of collusion between defendant and plaintiff's husband, plaintiff was entitled to exemplary damages. Wiley v. McGrath, 194 Pa. 498, 45 A 331, 75 AmSR 709.

[b] **Threats and violence.**—Where defendant without legal process came on plaintiff's premises at an early hour and by force, threats and a display of firearms, took and drove away plaintiff's property over his protests, plaintiff was entitled to punitive damages. Ray v. Navarre, 47 Okl. 438, 147 P 1019.

[c] **Wilful disregard of property rights.**—In an action to replevy personal property from a mortgagee who sold plaintiff's property under a foreclosure, there was sufficient basis for the jury to award punitive damages where plaintiff informed the mortgagee prior to the sale that the property was not included in the mortgage, but where the mortgagee nevertheless proceeded to sell without regard to plaintiff's protests. Manley v. Bailey, 151 S. C. 366, 149 SE 119.

[d] **In South Carolina** (1) exemplary damages formerly were not allowed in claim and delivery. Vance v. W. A. Vandercook Co., 170 U. S. 468, 18 SCt 645, 42 L. ed. 1111; Brayton v. Beall, 73 S. C. 308, 53 SE 641; Tittle v. Kennedy, 71 S. C. 1, 50 SE 544. (2) By statute the rule has been changed. Shieder v. Southern R. Co., 83 S. C. 455, 65 SE 631.

[e] **Well considered cases.**—Ray v. Navarre, 47 Okl. 438, 147 P 1019; Vitagraph Co. v. Swaab, 248 Pa. 478, 94 A 126, AnnCas1916C 311.

[58] Arzaga v. Villalba, 85 Cal. 191, 24 P 656.

[59] Vitagraph Co. v. Swaab, 248 Pa. 478, 94 A 126, AnnCas1916C 311; Lubin Mfg. Co. v. Swaab, 240 Pa. 182, 87 A 597.

[60] See infra text and notes 61-63.

[61] Moss v. Burdette, 151 S. C. 532, 149 SE 235.

[62] Williams v. Weekley, 100 S. C. 28, 84 SE 299.

[63] Williams v. Weekley, supra.

[64] See cases infra this note.

Malicious prosecution generally see 38 C. J. p 378.

[a] **In Oklahoma** (1) it has been held in an action to recover damages that the final determination of the replevin suit in defendant's favor would give him the right in an independent action to recover damages for the malicious institution of the replevin action as such damage was not properly within the issues of the replevin action. Harris v. Milligan, 68 Okl. 99, 171 P 850. (2) Where defendant by way of cross petition alleged that the taking of the property by plaintiff under the writ of replevin was wilful and malicious with intent to injure and damage defendant, it was held that the distinction between a malicious taking by defendant and an "improper institution of the suit," by plaintiff was a distinction without a difference. Lanyon v. Byus, 81 Okl. 203, 197 P 162. (3) It was held in a replevin action that damages for the taking of the property under the writ of replevin were not within the issues of the replevin action, but a proper subject for suit in an independent action for the malicious prosecution of the suit. Shipman v. Adamson, 96 Okl. 84, 221 P 74.

[65] Cable v. Dakin, 20 Wend. (N. Y.) 172; McDonald v. Scaife, 11 Pa. 381, 51 AmD 556; McCabe v. Morehead, 1 Watts & S. (Pa.) 513; Cox v. Burdett, 23 Pa. Super. 346.

"Where the writ of replevin has obviously been perverted to the purpose of a wilful injury, with a full consciousness in the plaintiff that he has no claim, the jury may perhaps assess smart money, as they might for a wilful and malicious trespass. That would certainly be going far enough. It supposes a right to recover damages as for a malicious prosecution; and to go even thus far would be dangerous unless a malicious replevin be considered as an exception to the rule which allows an independent action for a vexatious suit." Brizsee v. Maybee, 21 Wend. (N. Y.) 144, 145.

[66] **Partial recovery** see supra § 321.

[67] Knowles v. Pierce, 10 Del. 178; Wright v. Mathews, 2 Blackf. (Ind.) 187; Powell v. Hinsdale, 5 Mass. 343.

[68] Powell v. Hinsdale, 5 Mass. 343.

[69] **Judgment in replevin as essential to fixing liability of surety on:** Defendant's bond see infra § 414. Plaintiff's bond see infra § 408.

Conclusiveness of adjudication in action on bond see infra § 426.

[70] See statutory provisions.

[71] Colo.—Colorado Springs Co. v. Hopkins, 5 Colo. 206.

Iowa.—Newton v. Round, 109 Iowa 286, 80 NW 391.

Mich.—Delevan v. Bates, 1 Mich. 97.

Nebr.—Teel v. Miles, 51 Nebr. 542, 71 NW 296.

N. C.—Globe Oil Co. v. Messick Grocery Co., 136 N. C. 354, 48 SE 781.

Pa.—Bower v. Tallman, 5 Watts & S. 556; Com. v. Lintott, 64 Pa. Super. 328.

[a] **Where the replevin proceedings have been enjoined** by a decree which settles the rights of the parties but does not find the value of the property, the court in the replevin action must determine that question and upon it both parties have the right to present evidence. Dehr v. Lampton, 31 Iowa 172.

[72] Newton v. Round, 109 Iowa 286, 80 NW 391; Bower v. Tallman, 5 Watts & S. (Pa.) 556.

[a] **Illustration.**—Where plaintiff,

redelivery bond.[73]

[§ 390] 2. **Damages to Defendant—a. Value of Property.** Under the provisions of some statutes[74] the value of the property when recoverable by defendant, should be assessed by the jury in the replevin suit,[75] unless defendant was deprived of an opportunity to have the value assessed in the replevin action by plaintiff's failure to prosecute to final judgment,[76] in which case the value may be assessed in an action brought on the bond for plaintiff's failure to prosecute the action.[77] Under other statutory provisions, a defendant in an action of replevin tried on the merits, may recover in an action on the bond, the value of the property although not assessed in the replevin action.[78] It has also been held that an independent action for the value of the property will lie.[79]

[§ 391] **b. Depreciation in Value.** Statutory provisions in some jurisdictions contemplate that the depreciation in the value of the property up to judgment in replevin must be assessed in the replevin suit.[80] But depreciation occurring subsequent to the replevin judgment may be compensated for in damages in an action on the replevin bond.[81] In other jurisdictions defendant by suit on the bond may recover for the depreciation in the value of the property although there was no assessment in the replevin action.[82] Where the bond provides for a return of the property without reference to its condition, it has been held that the depreciation in the value of the property cannot be recovered in an action on the bond, but a separate action must be instituted for the purpose.[83]

[§ 392] **c. Damages for Detention.** Except where defendant's failure to have his damages assessed was caused by plaintiff's failure to prosecute the action to final judgment,[84] the damages for the taking and detention of the property are generally to be assessed in the replevin suit,[85] so that after final judgment in

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under a statute authorizing an election to take the property or its value, took a judgment for a return of the property, but failed to prove damages for an injury to the property, he could not recover such damage in a separate action. Newton v. Round, 109 Iowa 286, 80 NW 391.

73. Clark v. Ellingson, 35 N. D. 546, 161 NW 199.

74. See statutory provisions.

75. White v. Van Houten, 51 Mo. 577; Clinton v. Stovall, 45 Mo. A. 642; Fulkerson v. Dinkins, 28 Mo. A. 160. But see Hothenthal v. Watson, 28 Mo. 360 (although the rule of the text was recognized, defendant was permitted to have the value assessed by a jury other than the one trying the issues of the replevin action).

[a] **In Delaware** (1) ordinarily in an action on a replevin bond no question can be tried which could and ought to have been tried and determined in the replevin suit. Clark v. Wilmington Trust Co., 30 Del. 287, 105 A 834. (2) Notwithstanding that the questions of the value of the property and damages could be more conveniently tried in the replevin action, they may be assessed in an action on the bond. Harmon v. Collins, 18 Del. 36, 45 A 541.

76. Berghoff v. Hechwolf, 26 Mo. 511.

77. Berghoff v. Hechwolf, supra.

78. U. S.—Sweeney v. Lomme, 22 Wall. 208, 22 L. ed. 727.

Ind.—Yelton v. Slinkard, 85 Ind. 190; Whitney v. Lehmer, 26 Ind. 503.

Iowa.—Hall v. Smith, 10 Iowa 45.

Me.—Smith v. Dillingham, 33 Me. 384.

Mass.—Stevens v. Tuite, 104 Mass. 328.

Or.—Booth v. National Surety Co., 129 Or. 598, 278 P 987.

[a] **Although a statute requires an assessment** of the value and damages in the replevin suit, defendant, on obtaining judgment for a return of the property, may recover the value of the property in an action on the bond even though it was not assessed in the replevin action. Whitney v. Lehmer, 26 Ind. 503.

79. Johnson v. Boehme, 66 Kan. 72, 71 P 243, 97 AmSR 357.

80. Teel v. Miles, 51 Nebr. 542, 71 NW 296; Pabst Brewing Có. v. Rapid Safety Filter Co., 56 Misc. 445, 107 NYS 163.

[a] **Illustration.**—Where a defendant in replevin recovered judgment for the return of the property and his damage for the wrongful detention thereof he cannot thereafter maintain another action on account of depreciation in the value of the property while in plaintiff's possession. Teel v. Miles, 51 Nebr. 542, 71 NW 296.

81. Wallace v. Cox, 100 Nebr. 601, 160 NW 992, AnnCas1917D 699.

82. U. S.—Washington Ice Co. v. Webster, 125 U. S. 426, 8 SCt 947, 31 L. ed. 799.

Ala.—Heard v. Hicks, 101 Ala. 102, 13 S 256.

Conn.—Ralph N. Blakeslee Co. v. Rigo, 94 Conn. 481, 109 A 173; Bradley v. Reynolds, 61 Conn. 271, 23 A 928.

Ill.—Franks v. Matson, 211 Ill. 338, 71 NE 1011; Odell v. Hole, 25 Ill. 204; Dalby v. Campbell, 26 Ill. A. 502.

Ind.—Yelton v. Slinkard, 85 Ind. 190; Lindsey v. Hewitt, 42 Ind. A. 573, 86 NE 446.

Kan.—Fair v. Citizens' State Bank, 69 Kan. 353, 76 P 847, 105 AmSR 168.

Ky.—Mounts v. Murphy, 126 Ky. 803, 104 SW 978, 31 KyL 1192.

Me.—Kimball v. Thompson, 123 Me. 116, 122 A 46; Berry v. Hoeffner, 56 Me. 170; Thomas v. Spofford, 46 Me. 408.

Miss.—Hazlett v. Witherspoon, 25 S 150.

N. J.—Johnson v. Mason, 70 N. J. L. 13, 56 A 137.

Or.—Booth v. National Surety Co., 129 Or. 598, 278 P 987.

Tenn.—Colby v. Yates, 12 Heisk. 267.

[a] **Reason for rule.**—(1) "In our opinion the difference in the value of the property at the time taken and when returned may be recovered in an action like this, and such damages are not required by the Code to be fixed in the judgment in the action for claim and delivery of the property. In fact, it would be impossible to do so for the reason the property is at the time of the judgment in the possession of the plaintiff in the action, and not accessible to the defendant for inspection; nor can it be known in what condition the property will be when returned to the defendant." Mounts v. Murphy, 126 Ky. 803, 808, 104 SW 978. (2) "Now this character of question was not conveniently or properly cognizable in the trial of the title; for the property had been in the meantime in the possession of the plaintiff in replevin; and the defendant in such an action is not presumed to have had access to the property, so as to be advised of the injuries done it. These injuries undoubtedly afford a good ground for a separate action." Colby v. Yates, 12 Heisk. (Tenn.) 267, 269.

[b] **In Massachusetts** (1) where the statutory bond in replevin contemplates that the property be restored in like good order and condition, the rule obtains that the depreciation in the value of the property is only recoverable in an action on the bond (Tucker v. Tremont Trust Co., 242 Mass. 25, 136 NE 62, 24 ALR 1185; Citizens' Nat. Bank v. Oldham, 136 Mass. 515; Stevens v. Tuite, 104 Mass. 328 [dictum]; Gordon v. Jenney, 16 Mass. 465 [dictum]), (2) on the theory that a failure to return the property in like good condition as when taken is not damage arising from the detention but a breach of the bond (Tucker v. Tremont Trust Co., 242 Mass. 25, 136 NE 62, 24 ALR 1185).

83. Douglass v. Douglass, 21 Wall. (U. S.) 98, 22 L. ed. 479 (the court did not imply as a condition of the bond that the property was to be returned in like good order and condition).

84. Hall v. Smith, 10 Iowa 45; R. W. Wilson Motor Co. v. Hoover, 222 Mo. A. 570, 293 SW 61; Elliott v. Black, 45 Mo. 372; Berghoff v. Heckwolf, 26 Mo. 511; Morrison v. Yancey, 23 Mo. A. 670; Woody v. Jordan, 69 N. C. 189.

85. Cal.—Ginaca v. Atwood, 8 Cal. 446.

Colo.—Sopris v. Lilley, 2 Colo. 496.

Ind.—Jackson v. Morgan, 167 Ind. 528, 78 NE 633.

Ky.—Mounts v. Murphy, 126 Ky. 803, 104 SW 978, 31 KyL 1192.

Mass.—Rosen v. U. S. Rubber Co., 167 NE 655, 65 ALR 1299; Maguire v. Pan-American Amusement Co., 205 Mass. 64, 91 NE 135, 137 AmSR 422, 18 AnnCas 110; Stevens v. Tuite, 104 Mass. 328.

Mo.—White v. Van Houten, 51 Mo.

defendant's favor he cannot move to introduce evidence to show damages sustained,[86] or maintain another action to recover such damages.[87] However, it has been held that defendant may maintain an action for damages in conversion although he could have had his damages for the wrongful taking assessed in the replevin suit,[88] on the theory that the statute, providing that defendant may recover damages in replevin as well as a plaintiff, has not abolished the common law action for damages in a separate action;[89] and likewise where the damages have not been assessed in the replevin suit, some courts permit a recovery in an action on the replevin bond,[90] especially where such damages were not in issue in the replevin action.[91]

[§ 393] **K. Damages Pending Appeal.** A successful party in replevin may, either in the same proceedings,[92] or in an action on the bond,[93] recover damages for the further detention of the property pending an appeal. The rule applies to an appeal from a justice of the peace to a county, district or other trial court,[94] or to an appeal to an appellate court.[95] For this purpose plaintiff may amend his petition or complaint.[96] In the application of rules already considered[97] the damages recoverable for such further detention, may be the usable value of the property,[98] or interest,[99] or the depreciation in the value of the property.[1]

In separate action. There appears to be a conflict of authority as to whether a prevailing party in replevin may institute a separate action for damages occasioned by the further detention of the property pending appeal.[2] In some jurisdictions a separate action for damages in such a case is allowed,[3] while in other jurisdictions the damages must be assessed either in the original replevin suit or in an action on the bond,[4] but if a new demand is made for the possession of the property pending the appeal, a new cause of action accrues so that an independent action is maintainable.[5]

577; Freeman v. Lavenue, 99 Mo. A. 173, 72 SW 1085.

Nebr.—Teel v. Miles, 51 Nebr. 542, 71 NW 296.

N. Y.—Pabst Brewing Co. v. Rapid Safety Filter Co., 56 Misc. 445, 107 NYS 163; Ritchie v. Talcott, 10 Misc. 412, 31 NYS 196.

Or.—Gust v. Edwards Co., 129 Or. 409, 274 P 919.

Philippine.—Pascua v. Sideco, 24 Philippine 26.

Tenn.—Colby v. Yates, 12 Heisk. 267 (dictum).

Vt.—Miltimore v. Bottom, 66 Vt. 168, 28 A 872.

[a] **Reason for rule.**—"When a trial is had, it was intended, that all matters growing out of the controversy, should be finally determined in one and the same suit. The object was to prevent multiplicity of suits, and prevent the practice of trying one half of the cause before one jury, and then resort to another suit, to try the remainder of the cause, before another jury, which would unnecessarily harass parties, and produce needless litigation, and accumulate costs. The damages are incident to the actions, and spring immediately out of it, and ought to be determined when the action progresses." White v. Van Houten, 51 Mo. 577, 580.

[b] **In Delaware** (1) ordinarily in an action on a replevin bond no question can be tried which could and ought to have been tried and determined in the replevin suit (Clark v. Wilmington Trust Co., (Super.) 30 Del. 287, 105 A 834), (2) although damages for the detention might be more conveniently tried and determined in the replevin suit, they may be assessed in an action on the bond (Harmon v. Collins, 18 Del. 36, 45 A 541; McIlvaine v. Holland, 5 Harr. 226).

[86] Freeman v. Lavenue, 99 Mo. A. 173, 72 SW 1085.

[87] Drewyour v. Merrell, 112 Mich. 681, 71 NW 486; Teel v. Miles, 51 Nebr. 542, 71 NW 296; Ritchie v. Talcott, 10 Misc. 412, 31 NYS 196; Pascua v. Sideco, 24 Philippine 26.

[88] Johnson v. Boehme, 66 Kan. 72, 71 P 243, 97 AmSR 357; Bowen v. King, 146 N. C. 385, 59 SE 1044; Asher v. Reizenstein, 105 N. C. 213, 10 SE 889.

[89] Woody v. Jordan, 69 N. C. 189.

[90] Fields v. Crawford, 30 F. Cas. No. 18,296, 2 Hayw. & H. 256; Gould v. Hayes, 71 Conn. 86, 40 A 930; Shepard v. Butterfield, 41 Ill. 76; Kimball v. Thompson, 123 Me. 116, 122 A 46 (Rev. St. c 101 § 15); Washington Ice Co. v. Webster, 62 Me. 341, 16 AmR 462; Thomas v. Spofford, 46 Me. 408; Smith v. Dillingham, 33 Me. 384.

[91] Gould v. Hayes, 71 Conn. 86, 40 A 930.

[a] **Illustration.**—Where in replevin the jury's verdict was for a return of the property and $1 damages, defendant in an action on the bond might recover such damages to which he was entitled and which were not in issue in the replevin suit and not assessed therein. Gould v. Hayes, 71 Conn. 86, 40 A 930.

[92] Hanf v. Ford, 37 Ark. 544; Weleetka Light, etc., Co. v. Castleberry, 42 Okl. 745, 142 P 1006; Zitske v. Goldberg, 38 Wis. 216. See Cunningham v. Stoner, 10 Ida. 549, 79 P 228 (where from the fact that the unsuccessful party is allowed the cost of keeping the property pending the appeal, the rule of the text may be implied).

"The original claim for damages was made in a proceeding before a justice, in which the plaintiff, but for the retaining bond, might have had immediate redelivery, and it might be reasonably supposed, sufficient to cover any damages then incurred, or even those which might be sustained in the usual time required for proceedings before a justice. The defendant, however, continued to retain the plaintiff's property, by means of his bond, not only during the progress of the suit before the justice, but during its pendency on the appeal. During all this time the damages were increasing, and there would have been a failure of justice, if the plaintiff had not been allowed so to amend as to recover the whole damage sustained." Hanf v. Ford, 37 Ark. 544, 548.

[93] Washington Ice Co. v. Webster, 125 U. S. 426, 8 SCt 947, 31 L. ed. 799; Maguire v. Pan-American Amusement Co., 205 Mass. 64, 91 NE 135, 137 AmSR 422, 18 AnnCas 110.

[94] Hanf v. Ford, 37 Ark. 544; Weleetka Light, etc., Co. v. Castleberry, 42 Okl. 745, 142 P 1006; Zitske v. Goldberg, 38 Wis. 216.

[95] Washington Ice Co. v. Webster, 68 Me. 449.

[96] Hanf v. Ford, 37 Ark. 544.

[97] See supra §§ 369, 370, 376, 377-382.

[98] Schrandt v. Young, 62 Nebr. 254, 86 NW 1085; Williams v. Phelps, 16 Wis. 80.

[99] Devol v. Dye, 6 Ind. A. 257, 33 NE 253.

[1] Welch v. Welch, 106 Ky. 406, 50 SW 687.

[2] See infra text and notes 3-5.

[3] Fair v. Citizens' State Bank, 69 Kan. 353, 76 P 847, 105 AmSR 168, 2 AnnCas 960; Chesnut v. Sales, 49 Mont. 318, 141 P 986, 52 LRANS 1199, AnnCas1916A 620.

[4] Van Horne v. Treadwell, 164 Cal. 620, 130 P 5; Bracken v. Atlantic Trust Co., 167 N. Y. 510, 60 NE 772, 82 AmSR 731; Commerce Exch. Nat. Bank v. Blye, 123 N. Y. 132, 25 NE 208.

"We cannot admit that the taking of an appeal by the defendant constituted a new and separate detention of plaintiff's bonds because they remained in defendant's possession after delivery to him by the sheriff in accordance with the law of the chosen remedy. If that be so, added perils will surround appeals, and a prolific source of new actions will come into existence, and it will be difficult to say that one class of damages resulting from the law's delay may be recovered and all others be excluded. We think the right of appeal cannot be converted into a tort or wrong, and the delay it produces serve as a basis for a new action, and that the judgment already rendered closed the entire controversy." Commerce Exch. Nat. Bank v. Blye, 123 N. Y. 132, 137, 25 NE 208.

[a] **Illustration.**—The wrongful refusal of a pledgee to redeliver pledged stocks creates but a single cause of action in favor of the pledgor, and the continued withholding of the stocks pending an appeal is not a new wrong redressible by a new action, but is simply a continuation of the original wrong for which the only redress must be had in the original action and consequently a second action for the damage due to the depreciation in value of the stocks pending appeal will not lie. Van Horne v. Treadwell, 164 Cal. 620, 130 P 5.

[5] Chesnut v. Sales, 49 Mont. 318,

XVI. LIABILITY ON REPLEVIN AND REDELIVERY BONDS[6]

[By Bernard J. Kenny]

[§ 394] **A. In General.** A replevin bond is to be interpreted like any other contract[7] or bond,[8] and its several conditions are separate and independent,[9] so that an action may be maintained on the bond for the breach of any of its conditions.[10] A right of action on a replevin bond[11] carries with it the right to recover damages for a failure to perform its conditions.[12] The obligation of the sureties on defendant's replevy bond is created by the bond and dates only from its date;[13] and to justify a judgment against the obligor and sureties, there must have been some breach of the bond,[14] for until a breach of one of the conditions the liability of the obligors is merely contingent.[15] Where the statutes[16] confer on a married woman the right to execute a forthcoming or redelivery bond, she is subject to judgment on it.[17]

[§ 395] **B. Accrual or Release of Liability by Breach or Performance of Conditions—1. In General.** Liability on a bond in replevin accrues whenever there is a breach of any one or more of the several independent conditions of the bond;[18] and what will constitute an actionable breach must depend largely on the nature and terms of the particular condition claimed to be broken.[19]

[§ 396] **2. Plaintiff's Bond—a. Condition To Prosecute Action—(1) In General.** The condition to prosecute the action is contained in replevin bonds, but under the particular statutes,[20] the wording of this condition is not exactly the same, with the result that the conclusions reached do not coincide in all cases.[21] A condition to "prosecute the action" without the words "duly" or "with effect" has been construed by some courts to mean a prosecution to a successful termination by plaintiff,[22] or a prosecution with effect,[23] while in other jurisdictions these words have been construed as meaning a prosecution of the suit to a final judgment on the merits whether plaintiff be successful or not.[24] Under either view there will be a breach of this condition

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324, 141 P 986, 52 LRANS 1199, Ann Cas1916A 620 (where the court, commenting upon the decision in Commerce Exch. Nat. Bank v. Blye, supra, said: "The New York court laid some stress upon the fact that in the Blye Case the complaint alleged no new or separate demand, but simply a continuation of the refusal to obey the original one, and there is room for the inference that had a separate demand been made after judgment, a different conclusion might have been reached").

6. **Necessity, purpose, and validity of bond by:**
Defendant in replevin see supra §§ 156–159.
Plaintiff in replevin see supra §§ 116–132.
Third persons claimant see supra §§ 166, 167.

Similar bonds:
Attachment §§ 679–783, 863, 938–963.
Executions §§ 300–326, 541–546.
Landlord and Tenant §§ 1687–1692.
Sequestration [35 Cyc 1381].

7. Shaver v. Kappellas, 83 Ind. A. 338, 146 NE 858.

Construction of contract generally see Contracts § 481 et seq.

8. See Bonds § 49 et seq.

9. U. S.—Lapp v. Ritter, 88 Fed. 108.

Colo.—Imel v. Van Deren, 8 Colo. 90, 5 P 803. See Cox v. Sargent, 10 Colo. A. 1, 50 P 201 (recognizing rule).

Ill.—Vinyard v. Barnes, 124 Ill. 346, 16 NE 254; Humphrey v. Taggart, 38 Ill. 229.

Ind.—Fisse v. Katzentine, 93 Ind. 490; Brown v. Parker, 5 Blackf. 291.

Iowa.—Hall v. Smith, 10 Iowa 45.

Kan.—Little v. Bliss, 55 Kan. 94, 30 P 1025; Manning v. Manning, 26 Kan. 98.

Md.—Crabbs v. Koontz, 69 Md. 59, 13 A 591.

Mo.—Elliott v. Black, 45 Mo. 372; Berghoff v. Heckwolf, 26 Mo. 511.

Nebr.—Allen v. Lowe, 113 Nebr. 443, 203 NW 571.

N. Y.—Budracco v. National Surety Co., 112 Misc. 133, 182 NYS 590.

Pa.—Pure Oil Co. v. Terry, 209 Pa. 403, 58 A 814; Pittsburgh Nat. Bank of Commerce v. Hall, 107 Pa. 583; Balsley v. Hoffman, 13 Pa. 603; Gibbs v. Bartlett, 2 Watts & S. 29.

R. I.—Gardiner v. McDermott, 12 R. I. 206.

S. C.—Alderman v. Roesel, 52 S. C. 162, 29 SE 385.

Eng.—Moore v. Bowmaker, 7 Price 223, 146 Reprint 954, 7 Taunt. 97, 2 ECL 277, 129 Reprint 39.

Ont.—Golding v. Belknap, 26 U. C. Q. B. 163.

[a] **"In all replevin bonds there are several independent conditions;** one to prosecute, another to return the goods replevied, and a third to indemnify the sheriff; and a breach may be assigned upon any of these distinct parts of condition." Morgan v. Griffith, 7 Mod. 380, 87 Reprint 1304.

[b] **The conditions to prosecute the suit to effect and to make return of the property** are distinct, and the condition is broken and the bond forfeited by failure in either. Vinyard v. Barnes, 124 Ill. 346, 16 NE 254; Brown v. Parker, 5 Blackf. (Ind.) 291; Perreau v. Bevan, 5 B. & C. 284, 11 ECL 464, 108 Reprint 106.

10. See cases supra note 9.

11. See infra §§ 430, 431.

12. Lindsey v. Hewitt, 42 Ind. A. 573, 86 NE 446.

Damages recoverable see infra §§ 424, 425.

13. First State Bank v. Martin, 81 Kan. 794, 106 P 1056; Bateman v. Hipp, 51 Tex. Civ. A. 405, 111 SW 971 (holding that the sureties are not liable for the value of the use of the property which accrued prior to the time the property was replevied).

14. Gerlaugh v. Ryan, 127 Iowa 226, 103 NW 128; Lewis v. McNary, 38 Or. 116, 62 P 897.

15. Union Trust Co. v. Shoemaker, 172 Ill. A. 365 [aff 258 Ill. 564, 101 NE 1050].

16. See statutory provisions.

17. Ketchum v. Brennan, 53 Miss. 596.

18. Colo.—Sopris v. Lilley, 2 Colo. 496.

Conn.—Persse v. Watrous, 30 Conn. 139.

Ill.—Vinyard v. Barnes, 124 Ill. 346, 16 NE 254.

Ind.—Yelton v. Slinkard, 85 Ind. 190; Peffley v. Kenrick, 4 Ind. A. 510, 31 NE 40.

Me.—Jones v. Smith, 79 Me. 452, 10 A 256; Tuck v. Moses, 54 Me. 115.

Mass.—Smith v. Whiting, 97 Mass. 316.

Pa.—Pure Oil Co. v. Terry, 209 Pa. 403, 58 A 814; Pittsburgh Nat. Bank v. Hall, 107 Pa. 583.

S. C.—Alderman v. Roesel, 52 S. C. 162, 29 SE 385.

Eng.—Perreau v. Bevan, 5 B. & C. 384, 11 ECL 464, 108 Reprint 106, Moore v. Bowmaker, 7 Price 223, 146 Reprint 954, 7 Taunt. 97, 2 ECL 277, 129 Reprint 39; Morgan v. Griffith, 7 Mod. 380, 87 Reprint 1304.

Ont.—Golding v. Belknap, 26 U. C. Q. B. 163.

Several and independent conditions see supra § 394 text and note 9.

19. See infra §§ 396–414.

20. See statutory provisions.

21. See infra this section; and §§ 397–402.

22. Hoebel v. Utah-Idaho Livestock Loan Co., 39 Ida. 294, 227 P 1048.

23. Hoebel v. Utah-Idaho Livestock Loan Co., supra; Berghoff v. Heckwolf, 26 Mo. 511; Parrott v. Scott, 6 Mont. 340, 12 P 763; West v. Caldwell, 23 N. J. L. 736.

Condition to prosecute with effect see infra § 397.

24. Cal.—Donovan v. Ætna Indemn. Co., 10 Cal. A. 723, 103 P 365.

N. C.—Alderman v. Roesel, 52 S. C. 162, 29 SE 385.

N. D.—Siebolt v. Konatz Saddlery Co., 15 N. D. 87, 106 NW 564 [dist Kidwhere plaintiff voluntarily dismisses or discontinues his action,[25] or takes a voluntary nonsuit,[26] or where the action is dismissed on defendant's motion,[27] or on motion of the court.[28]

[§ 397] **(2) To Effect, with Effect, or with Success.** As a general rule a condition to prosecute "with effect" or "to effect" requires a prosecution to a successful termination,[29] and in any court to which the case may be removed,[30] although the condition has also been construed as meaning a prosecution to a not unsuccessful termination.[31] There is a breach of this condition when judgment is for defendant in replevin,[32] or where plaintiff voluntarily dismisses his replevin suit,[33] or abandons it,[34] or is nonsuited,[35] or his action is dismissed for lack of jurisdiction,[36] or for failure to return his replevin writ into court.[37] It has been held, however, that a plaintiff prosecutes "to effect" where a final determination on the merits has been had, although the verdict and judgment are for defendant.[38] Although pending the determination of the replevin suit there may be a breach of the condition to prosecute without delay,[39] it has been held that under such circumstances there cannot be a breach of the condition to prosecute with effect whether the replevin suit is pending in the trial court,[40] or on appeal.[41]

A condition to prosecute "with success" is breached where the replevin suit is dismissed for want of jurisdiction.[42]

[§ 398] **(3) Duly To Prosecute.** While it appears that a compliance with this condition would require plaintiff to prosecute his action to effect,[43]

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der v. Merryhew, 32 Mich. 470].

Or.—Peacock v. Kirkland, 74 Or. 279, 145 P 281.

Wash.—Ihrig v. Bussell, 68 Wash. 70, 122 P 608, LRA1917A 1188.

[a] **Discussion of rule.**—"The prosecution of the action, within the meaning of the statute, is to continue the proceedings to trial and to a determination of the issues by final judgment. The condition of the undertaking is complied with by continuing the proceedings to judgment on the merits, although not in plaintiff's favor. If the action had been prosecuted to judgment on the merits, the condition of the undertaking would be fulfilled, although the defendant had prevailed. If the action be prosecuted to judgment on the merits, and the defendant recover judgment, that judgment should provide for a return of the property to the defendant and for payment of such damages as had been awarded on the trial, and costs. If the action be prosecuted by the plaintiff to a determination of the issues in defendant's favor, the other conditions of the bond become operative, and the condition thereof for the prosecution of the action cannot be resorted to by the defendant." Siebolt v. Konatz Saddlery Co., 15 N. D. 87, 90, 106 NW 564.

[25] Miss.—Maxey v. White, 53 Miss. 80.

Mo.—Berghoff v. Heckwolf, 26 Mo. 511.

Mont.—Parrott v. Scott, 6 Mont. 340, 12 P 763.

N. Y.—Budracco v. National Surety Co., 112 Misc. 133, 182 NYS 590.

S. C.—Alderman v. Roesel, 52 S. C. 162, 164, 29 SE 385.

Wash.—Meigs v. Keach, 1 Wash. T. 306.

"Is such discontinuance [by plaintiff] of an action a breach of the condition of the bond to prosecute? To prosecute an action . . .. is to carry it on to final effect, and so the bond in question is conditioned to carry on the action to effect. Where a plaintiff abandons his action, fails to prosecute it, discontinues it on his motion, or where it is dismissed for want of prosecution, there is a breach of the condition to prosecute." Alderman v. Roesel, supra.

[26] Davis Bros. Co. v. Wallace, 190 N. C. 543, 130 SE 176.

[27] Seaboard Air Line R. Co. v. Hewlett, 94 S. C. 478, 78 SE 329.

[28] Mills v. Gleason, 21 Cal. 274; Roman v. Stratton, 2 Bibb. (Ky.) 199; Elliott v. Black, 45 Mo. 372; White Blakeslee Mfg. Co. v. Rhodes, 152 N. C. 636, 68 SE 141.

[29] Conn.—Persse v. Watrous, 30 Conn. 139.

Ill.—Danford v. Watkins, 337 Ill. 222, 168 NE 912.

Ind.—Yelton v. Slinkard, 85 Ind. 190; Wiseman v. Lynn, 39 Ind. 250; Brown v. Parker, 5 Blackf. 291.

Md.—Crabbs v. Koontz, 69 Md. 59, 13 A 591.

Minn.—Boom v. St. Paul Fdy., etc., Co., 33 Minn. 253, 22 NW 538.

N. Y.—Gould v. Warner, 3 Wend. 54.

Pa.—Pure Oil Co. v. Terry, 209 Pa. 403, 58 A 814; Pittsburgh Nat. Bank v. Hall, 107 Pa. 583; Gibbs v. Bartlett, 2 Watts & S. 29.

Eng.—Perreau v. Bevan, 5 B. & C. 284, 11 ECL 464, 108 Reprint 106; Tummons v. Ogle, 6 E. & B. 571, 88 ECL 571, 37 EngL&Eq 15, 119 Reprint 977; Morgan v. Griffith, 7 Mod. 380, 87 Reprint 1304.

Ont.—Welsh v. O'Brien, 28 U. C. Q. B. 405.

[a] **Judgment for part of property.**—Where plaintiff recovers judgment for only a portion of the property, this is not a compliance with the condition to prosecute with effect. Patterson v. Fuller, 31 U. C. Q. B. (Ont.) 323.

[30] See infra § 422.

[31] Jackson v. Hanson, 8 M. & W. 477, 151 Reprint 1127.

[a] **Criticism of rule.**—"The condition is absolute in its terms, to prosecute, and to effect, and it is a mistake to say that it is fulfilled by prosecuting to a not unsuccessful result. Some of the English judges may have proceeded upon that idea, but it is a mistaken one, at least as applicable to a replevin suit brought by a person not a party to the original suit, seeking as owner to obtain possession of goods attached." Persse v. Watrous, 30 Conn. 139, 146.

[32] Wheat v. Catterlin, 23 Ind. 85; Brown v. Parker, 5 Blackf. (Ind.) 291; Crabbs v. Koontz, 69 Md. 59, 13 A 591; Pure Oil Co. v. Terry, 209 Pa. 403, 58 A 814; Pittsburgh Nat. Bank v. Hall, 107 Pa. 583, 589.

[33] Persse v. Watrous, 30 Conn. 139; Langdoc v. Parkinson, 2 Ill. A. 136; Wiseman v. Lynn, 39 Ind. 250; Peffley v. Kenrick, 4 Ind. A. 510, 31 NE 40.

[34] Landry v. Sivret, 39 N. B. 356.

[35] Colo.—Cox v. Sargent, 10 Colo. A. 1, 50 P 201.

Ill.—Magerstadt v. Field, 160 Ill. A. 23.

Minn.—Boom v. St. Paul Fdy., etc., Co., 33 Minn. 253, 22 NW 538.

N. Y.—Covenhoven v. Seamen, 1 Johns. Cas. 23.

Eng.—Turnor v. Turner, 2 B. & B. 107, 6 ECL 58, 129 Reprint 898.

[36] Flannigan v. Erwin, 173 Ill. A. 452; Waddell v. Bradway, 84 Ind. 537; Sherry v. Foresman, 6 Blackf. (Ind.) 56.

[37] Allen v. Woodford, 36 Conn. 143.

"It is the duty of a plaintiff in a replevin suit to see that all the necessary steps are taken to bring the cause to trial, in order that both parties may have an opportunity to present their claims, and that the question of title may be finally determined. A failure to do this, either through his own negligence or the negligence of the officer employed by him, is a failure to prosecute to effect." Allen v. Woodford, 36 Conn. 143, 147.

[38] Ladd v. Prentice, 14 Conn. 109.

[a] **Tenants in common.**—In an action on a replevin bond conditioned to prosecute the action "to effect" there was no breach of the condition, although judgment was against plaintiff, since he was a cotenant of the property with defendant and as such was under no obligation to return the property. Ladd v. Prentice, 14 Conn. 109.

[39] See infra § 400.

[40] Harrison v. Wardle, 5 B. & Ad. 146, 27 ECL 70, 110 Reprint 746; Brackenbury v. Pell, 12 East 585, 104 Reprint 228; Culham v. Love, 30 U. C. Q. B. 410.

[41] Becker v. Ball, 18 U. C. Q. B. (Ont.) 192.

[42] McDermott v. Isbell, 4 Cal. 113.

[43] Biddinger v. Pratt, 50 Oh. St. 719, 35 NE 795.

"Counsel for appellees drew a distinction between the phrase 'to prosecute with effect' and to 'duly prosecute;' contending that to prosecute 'with effect' means to prosecute successfully, and 'to duly prosecute' means 'in due manner, regularly, le-generally plaintiff is not required to prosecute to a successful termination to avoid a breach of this condition.[44] So it has been held that the condition to "duly prosecute" the action is satisfied by a prompt trial in a trial court and on appeal, although plaintiff is unsuccessful,[45] and even though he dismisses his proceedings in error to the appellate court.[46] However, a voluntary dismissal of the replevin action in the trial court,[47] or a dismissal for want of jurisdiction,[48] or an unnecessary delay without good cause[49] will constitute a breach of this condition.

[§ 399] **(4) To Judgment or to Final Judgment.** Although a condition to prosecute "to judgment" has been construed to mean, not only a prosecution to judgment, but to a favorable result,[50] a plaintiff complies with the condition to prosecute to "final judgment" where there is a prosecution to a final judgment on the merits of the replevin suit,[51] regardless of the success of plaintiff in the action.[52]

Dismissal of replevin action by plaintiff,[53] or on motion of defendant,[54] or by the court for failure to prosecute,[55] or to enter the writ after service,[56] or for lack of jurisdiction[57] has been held to be a breach of the condition.[58]

Nonsuit has been held to constitute a final judgment to satisfy the condition.[59]

[§ 400] **(5) Without Delay.** A condition in a replevin bond to prosecute the action "without delay" contemplates that plaintiff will use due diligence in bringing his suit to a final determination according to the circumstances of the particular case,[60] but unless the delay is occasioned by plaintiff there will not be a breach of this condition.[61]

Pending determination of replevin suit there may be a breach of this condition, so that while a plea that the replevin suit is still pending may save a forfeiture of the condition to prosecute with effect,[62] it is not a good plea where the action is based on the breach of the condition to prosecute without delay.[63]

[§ 401] **(6) Effect of Death of Parties.** It has been held that the condition to prosecute with effect is saved, where plaintiff in replevin dies before a nonsuit or verdict is rendered against him.[64] Likewise a condition to prosecute to final judgment is satisfied by a judgment entered on the abatement of the action by plaintiff's death.[65] Where, however, under statutory provisions the cause of action survives the death of plaintiff,[66] the condition to prosecute is not saved.[67]

[§ 402] **(7) Absence of Court.** The abatement of the replevin action by the removal of the court

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gally, in the proper way.' We are not disposed to draw nice distinctions in construing remedial statutes. The lawmakers had no such distinctions in their minds." McAlester v. Suchy, 1 Ind. T. 666, 669, 43 SW 952.

[44] Citizens' State Bank v. Morse, 60 Kan. 526, 57 P 115; Vallandingham v. Ray, 128 Ky. 506, 108 SW 896, 33 KyL 392.

[a] **Duly prosecute and with effect.**—"Did the plaintiff bank duly prosecute the replevin suit? It is contended by counsel for defendant in error that the words 'duly prosecute' are synonymous with 'prosecute to effect.' We do not concur in this view. The word 'duly' is defined: 'In due time or proper manner; in accordance with what is right, required, or suitable; fittingly, becomingly, regular' (Stand. Dict.); 'in due manner, when, or as due; agreeable to obligation or propriety, exactly, fittingly, properly' (Cent. Dict.) In Morrison v. Wells, 48 Kan. 494, 29 P 601, there was a recital that plaintiffs had duly filed their motion. The court said: 'The word "duly" means properly, regularly, and in this connection indicates that the motion was regularly and properly filed.' 'Duly' in legal parlance means 'according to law.'" Citizens' State Bank v. Morse, 60 Kan. 526, 528, 57 P 115.

[45] Vallandingham v. Ray, 128 Ky. 506, 108 SW 896, 33 KyL 392.

[a] **Illustration.**—Where trial of the replevin action occurred about seven months after the action was commenced, and a general verdict for defendant was rendered, there was no breach of the condition. Citizens' State Bank v. Morse, 60 Kan. 526, 57 P 115.

[46] Citizens' State Bank v. Morse, 60 Kan. 526, 57 P 115.

[47] McAlester v. Suchy, 1 Ind. T. 666, 43 SW 952; Citizens' State Bank v. Morse, 60 Kan. 526, 57 P 115 (dictum); McKey v. Laufiin, 48 Kan. 581, 30 P 16; Manning v. Manning, 26 Kan. 98; Kentucky Land, etc., Co. v. Crabtree, 118 Ky. 395, 80 SW 1161, 26 KyL 283.

[48] Biddinger v. Pratt, 50 Oh. St. 719, 35 NE 795.

[49] Allen v. Lowe, 113 Nebr. 443, 203 NW 571. See Citizens' State Bank v. Morse, 60 Kan. 526, 57 P 115 (dictum).

[50] Hall v. Smith, 10 Iowa 45.

[51] Rosen v. U. S. Rubber Co., (Mass.) 167 NE 655, 65 ALR 1299; Sullivan v. Martinelli, 261 Mass. 261, 158 NE 662; Carroll v. Berger, 255 Mass. 132, 135, 150 NE 870; Chadwick v. Badger, 9 N. H. 450; Pierce v. King, 14 R. I. 611.

"The provision that the obligors of the bond 'shall prosecute said action of replevin to final judgment' plainly contemplates a prosecution to a final judgment on the merits so as to determine a right of possession in the plaintiffs in replevin or to direct a return and restoration to the defendants." Carroll v. Berger, supra.

"We think, however, that in order to satisfy the condition of the bond the plaintiff in replevin must prosecute his writ to a final judgment on the merits, so as either to determine a right of possession in himself or to direct a return and restoration to the defendant." Pierce v. King, supra.

[52] See cases supra note 51.

[53] Hall v. Smith, 10 Iowa 45.

[54] Tuck v. Moses, 54 Me. 115.

[55] Sullivan v. Martinelli, 261 Mass. 261, 158 NE 662.

[56] Jones v. Smith, 79 Me. 452, 10 A 256; Parker v. Young, 188 Mass. 600, 75 NE 98; Smith v. Whiting, 100 Mass. 122; Gardiner v. McDermott, 12 R. I. 206.

[57] Carroll v. Berger, 255 Mass. 132, 150 NE 870; Pierce v. King, 14 R. I. 611.

[58] See supra notes 50–57.

[59] Chadwick v. Badger, 9 N. H. 450.

[60] Axford v. Perrett, 4 Bing. 586, 13 ECL 648, 130 Reprint 894; Gents v. Cutts, 12 Jur. 113; Bletcher v. Burn, 24 U. C. Q. B. 124, 259.

[a] **Reasonable diligence.**—The condition to prosecute without delay means that "plaintiff in replevin is bound to proceed with his suit much as an attorney is who has undertaken to use due diligence, that is, with a reasonable diligence, according to the circumstances of the particular case." Gents v. Cutts, 12 Jur. 113, 114.

[b] **Inexcusable delay** of two years in the prosecution of a replevin action was held a breach of the condition. Axford v. Perrett, 4 Bing. 586, 13 ECL 648, 130 Reprint 894.

[61] Harrison v. Wardle, 5 B. & Ad. 146, 27 ECL 70, 110 Reprint 746.

[a] **Illustration.**—Where the cause had been removed, and plaintiff appeared, but defendant did not, as a result of a failure of the sheriff to summon him, a delay thereby occasioned was not a breach of the condition. Harrison v. Wardle, 5 B. & Ad. 146, 27 ECL 70, 110 Reprint 746.

[62] See supra § 397.

[63] Harrison v. Wardle, 5 B. & Ad. 146, 27 ECL 70, 110 Reprint 746; Culham v. Love, 30 U. C. Q. B. (Ont.) 410; Welsh v. O'Brien, 28 U. C. Q. B. (Ont.) 405.

[64] Morris v. Matthews, 2 Q. B. 293, 42 ECL 681, 114 Reprint 115; Ormond v. Bierly, Carth. 519, 90 Reprint 896.

[65] Badlam v. Tucker, 1 Pick. (Mass.) 284.

[a] **Reason for rule.**—"Where the condition of a bond is possible at the time it is made, and before the same can be performed the condition becomes impossible by the act of God, or of the law, or of the obligee, there the obligation is saved." Badlam v. Tucker, 18 Mass. 284, 287.

[66] See Abatement and Revival § 348.

[67] Waples v. Adkins, 5 Del. 381; Lahey v. Brady, 1 Daly (N. Y.) 443.

before whom it was commenced,[68] or the failure of the court to be present when the case comes to trial[69] will not breach the condition of the bond to prosecute the action.

[§ 403] **b. Condition To Return Property[70]—(1) In General.** Since the conditions for a return of the property are in many respects the same in redelivery bonds[71] many of the principles treated here will also be considered under defendant's redelivery bond.[72] When a return of personal property is adjudged in an action of replevin, in order to avoid liability it is the duty of plaintiff, if he has secured possession thereof pending the litigation, to take active measures to redeliver it to defendant,[73] within a reasonable time,[74] and usually in the same condition as it was when taken.[75] The failure of plaintiff to return the property to defendant in accordance with a valid judgment for its return,[76] or a failure to return in accordance with the condition of the bond, although no judgment is rendered for its return[77] is a breach of the condition of the bond for which an action thereon will lie.

[§ 404] **(2) Sufficiency of Return[78]—(a) In General.** As to what constitutes a sufficient return of the property to comply with the condition of the bond and judgment depends in a large measure on the particular circumstances of the case.[79] Thus the condition may be satisfied where the property comes into the hands of defendant in replevin in any manner, pending or subsequent to the replevin suit.[80] A tender or a return of the property must ordinarily be made to the holder of the replevin judgment,[81] but a return to an officer executing a writ of return against plaintiff for defendant may be equivalent to such a return.[82] A mere return, however, to the officer who took the property under plaintiff's replevin writ, is not a sufficient return.[83]

Place of return. The rule that plaintiff must return the property to defendant when a return has been adjudged further imposes on plaintiff the duty of seeking out defendant and tendering the property to him if it be readily capable of manual delivery,[84] or if such a course is difficult by reason of the bulky character of the property, an offer to redeliver it to defendant is all that the law requires.[85] Where the property has not been removed by plaintiff from the place where replevied, an offer to give defendant possession at that place, is sufficient if the property is bulky in character.[86] Such offer, however, is ineffectual unless plaintiff also withdraws his control over the property.[87]

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[68] Kidder v. Merryhew, 32 Mich. 470.

[a] **Removal of the justice.**—"Plaintiff in replevin could not be considered in fault on account of the removal of the justice from the township without placing the suits in a shape to be carried on. The suits being properly commenced, the caption of the property was a lawful consequence, and the plaintiff in replevin, being unable either to compel the justice to remain in the township, or to take the proper steps to prevent an abatement in consequence of his removal, ought not to be held responsible in suits on the bonds." Kidder v. Merryhew, 32 Mich. 470, 471.

[69] Pierce v. Hardee, 1 Thomps. & C. (N. Y.) 557.

[a] **Absence of justice on return-day.**—On the return day of process the parties were present at the office of the justice, but the justice was absent, and the suit was not further prosecuted. It was held that the replevin suit was prosecuted as far as plaintiff therein was able to prosecute, and its abatement, by reason of the absence of the justice, was not a breach of the condition in the undertaking to prosecute. Pierce v. Hardee, 1 Thomps. & C. (N. Y.) 557.

[70] **Satisfaction and discharge of replevin judgment by return of property** see supra § 329.

[71] Hallide Mach. Co. v. Whidbey Island Sand, etc., Co., 73 Wash. 403, 131 P 1156, 45 LRANS 40.

[72] See infra §§ 410-412.

[73] Berry v. Hoeffner, 56 Me. 170; Maguire v. Pan-American Amusement Co., 205 Mass. 64, 91 NE 135, 137 AmSR 422, 18 AnnCas 110; Jennison v. Haire, 29 Mich. 207; Capital Lumbering Co. v. Learned, 36 Or. 544, 59 P 454, 78 AmSR 792.

[74] Capital Lumbering Co. v. Learned, supra.

[a] **Mere delay** during three winter months in complying with a judgment requiring the return of a replevined threshing machine did not justify the owner's refusal to accept it when returned. Wallace v. Cox, 94 Nebr. 194, 142 NW 891, 47 LRANS 835, AnnCas1914D 109, 92 Nebr. 354, 138 NW 578, AnnCas1913E 1158.

[75] See infra § 405.

[76] U. S.—Sweeney v. Lomme, 22 Wall. 208, 22 L. ed. 727.

Colo.—Western Finance, etc., Co. v. Fisher, 72 Colo. 121, 210 P 66.

Ill.—Schweer v. Schwabacher, 17 Ill. A. 78.

Mass.—Maguire v. Pan-American Amusement Co., 211 Mass. 22, 97 NE 142; Davis v. Harding, 3 Allen 302.

N. Y.—Harrison v. Wilkin, 78 N. Y. 390; Sauerman v. Fidelity, etc., Co., 145 NYS 114.

Okl.—Dupree v. Jordan, 123 Okl. 91, 252 P 67; Grimes v. Payne, 116 Okl. 295, 244 P 753.

Pa.—Pittsburgh Nat. Bank v. Hall, 107 Pa. 583, 589.

"The undertaking to prosecute with effect is certainly broken when the plaintiff in replevin fails in his action. If he fails to return the goods after being ordered to do so, that also is a breach, but it is a different and an independent breach of another undertaking." Pittsburgh Nat. Bank v. Hall, supra.

[a] **Conditional judgment.**—Where the judgment in a replevin suit provides that plaintiff, mortgagee, is entitled to the replevined property for the purpose of foreclosing his mortgage, unless defendant within three days tenders plaintiff the amount found by the jury to be due plaintiff, then plaintiff shall deliver the replevined property to defendant, and defendant makes the tender, but plaintiff refuses to accept it, and refuses to return the property, an action will lie in favor of defendant for the value thereof. Emerson-Brantingham Impl. Co. v. Ritter, 92 Okl. 71, 218 P 315.

[b] **Order of court without jurisdiction.**—After a court has adjudged, without appeal being taken, that it had no jurisdiction of a replevin suit, its order that the property replevied be returned is void, and noncompliance therewith constitutes no breach of the bond conditioned for a return of the property, if a return be adjudged. Elder v. Greene, 34 S. C. 154, 13 SE 323.

[77] Wood v. Coman, 56 Ala. 283.

[a] **Illustration.**—Under a condition that plaintiffs "shall deliver the said property to the defendants in this suit within 30 days after judgment in case they fail in this suit," a failure to return the property within the time specified was a breach of the bond, although on plaintiffs' voluntary nonsuit a judgment for costs only was rendered. Wood v. Coman, 56 Ala. 283.

[78] **Sufficiency of return to satisfy replevin judgment** see supra § 329.

[79] See infra text and notes 80-91.

[80] Hunt v. Robinson, 11 Cal. 262; Rinker v. Johnson, 29 Nebr. 783, 46 NW 211; Lewis v. McNary, 38 Or. 116, 62 P 897.

[81] Hunt v. Robinson, 11 Cal. 262; Blatchford v. Boyden, 122 Ill. 657, 13 NE 801; Richards v. Rape, 3 Ill. A. 24; Capital Lumbering Co. v. Learned, 36 Or. 544, 59 P 454, 78 AmSR 792.

[a] **Replevy from sheriff on execution.**—Where goods are replevied from a sheriff on execution, on judgment for him for a return, they can be rightfully returned to him alone and not to plaintiff in execution. Blatchford v. Boyden, 122 Ill. 657, 13 NE 801.

[b] **Return to defendant's mortgagee.**—Where plaintiff in replevin for an automobile was unsuccessful, but defendant's mortgagee secured possession of the car, sold it, and credited defendant with the net proceeds, in an action on plaintiff's bond conditioned for the return of the automobile if possession thereof be adjudged for defendant, there is no breach of said condition as the mortgagee's possession was equivalent to a return to defendant, there being privity between them. Van Almkerk v. H. O. S. Motor Sales Corp., 208 App. Div. 464, 203 NYS 639.

[82] Carrico v. Taylor, 3 Dana (Ky.) 33. See National Surety Co. v. Austin Mach. Corp., 35 F. (2d) 842 [certiorari den 280 U. S. 614 mem, 50 SCt 162 mem, 74 L. ed. 655 mem (recognizing rule).

"The possession of the property by the sheriff, under that writ, is in truth the possession of the party who sues out the writ, and he cannot, after such possession say the obligor has failed to make return of it." Carrico v. Taylor, supra.

[a] **Property subject to attachments.**—Where the property replevied by plaintiff has materially depreciated and is subject to attachment levies, the levy of an execution by defendant under the replevin judgment for a return is not a restoration as contemplated by statute. National Surety Co. v. Austin Mach. Corp., 35 F. (2d) 842 [certiorari den 280 U. S. 614 mem, 50 SCt 162 mem, 74 L. ed. 655 mem].

[83] Gould v. Warner, 3 Wend. (N. Y.) 54.

Identical property. Plaintiff in replevin must, in order to satisfy the condition, return or offer to return the identical property replevied and not other property of like kind and value.[88]

Bulky property. Where the articles of property which have been replevied are very large and bulky, an offer to deliver is a sufficient compliance with the condition,[89] but plaintiff must also be in a position to return them.[90]

Tender to be sufficient must be an unconditional offer to return the property.[91]

[§ 405] **(b) In Same Condition.**[92] Not only must plaintiff return the property to satisfy the condition and judgment for a return, but the property must ordinarily be returned in substantially the same condition in which it was when replevied,[93] or in like good order and condition,[94] even though the latter requirement is not inserted in the judgment.[95]

[§ 406] **(c) Partial Return.**[96] The condition of the bond requires a return of all the property taken in replevin.[97] Where, however, defendant accepts a partial return, such return will be a defense pro tanto to a suit on the bond.[98]

[§ 407] **c. Condition To Pay Damages and Costs.** The nonpayment of the damages[99] and costs[1] adjudged in favor of defendant in the replevin action is a breach of the condition of the replevin bond on which an action may be maintained.

[§ 408] **d. Judgment in Replevin as Essential To Fix Liability—(1) In General.** Whether or not the rendition of a judgment in the original replevin suit is a prerequisite to the accrual of liability on the replevin bond depends on the terms of the condition for the breach of which liability is sought to be enforced.[2]

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[84] Capital Lumbering Co. v. Learned, 36 Or. 544, 59 P 454, 78 AmSR 792.

[a] **Tender of a warehouse receipt** which would enable defendant to obtain possession of a piano some miles distant was not a compliance with the condition of the bond, even though hauling charges were also tendered. Moore v. Paul F. Beach Co., 221 Ill. A. 609.

[85] See infra note 89.

[86] Frey v. Drahos, 10 Nebr. 594, 7 NW 319.

[87] Pittsburgh Nat. Bank v. Hall, 107 Pa. 583.

[a] **Illustration of insufficient return.**—Replevied goods were, by consent of the parties, left on the premises of defendant in charge of the occupant, and the suit having been decided in favor of defendant, plaintiff's attorney wrote to him, giving him notice that he could retain them and treat them as his own, and it was held, in a suit on the replevin bond, that the latter was not a sufficient return if the goods were in charge of an agent of plaintiff in replevin, unless the agent was withdrawn. Pittsburgh Nat. Bank of Commerce v. Hall, 107 Pa. 583.

[88] Hamilton v. Wilcox, 126 Me. 529, 140 A 201; Richardson Drug Co. v. Teasdall, 59 Nebr. 150, 80 NW 488; Eickhoff v. Eikenbary, 52 Nebr. 332, 72 NW 308.

[a] **Acceptance of other property** was a good defense in an action on the bond for breach of this condition. Sands v. Fritz, 84 Pa. 15.

[89] Gans v. Woolfolk, 2 Mont. 458, 463; Frey v. Drahos, 10 Nebr. 594, 7 NW 319; Leeper v. Hobart First Nat. Bank, 26 Okl. 707, 110 P 655, 29 LRA NS 747, AnnCas1912B 302; Capital Lumbering Co. v. Learned, 36 Or. 544, 59 P 454, 78 AmSR 792.

"The carpet was a bulky and cumbersome article and the respondents were not required to tender it, like money, to the appellants wherever found. They were obliged to deliver the property at some particular place. If the appellants neglected or refused to appoint the place the respondents had the right to select it, with a reasonable regard for the convenience of the appellants, and there deliver the goods." Gans v. Woolfolk, supra.

[a] **Property not bulky.**—Where in replevin for a horse hack, three calves and a heifer, defendant was entitled to an actual tender of the property by taking it to him in order to comply with the judgment for a return. Capital Lumbering Co. v. Learned, 36 Or. 544, 59 P 454, 78 AmSR 792.

[90] Hanson v. Weber Impl. Co., 173 Ill. A. 293.

[91] Hunter v. Empire State Surety Co., 191 Ill. A. 634; Naylor v. Knapp, 92 N. J. L. 253, 104 A 131.

[a] **Conditional tender.**—(1) An offer to return an automobile to defendant on the condition he would pay the storage charges, was an insufficient compliance with the judgment for a return. Naylor v. Knapp, 92 N. J. L. 253, 104 A 131. (2) An offer in an affidavit of merits to return the property if it should be found and held that said replevin judgment is valid, is conditional and insufficient. Hunter v. Empire State Surety Co., 191 Ill. A. 634.

[92] **Right to reject depreciated property** see supra § 330.

[93] Ind.—Yelton v. Slinkard, 85 Ind. 190.

Ky.—Mounts v. Murphy, 126 Ky. 803, 104 SW 978, 31 KyL 1192.

Me.—Berry v. Hoeffner, 56 Me. 170.

Mass.—Maguire v. Pan-American Amusement Co., 205 Mass. 64, 91 NE 135, 137 AmSR 422, 18 AnnCas 110; Parker v. Simonds, 8 Metc. 205.

N. J.—Johnson v. Mason, 70 N. J. L. 13, 56 A 137.

Or.—Booth v. National Surety Co., 129 Or. 598, 278 P 987; Capital Lumbering Co. v. Learned, 36 Or. 544, 59 P 454, 78 AmSR 792.

Wash.—Hallide Mach. Co. v. Whidbey Island Sand, etc., Co., 73 Wash. 403, 131 P 1156, 45 LRANS 40.

[a] **Ordinary wear and tear.**—A tender of a piano in a worse condition, resulting from ordinary wear and tear from use, did not fulfill the condition to return "in as good condition as the same was at the time of making said claim." Johnson v. Mason, 70 N. J. L. 13, 56 A 137.

[94] Berry v. Hoeffner, 56 Me. 170; Parker v. Simonds, 8 Metc. (Mass.) 205.

[a] **Illustration.**—Under a bond conditioned "to return the said property in case such shall be the final judgment," a return in like good order and condition is necessary and the fact that a prior statute, prescribing the condition as a return "in like good order and condition," was repealed, would not alter the conclusion. Parker v. Simonds, 8 Metc. (Mass.) 205.

[95] Berry v. Hoeffner, 56 Me. 170; Fitzgerald v. Nickerson, (R. I.) 113 A 674.

[a] **Where the condition** for a return was "in like good order and condition," and judgment was "that the said defendant recover against the plaintiff restoration and return of the property," a return must be in like good order and condition. Berry v. Hoeffner, 56 Me. 170.

[96] **Right to reject partial return** see supra § 331.

[97] Yelton v. Slinkard, 85 Ind. 190; Patterson v. Fuller, 31 U. C. Q. B. (Ont.) 323.

[98] Edwin v. Cox, 61 Ill. A. 567; Harts v. Wendell, 26 Ill. A. 274; Sands v. Fritz, 84 Pa. 15; Parish v. Smith, 66 S. C. 424, 45 SE 16.

[a] **Illustration.**—In debt on a replevin bond, an affidavit of defense, setting forth that after judgment in the suit in replevin defendant had surrendered all the property replevied, except a part, which was missing, and that, instead of the latter, other and more valuable articles of the same description had been delivered to plaintiff, who had accepted the same, retaining a part and selling the rest, is sufficient. Sands v. Fritz, 84 Pa. 15.

[99] Moore v. Shields, 17 F. Cas. No. 9,775, 2 Cranch C. C. 529; Hamilton v. Wilcox, 126 Me. 529, 140 A 201.

[1] Cook v. Lothrop, 18 Me. 260; Chadwick v. Badger, 9 N. H. 450.

Judgment for return. Where the condition of plaintiff's bond is to return the property to defendant if a return thereof be adjudged, and the action is based on a breach of that condition, the general rule is that there is no breach of the condition and no right of action thereon accrues prior to the entry of some appropriate order or judgment awarding defendant a return of the property.[3] However, a judgment in replevin for a return of the property is not essential for a recovery of its value in an action on the bond where at the time of trial of the replevin suit, it was shown that a return of the property was impossible,[4] or where the action on the bond is based on a breach of the independent condition to prosecute the action.[5]

Alternative judgment.[6] Unless there appears some reason for not entering an alternative judgment for a return of the property as well as for its value,[7] as where the property cannot be returned,[8] it has been held that an alternative judgment for a return of the property as well as its value, is necessary to the accrual of liability for breach of the condition to return the property,[9] on the ground that unless a return is adjudged the surety is prejudiced as no execution for the return of the property can be issued against the principal.[10] The failure, however, to render a judgment for the value of the property as well as for a return ordinarily will not prevent the accrual of liability on the condition to return the property.[11]

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[2] See infra text and notes 3–16.

[3] Cal.—Mitchum v. Stanton, 49 Cal. 302; Donovan v. Ætna Indemn. Co., 10 Cal. A. 723, 103 P 365.

Colo.—Imel v. Van Deren, 8 Colo. 90, 5 P 803; Gallup v. Wortmann, 11 Colo. A. 308, 53 P 247.

Ill.—Danford v. Watkins, 337 Ill. 222, 168 NE 912; Vinyard v. Barnes, 124 Ill. 346, 16 NE 254; Cermak v. Pauksztis, 218 Ill. A. 341; Reno v. Woodyatt, 81 Ill. A. 553.

Ind.—Foster v. Bringham, 99 Ind. 505; Thomas v. Irwin, 90 Ind. 557.

Kan.—Citizens' State Bank v. Morse, 60 Kan. 526, 57 P 115.

Ky.—Vallandingham v. Ray, 128 Ky. 506, 108 SW 896, 33 KyL 392; Kentucky Land, etc., Co. v. Crabtree, 118 Ky. 395, 80 SW 1161, 26 KyL 283, 4 AnnCas 1133; Wall v. Humphreys, 4 Dana 209.

Me.—Smallwood v. Norton, 20 Me. 83, 37 AmD 39; Pettygrove v. Hoyt, 11 Me. 66.

Mass.—Rosen v. U. S. Rubber Co., 167 NE 655, 65 ALR 1299.

Minn.—Clark v. Norton, 6 Minn. 412.

Mo.—Cummings v. Badger Lumber Co., 130 Mo. A. 557, 109 SW 68.

Nebr.—Lee v. Hastings, 13 Nebr. 508, 14 NW 476.

Oh.—Munding v. Michael, 10 Oh. Cir. Ct. 165, 6 Oh. Cir. Dec. 76.

Or.—Peacock v. Kirkland, 74 Or. 279, 145 P 281.

Pa.—Kimmel v. Kint, 2 Watts 431.

S. C.—Seaboard Air Line R. Co. v. Hewlett, 94 S. C. 478, 78 SE 329.

Tenn.—Morning v. Alexander, 10 Heisk. 606.

Wash.—Ihrig v. Bussell, 68 Wash. 70, 122 P 608, LRA1917A 1188.

Wis.—Ashley v. Peterson, 25 Wis. 621.

[a] **Illustration.**—Plaintiff in replevin, who obtained the property by giving a bond conditioned to perform the judgment rendered and return the property, if return be adjudged, although unsuccessful in the action, was not liable on his bond for failure to return the property, where defendant failed to obtain a judgment for such return or any amount for the seizure or detention of the property. Vallandingham v. Ray, 128 Ky. 506, 108 SW 896, 33 KyL 392.

[b] **Judgment for return in higher court.**—If an undertaking in an action of replevin commenced in a justice's court limits the liability of the person who executes it to a judgment for a return of the property rendered by the justice, and such judgment was not recovered in the justice's court, a recovery cannot be had on the undertaking, even if on appeal such judgment is rendered by the county court. Mitchum v. Swanton, 49 Cal. 302.

[c] **Since a surety on a replevin bond is only liable if a return of the property be adjudged,** where no return was adjudged, defendant was not entitled to judgment against the sureties, although entitled to judgment against plaintiff on equities arising in the case. Cummings v. Badger Lumber Co., 130 Mo. A. 557, 109 SW 68.

[d] **General judgment for defendant** in replevin without more will not be construed as a judgment for a return so as to support an action on the bond for failure to return the property. Rosen v. U. S. Rubber Co., (Mass.) 167 NE 655, 65 ALR 1299.

[4] Donovan v. Ætna Indemn. Co., 10 Cal. A. 723, 103 P 365, 366; Sullivan v. Martinelli, 261 Mass. 261, 158 NE 662; Davis Bros. Co. v. Wallace, 190 N. C. 543, 130 SE 176.

"If, after the taking of the property on the replevin bond from the possession of the defendant, it should be lost or destroyed while in the possession of the plaintiff, the plaintiff is liable to the defendant for the value of the property. De Thomas v. Witherby, 61 Cal. 92, 44 AmR 542. Such being the law it is perfectly clear that, if at the trial of the replevin suit it should appear that for any reason the property taken on the replevin bond from the defendant cannot be returned, a judgment for its return would be idle and vain, and the court may without error, and certainly without exceeding its jurisdiction, give a money judgment to defendant for its value. Such a judgment would certainly be within the condition of the replevin bond, given in accordance with the statute, whereby the surety bound himself or itself 'for the payment to him [defendant] of such sum as may from any cause be recovered against the plaintiff.'" Donovan v. Ætna Indemn. Co., supra.

[5] Cal.—Ginaca v. Atwood, 8 Cal. 446.

Colo.—Cox v. Sargent, 10 Colo. A. 1, 50 P 201.

Conn.—Allen v. Woodford, 36 Conn. 143; Persse v. Watrous, 30 Conn. 139.

Ida.—Hoebel v. Utah-Idaho Live Stock Loan Co., 39 Ida. 294, 227 P 1048; Keenan v. Washington Liquor Co., 8 Ida. 383, 69 P 112.

Ind.—Wiseman v. Lynn, 39 Ind. 250; Wheat v. Catterlin, 23 Ind. 85; Brown v. Parker, 5 Blackf. 291; Manufacturers' Finance Trust v. Hadley, (A.) 166 NE 774; Peffley v. Kenrick, 4 Ind. A. 510, 31 NE 40.

Iowa.—Hall v. Smith, 10 Iowa 45.

Kan.—Little v. Bliss, 55 Kan. 94, 39 P 1025; Manning v. Manning, 26 Kan. 98.

Ky.—Kentucky Land, etc., Co. v. Crabtree, 118 Ky. 395, 80 SW 1161, 26 KyL 283, 4 AnnCas 1133 (dictum); Roman v. Stratton, 2 Bibb 199.

Mass.—Smith v. Whiting, 100 Mass. 122.

Minn.—Boom v. St. Paul Fdy., etc., Co., 33 Minn. 253, 22 NW 538.

Mo.—Elliott v. Black, 45 Mo. 372; Berghoff v. Heckwolf, 26 Mo. 511.

N. Y.—Rogers v. U. S. Fidelity, etc., Co., 84 NYS 203.

Pa.—Pittsburgh Nat. Bank of Commerce v. Hall, 107 Pa. 583; Balsley v. Hoffman, 13 Pa. 603; Gibbs v. Bartlett, 2 Watts & S. 29 [overr Kimmel v. Kint, 2 Watts 431]; Krumbhaar v. Stetler, 10 Pa. Co. 12.

R. I.—Wright v. Card, 16 R. I. 719, 19 A 709; Gardiner v. McDermott, 12 R. I. 206 [cit Smallwood v. Norton, 20 Me. 83, 37 AmD 39; Pettygrove v. Hoyt, 11 Me. 66; Collamer v. Page, 35 Vt. 387].

Wash.—Ihrig v. Bussel, 68 Wash. 70, 122 P 608, LRA1917A-1188 (dictum).

Eng.—Moore v. Bowmaker, 7 Price 223, 146 Reprint 954, 7 Taunt. 97, 2 ECL 277, 129 Reprint 39; Morgan v. Griffith, 7 Mod. 380, 87 Reprint 1304; Dias v. Freeman, 5 T. R. 195, 101 Reprint 110; Waterman v. Yea, 2 Wils. C. P. 42, 95 Reprint 674.

"As the conditions of the bond are independent, a breach of either of them will occasion a forfeiture; and on the broken condition for the prosecution of the action the obligee may recover full damages within the limit of the penalty, without first obtaining a judgment de retorno habendo or for damages." Berghoff v. Heckwolf, 26 Mo. 511, 513.

[a] **That there was no judgment for a return of the property** does not prevent a recovery on a replevin bond, but plaintiff must show that he has sustained damages by reason of plaintiff in replevin not prosecuting the writ with effect. Burch v. Dowling, 4 F. Cas. No. 2,139, 5 Cranch C. C. 646.

Condition to prosecute action see supra §§ 396–402.

[6] **In replevin action** see supra § 325.

[7] Levine v. Dohl, 179 App. Div. 777, 167 NYS 329.

[8] Eisenhart v. McGarry, 15 Colo. 1, 61 P 56; McCarthy v. Strait, 7 Colo. A. 59, 42 P 189. See Selby v. McQuillan, 59 Nebr. 158, 80 NW 504 (failure to render an alternative judgment in replevin was no defense to an action on an appeal bond where it is properly shown that property cannot be returned).

Judgment for damages and costs.[12] Under a condition of a replevin bond to pay damages and costs adjudged against plaintiff ordinarily there can be no breach of the condition until a judgment in replevin awarding damages and costs has been rendered.[13] Although a judgment in replevin for damages for detention has been held necessary where the replevin action was dismissed on defendant's motion,[14] it has also been held that such a judgment is not necessary where the action was dismissed by plaintiff.[15] Where the damages sought to be recovered in an action on the bond were caused subsequent to the judgment in replevin, as damages for depreciation in value, they may be recovered without a judgment for such damages in replevin.[16]

[§ 409] **(2) Dismissal or Nonsuit.** Unless the breach relied on is of a condition which cannot be broken until a formal judgment on the merits has been had,[17] an order or judgment dismissing the replevin suit or nonsuiting plaintiff therein is ordinarily the only order or judgment necessary before defendant in replevin may sue to enforce liability on the replevin bond,[18] provided such order or judgment of dismissal or nonsuit amounts to a breach of the particular condition in the bond to prosecute the action.[19] However, after a replevin suit is compromised and dismissed by the parties,[20] or dismissed by plaintiff because defendant makes no claim to the property,[21] no suit can be maintained on the bond, and where a proceeding, in which a defendant gives a replevin bond, is dismissed, the bond becomes functus officio, and hence there can be no recovery thereon.[22]

[§ 410] **3. Defendant's Redelivery Bond—a. Condition To Return Property—(1) In General.** In view of the fact that the conditions prescribed for a return of the property in delivery and redelivery bonds are in substance the same,[23] the law touching the obligations of defendant to return the property is in many respects the same.[24] As in the case of a plaintiff's bond, the accrual of liability on a redelivery bond depends on the precise terms of the conditions of the bond.[25] Ordinarily, it is the duty of defendant in replevin against whom a judgment for a return of the property has been rendered, to take such action as will put the property in plaintiff's possession,[26] and a failure to do so will constitute a breach of the condition[27] and render the obligors on the bond liable for the full amount, not exceeding the penalty, that plaintiff may have been damaged thereby.[28]

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[9] Field v. Lumbard, 53 Nebr. 397, 73 NW 703; H. T. C. Hotel Corp. v. Royal Indemn. Co., 225 App. Div. 524, 234 NYS 9; Tauber v. National Surety Co., 219 App. Div. 253, 219 NYS 387; Levine v. Dohl, 179 App. Div. 777, 167 NYS 329; Michaelson v. National Surety Co., 199 NYS 79.

[10] Tauber v. National Surety Co., 219 App. Div. 253, 219 NYS 387.

[11] Sweeney v. Lomme, 22 Wall. (U. S.) 208, 22 L. ed. 727; Green v. Rehbine, 44 Okl. 96, 144 P 182; Booth v. National Surety Co., 129 Or. 598, 278 P 987; Capital Lumbering Co. v. Learned, 36 Or. 544, 59 P 454, 78 Am SR 792.

[a] **Illustration.**—Where the bond was conditioned "for the return of said property, if return thereof be adjudged and for the payment to the said defendant of such sum as may from any cause be recovered" the obligors were liable although there was no judgment in the alternative for the value of the property. Sweeney v. Lomme, 22 Wall. (U. S.) 208, 22 L. ed. 727.

[b] **Common-law remedy on bond.**—(1) Where plaintiff in replevin is in possession of the property, and defendant recovers judgment for its return, but the value of the property is not found as required by Burns St. Annot. (1908) § 575 (Burns St. Annot. [1901] § 558), defendant in the replevin suit may sue on the bond to recover the value of the property, the common-law remedy for breach of the bond not being excluded by Burns St. Annot. (1908) § 599 (Burns St. Annot. [1901] § 581), authorizing on verdict for plaintiff, judgment in the alternative for the return of the property or the value thereof in case a return cannot be made. Whitney v. Lehmer, 26 Ind. 503; Lindsey v. Hewitt, 42 Ind. A. 573, 86 NE 446. (2) This holding is on the ground that the right of action arises by the common law out of a breach of the contract, and, the statute giving a remedy without negative words, the common-law remedy still remains, and may be pursued at plaintiff's option. Lindsey v. Hewitt, supra.

[12] **Necessity of assessment of damages in replevin suit** see supra §§ 389–392.

[13] Sopris v. Lilley, 2 Colo. 498; Lake v. Hargis, 82 Kan. 711, 109 P 670, 30 LRANS 366.

[a] **General judgment for defendant** is not a judgment for damages. Rosen v. U. S. Rubber Co., (Mass.) 167 NE 655, 65 ALR 1299.

[b] **Application of rule.**—Where the replevin action was dismissed without a judgment for a return or damages whereupon defendant brought a second replevin action in which judgment for possession of the same property and damages were awarded him, in an action on the replevin bond given by plaintiff in first action defendant could not recover damages adjudged in the second replevin action. Boyer v. Fowler, 1 Wash. T. 101.

[14] Howard v. Wyatt, 145 Ky. 424, 140 SW 655; Mounts v. Murphy, 126 Ky. 803, 104 SW 978, 31 KyL 1192.

[15] Kentucky Land, etc., Co. v. Crabtree, 118 Ky. 395, 80 SW 1161, 26 KyL 283, 4 AnnCas 1133.

[a] **Rule discussed and distinguished.**—"We are referred to the case of Kentucky Land, etc., Co. v. Crabtree, 118 Ky. 395, 80 SW 1161, 26 KyL 283, as authorizing an action on a bond against the surety to recover from him damages when not fixed in the judgment disposing of the action for the claim and delivery of the property. The question in that case was not like the case at bar. In that case the plaintiff in the action obtained possession of some logs by giving the bond and afterward disposed of them, entered a motion, and dismissed the action without prejudice, and the court decided that it had violated its bond, in that it failed to duly prosecute the action. The court said in that case that: 'The plaintiff should not be permitted, by the execution of a bond, to obtain the possession of the property and upon its own motion dismiss the action without prejudice, and thus relieve itself and surety from all responsibility on the bond.' Here the defendant, now appellee, upon his own motion caused a dismissal of that action and caused a judgment to be rendered in his behalf for the property if to be had, if not, for its value, but failed to present and recover the damages he had sustained by the taking and withholding of the property from him"). Mounts v. Murphy, 126 Ky. 803, 807, 104 SW 978, 31 KyL 1192.

[16] Mounts v. Murphy, 126 Ky. 803, 104 SW 978, 31 KyL 1192; Booth v. National Surety, 129 Or. 598, 278 P 987.

[17] See supra § 408.

[18] U. S.—Gilbert v. American Surety Co., 121 Fed. 499, 57 CCA 619, 61 LRA 253.

Ind.—Peffley v. Kenrick, 4 Ind. A. 510, 31 NE 40.

Kan.—Little v. Bliss, 55 Kan. 94, 39 P 1025.

Minn.—Boom v. St. Paul Fdy., etc., Co., 33 Minn. 253, 22 NW 538 [dist Clark v. Norton, 6 Minn. 412].

N. D.—Siebolt v. Konatz Saddlery Co., 15 N. D. 87, 106 NW 564.

N. B.—Landry v. Sivret, 39 N. B. 356.

[19] See supra §§ 396–402.

[20] Gerard v. Dill, 96 Ind. 101.

[21] Bown v. Weppner, 62 Hun 579, 17 NYS 193.

[a] **Where defendant makes no allegation of ownership of, or right of possession to, the property replevied,** and denies that it is in his possession, and plaintiff thereupon withdraws suit, and a judgment or dismissal is rendered, no action can be maintained against the sureties on the bond given by plaintiff for the prosecution of the action, and for the return of the property to defendant in case the possession thereof should be adjudged to him, or in case the action should abate or be discontinued before the property be so returned. Bown v. Weppner, 62 Hun 579, 17 NYS 193.

[22] Avery v. Popper, 92 Tex. 337, 48 SW 572, 49 SW 122, 71 AmSR 849 [mod (Civ. A.) 45 SW 951]; Love v. Hudson, 24 Tex. Civ. A. 377, 59 SW 1127; Hail v. Tunstall, 21 Tex. Civ. A. 593, 54 SW 323; Lincoln v. Hollenbach, (Tex. Civ. A.) 49 SW 686; Mitchell v. Bloom, (Tex. Civ. A.) 46 SW 406, 91 Tex. 634, 45 SW 558.

[a] **Illustration.**—Where property seized under a writ of sequestration is replevied, the quashing of the sequestration discharges the replevin bond. Avery v. Popper, 92 Tex. 337, 48 SW 572, 49 SW 122, 71 AmSR 849 [mod (Civ. A.) 45 SW 951].

[§ 411] **(2) Sufficiency of Return[29]—(a) In General.** The condition to return the property on a rendition of a judgment for its return ordinarily contemplates that the property be returned to plaintiff in the replevin action.[30] However, a seizure of the property by an officer for plaintiff under a writ of return may be a sufficient compliance with the condition.[31] But the reacquisition of the property by plaintiff by purchase at a sale will not constitute a return sufficient to comply with the condition.[32]

The identical property which defendant withheld under his redelivery bond must be returned to plaintiff.[33]

Bulky property. Where the property adjudged to be returned is bulky in character, an offer to return the same will satisfy the condition.[34]

Partial return.[35] To comply with the judgment in replevin and the condition of a redelivery bond it is necessary that all the property be returned,[36] but an acceptance of a partial return will operate as a pro tanto satisfaction of the replevin judgment and discharge on the bond,[37] and only as such.[38]

[§ 412] **(b) In Same Condition.**[39] Under the condition to return the property in a redelivery bond, defendant on rendition of a judgment for a return, must ordinarily return or offer to return the property in substantially the same condition as it was when taken in order to avoid a breach of the condition,[40] without decrease in market value,[41] even though the bond obligating defendant to return the property does not specify the condition in which it is to be returned.[42] However, under the particular condition of some redelivery bonds, the court may not require a return in as good condition, so that a return in a worse condition than when taken may satisfy the condition.[43]

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[23] **Condition to return property under plaintiff's bond** see supra §§ 404-406.

[24] Hallide Mach. Co. v. Whidbey Island Sand, etc., Co., 73 Wash. 403, 131 P 1156, 45 LRANS 40.

[25] See infra text and notes 26, 27.

[26] See supra § 161.

[27] U. S.—Douglass v. Douglass, 21 Wall. 98, 22 L. ed. 479.

Cal.—Nickerson v. Chatterton, 7 Cal. 568.

Colo.—Trindle v. Register Printing, etc., Co., 58 Colo. 81, 143 P 282.

Ind.—Shaver v. Kappelas, 83 Ind. A. 338, 146 NE 858.

Iowa.—Nimon v. Reed, 79 Iowa 524, 44 NW 802.

Kan.—Binkley v. Dewall, (A.) 58 P 1028.

Miss.—Hazlett v. Witherspoon, 25 S 150.

N. J.—Johnson v. Mason, 70 N. J. L. 13, 56 A 137.

N. D.—Vallancy v. Hunt, 26 N. D. 611, 145 NW 132.

Oh.—Stern-Bloch Co. v. Heinsheimer, 1 OhS&CP 651, 1 OhNP 44.

Okl.—Gibson v. International Harvester Co., 105 Okl. 253, 232 P 80; Gerber v. Wehner, 96 Okl. 48, 220 P 648.

Or.—Burkitt v. Vail, 123 Or. 461, 238 P 1114, 260 P 1014.

Pa.—Com. v. Schroeder, 18 Pa. Dist. 929.

Philippine.—Bachrach Motor Co. v. Bona, etc., Guarantee Co., Ltd., 44 Philippine 378.

S. C.—Gibbes Mach. Co. v. Moore, 107 S. C. 327, 92 SE 1033.

S. D.—Schleuning v. West, 34 S. D. 356, 148 NW 604.

Tenn.—Massachusetts Bonding Co. v. McLemore, 4 Tenn. Civ. A. 633.

Tex.—Crenshaw v. Staples, (Civ. A.) 173 SW 1184.

Wash.—Arthur v. Sherman, 11 Wash. 254, 39 P 670.

[a] **Delivery of property to defendant must precede liability of sureties** on the undertaking, although it is under seal, and such delivery must be alleged in the complaint in an action on the undertaking. Nickerson v. Chatterton, 7 Cal. 568.

[b] **Sale of property.**—Under a redelivery bond conditioned to keep the property safely and from injury and to return the same if a return is adjudged, a sale of the property by defendant, after judgment for plaintiff for a return, was a breach of the condition. Shaver v. Kappelas, 83 Ind. A. 338, 146 NE 858.

[28] Shaver v. Kappelas, 83 Ind. A. 338, 146 NE 858; Gerber v. Wehner, 96 Okl. 48, 220 P 648; Crenshaw v. Staples, (Tex. Civ. A.) 173 SW 1184.

[29] **Sufficiency of return to satisfy replevin judgment** see supra § 329.

Effect of loss or destruction of property see infra § 420.

[30] Gerber v. Wehner, 96 Okl. 48, 220 P 648; Schleuning v. West, 34 S. D. 356, 148 NW 604.

[31] Douglass v. Douglass, 21 Wall. (U. S.) 98, 104, 22 L. ed. 479.

"If no writ de retorno habendo had issued it would have been the duty of the defendant to seek the plaintiff and deliver the property to him if he would receive it. Had the defendant failed to do this, there would have been a breach of the bond and he would have been liable. The action taken by the plaintiff obviated the necessity of his doing anything in that way." Douglass v. Douglass, supra.

[a] **Rule not applied.**—Where the sheriff, holding a special execution for the return of property, called on defendants who informed him they had nothing to do with the property, and where subsequently the sheriff found the property in the hands of a third person who allowed him to check the goods but forbade their removal, it was held that such acts did not constitute a return of the property. Arthur v. Sherman, 11 Wash. 254, 39 P 670.

[32] Gibbes Mach. Co. v. Moore, 107 S. C. 327, 92 SE 1033.

[33] Hazlett v. Witherspoon, (Miss.) 25 S 150; Gerber v. Wehner, 96 Okl. 48, 220 P 648.

[34] Nimon v. Reed, 79 Iowa 524, 44 NW 802; Kansas Nat. Drill, etc., Co. v. Redd, 97 Kan. 1, 154 P 250; Schleuning v. West, 34 S. D. 356, 148 NW 604; Arthur v. Sherman, 11 Wash. 254, 39 P 670.

[a] **Sufficient tender.**—(1) In an action on defendant's redelivery bond there was a sufficient compliance with the condition to return certain pumping machinery in a mine, where it had been replevied and not removed and was bulky, by an offer to plaintiff to put him in possession. Nimon v. Reed, 79 Iowa 524, 44 NW 802. (2) In an action in which a redelivery bond was given for unwieldy well-drilling property seized under attachment, evidence held to show a sufficient tender of return of the property, where the sheriff's representative said to plaintiff's agent, "If they are your machines, take them." Kansas Nat. Drill, etc., Co. v. Redd, 97 Kan. 1, 154 P 250.

[b] **Insufficient tender.**—Where the subject matter of the replevin action was a meat market, including tools, fixtures, a stock of meat, wagon, cart, harness and money, a tender of the key to the building without accompanying such tender with an invoice or offering to return the wagon, harness, cart and the cash and pay the costs of the action was insufficient to comply with the redelivery bond. Schleuning v. West, 34 S. D. 356, 148 NW 604.

[c] **Unconditional tender.**—That the representative of the sheriff and the attaching creditor, in making a tender to the mortgagor of the property seized by the sheriff under attachment and held under a redelivery bond given in replevin brought by the mortgagor, stated that he would pay such damages as the judge and jury might determine did not make the tender insufficient. Kansas Nat. Drill, etc., Co. v. Redd, 97 Kan. 1, 154 P 250.

[35] **Right to reject** see supra § 331.

[36] Trindle v. Register Printing, etc., Co., 58 Colo. 81, 143 P 282; Com. v. Schroeder, 18 Pa. Dist. 929.

[a] **Dividends on stock.**—Judgment for plaintiff for the return of a certificate of stock carries with it the right of the plaintiff to dividends paid to defendant during the detention. Com. v. Schroeder, 18 Pa. Dist. 929.

[37] Larabee v. Cook, (Kan. A.) 61 P 815.

[38] Trindle v. Register Printing, etc., Co., 58 Colo. 81, 143 P 282.

[39] **Right to reject depreciated property** see supra § 330.

[§ 413] **b. Condition To Pay Damages and Costs.** As in the case of a delivery bond,[44] a failure to pay damages and costs properly adjudged in the replevin suit for plaintiff is a breach of the condition on which an action on the bond may be maintained,[45] notwithstanding the property may have been returned.[46]

[§ 414] **c. Judgment in Replevin as Essential To Fix Liability.** Ordinarily the condition in a redelivery bond to return the property if a return thereof be adjudged is not broken and no liability thereon accrues until a judgment for a return has been rendered in the replevin action.[47] However, a recovery of the value of the property is proper in an action on the bond without proof of a judgment in replevin for a return where a judgment in replevin for a return of the property would on account of its loss or destruction be an idle act,[48] or where the only judgment prescribed by statute is a money judgment.[49] Although an action on a plaintiff's bond may be based on the independent condition to prosecute the action without proof of a judgment for a return of the property,[50] the courts are not in uniformity in permitting in an action on a redelivery bond a recovery of the value of the property for breach of the condition to pay damages, although the conclusions reached sometimes are based on the different wording of the conditions.[51–52] Thus it has been held under the particular terms of the condition to pay such sum as may be recovered, that this condition is independent and distinct from the condition to return the property,[53] and so even though no judgment in replevin for a return has been rendered, an action on the bond for the value may be maintained.[54] In other cases the particular condition to pay such sum as may be recovered has been held to be conditional on a judgment for a return, so that no action may be maintained for breach of this condition without a judgment for a return.[55] A condition to perform the replevin judgment is sufficiently broad to permit in an action on the bond a recovery of a money judgment rendered in the replevin action although there is no judgment for a return of the property.[56]

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[40] Colo.—Trindle v. Register Printing, etc., Co., 58 Colo. 81, 143 P 282.

Kan.—Walrus Mfg. Co. v. Quackenbush, 128 Kan. 474, 279 P 3 [den reh 128 Kan. 216, 276 P 806].

Miss.—Moody v. Citizens' Sav., etc., Co., 135 Miss. 403, 99 S 817; Hazlett v. Witherspoon, 25 S 150.

N. J.—Johnson v. Mason, 70 N. J. L. 13, 56 A 137.

N. D.—Vallancy v. Hunt, 26 N. D. 611, 145 NW 132.

Okl.—Dew v. Hoffman, 130 Okl. 247, 266 P 1107; Gerber v. Wehner, 96 Okl. 48, 220 P 648; Gibson v. International Harvester Co., 105 Okl. 253, 232 P 80.

Or.—Burkitt v. Vail, 123 Or. 461, 238 P 1114, 260 P 1014.

S. D.—Schleuning v. West, 34 S. D. 356, 148 NW 604.

Tenn.—Massachusetts Bonding Co. v. McLemore, 4 Tenn. Civ. A. 633.

[41] Dew v. Hoffman, 130 Okl. 247, 266 P 1107.

"In order to avoid the penalties of a redelivery bond by reason of a tender of the property after judgment, defendant must show a tender of the property within a reasonable time and in substantially as good condition as on the date on which it was replevied and without material depreciation in value, and a tender of the identical property in substantially as good condition but which is of less value by reason of decrease in market value does not avoid the penalties of the bond." Dew v. Hoffman, 130 Okl. 247, 248, 266 P 1107.

[42] Grace City First State Bank v. Bradley, 57 N. D. 159, 220 NW 848; Gerber v. Wehner, 96 Okl. 48, 220 P 648; Bachrach Motor Co. v. Bona, etc., Guarantee Co., Ltd., 44 Philippine 378.

[a] **Illustration.**—A return of wheat in a depreciated condition will not satisfy the condition that "defendant will deliver said property to said plaintiff if such delivery be adjudged." Gerber v. Wehner, 96 Okl. 48, 220 P 648.

[43] Lewis v. McNary, 38 Or. 116, 62 P 897. See Douglass v. Douglass, 21 Wall. (U. S.) 98, 22 L. ed. 479 (if the obligor in the replevin bond has injured the property, or culpably suffered it to become injured while in his possession, a recovery cannot be had against him on the bond if the marshal has once taken possession. The marshal's possession is that of the obligee in the bond, and any redress for such injury must be had by a separate proceeding).

[a] **Illustration.**—Under a condition that "defendant shall deliver said property to above named plaintiffs, if delivery thereof be adjudged" in replevin for hops in which plaintiff secured judgment for a return, a return of the hops in a depreciated condition was not a breach of the condition, although plaintiff may recover for the depreciation in an independent action. Lewis v. McNary, 38 Or. 116, 62 P 897.

[44] See supra § 407.

[45] Vulcan Steam Shovel Co. v. Cobb, (Mo. A.) 199 SW 448; Bolt v. Milam, 110 S. C. 399, 96 SE 614.

[a] **Condition to perform judgment.**—A failure to pay damages adjudged, is a breach of a condition to perform the judgment of the court in the action. Vulcan Steam Shovel Co. v. Cobb, (Mo. A.) 199 SW 448.

[b] **Where the damages are improperly awarded** in the replevin suit and such award is not conclusive in an action on the bond, there is no breach of the condition. Clark v. Ellingson, 35 N. D. 546, 161 NW 199.

[46] Hicks v. McBride, 3 Phila. (Pa.) 377; Bolt v. Milam, 110 S. C. 399, 96 SE 614.

[47] Colo.—Colorado Springs Co. v. Hopkins, 5 Colo. 206; Lewin v. Stein, 7 Colo. A. 65, 42 P 185.

Ind. T.—Spencer v. Davidson, 5 Ind. T. 231, 82 SW 731.

Kan.—Swartz v. English, 4 Kan. A. 509, 44 P 1004.

Minn.—New England Furniture, etc., Co. v. Bryant, 64 Minn. 256, 66 NW 974.

N. Y.—Gallarati v. Orser, 27 N. Y. 324; Jaggar v. Lalance, etc., Mfg. Co., 8 Daly 251.

N. C.—Orange Trust Co. v. Hayes, 191 N. C. 542, 132 SE 466.

N. D.—Farmers' Nat. Bank v. Ferguson, 28 N. D. 347, 148 NW 1049; Larson v. Hanson, 21 N. D. 411, 131 NW 229.

S. C.—Wilkins v. Willimon, 128 S. C. 509, 524, 122 SE 503.

Tenn.—Massachusetts Bonding Co. v. McLemore, 4 Tenn. Civ. A. 633.

Tex.—A. C. Horn Co. v. Bonin, (Civ. A.) 23 SW (2d) 804.

"The second cause of action was for failure to return a portion of the property. The demurrer was probably sustained to this cause of action, because it did not appear from the complaint that an order was entered for a return of the property. We think such order was necessary before there could be a breach of this condition of the bond. The condition was: 'And deliver said property to the Colorado Springs Company, in case return thereof shall be awarded.'" Colorado Springs Co. v. Hopkins, 5 Colo. 206, 210.

"It seems indisputable that the surety's obligation does not mature until the condition of the bond has been fulfilled; an adjudication by the Court of a delivery of the car to the plaintiff, with an assessment of the value and damages." Wilkins v. Willimon, supra.

[a] **Vacation of judgment for return.**—Where in replevin before a justice of the peace a judgment for a return of the property was adjudged, but an appeal taken to the district court did not affirm nor reverse the judgment, such judgment was vacated by the appeal, and in the absence of a rendition of a judgment for a return by the district court there was no breach of the condition to return. Swartz v. English, 4 Kan. A. 509, 44 P 1004.

[b] **Judgment for possession.**—(1) A judgment in replevin that at the commencement of the action the right of possession was in plaintiff, that costs be taxed against defendant, and showing that they have been paid, will not support an action for breach of a delivery bond conditioned to deliver the property to plaintiff if delivery be adjudged, and to pay costs and damages awarded against defendant on failure to return the property. Lewin v. Stein, 7 Colo. A. 65, 42 P 185. (2) Judgment providing that plaintiff recover of defendant the possession of the automobile sued for, was held one for the return of the property, within conditions of replevin bond. Shaver v. Kappellas, 83 Ind. A. 338, 146 NE 858.

[c] **Sureties on an undertaking given under Code Proc. § 211,** to procure the return to defendant of personal property taken by the sheriff in an action of replevin, the undertaking being conditioned "for the delivery of the said property to the plaintiff, if such delivery shall be adjudged, and for the payment to him of such sum as may for any cause be recovered against the defendant in this action," are not liable for a breach of the condition of the undertaking on a mere failure of defendant in the action to pay a money judgment for damages for the conversion of the property, no delivery of the property to plaintiff being adjudged, nor any demanded in the complaint. Jaggar v. Lalance, etc., Mfg. Co., 8 Daly (N. Y.) 251 [foll Gallarati v. Orser, 27 N. Y. 324].

[d] **Judgment against surviving defendant.**—Where one of two defendants in replevin dies, and the action is continued against the survivor, a recovery against him is a recovery "against the defendants" within the meaning of an undertaking given by defendants to obtain a redelivery of the property to them, thus rendering the sureties liable. Potter v. Van Vranken, 36 N. Y. 619; 2 Transcr. A. 73.

[e] **Where the bond is not conditioned on a judgment for a return,** but conditioned that defendant would deliver the goods to plaintiff, if the same should be adjudged to plaintiff a judgment for their value neces-

An alternative judgment for the value of the property as well as for a return has been held not essential to a recovery of its value in an action on the bond.[57]

Judgment for damages in the replevin action is essential before there can be a breach of the condition of the bond to pay damages.[58]

[§ 415] **C. Effect of Payment of Judgment or Claim.** While payment of the original claim or satisfaction of the judgment in the replevin action is a complete discharge of the principal and sureties on the replevin bond,[59] or a pro tanto discharge, if a partial payment is made,[60] an unauthorized set-off against an assignee of the bond will not constitute payment.[61] However, the surety on a replevin bond is not entitled to have the penalty of the bond reduced by reason of the fact that the property itself has been returned, but he still remains liable to the amount of the penalty for any other default of his principal, as for his failure to pay damages or costs adjudged against him.[62]

[§ 416] **D. Rights and Remedies of Sureties.**[63] In order to allow a surety on a bond in replevin to

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sarily carries a finding that the goods belong to plaintiff, and on such judgment recovery may be had on the bond. Johnson v. Mason, 64 N. J. L. 258, 45 A 618.

[48] Shaver v. Kappellas, 83 Ind. A. 338, 146 NE 858; Larson v. Hanson, 26 N. D. 406, 144 NW 681, 51 LRANS 655; Larson v. Hanson, 21 N. D. 411, 131 NW 229 (dictum).

[a] **Where the property was disposed of** by defendant pending the trial of the replevin suit, a judgment for the value of the property without an alternative judgment for a return, was sufficient to allow an action on the bond for the value. Shaver v. Kappellas, 83 Ind. A. 338, 146 NE 858.

[49] Ft. Wayne Electric Corp. v. Security Trust, etc., Co., 65 N. J. L. 221, 47 A 559.

[50] **Judgment as essential to fix liability on plaintiff's bond** see supra § 408.

[51–52] See infra text and notes 53–57.

[53] Parish v. Smith, 66 S. C. 424, 45 SE 16; Thomson v. Joplin, 12 S. C. 580, 581.

"It is clearly not the intention of the statute, which gives the language of the appropriate undertaking, to make the agreement to pay such sum as might from any cause be recovered against the defendant conditional upon there being a judgment for the return of the property to the plaintiff, and the bond must receive the same construction as the language of the act which it followed. There is no language to impart any such condition; on the contrary, the obligation of the sureties, as it regards the return of the property and the payment of any sum recovered, is stated in cumulative language, so that a separate and distinct breach may be assigned as to each." Thomson v. Joplin, supra.

[a] **Illustration.**—A condition "for the delivery of the said property to the plaintiff, if such delivery shall be adjudged, and for the payment to him of such sum as may in this action for any cause to be recovered," recovery for breach of the latter condition may be had, although there is no delivery adjudged. Parish v. Smith, 66 S. C. 424, 45 SE 16.

[54] See supra note 53.

[55] Gallarati v. Orser, 27 N. Y. 324; Farmers' Nat. Bank v. Ferguson, 28 N. D. 347, 148 NW 1049; Larson v. Hanson, 21 N. D. 411, 131 NW 229.

[a] **Illustration.**—A condition "for the delivery of the said property to the plaintiffs, if such delivery shall be adjudged, and for the payment to them of such sum as may, for any cause, be recovered," will not support an action on the bond for the value of the property where judgment for a return was not rendered. Larson v. Hanson, 21 N. D. 411, 413, 131 NW 229.

[b] **Under a bond conditioned** "for the delivery of the said property to the plaintiff, if such delivery shall be adjudged, and if return be not made for the payment to plaintiff of such sum as may, for any cause, be recovered," the court said: "These sureties did not obligate themselves to pay plaintiff the value of the property absolutely, but they merely bound themselves conditionally for such payment if a delivery therefor 'be adjudged and if return be not made.'" Farmers' Nat. Bank v. Ferguson, 28 N. D. 347, 350, 351, 148 NW 1049.

[56] American Bonding Co. v. Hurd, 143 Ky. 799, 137 SW 539.

[a] **Illustration.**—Where, in replevin, defendant gave a redelivery bond, binding himself and his surety to "perform the judgment of the court" in the action, and judgment was rendered therein, in favor of plaintiff, for one thousand dollars, interest, and costs, and was affirmed on appeal, it was no defense to an action on the bond that the judgment did not provide for the return of the specific property, if possible, and, if not, for its value, and because the value of the property was not assessed in that action. American Bonding Co. v. Hurd, 143 Ky. 799, 137 SW 539.

[57] Marix v. Franke, 9 Kan. 132.

[58] Moore v. Sanders, 114 S. C. 350, 103 SE 589.

[59] Cal.—Chambers v. Waters, 7 Cal. 390.

N. H.—Ramsey v. Landry, 78 N. H. 612, 102 A 531.

Pa.—Clements v. Dempsey, 7 Pa. Super. 52.

Vt.—Moore v. Campbell, 36 Vt. 361.

Wis.—Gage v. Allen, 84 Wis. 323, 54 NW 627.

[60] Carroll v. Swicord, (Ark.) 9 SW (2d) 783.

[61] Hamilton v. Wilcox, 126 Me. 529, 140 A 201.

[62] Wyman v. Robinson, 73 Me. 384, 40 AmR 360; Hendly v. McIntyre, 132 N. C. 276, 43 SE 824.

[a] **Illustration.**—Where plaintiff in replevin gave a bond for one hundred and ten dollars, while the goods replevied greatly exceeded that amount in value, and defendant recovered the value of the goods against a third party in whose hands they came, it was held to be no defense to a suit on the bond for the unsatisfied damages. Wyman v. Robinson, 73 Me. 384, 40 AmR 360.

[63] **Cross references:**
Generally see Principal and Surety §§ 374–464.
Discharge of surety see infra §§ 417–421.
Right of set-off see infra § 440.

protect himself the court may permit him to prosecute the action on its abandonment by the principal,[64] but satisfaction of the replevin judgment may prevent such substitution.[65]

Subrogation. As between sureties on respective bonds, the surety whose position is prejudicially altered by the execution of an additional bond is, on payment to the creditor, subrogated to his rights as against the sureties on the additional bond.[66]

Recourse against principal.[67] Although in some jurisdictions the judgment creditor, on rendition of a judgment on the bond, is compelled in equity to first exhaust his remedies against the principal,[68] it has been held in equity that in the absence of statute prescribing a different procedure, a surety, against whom judgment on the bond has been rendered, cannot compel the creditor to first proceed against the property of his principal even though the principal has sufficient property to satisfy the judgment.[69]

[§ 417] **E. Discharge of Surety[70]—1. In General.** The rules governing the discharge of sureties generally[71] are applicable to sureties on replevin and redelivery bonds.[72] Thus the surety is discharged by an alteration of the terms of his contract,[73] or by performance of the conditions of the bond[74] if there was a full compliance with the conditions[75] and compliance in accordance with the judgment in the replevin action.[76] If the creditor releases the surety so that he changes his position in relation to his principal, the creditor cannot afterwards have recourse against the surety.[77] The surety, however, is generally not released where he is not prejudiced;[78]

Rights and liabilities between co-sureties see Principal and Surety §§ 466-527.

[64] Hoffman v. Steinau, 34 Hun (N. Y.) 239.

[a] **Judgment on dismissal of complaint.**—Although judgment for a return of the property or its value and costs was entered against a plaintiff in replevin on a dismissal of the complaint, the surety on the bond may be substituted as plaintiff to continue the prosecution of the action. Hoffman v. Steinau, 34 Hun (N. Y.) 239.

[65] Clemmons v. Gorman, 7 Misc. 45, 27 NYS 354.

[a] **Default judgment.**—The sureties on a redelivery bond given by a sheriff are not entitled to have a judgment by default against the sheriff opened, and to be substituted as defendants in his place, where such judgment was satisfied by the sheriff before any steps were taken by the sureties to be substituted. Clemmons v. Gorman, 7 Misc. 45, 27 NYS 354.

[66] Southwestern Surety Ins. Co. v. King, 68 Okl. 100, 172 P 74, LRA 1918D 1188.

[a] **Redelivery and supersedeas bonds.**—The sureties on a supersedeas bond staying execution pending the appeal of defendant in replevin are primarily liable, so that on payment to the creditor by the sureties on the redelivery bond, the latter are subrogated to the rights of the creditor as against the sureties on the supersedeas bond. Southwestern Surety Ins. Co. v. King, 68 Okl. 100, 172 P 74, LRA1918D 1188.

[67] **Execution against principal as condition precedent to action on bond** see infra § 434.

[68] See Principal and Surety §§ 375-380.

[69] Walker v. Files, 94 Ark. 453, 127 SW 739.

[70] **Defenses** see infra §§ 437-440.

[71] See Principal and Surety §§ 150-319.

[72] See cases infra this section; and §§ 418-421.

[73] Anderson v. Bellenger, 87 Ala. 334, 6 S 82, 13 AmSR 46, 4 LRA 680.

[74] Ark.—Carroll v. Swicord, 9 SW (2d) 783.

Cal.—Ely v. Liscomb, 24 Cal. A. 224, 140 P 1086.

Colo.—Trindle v. Register Printing, etc., Co., 58 Colo. 81, 143 P 282.

Ind.—Shaver v. Kappellas, 83 Ind. A. 338, 146 NE 858.

Iowa.—Edwards v. Cottrell, 43 Iowa 194.

Mass.—Badlam v. Tucker, 1 Pick. 284; Arnold v. Allen, 8 Mass. 147.

N. Y.—Van Almkerk v. H. C. S. Motor Sales Corp., 208 App. Div. 464, 203 NYS 639.

S. C.—Morris Motor Co. v. Alford, 137 S. C. 446, 135 SE 557.

Eng.—Morris v. Matthews, 2 Q. B. 293, 42 ECL 681, 114 Reprint 115.

[a] **Tender of property.**—The attorneys for plaintiff in claim and delivery being authorized under Code Civ. Proc. § 283, subd. 2, to receive the property in satisfaction of the judgment, an offer to the attorneys to surrender the property discharged the sureties on defendants' redelivery bond. Ely v. Liscomb, 24 Cal. A. 224, 140 P 1086.

[b] **Return of property.**—Where plaintiff in replevin secured a return of the property awarded by judgment and sold it at public auction, in an action on the redelivery bond the sureties were not liable for a deficiency resulting from the sale, as the return of the property was a performance of the bond. Morris Motor Co. v. Alford, 137 S. C. 446, 135 SE 557.

[75] Trindle v. Register Printing, etc., Co., 58 Colo. 81, 143 P 282.

[a] **Partial return.**—Sureties on a redelivery bond were not released from liability, where only part of the property adjudged to be returned was surrendered to plaintiff. Trindle v. Register Printing, etc., Co., 58 Colo. 81, 143 P 282.

[76] Shaver v. Kappellas, 83 Ind. A. 338, 146 NE 858.

[a] **Judgment for value.**—Where the judgment in replevin was for the value of the property, defendant could not satisfy the judgment by a return of the property, and any tender of the property was without force. Shaver v. Kappellas, 83 Ind. A. 338, 146 NE 858.

[77] Lewis v. Smith, 179 Mo. A. 348, 166 SW 818.

[a] **Illustration.**—Where defendant obtains a judgment in replevin against plaintiff and the sureties on the replevin bond, and accepts in payment a check signed by a corporation by plaintiff as president, and obtains the money thereon, and notifies the sureties that they are released, he thereby releases the sureties, although afterward compelled to refund to the corporation. Lewis v. Smith, 179 Mo. A. 348, 166 SW 818.

[78] U. S.—Wood v. Forrest, 30 F. Cas. No. 17,945, 2 Cranch C. C. 303.

Cal.—Donovan v. Ætna Indemn. Co., 10 Cal. A. 723, 733, 103 P 365.

Colo.—Trindle v. Register Printing, etc., Co., 58 Colo. 81, 143 P 282.

Iowa.—Tousey v. Bishop, 22 Iowa 178.

Kan.—First State Bank v. Martin, 81 Kan. 794, 106 P 1056.

Ky.—Cooper v. Brown, 7 Dana 333.

Me.—Howe v. Handley, 28 Me. 241.

Mass.—Flagg v. Tyler, 6 Mass. 33.

Mich.—In re Cahill, 48 Mich. 616, 12 NW 877.

Minn.—Plankerton v. Continental Casualty Co., 180 Minn. 168, 230 NW 464.

Miss.—Robinson v. Soule, 56 Miss. 549.

Nebr.—Campbell v. Laue, 2 Nebr. (Unoff.) 63, 95 NW 1043.

N. Y.—John Church Co. v. Dorsey, 38 Misc. 542, 77 NYS 1065.

N. C.—Wallace v. Robinson, 185 N. C. 530, 117 SE 508.

N. D.—Larson v. Hanson, 26 N. D. 406, 144 NW 681, 51 LRANS 655.

Oh.—Rhodenbaugh v. Carey, 2 Oh. Dec. (Reprint) 162, 1 WestLMonth 599.

Okl.—Dupree v. Jordan, 123 Okl. 91, 252 P 67.

Or.—Mishler v. Edmondson, 92 Or. 347, 180 P 934.

Pa.—Jennings v. Hare, 104 Pa. 489.

Tex.—Bankhead v. Sperry, (Civ. A.) 298 SW 453.

Eng.—Moore v. Bowmaker, 7 Price 223, 146 Reprint 954, 7 Taunt. 97, 27 ECL 277, 129 Reprint 39, 3 Price 214, 146 Reprint 240, 6 Taunt. 379, 1 ECL 663, 128 Reprint 1081.

Ont.—O'Donnell v. Duchenault, 14 Ont. 1.

N. S.—Martin v. Passarini, [1928] 1 DomLR 636.

[a] **Delay in correcting judgment.**—Rights of surety on replevin bond were not prejudiced by delay of six months before correcting judgment for return of property or value. Plankerton v. Continental Casualty Co., 180 Minn. 168, 230 NW 464.

[b] **Where surety had notice of plaintiff's claim of title,** he cannot set up in defense an arrangement between plaintiff and defendant by which the apparent ownership of the chattel was given to defendant, nor can he set up

and accordingly it has been held that he is not released because the bond has been used as a set-off in another action,[79] or that the principal has failed to appeal,[80] or that the creditor had formerly objected to the sufficiency of the bond,[81] or that the bond was not in the exact language of the statute,[82] or was not signed by the principal,[83] or that the replevin judgment was entered by stipulation between the principal and creditor[84] or that the property was subject to seizure by third persons.[85] An attorney without the consent of his client cannot release a surety.[86]

Delay in the prosecution of the replevin suit not occasioned by or with the consent of the creditor of the bond,[87] or a delay which is not unreasonable and improper, although with the creditor's consent,[88] will not operate to release a nonconsenting surety. However, where the delay either occasioned by or consented to by the creditor is unreasonable and improper, the surety will be discharged.[89]

Bankruptcy and insolvency.[90] A discharge of the principal in bankruptcy will not discharge the surety on a replevin bond,[91] or on a redelivery bond.[92] The liability of a surety, however, is provable in bankruptcy, and a discharge of the surety in bankruptcy will be a discharge on the replevin bond.[93]

Bar of action by limitations. While there is a conflict of authority as to whether a surety is discharged merely because the cause of action against the principal on the bond has been barred,[94] it has been held that the running of the statute of limitations in favor of a surety in a replevin bond is not stopped by bringing another action to enforce the bond.[95]

Cosureties. A release of one of the sureties by the creditor will generally operate to release the cosureties.[96] But the mere substitution of a surety will not release a cosurety where the latter is not prejudiced.[97]

[§ 418] **2. Change in Proceedings.**[98] Where the form of action is changed to trover,[99] or where under a statute an election to take the value of the property is made,[1] or a personal judgment is taken,[2] the surety is released from liability to return the property.

Dismissal of parties. Although the surety is not released by a dismissal of the replevin action as against a defendant who claims no interest in the property,[3] it has been held that a dismissal as to

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an arrangement between them for an illegal purpose when he was not defrauded thereby. Dannels v. Fitch, 8 Pa. 495.

[79] Jennings v. Hare, 104 Pa. 489.

[80] Bankhead v. Sperry, (Tex. Civ. A.) 298 SW 453.

[a] **Intimidation** of plaintiff by defendant in order to prevent his appeal is insufficient, where it is not shown that it could have prevented his appeal. Bankhead v. Sperry, (Tex. Civ. A.) 298 SW 453.

[81] First State Bank v. Martin, 81 Kan. 794, 106 P 1056.

[a] **Illustration.**—Where plaintiff excepted to the sureties on a redelivery bond but which was accepted and approved, the liability on the bond became fixed on approval, and the fact that plaintiff had excepted to the surety and defendant had demanded that the bond be withdrawn, would not discharge the sureties. First State Bank v. Martin, 81 Kan. 794, 106 P 1056.

[82] John Church Co. v. Dorsey, 38 Misc. 542, 77 NYS 1065.

[83] U. S.—Wood v. Forrest, 30 F. Cas. No. 17,945, 2 Cranch C. C. 303.

Ky.—Cooper v. Brown, 7 Dana 333.

Me.—Howe v. Handley, 28 Me. 241.

Mich.—In re Cahill, 48 Mich. 616, 12 NW 877.

Oh.—Rhodenbaugh v. Carey, 2 Oh. Dec. (Reprint) 162, 1 WestLMonth 599.

Okl.—Dupree v. Jordan, 123 Okl. 91, 252 P 67, 69 [quot Cyc].

[84] Donovan v. Ætna Indemn. Co., 10 Cal. A. 723, 733, 103 P 365.

"A judgment entered on a stipulation is none the less a judgment of the court because consented to by the parties. . . . In the absence of fraud and collusion we see no good reason why sureties on a replevin bond should not be bound by a judgment thus obtained." Donovan v. Ætna Indemn. Co., supra.

[a] **Effect of settlement.**—In an action at law in a federal court on a replevin bond, plaintiff cannot avoid the effect of a settlement made by the parties to the replevin suit by virtue of which it was dismissed on the ground that it was procured by the fraud of the plaintiff therein. Cook v. Fidelity, etc., Co., 167 Fed. 95, 92 CCA 547.

[85] Martin v. Passarini, (N. S.) [1928] 1 DomLR 636.

[86] Lowry v. Clark, 20 Pa. Super. 357.

[87] O'Donnell v. Duchenault, 14 Ont. 1.

[a] **Postponement of trial.**—The trial of an action of replevin in a county court was by a judge's order, on the application of plaintiff therein, postponed to the next sitting thereof, and subsequently the action was by the judge's order transferred to another county court. In an action on the replevin bond it was held on demurrer that, the delay being that of plaintiff in the replevin action, without the consent or connivance of, and against the opposition of defendant, the sureties on the bond were not discharged. O'Donnell v. Duchenault, 14 Ont. 1.

[88] Daniels v. Patterson, 3 N. Y. 47; Moore v. Bowmaker, 7 Price 223, 146 Reprint 954, 7 Taunt. 97, 2 ECL 277, 129 Reprint 39, 3 Price 214, 146 Reprint 240, 6 Taunt. 379, 1 ECL 663, 128 Reprint 1081.

[89] Canniff v. Bogert, 6 U. C. C. P. (Ont.) 474. See Daniels v. Patterson, 3 N. Y. 47 (dictum); O'Donnell v. Duchenault, 14 Ont. 1 (dictum).

[a] **Where the trial of the replevin action was postponed** at the instance of defendant, but without the direct assent or concurrence of the sureties, it was held that the sureties were discharged, the question being not whether they were injured by the delay but whether they might have been. Canniff v. Bogert, 6 U. C. C. P. (Ont.) 474.

[90] **Generally** see Principal and Surety § 316.

[91] Flagg v. Tyler, 6 Mass. 33.

[92] Robinson v. Soule, 56 Miss. 549.

[93] Choate v. Quinichett, 12 Heisk. (Tenn.) 427.

[94] See Principal and Surety § 312.

[95] Snider's Sons Co. v. Armendt, 105 Ky. 317, 49 SW 10, 20 KyL 1203, 88 AmSR 306.

[a] **Replevin judgment functus officio.**—If the action on a replevin bond be filed against the sureties thereon within the five year limitation applicable to such bonds, the fact that at the time of trial the replevin judgment was functus officio will not discharge the sureties from their obligation. Dupree v. Jordan, 123 Okl. 91, 252 P 67.

[96] Kirkendall v. Thomas, 7 U. C. Q. B. (Ont.) 30. See Quarch v. Metz, 15 Misc. 622, 37 NYS 218 (where an undertaking given by defendant in replevin upon reclaiming the property has been approved, an order releasing one of the sureties thereon without the consent of plaintiff is erroneous).

[97] Lowry v. Clark, 20 Pa. Super. 357.

[98] **Amendment including new parties** see infra § 441.

Effect of increasing ad damnum see infra § 423.

[99] Reno v. Woodyatt, 81 Ill. A. 553.

[1] Gerlaugh v. Ryan, 127 Iowa 226, 103 NW 128. But see Thomson v. Joplin, 12 S. C. 580 (where an election to take the value of the property did not discharge the surety).

[2] Toland v. Swearingen, 39 Tex. 447.

[3] Trindle v. Register Printing, etc., Co., 58 Colo. 81, 143 P 282; Larson v. Hanson, 26 N. D. 406, 144 NW 681, 51 LRANS 655.

one of the principals on a forthcoming bond,[4] or a dismissal of the replevin action by plaintiff[5] will release the surety on defendant's bond.

Amendments. Although a surety is generally not released by amendments to the pleadings,[6] yet when the effect of an amendment is to impose on him a greater liability than he had assumed in his undertaking he is released.[7]

Transfer of the action in replevin to another court by virtue of a statute will not release the surety.[8]

Submission to arbitration. While the surety is not released where he consents,[9] a voluntary submission of the replevin suit to arbitration, without his consent will generally absolve him of liability on his obligation.[10] But where the submission provides that the award shall have the force and effect of a verdict of the jury and that judgment may be entered thereon in the action, the surety is not released,[11] for the reason the replevin suit is not withdrawn from the court in which it was instituted.[12]

Stay of execution. Whether the surety expressly consents,[13] or does not expressly consent,[14] he is not discharged by an agreement between the principal and creditor for a stay of execution, especially where the agreement for a stay of execution is not valid and binding.[15]

[§ 419] **3. Effect of Additional or Other Bond.** Although the surety on a replevin or redelivery bond may be discharged by the execution of a second replevin bond where the latter is expressly or by clear implication accepted in lieu of the first bond,[16] yet where a second bond is additional to secure further sums which may become due, the execution of such bond will not release the surety.[17] Thus, the execution of a bond for the appeal of the replevin suit will not operate to relieve the surety of liability on a replevin bond,[18] or on a redelivery bond.[19]

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[4] Tyler v. Davis, 63 Miss. 345.

[a] **Reason for rule.**—"By his own act the plaintiff thrust Mrs. Davis from the suit. She had no right to insist that the suit should be continued as to her against the wishes of the plaintiff, and since the effect of dismissing as to her was to relieve her of liability on the bond as principal, it follows as a consequence that the sureties are also discharged. The contract of the sureties was to respond to any judgment which might be entered in the suit to which Mrs. Davis and her husband were parties. They were connected with the suit by their connection with both parties as principals on the bond, and though a judgment has been entered against Davis, there has been none against Mrs. Davis nor any in any suit to which she is a party within the condition of the bond." Tyler v. Davis, 63 Miss. 345, 346.

[5] Spencer v. Davidson, 5 Ind. T. 231, 82 SW 731.

[6] Jamieson v. Capron, 95 Pa. 15, 20.

"When a person becomes surety for another in a judicial proceeding, there is an implied understanding that it shall be conducted according to the provisions of law relating thereto. The statutes regulating amendments, as well as other incidents of trial, are as much a part of the contract, in the contemplation of the parties thereto, as if they were embodied in the condition of the bond. Jamieson v. Capron, supra.

[a] **Illustration.**—Where plaintiffs as executors in an action on a redelivery bond with permission amended so that the parties plaintiffs were "heirs at law" instead of "executors," such amendment did not release the sureties. Jamieson v. Capron, 95 Pa. 15.

[b] **Correction of judgment.**—Where in the replevin suit judgment for a return of the property or its value was rendered against defendant, and erroneously against the sureties on the forthcoming bond, a correction of the entry releasing the sureties from any and all liability by reason of said judgment, did not release them from their obligations on the bond. Vulcan Steam Shovel Co. v. Cobb, (Mo. A.) 199 SW 448.

[7] Bolton v. Nitz, 88 Mich. 354, 358, 50 NW 291.

"The fact that the parties amended the description by stipulation in the written affidavit as to the particular tract of land from which the logs were cut shows that the parties themselves regarded it as a material portion of the description of the property; and so we think it was. Being so, any alteration by which other property was inserted in the writ of replevin, after the execution of the bond, without the knowledge and consent of the sureties, and with the consent of the defendants in the replevin suit, would discharge them from liability upon the bond." Bolton v. Nitz, supra.

[8] Reusch v. Demass, 34 Mich. 95, 96.

"The plaintiff is not allowed to select his own forum without giving the defendant a voice in the matter, and his sureties, who enable him to get possession of the defendant's property, are not authorized to separate their responsibility from his." Reusch v. Demass, supra.

[9] Hutt v. Gilleland, 1 U. C. Q. B. (Ont.) 540.

[10] Pirkins v. Rudolph, 36 Ill. 306; Archer v. Hale, 4 Bing. 464, 13 ECL 590, 130 Reprint 846; Moore v. Bowmaker, 3 Price 214, 146 Reprint 240, 6 Taunt. 379, 1 ECL 663, 128 Reprint 1081; Burke v. Glover, 21 U. C. Q. B. (Ont.) 294; Hutt v. Gilleland, 1 U. C. Q. B. (Ont.) 540. But see Aldridge v. Harper, 10 Bing. 118, 25 ECL 63, 131 Reprint 850 (where plea that sureties were discharged by a reference to arbitrators was held bad).

[a] **Reason for rule.**—"We place our decision, however, on the ground that the surety in the bond undertook only that the principal would prosecute his suit with effect and without delay, and make return of the property replevied, if a return should be adjudged. This undertaking, to prosecute the suit with effect and without delay, has express reference to its prosecution in court, before the court, and not privately, before arbitrators. Had it been prosecuted in court, as it would have been without this arrangement to arbitrate between the plaintiff and defendant, the court might have awarded a return of the property, which would have enabled the surety to take the necessary steps to effect a redelivery to the officers, or to secure himself, in some way, on the issuing of the writ of retorno habendo." Pirkins v. Rudolph, 36 Ill. 306.

[11] Lee v. Grimes, 4 Colo. 185; Moore v. Bowmaker, 7 Price 223, 146 Reprint 223, 7 Taunt. 97, 2 ECL 277, 129 Reprint 39, 3 Price 214, 146 Reprint 240, 6 Taunt. 379, 1 ECL 663, 128 Reprint 1081. See Perrigo Gold Min., etc., Co. v. Grimes, 2 Colo. 651 (where an action in replevin is withdrawn, and the matters therein submitted to arbitrators, the parties are regarded as confessing the judgment, which may thereafter be entered according to its terms upon the award of arbitrators, and in such case neither the principal nor the sureties to the replevin bond will be discharged from their obligation by the reference to arbitrators).

[12] See cases supra note 11.

[13] London First Nat. Bank v. Gabbard, 55 SW 548, 21 KyL 1441; Furber v. Bassett, 2 Duv. (Ky.) 433.

[a] **Consent extending stay of execution.**—Where the surety on plaintiff's bond wrote the obligee that a stay of execution to April 1st would be allowed "and longer if he [principal] asked for it," and the principal continued to ask for and received extensions for about a year, the surety was not discharged as the letter was substantially a power of attorney to the principal and hence extensions were made with surety's consent. Furber v. Bassett, 2 Duv. (Ky.) 433.

[14] Wallace v. Robinson, 185 N. C. 530, 117 SE 508; U. S. Fidelity, etc., Co. v. Clifton, (Tex. Civ. A.) 250 SW 1056. But see Tousey v. Bishop, 22 Iowa 178 (where by way of dictum a valid and binding agreement without the surety's consent would in law discharge him).

[15] Tousey v. Bishop, 22 Iowa 178.

[16] Brooks v. Shepherd, 4 Bibb (Ky.) 572; Busch v. Fisher, 73 Mich. 370, 41 NW 325.

[17] See infra text and notes 18, 19.

[18] Brown v. Brigham, 5 Allen (Mass.) 582; Brabon v. Pierce, 34 Mich. 39; Campbell v. Lane, 2 Nebr. (Unoff.) 63, 95 NW 1043, 1044.

"Finally it is said that an appeal bond subsequently given by the plaintiff in replevin should be first sued upon. It may be true that the surety in the replevin undertaking was secondarily liable, as between himself and the surety on the appeal bond. But this would not cast any duty on the plaintiff in this cause of pursuing one rather than the other. The surety cannot urge his rights with respect to the other bond against this suit." Campbell v. Lane, supra.

[a] **Plaintiff's appeal bond in a re-**

[§ 420] **4. Impossibility of Performance; Destruction or Loss of Subject Matter.**[20] Where the condition of the bond becomes impossible of performance by law, it has been held that the obligors on the bond are discharged.[21] There is a conflict of authority on the question as to the liability of the sureties on a replevin bond where performance of the bond, possible at the time of its execution, becomes impossible by the loss or destruction of the subject matter, it being held in some jurisdictions that under such circumstances the obligors on the bond are thereby released.[22] In other jurisdictions, however, the inability of the obligors to return the property[23] as where it belongs to a third person,[24] or its loss[25] or destruction after it is replevied[26] will not discharge the surety from liability.

[§ 421] **5. Death of Parties.** Where the death of the principal discharges the condition of the bond, the surety is also released.[27] But where the

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plevin suit is a cumulative remedy in favor of defendant and does not supersede or take the place of the replevin bond given on the institution of the suit. Brabon v. Pierce, 34 Mich. 39; Campbell v. Lane, 2 Nebr. (Unoff.) 63, 95 NW 1043.

[b] **Granting a writ of review** and a supersedeas of the execution after judgment for defendant in the replevin suit, and taking a new bond which is not intended as a substitute for the original bond, will not discharge the original bond. Brown v. Brigham, 5 Allen (Mass.) 582.

[19] Kan.—Swartz v. English, 4 Kan. A. 509, 44 P 1004.

N. C.—Long v. Meares, 196 N. C. 211, 145 SE 7.

Oh.—Willems v. Moore, 19 Oh. A. 26.

Okl.—Southwestern Surety Ins. Co. v. King, 68 Okl. 100, 172 P 74, LRA 1918D 1188.

Or.—Mishler v. Edmunson, 92 Or. 347, 180 P 934.

[a] **Supersedeas bond.**—Where, in replevin, plaintiff recovered judgment for the value of hops which defendant wrongfully detained and which he retained by the execution of a counter bond in replevin, the fact that on appeal from the judgment in replevin he executed a supersedeas bond would not release the sureties on the counter bond, as the supersedeas bond was merely cumulative to defendant's replevin bond. Mishler v. Edmunson, 92 Or. 347, 180 P 934.

[20] **As to principal in replevin action** see supra § 375.

[21] Pait v. McCutchen, 43 Tex. 291 (where one who believed his possession to be rightful executed a replevin bond for the delivery of a slave in 1857, and was afterward, when final judgment was rendered, prevented from delivery of the property by the laws of the United States and Texas, by reason of its having ceased to be property, and it was held that he was relieved thereby from all liability on his bond).

[22] Walker v. Osgood, 53 Me. 422; Melvin v. Winslow, 10 Me. 397.

[a] **Loss by freezing.**—Although it is the rule that a defendant in a suit on a replevin bond may defend on the ground that the replevied property was destroyed by inevitable cause without his fault, it can only be made in a clear case of vis major, and depreciation caused by freezing or decay is not within the rule. Kimball v. Thompson, 123 Me. 116, 122 A 46.

[23] Arthur v. Sherman, 11 Wash. 254, 39 P 670.

[a] **Injunction restraining return.**—Failure of plaintiff to return goods taken under a replevin bond after the suit is decided against him is not excused by the fact that he was prevented from returning the goods by an injunction, issued by a stranger after the proper demand was made by defendant for their return, provided plaintiff was in a position at that time to make the return. Arthur v. Sherman, 11 Wash. 254, 39 P 670.

[b] **Where, in an action on a redelivery bond,** it is shown that the property was sold by a receiver, and after the trial in the replevin action the owner applies to the court for the proceeds of the sale, and on such application receives a portion thereof, the remainder being retained to abide the result of the action in which the receiver was appointed, such facts constitute a defense to the action on the redelivery bond for the amount for which the property was sold at the receiver's sale. Boyd v. Huffaker, 39 Kan. 525, 18 P 508.

[c] **In New York** (1) fact that the property could not be reached was no defense to the sureties. Harrison v. Wilkin, 78 N. Y. 390. (2) Inability to deliver possession was no defense. Van Almkerk v. H. C. S. Motor Sales Corp., 208 App. Div. 464, 203 NYS 639. (3) It was a good plea to an action on the bond that the animal had died without defendant's fault. Carpenter v. Stevens, 12 Wend. 589.

[24] Staples v. Wood, (Tex. Civ. A.) 48 SW 751.

[25] Hansen v. Thomas, 171 Minn. 101, 213 NW 378; Garner v. Quakenbush, 188 N. C. 180, 124 SE 154, 187 N. C. 603, 122 SE 474, 36 ALR 1095.

[a] **Loss by mortgage foreclosure.**—Where plaintiff in the action on the bond was a tenant in common of grain with her husband who went into bankruptcy, and the trustee therein replevied the grain but it was sold on a mortgage foreclosure by a third person, the trustee in the action on the bond by plaintiff, is not relieved of liability for the value of the grain, although he may in mitigation of damages, show the extent of plaintiff's interest. Hansen v. Thomas, 171 Minn. 101, 213 NW 378.

[b] **Loss to superior titleholder.**—Inability of defendant in replevin to return property retained under a redelivery bond because taken by a third person holding a paramount title will not discharge the sureties. Garner v. Quakenbusch, 188 N. C. 180, 124 SE 154, 187 N. C. 603, 122 SE 474, 36 ALR 1095.

[26] Cal.—Nahhas v. Browning, 181 Cal. 55, 183 P 442, 6 ALR 476.

Ill.—Schott v. Youree, 142 Ill. 233, 31 NE 591 [aff 41 Ill. A. 476]; Suppiger v. Gruaz, 137 Ill. 216, 27 NE 22 [aff 36 Ill. A. 60].

Iowa.—Richards v. Hellen, 153 Iowa 66, 133 NW 393; Hinkson v. Morrison, 47 Iowa 167.

Miss.—Hazlett v. Witherspoon, 25 S 150; McPherson v. Acme Lumber Co., 70 Miss. 649, 12 S 857; George v. Hewlett, 70 Miss. 1, 12 S 855, 35 AmSR 626 [overr Whitfield v. Whitfield, 44 Miss. 254].

N. C.—T., etc., Motor Co. v. Sands, 186 N. C. 732, 120 SE 459 (see Clark, C. J., dis. op.); Randolph v. McGowans, 174 N. C. 203, 93 SE 730.

Okl.—Jacobs v. Walker, 90 Okl. 209, 216 P 935, 31 ALR 1287.

Tenn.—Barry v. Frayser, 10 Heisk. 206 [dist Mosely v. Baker, 2 Sneed 362].

[a] **The effect of giving a redelivery bond** is to impose on defendants an obligation to account to plaintiffs for the value of the property, even though after the execution of the bond it is destroyed without fault on their part. Hinkson v. Morrison, 47 Iowa 167.

[b] **By death.**—(1) Where in replevin, defendant executed a redelivery bond for a horse taken by the sheriff, under an order of replevin, and the horse died during the pendency of the action, in which it was decided that plaintiff was the owner and entitled to the possession of the horse, defendant and his sureties are liable to plaintiff on such bond for the value of the horse. Jacobs v. Walker, 90 Okl. 209, 216 P 935, 31 ALR 1287. (2) Defendant, in action to recover possession of a cow, who replevied, and gave forthcoming bond, when the cow was seized in plaintiff's ancillary proceeding of claim and delivery, was held liable to plaintiff for the value of the cow, adjudged to belong to plaintiff, she having died from natural causes before the action was tried. Randolph v. McGowans, 174 N. C. 203, 93 SE 730.

[c] **By fire.**—(1) Where a delivery bond is conditioned on the return or delivery of property sought in a replevin suit in as good condition as at the date of commencement of the action, and plaintiff, on a judgment in his favor, has first secured an execution for the return of the specific property, which has been returned unsatisfied because of the destruction of the property by fire, he is entitled to a judgment against the sureties on the delivery bond for the value of the property at the commencement of the action; the sureties not being discharged by the destruction of the property. Richards v. Hellen, 153 Iowa, 66, 133 NW 393. (2) Where a sheriff, as authorized under C. S. § 3403, seized an automobile used in violation of the prohibition law, and, when directed in replevin, to deliver it to plaintiffs gave a forthcoming bond under section 836, and thereafter, without his fault, it was destroyed by fire, the character of his possession was changed from custodian to that of insurer. T., etc., Motor Co. v. Sands, 186 N. C. 732, 120 SE 459.

[27] Badlam v. Tucker, 1 Pick. (Mass.) 284; Morris v. Matthews, 2 Q. B. 293, 42 ECL 681, 114 Reprint 115.

[a] **Illustration.**—Where a plaintiff's bond was conditioned to prose-

cause of action survives[28] enabling defendant to procure an order against the personal representative to continue the suit the surety is not released,[29] unless defendant fails to have plaintiff's personal representative continue the action.[30] A surety on a replevin bond of an assignee for the benefit of creditors, given to replevy attached property, is not released where on the death of the assignee the action is revived by a successor in office.[31]

[§ 422] **F. Extent of Liability[32]—1. In General.** A surety on an undertaking in replevin is a joint debtor with his principal,[33] and in determining the extent of his liability the undertaking has been construed both strictly,[34] and liberally.[35] Although for the purpose of permitting an intervener in the replevin action to sue on the replevin bond,[36] it has been said that the statute in pursuance of which the bond is executed forms part of the undertaking and the parties are conclusively presumed to intend what the statute provides;[37] it has also been held that the liability of the sureties is governed by the terms of the bond rather than by the terms prescribed by statutes for replevin bonds.[38] Where the bond is executed according to statutory requirements,[39] the liability of a principal or surety thereon is ordinarily limited to the terms of the undertaking,[40] and although the surety's obligation is

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cute the action with effect and his death excused further prosecution, the surety was also discharged as to the condition. Morris v. Matthews, 2 Q. B. 293, 42 ECL 681, 114 Reprint 115.

[28] See Abatement and Revival § 329.

[29] D. C.—Corbett v. Pond, 10 App. 17, 29.

Ill.—Strauss v. Merchants' L. & T. Co., 119 Ill. A. 588.

N. Y.—Lahey v. Brady, 1 Daly 443 [dist Burkle v. Luce, 1 N. Y. 163].

Tenn.—Barry v. Frayser, 10 Heisk. 206.

"It is of no consequence whether the undertaking was a joint or a joint and several obligation. By the death of the principal, the surety became solely liable upon the instrument; and the cause could properly be prosecuted to judgment thereon as against him. The only alternative to this proposition would be, that, by the death of the principal, the plaintiff in the suit, the surety would be released,—which would be a novel and unauthorized theory of law that would render all obligations given in legal proceedings hazardous and many of them useless." Corbett v. Pond, supra.

[30] Jenney v. Jenney, 14 Mass. 231, 232.

"For although, by law the cause of action survived, yet we think that it was not a duty of the administrator of the plaintiff in replevin to enter and prosecute the action at the Supreme Judicial Court, until summoned thereby by the defendant in that suit; who might by process have compelled the administrator to come in, or, in case of his default, after notice, he would have had judgment for a return of the chattels replevied, and would have recovered his damages out of the goods and estate of the deceased, in the administrator's hands." Jenney v. Jenney, supra.

[31] Greer v. Howard, 41 Oh. St. 591.

[32] **Generally** see Principal and Surety §§ 126–149.

Limitation as to parties see infra §§ 441–445.

[33] Ark.—Walker v. Files, 94 Ark. 453, 127 SW 739.

D. C.—Corbett v. Pond, 10 App. 17.

Ill.—Leland v. Barry, 69 Ill. 348.

Ind.—Walls v. Johnson, 16 Ind. 374; Hutchins v. Hanna, 8 Ind. 533.

Kan.—Kendall v. Black, 99 Kan. 101, 160 P 1015; McCormick Harvesting Mach. Co. v. Fisher, 63 Kan. 199, 65 P 223.

S. C.—Harris v. Keckley, 27 S. C. L. 196.

[a] **Plaintiff in replevin who joins in the undertaking** to prosecute the action and restore the property delivered to him, in case of judgment to that effect, is bound by the terms of the instrument to the same extent as any other obligor. Buck v. Lewis, 9 Minn. 314.

[34] Anderson v. Bellenger, 87 Ala. 334, 6 S 82, 13 AmSR 46, 4 LRA 680; Lewin v. Stein, 7 Colo. A. 65, 42 P 185; Danford v. Watkins, 337 Ill. 222. 168 NE 912; Vinyard v. Barnes, 124 Ill. 346, 16 NE 254; General Securities Co. v. Hindes, 119 Kan. 226, 237 P 659.

Compensated surety see Principal and Surety § 133.

[35] Magerstadt v. Field, 160 Ill. A. 23; Hotz v. Bollman Bros. Co., 47 Ill. A. 378.

[36] **Right of added defendant to sue** see infra § 441.

[37] Massachusetts Bonding, etc., Co. v. Novotny, 200 Iowa 227, 202 NW 588.

[38] General Securities Co. v. Hindes, 119 Kan. 226, 237 P 659.

[a] **Illustration.**—On a bond conditioned for the return of the property or the payment of its value, the sureties were not liable for damages and costs although the statutory form of undertaking included such damages and costs. General Securities Co. v. Hindes, 119 Kan. 226, 237 P 659.

[39] **Requisites, sufficiency and validity of bonds** see supra §§ 120–128.

[40] Ark.—McCoy v. Atkins, 172 Ark. 365, 288 SW 886.

Ind.—Thomas v. Irwin, 90 Ind. 557.

Kan.—Hurd v. U. S. Fidelity, etc., Co., 116 Kan. 453, 227 P 337.

Ky.—Berry v. Keatan, 1 Ky. Dec. 70.

Mo.—Collins v. Hough, 26 Mo. 149.

N. C.—McCormick v. Crotts, 198 N. C. 664, 153 SE 152; Williams v. Perkins, 192 N. C. 175, 134 SE 417; Orange Trust Co. v. Hayes, 191 N. C. 542, 132 SE 466; Garner v. Quakenbush, 188 N. C. 180, 124 SE 154, 187 N. C. 603, 122 SE 474, 36 ALR 1095.

Or.—Peacock v. Kirkland, 74 Or. 279, 145 P 281; Lewis v. McNary, 38 Or. 116, 62 P 897.

S. C.—Moore v. Sanders, 114 S. C. 350, 103 SE 589.

Tex.—Linn Bros. Motor Co. v. Williams, (Civ. A.) 293 SW 658.

Wash.—Ihrig v. Bussell, 68 Wash. 70, 122 P 608, LRA1917A 1188.

"It is elementary that a surety cannot be held for what he did not undertake to perform, and no action can be maintained against him until there is a breach of his contract." Lewis v. McNary, 38 Or. 116, 119, 62 P 897.

[a] **Judgment beyond conditions void.**—"Under the statute the court was without jurisdiction to enter judgment against the sureties on their replevy bond, beyond its conditions, and, in so far as the judgment in question attempted so to do, it was void." Linn Bros. Motor Co. v. Williams, (Tex. Civ. A.) 293 SW 658, 659.

[b] **Limitation to property described in affidavit.**—Where the affidavit and writ of the plaintiff in replevin were for the seizure of corn, plaintiff or the sureties on the bond were not liable for the act of the sheriff in wrongfully seizing other property, as their liability extended only to the property described in the affidavit, writ, or bond. Williams v. Perkins, 192 N. C. 175, 134 SE 417.

[c] **Liability for special interest.**—Where a bond conditioned to duly prosecute the action and pay all costs and damages awarded defendant, and return the property if a return be adjudged to him, there was no breach of the bond where the judgment in replevin was for plaintiff for the possession of the property and a judgment for defendant for his special interest, for under the terms of the bond, plaintiff was not obligated to pay defendant his special interest. Hurd v. U. S. Fidelity, etc., Co., 116 Kan. 453, 227 P 337.

[d] **Costs.**—A redelivery bond contemplates liability for the taking and detention of the property, and sureties thereon were not subject to a judgment for the costs of a continuance of the cause granted on application of defendant, when defendant was found to be entitled to, and was awarded, the property. American Soda Fountain Co. v. Dean Drug Co., 136 Iowa 312, 111 NW 534.

[e] **Liability for deficiency at sale after return.**—Where the condition of a redelivery bond was to have the property forthcoming to abide the decision of the court, the sureties were not liable, on the bond for a deficiency resulting from a sale of the property by plaintiff after its return by defendant in accordance with the replevin judgment. Linn Bros. Motor Co. v. Williams, (Tex. Civ. A.) 293 SW 658.

[f] **Liability of principal's estate.**—Where three partners, as a firm, brought an action of replevin, giving a bond signed by all, the death of one of the partners during the pendency of the action will not relieve his estate from liability on the bond. Union Trust Co. v. Shoemaker, 258 Ill. 564, 101 NE 1050 [aff 172 Ill. A. 365].

ordinarily not in excess of the principal's,[41] the surety may limit his obligation to less than that of his principal.[42] Unless it is clear that the terms of the undertaking limit the sureties' liability to a judgment in the court of first instance,[43] the surety's obligation extends to all proceedings and adjudications in the same action through every court to which it may be carried.[44] Thus it has been held that a condition to prosecute an action with effect contemplates a successful termination by plaintiff in whatever court the case is properly removed,[45] whether the removal is occasioned by a change of venue,[46] or by an appeal or writ of error.[47]

Limitation to recovery in replevin suit. Although a surety is liable within the terms of his obligation to the full extent of the verdict in the replevin action,[48] his liability ordinarily extends only to the judgment in the replevin suit in which the bond was given, so that, even though the replevin action is ancillary to another action, the surety is not liable for a judgment rendered against his principal in the other action.[49]

[§ 423] **2. Limitation as to Amount.** As a general rule the recovery in an action on a bond in replevin cannot exceed the penalty of the bond,[50] although the amount recoverable may exceed the penalty of the bond where interest is allowed on the penalty.[51] As against the surety, however, it has been held error to allow interest on the penalty.[52] Where the amount of the penalty is omitted in the bond, there can be no recovery against the sureties.[53]

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[41] McCormick v. Crotts, 198 N. C. 664, 153 SE 152.

[a] **Infant as principal.**—In an action on a redelivery bond where an infant as principal on disaffirming a contract of purchase was not liable for the depreciation in the value of the property, the sureties were not, although the condition of the bond was for the return of the property with damages for deterioration and detention. McCormick v. Crotts, 198 N. C. 664, 153 SE 152.

[42] See Principal and Surety § 127.

[43] Mitchum v. Stanton, 49 Cal. 302; Bell v. Bartlett, 7 N. H. 178.

[a] **Limitation to judgment in justice court.**—Where in replevin commenced before a justice of the peace the bond was conditioned for a return of the property if adjudged "by the said court," the liability of the sureties extended only to a judgment in the justice court, so that a reversal of the judgment for plaintiff by a higher court would not render the sureties liable. Mitchum v. Stanton, 49 Cal. 302.

[44] Woodburn v. Driver, 81 Ark. 333, 99 SW 384; Letson v. Dodge, 61 Barb. (N. Y.) 125; Fisher v. Stanisic, 18 Oh. Cir. Ct. N. S. 440.

[a] **Changes in procedure for appeal.**—A redelivery bond in replevin must be regarded as having been entered into subject to such changes in remedy or procedure as do not change the contractual rights of the parties, for example, the statutory allowance of a writ of error from the federal supreme court, to review the final judgment in the replevin suit, where no such review had theretofore been permissible, or subsequent legislation authorizing the issuance of an execution during the pendency of a writ of error to review such judgment if defendant should be ruled to give a new redelivery bond on an affidavit of insufficiency. William W. Bierce, Ltd. v. Waterhouse, 219 U. S. 320, 31 SCt 241, 55 L. ed. 237 [rev 19 Hawaii 398].

[b] **Change to chancery court.**—Liability of sureties was not enlarged by a transfer to the chancery court. Woodburn v. Driver, 81 Ark. 333, 99 SW 384.

[45] See infra text and notes 46, 47.

[46] Reusch v. Demass, 34 Mich. 95; Vaughan v. Norris, Cas. t. Hardw. 137, 95 Reprint 87; Lane v. Foulk, Comb. 228, 90 Reprint 445; Morgan v. Griffith, 7 Mod. 380, 87 Reprint 1304.

[a] **Illustration** where a replevin bond was conditioned to appear at the county court, and "then and there" prosecute with effect, it was held that the words "then and there" did not limit the obligation of plaintiff to prosecute with effect to the county court but extended to wherever removed. Vaughan v. Norris, Cas. t. Hardw. 137, 95 Reprint 87.

[47] Persse v. Watrous, 30 Conn. 139; Danford v. Watkins, 337 Ill. 222, 168 NE 912; Gibbs v. Bartlett, 2 Watts & S. (Pa.) 29; Turnor v. Turner, 2 B. & B. 107, 6 ECL 58, 129 Reprint 898; Gwillim v. Holbrook, 1 B. & P. 410, 126 Reprint 981; Chapman v. Butcher, Carth. 248, 90 Reprint 748.

"The condition to prosecute to effect required the plaintiff in replevin to pursue the action before a higher court, if removed by recordari, on error, or appeal, and by either of the actors in the suit." Persse v. Watrous, 30 Conn. 139, 145.

[a] **Reversal but no venire de novo.**—The condition of a replevin bond required a continued prosecution of the action from the commencement to a successful termination, and that if plaintiff succeeded in the common pleas, and judgment was reversed in the supreme court, and no venire de novo awarded, there was a breach of the bond. Gibbs v. Bartlett, 2 Watts & S. (Pa.) 29.

[b] **Reversal on appeal.**—In an action on a replevin bond conditioned to prosecute with effect, such condition was not fulfilled where, although plaintiff was successful in the trial court, the case was reversed on appeal. Danford v. Watkins, 337 Ill. 222, 168 NE 912.

[c] **Failure to prosecute appeal.**—Where an action in replevin is determined against plaintiff, and he appeals, and fails to prosecute his appeal, he is liable on his bond. Webster v. Price, 1 Root (Conn.) 56.

[48] Parish v. Smith, 66 S. C. 424, 45 SE 16.

[49] McCoy v. Atkins, 172 Ark. 365, 288 SW 886; Woodburn v. Driver, 81 Ark. 333, 99 SW 384; Lee v. Hastings, 13 Nebr. 508, 14 NW 476; Barrett v. Habern, 22 Tex. Civ. A. 207, 54 SW 644.

[a] **Illustration.**—Under a condition in a redelivery bond that defendants "shall perform the judgment of the court in this action," they are not liable for a judgment against their principal on a promissory note, although the property replevied secured the note. McCoy v. Atkins, 172 Ark. 365, 288 SW 886.

[b] **Counterclaims.**—The statutory undertaking given by a plaintiff in replevin, under Code Civ. Proc. § 1699, to answer for "the payment to the defendant in any sum which the judgment awards to him against the plaintiff," has reference only to such damages as the statute authorizes in a replevin suit; and as §§ 1730, 1731, 1733 preclude the rendition of an affirmative judgment for defendant for damages not connected with the chattel or the withholding of its possession, an action does not lie on the bond for the amount of a judgment on counterclaim disconnected from the chattels. Dickson v. Bickershoff, 48 Misc. 353, 95 NYS 585.

[c] **In South Carolina** (1) it was held that sureties on redelivery bond conditioned "for the payment to the plaintiff of such sum as may be recovered against the defendant in this case" were not liable for a judgment rendered for the amount of a promissory note. Wilkins v. Willmon, 128 S. C. 509, 122 SE 503. (2) Sureties on a redelivery bond conditioned "for the payment of such sum as may for any cause be recovered against the defendant" were held liable for the balance of a judgment on a note after deducting an amount the returned property was sold for. Bolt v. Milam, 110 S. C. 399, 96 SE 614. (3) A surety on a replevin bond given by a tenant to recover crops seized under distress was not liable on a judgment against the principal in a separate action for the rent. Cheatham v. Morrison, 31 S. C. 326, 9 SE 964.

[d] **Well considered case.**—Wilkins v. Willimon, 128 S. C. 509, 122 SE 503.

[50] Colo.—Cox v. Sargent, 10 Colo. A. 1, 50 P 201.

Del.—Truitt v. Collins, 18 Del. 36, 45 A 541.

Ill.—Odell v. Hole, 25 Ill. 204.

Ind.—Kellar v. Carr, 119 Ind. 127, 21 NE 463.

Kan.—Lake v. Hargis, 82 Kan. 711, 109 P 670, 30 LRANS 366.

Mass.—Wright v. Quirk, 105 Mass. 44; Leighton v. Brown, 98 Mass. 515; Davis v. Harding, 3 Allen 302.

Mich.—Fraser v. Little, 13 Mich. 195, 87 AmD 741.

Nebr.—Kaufman v. Wessel, 14 Nebr. 161, 15 NW 219.

N. Y.—Pettit v. Allen, 64 App. Div. 579, 72 NYS 287; Gould v. Warner, 3 Wend. 54.

N. C.—Harrell v. Tripp, 197 N. C. 426, 149 SE 548.

Or.—Carlon v. Dixon, 14 Or. 293, 12 P 394.

Pa.—Balsley v. Hoffman, 13 Pa. 603; Ingram v. Cox, 5 Pa. Dist. 617.

Tenn.—Muhling v. Ganeman, 4 Baxt. 88.

Tex.—Miles v. Davis, 36 Tex. 690.

Vt.—Miltimore v. Bottom, 66 Vt. 168, 28 A 872.

Ont.—Heley v. Cousins, 34 U. C. Q. B. 63.

Increasing ad damnum by amendment. Where no new cause of action is pleaded, an amendment to the complaint increasing the amount sought to be recovered will not alter the liability of the surety on the bond as his liability extends to the sum named in the bond as the penalty.[54]

[§ 424] **3. Elements of Recovery**[55]**—a. In General.** Generally a successful party in replevin may recover in an action on the bond the value of the property,[56] or of that part of the property,[57] not returned. Where the prevailing party has but a special interest in the property, he is confined to a recovery of the value of his special interest,[58] although he may recover the entire value of the prop-

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[a] **Judgment for penalty.**—In an action on a replevin bond, where the damages allowed are full and final, there is no occasion to give judgment for the penal sum of the bond, Rev. St. c 87 § 51, providing for judgments for the penal sum of bonds, not being applicable. Kimball v. Thompson, 123 Me. 116, 122 A 46.

[51] Wyman v. Robinson, 73 Me. 384, 387, 40 AmR 360.

"The obligee is to have the penalty at a particular and definite time. Immediately upon a breach of the bond the penalty is due to him. If he gets it then, he gets what the contract provides. If, then, the penalty be paid after the breach, interest should be added for the detention of the penalty, to make it equivalent to a payment at the date of the breach." Wyman v. Robinson, supra.

[52] Miltimore v. Bottom, 66 Vt. 168, 28 A 872.

[53] Harbin v. Nations, 214 Ala. 649, 108 S 749.

[54] Bierce v. Waterhouse, 219 U. S. 320, 31 SCt 241, 55 L. ed. 237; Kirkman Nurseries v. Thorwaldson, 56 Cal. A. 1, 204 P 253; Vulcan Steam Shovel Co. v. Cobb, (Mo. A.) 199 SW 448.

[a] **Reason for rule.**—"The surety on such a bond, given in the course of a judicial proceeding, is represented in that proceeding by his principal. That the court possessed the power of allowing an amendment which introduced no new cause of action is plain. The surety became such in contemplation of the possible exercise of that power. The penalty of the bond was not exceeded, and an increase in the ad damnum did not introduce a new cause of action. Townsend Nat. Bank v. Jones, 151 Mass. 454, 24 NE 593. By the execution of the bond, the surety consented to become responsible to the amount of the penal sum therein named." Bierce v. Waterhouse, 219 U. S. 320, 31 SCt 241, 244, 55 L. ed. 237.

[b] **Value of property increased.**—(1) In an action on a redelivery bond to secure release of certain nursery stock, where the undertaking by defendants for the delivery of a certain sum to plaintiff, if delivery be adjudged, provided "for the payment to plaintiff of such sum as may, for any cause, be recovered against the defendant," it was held that the sureties were not exonerated on the ground that in an amended complaint, filed after the undertaking was given and on which judgment was entered, the valuation of the property had been increased over that in the original complaint. Kirkman Nurseries v. Thorwaldson, 56 Cal. A. 1, 204 P 253. (2) An amendment of a declaration increasing the value of the property replevied from fifteen to twenty two thousand dollars did not enlarge the liability of the obligors, where the penalty of the bond was thirty thousand dollars. Bierce v. Waterhouse, 219 U. S. 320, 31 SCt 241, 55 L. ed. 237.

[55] **Damages recoverable in replevin suit** see supra §§ 359-393.

[56] Ala.—Ward v. Hood, 124 Ala. 570, 27 S 245, 82 AmSR 205.

Cal.—Mitchum v. Stanton, 49 Cal. 302; Ginaca v. Atwood, 8 Cal. 446.

Conn.—Bradley v. Reynolds, 61 Conn. 271, 23 A 928; Ormsbee v. Davis, 16 Conn. 567.

Ill.—Cermak v. P. A. Starck Piano Co., 198 Ill. A. 494; Martin v. Hertz, 118 Ill. A. 297 [aff 224 Ill. 84, 79 NE 558].

Ind.—Ringgenberg v. Hartman, 20 NE 637, 124 Ind. 186, 24 NE 987; Walls v. Johnson, 16 Ind. 374.

Ky.—Kentucky Land, etc., Co. v. Crabtree, 118 Ky. 395, 80 SW 1161, 26 KyL 283.

Me.—Wyman v. Robinson, 73 Me. 384, 40 AmR 360.

Mass.—Maguire v. Pan-American Amusement Co., 211 Mass. 22, 97 NE 142; Maguire v. Pan-American Amusement Co., 205 Mass. 64, 91 NE 135, 137 AmSR 422, 18 AnnCas 110; Parker v. Simonds, 8 Metc. 205.

Minn.—Hansen v. Thomas, 171 Minn. 101, 213 NW 378.

N. J.—Peacock v. Haney, 37 N. J. L. 179; Lutes v. Alpaugh, 23 N. J. L. 165.

N. Y.—Pettit v. Allen, 64 App. Div. 579, 72 NYS 287.

Oh.—Berwanger v. Bristol, 3 OhS &CP 683, 3 OhNP 161.

Pa.—Krumbhaar v. Stetler, 10 Pa. Co. 12; Chase v. Sherwood, 4 Lack LegN 271.

Tenn.—Muhling v. Ganeman, 4 Baxt. 88.

Tex.—Talcott v. Rose, (Civ. A.) 64 SW 1009.

Ont.—Ruttan v. Short, 12 U. C. Q. B. 485.

[a] **Price at which defendant sold the property** is no measure of damages on the bond. Schrader v. Wolfin, 21 Ind. 238.

[b] **Assessment of value.**—In an action on a redelivery bond the undertaking of defendant to pay the assessed value of the property is construed to mean the value assessed by the judgment, rendered on the verdict, and not the value assessed by the appraisers. Berwanger v. Bristol, 3 OhS&CP 683.

[c] **Determination of value.**—In an action on a bond, given to plaintiff sheriff in replevin for theatrical properties attached by him, the jury should consider, in determining the market value of the properties, the circumstances that a purchaser might buy with intention of using it for other uses, or might have acquired or believed he could acquire therewith the play to which they were peculiarly adapted, or that the owners of the play might have attended the attachment sale, if held, and bid on the properties. Maguire v. Pan-American Amusement Co., 211 Mass. 22, 97 NE 142.

[d] **Enhancement of value.**—In an action on a bond given in replevin for logs, where, after the suit was brought, defendant manufactured some of the logs into lumber, the recovery is limited to the value of the logs, without reference to the value of the lumber, the bond having taken the place of the property. Busch v. Fisher, 89 Mich. 192, 50 NW 788.

[e] **Where property is reacquired by purchase** at a public sale pending the trial in replevin by the prevailing party, he is not entitled to the value of the property but may only recover what it cost to regain possession. Pure Oil Co. v. Terry, 209 Pa. 403, 58 A 814.

[57] Trindle v. Register Printing, etc., Co., 58 Colo. 81, 143 P 282; Kiser v. Hensley, 123 Va. 536, 96 SE 777.

[58] Colo.—Perrigo Gold Min., etc., Co. v. Grimes, 2 Colo. 651.

Conn.—Gould v. Hayes, 71 Conn. 86, 40 A 930.

Ill.—David v. Bradley, 79 Ill. 316; Warner v. Matthews, 18 Ill. 83; King v. Ramsay, 13 Ill. 619; Jackson v. Bry, 3 Ill. A. 586.

Ind.—McFadden v. Ross, 108 Ind. 512, 8 NE 161; Schrader v. Wolfin, 21 Ind. 238.

Iowa.—Clement v. Duffy, 54 Iowa 632, 7 NW 85.

Ky.—Roman v. Stratton, 2 Bibb 199.

Mass.—Bartlett v. Kidder, 14 Gray 449. See Parker v. Simonds, 8 Metc. 205 (where it does not appear that the amount needed to satisfy an execution was less than the full value, full value will be awarded).

Mich.—Pearl v. Garlock, 61 Mich. 419, 28 NW 155, 1 AmSR 603; Lindner v. Brock, 40 Mich. 618.

N. H.—Claggett v. Richards, 45 N. H. 360.

S. C.—Seaboard Air Line R. Co. v. Hewlett, 94 S. C. 478, 78 SE 329.

Recovery of special interest in replevin suit see supra §§ 371, 372.

[a] **Interest of an execution creditor** in an action on the bond should not exceed the amount of the execution. Roman v. Stratton, 2 Bibb (Ky.) 199.

[b] **Interest of lienholder.**—For a breach of the bond, given by plaintiff in an action of claim and delivery, recovery can be had only for such damages as defendant sustained by the taking of the property from its possession; so, where it was merely holding the property for demurrage

erty where the opposing party is a stranger to the title.[59] The value of the property is to be measured either as of the time the property was taken in the replevin action,[60] or as of the time of the judgment or order for a return.[61] In addition to a recovery of the value of the property plaintiff is generally entitled to damages for its detention,[62] including interest on the value of the property from the date of the judgment of return,[63] or in some cases the usable value of the property,[64] together with damages for depreciation in value,[65] and costs and expenses of the main action,[66] and the necessary ex-

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charges, it can recover only such amount as is found was due it for demurrage. Seaboard Air Line R. Co. v. Hewlett, 94 S. C. 478, 78 SE 329.

[59] U. S.—Sweeney v. Lomme, 22 Wall. 208, 22 L. ed. 727.

Colo.—Perrigo Gold Min., etc., Co. v. Grimes, 2 Colo. 651 (dictum).

Ill.—Bennet v. Gilbert, 194 Ill. 403, 62 NE 847 [aff 94 Ill. A. 505]; Atkins v. Moore, 82 Ill. 240.

Ind.—Smith v. Lisher, 23 Ind. 500.

Me.—Farnham v. Moor, 21 Me. 508.

Mich.—Williams v. Vail, 9 Mich. 162, 80 AmD 76.

Okl.—U. S. Fidelity, etc., Co. v. Yoder, 139 Okl. 256, 281 P 974.

[a] **Sheriff in attachment.**—(1) Where a sheriff attached property which was replevied by a stranger to the title, the sheriff or the attachment creditor may recover the full value of the property in an action on the plaintiff's bond, although there was no assessment of the value in the replevin suit. Sweeney v. Lomme, 22 Wall. (U. S.) 208, 22 L. ed. 727. (2) A sheriff having a special property in the articles replevied was entitled to recover, as against a stranger having no interest in the property, not merely the extent of his special interest but the full value of the property, and the excess beyond his special interest will be held by him in trust for the general owner. Atkins v. Moore, 82 Ill. 240.

[60] U. S.—Washington Ice Co. v. Webster, 125 U. S. 426, 8 SCt 947, 31 L. ed. 799.

Conn.—Bradley v. Reynolds, 61 Conn. 271, 23 A 928.

Ill.—Plano Mfg. Co. v. Downey, 100 Ill. A. 36; Treman v. Morris, 9 Ill. A. 237.

Kan.—Edwards v. Bricker, 71 P 587.

Me.—Washington Ice Co. v. Webster, 62 Me. 341, 16 AmR 462; Thomas v. Spofford, 46 Me. 408; Smith v. Dillingham, 33 Me. 384.

Tenn.—Massachusetts Bonding Co. v. McLemore, 4 Tenn. Civ. A. 633.

Ont.—Patterson v. Fuller, 32 U. C. Q. B. 240.

[a] **In Texas** (1) it was held that the value of the property is to be measured as of the date of the approval of the bond (McLeod Artesian Well Co. v. Craig, (Civ. A.) 43 SW 934); (2) it was also held that the value of the property is to be measured as of the time of the trial. Alderete v. Western Indemn. Co., (Civ. A.) 278 SW 265; Talcott v. Rose, (Civ. A.) 64 SW 1009). (3) Where the property is unavailable at the time of the trial, its value is to be measured as of the time it was replevied. Western Indemn. Co. v. Alderete, (Civ. A.) 292 SW 914.

[61] Lindsey v. Hewitt, 42 Ind. A. 573, 86 NE 446; Maguire v. Pan-American Amusement Co., 211 Mass. 22, 97 NE 142; Maguire v. Pan-American Amusement Co., 205 Mass. 64, 91 NE 135, 137 AmSR 422, 18 AnnCas 110; Leighton v. Brown, 98 Mass. 515; Parker v. Simonds, 8 Metc. (Mass.) 205; Swift v. Barnes, 16 Pick. (Mass.) 194; Caldwell v. West, 21 N. J. L. 411.

[62] Colo.—Sopris v. Lilley, 2 Colo. 496.

Ill.—Shepard v. Butterfield, 41 Ill. 76; Pace v. Neal, 92 Ill. A. 416.

Me.—Thomas v. Spofford, 46 Me. 408.

Mass.—Stevens v. Tuite, 104 Mass. 328; Parker v. Simonds, 8 Metc. 205; Arnold v. Bailey, 8 Mass. 145.

N. C.—Scott v. Elliott, 63 N. C. 215.

[a] **Double damages.**—The obligation of sureties to the return bond in actions for the delivery of personal property, under Practice Act (1849) § 8, cannot be extended to the payment of double damages, for the detention of the property by plaintiff. Collins v. Hough, 26 Mo. 149.

[b] **Interest on damages and costs** are not allowed where the bond does not so provide. Berry v. Keatan, Ky. Dec. 70.

[63] Ala.—Ward v. Hood, 124 Ala. 570, 27 S 245, 82 AmSR 205.

Ill.—Hopkins v. Ladd, 35 Ill. 178; Cermak v. Cable Piano Co., 211 Ill. A. 219; Hanson v. Weber Impl. Co., 173 Ill. A. 293; Pace v. Neal, 92 Ill. A. 416.

Ind.—Story v. O'Dea, 23 Ind. 326; Walls v. Johnson, 16 Ind. 374.

Ky.—Kentucky Land, etc., Co. v. Crabtree, 118 Ky. 395, 80 SW 1161, 26 KyL 283.

Me.—Howe v. Handley, 28 Me. 241.

Mass.—Stevens v. Tuite, 104 Mass. 328; Huggeford v. Ford, 11 Pick. 223; Arnold v. Bailey, 8 Mass. 145.

N. J.—Peacock v. Haney, 37 N. J. L. 179; Caldwell v. West, 21 N. J. L. 411.

[a] **Where the damages equal the penalty of the bond,** it is error to allow interest from the judgment in replevin as against the surety on the bond. Miltimore v. Bottom, 66 Vt. 168, 28 A 872.

[64] Nahhas v. Browning, 181 Cal. 55, 183 P 442, 6 ALR 476; Ralph N. Blakeslee Co. v. Rigo, 94 Conn. 481, 109 A 173.

[a] **Net usable value.**—(1) Where defendant, who had replevied plaintiff's automobile truck, was required to make expenditures on car before it was capable of use, the amount of such expenditures with interest thereon will be deducted from damages sustained by plaintiff by defendant's wrongful taking of truck. Ralph N. Blakeslee Co. v. Rigo, 94 Conn. 481, 109 A 173. (2) Owner of property taken by replevin is not liable for the expense of keeping it during the period of detention, and hence, in an action on a replevin bond, the defendant is not entitled to have deducted from the amount of damages the expense of feeding the cattle replevied during such detention. Kimball v. Thompson, 123 Me. 116, 122 A 46.

[65] U. S.—Washington Ice Co. v. Webster, 125 U. S. 426, 8 SCt 947, 31 L. ed. 799.

Conn.—Ralph N. Blakeslee Co. v. Rigo, 94 Conn. 481, 109 A 173.

Ill.—Franks v. Matson, 211 Ill. 338, 71 NE 1011.

Ind.—Yelton v. Slinkard, 85 Ind. 190.

Kan.—Walrus Mfg. Co. v. Quackenbush, 128 Kan. 474, 279 P 3 [den reh 128 Kan. 216, 276 P 806].

Me.—Kimball v. Thompson, 123 Me. 116, 122 A 46.

Mass.—Tucker v. Tremont Trust Co., 242 Mass. 25, 136 NE 62, 24 ALR 1185.

N. C.—Crump v. Love, 193 N. C. 464, 137 SE 418.

Or.—Booth v. National Surety Co., 129 Or. 598, 278 P 987.

Wash.—Hafner v. U. S. Fidelity, etc., Co., 126 Wash. 670, 219 P 16.

[a] **Fault of defendant.**—The amount of depreciation in the value of the property during the time of detention cannot be recovered in such action, unless the depreciation was occasioned by defendant's fault. Odell v. Hole, 25 Ill. 204.

[66] Ark.—Morrill v. Daniel, 47 Ark. 316, 1 SW 702.

Cal.—Mitchum v. Stanton, 49 Cal. 302.

Del.—Truitt v. Collins, 18 Del. 36, 45 A 541.

Ida.—Folen v. Saxton, 31 Ida. 319, 171 P 669.

Ill.—Cermak v. P. A. Starck Piano Co., 198 Ill. A. 494; Larson v. Laird, 36 Ill. A. 402.

Ind.—Kellar v. Carr, 119 Ind. 127, 21 NE 463.

Ky.—Galloway v. Bethume, 6 Bush 113.

Me.—Howe v. Handley, 28 Me. 241; Hovey v. Coy, 17 Me. 266.

Mass.—Matton v. Pearce, 12 Mass. 406.

Mich.—Peterson v. Harrington, 197 Mich. 611, 164 NW 547.

Minn.—Katz v. American Bonding, etc., Co., 86 Minn. 168, 90 NW 376.

Miss.—Sparks v. Hopsen, 83 Miss. 124, 35 S 446; Phillips v. Cooper, 59 Miss. 17.

Mont.—Clark v. National Surety Co., 81 Mont. 113, 261 P 618.

Nebr.—Campbell v. Lane, 2 Nebr. (Unoff.) 63, 95 NW 1043.

N. J.—Sloan v. Poor, 7 N. J. Misc. 197, 145 A 469.

N. Y.—Tibbles v. O'Connor, 28 Barb. 538; John Church Co. v. Dorsey, 38 Misc. 542, 77 NYS 1065.

N. C.—Hall v. Tillman, 110 N. C. 220, 14 SE 745.

Or.—Mishler v. Edmunson, 92 Or. 347, 180 P 934; Carlon v. Dixon, 14 Or. 293, 12 P 394.

Pa.—Tibbal v. Cahoon, 10 Watts 232; Phillips v. Hyde, 1 Dall. 439, 1 L. ed. 213.

S. C.—Rhodes v. Burkart, 28 S. C. 154, 5 SE 347.

penses incurred by reason of the wrongful prosecution of the main suit.[67]

Attorney's fees, incurred in the prosecution or defense of the replevin action, are recoverable in an action on a replevin bond where the conditions of the bond are considered sufficiently broad to include such fees,[68] but generally the terms of the conditions of the bond are construed as excluding a recovery of such fees.[69]

Exemplary damages, recovered in the replevin action are generally not within the conditions of the bond and are not recoverable in an action thereon.[70]

[§ 425] **b. Nominal Damages.** Only nominal damages can be allowed in an action on the replevin bond where the value of the property and value of its use[71] or the depreciation in value are not

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Eng.—Branscombe v. Scarbrough, 6 Q. B. 13, 51 ECL 13, 115 Reprint 5.

Ont.—Burn v. Blecher, 14 U. C. C. P. 415.

[a] **Condition to perform the judgment.**—A condition in a redelivery bond "that the defendant shall perform the judgment of the court in the action" would include costs assessed in the replevin suit for which the surety is liable, although the property is returned. Morrill v. Daniel, 47 Ark. 316, 1 SW 702.

[b] **Pay such sum as is recovered.**—(1) A redelivery bond conditioned for the payment to plaintiff of such sum "as may for any cause be recovered" against defendant includes plaintiff's costs in the replevin suit. John Church Co. v. Dorsey, 38 Misc. 542, 77 NYS 1065. (2) A condition of a plaintiff's bond to pay "such sum as may for any cause be recovered in this action" against plaintiff would include costs. Rhodes v. Burkart, 28 S. C. 154, 5 SE 347. (3) A redelivery bond conditioned to return the property if adjudged and pay "any damages awarded against him in said suit" does not include costs. Brock v. Bolton, 37 S. C. 40, 16 SE 370 [dist Rhodes v. Burkart, 28 S. C. 154, 5 SE 347].

[c] **Although a redelivery bond is silent as to costs,** the sureties thereon were liable for costs under Code (1871) § 1535, which declares that the successful party may have his distringas to compel the delivery of the property, together with a fieri facias for damages and costs. Sparks v. Hopsen, 83 Miss. 124, 35 S 446; Phillips v. Cooper, 59 Miss. 17.

[d] **Costs for continuance.**—Where defendant is awarded possession of the property, the sureties are not liable for the costs of a motion for a continuance which was decided against him. American Soda Fountain Co. v. Dean Drug Co., 136 Iowa 312, 111 NW 534.

[e] **A redelivery bond** conditioned that defendant should deliver the property in as good condition if the same be adjudged does not include costs so the sureties thereon were not liable. Lutes v. Alpaugh, 23 N. J. L. 165.

[f] **Liability of surety to principal.**—The surety on a forthcoming bond, given by plaintiff in replevin, is not liable thereon to his principal for plaintiff's costs. Hallman v. Dellinger, 84 N. C. 1.

[g] **Costs of writ of retorno habendo.**—On a condition in a replevin bond to make return of the property if awarded, the costs of a writ of retorno habendo are recoverable distinct from the costs in the judgment. Langdoc v. Parkinson, 2 Ill. A. 136.

[h] **In Missouri** the surety on a replevin bond is not rendered liable by the statute for the costs of the suit. Morrow v. Shepherd, 9 Mo. 131.

[i] **In Texas** (1) Costs incurred in the prosecution of the replevin action are not taxable against the sureties on the bond. Riggle v. Automobile Finance Co., (Civ. A.) 276 SW 439; McIntyre v. Emerson, (Civ. A.) 132 SW 947. (2) Sureties were held liable for such costs where after being made parties to the replevin action by citation they litigated the question of their liability. McLeod Artesian Well Co. v. Craig, (Civ. A.) 43 SW 934.

67. U. S.—Alexander v. Thomas, 1 F. Cas. No. 174, 1 Cranch C. C. 92.

Conn.—Gould v. Hayes, 71 Conn. 86, 40 A 930.

Del.—Truitt v. Collins, 18 Del. 136, 45 A 541.

Ill.—Harts v. Wendell, 26 Ill. A. 274.

Ind.—Davis v. Crow, 7 Blackf. 129.

Kan.—Little v. Bliss, 55 Kan. 94, 39 P 1025.

Me.—Washington Ice Co. v. Webster, 62 Me. 341, 16 AmR 462; Howe v. Handley, 28 Me. 241.

68. Danford v. Watkins, 337 Ill. 222, 168 NE 912; Gilbert v. Sprague, 196 Ill. 444, 63 NE 993 [rev 88 Ill. A. 508]; Moore v. Paul F. Beech Co., 221 Ill. A. 609; Zimmer v. Lyon, 190 Ill. A. 642; Hunter v. Commercial Security Co., 181 Ill. A. 260; Richardson v. Gilbert, 135 Ill. A. 363; Pace v. Neal, 92 Ill. A. 416; Washburne v. Burke, 84 Ill. A. 587; Scott v. Rogers, 56 Ill. A. 571; Siegel v. Hanchett, 33 Ill. A. 634; Harts v. Wendell, 26 Ill. A. 274. But see Reno v. Woolyatt, 81 Ill. A. 553 (holding that, in an action on a replevin bond, where the writ in the original suit was not wrongfully sued out, the sureties on the bond are not liable for the attorney's fees to defendant in the replevin suit).

[a] **Illustration.**—A condition in a plaintiff's bond providing for the "payment of all costs and damages occasioned by wrongfully suing out said writ of replevin" was broad enough to include attorney fees. Danford v. Watkins, 337 Ill. 222, 168 NE 912.

[b] **Stipulation in chattel mortgage.**—Where plaintiff replevied hay held by a sheriff under a foreclosure of a chattel mortgage which stipulated for an attorney's fee, and judgment was rendered for defendant for the return of the hay or its value, in an action on plaintiff's claim and delivery bond the court allowed an attorney's fee, it not appearing whether the bond contained a stipulation for an attorney's fee. Folen v. Saxton, 31 Ida. 319, 171 P 669.

69. U. S.—Gilbert v. American Surety Co., 121 Fed. 499, 57 CCA 619, 61 LRA 253.

Ind.—Davis v. Crow, 7 Blackf. 129; Consolidated Tank Line Co. v. Bronson, 2 Ind. A. 1, 28 NE 155.

Kan.—Lake v. Hargis, 82 Kan. 711, 109 P 670, 30 LRANS 366; Edwards v. Bricker, 66 Kan. 241, 71 P 587.

Ky.—Kentucky Land, etc., Co. v. Crabtree, 80 SW 1161, 26 KyL 283; Kenley v. Com., 6 B. Mon. 583.

Me.—Kimball v. Thompson, 123 Me. 116, 122 A 46.

Mass.—Maguire v. Pan-American Amusement Co., 205 Mass. 64, 91 NE 135, 137 AmSR 422, 18 AnnCas 110.

N. Y.—Firestone v. Ætna Indemn. Co., 67 Misc. 443, 123 NYS 107.

Okl.—Gibson v. International Harvester Co., 105 Okl. 253, 232 P 80.

Pa.—Com. v. Lintott, 64 Pa. Super. 328.

Ont.—Williams v. Crow, 10 Ont. A. 301.

N. B.—Steen v. Hanson, 9 N. B. 589.

[a] **Illustrations.**—(1) In an action on a replevin bond, although the bond stipulated for the payment of "such damages and costs as the defendant shall recover," plaintiff was not entitled to recover counsel fees, since the phrase "damages that defendant shall recover," under Rev. St. c 101 § 11, clearly means "damages for the taking" recoverable by defendant in the replevin suit, in which counsel fees are not recoverable, nor may such fees be recovered under §§ 13, 18. Kimball v. Thompson, 123 Me. 116, 122 A 46. (2) A replevin bond given under Municipal Court Act (L. [1902] c 580) § 99, providing that such bond shall cover payment to defendant of "any sum which the judgment awards to him against the plaintiff," does not indemnify defendant against expenses incurred for counsel. Firestone v. Ætna Indemn. Co., 67 Misc. 443, 123 NYS 107. (3) Recovery cannot be had, on a replevin bond conditioned that the principal defendant should pay whatever damages and costs plaintiff should recover against defendant, and return the property replevied, if such should be the final judgment, for expenses incurred in the defense of the replevin suit, including counsel fees, and in the action on the bond, since the condition of the bond excludes such a recovery, and, further, the taxable costs which plaintiffs recover in each case are in contemplation of law a full indemnity for all the expenses incurred in their defense or prosecution. Maguire v. Pan-American Amusement Co., 205 Mass. 64, 91 NE 135, 137 AmSR 422, 18 AnnCas 110.

[b] **Costs** mentioned in the bond mean taxable costs and do not include attorney fees. Steen v. Hanson, 9 N. B. 589.

70. Dalby v. Campbell, 26 Ill. A. 502; Martin v. Rexford, 170 N. C. 540, 87 SE 352.

71. Sopris v. Lilley, 2 Colo. 496; Uhl v. Maiorano, 96 Conn. 683, 115 A 473; Morrison v. Yancey, 23 Mo. A. 670.

[a] **Illustration.**—Where, during pendency of a replevin action, a third party, the rightful owner thereof, took possession of the property, and the sheriff sued on replevin bond and alleged that by reason of the replevin action expenses were incurred and time lost by preparing and investigating the trial, no recovery could be had, beyond nominal damages and costs, where no evidence was offered to prove the value of the property in question, or of the interest of any person in it, or any damages sustained by any person by the taking or failing to return the property, or of plaintiff's expenses and time lost.

shown,[72] or where there was no decision as to the merits of the case in the action in which the bond was given.[73] Where it appears that the obligee in the bond has no title to the property, or right to possession, he is entitled to only nominal damages where the principal obligor is defeated in the replevin suit,[74] and where there is only a technical breach of the bond, and the obligor therein has recovered the value of the property, he can only recover nominal damages in an action on the bond.[75]

[§ 426] **G. Conclusiveness of Adjudication in Replevin Proceedings**[76]**—1. In General.** The general rule as to the conclusiveness on the surety on a bond given in the course of legal proceedings, of a judgment against the principal,[77] applies to a surety on a replevin bond so that he is conclusively bound by the judgment against his principal as to all matters which were,[78] and, in some jurisdictions, which might have been litigated in the replevin action,[79] although he was not served with process

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Uhl v. Maiorano, 96 Conn. 683, 115 A 473.

72. Paster v. Berry, (R. I.) 103 A 781.

73. Webber v. Mackey, 31 Ill. A. 369; Miller v. Cheney, 88 Ind. 466; Holcombe, etc., Mfg. Co. v. Watts, (Ind. A.) 170 NE 861; Robinson v. Teeter, 10 Ind. A. 698, 38 NE 222; Little v. Bliss, 55 Kan. 94, 39 P 1025.

74. Ind.—Stockwell v. Byrne, 22 Ind. 6; Consolidated Tank Line Co. v. Bronson, 2 Ind. A. 1, 28 NE 155.

Me.—Jones v. Smith, 79 Me. 452, 10 A 256.

Mass.—Smith v. Whiting, 100 Mass. 122.

N. Y.—Budracco v. National Surety Co., 112 Misc. 133, 182 NYS 590.

N. C.—Davis Bros. Co. v. Wallace, 190 N. C. 543, 547, 130 SE 176.

Ont.—Pacaud v. McEwan, 31 U. C. Q. B. 328.

"If the bond was executed by defendants and there was a breach thereof as alleged in the complaint, plaintiffs, although not the owners or entitled to possession of the automobile at the time of its seizure, are entitled to recover at least nominal damages." Davis Bros. Co. v. Wallace, supra.

75. Stuart v. Trotter, 75 Iowa 96, 39 NW 212; Macomber v. Moore, 128 Me. 481, 148 A 682; Alderman v. Roesel, 52 S. C. 162, 165, 29 SE 385.

"Where a technical breach of the bond is shown, while there should be a recovery for something, the recovery may be merely nominal, in the absence of proof of actual damages." Alderman v. Roesel, supra.

76. Construction, operation and effect of replevin judgment see supra § 326.

Evidence admissible in mitigation of damages see infra § 456.

77. See Principal and Surety § 336.

78. U. S.—Washington Ice Co. v. Webster, 125 U. S. 426, 8 SCt 947, 31 L. ed. 799.

Cal.—Montgomery v. Fidelity, etc., Co., 69 Cal. A. 251, 230 P 993.

Colo.—Trindle v. Register Printing, etc., Co., 58 Colo. 81, 143 P 282; McCarthy v. Strait, 7 Colo. A. 59, 42 P 189.

Conn.—Holtz v. Riddell, 101 Conn. 416, 126 A 333; Ormsbee v. Davis, 16 Conn. 567.

Fla.—Fariss v. Holly, 95 Fla. 360, 116 S 763; Evans v. Kloeppel, 72 Fla. 267, 73 S 180.

Ill.—Schott v. Youree, 142 Ill. 233, 31 NE 591 [aff 41 Ill. A. 476]; McMurchy v. O'Hair, 67 Ill. 242; Warner v. Matthews, 18 Ill. 83; Cermak v. Guggenheim Laundry Mach. Co., 198 Ill. A. 202.

Ind.—McFadden v. Fritz, 110 Ind. 1, 10 NE 120; Woods v. Kessler, 93 Ind. 356; Denny v. Reynolds, 24 Ind. 248; Shaver v. Kappellas, 83 Ind. A. 338, 146 NE 858.

Iowa.—Hershler v. Reynolds, 22 Iowa 152.

Kan.—First State Bank v. Martin, 81 Kan. 794, 106 P 1056.

Mass.—Rosen v. U. S. Rubber Co., 167 NE 655, 65 ALR 1299; Huggeford v. Ford, 11 Pick. 223.

Mo.—Dolfuss v. Cohen, (A.) 261 SW 754; Sconce v. Long Bell Lumber Co., 54 Mo. A. 509.

Nebr.—Pennington County Bank v. Bauman, 87 Nebr. 25, 126 NW 654 [rev on reh 85 Nebr. 226, 122 NW 848].

N. J.—Lutes v. Alpaugh, 23 N. J. L. 165.

N. Y.—Van Almkerk v. H. C. S. Motor Sales Corp., 208 App. Div. 464, 203 NYS 639; Thompson v. Illinois Surety Co., 175 App. Div. 379, 161 NYS 1009; Christiansen v. Mendham, 45 App. Div. 554, 61 NYS 326 [aff 28 Misc. 765, 59 NYS 1100]; Brady v. Beadleston, 62 Hun 548, 17 NYS 42.

N. D.—Grace City First State Bank v. Bradley, 57 N. D. 159, 220 NW 848.

Oh.—Richardson v. People's Nat. Bank, 57 Oh. St. 299, 48 NE 1100.

Okl.—U. S. Fidelity, etc., Co. v. Yoder, 139 Okl. 256, 281 P 974; Dupree v. Jordan, 123 Okl. 91, 252 P 67; Grimes v. Payne, 116 Okl. 295, 244 P 753; U. S. Fidelity, etc., Co. v. Harmon, 92 Okl. 167, 218 P 682; Emerson-Brantingham Impl. Co. v. Ritter, 92 Okl. 71, 218 P 315.

Or.—Capital Lumbering Co. v. Learned, 36 Or. 544, 59 P 454, 78 Am SR 792.

Pa.—Cox v. Hartranft, 154 Pa. 457, 26 A 304; Bradford v. Frederick, 101 Pa. 445; Com. v. King, 18 Pa. Dist. 404, 36 Pa. Co. 149; Hicks v. McBride, 3 Phila. 377.

R. I.—Horton v. Stone, 32 R. I. 499, 80 A 1.

S. C.—Bolt v. Milam, 110 S. C. 399, 96 SE 614; Gibbes Mach. Co. v. Moore, 107 S. C. 327, 92 SE 1033; Parish v. Smith, 66 S. C. 424, 45 SE 16; Cheatham v. Morrison, 37 S. C. 187, 15 SE 924; Thomson v. Joplin, 12 S. C. 580.

S. D.—Folmer v. Hanson, 44 S. D. 122, 182 NW 633.

Tenn.—Wells v. Griffin, 2 Head 568.

Wash.—Hafner v. U. S. Fidelity, etc., Co., 126 Wash. 670, 219 P 16.

Ont.—Meyers v. Maybee, 10 U. C. Q. B. 200.

See also infra § 427.

"Appellant, by signing the bond, having submitted himself thereby to the jurisdiction of the court, under the above authorities was bound by the judgment rendered in that cause, the same being within the issues as well as the principal, and cannot now be heard in this action collaterally to challenge the validity of the judgment." Shaver v. Kappellas, 83 Ind. A. 330, 146 NE 858, 859.

[a] **Collateral attack.**—In an action against sureties on a replevin bond, they cannot collaterally attack the replevin judgment, except for want of jurisdiction of the parties or the subject matter, and it matters not that such judgment may be erroneous; not having been appealed from it is final. Dupree v. Jordan, 123 Okl. 91, 252 P 67.

[b] **Judgment by consent.**—Where a principal consented to a judgment against him in consideration of a stay of execution, the sureties on the bond were nevertheless concluded by such judgment as they are treated as being in court. Hershler v. Reynolds, 22 Iowa 152.

[c] **Judgment by confession** in the replevin suit is as binding on the sureties on the redelivery bond as a judgment on verdict, in the absence of fraud and collusion. Bradford v. Frederick, 101 Pa. 445.

[d] **Surety cannot object to the form of proceeding** against the principal; the surety is bound by the result of the litigation, although the principal waive the form. Greenlaw v. Logan, 2 Lea (Tenn.) 185.

[e] **Validity of bond.**—A judgment dismissing a replevin suit because the bond was void, to which no exception was taken, was held res judicata as to the validity of the bond in an action thereon. Horton v. Stone, 32 R. I. 499, 80 A 1.

[f] **Sheriff's return of elongata** to a writ de retorno habendo on judgment for a return in replevin is conclusive in an action on the replevin bond. Caldwell v. West, 21 N. J. L. 411.

[g] **Form of judgment.**—The form of a judgment in a replevin action cannot be attacked by defendants in an action by a surety on a forthcoming bond against the principal's cosurety, who has been required by action to pay the judgment. Dunkle v. Haight, 68 Colo. 404, 189 P 783.

79. Colo.—Cantril v. Babcock, 11 Colo. 142, 458, 17 P 296, 18 P 342; Colorado Springs Co. v. Hopkins, 5 Colo. 206.

Fla.—Fariss v. Holly, 95 Fla. 360, 116 S 763; Evans v. Kloeppel, 72 Fla. 267, 73 S 180.

Ind.—Jackson v. Morgan, 167 Ind. 528, 78 NE 633; McFadden v. Fritz, 110 Ind. 1, 10 NE 120; Lindsey v. Hewitt, 42 Ind. A. 573, 86 NE 446.

Kan.—Boyd v. Huffaker, 39 Kan. 525, 18 P 508.

Mass.—Rosen v. U. S. Rubber Co., 167 NE 655, 65 ALR 1299.

Nebr.—Pennington County Bank v. Bauman, 87 Nebr. 25, 126 NW 654.

Or.—Gust v. Edwards Co., 129 Or.

and did not appear and defend,[80] and similarly matters litigated in the replevin suit cannot be reëxamined in a suit on the redelivery bond.[81] When the judgment in the replevin suit is in favor of defendant, plaintiff in that suit is estopped, in an action on a replevin bond, to deny that one of the obligees had any interest in the bond, on the ground that he had no interest in property involved in the suit.[82] But the surety is not bound as to matter not affecting the merits of the replevin suit and not necessary to be pleaded therein,[83] nor is he bound by a replevin judgment procured by fraud, mistake or collusion,[84] or entered by a court having no jurisdiction to enter judgment other than a judgment of dismissal.[85] Evidence that the judgment was subsequently satisfied by a delivery of the property is not objectionable as impeaching the record of the judgment, or the return by the officer in the replevin suit,[86] and the surety on a replevin bond may prove in discharge of his liability that he has complied with the contract by offering to return the goods in accordance with the condition of the bond.[87]

The value of the property or the amount of the judgment in replevin is conclusive on the surety when such matters have been put in issue and decided by a court of competent jurisdiction.[88]

Damages for detention. A judgment in replevin for damages for detention of the property is conclusive on the surety where such damages have been in issue in the replevin suit.[89]

Depreciation in value. While a judgment in re-

409, 274 P 919; Peacock v. Kirkland, 74 Or. 279, 145 P 281.

Pa.—Com. v. Lintott, 74 Pa. Super. 401, 64 Pa. Super. 328.

S. D.—Gilloth v. Trow, 53 S. D. 551, 221 NW 266.

Wash.—Western Farquhar Mach. Co. v. Pierce, 113 Wash. 141, 193 P 708; Ihrig v. Bussel, 68 Wash. 70, 122 P 608, LRA1917A 1188.

[a] **General denial.**—Where a general denial put the right of possession of the property, its value, and the damages for detention in issue, defendant, recovering judgment in replevin for a return of the property or its value and costs, cannot in an action on the bond recover damages for detention as such matter having been put in issue should have been determined in the replevin suit. Jackson v. Morgan, 167 Ind. 528, 78 NE 633.

[b] **If the pendency of bankrupt proceedings invalidates a levy,** they should be shown in an action of replevin to recover the value of the goods levied on, and not withheld to be litigated in proceedings relating to the replevin bond. Jacobson v. Metzgar, 43 Mich. 403, 5 NW 445.

[c] **One who replevies property transferred to him in fraud of creditors,** and levied on accordingly, cannot after suffering judgment in replevin enjoin a suit on the replevin bond, on the ground that the debtor had made a composition with creditors and thereby recovered his assets. Jacobson v. Metzgar, 43 Mich. 403, 5 NW 445; Phillips v. Hyde, 1 Dall. (Pa.) 439, 1 L. ed. 213.

[d] **Right of possession.**—When plaintiff sued in claim and delivery to foreclose a chattel mortgage, defendant's right to remove certain apparatus attached to the property when the redelivery bond was given will be presumed to have been litigated in the replevin action and cannot be inquired into in an action on the redelivery bond. Gilloth v. Trow, 53 S. D. 551, 221 NW 266.

Necessity of assessment of damages in replevin suit see supra §§ 389–392.

[80] Moore v. Kepner, 7 Nebr. 291 (by signing the replevin bond the surety submits himself to the jurisdiction of the court, and is not entitled to notice to defend, but is bound by the judgment against his principal).

[81] Bierce v. Waterhouse, 219 U. S. 320, 31 SCt 241, 55 L. ed. 237; Boyd v. Huffaker, 39 Kan. 525, 18 P 508; Kennedy v. Brown, 21 Kan. 134; O'Loughlin v. Carr, 9 Kan. A. 818, 60 P 478; Vulcan Steam Shovel Co. v. Cobb, (Mo. A.) 199 SW 448.

[a] **Amendment to complaint.**—Where in replevin the court ruled an amendment to the complaint as proper, such ruling was binding on the sureties on the redelivery bond as the matter was in issue in the replevin suit. Bierce v. Waterhouse, 219 U. S. 320, 55 L. ed. 237, 31 SCt 241.

[82] Ringgenberg v. Hartman, 124 Ind. 186, 24 NE 987.

[83] Ill.—David v. Bradley, 79 Ill. 316; Klaproth v. Greenberg, 147 Ill. A. 380.

Mass.—Easter v. Foster, 173 Mass. 39, 53 NE 132, 73 AmSR 257; Leonard v. Whitney, 109 Mass. 265; Davis v. Harding, 3 Allen 302.

Mo.—R. W. Wilson Motor Co. v. Hoover, 222 Mo. A. 570, 293 SW 61.

N. C.—Moore v. Edwards, 192 N. C. 446, 135 SE 302.

N. D.—Clark v. Ellingson, 35 N. D. 546, 161 NW 199.

[a] **Defendant must affirmatively state** in his plea why the merits were not determined and give enough of the proceedings in replevin to enable the court to decide on demurrer whether the right of property has been determined. King v. Ramsay, 13 Ill. 619; Moore v. Paul F. Beach Co., 221 Ill. A. 609; Klaproth v. Greenberg, 147 Ill. A. 380.

[b] **Damages recovered by an attaching officer,** in a replevin suit brought against him in which the property attached is replevied, being recovered in trust, are not conclusive on the parties in a suit on the replevin bond. Howe v. Handley, 28 Me. 241.

[84] Richardson v. People's Nat. Bank, 57 Oh. St. 299, 48 NE 1100. See Bierce v. Waterhouse, 219 U. S. 320, 31 SCt 241, 55 L. ed. 237 (dictum); Vulcan Steam Shovel Co. v. Cobb, (Mo. A.) 199 SW 448 (dictum).

[85] Gallup v. Wortmann, 11 Colo. A. 308, 53 P 247; Hulman v. Benighof, 125 Ind. 481, 25 NE 549; Carroll v. Berger, 255 Mass. 132, 150 NE 870; Bates v. American Surety Co., (R. I.) 148 A 323.

[86] Dempsey v. Cogswell, 29 Minn. 100, 12 NW 148.

[87] Johnson v. Mason, 64 N. J. L. 258, 45 A 618.

[88] U. S.—Bierce v. Waterhouse, 219 U. S. 320, 31 SCt 241, 55 L. ed. 237 [rev 19 Hawaii 398]; Washington Ice Co. v. Webster, 125 U. S. 426, 8 SCt 947, 31 L. ed. 799.

Colo.—Trindle v. Register Printing, etc., Co., 58 Colo. 81, 143 P 282; Cantril v. Babcock, 11 Colo. 142, 458, 18 P 342, 17 P 296.

Mass.—Huggeford v. Ford, 11 Pick. 223.

Mo.—Dolfuss v. Cohen, (A.) 261 SW 754.

Or.—Capital Lumbering Co. v. Learned, 36 Or. 544, 59 P 454, 78 Am SR 792.

S. C.—Parish v. Smith, 66 S. C. 424, 45 SE 16; Thomson v. Joplin, 12 S. C. 580.

S. D.—Folmer v. Hanson, 44 S. D. 122, 182 NW 633.

Wash.—Hafner v. U. S. Fidelity, etc., Co., 126 Wash. 670, 219 P 16.

"The issue as to whether the value of the property redelivered to the defendants was greater than alleged in the plaintiff's affidavit and claimed in the original complaint, as well as whether the amendment of that complaint was such as to change the cause of action, were issues made and decided against the principal in the bond upon which the sureties were bound and cannot be relitigated, in the absence of fraud and collusion, by a surety when sued on the bond." Bierce v. Waterhouse, 219 U. S. 320, 335, 31 SCt 241, 55 L. ed. 237.

"The sureties in the replevin bond were represented in the replevin suit by the plaintiff therein, and were identified with it in interest, and claimed in privity with it, so as to be concluded by the proceedings in that suit. . . . The question of value of the ice at the time it was taken in replevin was essential to the finding of the verdict in the replevin suit; and in such case, it is not necessary to the conclusiveness of the former judgment that there should have been a formal issue in the prior suit as to such question." Washington Ice Co. v. Webster, 125 U. S. 426, 446, 8 SCt 947, 31 L. ed. 799.

[89] Colorado Springs Co. v. Hopkins, 5 Colo. 206, 212; Holtz v. Riddell, 101 Conn. 416, 126 A 333; Jackson v. Morgan, 167 Ind. 528, 78 NE 633; Thompson v. Illinois Surety Co., 175 App. Div. 379, 161 NYS 1009.

"Enough appears, however, to show that the subject of damages for detention of the property was an issue in that proceeding. It follows that to the extent of the recovery which might have been obtained in that suit, if no error intervened, the matter is res adjudicata. The same matters litigated there cannot be re-examined in a suit upon the bond."

plevin may be conclusive against the surety where the matter of depreciation has been put in issue, yet where the question has not been determined on its merits in the replevin suit, the surety is not bound by the judgment.[90]

[§ 427] **2. Title and Right to Possession.** Where the judgment in replevin passes on the question of title or possession to the property, the matter is res judicata in an action on the replevin bond,[91] and the rule is the same in an action on the redelivery bond.[92] Where the question of title has been in issue and decided in the replevin suit, the obligee on the bond in an action thereon cannot avoid recovery by showing that the property replevied belonged to a stranger.[93] But unless the title to the property is put in issue and determined, a judgment in the replevin suit determines nothing beyond the right of possession, and evidence bearing on title and real ownership, although not admissible in bar of the action,[94] is admissible in an action on the bond as affecting the measure of damages.[95] Al-

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Colorado Springs Co. v. Hopkins, supra.

[a] **When damages in issue.**—(1) Where in replevin judgment was rendered on a verdict that "The jury . . . finds the issues for the defendant . . . and according to such finding renders a verdict for the return of the goods to the defendant, and assess his damages at $1," it was held that such judgment and verdict was not res judicata as to defendant, since only plaintiff's damages were in issue in the replevin suit and not the defendant's. Gould v. Hayes, 71 Conn. 86, 92, 40 A 930. (2) In replevin where defendant by counterclaim pleaded damages and such was an issue before the jury, the finding for defendant in the sum of one dollar as damages was res judicata so that no recovery for damages could be had in an action on plaintiff's replevin bond. Holtz v. Riddell, 101 Conn. 416, 126 A 333 [dist Gould v. Hayes, 71 Conn. 86, 40 A 930]. (3) In an action on a redelivery bond, the sureties are not concluded by a judgment for damages for detention in the replevin suit, where in that suit the petition did not claim such damages, and although leave to amend was granted to include such damages, plaintiff failed properly to amend. Clark v. Ellingson, 35 N. D. 546, 161 NW 199.

90. R. W. Wilson Motor Co. v. Hoover, 222 Mo. A. 570, 293 SW 61; Moore v. Edwards, 192 N. C. 446, 135 SE 302.

91. Ill.—McMurchy v. O'Hair, 67 Ill. 242; Warner v. Matthews, 18 Ill. 83; Cermak v. Guggenheim Laundry Mach. Co., 198 Ill. A. 202.

Ind.—Ringgenberg v. Hartman, 124 Ind. 186, 24 NE 987; Woods v. Kessler, 93 Ind. 356; Davis v. Crow, 7 Blackf. 129.

Iowa.—Hawley v. Warner, 12 Iowa 42.

Kan.—Kennedy v. Brown, 21 Kan. 171.

Md.—Seldner v. Smith, 40 Md. 602; Cumberland Coal, etc., Co. v. Tilghman, 13 Md. 74.

Minn.—Boom v. St. Paul Fdy., etc., Co., 33 Minn. 253, 22 NW 538.

Mo.—Waterman v. Frank, 21 Mo. 108.

N. C.—Davis Bros. Co. v. Wallace, 190 N. C. 543, 130 SE 176.

Wash.—Ihrig v. Bussell, 68 Wash. 70, 122 P 608, LRA1917A 1188.

N. B.—Wheeler v. Stewart, 16 N. B. 398.

[a] **Judgment of dismissal based on title.**—Where a judgment of dismissal does not mention the question of title, but the judgment is based on a determination of title, such judgment being on the merits is conclusive against the sureties on the bond in an action thereon. Boom v. St. Paul Fdy., etc., Co., 33 Minn. 253, 22 NW 538.

[b] **Termination of title after judgment.**—Although a defendant in an action on the bond may not show title in himself in mitigation of damages, he could show that plaintiff's title was of a short duration and terminated by contract in a short time after judgment in the replevin suit. Cumberland Coal, etc., Co. v. Tilghman, 13 Md. 74.

[c] **Judgment by default.**—Where judgment by default was recovered against plaintiff in replevin, whereupon defendant waived a return of the property in controversy and had his damages assessed, in an action on the replevin bond the obligors could not show in mitigation of damages that the principal obligor, plaintiff in replevin suit, was a part owner of the property in question, as allowed by Comp. L. § 677, in case where judgment for return is taken. Ryan v. Akeley, 42 Mich. 516, 4 NW 207.

[d] **Where goods owned in common** and replevied from one of the owners by the others are not restored by them on a judgment for a return, the judgment does not estop them from proving the common ownership of the goods on the question for what sum he shall take execution on a judgment in his favor on the replevin bond. Leonard v. Whitney, 109 Mass. 265.

92. Hurd v. U. S. Fidelity, etc., Co., 116 Kan. 453, 227 P 337; Boyd v. Huffaker, 40 Kan. 634, 20 P 459.

[a] **Subsequently acquired title.**—Where a judgment for defendant and for a return of the property has been rendered in an action of replevin, plaintiff cannot, in an action against him, on his bond, for failure to deliver the property, set up in defense to such action a new title to the property, acquired after the replevin bond was given, and before the judgment of return. Carr v. Ellis, 37 Ind. 465.

93. Smith v. Lisher, 23 Ind. 500; Henry v. Ferguson, 55 Mich. 399, 21 NW 381. But see Walter v. Warfield, 2 Gill (Md.) 162 (where defendant in replevin pleaded property in S, and, on judgment in his favor, brought an action on the bond, and it was held that the damages which he could recover thereon were only such as he had suffered personally by reason of the action in replevin, and defendants, in an action on the bond, might therefore show that S was the owner of the property, and that defendant in replevin had no personal interest therein).

94. Ernst v. Hogue, 86 Ala. 502, 5 S 738; Ormsbee v. Davis, 16 Conn. 567; Wiseman v. Lynn, 39 Ind. 250; Sammons v. Newman, 27 Ind. 508; Davis v. Crow, 7 Blackf. (Ind.) 129; Sherry v. Foresman, 6 Blackf. (Ind.) 56. See Stockwell v. Byrne, 22 Ind. 6 (a plea in bar except as to nominal damages allowed).

95. U. S.—Gilbert v. American Surety Co., 121 Fed. 499, 57 CCA 619, 61 LRA 253.

Ala.—Ernst v. Hogue, 86 Ala. 502, 5 S 738; Savage v. Gunter, 32 Ala. 467.

Conn.—Fielding v. Silverstein, 70 Conn. 605, 40 A 454; Jackson v. Emmons, 59 Conn. 493, 22 A 296; Allen v. Woodford, 36 Conn. 143.

Ill.—Gilbert v. Sprague, 196 Ill. 444, 63 NE 993 [rev 88 Ill. A. 508]; O'Donnell v. Colby, 153 Ill. 324, 38 NE 1065 [rev 55 Ill. A. 112, 38 Ill. A. 196]; Hanchett v. Gardner, 138 Ill. 571, 28 NE 788; Lemen v. Robinson, 59 Ill. 115; Chinn v. McCoy, 19 Ill. 604; Warner v. Matthews, 18 Ill. 83; King v. Ramsay, 13 Ill. 619; Hock v. Magerstadt, 124 Ill. A. 140; Lyon v. Pease, 86 Ill. A. 251; Farson v. Gilbert, 85 Ill. A. 364; Schweer v. Schwabacher, 17 Ill. A. 78; Rankin v. Kinsey, 7 Ill. A. 215.

Ind.—Hulman v. Benighof, 125 Ind. 481, 25 NE 549; Ringgenberg v. Hartman, 124 Ind. 186, 24 NE 987; McFadden v. Ross, 108 Ind. 512, 8 NE 161; Wiseman v. Lynn, 39 Ind. 250; Sammons v. Newman, 27 Ind. 508; Wallace v. Clark, 7 Blackf. 298; Sherry v. Foresman, 6 Blackf. 56; Consolidated Tank Line Co. v. Bronson, 2 Ind. A. 1, 28 NE 155.

Iowa.—Hawley v. Warner, 12 Iowa 42; Buck v. Rhodes, 11 Iowa 348.

Me.—Macomber v. Moore, 128 Me. 481, 148 A 682 [quot Cyc]; Williams v. Dunn, 120 Me. 506, 115 A 276; Harmon v. Flood, 115 Me. 116, 97 A 834; Jones v. Smith, 79 Me. 452, 10 A 256.

Md.—Crabbs v. Koontz, 69 Md. 59, 13 A 591; Mason v. Sumner, 22 Md. 312.

Mass.—Easter v. Foster, 173 Mass. 39, 53 NE 132, 73 AmSR 257; Davis v. Harding, 3 Allen 302.

Mich.—Simmons v. Robinson, 101 Mich. 240, 59 NW 623; Henry v. Ferguson, 55 Mich. 399, 21 NW 381.

Minn.—Hansen v. Thomas, 171 Minn. 101, 213 NW 378.

Mo.—Bailey v. Dennis, 135 Mo. A. 93, 115 SW 506.

N. Y.—Freeman v. U. S. Fidelity, etc., Co., 43 Misc. 364, 87 NYS 493.

N. C.—Davis Bros. Co. v. Wallace, 190 N. C. 543, 130 SE 176.

R. I.—Bates v. American Surety Co., 148 A 323.

See also infra § 428.

"As the defendant was the legal owner of the goods replevied, he was entitled to the possession thereof, but as his replevin suit failed for an irregularity in the writ, no judgment affecting the title was entered, and, as he did not return the goods replevied and place this plaintiff in statu quo, there was a breach of the bond; but it was admissible for him to show in mitigation of damages that he was the lawful owner of the goods re-though under statutory provisions a defendant in an action on the bond may not show title in a stranger, even though the question of title has not been decided in the replevin suit,[96] a contrary rule has been followed in the absence of statute.[97]

[§ 428] **3. Dismissal or Nonsuit.** Unless by statute a voluntary dismissal or submission to a nonsuit in replevin deprives the party from pleading his title in mitigation of damages,[98] the general rule is that when the merits of the replevin suit were not determined at the trial, great latitude is allowed in pleading defenses to the suit on the bond, and a plaintiff who has submitted to a nonsuit or dismissed the action of replevin may, when sued on the bond, prove title to the property in reduction of damages.[99]

[§ 429] **H. Summary Remedies.**[1] In the absence of express statutory provision, summary judgment rendered against the principal and sureties in a replevin bond, jointly, without any direct proceeding on the bond, is erroneous.[2] The bond can only be made the foundation of a judgment by an action upon it,[3] either of debt,[4] or by scire facias.[5] In some jurisdictions, however, the statutes provide for proceedings by rule or motion for judgment and award of execution on the replevin bond, after breach thereof,[6] as in Arkansas,[7] Florida,[8] Iowa,[9] Mississippi,[10] Missouri,[11] New Mexico,[12] North Carolina,[13] Ohio,[14] Tennessee,[15] Texas,[16] and Washing-

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plevied." Harmon v. Flood, 115 Me. 116, 122, 97 A 834.

[a] **Voluntary nonsuit.**—Dismissal of an action of claim and delivery for the possession of an automobile on voluntary nonsuit was not conclusive as to the title to the automobile, and defendants, in an action for breach of a claim and delivery bond, might offer evidence in support of their allegation of title, not to defeat plaintiffs' action, but in mitigation of actual damages. Davis Bros. Co. v. Wallace, 190 N. C. 543, 130 SE 176.

[b] **No jurisdiction to determine title.**—Where the court in the replevin action had no jurisdiction to determine title, a judgment in that action was not conclusive on the surety. O'Donnell v. Colby, 153 Ill. 324, 38 NE 1065 [rev 55 Ill. A. 112, 38 Ill. A. 196]; Bates v. American Surety Co., (R. I.) 148 A 323.

Evidence admissible in mitigation of damages see infra § 456.

96. Holler v. Coleson, 23 Ill. A. 324.

97. Macomber v. Moore, 128 Me. 481, 148 A 682.

98. Clark v. Howell, 3 Colo. 564 (under Rev. St. p 540 § 14).

99. U. S.—Gilbert v. American Surety Co., 121 Fed. 499, 57 CCA 619, 61 LRA 253.

Ala.—Ernst v. Hogue, 86 Ala. 502, 5 S 738; Savage v. Gunter, 32 Ala. 467.

Ill.—Hanchett v. Gardner, 138 Ill. 571, 28 NE 788 [aff 37 Ill. A. 79] (under Rev. St. c 118 § 26); Stevison v. Earnest, 80 Ill. 513.

Ind.—Hulman v. Benighof, 125 Ind. 481, 25 NE 549 (under Rev. St. [1881] § 572); Robinson v. Teeter, 10 Ind. A. 698, 38 NE 222.

Me.—Harmon v. Flood, 115 Me. 116, 97 A 834.

Md.—Belt v. Worthington, 3 Gill & J. 247.

Mich.—Pearl v. Garlock, 61 Mich. 419, 28 NW 155, 1 AmSR 603.

"In the replevin suit, however, there was no judgment determining the merits of the cause. The case was dismissed for want of prosecution, with the ordinary judgment for the return of the property taken in replevin. The decision of the Supreme Court merely ruled that certain evidence tending to show the illegality of the transaction, and which was excluded at the trial of the replevin suit, should have been allowed, and the judgment was therefore reversed, with a direction for a new trial. There was no new trial. The dismissal of the suit for want of prosecution is no bar to a subsequent action—certainly not so persuasive as a judgment of nonsuit when the plaintiff's evidence has been heard; and the latter is not a bar to a second suit." Gilbert v. American Surety Co., 121 Fed. 499, 501, 157 CCA 619, 61 LRA 253.

Evidence admissible in mitigation of damages see infra § 456.

1. Generally see Judgments §§ 421–435; Summary Proceedings [37 Cyc 528].

2. Iowa.—Hurd v. Gallaher, 14 Iowa 394; Jansen v. Effey, 10 Iowa 227.

Ky.—Gay v. Morgan, 4 Bush 606.

Miss.—Thompson v. Raymon, 8 Miss. 186.

Tenn.—Keelin v. Graves, 129 Tenn. 103, 165 SW 232, LRA1915A 421.

Wash.—Bancroft-Whitney Co. v. Gowan, 24 Wash. 66, 63 P 1111; Eidson v. Woolery, 10 Wash. 225, 38 P 1025.

3. Gay v. Morgan, 4 Bush (Ky.) 606; Thompson v. Raymon, 8 Miss. 186; Mariany v. Lemaire, (Tex. Civ. A.) 83 SW 215.

4. Manning v. Pierce, 3 Ill. 4; Salter v. Richardson, 3 T. B. Mon. (Ky.) 204; Chalfant v. Hart, 1 A. K. Marsh. (Ky.) 572; Pemble v. Clifford, 13 S. C. L. 31. See Leland v. Barry, 69 Ill. 348; Peck v. Wilson, 22 Ill. 205 (an action of debt on a forfeited replevin bond is not such a contract as is contemplated by the third and fourteenth sections of the Practice Act for the courts of Cook County. Those sections relate to contracts for the payment of money as damages arising from a breach on contract, and a plea to an action on such a bond should not be stricken from the files for want of an affidavit of merits).

5. Thompson v. Raymon, 8 Miss. 186.

[a] **Where execution might issue without revivor.**—If scire facias be sued out on a replevin bond, on which execution might have issued without revivor, a demurrer will be sustained to the writ. Davenport v. Irvine, 4 J. J. Marsh. (Ky.) 60.

[b] **Writ of return necessary.**—Proceeding by scire facias on a replevin bond cannot be resorted to unless the writ pro retorno habendo be issued and returned elongata. Pemble v. Clifford, 13 S. C. L. 31.

6. See statutory provisions.

7. [a] **Statutes construed and applied.**—Conlee v. Love, 178 Ark. 238, 10 SW (2d) 372; Thomas v. Schaad, 170 Ark. 797, 281 SW 10; Sibeck v. McTiernan, 94 Ark. 1, 125 SW 136.

[b] **Capias bond.**—A bond given by a defendant who had been arrested on capias in replevin, held to be a delivery bond under Kirby Dig. § 6863, on which the court could properly render judgment against the sureties under § 6870, and not a bail bond provided for by Kirby Dig. §§ 6858, 6859. O'Brien v. Alford, 114 Ark. 257, 169 SW 774.

8. [a] **Statutes construed and applied.**—Evans v. Kloeppel, 72 Fla. 267, 73 S 180; Malsby v. Gamble, 61 Fla. 310, 54 S 766.

[b] **Judgment on nonsuit.**—Under the express provisions of Gen. St. (1906) § 2189, a judgment against plaintiff and his sureties in replevin on plaintiff's nonsuit shall be given as on a verdict recovered after trial. Malsby v. Gamble, 61 Fla. 310, 327, 54 S 766.

9. [a] **Statutes construed and applied.**—Under Code §§ 4176, 4178, 4179, which provide the procedure on a verdict for a plaintiff in replevin, a judgment was properly rendered against the sureties on a delivery bond conditioned for the return or delivery of the property sought, on judgment for plaintiff, on motion after plaintiff's execution for the return of the specific property had been returned unsatisfied. Richards v. Hellen, 153 Iowa 66, 133 NW 393.

10. [a] **Statutes construed and applied.**—Vannerson v. Staunton, Walk. (Miss.) 358.

[b] **Forfeiture of bond operating as judgment.**—On a replevin bond given by a tenant on replevying goods distrained for rent under the statute, motion should be for execution and not for judgment, as the bond after forfeiture operates as a judgment. Vannerson v. Staunton, 1 Miss. 358.

11. [a] **Statutes construed and applied.**—Collins v. Hough, 26 Mo. 149.

12. [a] **Statutes construed and applied.**—Cochrane v. Stevenson, 32 N. M. 264, 255 P 404.

13. [a] **Statutes construed and applied.**—Harrell v. Tripp, 197 N. C. 426, 149 SE 548; Federal Finance, etc., Co. v. Teeter, 196 N. C. 232, 145 SE 8; Orange Trust Co. v. Hayes, 191 N. C. 542, 132 SE 466; White-Blakeslee Mfg. Co. v. Rhodes, 152 N. C. 636, 68 SE 141; Hall v. Tillman, 103 N. C. 276, 9 SE 194; Harker v. Arendell, 74 N. C. 85; Boylston Ins. Co. v. Davis, 74 N. C. 78.

14. [a] **Statutes construed and applied.**—Richardson v. People's Nat. Bank, 57 Oh. St. 299, 48 NE 1100; Woog v. People's Bank, 4 OhS&CP 51, 2 OhNP 394.

15. [a] **Statutes construed and applied.**—Hamilton v. Henney Buggy Co., 102 Tenn. 714, 52 SW 160.

16. [a] **Statutes construed and applied.**—Close v. Hannig, (Tex.) 17 SW 350; Cawley v. Dixie Finance Co., (Tex. Civ. A.) 15 SW (2d) 664; Dempton;[17] and where a judgment is rendered against plaintiff in replevin, it may at the same time be entered up against the sureties on his replevin bond,[18] or at a subsequent time,[19] without further notice to the surety.[20] Such a proceeding, however, being a summary remedy, must conform to the statute in all material respects,[21] and the judgment must be such as is authorized by law.[22] When so authorized by statute, the court, in the replevin proceeding, may render judgment against the obligors in the replevy bond;[23] but the sureties are liable on only

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sey Oil Co. v. Hussey, (Tex. Civ. A.) 254 SW 590; Brooks v. Taylor, (Tex. Civ. A.) 214 SW 361; Tripplett v. Hendricks, (Tex. Civ. A.) 212 SW 754; Gonzales v. Flores, (Tex. Civ. A.) 200 SW 851; Tyson v. First State Bank, etc., Co., (Tex. Civ. A.) 154 SW 1055.

[b] **Judgment against sureties** on a replevin bond follows as a matter of law, without notice to them, after judgment against their principal, under Vernon's Sayles' Civ. St. Annot. (1914) art 269. Tripplett v. Hendricks, (Tex. Civ. A.) 212 SW 754.

17. [a] **Statutes construed and applied.**—MacCallum-Donahoe Finance Co. v. Warren, 133 Wash. 106, 233 P 7.

[b] **Judgment under admission of counsel.**—Although the statute was silent as to the rendition of a summary judgment on a redelivery bond, such judgment was entered on the admission of counsel that such should be the judgment. MacCallum-Donahoe Finance Co. v. Warren, 133 Wash. 106, 233 P 7.

18. Glenn v. Porter, 68 Ark. 320, 57 SW 1109; Booth v. Ableman, 20 Wis. 602; Pratt v. Donovan, 10 Wis. 378.

[a] **Sureties become parties by executing bond.**—A party who signs the undertaking as surety for the return of property replevied thereby becomes quasi, a party to the suit then pending, and is liable to have judgment entered against him with his principal, on a failure of the principal to sustain his cause. Fariss v. Holly, 95 Fla. 360, 116 S 763; Evans v. Kloeppel, 72 Fla. 267, 73 S 180; Pratt v. Donovan, 10 Wis. 378.

[b] **Provision that the sureties be notified to appear in court and show cause** why judgment should not be rendered against them for the breach of the undertaking gives said sureties a day in court and an opportunity to set up, by way of defense, any matter not concluded by the judgment in replevin. Woog v. People's Bank, 4 OhS&CP 51, 2 OhNP 394.

[c] **Effect of dismissal.**—The fact that plaintiff's action is dismissed will not prevent the court entering summary judgment under the statute against the obligors on the replevy bond. Brooks v. Taylor, (Tex. Civ. A.) 214 SW 361.

[d] **Necessity of judgment against principal.**—A judgment in replevin for the penalty of a bond given by defendant without a previous judgment against such defendant is erroneous. Scott v. Elliott, 63 N. C. 215.

[e] **But in Tennessee** under Acts (1885) c 59 § 1, Code § 5145, judgment for the penalty of the bond, without reference to the value of the property, is allowable only after plaintiff has failed to return the property and a writ of fieri facias has been returned unsatisfied in whole or in part and then at the term of the court to which that writ shall have been so returned. Nighbert v. Hornsby, 100 Tenn. 82, 42 SW 1060, 66 AmSR 736 (where judgment was rendered at the trial court before plaintiff had an opportunity to return the property and before an execution had been issued, it was premature and unauthorized, and the fact that it was stayed by its own terms for forty days did not cure the defect).

[f] **Judgment by confession** against the principal in a replevin bond may under some circumstances bind the sureties. Siddall v. Goggan, 68 Tex. 708, 5 SW 668.

19. Sibeck v. McTiernan, 94 Ark. 1, 8, 125 SW 136.

But see Rafalshy v. Kraus, 10 Heisk. (Tenn.) 558 (where judgment against the principal was entered at one term, judgment could not be entered against the surety on motion made at the next term).

"By executing the bond, the sureties became parties to the action, and the statute provides for no process or notice to them before judgment. Upon bonds upon which the statutes authorize summary judgments upon motion against sureties after judgment against the principal, this court has repeatedly held that such judgments may be entered without notice against the sureties after a failure to do so at the time judgment was rendered against the principal, even at a subsequent term of the court." Sibeck v. McTiernan, supra.

20. Sibeck v. McTiernan, supra; Glenn v. Porter, 68 Ark. 320, 57 SW 1109; Tripplett v. Hendricks, (Tex. Civ. A.) 212 SW 754.

21. Ark.—Schneider v. Coker, 115 Ark. 490, 171 SW 898; Dillard v. Nelson, 78 Ark. 237, 95 SW 460; McKnight v. Smith, 5 Ark. 409.

Fla.—Fariss v. Holly, 95 Fla. 360, 116 S 763; Hickson v. Osteen, 83 Fla. 336, 91 S 331.

Mo.—Wooldridge v. Quinn, 49 Mo. 425; Huttig-McDermid Pearl Button Co. v. Springfield Shirt Co., 140 Mo. A. 374, 124 SW 1094; Puller v. Thomas, 36 Mo. A. 105.

N. C.—Orange Trust Co. v. Hayes, 191 N. C. 542, 132 SE 466.

Tex.—Mariany v. Lemaire, (Civ. A.) 83 SW 215.

"Nothing is better settled than that in these summary proceedings against parties not served with process, the statute must be strictly pursued; and they cannot be had against those who have not submitted themselves to the operation of the statute." Wooldridge v. Quinn, 49 Mo. 425, 427.

[a] **If the proceeding is void,** so that the court has no jurisdiction over the subject matter, there can be no summary judgment rendered under the statute. Frederick v. Tiffin, 22 Mo. A. 443.

[b] **Proof of breach of conditions.**—To authorize a summary judgment on the bond, it is necessary to show facts constituting a breach of its conditions. McKnight v. Smith, 5 Ark. 409.

[c] **Where the bond is not in the form prescribed by statute,** a summary judgment thereon is unauthorized. Dillard v. Nelson, 78 Ark. 237, 95 SW 460; Orange Trust Co. v. Hayes, 191 N. C. 542, 132 SE 466.

[d] **Bond must conform to statute.**—(1) Where the bond was conditioned for the delivery of the property to the sheriff instead of to plaintiff, a summary judgment was unauthorized. Wooldridge v. Quinn, 49 Mo. 425. (2) A bond conditioned that "he will deliver to the plaintiffs the property sought to be replevied, or in lieu thereof will pay to them the value of said property as the court may direct," is a replevin bond and not a bail bond. O'Brien v. Alford, 114 Ark. 257, 169 SW 774.

[e] **Approval of bond by sheriff.**—Rev. St. (1899) c 56 § 4474 (St. Annot. [1906] p 2453), authorizing summary judgment without process or notice against plaintiff in replevin and his sureties, refers to and is conditioned on the statutory bond having been delivered to and approved by the sheriff, as provided by § 4465. Huttig-McDermid Pearl Button Co. v. Springfield Shirt Co., 140 Mo. A. 374, 124 SW 1094.

[f] **Filing bond with clerk.**—The record must show affirmatively that the bond had been lodged in the office of the clerk of court; and, if it shows that the bond was lost before it was lodged in the clerk's office, the court cannot take jurisdiction. Tifft v. Virden, 15 Miss. 91.

[g] **Necessity of possession under replevin writ.**—A summary judgment cannot be entered against the surety on plaintiff's bond where plaintiff secured possession of the property other than by the writ of replevin, the statute providing for summary judgment for the value where the property was taken under the order of delivery. Schneider v. Coker, 115 Ark. 490, 171 SW 898.

[h] **Necessity of plea for return of property.**—(1) If defendant wishes to avail himself of the summary remedy or judgment provided by Rev. St. § 3855, he must, in his answer, claim the property and demand a return thereof. Puller v. Thomas, 36 Mo. A. 105. (2) Although defendant in replevin filed no written plea disputing plaintiff's right to the property, a verbal claim to the property was held sufficient. Glenn v. Porter, 68 Ark. 320, 57 SW 1109.

[i] **Bail bond in replevin not authorizing summary judgment for value.**—Watson v. Keebey, 175 Ark. 527, 299 SW 993; Daniels v. Wagner, 156 Ark. 198, 245 SW 487; Jones v. Keebey, (Ark.) 252 SW 591.

22. Woodburn v. Driver, 81 Ark. 333, 99 SW 384; Hall v. Tillman, 103 N. C. 276, 9 SE 194; Nighbert v. Hornsby, 100 Tenn. 82, 42 SW 1060, 66 AmSR 736.

[a] **Judgment for mortgage indebtedness.**—The liability of sureties on a redelivery bond is limited to the value of the property in case its return cannot be had and damages for detention so that a summary judgment for the amount of a mortgage indebtedness is erroneous. Woodburn v. Driver, 81 Ark. 333, 99 SW 384.

23. Cabell v. Floyd, 21 Tex. Civ. A. 135, 50 SW 478.

[a] **Judgment against the sureties, although not rendered against the principal,** is not void, but is, at best, only voidable. Caball v. Floyd, 21 Tex. Civ. A. 135, 50 SW 478.

such summary judgment as the statute authorizes.[24]

[§ 430] **I. Actions—1. In General—a. Right of Action[25]—(1) Plaintiff's Bond.** Upon a breach of the conditions of the replevin bond,[26] and upon any existing conditions precedent having been complied with,[27] the liability of plaintiff and his sureties may be enforced by an action thereon;[28] as, for example, where there has been a failure to prosecute the action[29] or to comply with the judgment in replevin.[30] An action may be brought on the bond notwithstanding the existence of a statutory summary remedy,[31] where such remedy is not made exclusive by the statute.[32] An action cannot generally be maintained until a final determination of the action in which it was executed;[33] but if the bond is conditioned to prosecute the replevin action without delay, on the breach of such condition, an action on the bond may be maintained without awaiting a final determination of the replevin action.[34] An action on the bond cannot be maintained where the bond has been merged into judgment.[35]

Effect of dismissal of replevin action. Plaintiff in replevin cannot after giving bond and getting possession of the property dismiss the action without prejudice and relieve himself and the sureties on the bond from liability,[36] and although, in case of a dismissal by plaintiff, defendant may have a right to have judgment rendered determining his rights,[37] his failure to do so will not prevent him from suing upon the bond to recover such damages as he has sustained,[38] although it has been held that, if the action of replevin is dismissed on motion of defendant, and judgment rendered in his favor, he cannot maintain an action against the sureties on the bond to recover damages for a detention of the property by plaintiff in replevin where no claim therefor was presented to and passed upon in the replevin action.[39] Where the breach assigned is plaintiff's failure in the replevin action, it is no defense that such action was dismissed against his will.[40]

Effect of execution. The right to sue on plaintiff's bond is not affected by the fact that an execution on the replevin judgment is outstanding;[41] or that the goods were sold under execution in the replevin action;[42] or that costs of the replevin action were collected under execution.[43]

Settlement; dismissal of action on bond. Plaintiff in replevin has a right to settle his liability with defendant in replevin after judgment in favor of the latter, and, if he does so without any notice that other persons are interested in the property, such persons cannot thereafter maintain an action on the bond.[44] A dismissal of an action on the bond by a nominal plaintiff without the consent of the real

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24. Woodburn v. Driver, 81 Ark. 333, 99 SW 384; Dillard v. Nelson, 78 Ark. 237, 95 SW 460; Dent v. Ross, 52 Miss. 188.

25. **Parties** see infra §§ 441–445.

26. **What constitutes breach** see supra §§ 395–414.

27. **Conditions precedent** see infra §§ 434–436.

28. Kimball v. Thompson, 123 Me. 116, 122 A 46; Davis Bros. Co. v. Wallace, 190 N. C. 543, 130 SE 176; Wheeler v. Stewart, 16 N. B. 398.

[a] **Removal to federal court** of attachment suit involving the same property does not affect the right to sue on plaintiff's bond. Maguire v. Pan-American Amusement Co., 205 Mass. 64, 91 NE 135, 137 AmSR 422, 18 AnnCas 110.

[b] **The failure of the jury to assess** the value of the property in the replevin action as required by statute will not prevent defendant from recovering the value in an action on the bond. Yelton v. Slinkard, 85 Ind. 190.

[c] **Estoppel.**—The fact that defendants in replevin stipulated that the property was, at the time of the commencement of the action, in their possession does not estop them in an action on the undertaking. Harrison v. Wilkin, 78 N. Y. 390.

[d] **Pursuit of other remedies.**—Where property is taken from an attaching creditor by replevin begun by a stranger to the replevin suit, the fact that the attaching creditor pursues other remedies for the collection of his debt against the attachment defendant will not preclude his action on the replevin bond. Bradley v. Reynolds, 61 Conn. 271, 23 A 928.

29. Gould v. Warner, 3 Wend. (N. Y.) 54; Davis Bros. Co. v. Wallace, 190 N. C. 543, 130 SE 176; Turnor v. Turner, 2 B. & B. 107, 6 ECL 58, 129 Reprint 898; Culham v. Love, 30 U. C. Q. B. (Ont.) 410.

Conditions of bond see supra §§ 396–400.

30. Walker v. Cooke, 163 Mass. 401, 40 NE 185; Wright v. Quirk, 105 Mass. 44.

[a] **Action should be on replevin bond** and not on bond on appeal from judgment of justice of the peace. Kantzler v. Albertson, 18 Ill. A. 313.

Judgment for return and damages see supra §§ 403–407.

31. Leach v. Rich, 138 Tenn. 94, 196 SW 138.

[a] **Illustration.**—Acts (1905) c 31 (Thompson-Shannon Code § 5152a), declaring that, if justice finds a lien for defendant and adjudges the property replevied to belong to him, etc., justice shall render judgment against plaintiff and his sureties on a replevin bond that the property be returned, etc., provides a summary remedy, not exclusive, and plaintiff could maintain an action on two bonds given by defendant in a replevin suit after defendant had dismissed suit. Leach v. Rich, 138 Tenn. 94, 196 SW 138.

Summary remedies see supra § 429.

32. Leach v. Rich, 138 Tenn. 94, 196 SW 138.

33. Hansard v. Reed, 29 Mo. 472; Boughton v. Omaha L. & T. Co., 73 Mo. A. 597; Emerson-Brantingham Impl. Co. v. Ritter, 92 Okl. 71, 218 P 315; Chase v. Sherwood, 4 LackLegN (Pa.) 271; Johnson v. Parke, 12 U. C. C. P. (Ont.) 179; Becker v. Ball, 18 U. C. Q. B. (Ont.) 192.

[a] **What constitutes final determination.**—(1) Where in the action of replevin a demurrer to the complaint was sustained and judgment for costs entered against plaintiff, but without any assessment of the value of the property, or damages or award for its return, but the court subsequently at the same term granted plaintiff leave to amend his petition, this in effect set aside the judgment against plaintiff and reinstated the case on the docket, so that no action upon the bond could be brought while the case as so reinstated was still pending and not finally disposed of. Hansard v. Reed, 29 Mo. 472. (2) An action of replevin is not finally disposed of, so as to authorize an action upon the bond, while an appeal from the judgment rendered before a justice of the peace in favor of defendant is pending on an appeal to a circuit court taken by plaintiff. Boughton v. Omaha L. & T. Co., 73 Mo. A. 597. (3) The assignee of a replevin bond cannot bring an action on the bond until judgment has been entered in the replevin suit. Chase v. Sherwood, 4 LackLegN (Pa.) 271.

34. Culham v. Love, 30 U. C. Q. B. (Ont.) 410; Welsh v. O'Brien, 28 U. C. Q. B. (Ont.) 405.

Condition to prosecute without delay see supra § 400.

35. Conlee v. Love, 178 Ark. 238, 10 SW (2d) 372.

36. Kentucky Land, etc., Co. v. Crabtree, 118 Ky. 395, 80 SW 1161, 26 KyL 283.

37. See supra § 256.

38. Manning v. Manning, 26 Kan. 98.

39. Mounts v. Murphy, 126 Ky. 803, 104 SW 978, 31 KyL 1192 [dist Kentucky Land, etc., Co. v. Crabtree, 118 Ky. 395, 80 SW 1161, 26 KyL 283].

Necessity for assessment of damages in replevin suit see supra §§ 390–392.

40. Sherry v. Foresman, 6 Blackf. (Ind.) 56.

41. Hartlep v. Cole, 120 Ind. 247, 22 NE 130; Cimini v. Zambarano, 36 R. I. 122, 89 A 295 [op amended 89 A 711]; Potter v. James, 7 R. I. 312.

42. Krumbhaar v. Stetler, 10 Pa. Co. 12.

43. Kafer v. Harlow, 5 Allen (Mass.) 348.

44. Joseph Schlitz Brewing Co. v. Barr, 135 Ill. A. 467.

party in interest will not deprive such party on assignment from maintaining a subsequent action on the bond.[45]

Form and nature of action. An action on a replevin bond is an action on contract.[46]

Revival of action. A statute providing for the revival of an action against the legal representatives of a deceased party has been held to include an action on a replevin bond, although such action is not specified in the act.[47]

[§ 431] **(2) Defendant's Bond.** As in the case of a plaintiff's bond,[48] on the breach[49] of the conditions of a defendant's bond plaintiff may, on compliance with necessary conditions precedent,[50] bring suit on defendant's redelivery bond,[51] the remedy being cumulative to a statutory right to issue execution on the replevin judgment or to apply for an order of restoration of the property;[52] and where the statute provides for a judgment in replevin for the value of the property without a judgment for a return, the right to proceed on the bond is not waived or affected by such judgment for value only.[53] Where a redelivery bond is given to the officer for the use of the successful party in the action, he is a mere stakeholder, and cannot release a surety on the bond without plaintiff's consent so as to deprive plaintiff of his right on assignment to maintain an action.[54] Although an action on a redelivery bond should not lie until the final determination of the replevin action,[55] it has been held that the action is not premature merely because it was commenced pending a writ of error to review the replevin judgment.[56]

[§ 432] **b. Jurisdiction and Venue.** In the absence of statute it is not necessary that the action on a replevin bond should be brought in the same court where the action of replevin was brought,[57] and where plaintiff and the obligors in the bond are citizens of different states, the action on the bond may be brought in a federal court,[58] and the action may be brought in a state court although the replevin action, in which the bond was executed, was tried in a federal court.[59] It has been held that a justice of the peace has no jurisdiction of an action on a replevin bond,[60] and that, where an action of replevin is appealed from a justice of the peace to a circuit court, an action on the bond may properly be brought in the latter court.[61] It has been held that although the court in the replevin action had no jurisdiction to hear the cause, it had jurisdiction to enter summary judgment on plaintiff's bond for the property or its value.[62] In an action on a redelivery bond the amount in controversy when material in determining the jurisdiction of the court is the amount due on such bond including the amount of the judgment, interest, and costs in the replevin action.[63]

[§ 433] **c. Assignment of Bond.**[64] Under some statutes a replevin bond may be assigned, by the officer to whom it is given, to defendant only where it is given in a case of distress for rent,[65] and under such statutes, if the bond is given in other cases, it is construed to be wholly for the protection of the officer and is not assignable.[66] Although it has been held that if the officer does take a bond he may at his option assign it.[67] Under other statutes, however, it seems that such an assignment of a replevin bond may be made to defendant or a party in interest, in any case.[68] Where the statute authorizing an assignment prescribes no mode therefor, the assignment may be made in writing, or by parol and delivery, or by any other act amounting to a legal transfer of the bond.[69]

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[45] Norton v. Lawrence, 39 Kan. 458, 18 P 526.

[a] **Sheriff in attachment.**—Where plaintiff in replevin gave a bond to an officer who was holding the property under an attachment, the attaching creditor was the real party in interest, and in an action on the bond such officer had no authority to dismiss the action as to a surety without the consent of the real parties in interest, and such a dismissal was no bar to a subsequent action brought by such parties upon the bond. Norton v. Lawrence, 39 Kan. 458, 18 P 526.

[46] Dupree v. Jordan, 123 Okl. 91, 252 P 67.

[47] Chinn v. Harrodsburg Sav. Inst., 8 Bush (Ky.) 290.

[48] See supra § 430.

[49] **What constitutes breach** see supra §§ 410-414.

[50] **Conditions precedent** see infra §§ 434-436.

[51] Johnson v. Mason, 64 N. J. L. 258, 45 A 618.

[52] Ft. Wayne Electric Corp. v. Security Trust, etc., Co., 65 N. J. L. 221, 47 A 559; Johnson v. Mason, 64 N. J. L. 258, 45 A 618.

[53] Ft. Wayne Electric Corp. v. Security Trust, etc., Co., 65 N. J. L. 221, 47 A 559.

[54] Lowry v. Clark, 20 Pa. Super. 357.

[55] Corn Exch. Bank v. Blye, 102 N. Y. 305, 7 NE 49, 9 CivProc 416.

[a] **Pending appeal** of the replevin judgment the action does not lie. Corn Exch. Bank v. Blye, 102 N. Y. 305, 7 NE 49, 9 CivProc 416.

[56] Bierce v. Waterhouse, 219 U. S. 320, 31 SCt 241, 55 L. ed. 237.

[a] **Illustration.**—An action on the redelivery bond in replevin was not premature because started during the pendency of a writ of error in the supreme court of Hawaii, to review the judgment in the replevin suit, where, pursuant to Hawaii L. (1903) c 32 §§ 17-19, enacted after the making of the redelivery bond, an execution had been issued and returned unsatisfied, because of the failure to give a new redelivery bond upon an affidavit of insufficiency. Bierce v. Waterhouse, 219 U. S. 320, 31 SCt 241, 55 L. ed. 237.

[57] Walker v. Cooke, 163 Mass. 401, 40 NE 185.

[a] **Municipal court** has jurisdiction of an action on a replevin bond given in an action in a superior court, if the sum demanded is within the jurisdiction of the municipal court. Walker v. Cooke, 163 Mass. 401, 40 NE 185.

[b] **Where damages should have been assessed** in the replevin action, another court has no jurisdiction to assess such damages in an action on defendant's counter bond. Com. v. Lintott, 64 Pa. Super. 328.

[58] Patterson v. Mater, 26 Fed. 31.

[59] Wood v. Coman, 56 Ala. 283.

[60] Henoch v. Chaney, 61 Mo. 129.

[61] Henoch v. Chaney, supra.

[62] Close v. Hannig, (Tex. A.) 17 SW 350.

[63] Swartz v. English, 4 Kan. A. 509, 44 P 1004.

[64] **Assignment as condition precedent to action on bond** see infra § 436.

Parties see infra §§ 441-445.

[65] Waples v. Adkins, 5 Del. 381; Everett v. Bartlett, 20 N. J. L. 117; Williamson v. Gordon, 20 N. J. L. 77; Meyers v. Maybee, 10 U. C. Q. B. (Ont.) 200 (implied authority under act to assign bond in case of distress).

[a] **In Pennsylvania** (1) under the act of March 21, 1772, a replevin bond can be legally assigned to defendant in replevin only where it is given in case of distress for rent. Clark v. Morss, 142 Pa. 311, 21 A 802; Krumbhaar v. Stetler, 10 Pa. Co. 12. (2) Such statute does not prevent the sheriff from taking a bond for his own protection in other cases of replevin, although the statute does not relate to such a bond, and the sheriff may or may not assign the bond so taken to defendant, and if he does so defendant may use it, but defendant cannot require him to assign it. Clawsen v. Seanor, 23 Pa. Co. 257.

[b] **In South Carolina,** although the English statutes in relation to assignment of bonds in replevin and distress were not enacted by statute, they were adopted in practice. Harris v. Keckley, 27 S. C. L. 196; Pemble v. Clifford, 13 S. C. L. 31; Charleston v. Price, 12 S. C. L. 299.

[66] Williamson v. Gordon, 20 N. J. L. 77.

[67] Clawsen v. Seanor, 23 Pa. Co. 257.

[§ 434] **2. Conditions Precedent[70]—a. Demand or Execution.** Since, on the rendition of a judgment in replevin for a return of the goods, it is the duty of either plaintiff or defendant to take active steps to return the property to the prevailing party,[71] in the absence of a statutory provision to the contrary, defendant may maintain an action on the replevin bond on failure of plaintiff in replevin to comply with the terms of the judgment, without any previous demand,[72] and without the issuance of an execution on such judgment.[73] Some statutes,[74] however, expressly provide that, where judgment is rendered for defendant in a replevin suit, he cannot maintain an action on the replevin bond, particularly to hold the sureties liable thereon, until execution on the judgment in replevin has been issued and returned unsatisfied in whole or in part.[75] But under particular statutory provisions it has been held that the issuance and return of an execution unsatisfied in whole or in part is not a condition precedent where there is no judgment on the merits of the case, so that if the action abates or is discontinued or dismissed before the property is returned to defendant, and plaintiff retains the property, an action may be maintained on the bond against the obligors thereon for plaintiff's failure to prosecute the action.[76] Under other statutes inability to issue an execution because there is no judgment upon which to issue it will not be considered an exception to the statutory rule requiring issuance of an execution as a condition precedent.[77]

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[68] Ala.—Adkins v. Allen, 1 Stew. 130.

Ark.—Nunn v. Goodlett, 10 Ark. 89.

Cal.—Wingate v. Brooks, 3 Cal. 112.

Eng.—Dias v. Freeman, 5 T. R. 195, 101 Reprint 110.

N. B.—Hubbard v. Young, 34 N. B. 641.

Ont.—Bacon v. Langton, 9 U. C. C. P. 410.

[a] **In Michigan,** under Comp. L. § 6764, the sheriff is required to assign the bond to defendant or his representatives on their request. Green v. Kindy, 43 Mich. 279, 5 NW 297.

[b] **Statutory extension of remedy of replevin to other cases than those of distress** would, without express mention, extend the right to assignment in these other cases. Bacon v. Langton, 9 U. C. C. P. (Ont.) 410.

[c] **Number of sureties required.**—Although the statute directs the sheriff to take a bond with two sureties, a bond with one surety is assignable where neither the sheriff nor defendant in replevin objects. Taylor v. Burpee, 10 N. B. 191.

[d] **Execution by several principals.**—Where the bond has two sureties as required by statute, it may be assigned, although some of the plaintiffs failed to execute it. Wheeler v. Stewart, 16 N. B. 398.

[e] **Parties to bond.**—Where the statutory form of plaintiff's bond was to prosecute the action against C D, a bond conditioned to prosecute against C D and some other person did not conform to statute and was nonassignable. Wheeler v. Stewart, 16 N. B. 398.

[f] **Attestation of assignment.**—An assignment by the sheriff of a replevin bond was valid where attested by only one witness. Heley v. Cousins, 34 U. C. Q. B. (Ont.) 63.

[g] **In New York** (1) a replevin bond duly executed to a coroner may be assigned by him pursuant to 2 Rev. St. § 64, and the assignee may sue thereon in his own name. Acker v. Finn, 5 Hill 293. (2) A defendant in a replevin suit, in case of distress for rent, is entitled to an assignment. Gould v. Warner, 3 Wend. 54. (3) A declaration is fatally defective in not averring that the goods replevied were taken by plaintiffs as a distress for rent, for only in such cases is the bond assignable to authorize assignees to bring an action on the bond in their own names. Knapp v. Colburn, 4 Wend. 616.

[h] **In New Brunswick,** (1) under 4 Wm. IV c 38 a proceeding on the writ de proprietate probanda and a return of the property to defendant in replevin would terminate the action and prevent an assignment of the bond, even for the collection of costs. Pollock v. Gardner, 4 N. B. 655. (2) Under 13 Vict. c 53, on claim of property by defendant if on inquisition by the jury the claim is held good, defendant may have an assignment of the bond to enforce payment of costs. Berry v. Mitchell, 7 N. B. 380.

[69] Sartin v. Weir, 3 Stew. & P. (Ala.) 421; Nunn v. Goodlett, 10 Ark. 89; Everett v. Bartlett, 20 N. J. L. 117.

[a] **Delivery of bond to defendant's attorney** is not an assignment to defendant. Green v. Kindy, 43 Mich. 279, 5 NW 297.

[b] **Date or seal** of the sheriff is unnecessary. Nunn v. Goodlett, 10 Ark. 89.

[70] **Judgment in replevin as** see supra §§ 408, 414.

[71] **Condition to return property** see supra §§ 403, 410.

[72] Sweeney v. Lomme, 22 Wall. (U. S.) 208, 22 L. ed. 727 [aff 1 Mont. 584]; Persse v. Watrous, 30 Conn. 139; Cook v. Lothrop, 18 Me. 260; Walker v. Cooke, 163 Mass. 401, 40 NE 185; Wright v. Quirk, 105 Mass. 44.

[a] **Illustrations.**—(1) Where the alternative condition of a replevin bond is to return the goods to the officer who attached them or to the officer having the execution in the original suit, no demand on the replevin bond either for the penalty thereof or for the amount of the judgment obtained in the attachment suit is necessary before bringing suit on the bond. Persse v. Watrous, 30 Conn. 139. (2) If a return be awarded in the replevin suit, the surety on the bond is liable on the condition of the bond to return, without a demand therefor. Sweeney v. Lomme, 22 Wall. (U. S.) 208, 22 L. ed. 727 [aff 1 Mont. 584].

[73] U. S.—Sweeney v. Lomme, 22 Wall. 208, 22 L. ed. 727 [aff 1 Mont. 584].

Me.—Cook v. Lothrop, 18 Me. 260.

Minn.—Robertson v. Davidson, 14 Minn. 554.

Okl.—Grimes v. Payne, 116 Okl. 295, 244 P 753; Gerber v. Wehner, 96 Okl. 48, 220 P 648.

R. I.—Cimini v. Zambarano, 36 R. I. 122, 89 A 295 [op. amended 89 A 711]; Potter v. James, 7 R. I. 312.

[74] See statutory provisions.

[75] Cornish v. Keesee, 17 Ark. 391; Scott v. Scott, 50 Mich. 372, 15 NW 515; Phillips v. Waterhouse, 40 Mich. 273; Eaton v. Campbell, 2 Mich. N. P. 10; Allen v. Lowe, 113 Nebr. 443, 203 NW 571; Hershiser v. Jordan, 25 Nebr. 275, 41 NW 147; Lininger v. Raymond, 9 Nebr. 40, 2 NW 359; De Veaux v. Holliday, 107 NYS 747.

[a] **Execution in assumpsit.**—Where the form of execution issued for defendant in replevin was in the form of an execution in assumpsit, such execution was not a compliance with the statute. Eaton v. Campbell, 2 Mich. N. P. 10; Williams v. Vail, 9 Mich. 162, 80 AmD 76.

[b] **The surety** on such a bond is not liable until after execution is returned unsatisfied against the principal. Lininger v. Raymond, 9 Nebr. 40, 2 NW 359.

[c] **Sufficiency of return.**—A return on the execution of "no property found" is sufficient to justify an action upon a replevin bond, under a statute requiring a return "that sufficient property of the plaintiffs cannot be found," etc. Cameron v. Boyle, 2 Greene (Iowa) 154.

[d] **Bond executed in justice's court.**—Code Civ. Proc. § 1733, providing that a defendant in replevin who has recovered a final judgment cannot maintain an action against the sureties on plaintiff's undertaking given to procure a replevin, until after a return, wholly or partly unsatisfied or unexecuted, of an execution in his favor for the delivery of the possession of the chattel, or to satisfy a sum of money out of the property of plaintiff, or for both purposes, has no application to an action on an undertaking to defendant in replevin commenced in a justice's court. Letson v. Dodge, 61 Barb. (N. Y.) 125.

[e] **Capias bond.**—Surety on a bond for the release of defendant arrested on a capias bond in replevin under Mansfield Dig. § 5577 was not liable unless execution against the body of defendant had been issued and returned not found. Duncan v. Owens, 47 Ark. 388, 1 SW 698.

[76] Rushbrook v. Jerge, 74 Misc. 43, 133 NYS 640; Verra v. Domenico Costantino, 84 NYS 222, 33 NYCivProc 189; Rogers v. U. S. Fidelity, etc., Co., 84 NYS 203.

[a] **Dismissal not final judgment.**—A judgment of dismissal is not a "final judgment" within Code Civ. Proc. § 1733, requiring a return of an execution upon final judgment in favor of defendant before an action on the bond may be maintained. Rushbrook v. Jerge, 74 Misc. 43, 133 NYS 640.

To maintain an action on a redelivery bond it is not necessary in the absence of statute either that plaintiff demand a return of the property from defendant,[78] or that he issue execution upon the judgment in replevin;[79] but under some statutes it is essential to a suit against sureties on the bond that execution should be issued against the original defendant in replevin and be returned unsatisfied in whole or in part.[80]

[§ 435] **b. Writ of Return or Reprisal.**[81] In some jurisdictions, an action on plaintiff's replevin bond may be maintained wherever a return of the property has been adjudged in favor of defendant and the judgment is disobeyed, and it is not necessary as a condition precedent to the maintaining of such an action that a writ of retorno habendo be returned at length,[82] or, where the officer's return on such a writ is that he cannot find the goods, that a writ of reprisal be sued out.[83] Under some statutes, however, an action on the replevin bond cannot be maintained until a writ of retorno habendo has been issued and returned unsatisfied in whole or in part.[84]

[§ 436] **c. Assignment of Bond.**[85] Under some statutes where the sheriff or other officer is the obligee in a replevin bond, in order to enable defendant in replevin to maintain an action on the bond in his own name, it is necessary that the bond be formally assigned to him,[86] but in some jurisdictions an assignment is necessary only in cases of distress for rent.[87] Under other statutes, an assignment of the bond to defendant is not necessary to enable him to sue thereon in his own name, particularly where the undertaking is not in terms to any obligee or promisee, and may be regarded as an undertaking to the sheriff or to defendant.[88] In an action on a redelivery bond it has been held unnecessary that such bond should be assigned to plaintiff to entitle him to maintain an action.[89]

[§ 437] **3. Defenses**[90]**—a. In General.** Many matters available to a surety in defense have elsewhere been considered in connection with a general treatment of the accrual and release of liability on the bond,[91] the extent of liability,[92] the discharge of the surety from liability,[93] the right of action on the bond,[94] and conditions precedent to the right of action.[95] Matters concluded by the replevin judgment cannot be set up in defense.[96] It has been held a good defense that the surety's signature had been induced by fraud.[97] In the absence of knowledge or consent of the opposite party it is no defense that the bond was delivered conditionally or in escrow.[98] Where property in the hands of an officer is replevied by a third person, it is no defense to an action on the replevin bond that the execution debtor was entitled to the goods as exempt;[99] that attachment proceedings against the property were invalid,[1] or that execution in attachment did not issue;[2] or that at the time plaintiff attached the goods they were held by the officer under prior attachments against the same debtor.[3] It is no defense to the surety that he executed the bond in reliance on principal's statement of his ownership of the property;[4] or that default was taken against the principal without the surety's knowledge,[5] or that he had attempted, but failed, to have the default set aside to allow him to prosecute the action.[6]

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[77] Cornish v. Keesee, 17 Ark. 391; Allen v. Lowe, 113 Nebr. 443, 203 NW 571; Mulhall v. McVay, 2 Okl. 534, 37 P 604.

[78] First State Bank v. Martin, 81 Kan. 794, 106 P 1056; MacRae v. Kansas City Piano Co., 69 Kan. 457, 77 P 94; Adams v. Wiesenthal, 69 N. J. L. 65, 54 A 516; Burkitt v. Vail, 123 Or. 461, 467, 238 P 1114, 260 P 1014.

"The entry of the judgment in favor of plaintiff for the return of the property or payment of the value thereof as fixed in the judgment is sufficient demand and notice to defendant and his surety." Burkitt v. Vail, supra.

[79] First State Bank v. Martin, 81 Kan. 794, 798, 106 P 1056; Livingston v. Hammer, 20 N. Y. Super. 670; Burkitt v. Vail, 123 Or. 461, 238 P 1114, 260 P 1014.

"The obligation of the sureties was not that they would pay the value of the cattle provided an execution was issued and found to be fruitless, but that the defendants would deliver the property to the plaintiff if delivery be adjudged." First State Bank v. Martin, supra.

[80] Hager v. Clute, 10 Hun (N. Y.) 447; Baxter v. Maloney, 1 NYCityCt 383. But see Livingston v. Hammer, 20 N. Y. Super. 670 (execution need not be issued and returned unsatisfied).

[a] **Execution for damages and costs.**—An action on a bond to recover damages and costs awarded by the judgment in replevin may be maintained without the issue and return of such an execution, on the ground that the judgment as to these items is absolute, and that these charges will have to be paid whether the property is returned or not. Baxter v. Maloney, 1 NYCityCt 383.

[81] **As condition precedent to execution for value** see supra § 334.

[82] U. S.—Moore v. Shields, 17 F. Cas. No. 9,775, 2 Cranch C. C. 529.

Ill.—Peck v. Wilson, 22 Ill. 205; Hunter v. Sherman, 3 Ill. 539; Cermak v. Guggenheim Laundry Mach. Co., 198 Ill. A. 202.

Mass.—Walker v. Cooke, 163 Mass. 401, 40 NE 185; Wright v. Quirk, 105 Mass. 44.

Mont.—Lomme v. Sweeney, 1 Mont. 584 [aff 22 Wall. (U. S.) 208, 22 L. ed. 727].

Pa.—Evans-Morrow Motor Co. v. Samuels, 83 Pa. Super. 280.

[a] **Action for costs.**—A writ of retorno is not a prerequisite to the recovery of costs where the breach alleged is a failure to prosecute with effect. Myers v. Dixon, 106 Ill. A. 322.

[83] Parker v. Simonds, 8 Metc. (Mass.) 205.

[84] Cowdin v. Stanton, 12 Wend. (N. Y.) 120; Cowden v. Pease, 10 Wend. (N. Y.) 333; Duggan v. England, 16 S. C. L. 215; Pemble v. Clifford, 14 S. C. L. 43.

[85] **Parties** see infra §§ 441-445.

[86] Nunn v. Goodlett, 10 Ark. 89; Green v. Kindy, 43 Mich. 279, 5 NW 297; Lazarus v. Trible, 9 Miss. 575; Berry v. Mitchell, 7 N. B. 380.

[a] **Where property is replevied from officer holding it under execution,** plaintiff in execution cannot sue on the bond without an assignment by the sheriff of either the bond or the judgment in the replevin action, unless the sheriff refuses to make such assignment or to enforce the bond. Greer v. Howard, 41 Oh. St. 591.

[87] Clark v. Morss, 142 Pa. 311, 21 A 802.

[88] Decker v. Anderson, 39 Barb. (N. Y.) 346.

[89] Dunkle v. Haight, 68 Colo. 404, 189 P 783; Hedderick v. Pontet, 6 Mont. 345, 12 P 765.

[90] **Defenses in actions on bonds given to replevy attached property** see Attachment § 744.

[91] See supra §§ 396-414.

[92] See supra §§ 422-425.

[93] See supra §§ 417-421.

[94] See supra §§ 430, 431.

[95] See supra §§ 434-436.

[96] **Conclusiveness of adjudication in replevin action** see supra §§ 426-428.

[97] Anderson v. Bellenger, 87 Ala. 334, 6 S 82, 13 AmSR 46, 4 LRA 680 (in an action on a statutory claim bond, a plea by one of the sureties that he was fraudulently induced by the sheriff to sign the bond under a mistake of fact, after it had been accepted and approved by the sheriff with the signatures of two other sureties only, is good).

[98] Richardson v. People's Nat. Bank, 57 Oh. St. 299, 48 NE 1100.

[99] Capen v. Bartlett, 153 Mass. 346, 26 NE 873.

[1] Farnham v. Moor, 21 Me. 508.

[2] Zimmer v. Lyon, 190 Ill. 642 (holding that plaintiff in replevin cannot complain of the failure to issue execution in attachment where, after

[§ 438] **b. Irregularities and Defects in Replevin Proceedings.**[7] As a general rule mere irregularities or defects in the institution or prosecution of the replevin action cannot be set up in defense in an action on the replevin bond.[8] Thus it has been held that it cannot be set up as a defense in such an action that the affidavit[9] or the bond[10] is defective, as, for example, that the bond was not signed by the principal,[11] or by the requisite number of sureties,[12] or that the sureties had failed to justify,[13] or that the bond was not filed with the clerk of court as required by statute;[14] or that the condition of the bond has become void.[15] Nor is it a good defense in such an action that the writ of replevin was defective[16] or was not returned after service.[17] It has been held not to constitute a good defense that the execution in replevin for a return of the property was irregularly issued,[18] or that the property was delivered under the writ before the execution of the bond,[19] or that the property was never actually taken into custody under the writ.[20] But it has been held to be a complete defense that the judgment in replevin on which the breach alleged is based,[21] or the bond itself,[22] is void for want of jurisdiction;[23] or that the bond omitted the amount of the penalty;[24] or that the judgment was obtained by fraud.[25] But where the breach alleged is plaintiff's failure in replevin to prosecute the action, it has been held not to constitute a good defense that the judgment for a return of the property was void for lack of jurisdiction.[26]

[§ 439] **c. Estoppel To Set Up Defense.**[27] As a general rule, plaintiff in replevin and his sureties are estopped in an action on the replevin bond to set up any matter of defense which is contradictory to, or inconsistent with, the material recitals in the

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judgment in replevin for defendant, plaintiff refused to return the property).

3. Ormsbee v. Davis, 16 Conn. 567, 18 Conn. 555.

4. Ind.—Fuller v. Wright, 59 Ind. 333.

5. Fuller v. Wright, supra.

6. Fuller v. Wright, supra.

7. **Cross references:**
Estoppel to set up irregularities and defects see infra § 439.
Nature, validity, and sufficiency of affidavit, bond, and writ see supra §§ 101–109, 120–128, 137–139.
Necessity for assessment of damages in replevin suit see supra §§ 389–392.

8. Colo.—Cox v. Sargent, 10 Colo. A. 1, 50 P 201.

Conn.—Nichols v. Standish, 48 Conn. 321.

Ill.—Tedrick v. Wells, 59 Ill. A. 657.

Ind.—Waddell v. Bradway, 84 Ind. 537.

Iowa.—Mason v. Richards, 12 Iowa 73; McGinnis v. Hart, 6 Iowa 204.

Ky.—Roman v. Stratton, 2 Bibb 199.

Mass.—Flagg v. Tyler, 3 Mass. 303.

Mich.—Dudley v. Conely, 125 Mich. 300, 84 NW 286; Estey v. Harmon, 40 Mich. 645.

Minn.—Robertson v. Davidson, 14 Minn. 554.

Mo.—Reeves v. Reeves, 33 Mo. 28.

Mont.—Parrott v. Scott, 6 Mont. 340, 12 P 763.

N. Y.—Harrison v. Wilkin, 78 N. Y. 390.

Or.—Carlon v. Dixon, 12 Or. 144, 6 P 500 (holding that, where the affidavit and bond in replevin are sufficient, the fact that the direction to the sheriff indorsed on it is signed by plaintiff, instead of by the justice, as provided by statute, will not exonerate the sureties on the bond).

[a] **Failure of judgment creditor to execute indemnifying bond** as provided by statute, to the sheriff who is about to levy an execution on the judgment, does not prevent him from suing on the bond given by claimants and their sureties who replevied the property levied upon. Parrott v. Scott, 6 Mont. 340, 12 P 763.

[b] **Failure of plaintiff to execute bond** before execution of writ was no defense to surety on defendant's bond. Terry v. Johnson, 109 Ky. 589, 60 SW 300, 22 KyL 1210.

9. Nichols v. Standish, 48 Conn. 321.

[a] **Failure of affiant to subscribe to affidavit** is no defense, especially where defendant in replevin has waived compliance with statute. Nichols v. Standish, 48 Conn. 321.

10. Douglas v. Unmack, 77 Conn. 181, 58 A 710, 107 AmSR 25; Nichols v. Standish, 48 Conn. 321; Leeper v. Hobart First Nat. Bank, 26 Okl. 707, 110 P 655, 29 LRANS 747, AnnCas 1912B 302.

[a] **Recital of court** (1) from which the writ was to issue not being a recital of a material matter, it was no defense that the writ issued out of a court other than recited in the bond. Jenkins v. Lahey, 216 Ill. A. 613. (2) Recital in bond that writ should issue out of the superior court instead of the civil circuit court as was intended by the surety was no defense. Fuller v. Wright, 59 Ind. 333.

[b] **Order setting aside a writ of replevin** "and all proceedings thereon, subsequent to the issue thereof" did not absolutely annul the bond, so that to an action thereon such order could be pleaded as a defense. Meloche v. Reaume, 34 U. C. Q. B. (Ont.) 606.

11. Hoebel v. Utah-Idaho Livestock Loan Co., 39 Ida. 294, 227 P 1048.

12. Shaw v. Tobias, 3 N. Y. 188; Wood v. Colby, 30 Okl. 106, 118 P 584; Capital Lumbering Co. v. Learned, 36 Or. 544, 59 P 454, 78 AmSR 792.

[a] **Reason for rule.**—"The provision in the statute requiring two sureties, and the power of exception to their sufficiency, or of moving to set the plaintiff's proceedings aside, are provisions for the benefit and safety of the defendant in replevin. If the bond is substantially good, without the sureties, and entirely satisfactory to the defendant, it would be absurd to require him to take proceedings to make it better. He may waive a strict compliance with the statute by the plaintiff in regard to those matters which are unimportant to himself. But after the plaintiff has obtained possession of the property in dispute by acting on the bond as a lawful and valid security, neither he nor his surety ought to be permitted to get rid of it by alleging that it is not so strong or so perfect as the defendant might have required him to make it." Shaw v. Tobias, 3 N. Y. 188, 192.

13. Decker v. Anderson, 39 Barb. (N. Y.) 346; Barton v. Donnelly, 6 Misc. 473, 27 NYS 525; Van Duyne v. Coope, 1 Hill (N. Y.) 557.

14. Hedderick v. Pontet, 6 Mont. 345, 12 P 765; Leeper v. Hobart First Nat. Bank, 26 Okl. 707, 110 P 655, 29 LRANS 747, AnnCas1912B 302.

15. Ward v. Hood, 124 Ala. 570, 27 S 245, 82 AmSR 205.

16. Waddell v. Bradway, 84 Ind. 537.

17. Nichols v. Standish, 48 Conn. 321.

18. Harrison v. Wilkin, 78 N. Y. 390.

19. Nunn v. Goodlett, 10 Ark. 89.

20. Jackson v. Bry, 3 Ill. A. 586 (holding, however, that the fact that the property was not taken into custody may be shown on the question of damages).

21. Robinson v. Bonjour, 16 Colo. A. 458, 66 P 451; McBrayer v. Jordan, 73 Nebr. 483, 103 NW 50.

[a] **Judgment for return void.**—Where the breach alleged was a failure to return the property, but the judgment in replevin for a return was void because rendered in excess of the justice's jurisdiction, such facts constitute a good defense to the breach alleged. Robinson v. Bonjour, 16 Colo. A. 458, 66 P 451.

22. Caffrey v. Dudgeon, 38 Ind. 512, 10 AmR 126.

23. See supra notes 21, 22.

24. Harbin v. Nations, 214 Ala. 649, 108 S 749.

25. McBrayer v. Jordan, 73 Nebr. 483, 103 NW 50.

26. McDermott v. Isbell, 4 Cal. 113.

27. **Estoppel generally** see Estoppel §§ 84, 86.

Estoppel to deny recitals of value see infra § 458.

bond,[28] except where the bond is void in its inception and possesses no force or validity.[29] Where by virtue of the replevin bond and other proceedings in replevin, plaintiff in replevin acquires and retains possession of the property, both he and his sureties are estopped in an action on the replevin bond from setting up any matter of defense that disputes the regularity or validity of the bond,[30] or of the proceedings under which it was obtained;[31] or that disputes the levy on the property by the officer[32] or the liability of the property on which it is made;[33] or that disputes the regularity of the replevin proceedings,[34] as by denying the jurisdiction of the justice who issued the writ,[35] or of the trial court.[36] Defendant, who has retained possession under a redelivery bond, is estopped in an action on such bond from denying the legal existence of plaintiff.[37] But an estoppel as to one condition in the bond does not necessarily operate as an estoppel as to a separate and distinct condition.[38]

[§ 440] **d. Set-Off and Counterclaim.** Subject to the rules relating to recoupment, set-off, and counterclaim generally,[39] a surety, when sued on a replevin bond, can set off claims against plaintiff,[40] unless the set-off or counterclaim is such that it should have been claimed in the replevin action.[41] Thus a surety may show rights to the property replevied in himself or cosureties,[42] and may avail himself of any set-off or counterclaim that might be interposed by the principal obligor.[43] Although the claims must be due between all the parties in the action and in the same right,[44] when the action is brought in the name of the officer to whom the bond was given, defendant therein may set off a demand against defendant in replevin as he is the real party in interest.[45] However, the rights of a surety can rise no higher than those of his principal;[46] and it has been held that an assignment of the claim by the principal to the surety is necessary before the latter may plead such defense.[47] A set-off is not confined to matters arising out of the bond sued on.[48]

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[28] Collins v. Mitchell, 5 Fla. 364; May v. Johnson, 3 Ind. 449; Decker v. Judson, 16 N. Y. 439; Auerbach v. Marks, 10 Daly (N. Y.) 171.

[29] Caffrey v. Dudgeon, 38 Ind. 512, 520, 10 AmR 126; Sturdevant v. Farmers', etc., Bank, 62 Nebr. 472, 87 NW 156. But see Walko v. Walko, 64 Conn. 74, 29 A 243 (plaintiff estopped to say that bond was wholly void).

"The whole doctrine of estoppels of this kind is based upon the theory that the instrument, whether it is a record of court, a deed, a mortgage, or a bond, is legal and valid, and by virtue of its legality and by force of its validity, operates as an estoppel." Caffrey v. Dudgeon, supra.

[30] Conn.—Douglass v. Unmack, 77 Conn. 181, 58 A 710, 107 AmSR 25.

Ind.—Hartlep v. Cole, 120 Ind. 247, 22 NE 130; Trueblood v. Knox, 73 Ind. 310.

Okl.—Leeper v. Hobart First Nat. Bank, 26 Okl. 707, 110 P 655, 29 LRA NS 747, AnnCas1912B 302.

Tenn.—Dale v. Heffner, 4 Baxt. 217.

Wash.—Arthur v. Sherman, 11 Wash. 254, 39 P 670.

[a] **Signature to bond.**—Plaintiff in replevin who takes possession of property under the bond is estopped to deny that his signature was fixed by an unauthorized agent. Arthur v. Sherman, 11 Wash. 254, 39 P 670.

[b] **Failure to recite value in bond.**—A surety on a replevin bond is estopped to deny its validity on the ground that the value of the property attached is not fixed therein. Dale v. Heffner, 4 Baxt. (Tenn.) 217.

[c] **Penalty of bond.**—The fact that the penalty named in a replevin bond is less than double the value of the property cannot be set up as a defense in a suit on the bond, after the writ of replevin has been issued and possession of the property obtained upon it. Trueblood v. Knox, 73 Ind. 310.

[d] **Consideration.**—Where plaintiff in replevin obtains possession of the property sued for, he and his sureties are estopped from averring that there was no consideration for their undertaking. McFadden v. Fritz, 110 Ind. 1, 10 NE 120.

[31] Dale v. Heffner, 4 Baxt. (Tenn.) 217.

[32] Adler v. Potter, 57 Ala. 571; Tedrick v. Wells, 59 Ill. A. 657.

[33] Adler v. Potter, 57 Ala. 571.

[34] Tedrick v. Wells, 59 Ill. A. 657; McFadden v. Fritz, 110 Ind. 1, 10 NE 120; McFadden v. Ross, 108 Ind. 512, 8 NE 161; Sammons v. Newman, 27 Ind. 508; Central Nat. Bank v. Brecheisen, 65 Kan. 807, 70 P 895; McCormick Harvesting Mach. Co. v. Fisher, 63 Kan. 199, 65 P 223; Jennison v. Haire, 29 Mich. 207; Stimer v. Allen, 88 Mich. 140, 50 NW 107.

[a] **Affidavit.**—Parties in replevin who replevied the property cannot set up that they secured possession without an affidavit. Stimer v. Allen, 88 Mich. 140, 50 NW 107; Jennison v. Haire, 29 Mich. 207.

[b] **Pendency of replevin action** cannot be denied by plaintiff or his sureties in defense because no summons ever issued in that action when under the writ plaintiff obtained the property. Sammons v. Newman, 27 Ind. 508.

[35] Fahnestock v. Gilham, 77 Ill. 637; Bates v. Williams, 43 Ill. 494; Bierma v. Columbia Typewriter Co., 179 Ill. A. 69; Harbaugh v. Albertson, 102 Ind. 69, 1 NE 298.

[36] Janssen v. Duncan, 43 Colo. 286, 95 P 922 [dist Robinson v. Bonjour, 16 Colo. A. 458, 66 P 451].

[37] Loaners' Bank v. Jacoby, 10 Hun (N. Y.) 143.

[38] Alderman v. Roesel, 52 S. C. 162, 29 SE 385 (holding that an estoppel as to the condition for the return of the property does not necessarily operate as an estoppel as to the condition to prosecute).

[39] **Set-off and counterclaim:**
Generally see Set-Off and Counterclaim [34 Cyc 618].
In actions against surety generally see Principal and Surety §§ 331–335.
In replevin generally see supra § 86.

[40] See infra text and notes 41–48.

[41] Com. v. Lintott, 64 Pa. Super. 328, 71 Pa. Super. 401.

Conclusiveness of adjudication in replevin see supra § 426.

[a] **Claim for storage of goods replevied.**—In an action on a counterbond, sureties cannot set off a claim for storage of the goods, as such claim must be made in the replevin action. Com. v. Lintott, 64 Pa. Super. 328, 71 Pa. Super. 401.

[42] Henry v. Ferguson, 55 Mich. 399, 21 NW 381.

[43] Iowa.—Struman v. Robb, 37 Iowa 311.

Md.—Seldner v. Smith, 40 Md. 602.

Oh.—Evans v. Beddinger, 24 Oh. Cir. Ct. N. S. 553.

Okl.—Elk City State Bank v. Davis, 118 Okl. 294, 248 P 639.

Pa.—Com. v. King, 18 Pa. Dist. 404, 36 Pa. Co. 149; Snyder v. Frankenfield, 4 Pa. Dist. 767.

Ont.—McKelvey v. McLean, 34 U. C. Q. B. 635.

[a] **Judgment of principal.**—Surety on a claim property bond may set off a judgment assigned to his principal after judgment in replevin but before inception of action on the bond. Com. v. King, 18 Pa. Dist. 404, 36 Pa. Co. 149.

[b] **Proceeds of execution sale.**—Where attached goods are replevied by defendant, and he fails in both proceedings, and an execution is levied on the goods, the sureties on the replevin bond, in an action thereon, are entitled to have the proceeds of the levy first applied in discharge of their liability; and this right is pro tanto an equitable defense to the action at law. Struman v. Robb, 37 Iowa 311.

[c] **Use of goods.**—In an action on a replevin bond a set-off cannot be claimed for the use by defendant in replevin of their own property during the time that it is voluntarily left in their possession, from the issuance of the writ to the actual taking of the property by plaintiff in replevin. Pure Oil Co. v. Terry, 16 Pa. Super. 337.

[44] Gorman v. Lenox, 15 Pet. (U. S.) 115, 10 L. ed. 680; Coffin v. McLean, 80 N. Y. 560.

[a] **In action on replevin bond executed in favor of two plaintiffs,** notes held against one of them by defendant are not available as a set-off. Ringgenberg v. Hartman, 124 Ind. 186, 24 NE 987.

[45] Engs v. Matson, 11 Ill. A. 639; Balsley v. Hoffman, 13 Pa. 603 (holding that the surety with the consent of his principal may set off a judgment obtained by his principal against defendant in replevin for whose use the action on the bond is brought).

[46] Com. v. Lintott, 71 Pa. Super. 401.

[§ 441] **4. Parties[49]—a. Parties Plaintiff—(1) Plaintiff's Bond—(a) In General.** A replevin bond is given for the protection of both the officer and defendant in the action,[50] and where the officer is the obligee in the bond, he may sue thereon in his own name,[51] and the action need not be brought in his name of office but may be in his individual name.[52] So also the officer having the legal right of action may sue on the bond, at least in so far as defendants to such action are concerned, for the use of whatever person he chooses,[53] and it is not necessary that such person should have any other interest in, or connection with, the suit;[54] and, while in case there are several defendants in the replevin action the officer may sue for the use of all jointly without bringing separate actions,[55] it is no ground of objection that the action is brought for the use of only one of them.[56] Defendant in replevin may also sue on the bond in the name of the officer for his own use.[57] The persons named as obligees in the bond should ordinarily join in an action thereon or in case of failure to do so should be made defendants;[58] but where in replevin against several defendants the final judgment is in favor of only one of them, to whom the entire property is awarded, he may sue on the bond without joining the other defendants who were obligees,[59] and if one of two obligees is insolvent and an assignee is appointed after the taking of the bond, such assignee cannot join in an action thereon, but such action must be brought in the name of the other obligee alone.[60] Where the bond is assignable, an assignee may sue thereon in his own name,[61] but if not assignable the action must be brought in the name of the officer to whom the bond was given for the use of the person beneficially entitled.[62]

Right of added defendant to sue on bond. Although an action on the bond cannot be maintained by a person who is neither a party to the replevin proceeding nor an obligee in the bond,[63] yet, where subsequent to the execution of plaintiff's bond an additional party is made a defendant to the replevin action, it has been held in some jurisdictions that such bond inures to the benefit of such defendant so that he may maintain an action thereon against the sureties,[64] or, where the bond runs to the officer, the latter may sue the sureties for the use of such additional party defendant.[65] In other jurisdictions, however, such additional defendant has no right of action against the sureties on the bond.[66] However, where such defendant is in privity of title or possession with the obligee on the bond, he may maintain an action thereon.[67]

[§ 442] **(b) Where Property Was Replevied from**

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[47] Com. v. Lintott, supra.

[48] Engs v. Matson, 11 Ill. A. 639; Com. v. King, 18 Pa. Dist. 404, 36 Pa. Co. 149.

[49] **Generally** see Parties 47 C. J. p 1 et seq; Bonds §§ 151–161; Contracts §§ 805–825.

[50] See supra § 116.

[51] Ogle v. Smith, 7 Del. 174.

[52] Caldwell v. West, 21 N. J. L. 411.

[53] Atkins v. Moore, 82 Ill. 240; Tedrick v. Wells, 59 Ill. A. 657; Smith v. Hertz, 37 Ill. A. 36. See also Burgett v. Gilbert, 107 Ill. A. 351 (the sheriff being the actual and nominal plaintiff, the fact that the action is for the use of another is inconsequential).

[54] Atkins v. Moore, 82 Ill. 240; Smith v. Hertz, 37 Ill. A. 36.

[55] Koehler v. King, 119 Ill. A. 6.

[56] Buckmaster v. Beames, 9 Ill. 443.

[57] Humphrey v. Taggart, 38 Ill. 228.

[53] Kellar v. Carr, 119 Ind. 127, 21 NE 463.

[a] **Defect of parties plaintiff** cannot for the first time be raised on appeal. Bowdoin v. Colman, 13 N. Y. Super. 182, 3 AbbPr 431.

[b] **Allegation that one party has no interest** where he was not joined as a defendant was not subject to a demurrer for defect of parties plaintiff, no objection being made to the nonjoinder of such obligee as a party defendant. Kellar v. Carr, 119 Ind. 127, 21 NE 463.

[59] Pilger v. Marder, 55 Nebr. 113, 75 NW 559.

[a] **Where party was improperly named as obligee** in the bond in addition to defendant in replevin, the latter may sue alone, and the erroneous addition of another party is immaterial. Cimini v. Zambarano, 36 R. I. 122, 89 A 295 [op. amended 89 A 711].

[60] Brown v. Brigham, 5 Allen (Mass.) 582.

[61] Swezey v. Lott, 21 N. Y. 481, 78 AmD 160; Acker v. Finn, 5 Hill (N. Y.) 293; Charleston v. Price, 12 S. C. L. 299; Bacon v. Langton, 9 U. C. C. P. (Ont.) 410; Meyers v. Maybee, 10 U. C. Q. B. (Ont.) 200.

Assignability of bond see supra § 433.

[62] Waples v. Adkins, 5 Del. 381; Balsley v. Hoffman, 13 Pa. 603; Krumbhaar v. Stetler, 10 Pa. Co. 12.

[a] **Illustration.**—A bond not taken under the act of 1872, relating to replevin for rent, is not assignable by the sheriff to defendant in the replevin action, and the action must be brought by the officer for the use of such defendant. Krumbhaar v. Stetler, 10 Pa. Co. 12.

[63] Pipher v. Johnson, 108 Ind. 401, 9 NE 376; Union Motor Car Co. v. Farmer, 151 Miss. 734, 118 S 425.

[64] Becovitz v. Sapperstein, 46 Ind. A. 339, 92 NE 551; McGlasson v. Bradford, 7 Bush (Ky.) 250, 252; Grimes v. Payne, 116 Okl. 295, 244 P 753. See Newton v. Round, 109 Iowa 286, 80 NW 391 (where it was intimated that, had an intervener properly alleged and proved damages in the replevin suit, he could have maintained an action on plaintiff's bond for such damages).

"In our opinion the bond, though not a covenant in express terms to the appellee, inured to his benefit, and operated to secure such rights in the property as might be adjudged to him in the action." McGlasson v. Bradford, supra.

"The undertaking obligated the surety to return the property involved 'to the defendants' if the return was adjudged: that is, to those who are defendants at the time the judgment is rendered. This interpretation does not change or enlarge the liability of the surety, although it may change the beneficiary. The suit was instituted to determine the rights of the parties in the property in question, and such right could only be settled by the adjudication. But one bond is contemplated for the return of property in one action, and that is for the benefit of any party to the suit when the return is adjudged." Becovitz v. Sapperstein, supra.

[65] Magerstadt v. Field, 160 Ill. A. 23; Tedrick v. Wells, 59 Ill. A. 657.

[a] **Reason for rule.**—"The statute also contemplates that the proceedings in which the bond is given may be amended, and that such amendment shall not affect the protection given by the bond except where the legal effect of such amendment is to enlarge the liability thereunder. The statute enters into and forms a part of a replevin bond in legal contemplation, and the parties are conclusively presumed to intend what the statute provides." Magerstadt v. Field, 160 Ill. A. 23, 30.

[66] Williams v. St. Louis, etc., R. Co., 8 Mo. A. 135; First Commercial Bank v. Valentine, 209 N. Y. 145, 102 NE 544, AnnCas1913D 1104.

[a] **Illustration.**—Where a bond is given to defendant named in the suit and he disclaims any interest in the property, and another person is substituted as defendant after the bond is given and in whose favor judgment is rendered, such person cannot sue on the bond. Williams v. St. Louis, etc., R. Co., 8 Mo. A. 135.

[67] Massachusetts Bonding, etc., Co. v. Novotny, 200 Iowa 227, 202 NW 588; First Commercial Bank v. Valentine, 163 App. Div. 709, 148 NYS 792 [aff 214 N. Y. 669 mem, 108 NE 1094 mem].

[a] **Bailor and bailee.**—A bailor admitted as a defendant in a replevin action against the bailee, and to

Officer. Where property is replevied from an officer who is in possession thereof by virtue of an execution or attachment, the bond taken by the officer who executes the writ of replevin is primarily for the benefit of the execution or attachment creditor.[68] In such case the officer executing the writ of replevin and to whom the bond is given may sue thereon,[69] and he may bring his action for the joint use of the execution or attachment creditor and the officer who was defendant in the action of replevin.[70] An action on the bond may also be brought jointly by the execution or attachment creditor and the officer who was defendant in the action of replevin,[71] and where there are different creditors, although claiming under different executions, they may join in such action.[72] The execution or attachment creditor may also as the real party in interest sue upon the bond in his own name,[73] without joining the officer,[74] and where the property replevied was taken on different executions, the different execution plaintiffs may join in an action on the bond.[75]

[§ 443] **(2) Defendant's Bond.** Although a redelivery bond is given to the officer, plaintiff in replevin is the real party in interest and may sue thereon in his own name,[76] and he should sue alone without joining the officer as a party.[77] If, however, the action is brought by the party having the legal right of action, defendant cannot object that it is not brought for the benefit of the proper person.[78] Where after a redelivery bond is given plaintiff in replevin dies and another person is substituted as plaintiff, the bond takes effect in favor of the latter party who may maintain an action thereon,[79] and an assignment of the judgment recovered against defendant in replevin operates as an assignment of the redelivery bond, and authorizes the assignee as the real party in interest to sue thereon in his own name.[80]

[§ 444] **b. Parties Defendant—(1) Plaintiff's Bond.** If plaintiff in the replevin action joins in the execution of the replevin bond, he may be sued thereon jointly with the sureties,[81] but if he did not sign the bond he should not be joined as a party defendant.[82] Where the liability of the obligors is joint and several it is no objection that one of them is not joined as a defendant,[83] and where the first bond filed is insufficient in amount and an additional bond is executed with a different surety, a recovery may be had against the surety on the first bond without making the surety on the second bond a party to the action.[84]

[§ 445] **(2) Defendant's Bond.** Where several defendants who are in possession of different parts of the property execute a joint bond, they are jointly liable and may be sued jointly together with the sureties;[85] and where the obligation is several, the surety may, under statutes, be sued without a joinder of the principal.[86]

[§ 446] **5. Pleading[87]—a. Declaration or Complaint—(1) In General.** In an action on a replevin bond the declaration or complaint must allege every fact necessary to authorize a recovery,[88] but need

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whom possession of the property involved was awarded, was held entitled to sue on the replevin bond for damages from the taking and detention of such property. First Commercial Bank v. Valentine, 163 App. Div. 709, 148 NYS 792 [order aff 214 N. Y. 669 mem, 108 NE 1094 mem].

[b] **Principal and agent.**—Where an agent was made defendant in replevin, his principal intervening in that action may sue on the bond. Massachusetts Bonding, etc., Co. v. Novotny, 200 Iowa 227, 202 NW 588.

[68] Quinnipiac Brewing Co. v. Hackbarth, 74 Conn. 392, 50 A 1023; Kahn v. Gavit, 23 Ind. A. 274, 55 NE 268.

[69] Schott v. Youree, 142 Ill. 233, 31 NE 591; Blatchford v. Boyden, 122 Ill. 657, 13 NE 801 [aff 18 Ill. A. 378].

[a] **Successor in office.**—If the bond is given to the officer and his "successors in office," the action is properly brought by the officer to whom the bond is given, the words quoted being without legal effect. Schott v. Youree, 142 Ill. 233, 31 NE 591 [aff 41 Ill. A. 476].

[70] Blatchford v. Boyden, 122 Ill. 657, 13 NE 801 [aff 18 Ill. A. 378].

[71] Quinnipiac Brewing Co. v. Hackbarth, 74 Conn. 392, 50 A 1023; Walls v. Johnson, 16 Ind. 374; Kaufman v. Wessel, 14 Nebr. 161, 15 NW 219; U. S. Fidelity, etc., Co. v. Yoder, 139 Okl. 256, 281 P 974.

[a] **Although not party defendant in replevin action,** the execution or attachment creditor may join with the officer in an action upon the bond. Quinnipiac Brewing Co. v. Hackbarth, 74 Conn. 392, 50 A 1023.

[72] Kaufman v. Wessel, 14 Nebr. 161, 15 NW 219.

[73] Kahn v. Gavit, 23 Ind. A. 274, 55 NE 268; Lomme v. Sweeney, 1 Mont. 584 [aff 22 Wall. (U. S.) 208, 22 L. ed. 727].

[74] Kahn v. Gavit, 23 Ind. A. 274, 55 NE 268.

[75] Thomas v. Irwin, 90 Ind. 557.

[76] Dunkle v. Haight, 68 Colo. 404, 189 P 783; Kimball Co. v. Bleick, 24 Or. 59, 32 P 766.

[a] **Assignment of bond.**—Although the officer is named as obligee in the bond, it seems that plaintiff in replevin as the real party in interest might sue in his own name without any assignment of the bond, but he may certainly sue in his own name where the bond is assigned to him by the officer. Smith v. Stubbs, 16 Colo. A. 130, 63 P 955.

[77] McBeth v. Van Sickle, 6 Nev. 134 (although the statute requires the bond to be delivered to the sheriff, he has no interest therein, and that plaintiff in replevin as the only person interested should sue alone).

[78] Conlin v. Butler, 10 Kulp (Pa.) 273.

[79] Emerson v. Booth, 51 Barb. (N. Y.) 40.

[80] Schlieman v. Bowlin, 36 Minn. 198, 30 NW 879.

[81] Buck v. Lewis, 9 Minn. 314 (holding that, even if it were unnecessary that he should be joined, neither he nor the sureties can complain).

[82] Jackson v. Morgan, 167 Ind. 528, 78 NE 633.

[83] Becker v. Ball, 18 U. C. Q. B. (Ont.) 192.

[a] **In Texas** (1) suit cannot be prosecuted against the sureties without joinder of the principal where it does not appear that the principal was insolvent when the suit was begun. Toland v. Swearingen, 39 Tex. 447. (2) Where the principal was a nonresident and insolvent, it was proper to sue his sureties without joining him as party defendant. Houghton v. Ledbetter, 37 Tex. 161.

[84] Smith v. Whitten, 117 N. C. 389, 23 SE 320.

[85] Boykin v. Rosenfield, 69 Tex. 115, 9 SW 318.

[86] Citizens' Ins. Co. v. Etchen, 111 Kan. 545, 207 P 782 [cit Cyc]; Moore v. Edwards, 192 N. C. 446, 135 SE 302.

[a] **Joint and several obligation.**—Under Comp. St. § 458, providing that persons severally liable on the same obligation may be sued jointly or severally, in an action on a redelivery bond to recover damages for the detention and deterioration in the value of the property, it was not necessary to join the principal on the bond, but the action might proceed against the surety alone. Moore v. Edwards, 192 N. C. 446, 135 SE 302.

[87] **Generally** see Pleading §§ 132-196; Bonds §§ 162-176; Contracts §§ 827-870.

[88] Parrott v. Scott, 6 Mont. 340, 12 P 763; Wetherbee v. Colby, 6 Vt. 647.

[a] **Corporate existence of surety.**—A complaint on an undertaking in claim and delivery was not fatally defective because it failed to allege the corporate existence of the surety

not negative matters of defense.[89] It must therefore show a breach of the condition of the bond;[90] but if a breach of condition is shown it is not necessary that the breach should be formally assigned.[91] A breach assigned must be as broad as the condition of the bond,[92] and if the condition is in the alternative it must be alleged that neither condition was performed,[93] but the breach need not be assigned in any broader terms than the condition of the bond.[94] The complaint should describe the bond by setting forth its material portions either literally or according to their legal effect,[95] so as to show what were its conditions,[96] and must allege that it was delivered;[97] but the complaint need not show who were the principals and who the sureties on the bond,[98] or allege in terms that the bond was taken in pursuance of the statute,[99] or that the writ was directed to the officer;[1] nor is it necessary expressly to allege that the bond was executed in behalf of plaintiff in replevin, if it shows that it was given for the prosecution of such suit.[2] The complaint must also show what judgment was rendered in the replevin action,[3] and that it was such as the statute requires,[4] and a failure to comply with such judgment;[5] but it is sufficient to set out the judgment without setting out the whole record of the replevin suit,[6] and it is not necessary to state the avowry or cognizance,[7] or allege the issuing and return of execution in the replevin action.[8] A general description of the property is sufficient in an action on the bond,[9] and it is not necessary to allege a demand for the property replevied,[10] or the issuing of a writ retorno habendo.[11] Under some statutes, the bond or a copy thereof must be filed with the complaint;[12] but it is not necessary to file copies of the writ of replevin and the return of the officer thereon,[13] or a transcript of the record in the replevin suit.[14] The complaint may be amended as in other civil actions subject to the rules prevailing in such actions generally.[15]

Pleading damages. A general allegation of damages is sufficient to authorize a recovery of such

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executing the undertaking. Hoebel v. Utah-Idaho Livestock Loan Co., 39 Ida. 294, 227 P 1048.

[b] **Delivery of property to plaintiff.**—A complaint in an action on a replevin bond, given under Code Civ. Proc. § 512, although stating facts defectively as to delivery of the property to plaintiff in replevin, was held to state sufficient facts to constitute a cause of action. Montgomery v. Fidelity, etc., Co., 69 Cal. A. 251, 230 P 993.

[c] **Form of petition or complaint** see Green v. Rehbine, 44 Okl. 96, 144 P 182.

[d] **Allegations held sufficient** to state a cause of action on the bond see Keenan v. Washington Liquor Co., 8 Ida. 383, 69 P 112; Story v. O'Dea, 23 Ind. 326; Dillon v. Scofield, 11 Nebr. 419, 9 NW 554; Gould v. Warner, 3 Wend. (N. Y.) 54; Green v. Rehbine, 44 Okl. 96, 144 P 182; Cooper v. McGrew, 8 Or. 327.

[e] **Aider by verdict.**—A defective complaint may be helped by verdict. An objection that it does not allege the value of the property should be taken advantage of by demurrer, and if not so taken is cured by verdict. Krumbhaar v. Stetler, 10 Pa. Co. 12.

[89] Parrott v. Scott, 6 Mont. 340, 12 P 763.

[90] Barr v. McGary, 131 Pa. 401, 19 A 45; Duggan v. England, 16 S. C. L. 215.

[a] **Allegations held sufficient** (1) to show a breach of the condition of the bond see Gorman v. Lenox, 15 Pet. (U. S.) 115, 10 L. ed. 680; Manning v. Pierce, 3 Ill. 4; Keyes v. McNulty, 14 Iowa 484; Cameron v. Boyle, 2 Greene (Iowa) 154. (2) The complaint, in an action on a bond given by plaintiff in claim and delivery, attaching thereto a copy of the bond and making it part of the complaint, and alleging dismissal of the claim and delivery action, was sufficient to entitle plaintiff to rely on breach of the condition of the bond to prosecute the action. Seaboard Air Line R. Co. v. Hewlett, 94 S. C. 478, 78 SE 329.

[91] Hunter v. Sherman, 3 Ill. 539. But see Livingston v. New York Super. Ct., 10 Wend. (N. Y.) 545 (in an action in one state on a replevin bond executed in a suit in another, breaches must be assigned).

[92] Colorado Springs Co. v. Hopkins, 5 Colo. 206.

[93] Duggan v. England, 16 S. C. L. 215.

[94] Peck v. Wilson, 22 Ill. 205; Hunter v. Sherman, 3 Ill. 539.

[95] Mills v. Gleason, 21 Cal. 274 (holding that it is not sufficient where there is no other description of the bond than that it corresponds with the provisions of the statute, but that the defect is one of form rather than substance and the condition must be taken by demurrer).

[96] Barr v. McGary, 131 Pa. 401, 19 A 45.

[97] Parrott v. Scott, 6 Mont. 340, 12 P 763.

[98] Shappendocia v. Spencer, 73 Ind. 133.

[99] Shaw v. Tobias, 3 N. Y. 188, 191 (holding that it is sufficient if the instrument as set forth is in accordance with the statute).

[1] Shaw v. Tobias, supra.

"The giving of the bond by the defendant to the coroner is at least prima facie evidence that the writ was directed to him and the declaration is therefore sufficient." Shaw v. Tobias, supra.

[2] Shaw v. Tobias, supra.

[3] Barr v. McGary, 131 Pa. 401, 19 A 45.

[4] Clary v. Rolland, 24 Cal. 147 (holding that, in a suit against the sureties on a replevin bond, a complaint is not sufficient which does not aver that the value of the property was found by the jury, and that an alternative judgment was rendered, as provided in Pract. Act § 200).

[5] Barr v. McGary, 131 Pa. 401, 19 A 45.

[a] **Complaint should allege,** as a breach of the condition of the bond, a failure to return the property replevied on the judgment in the replevin suit. Brown v. Brigham, 5 Allen (Mass.) 582.

[6] Nunn v. Goodlett, 10 Ark. 89.

[7] Gould v. Warner, 3 Wend. (N. Y.) 54.

[8] Jennison v. Haire, 29 Mich. 207. Contra Hershiser v. Jordan, 25 Nebr. 275, 41 NW 147.

Necessity of execution as condition precedent see supra § 434.

[9] Keenan v. Washington Liquor Co., 8 Ida. 383, 69 P 112.

[a] **Reference to writ.**—A declaration in which the property is described by reference to the writ of replevin, and which makes profert of the record and proceedings in the action of replevin, is sufficient. Cushenden v. Harman, 2 Tyler (Vt.) 431.

[10] Wetherbee v. Colby, 6 Vt. 647; Cushenden v. Harman, 2 Tyler (Vt.) 431.

[11] Hunter v. Sherman, 3 Ill. 539; Cowden v. Pease, 10 Wend. (N. Y.) 333; Knapp v. Colburn, 4 Wend. (N. Y.) 616.

[a] **As condition precedent.**—Although the issuance and return of such writ is essential as a condition precedent to the maintenance of the action, it is merely a matter of proof and need not be alleged in the declaration. Cowden v. Pease, 10 Wend. (N. Y.) 333.

Writ retorno habendo as condition precedent see supra § 435.

[12] Burtt v. Little, 12 Ind. A. 567, 40 NE 929.

[13] Shappendocia v. Spencer, 73 Ind. 133.

[14] Sammons v. Newman, 27 Ind. 508 (holding that, if such transcript of the proceedings in the replevin suit is filed with the complaint, it is not cause for demurrer, but that the court may strike it out on motion).

[15] Truitt v. Collins, 18 Del. 36, 45 A 541; Keenan v. Washington Liquor Co., 8 Ida. 383, 69 P 112; Wheat v. Catterlin, 23 Ind. 85.

[a] **Illustrations.**—(1) Where the proceedings in an action of replevin are reviewed and corrected during the pendency of an action on the replevin bond, the court may allow the complaint in an action on the bond to be amended by adding the proceedings and judgment on review. Wheat v. Catterlin, 23 Ind. 85. (2) Plaintiff may be allowed to amend his pleading from an action by plaintiff as assignee of the sheriff to one by the sheriff for the use of plaintiff. Truitt v. Collins, 18 Del. 36, 45 A 541.

damages as are the natural and immediate consequence caused by the breach of the conditions of the bond.[16]

[§ 447] **(2) Allegations as to Assignment of Bond.** Where an assignment of the bond by the officer is necessary in order to authorize the party beneficially interested to sue thereon,[17] the complaint must allege or show such an assignment,[18] and that it was made before the action on the bond was brought;[19] and where such bonds are assignable only in certain cases, the complaint must show that the bond in question was assignable.[20] If the complaint alleges an assignment of the bond it is not necessary to allege that the judgment in the action was also assigned;[21] and conversely it seems that as an assignment of the judgment operates as an assignment of the bond, it is sufficient merely to allege an assignment of the judgment.[22] If no assignment is necessary in order to authorize the action on the bond, it is not necessary that the complaint should allege an assignment.[23]

[§ 448] **(3) Defendant's Bond.** In an action on a redelivery bond, the complaint must show a breach of the condition of the bond,[24] and the breach assigned must be as broad as the condition.[25] It must allege that the officer returned the property to defendant,[26] and that such delivery was procured by means of the undertaking sued on;[27] but it is not necessary expressly to allege that the bond was given in an action of replevin if the bond is set out in the complaint and its recitals show that it was given in such an action,[28] and where plaintiff in replevin may sue on a redelivery bond without an assignment thereof, it is not necessary to allege an assignment in the complaint.[29] The complaint must allege the rendition of a judgment in favor of plaintiff in the action of replevin,[30] and must allege facts showing that the judgment rendered was one authorized by law,[31] and where the judgment in the action of replevin is in the alternative for a return of the property or its value, the complaint must allege that neither condition has been performed;[32] but if it is alleged that defendant has failed to pay the judgment, it is not necessary to allege that it remains in full force and unappealed from.[33] Where a judgment for a return is necessary, such judgment or facts showing that a return was impossible must be alleged.[34] It is not necessary to allege the regularity of the proceedings in the replevin suit,[35] it being sufficient to allege the rendition of judgment,[36] and it is not necessary to allege that execution has been issued against defendant and returned unsatisfied.[37] It is not necessary that the bond or a copy thereof should be filed with the complaint,[38] unless the statute so requires.[39] A defect in the complaint which is not objected to may be cured by verdict.[40] In some jurisdictions an amendment to the complaint which introduces a new and distinct cause of action is not permitted.[41]

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[16] Ralph N. Blakeslee Co. v. Rigo, 94 Conn. 481, 109 A 173.

[a] **Usable value.**—Where plaintiff was engaged in the cartage business, and was deprived of the use of an automobile truck which defendant had replevied, damages for loss of the use of truck while in the possession of defendant were recoverable in an action on the replevin bond without being specially pleaded, not being special damages, since detention of the truck necessarily implied a loss of its use during the period of detention. Ralph N. Blakeslee Co. v. Rigo, 94 Conn. 481, 109 A 173.

[17] See supra § 436.

[18] Nunn v. Goodlett, 10 Ark. 89; Greer v. Howard, 41 Oh. St. 591 (holding that, where the property was replevied from an officer holding it under an execution, the complaint in an action on the bond by plaintiff in such action must allege an assignment of the bond or the judgment in replevin, which would have effected an assignment of the bond, or allege a refusal on the part of the sheriff to assign the bond or judgment or enforce the bond).

[19] Nunn v. Goodlett, 10 Ark. 89 (holding, however, that the complaint need not allege the exact date of the assignment if it shows that the assignment was before the action on the bond was brought).

[20] Knapp v. Colburn, 4 Wend. (N. Y.) 616 (holding that a replevin bond is assignable only in cases where the goods replevied were taken as a distress for rent, and that such fact must be averred in a declaration by assignees or it will be bad).

[21] Morange v. Mudge, 6 AbbPr (N. Y.) 243.

[22] See Greer v. Howard, 41 Oh. St. 591 (where, however, the complaint failed to allege an assignment of either the bond or the judgment).

[23] Parrott v. Scott, 6 Mont. 340, 12 P 763.

[24] Colorado Springs Co. v. Hopkins, 5 Colo. 206 (holding that, where the bond is conditioned to deliver the property "in case the return thereof shall be awarded," it is not sufficient merely to allege a failure to return the property, but in order to show a breach of the bond it must be alleged that an order was made for its return).

[a] **Allegations held sufficient** (1) generally see Fisse v. Katzentine, 93 Ind. 490. (2) An allegation that the judgment remains in full force and effect and is wholly unpaid is sufficient to show a breach of the bond. Terry v. Johnson, 109 Ky. 589, 60 SW 300, 22 KyL 1210. (3) A complaint which alleges the giving of the redelivery bond "and that the defendants herein have wholly failed, refused and neglected to redeliver said personal property to this plaintiff in accordance with the terms of the undertaking above set forth, a copy of which is hereto attached and marked Exhibit A, and has wholly failed, refused, and neglected to pay the judgment awarded the plaintiff in said action and are in default under said undertaking," sufficiently sets forth facts constituting the breach. Burkitt v. Vail, 123 Or. 461, 238 P 1114, 260 P 1014, 1015. (4) Where the complaint set out the bond in hæc verba and averred that defendants breached the conditions of the bond in that they failed to deliver the property replevied by them within thirty days after such judgment, and failed to pay plaintiff the damages accruing from the detention, such complaint stated a substantial cause of action. Rains v. Ethridge-Atkins Motor Co., (Ala.) 127 S 905.

[25] Colorado Springs Co. v. Hopkins, 5 Colo. 206.

[26] Nickerson v. Chatterton, 7 Cal. 568; Barton v. Donnelly, 6 Misc. 473, 27 NYS 525 [aff 142 N. Y. 523, 37 NE 619]. But see Slack v. Heath, 4 E. D. Smith (N. Y.) 95, 1 AbbPr 331 (where the bond is in statutory form, return to defendant need not be alleged).

[a] **But if bond itself states** that the property was returned to defendant and the bond is made a part of the petition, no further allegation as to the return of the property is necessary. O'Loughlin v. Carr, 9 Kan. A. 818, 60 P 478.

[b] **Redelivery to one defendant.**—A complaint on an undertaking given by defendants in replevin to secure a return of the property to them is not defective in failing to allege a redelivery to both defendants, it appearing that the property was redelivered to one of them on a requisition made by both. Potter v. Van Vranken, 36 N. Y. 619, 2 Transcr. A. 73.

[27] Barton v. Donnelly, 6 Misc. 473, 27 NYS 525 [aff 142 N. Y. 523, 37 NE 619].

[28] Slack v. Heath, 4 E. D. Smith (N. Y.) 95, 1 AbbPr 331.

[29] Hedderick v. Pontet, 6 Mont. 345, 12 P 765.

[30] Eldred v. Bennett, 33 Pa. 183.

[31] Nickerson v. Chatterton, 7 Cal. 568.

[a] **Alternative judgment.**—Where an alternative judgment for the return of the property, as well as a judgment for the value, was necessary under the statute, a complaint alleging a money judgment was bad. New England Furniture, etc., Co. v. Bryant, 64 Minn. 256, 66 NW 974.

[32] Nickerson v. Chatterton, 7 Cal. 568.

[33] Blackburn v. Crowder, 108 Ind. 238, 9 NE 108.

[34] Farmers' Nat. Bank v. Ferguson, 28 N. D. 347, 148 NW 1049; Larson v. Hanson, 21 N. D. 411, 131 NW 229.

Judgment in replevin as essential to fix liability see supra § 414.

[a] **Insufficient allegation of impossibility of return.**—In an action on a redelivery bond an allegation of the rendition of a mere money judgment in the prior action, and concluding with a recital that it satisfactorily appeared that a return of the property could not be had, was held insufficient to warrant recovery.

[§ 449] **b. Plea, Answer, and Affidavit of Defense[42]—(1) Plaintiff's Bond.** In an action on a replevin bond the plea or answer must present a good defense to the action,[43] and in traversing the allegations of the complaint should do so directly and not inferentially, as by setting up facts inconsistent with what is there alleged.[44] So also the allegations of the plea or answer must not be repugnant to each other,[45] or tender an immaterial issue,[46] as by tendering issue only upon an allegation of the complaint, which is mere surplusage.[47] While a plea which purports to answer only a part of the action is good so far as it goes,[48] a plea to the whole declaration or complaint which is an answer to only a part thereof is bad,[49] since it must be sufficient as to all breaches of the conditions of the bond which are well assigned in the declaration or complaint.[50] Fraud or collusion in regard to the procuring of the judgment in the action of replevin may be pleaded as a defense,[51] but the facts constituting the alleged fraud or collusion must be set out.[52] A plea of nil debet is not a proper plea in an action on a replevin bond;[53] and where the complaint sets out the condition and alleges special breaches, a plea of general performance,[54] or a plea of non damnificatus is bad.[55] A plea of nul tiel record is bad where no record is averred in the declaration,[56] and although the complaint alleges an award of retorno habendo by a court of record, a plea of nul tiel record is not proper, since the action is not founded upon the record but upon the bond,[57] and a plea denying that plaintiff had any property in the goods replevied is bad where no such property is averred in the declaration.[58] Matters in excuse of a breach of condition of the bond cannot be availed of unless specially pleaded;[59] but ordinarily facts and circumstances which are merely in mitigation of damages need not,[60] and should not be pleaded,[61] and a plea which does not answer any or any part of the breaches alleged, but merely sets up matters which would be properly considered in mitigation of damages, is bad.[62] In some jurisdictions, however, by statute defendant may plead in mitigation of damages that the merits of the case were not determined in the action of replevin and may set up his title to the property in question;[63] but such

Farmers' Nat. Bank v. Ferguson, 28 N. D. 347, 148 NW 1049.

[35] Slack v. Heath, 4 E. D. Smith (N. Y.) 95, 1 AbbPr 331.

[36] O'Loughlin v. Carr, 9 Kan. A. 818, 60 P 478.

[37] Slack v. Heath, 4 E. D. Smith (N. Y.) 95, 1 AbbPr 331.

[38] Terry v. Johnson, 109 Ky. 589, 60 SW 300, 22 KyL 1210.

[39] Blackburn v. Crowder, 108 Ind. 238, 9 NE 108 (holding that, under a statute requiring the bond or a copy thereof to be filed with the complaint, if there is a variance between the recitals of the complaint and those of the bond filed therewith, the latter will control).

[40] Chaffee v. Sangston, 10 Watts (Pa.) 265.

[41] Kirkman Nurseries v. Thorwaldson, 56 Cal. A. 1, 204 P 253.

[a] **New cause of action was not set out** in an amended complaint in an action on a redelivery bond merely because the word "merchantable" was included in the description of trees. Kirkman Nurseries v. Thorwaldson, 56 Cal. A. 1, 204 P 253.

Amendments generally see Pleading § 671 et seq.

[42] **Generally** see Pleading §§ 197-379; Bonds §§ 187-201; Contracts §§ 871-897.

[43] Bradley v. Reynolds, 61 Conn. 271, 23 A 928; Goelz v. Joerg, 64 Ill. 114; Palmer v. Emery, 91 Ill. A. 207.

[a] **Plea insufficient.**—(1) A plea that plaintiff ought not to maintain his action because the suit in replevin was dismissed by agreement of the parties is bad because it attempts to set up a parol dispensation of a specialty, and because the agreement would not include an agreement to dispense with a return of the property, without which the dismissal would itself be a breach of the bond. O'Neal v. Wade, 3 Ind. 410. (2) A plea alleging that defendant commenced an action of replevin without any delay and "from thence hitherto has continued and prosecuted his said suit, as in the said condition is mentioned" is insufficient for not alleging that the suit was prosecuted without delay. Caswell v. Catton, 9 U. C. Q. B. (Ont.) 282. (3) An answer alleging that, after the property had been delivered to defendant by the officer on the same day, one of the plaintiffs violently and forcibly took it out of his possession and deprived him of the possession thereof, wherefore he could not make return thereof, is perhaps sufficient to bar a recovery for the value of the property or sufficient in mitigation of damages, but does not state facts sufficient to bar an action. Story v. O'Dea, 23 Ind. 326.

[44] Perrigo Gold Min., etc., Co. v. Grimes, 2 Colo. 651; Danford v. Watkins, 337 Ill. 222, 168 NE 912.

[45] Wright v. Card, 16 R. I. 719, 19 A 709 (holding that a plea setting up matters of confession and avoidance and then alleging a general performance is bad for repugnancy).

[46] Barbour v. Perry, 41 Ill. A. 613.

[47] Bradley v. Reynolds, 61 Conn. 271, 23 A 928.

[48] See Wright v. Card, 16 R. I. 719, 19 A 709 (dictum).

[49] Wood v. Franklin, 30 F. Cas. No. 17,946, 2 Cranch C. C. 115; Sopris v. Lilly, 1 Colo. 266; Goelz v. Joerg, 64 Ill. 114; Humphrey v. Taggart, 38 Ill. 228; Palmer v. Emery, 91 Ill. A. 207; Fellheimer v. Hainline, 65 Ill. A. 384; Larson v. Laird, 36 Ill. A. 402; Morehead v. Yeazel, 10 Ill. A. 263; Lindsay v. Blood, 2 Mass. 518.

[50] Sopris v. Lilly, 1 Colo. 266; Golding v. Bellnap, 26 U. C. Q. B. (Ont.) 163.

[a] **Plea as to one breach.**—A plea that defendant returned the property was insufficient where the breach also alleged was a failure to prosecute with effect. Golding v. Bellnap, 26 U. C. Q. B. (Ont.) 163.

[51] Wright v. Card, 16 R. I. 719, 19 A 709.

[52] Bradley v. Reynolds, 61 Conn. 271, 23 A 928. See Wright v. Card, 16 R. I. 719, 19 A 709 (where the allegations were held to be insufficient).

[53] King v. Ramsay, 13 Ill. 619; Fellheimer v. Hainline, 65 Ill. A. 384.

[54] Gorman v. Lenox, 15 Pet. (U. S.) 115, 10 L. ed. 680 [aff 15 F. Cas. No. 8,246, 5 Cranch C. C. 531]; Wood v. Franklin, 30 F. Cas. No. 17,946, 2 Cranch C. C. 115. See Doogan v. Tyson, 6 Gill & J. (Md.) 453 (holding that whether a plea of general performance is a correct plea or not, if incorrect it can only be objected to by special demurrer).

[55] Wood v. Franklin, 30 F. Cas. No. 17,946, 2 Cranch C. C. 115.

[56] Wood v. Franklin, supra.

[57] Fellheimer v. Hainline, 65 Ill. A. 384.

[58] Wood v. Franklin, 30 F. Cas. No. 17,946, 2 Cranch C. C. 115.

[59] Smith v. Bowers, 2 Nebr. (Unoff.) 611, 89 NW 596.

[60] Bradley v. Reynolds, 61 Conn. 271, 23 A 928.

[61] Wiseman v. Lynn, 39 Ind. 250; Sammons v. Newman, 27 Ind. 508; Smith v. Lisher, 23 Ind. 500.

[62] Wright v. Card, 16 R. I. 719, 19 A 709.

[63] Chinn v. McCoy, 19 Ill. 604.

[a] **Form of plea.**—Under such statute defendant must affirmatively state in his plea why the merits were not so determined, and enough of the proceedings in the former action should be set forth to enable

plea is not good if pleaded in bar of the whole cause of action as it does not answer the whole declaration.[64] The practice varies in different jurisdictions as to the necessity of filing an affidavit of merits or defense in an action on a replevin bond.[65]

[§ 450] **(2) Defendant's Bond.** In an action on a redelivery bond the plea or answer must allege facts which if true present a good defense to the action;[66] and where the declaration or complaint sets out the conditions of the bond and specially assigns breaches, the plea or answer should traverse the breaches as laid and conclude to the country.[67] An answer is insufficient if it neither contradicts any material allegation of the complaint nor sets up any new matter constituting a defense;[68] and an answer made on information and belief is insufficient where the facts alleged are necessarily within the knowledge of the party pleading.[69] In an action on a redelivery bond no affidavit of defense is necessary.[70]

[§ 451] **c. Other Pleadings.** The rules of pleading applicable in civil actions generally[71] apply with regard to the replication or reply,[72] and to the subsequent pleadings.[73] A party who by replication waives an objection to a formal defect in the plea cannot afterward avail himself of such objection.[74]

[§ 452] **6. Issues, Proof, and Variance.**[75] An issue arises in an action on the bond when a fact or conclusion of law is maintained by the pleadings of one party and is controverted by the pleadings of the other.[76] Plaintiff must support by proof the material facts in issue necessary to authorize a recovery,[77] and defendant the facts relied on as a defense,[78] unless such facts are admitted or deemed admitted by the adverse party,[79] but the proof need not be more extensive than the breach of the condition alleged.[80] Where the answer is a general denial, plaintiff should ordinarily prove the undertaking sued on,[81] the termination of the replevin action,[82] the judgment in replevin,[83] and, in some jurisdictions, the order for the writ of return;[84] and where the only breach of the bond is a failure to prosecute the suit to effect, such suit having been dismissed and no return of the property awarded, actual damages must be shown in order to authorize a recovery of more than nominal damages.[85] The case must be proved as alleged,[86] and a material variance is fatal to a recovery;[87] but a variance which

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the court to decide on demurrer whether the right of property was determined. King v. Ramsay, 13 Ill. 619.

[b] **Plea not showing that merits have not been tried** in a replevin suit was demurrable. Moore v. Paul F. Beech Co., 221 Ill. A. 609.

Conclusiveness of adjudication in replevin see supra § 427.

[64] King v. Ramsay, 13 Ill. 619, 623; Morehead v. Yeazel, 10 Ill. A. 263.

"The plea was also defective in professing to answer the entire cause of action. Even if the goods replevied belonged to the plaintiffs in the action of replevin, and the right of property was not determined in that suit, the obligee would still have a cause of action on the bond, and be entitled to recover nominal damages, for a failure to make return of the goods, as required by the judgment of the court." King v. Ramsay, supra.

[65] See Peck v. Wilson, 22 Ill. 205 (holding that a plea in an action on a replevin bond should not be stricken from the files for want of an affidavit of merits); Barr v. McGary, 131 Pa. 401, 19 A 45 (holding that an affidavit of defense is necessary where plaintiff has complied with the Practice Act of 1887, without regard to the affidavit of defense law or cases arising under its provisions).

[66] Smith v. Stubbs, 16 Colo. A. 130, 63 P 955; Adams v. Wiesenthal, 69 N. J. L. 65, 54 A 516.

[67] Adams v. Wiesenthal, supra.

[68] Livingston v. Hammer, 20 N. Y. Super. 670 (holding such an answer to be frivolous).

[69] Smith v. Stubbs, 16 Colo. A. 130, 63 P 955.

[70] Elliott v. Kunszig, 9 WklyNC (Pa.) 542.

[71] **Generally** see Pleading §§ 392-451; Bonds §§ 202, 203; Contracts §§ 898-905.

[72] See Clark v. Hanchett, 40 Ill. A. 212 (replication held defective); Doogan v. Tyson, 6 Gill & J. (Md.) 453 (holding that, where defendant pleads a general performance, plaintiff must show his cause of action in his replication, stating the breaches of conditions of the bond upon which he intends to rely).

[73] Clark v. Hanchett, 40 Ill. A. 212 (holding that, in the particular case, the sustaining of a demurrer to the rejoinder was not prejudicial to defendant).

[74] Fellheimer v. Hainline, 65 Ill. A. 384.

[75] **Generally** see Pleading §§ 1144-1211; Bonds §§ 206-217; Contracts §§ 906-925.

[76] See Montgomery v. Fidelity, etc., Co., 69 Cal. A. 251, 230 P 993.

[a] **Denial on information and belief** of allegation that defendant filed disclaimer in the replevin action did not raise an issue as to whether such disclaimer was filed, and hence the court properly proceeded without first causing a representative of such deceased person to be present. Montgomery v. Fidelity, etc., Co., 69 Cal. A. 251, 230 P 993.

Issues generally see Pleading § 1144 et seq.

[77] Gallup v. Wortmann, 11 Colo. A. 308, 53 P 247; Pettit v. Allen, 64 App. Div. 579, 72 NYS 287; Cowdin v. Stanton, 12 Wend. (N. Y.) 120; Knott v. Sherman, 7 S. D. 522, 64 NW 542. See also Le Barron v. Taylor, 53 Iowa 637, 6 NW 35 (although the petition did not distinctly allege the levy of an execution, parties proceeded to trial as if a proper allegation had been made, but it was held that the evidence was insufficient to prove such levy).

[78] Clapham v. Crabtree, 72 Me. 473.

[79] See cases infra this note.

[a] **What deemed admitted.**—(1) If no plea is filed traversing the allegation of the declaration of a failure to return the property, such allegation stands admitted and need not be proved. Richardson v. Gilbert, 135 Ill. A. 363. (2) An allegation of the declaration that there was an award of retorno habendo upon dismissal of the replevin suit, unless denied by plea, stands admitted and need not be proved. Hanchett v. Buckley, 27 Ill. A. 159.

[b] **Party by his default** admits all the facts well pleaded. Peck v. Wilson, 22 Ill. 205.

[80] Kellogg v. Boyden, 126 Ill. 378, 18 NE 770; Peck v. Wilson, 22 Ill. 205.

[81] Smith v. Lisher, 23 Ind. 500.

[a] **Proof of execution of bond.**—(1) In an action of debt on a replevin bond, the introduction of the bond without objection, under a verified plea of non est factum, is not a waiver of proof of the execution of such bond. Carlson v. Gilbert, 99 Ill. A. 574. (2) But where the declaration states the legal effect of the bond, it is unnecessary to prove its execution where it has not been denied by a plea verified by affidavit. Horner v. Boyden, 27 Ill. A. 573.

[82] Bierma v. Columbia Typewriter Co., 179 Ill. A. 69.

[83] Bierma v. Columbia Typewriter Co., supra.

[84] Bierma v. Columbia Typewriter Co., supra.

Writ of return as condition precedent see supra § 435.

[85] Imel v. Van Deren, 8 Colo. 90, 5 P 803.

[86] Lockhart v. Bell, 20 S. C. L. 422 (holding that, where the bond is declared on as a joint bond against two obligors, plaintiff cannot recover upon proof that it was executed by one of them without any proof as to the other).

[87] Salter v. Richardson, 3 T. B. Mon. (Ky.) 204; Lockhart v. Bell, 20 S. C. L. 422.

[a] **Variance as to terms of bond.**—(1) Where there is a difference of two years in the date of the bond alleged and proved, it is a material

is not material may be disregarded.[88] The proof to be admissible must conform to the pleadings and issues,[89] and whether a particular issue has been raised by the pleadings to allow proof depends on the particular matter in question.[90] In an action upon a redelivery bond plaintiff must prove the rendition of a judgment in his favor in the action of replevin,[91] and if plaintiff relies on a judgment apparently not authorized by statute, it is incumbent upon him to show the exceptional facts which authorize the judgment.[92] Defendant can prove only such defenses as are properly pleaded,[93] and no recovery can be had where there is no evidence of the contents of the bond or of the sureties thereon.[94]

[§ 453] 7. **Evidence**[95]**—a. Presumptions and Burden of Proof.** In an action on a replevin bond plaintiff has the burden of proving the ultimate facts alleged which are denied,[96] such as the breach of the conditions of the bond relied on,[97] and the value of the property as of the time such valuation is to be determined,[98] unless this course is rendered unnecessary by the acceptance of the value admitted by defendant in entering into the bond.[99] If more than nominal damages are claimed, plaintiff has the burden of proof to produce evidence to show actual damages sustained.[1] Defendant in a similar manner has the burden of proof to establish ultimate facts alleged either in defense of the action,[2] or in mitigation of damages.[3] Thus where defendant for the purpose of mitigating damages alleges ownership of the property awarded plaintiff in the replevin action, defendant has the burden of proof to sustain such allegation.[4]

Presumptions. While presumptions may be indulged in as against the principal, they will ordinarily not be indulged in as against the surety.[5] It has been held, however, that, where no return of the property is awarded, it will be presumed that it was made to appear that plaintiff had become entitled to the possession.[6] In the absence of a showing to the contrary, it will be presumed that the officer has acted regularly and taken sufficient bond before serving the writ;[7] that the court in the replevin action had jurisdiction;[8] that the judgment rendered in replevin was the proper judgment;[9] that on breach of the conditions of the bond damages were incurred,[10] although such damages may be only nomi-

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variance. Salter v. Richardson, 3 T. B. Mon. (Ky.) 204. (2) Where the bond stipulated for the payment of a sum with interest and the declaration recited a bond for the same amount due without naming interest, there was a fatal variance. Salter v. Richardson, supra.

[b] **Variance as to parties defendant.**—Under a declaration against one defendant upon a bond as a joint and several obligation, plaintiff cannot recover upon the bond which, as adduced and proved, purports to be a joint obligation entered into by defendant and others. Lockhart v. Bell, 20 S. C. L. 422.

[88] Stevison v. Earnest, 80 Ill. 513; Cimini v. Zambarano, 36 R. I. 122, 89 A 295 [op. amended 89 A 711].

[a] **Variance as to bond.**—Variance between declaration and proof, when due to a mistake in a condition of the bond and where a further like condition, not affected by such mistake appeared therein, was held insufficient to require a directed verdict for defendant. Cimini v. Zambarano, 36 R. I. 122, 89 A 295 [op. amended 89 A 711].

[b] **Where variance is immaterial,** an amendment should be permitted, even on reargument in the supreme court. Cimini v. Zambarano, (R. I.) 89 A 711 [amending op. 36 R. I. 122, 89 A 295].

[89] Gorman v. Lenox, 15 Pet. (U. S.) 115, 10 L. ed. 680 [aff 15 F. Cas. No. 8,246, 5 Cranch C. C. 531]; Chapin v. Matson, 37 Ill. A. 257; Wall v. Humphreys, 4 Dana (Ky.) 209.

[90] See cases infra this note.

[a] **Attorney's fees.**—Evidence of expenses for attorney's fees was not admissible where there was no proped foundation laid in the complaint. Edwin v. Cox, 61 Ill. A. 567.

[b] **Proof in mitigation of damages** may be admitted under a general denial. Smith v. Lisher, 23 Ind. 500.

[c] **Jurisdiction of justice.**—Defense that the justice before whom the action of replevin was brought was without jurisdiction should, where such fact does not affirmatively appear from the proceedings, be specially pleaded. Tyler v. Bowlus, 54 Ind. 333, 601.

[91] Eldred v. Bennett, 33 Pa. 183.

[a] **Award in arbitration,** not under a rule of court, was not sufficient proof of a judgment in replevin. Eldred v. Bennett, 33 Pa. 183.

[92] New England Furniture, etc., Co. v. Bryant, 64 Minn. 256, 66 NW 974.

[93] Bolt v. Milam, 110 S. C. 399, 96 SE 614.

[94] Rousher v. Hamm, 3 Brewst. (Pa.) 233.

[95] **Cross references:**
Burden of proof generally see Bonds §§ 218–229; Contracts §§ 926–959; Evidence §§ 13–24.
Presumptions generally see Bonds §§ 218–229; Contracts §§ 926–959; Evidence §§ 25–88.
Recital of value in bond as presumptive evidence of value see infra § 458.

[96] New England Furniture, etc., Co. v. Bryant, 64 Minn. 256, 66 NW 974.

[a] **Corporate mortgage.**—In an action by a junior mortgagee on the bond of a senior mortgagee, the former was not in the first instance required to show that the corporation mortgagor had complied with the law in the execution of the mortgage, although the mortgage was not authorized by members of the corporation. Cermak v. Cable Piano Co., 211 Ill. A. 219.

[97] Gallup v. Wortmann, 11 Colo. A. 308, 53 P 247.

[98] Sullivan v. Martinelli, 261 Mass. 261, 158 NE 662.

[99] Martin v. Passarini, (N. S.) [1928] 1 DomLR 636.

[1] Davis Bros. Co. v. Wallace, 190 N. C. 543, 130 SE 176.

[2] Fabian v. Traeger, 215 Ill. 220, 74 NE 131 [aff 117 Ill. A. 176]; Grace City First State Bank v. Bradley, 57 N. D. 159, 220 NW 848; Anderson v. Phillips, 40 N. D. 586, 169 NW 315; Vallancy v. Hunt, 26 N. D. 611, 145 NW 132; Siebolt v. Konatz Saddlery Co., 15 N. D. 87, 106 NW 564.

[a] **Mortgage foreclosure.**—Defendant has the burden of proving that plaintiff's rights to the property had been extinguished by foreclosure of a mortgage held by defendant. Siebolt v. Konatz Saddlery Co., 15 N. D. 87, 106 NW 564.

[b] **Return of property.**—Defendant and surety on a redelivery bond had the burden of sustaining the defense that the property was returned in substantially the same condition. Grace City First State Bank v. Bradley, 57 N. D. 159, 220 NW 848.

[3] Clapham v. Crabtree, 72 Me. 473.

[4] Lapp v. Ritter, 88 Fed. 108; Stevison v. Ernest, 80 Ill. 513; Norton v. Deuchler, 191 Ill. A. 271; Davis Bros. Co. v. Wallace, 190 N. C. 543, 130 SE 176.

[5] New England Furniture, etc., Co. v. Bryant, 64 Minn. 256, 66 NW 974; Larson v. Hanson, 21 N. D. 411, 131 NW 229.

[a] **Loss of property.**—In claim and delivery, judgment for the value of the property and for damages may be rendered, where the property is destroyed or lost; and where such a judgment has been rendered, and there is no proof to the contrary, it will be presumed that the property has been so destroyed or lost; but the presumption cannot be indulged in as against the sureties on the undertaking, but as against them exceptional facts warranting a money judgment must be proved, in an action on the bond. Larson v. Hanson, 21 N. D. 411, 131 NW 229.

[6] Danford v. Watkins, 337 Ill. 222, 168 NE 912; Vinyard v. Barnes, 124 Ill. 346, 16 NE 254.

[7] Edgecomb v. Lawlis, 126 Me. 550, 140 A 182; Howe v. Handley, 28 Me. 241.

[8] Klaproth v. Greenberg, 147 Ill. A. 380.

[9] Vinyard v. Barnes, 124 Ill. 346, 16 NE 254.

[10] Davis Bros. Co. v. Wallace, 190 N. C. 543, 130 SE 176, 179.

nal;[11] and that the value of the property at the time of the trial is the same as found by the court at the time it was replevied.[12]

[§ 454] **b. Admissibility—(1) In General.** In actions on replevin bonds the ordinary rules of evidence in civil actions apply,[13] and subject to such rules and except as to matters conclusively determined in the replevin action,[14] evidence which is relevant to any of the material facts in issue is admissible,[15] while evidence that is irrelevant or immaterial,[16] such as proceedings in attachment,[17] or in assumpsit,[18] or evidence of facts not pleaded,[19] or insufficient, may not be admissible.[20] The bond, where its execution is sufficiently proved,[21] the affidavit,[22] declaration, or petition,[23] writ and indorsement thereon,[24] the judgment in replevin,[25] and other papers and files in the replevin suit, if properly identified, are admissible,[26] and such record constitutes the proper means of showing the subject matter of that suit.[27] It is error to refuse to permit plaintiff to prove that the property has not been returned as the condition of the bond required;[28] and where the value of the property is a material issue as affecting plaintiff's damages, it is error to exclude evidence of such value.[29] It is erroneous to exclude evidence to support the merits of the replevin action where in that action the merits of the controversy were not tried or determined.[30] In an action on a redelivery bond evidence which is irrelevant and immaterial is inadmissible,[31] so that testimony relating to the condition of the property at a time long subsequent to the bringing of the suit is properly rejected.[32]

[§ 455] **(2) Evidence of Damages.** Any proper evidence is admissible which tends to show the damages actually sustained after judgment in the replevin action by reason of a failure to return the property in accordance with such judgment,[33] and while, under a general breach assigned, evidence of damages suffered by a detention of the property prior to an order of return is admissible,[34] yet it must be evidence of what the damages in fact were, without any reference to the former assessment.[35] The opinion of third persons as to the possible profits

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"If there was a breach of the bond as alleged in the complaint, such breach was a wrongful act, and the law infers or presumes damages arising therefrom to plaintiffs; if no actual or substantial damages are shown, the law gives nominal damages in order to determine and establish plaintiff's right of action, and thus affords a remedy for the wrong done to them by the defendant's breach of the bond." Davis Bros. Co. v. Wallace, supra.

11. Davis Bros. Co. v. Wallace, supra.

12. Monday v. Vance, (Tex. Civ. A.) 51 SW 346.

13. **Generally** see Evidence § 89 et seq; Contracts §§ 960-975.

14. **Conclusiveness of adjudication in replevin** see supra §§ 426, 427.

15. Colo.—Perrigo Gold Min., etc., Co. v. Grimes, 2 Colo. 651.

Ill.—Hunter v. Empire State Surety Co., 191 Ill. A. 634.

Mich.—Bolton v. Nitz, 88 Mich. 354, 50 NW 291.

N. D.—Siebolt v. Konatz Saddlery Co., 15 N. D. 87, 106 NW 564.

S. D.—Knott v. Sherman, 7 S. D. 522, 64 NW 542.

16. Janssen v. Duncan, 43 Colo. 286, 95 P 922; Martin v. Hertz, 224 Ill. 84, 79 NE 558 [aff 118 Ill. A. 297]; Hanchett v. Buckley, 27 Ill. A. 159.

[a] **Declarations of plaintiff.**—Pye v. Wood, 3 Harr. & J. (Md.) 504.

17. Maguire v. Pan-American Amusement Co., 211 Mass. 22, 97 NE 142.

[a] **Illustration.**—In an action on a bond given to plaintiff, a deputy sheriff, in replevin for property attached by him in an action against defendants' vendor, the writ, declaration, execution, etc., in the attachment proceedings, were not admissible in evidence, since plaintiff's cause of action did not depend on the result of that proceeding, he being accountable to the true owner of the goods, however that case went. Maguire v. Pan-American Amusement Co., 211 Mass. 22, 97 NE 142.

18. Eaton v. Campbell, 2 Mich. N. P. 10.

[a] **Execution in assumpsit.**—An execution in favor of defendant issued in the form of an execution in favor of a plaintiff in assumpsit cannot be considered as an execution in the replevin suit and is not admissible in an action against the sureties on the bond where, under the law, they are not liable until execution has been issued in that suit and returned unsatisfied. Eaton v. Campbell, 2 Mich. N. P. 10.

19. Hanson v. Weber Impl. Co., 173 Ill. A. 293.

[a] **Pleas of tender** of property being an affirmative defense it is doubtful whether evidence of the tender is admissible under a general denial. Shrader v. Wolflin, 21 Ind. 238.

20. Schrader v. Wolflin, supra.

[a] **To establish legal tender.**—Schrader v. Wolflin, 21 Ind. 238.

21. McFadden v. Ross, 108 Ind. 512, 8 NE 161; Shaver v. Kappellas, 83 Ind. A. 338, 146 NE 858.

[a] **Admission of due execution.**—In an action against a surety on a replevin bond, where defendant admitted his signature to the bond, and the sheriff had accepted and indorsed his approval thereon, the execution of the bond was sufficiently proved to authorize its admission in evidence. McFadden v. Ross, 108 Ind. 512, 8 NE 161; Shaver v. Kappellas, 83 Ind. A. 338, 146 NE 858.

[b] **Copy of lost bond.**—Where, prior to the dismissal of a replevin suit, the affidavit, writ, and bond were lost, and plaintiff therein obtained leave to substitute copies, he could not complain, in a suit upon the bond, that the copy of the bond was introduced in evidence against him. Fleet v. Hertz, 201 Ill. 594, 66 NE 858, 94 AmSR 192 [rev 98 Ill. A. 564].

22. Stevison v. Earnest, 80 Ill. 513; Love v. Peo., 94 Ill. A. 237 (holding that the affidavit made by a plaintiff in a replevin suit is competent evidence against him in a suit on the bond).

23. Stevison v. Earnest, 80 Ill. 513; McGinnis v. Hart, 6 Iowa 204.

24. Stevison v. Earnest, 80 Ill. 513; McGinnis v. Hart, 6 Iowa 204; West v. Caldwell, 23 N. J. L. 736.

25. Hunter v. Empire State Surety Co., 191 Ill. A. 634; Shaver v. Kappellas, 83 Ind. A. 338, 146 NE 858; Bolt v. Milam, 110 S. C. 399, 96 SE 614.

[a] **Nunc pro tunc** judgment was admitted, and it was immaterial that such order was entered by a judge other than the one who tried the case. Hunter v. Empire State Surety Co., 191 Ill. A. 634.

26. Stevison v. Earnest, 80 Ill. 513; Woods v. Kessler, 93 Ind. 356; Shaver v. Kappellas, 83 Ind. A. 338, 146 NE 858; West v. Caldwell, 23 N. J. L. 736.

[a] **Dismissal of replevin suit** does not remove the papers from the record, and the admission of such papers in evidence in an action on the bond is not error. Woods v. Kessler, 93 Ind. 356.

[b] **Motion to set aside judgment.**—Hunter v. Empire State Surety Co., 191 Ill. A. 634.

[c] **Receipt for property.**—Barrett v. Marschak, 192 Ill. A. 481.

27. McGinnis v. Hart, 6 Iowa 204.

28. Smith v. Pries, 21 Ill. 656.

29. Siebolt v. Konatz Saddlery Co., 15 N. D. 87, 106 NW 564.

30. Klaproth v. Greenberg, 147 Ill. A. 380.

31. Clark v. Ellingson, 35 N. D. 546, 161 NW 199.

32. Johnson v. Mason, 70 N. J. L. 13, 56 A 137.

33. Miltimore v. Bottom, 66 Vt. 168, 28 A 872.

[a] **Depreciation in value.**—In an action on a replevin bond, evidence respecting the value and condition of the property when returned was held erroneously excluded, notwithstanding no alternative judgment for value had been taken. Booth v. National Surety Co., 129 Or. 598, 278 P 987.

34. Shepard v. Butterfield, 41 Ill. 76.

35. Shepard v. Butterfield, supra (holding that, when plaintiff in an ac-which plaintiff might have realized if he had not been deprived of the property replevied is not admissible.[36]

[§ 456] **(3) Evidence in Mitigation of Damages.** Since a replevin bond is one of indemnity only,[37] defendant, in an action on the bond, is entitled to show, unless concluded by the proceedings in the replevin suit,[38] that the actual damage sustained by plaintiff was less than the value of the property replevied,[39] and to introduce evidence of any fact proper to be considered in mitigation of damages.[40] What evidence is admissible depends on the rights decided in the replevin action and the nature of the bond;[41] but since a judgment for defendant in replevin does not necessarily determine the title to the property,[42] defendant in the action on the bond is entitled to show that it was not determined in such suit;[43] to show in mitigation of damages the right on which defendant in replevin recovered;[44] and to show that he was not the owner of the property,[45] that he had merely a qualified[46] or partial interest therein,[47] and the extent of such interest,[48] that the interest which he had has ceased to exist[49] or was a mere possessory right,[50] that the action of replevin was defeated solely because it was prematurely commenced,[51] or that plaintiff in replevin was in fact the owner of the property,[52] and entitled to possession.[53] Although defendant in the action on the bond cannot show title in himself even in mitigation of damages, where the question of title was adjudicated in the replevin suit,[54] he may, in mitigation of damages, show that such title was of short duration and was terminated by contract shortly after the judgment in replevin.[55] Evidence is also admissible to show that plaintiff has received the value of the property replevied,[56] and in an action on a bond given in replevin, for goods distrained for rent defendant may show in mitigation of damages that there was no rent in arrear,[57] or that plaintiff's interest in the property was qualified.[58] In an action on a redelivery bond where the judgment in replevin was for a return of the property or a certain sum as its value, defendant may show in mitigation of damages that he offered to return the property without unreasonable delay and did return it before the commencement of the

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tion of replevin was nonsuited, and the court ordered a return of the property, and damages were assessed for its detention, evidence of such assessment was not admissible in an action subsequently brought on the replevin bond).

36. Crabbs v. Koontz, 69 Md. 59, 13 A 591 (holding that, while plaintiff may recover for a loss of profits if proved with reasonable certainty, the mere opinion of a witness as to future profits has not that element of certainty necessary as a basis for estimating damages).

37. See supra § 116.

38. **Conclusiveness of adjudication in replevin proceedings** see supra §§ 426, 427.

39. Jackson v. Emmons, 59 Conn. 493, 22 A 296; Hansen v. Thomas, 171 Minn. 101, 213 NW 378.

40. Jackson v. Emmons, 59 Conn. 493, 22 A 296; Vinton v. Mansfield, 48 Conn. 474; Jones v. Smith, 79 Me. 452, 10 A 256; Hansen v. Thomas, 171 Minn. 101, 213 NW 378.

[a] **Fraud in procuring property.**—In an action on a replevin bond, defendant may, in mitigation of damages, give evidence of fraud by which defendant was cheated by plaintiff and others in playing at cards, whereby plaintiff won the property of defendant which was the subject of the replevin. McDaniel v. Fish, 16 F. Cas. No. 8,744, 2 Cranch C. C. 160.

41. Mason v. Sumner, 22 Md. 312; Belt v. Worthington, 3 Gill & J. (Md.) 247.

42. Crabbs v. Koontz, 69 Md. 59, 13 A 591; Davis Bros. Co. v. Wallace, 190 N. C. 543, 130 SE 176.

43. Crabbs v. Koontz, 69 Md. 59, 13 A 591.

44. Mason v. Sumner, 22 Md. 312.

45. Walter v. Warfield, 2 Gill (Md.) 216; Easter v. Foster, 173 Mass. 39, 53 NE 132, 73 AmSR 257.

46. Conn.—Hannon v. O'Dell, 71 Conn. 698, 43 A 147.

Ill.—Zimmer v. Cummings, 202 Ill. A. 18.

Ind.—Ringgenberg v. Hartman, 124 Ind. 186, 24 NE 987; McFadden v. Ross, 108 Ind. 512, 8 NE 161.

Md.—Mason v. Sumner, 22 Md. 312.

Mich.—Lindner v. Brock, 40 Mich. 618.

[a] **Interest as bailee or trustee.**—Zimmer v. Cummings, 202 Ill. A. 18.

[b] **Mortgage on property replevied.**—Evidence in an action on a replevin bond that defendants, who were plaintiffs in the replevin suit, held a mortgage on the property involved in that suit, and that the notes secured by it were still unpaid, was admissible in mitigation of damages. Ringgenberg v. Hartman, 124 Ind. 186, 24 NE 987; McFadden v. Ross, 108 Ind. 512, 8 NE 161.

[c] **Validity of corporate mortgage.**—A chattel mortgage executed by a corporation, and offered in evidence in an action on plaintiff's bond by the then defendant in mitigation of damages, was not void because authorized at a meeting of directors from which one of the directors, who received no notice, was absent, where there was no disaffirmance of the transaction so that plaintiff in the action on the bond would take subject to such mortgage at a sale previously had. Magerstadt v. Chicago First Nat. Bank, 175 Ill. A. 407.

47. Hansen v. Thomas, 171 Minn. 101, 213 NW 378. But see Williams v. Vail, 9 Mich. 162, 80 AmD 76 (where defendant in replevin waived a return of property, plaintiff, when sued on bond, cannot show in mitigation that defendant was but a part owner).

48. Hannon v. O'Dell, 71 Conn. 698, 43 A 147; Lindner v. Brock, 40 Mich. 618.

49. Tuck v. Moses, 58 Me. 461.

50. Crabbs v. Koontz, 69 Md. 59, 13 A 591.

51. Davis v. Harding, 3 Allen (Mass.) 302.

52. U. S.—Gilbert v. American Surety Co., 121 Fed. 499, 57 CCA 619, 61 LRA 253; Ringgold v. Bacon, 20 F. Cas. No. 11,842, 3 Cranch C. C. 257; Smith v. Hazel, 22 F. Cas. No. 13,055, 3 Cranch C. C. 55.

Conn.—Allen v. Woodford, 36 Conn. 143.

Me.—Harmon v. Flood, 115 Me. 116, 97 A 834; Jones v. Smith, 79 Me. 452, 10 A 256.

Md.—Crabbs v. Koontz, 69 Md. 59, 13 A 591; Belt v. Worthington, 3 Gill & J. 247.

N. C.—Davis Bros. Co. v. Wallace, 190 N. C. 543, 130 SE 176.

R. I.—Bates v. American Surety Co., 148 A 323.

[a] **Claim under fraudulent deed.**—Although plaintiff in replevin when sued on the bond may show in mitigation that he owned the property, defendant may rebut such evidence by showing that the deed under which plaintiff claimed title was fraudulent and void. Ringgold v. Bacon, 20 F. Cas. No. 11,842, 3 Cranch C. C. 257.

[b] **Sureties on replevin bond,** in an action thereon, may show rights to the property in themselves or in either of them, which was taken upon the replevin writ, and for which plaintiff took judgment under his lien established at the trial. Henry v. Ferguson, 55 Mich. 399, 21 NW 381.

[c] **In Illinois** it is provided by statute that, when the merits of the case have not been determined in the replevin action, defendant in the action on the bond may plead title to the property in controversy in mitigation of damages. Hanchett v. Gardner, 138 Ill. 571, 28 NE 788; Stevison v. Earnest, 80 Ill. 513; Peters v. Brown, 245 Ill. A. 570; Bierma v. Columbia Typewriter Co., 179 Ill. A. 69; Farson v. Gilbert, 85 Ill. A. 364. See King v. Ramsay, 13 Ill. 619 (prior to statute).

Conclusiveness of adjudication in replevin as to title and possession see supra § 427.

53. Peters v. Brown, 245 Ill. A. 570.

54. Cumberland Coal, etc., Co. v. Tilghman, 13 Md. 74.

55. Cumberland Coal, etc., Co. v. Tilghman, supra.

56. Vinton v. Mansfield, 48 Conn. 474.

57. Wood v. May, 30 F. Cas. No. 17,956, 3 Cranch C. C. 172.

58. Mason v. Sumner, 22 Md. 312.

action on the bond.[59]

[§ 457] **(4) Value of Property.** As tending to show the value of the property at the time it was replevied, evidence is admissible as to its value before or after that time,[60] and the testimony of any witness of competent knowledge is admissible as to its value.[61] The finding of the jury in the replevin action as to the value of the property,[62] or the sum named in the affidavit[63] or in the replevin bond, is admissible as evidence of the value of the property.[64] But unless statements as to the value of the property in the bond, writ, or affidavit are treated as conclusive evidence of the value, either party in the action on the bond may show by other evidence the true value of the property.[65] The original appraisement in the replevin action is not admissible on the question of value as against plaintiff who was defendant in replevin and had no part in procuring it to be made.[66]

[§ 458] **c. Weight and Sufficiency.** The general rules which govern as to the weight and sufficiency of the evidence in other civil actions[67] apply in an action on a replevin bond.[68] A verdict or finding must rest upon facts of which there is substantial evidence,[69] such as the fact of the execution of the bond,[70] the taking of the property under the replevin writ,[71] the breach of the conditions of the bond,[72] or the award of damages;[73] and if there is no substantial evidence to sustain the conclusions upon which the verdict must rest, the verdict must be set aside.[74]

Recitals of value as prima facie evidence.[75] The value stated in the replevin affidavit,[76] in the writ of replevin,[77] or in the replevin bond,[78] or the valuation of the officer who made the levy,[79] is at least prima facie evidence of the value of the property;[80] and such evidence, if uncontradicted, is sufficient.[81] So, also, in an action on a bond given on the replevin of property held under an execution, the recital in the bond is prima facie evidence of the amount of the execution.[82] There is a conflict of opinion as to whether statements made in the affidavit, bond, or in the writ respecting the value of the property are conclusive.[83] It has been held in some jurisdictions that the recitals of value by plaintiff in replevin in the affidavit,[84] in the bond,[85] or in the writ[86] will not estop him, when sued on his bond, from proving the actual value of the property as of the particular time such value is to be measured. In other jurisdictions plaintiff in replevin, when sued on the bond, is bound by the value stated in the affidavit,[87] in the bond,[88] or in writ of replevin;[89] but defendant in replevin who had no part in fixing the value of the property is not bound by the value named in plaintiff's affidavit,[90] bond,[91] in the writ of replevin,[92] or by the value in a certificate of appraisement.[93]

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[59] June v. Payne, 107 Ind. 307, 7 NE 370, 8 NE 556.

[60] Balsley v. Hoffman, 13 Pa. 603.

[a] **In rebuttal.**—Where defendant is allowed to give evidence of the value of the property before and after the time it was replevied, plaintiff should be allowed the same privilege in rebuttal and not confined to the day on which the property was replevied. Balsley v. Hoffman, 13 Pa. 603.

[61] Wright v. Quirk, 105 Mass. 44.

[a] **Householder** who bought and paid for a piano was sufficiently qualified to testify as to its value. Klaproth v. Greenberg, 147 Ill. A. 380.

[62] Washington Ice Co. v. Webster, 125 U. S. 426, 8 SCt 947, 31 L. ed. 799 (such finding is both admissible and conclusive).

[63] Folen v. Saxton, 31 Ida. 319, 171 P 669.

[64] Wiseman v. Lynn, 39 Ind. 250; Wright v. Quirk, 105 Mass. 44.

[65] **Recitals of value as prima facie evidence** see infra § 458.

[66] Wright v. Quirk, 105 Mass. 44; Kafer v. Harlow, 5 Allen (Mass.) 348.

[67] See Evidence §§ 1730-1806.

[68] See cases infra notes 69-74.

[69] Anderson v. Phillips, 40 N. D. 586, 169 NW 315.

[a] **Whether there is such evidence** is a question of law for the court. Anderson v. Phillips, 40 N. D. 586, 169 NW 315.

[b] **Evidence held sufficient:** (1) To establish a prima facie case for plaintiff. Hoebel v. Utah-Idaho Livestock Loan Co., 39 Ida. 294, 227 P 1048; Zimmer v. Lyon, 190 Ill. A. 642; Hunter v. Commercial Security Co., 181 Ill. A. 260. (2) To rebut prima facie evidence of ownership arising from possession. Strassheim v. Barnes, 212 Ill. A. 299. (3) To establish the identity of the property replevied. Kellogg v. Boyden, 126 Ill. 378, 18 NE 770. (4) To establish the ownership of the property. Wiseman v. Lynn, 39 Ind. 250. (5) To show that title did not pass to plaintiff in replevin at sale until the note for the purchase price was delivered. Bailey v. Dennis, 135 Mo. A. 93, 115 SW 506.

[c] **Evidence held insufficient:** (1) To estop plaintiff from recovering by virtue of aiding in the disposition of the property pending the replevin action. Bisconer v. Billing, 71 Cal. A. 779, 236 P 329. (2) To prove that principal's appeal was prevented by intimidation. Bankhead v. Sperry, (Tex. Civ. A.) 298 SW 453.

[d] **In action on redelivery bond.**—(1) Evidence held sufficient. Kansas Nat. Drill, etc., Co. v. Redd, 97 Kan. 1, 154 P 250 (to establish a proper tender); Larson v. Hanson, 26 N. D. 406, 144 NW 681, 51 LRANS 655 (to show excuse for money judgment in replevin instead of alternative judgment). (2) Evidence held insufficient. Alves v. Humphrey, 69 SW 1080, 24 KyL 764 (to sustain a verdict that defendants were not liable on the ground that the property had been delivered to plaintiff before execution of the redelivery bond); Farmers' Nat. Bank v. Ferguson, 28 N. D. 347, 148 NW 1049 (to show facts necessary to authorize a money judgment only); Gibson v. International Harvester Co., 105 Okl. 253, 232 P 80 (to show a tender in substantially the same condition).

[70] See case infra this note.

[a] **Evidence held sufficient** as to execution and delivery of the bond. Clark v. Dreyer, 9 Colo. 453, 48 P 818.

[71] See cases infra this note.

[a] **Evidence held sufficient** to sustain finding that plaintiff lost goods by reason of the writ. Jenkins v. Lahey, 216 Ill. A. 613.

[b] **Evidence held insufficient** to show that plaintiff in replevin took possession of the property in question by virtue of his writ. Pettit v. Allen, 64 App. Div. 579, 72 NYS 287.

[72] See cases infra this note.

[a] **Proof of breach of one condition,** such as the condition to prosecute, is not sufficient evidence of the breach of another condition such as the condition to return the property. Vinyard v. Barnes, 124 Ill. 346, 16 NE 254.

[b] **Evidence held sufficient:** (1) To show a breach of the condition to prosecute the action. Hunter v. Commercial Security, 181 Ill. A. 260; Hood v. Spaeth, 51 N. J. L. 129, 16 A 163. (2) To show a breach of the condition to return the property. Jenkins v. Lahey, 216 Ill. A. 613; Maguire v. Pan-American Amusement Co., 211 Mass. 22, 97 NE 142; Hood v. Spaeth, 51 N. J. L. 129, 16 A 163. (3) To show a breach of the condition to pay damages. Maguire v. Pan-American Amusement Co., supra.

[c] **Evidence held insufficient:** (1) To show a breach of condition to return the property where there is no judgment in replevin for a return. Danford v. Watkins, 337 Ill. 222, 168 NE 912. (2) To show return in substantially as good condition. Caldwell v. Stiles, 80 Okl. 106, 194 P 226.

[d] **In action on redelivery bond.**—(1) Evidence held sufficient. Vallancy v. Hunt, 26 N. D. 611, 145 NW 132 (to show a breach of the condition to return property in substantially the same condition). (2) Evidence held insufficient. Anderson v. Phillips, 40 N. D. 586, 169 NW 315; Gibson v. International Harvester Co., 105 Okl. 253, 232 P 80 (to show a return in as good condition).

[73] See cases infra this note.

[a] **Evidence held sufficient:** (1) To sustain a judgment for damages for depreciation in the value of the property. Walrus Mfg. Co. v. Quackenbush, 128 Kan. 216, 276 P 806 [reh den 128 Kan. 474, 279 P 3]; Hafner v. U. S. Fidelity, etc., Co., 126 Wash. 670, 219 P 16. (2) To warrant finding replevied automobile was not worth more than price received at public auction. Federal Finance, etc., Co. v. Teeter, 196 N. C. 232, 145 SE 8.

[b] **Evidence held insufficient:** (1) To support judgment for value of property. Kelley v. C. D. Shamburger Lumber Co., (Tex. Civ. A.) 23 SW (2d) 883. (2) To support judgment for damages. Vaughan v. U. S. Fidelity, etc., Co., 56 N. D. 272, 217 NW 167.

[74] Anderson v. Phillips, 40 N. D. 586, 169 NW 315.

[75] **Recitals as prima facie evidence in replevin action** see supra § 240.

[76] Bernhardt v. Cappelletti, 104 Conn. 501, 133 A 576; Malsby v. Gamble, 61 Fla. 310, 327, 54 S 766; Martin v. Hertz, 224 Ill. 84, 79 NE 558 [aff 118 Ill. A. 297]; Peters v. Brown, 245 Ill. A. 570; Jenkins v. Lahey, 216 Ill. A. 613; Cermak v. Cable Piano Co., 211 Ill. A. 219; Richardson v. Gilbert, 135 Ill. A. 363; Farson v. Gilbert, 114 Ill. A. 17; Farson v. Gilbert, 85 Ill. A. 364.

[77] Kimball v. Thompson, 123 Me. 116, 122 A 46; Gibbs v. Bartlett, 2 Watts & S. (Pa.) 29.

[78] Wood v. May, 30 F. Cas. No. 17,956, 3 Cranch C. C. 172; Jenkins v. Lahey, 216 Ill. A. 613; Maguire v. Pan-American Amusement Co., 205 Mass. 64, 91 NE 135, 137 AmSR 422, 18 AnnCas 110; Chernick v. Nation-

[§ 459] **8. Trial[94]—a. In General.** Where an action on a replevin bond is tried before a jury, questions of law are for the court,[95] and questions of fact are for the jury.[96]

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al Surety Co., (R. I.) 148 A 418 [cit Cyc].

79. Coleman v. Bowman, 135 Miss. 137, 99 S 465.

80. See cases supra notes 76–79.

81. Ill.—Martin v. Hertz, 224 Ill. 84, 79 NE 558; Cermak v. Cable Piano Co., 211 Ill. A. 219 (statement of value in affidavit).

Ind.—Wiseman v. Lynn, 39 Ind. 250 (statement of value in bond).

Mass.—Wright v. Quirk, 105 Mass. 44 (statement of value in bond).

N. Y.—Budracco v. National Surety Co., 112 Misc. 133, 182 NYS 590 (statement of value in affidavit or bond).

Or.—Capital Lumbering Co. v. Learned, 36 Or. 544, 59 P 454, 78 AmSR 792 (statement of value in bond).

N. S.—Martin v. Passarini, [1928] 1 DomLR 636 (statement of value in bond).

82. Roman v. Stratton, 2 Bibb (Ky.) 199.

83. See infra text and notes 84–89.

84. Bernhardt v. Cappelletti, 104 Conn. 501, 133 A 576, 577; Budracco v. National Surety Co., 112 Misc. 133, 182 NYS 590.

"While the value of the property as stated in the affidavit is presumed to be its true value until otherwise shown in subsequent proceedings and is prima facie evidence of that value, on both reason and authority it is not conclusive, and when occasion arises, either in the replevin suit or in a subsequent action on the replevin bond, the parties are entitled to introduce any competent evidence of the actual value, and have the same determined accordingly." Bernhardt v. Cappelletti, supra.

[a] **In Illinois** (1) a plaintiff in replevin and his surety are not estopped when sued on the bond from showing, by competent witnesses, that the actual value of the property was different from that stated in the affidavit. Peters v. Brown, 245 Ill. A. 570 [crit Cermak v. Cable Piano Co., 211 Ill. A. 219]; Farson v. Gilbert, 85 Ill. A. 364. (2) Plaintiff in replevin is estopped in an action on the bond from asserting a value different than that stated in his affidavit. Moore v. Paul F. Beach Co., 221 Ill. A. 609; Cermak v. Cable Piano Co., supra; O'Donnell v. Colby, 55 Ill. A. 112 [rev on other grounds 153 Ill. 324, 38 NE 1065].

85. Mass.—Maguire v. Pan-American Amusement Co., 205 Mass. 64, 91 NE 135, 137 AmSR 422, 18 Ann Cas 110; Wright v. Quirk, 105 Mass. 44.

N. J.—West v. Caldwell, 23 N. J. L. 736, 740.

N. Y.—Budracco v. National Surety Co., 112 Misc. 133, 182 NYS 590.

Pa.—Com. v. Lintott, 64 Pa. Super. 328.

R. I.—Chernick v. National Surety Co., 148 A 418 [cit Cyc].

Tenn.—Muhling v. Ganeman, 4 Baxt. 88.

"Neither party can be presumed to have assented to the value mentioned in the bond, except for the purpose for which it is there; and the plaintiff was therefore entitled to show the real value of the property at the time taken." West v. Caldwell, supra.

86. Gibbs v. Bartlett, 2 Watts & S. (Pa.) 29.

87. Janssen v. Duncan, 43 Colo. 286, 95 P 922 (holding that, by the value stated in the affidavit, plaintiff in replevin is estopped to dispute the jurisdiction of the justice in replevin).

88. U. S.—Washington Ice Co. v. Webster, 125 U. S. 426, 8 SCt 947, 31 L. ed. 799; Vulcan Iron Works v. Cyclone Steam Snow Plow Co., 48 Fed. 652 [aff 52 Fed. 920, 3 CCA 352].

Ind.—Wiseman v. Lynn, 39 Ind. 250.

Me.—Tuck v. Moses, 58 Me. 461; Miller v. Moses, 56 Me. 128; Howe v. Handley, 28 Me. 241.

Or.—Capital Lumbering Co. v. Learned, 36 Or. 544, 59 P 454, 78 AmSR 792.

Eng.—Middleton v. Bryan, 3 M. & S. 155, 105 Reprint 569.

See Martin v. Passarini, (N. S.) [1928] 1 DomLR 636 (defendant in replevin in an action on a bond need not prove the value if he accepts the value admitted by plaintiff in the bond).

"The recital in the bond, that the piano was of the value of four hundred dollars, was a solemn admission of the appellants, and which, in an action upon the bond, would estop them from denying the truth of the admission." Wiseman v. Lynn, 39 Ind. 250, 259.

[a] **Criticism of rule.**—"But such a rule would many times operate very harshly and unreasonably. It is common knowledge that such statement of value is usually made without a very nice attention to the real value of the property, but is made largely as an estimate based somewhat upon the amount of the plaintiff's claim, lest under some circumstances the jury might not, perhaps, be at liberty to give him more than the value he had himself estimated." Farson v. Gilbert, 85 Ill. A. 364, 366.

[b] **Where value of property is diminished by use of it** and by lapse of time, it has been held that the obligors in the replevin bond would be bound by the value of the property named in the bond. Howe v. Handley, 28 Me. 241.

89. Tuck v. Moses, 58 Me. 461.

90. Walrus Mfg. Co. v. Quackenbush, 128 Kan. 216, 276 P 806 [reh den 128 Kan. 474, 279 P 3].

91. Washington Ice Co. v. Webster, 125 U. S. 426, 8 SCt 947, 31 L. ed. 799; Tuck v. Moses, 58 Me. 461; Miller v. Moses, 56 Me. 128; Thomas v. Spofford, 46 Me. 408; Howe v. Handley, 28 Me. 241; Caldwell v. West, 21 N. J. L. 411 [aff 23 N. J. L. 736].

92. Kimball v. Thompson, 123 Me. 116, 122 A 46; Tuck v. Moses, 58 Me. 461; Thomas v. Spofford, 46 Me. 408; Swift v. Barnes, 16 Pick. (Mass.) 194.

93. Kafer v. Harlow, 5 Allen (Mass.) 348.

94. **Generally** see Trial [38 Cyc 1267].

95. Anderson v. Phillips, 40 N. D. 586, 169 NW 315.

[a] **Question of sufficiency of evidence** is a question of law for the court. Anderson v. Phillips, 40 N. D. 586, 169 NW 315.

[b] **Whether summary judgment** should be rendered against sureties on a replevin bond is a question exclusively for the court. Gonzales v. Flores, (Tex. Civ. A.) 200 SW 851.

96. Bierce v. Waterhouse, 219 U. S. 320, 31 SCt 241, 55 L. ed. 237; Anderson v. Phillips, 40 N. D. 586, 169 NW 315.

[a] **Value of property.**—The liability of sureties on a replevin bond executed in a laborer's lien proceeding for the return of the property replevied or in default thereof for its value must be ascertained by a jury. Coleman v. Bowman, 135 Miss. 137, 99 S 465.

[b] **Tender of property.**—Whether the evidence in a suit on a redelivery bond in replevin shows a tender of redelivery of the property by the principal obligor after judgment requiring such return is for the jury to determine, upon proper instructions. Bierce v. Waterhouse, 219 U. S. 320, 31 SCt 241, 55 L. ed. 237.

[c] **Return of property.**—Where the evidence is substantial and in conflict on the question whether the property was returned by defendant to plaintiff in as good condition, such question is to be submitted to the jury and their finding for defendant is binding on the court. Clark v. Ellingson, 35 N. D. 546, 161 NW 199.

Taking case from jury. The case should not be withdrawn from the jury and a verdict directed against a party as a matter of law where such party has introduced evidence sufficient to sustain a verdict in his favor;[97] but, conversely, if the evidence of the party is such that the court on motion would be bound to set aside a verdict in his favor, a directed verdict is proper.[98]

Reopening case.[99] A motion to reopen the case, being addressed to the sound judicial discretion of the trial court, is properly denied a plaintiff at the close of his evidence where the offer is not properly made,[1] or does not show that, if allowed, the evidence to be adduced would be sufficient to support a recovery.[2]

[§ 460] **b. Instructions.**[3] The case should be submitted to the jury with correct and appropriate instructions.[4] The instructions must conform to the evidence[5] and to the material issues,[6] and must neither assume facts in controversy,[7] nor be based upon a misstatement of facts,[8] nor be misleading.[9]

[§ 461] **c. Verdict.**[10] In an action on a replevin bond the verdict must conform to the evidence.[11] It should find both the debt and damage[12] and the value of the property.[13] If there is no substantial evidence to support the verdict, it must be set aside;[14] but where a verdict does substantial justice, and the party against whom it is rendered shows no merit, informality will not vitiate it.[15] A verdict cannot be taken subject to the opinion of the court without the consent of both parties.[16]

[§ 462] **9. Judgment.**[17] In an action on a replevin bond judgment can be rendered only in the form and manner, if any, provided by statute.[18] It can be a judgment for the recovery of damages only,[19] and not a judgment in the alternative for a return of the property or its value,[20] and is limited to a recovery of the value of property actually replevied.[21] In some jurisdictions the judgment must also show the value of each separate article.[22]

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[97] Dew v. Hoffman, 130 Okl. 247, 266 P 1107, 1108.

[a] **Evidence sufficient for submission to jury.**—(1) Under the evidence on the issue whether, shortly after the giving of a redelivery bond in replevin, defendant tendered back the property to plaintiff, it was held that the court properly refused peremptorily to instruct that no tender was made. Kansas Nat. Drill, etc., Co. v. Redd, 97 Kan. 1, 154 P 250. (2) In an action on a replevin bond, evidence was held sufficient for submission to the jury whether defendant in the replevin action offered to, or in good faith did, return a substantial part of the property. Folmer v. Hanson, 44 S. D. 122, 182 NW 633.

[98] U. S. Fidelity, etc., Co. v. Yoder, 139 Okl. 256, 281 P 974; Dew v. Hoffman, 130 Okl. 247, 266 P 1107.

[a] **Issue of depreciation in value.**—Evidence of an automobile's depreciation in value when redelivery was tendered was held to justify directing a verdict for plaintiff suing on replevin redelivery bond. Dew v. Hoffman, 130 Okl. 247, 266 P 1107.

[99] **Generally** see Trial [38 Cyc 1360].

[1] Strassheim v. Perfect Knitting Mills, 171 Ill. A. 601.

[a] **Proper offer to introduce replevin judgment** at the close of plaintiff's testimony would be to offer a certified copy of the judgment and affirmance. Strassheim v. Perfect Knitting Mills, 171 Ill. A. 601.

[2] Strassheim v. Perfect Knitting Mills, supra.

[3] **Generally** see Trial [38 Cyc 1594].

[4] Clark v. Ellingson, 35 N. D. 546, 161 NW 199.

[a] **Instructions held proper.**—In an action on a replevin bond, an instruction to find for plaintiff if defendant neglected to tender property within thirty days of a certain date was held proper under the evidence. Rains v. Ethridge-Atkins Motor Co., (Ala.) 127 S 905.

[b] **Instructions held erroneous.**—(1) An instruction placing the burden of proof on the wrong party is erroneous. Hanchett v. Buckley, 27 Ill. A. 159. (2) It is error, in an action on a replevin bond, to charge that, the bond being one of indemnity only, the verdict must be for defendant unless plaintiff sustained actual damage from the taking of the property under the writ, since where plaintiff in replevin fails to prosecute the writ with effect, defendant would in any case be entitled to nominal damages. Crabbs v. Koontz, 69 Md. 59, 13 A 591.

[c] **Instruction held not to invade province of jury.**—Where the record of the replevin suit is properly in evidence, an instruction stating the legal effect thereof does not invade the province of the jury. McGinnis v. Hart, 6 Iowa 204.

[5] See cases infra this note.

[a] **Instructions held proper.**—(1) An instruction to determine whether the services of two attorneys were necessary was not erroneous, where the evidence tended to show that there was more work than could properly be done by one attorney and where the evidence further tended to show that plaintiff authorized the employment of an additional attorney. Hunter v. Empire State Surety Co., 191 Ill. A. 634. (2) Instruction on tender of property held to be based on the evidence. Kansas Nat. Drill, etc., Co. v. Redd, 97 Kan. 1, 154 P 250.

[6] Davis Bros. Co. v. Wallace, 190 N. C. 543, 130 SE 176.

[a] **Where issue is immaterial** to, and not determinative of, the cause of action set out in the complaint, it is error to submit such issue over objection. Davis Bros. Co. v. Wallace, 190 N. C. 543, 130 SE 176.

[7] Johnson v. Mason, 70 N. J. L. 13, 56 A 137.

[8] Johnson v. Mason, supra.

[9] Odell v. Hole, 25 Ill. 187.

[10] **Generally** see Trial [38 Cyc 1868].

[11] See case infra this note.

[a] **Award of damages.**—Where the bond in evidence was in the penal sum of fifteen hundred dollars, and the affidavit placed the value of the property at seven hundred dollars, and plaintiff's usee testified that the property was worth thirteen hundred dollars, an award of ten hundred dollars is not so excessive as to justify a reversal of the judgment where such proof was not rebutted. Jenkins v. Lahey, 216 Ill. A. 613.

[12] Odell v. Hole, 25 Ill. 204.

[13] Talcott v. Rose, (Tex. Civ. A.) 64 SW 1009; Meyers v. Bloon, 20 Tex. Civ. A. 554, 50 SW 217.

[14] Anderson v. Phillips, 40 N. D. 586, 169 NW 315.

[15] Bates v. Williams, 43 Ill. 494.

[16] Bletcher v. Burn, 24 U. C. Q. B. (Ont.) 124.

[17] **Generally** see Judgments 33 C. J. p 1042; Bonds §§ 235-239.

Summary judgment see supra § 429.

[18] Linn Bros. Motor Co. v. Williams, (Tex. Civ. A.) 293 SW 658.

[a] **Provision as to satisfaction.**—A judgment against the sureties on a replevin bond should, under Vernon's Sayles Civ. St. Annot. (1914) art 7107, provide that a delivery to, and acceptance by, the sheriff of the property replevied should, as to them, operate as a satisfaction of the judgment. Ingram v. Brown, (Tex. Civ. A.) 173 SW 524.

[b] **Judgment for value of property.**—Where the statute provides that judgment against the sureties shall be for the value of the property, judgment cannot be entered against the sureties for a deficiency resulting after sale of the property by the prevailing party. Linn Bros. Motor Co. v. Williams, (Tex. Civ. A.) 293 SW 658.

[19] Plankerton v. Continental Casualty Co., 180 Minn. 168, 230 NW 464.

[20] Plankerton v. Continental Casualty Co., supra.

[21] Hill v. Petty, 111 Miss. 665, 71 S 910.

[22] Bateman v. Hipp, (Tex. Civ. A.) 111 SW 971; Cummings v. Masterson, 42 Tex. Civ. A. 549, 93 SW 500; Meyers v. Bloon, 20 Tex. Civ. A. 554, 50 SW 217; Herder v. Schwab Clothing Co., (Tex. Civ. A.) 37 SW 784.

[a] **Sufficiency of judgment.**—A judgment, approving a verdict in replevin which establishes the value of each article as shown by the verdict copied therein, complies suffi-

On a motion to have execution on a lost replevin bond, the judgment must conform to the statute authorizing the proceeding.[23] Where defendant demurs and his demurrer is overruled and he fails to obtain leave to plead, the judgment on the demurrer in such case is that plaintiff recover his debt and damages occasioned by detention of the same.[24] In an action on a redelivery bond judgment against the sureties can be rendered only in the manner provided for by statute.[25] A judgment against the sureties is not warranted where defendant's bond is not in compliance with statute;[26] but where, in the absence of contrary proof, the bond shows that the property is retained by defendant, a judgment against him is justified.[27] That defendant consented to judgment before maturity of the debt is no ground for complaint by his sureties;[28] and a consent judgment cannot be set aside as fraudulent at the instance of the sureties by motion in the same cause, but only in a separate action.[29]

Conformity to pleadings and issues. The judgment must conform to the issues in the case,[30] and the relief awarded by a judgment is limited to the conditions of the bond,[31] and to the relief sought by the pleadings.[32]

Parties. The judgment must be in favor of the obligee on the bond,[33] but where statutory provisions permit a person in a representative capacity to sue either individually or representatively, a judgment for plaintiff individually is not erroneous.[34] Plaintiff is entitled to judgment against as many as are legally liable on the bond;[35] and where a person in a representative capacity signs the bond as an individual, judgment may be entered against him individually.[36] Where a defendant, after giving a redelivery bond which proves insufficient in amount, executes an additional bond, with a different surety, plaintiff may have judgment against the surety on the first bond, although he has not made the administrator of the surety on the additional bond a party to the action.[37]

Judgment by confession. In the absence of a statute or rule of public policy prohibiting it, a sheriff may take a bond, voluntarily offered him, containing a warrant to confess judgment.[38] Judgment on a replevin bond, with warrant to confess judgment, may be confessed after verdict in the replevin suit, and before final judgment is entered thereon.[39] But the confession of judgment is merely cautionary, and plaintiff has no right to enforce it unless there has been some breach of the condition of the bond, and then only to the amount of damages which he has suffered by reason of such breach.[40]

[§ 463] **10. Execution and Enforcement.**[41] In an action on a replevin bond, judgment for plaintiff must be for the penalty of the bond, but execution can issue for so much thereof only as is due for the breach proved.[42] It has been held that execution should issue in the name of the obligee, although the bond has been assigned.[43] Under some statutes the jury upon finding a breach of the bond are to determine for what amount execution should issue.[44]

[§ 464] **11. Review.**[45] Where, on appeal in an action on a replevin bond, the judgment is erroneous for failure to find the value of each article replevied, but the evidence in the record is sufficient to show the value of each article, the appellate court has power to reform the judgment.[46] So where judgment

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ciently with the statute, especially when considered with the judgment provision authorizing return of property described in the verdict or any portion thereof. Gonzales v. Flores, (Tex. Civ. A.) 200 SW 851.

[23] Farrow v. Orear, 2 Duv. (Ky.) 261.

[24] Bates v. Williams, 43 Ill. 494.

[25] Baldwin v. Dillon, 30 Mo. 429 (holding that, in a suit for the possession of personal property, under Pract. Act [1849] art 8 [Sess. Acts (1849) p 82], if defendant gave a forthcoming bond, as allowed by such article, with sureties, judgment could be rendered against the sureties only in the mode pointed out in § 9 of such article).

[26] Fenn v. Harrington, 54 Miss. 733.

[27] Fenn v. Harrington, supra.

[28] McDonald v. McBryde, 117 N. C. 125, 23 SE 103.

[29] McDonald v. McBryde, supra.

[30] Barnett v. Henry, 133 Ark. 531, 202 SW 707.

[31] Linn Bros. Motor Co. v. Williams, (Tex. Civ. A.) 293 SW 658.

[32] McGinnis v. Hart, 6 Iowa 204; Monday v. Vance, (Tex. Civ. A.) 51 SW 346 (redelivery bond).

[33] U. S. Fidelity, etc., Co. v. Yoder, 139 Okl. 256, 281 P 974.

[a] **Sheriff as obligee.**—Where property is replevied from a sheriff holding such property under execution, in an action on the bond by the sheriff judgment should be for the sheriff only, although the proceeds shall be used to satisfy the claim of plaintiff in execution. U. S. Fidelity, etc., Co. v. Yoder, 139 Okl. 256, 281 P 974.

[34] Oliver v. Townsend, 16 Iowa 430.

[35] Alexander v. Lydick, 80 Mo. 341.

[a] **While general judgment cannot be rendered against married woman** on a replevin bond, yet it can be rendered against her coprincipal and sureties, who are legally liable thereon. Alexander v. Lydick, 80 Mo. 341.

[36] Oliver v. Townsend, 16 Iowa 430.

[37] Smith v. Whitten, 117 N. C. 389, 23 SE 320.

[38] Clark v. Morss, 142 Pa. 311, 21 A 802.

[39] Clark v. Morss, supra.

[40] Lewis v. Bonnert, 12 Pa. Co. 366.

[41] **Cross references:**

Enforcement of judgment generally see Judgments §§ 1139–1153; Principal and Surety §§ 364–367.

Executions generally see Executions 23 C. J. p 281.

Recourse against principal as condition precedent to liability of surety see supra § 416.

[42] Wright v. Quirk, 105 Mass. 44; Lewis v. Bonnert, 2 Pa. Dist. 698.

[a] **Execution should be for debt,** with an indorsement that damages only should be collected thereon. Odell v. Hole, 25 Ill. 187.

[43] Jones v. Powell, 5 Litt. (Ky.) 290 (holding that, although a replevin bond may be assigned to a third person, execution thereon must still issue in the name of the obligee, and a delivery bond taken to the assignee, by virtue of such execution, is irregular).

[44] Maguire v. Pan-American Amusement Co., 211 Mass. 22, 97 NE 142 (Rev. L. c 177 § 9 provides that if, in an action for a breach of the condition of a bond, it be found that the condition has been broken, no execution shall issue, except as is provided in the following sections; and § 10 requires the court to award an execution for so much of the penal sum as is justly payable, the amount of which shall be determined by the court, unless an assessment by a jury is claimed, or is ordered by the court. It was held that it was for the jury, pursuant to the practice prescribed by the statutes, to determine for what amount execution should issue upon finding a breach in an action on a replevin bond).

[45] **Generally** see Appeal and Error 3 C. J. p 256.

[46] Cummings v. Masterson, 42 Tex. Civ. A. 549, 93 SW 500.

is rendered in damages, for a greater amount than the ad damnum laid in the declaration, the appellate court may permit the judgment to be amended by remitting the excess.[47] If the verdict is against the weight of evidence, the judgment thereon will be reversed;[48] but reversal of a judgment cannot be had for harmless error,[49] nor for errors which were not called to the attention of the trial court.[50] Instructions will be assumed to have been pertinent where nothing is shown to the contrary.[51]

***REPLEVY.**[1] To redeliver goods which have been distrained to the original possessor of them upon his giving pledges.[2]

Replevied, used in its technical sense, means delivered to the owner.[3]

REPLICA. A duplicate executed by the artist himself and regarded equally with the first as an original.[4]

REPLICATIO. In the civil law and old English pleading, plaintiff's answer to defendant's exception or plea, corresponding with and giving name to the replication in modern pleading.[5]

REPLICATION or REPLY.[6]

REPONE. In Scotch practice, to replace; to restore to a former state or right.[7]

REPORT. [§ 1] **A. As Noun.**[8] An account brought back;[9] a tale carried; a story circulated;[10] rumor,[11] or common fame;[12] hearsay;[13] also, an account or statement of the results of examination or inquiry made by request or direction.[14] The term has been applied to the mechanical reproduction of what actually took place,[15] and hence distinguished from mere "comment."[16]

Report of committee. That communication which the chairman of the committee makes at the close of the investigation upon which it has been engaged.[17]

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[47] Hunter v. Sherman, 3 Ill. 539; Kaufman v. Wessel, 14 Nebr. 161, 15 NW 219.

[48] Alves v. Humphrey, 69 SW 1080, 24 KyL 764 (holding that a verdict exonerating defendant and his sureties from liability on the ground that the property had been delivered to plaintiff is against the weight of evidence, where there is testimony showing that the delivery of the property to defendant was simply delayed until a proper bond was given).

[49] Ringgenberg v. Hartman, 124 Ind. 186, 24 NE 987.

[50] Crill v. Jeffrey, 95 Iowa 634, 64 NW 625.

[51] McGinnis v. Hart, 6 Iowa 204.

[1] **Replevy bail or bond** see Arrest § 263; Attachment §§ 679–783; Bail §§ 27–66, 225–266; Executions §§ 300–326; Replevin §§ 116, 156.

[2] Bouvier L. D. [quot Kirk v. Morris, 40 Ala. 225, 229].

[a] **Process indicated** by this term is intended merely as an inexpensive method of preserving the property until it is wanted for the payment of a judgment that may be rendered. Humes v. Scott, 130 Ala. 281, 284, 30 S 788.

[3] Steuer v. Maguire, 182 Mass. 575, 576, 66 NE 706.

[a] **As used in the rule** that it is the duty of the officer, when property described in the writ is pointed out to him, to immediately take it in his possession for the purpose of having it appraised and ready to be replevied as soon as the bond is given. Steuer v. Maguire, 182 Mass. 575, 576, 66 NE 706.

[4] Standard D. [quot U. S. v. Twenty-five Pictures, 260 Fed. 851, 854].

[a] **Replica as not really different** from a reproduction. U. S. v. Twenty-five Pictures, 260 Fed. 851, 854.

"Reproduction" see Reproduce post.

[5] Black L. D.

[6] **Cross references:**
Generally see Pleading §§ 392–442.
Aider by verdict or judgment see Pleading §§ 1280–1303.
Amendment of see Pleading §§ 721–723.
Demurrer to:
  Generally see Pleading §§ 514–515.
  Equity see Equity §§ 538–540, 585–595.
  Justice's court see Justice of the Peace § 235.
Incorporating demurrer in see Pleading § 520.
Supplemental see Pleading § 807.
Waiver of objections see Pleading § 1228.
Withdrawal of see Pleading §§ 935–941.

"Replication" defined see Equity § 585 note 87.

[7] Black L. D. [cit 2 Alison Cr. Pr. p 351].

[8] **As evidence:**
In general see Evidence 22 C. J. p 65 et seq passim.
Best and secondary see Evidence § 1219 et seq passim.
Character or reputation see Evidence §§ 560–587.
Documentary see Evidence § 900 et seq passim.
Former see Evidence §§ 510–534.
Hearsay see Evidence § 177.

By or of particular persons or matters:
Admiralty §§ 263–272.
Auditor or trustee in attachment see Attachment § 818.
Banks and Banking §§ 196 (false report), 465, 466.
Boundaries § 210.
Commercial agency see Evidence § 1103.
Corporation see Corporations §§ 2010–2033; Taxation [37 Cyc 1020].
Drains §§ 90–101.
Eminent Domain §§ 421–441.
Fences §§ 31–34.
Grand Juries § 92.
Guardian and Ward §§ 497, 498.
Highways §§ 108–127, 240.
Insurance company see Insurance §§ 15, 24.
Judicial Sales §§ 55–59.
Municipal Corporations § 2431.
Partition §§ 460–465.
Partnership §§ 990, 991.
Private Roads §§ 31–42.
Public finances see Courts § 286; Municipal Corporations § 4109.
Public Lands § 706.
Receivers § 593 et seq.
Receiver's sale see Receivers § 341 et seq.
Referee:
  In general see Appeal and Error §§ 2730, 2861; References §§ 149–364.
  In creditor's suit see Creditors' Suits § 160.
  In equity see Equity §§ 773–797.
Sale by order of court:
  Of decedent's estate see Executors and Administrators §§ 1624–1630.
  Of school land see Public Lands § 204.
Sale of land for taxes see Taxation [37 Cyc 1364–1368].
Taxation [37 Cyc 1364].

Privilege of report:
As to commercial standing see Libel and Slander §§ 252–254.
Of public officer see Libel and Slander § 243.

Report of judicial opinion see post.

[9] McDoel v. Jordan, (Tex.) 151 SW 1178, 1179.

[10] McDoel v. Jordan, supra.

[11] McDoel v. Jordan, supra.

[a] **Synonymous with "rumor."**—State v. Culler, 82 Mo. 623, 627; State v. Vettere, 76 Mont. 574, 248 P 179, 183.

"Rumor" post.

[12] McDoel v. Jordan, (Tex.) 151 SW 1178, 1179.

[13] McDoel v. Jordan, supra.

"Hearsay" 29 C. J. p 286.

[14] Webster D. [quot Gillette v. Peabody, 19 Colo. A. 356, 75 P 18, 20].

[15] Jones v. Press Pub. Co., 61 N. Y. Super. 207, 209, 19 NYS 3.

[a] **Equivalent of "transcribe."**—Rex v. Book, (Man.) 25 CanCrCas 89, 94.

[16] Johns v. Press Pub. Co., 61 N. Y. Super. 207, 19 NYS 3.

[a] "**Comment** is the judgment passed on the circumstances reported, by one who has applied his mind to them." Johns v. Press Pub. Co., 61 N. Y. Super. 207, 209, 19 NYS 3, 5. See also Libel and Slander §§ 276–294.

*By Carolan Jefferson Walsh (Replevy—Reporting inclusive).

Other phrases: "Newspaper report,"[18] "report of judicial proceedings,"[19] "report of material facts."[20]

"The Reports." The name given, par excellence, to Lord Coke's Reports, from 14 Eliz. to 13 Jac. I, which are cited as "Rep." or "Coke." They are divided into thirteen parts.[21]

[§ 2] **B. As Adjective** the term may be and has been employed.[22]

[§ 3] **C. As Verb.** To make or furnish a report,[23] as "to report the same to congress;"[24] also, to notify[25] as "to report at the custom-house."[26]

REPORTER.[27] Of a newspaper, is a person employed in reporting proceedings of courts, public meetings, legislative assemblies, and other services of a kindred character for the newspaper.[28]

REPORTING. A term applied to acts of intimidation and opprobrious epithets, theretofore called "picketing."[29]

Phrase: "Reporting day."[30]

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[17] Black L. D. [cit Brown].

[18] See Newspaper Report 43 C. J. p 16.

[19] Finnegan v. Eagle Printing Co., 173 Wis. 5, 179 NW 788, 790.

By newspaper as qualifiedly privileged see Libel and Slander §§ 266–269.

[20] Romanausky v. Skutulas, 258 Mass. 190, 154 NE 856, 857.

Right of appellant to see Appeal and Error § 1960 note 50 [b].

[21] Black L. D.

[22] Black L. D.

[a] **Report office** was a department of the English court of chancery. Black L. D. (the suitors' account there is discontinued by 15 & 16 Vict. c 87 § 36).

[23] Webster New Int. D.

[24] Irwin v. U. S., 23 Ct. Cl. 149, 155.

[25] Mignano v. MacAndrews, 49 Fed. 376, 377.

[26] Mignano v. MacAndrews, supra.

[a] **As meaning** "to be entered at the custom-house." Mignano v. MacAndrews, 49 Fed. 376.

[27] **Of legal decisions** see Reports post.

[28] Harris v. Norvell, 1 AbbNCas (N. Y.) 127, 131.

[a] **Newspaper reporter's work** as intellectual rather than manual see Michigan Trust Co. v. Grand Rapids Democrat, 113 Mich. 615, 617, 71 NW 1102, 67 AmSR 486.

[29] Atchison, etc., R. Co. v. Gee, 140 Fed. 153, 156.

"Picketing" see Conspiracy §§ 70, 140; Injunctions §§ 261–275.

[30] Webster New Int. D. See Larrinaga SS. Co., Ltd. v. Green, [1916] 2 Ir. 126, 130, 133, 141.

REPORTS

By Francis J. Ludes

[Matters not in this Title, treated elsewhere in this Work, see Cross References infra this page]

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CROSS REFERENCES

Copyright see **Copyright and Literary Property** §§ 134, 163.

Law reports as documentary evidence see **Evidence** § 906.

Reading to jury see **Criminal Law** § 2263; **Trial** [38 Cyc 1480].

Report, general definition of, see **Report** ante.

I. DEFINITION

[§ 1] Reports are collections of the authoritative expositions of the law by the regularly constituted judicial tribunals supplemented and arranged by an officer called the court reporter.[1] Provisions in various state constitutions as to "department reports" do not apply to reports of judicial decisions.[2]

[1] Banks v. West Pub. Co., 27 Fed. 50.

[a] **Other definitions.**—A report is "an account or statement of a judicial opinion or decision, or of a case argued and determined in a court of law, chancery," etc. Webster Int. D.

[b] **Special or peculiar sense.**—After opinions are printed and bound in book form, the volumes containing them are denominated "reports." But the name so given is used in a special and peculiar sense. Such reports are not reports within the ordinary meaning of the term. Gillette v. Peabody, 19 Colo. A. 356, 75 P 18, 20.

[c] **"Delivered" distinguished from "reported."**—The final judgment of a court is never called a "report;" neither is the opinion giving the reasons on which the judgment is based. In appellate tribunals, when, in a given case, the court has reached its conclusion, and is ready to pronounce its judgment, some member of the court is usually designated to prepare the opinion, but he is never said to report it. The opinion is delivered, not reported, by him. Gillette v. Peabody, 19 Colo. A. 356, 75 P 18, 20.

[2] Gillette v. Peabody, supra.

For **later cases, developments** and **changes** in the law see **Annotations,** same title and section number.

II. NATURE AND CONTENTS

[§ 2] **A. In General.** Each volume of reports usually consists of a title page,[3] of a statement of the entry of copyright,[4] of a list of the judges composing the court,[5] of a table of cases reported in the volume[6] arranged in alphabetical order,[7] of an index to all subjects judicially considered,[8] arranged alphabetically,[9] often consisting substantially of a reproduction of the headnotes of the cases reported,[10] and principally of the reported cases themselves.[11] In addition it may and frequently does contain appropriate cross references[12] and footnotes.[13]

[§ 3] **B. Component Parts of Cases Reported.** A complete report of a decided case can usually be divided into six distinct parts: (1) The title of the case;[14] (2) the syllabus or headnote;[15] (3) the statement of the case,[16] sometimes embodied in the opinion[17] and sometimes preceding it;[18] (4) the argument of counsel,[19] with the names of the respective counsel;[20] (5) the opinion of the court;[21] and (6) the judgment.[22]

III. PRINTING, SALE, AND DISTRIBUTION

[§ 4] **A. In General.** The printing of reports by a state is a part of its public printing,[23] and while the state has the right to provide for and control the printing, publication, sale, and distribution of the reports of the decisions of its courts in their official form,[24] the state cannot restrict the right of any citizen to make and sell these reports where they have been already published and not copyrighted.[25] The printing of reports is not embraced in constitutional provisions and requirements as to "printing for the judicial and other departments,"[26] nor does the phrase "other printing and binding" include them.[27]

[§ 5] **B. Contracts for[28]—1. In General.** Generally contracts for the printing, publication, sale, and distribution of official reports are authorized by law;[29] and the duty of making such contracts devolves upon certain designated officials.[30] When not prohibited by the constitution,[31] state officers, in making such contracts, may impose conditions,[32] not named in the statute,[33] on the publisher; and may make provision that upon failure to observe them the publisher be liable for fixed sums[34] to the state[35] and to the parties injured.[36]

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[3] Callaghan v. Myers, 128 U. S. 617, 645, 9 SCt 177, 32 L. ed. 547.

[4] Callaghan v. Myers, supra.

[5] Callaghan v. Myers, supra.

[6] Callaghan v. Myers, supra; Gould v. Banks, 53 Conn. 415, 2 A 886, 55 AmR 143.

[7] Callaghan v. Myers, 128 U. S. 617, 645, 9 SCt 177, 32 L. ed. 547.

[8] Callaghan v. Myers, supra; State v. Gould, 34 Fed. 319; Gould v. Banks, 53 Conn. 415, 2 A 886, 55 AmR 143.

[9] Callaghan v. Myers, 128 U. S. 617, 645, 9 SCt 177, 32 L. ed. 547.

[10] Callaghan v. Myers, supra.

[11] See infra § 3.

[12] Gould v. Banks, 53 Conn. 415, 2 A 886, 55 AmR 143.

[13] Gould v. Banks, supra.

[14] Hepburn "How to Study Cases" p 1; Brief Making § 17.

[a] **Title of case** gives the names of the parties, the court, the date, and the name, volume, and page of the report. Hepburn "How to Study Cases" p 1.

[15] Callaghan v. Myers, 128 U. S. 617, 645, 9 SCt 177, 32 L. ed. 547; State v. Gould, 34 Fed. 319; Gould v. Banks, 53 Conn. 415, 2 A 886, 55 AmR 143; Hepburn "How to Study Cases" p 2; Brief Making § 17.

[a] **Syllabus or headnote** indicates more or less fully the proposition of law for which, in the opinion of the reporter, or sometimes of a judge, the case is supposed to be an authority. Hepburn "How to Study Cases" p 2.

[16] Callaghan v. Myers, 128 U. S. 617, 645, 9 SCt 177, 32 L. ed. 547; Gould v. Banks, 53 Conn. 415, 2 A 886, 55 AmR 143; Hepburn "How to Study Cases" p 2; Brief Making § 17.

[a] **Statement of case** is usually a recital drawn up by the judge, sometimes by the reporter, of the important facts in controversy, of the nature of plaintiff's claim, or, in older cases, of his form of action, and the manner in which his claim was presented to the trial court, including especially the course of the pleadings, of the rulings of the trial court, and the supposed errors therein, and of the manner in which the aid of the reviewing court has been sought. Hepburn "How to Study Cases" p 2.

[17] Callaghan v. Myers, 128 U. S. 617, 645, 9 SCt 177, 32 L. ed. 547.

[18] Callaghan v. Myers, supra.

[19] Callaghan v. Myers, supra; Hepburn "How to Study Cases" p 2; Brief Making § 17.

[a] **The argument of counsel** is usually a somewhat summary statement of the arguments presented to the reviewing courts by the opposing counsel. Hepburn "How to Study Cases" p 2.

[20] Callaghan v. Myers, 128 U. S. 617, 645, 9 SCt 177, 32 L. ed. 547.

[21] Callaghan v. Myers, supra; State v. Gould, 34 Fed. 319; Gould v. Banks, 53 Conn. 415, 2 A 886, 55 AmR 143; Hepburn "How to Study Cases" p 2; Brief Making § 17.

[a] **The opinion of the court** is the vital part of the report. Its purpose is to show with clearness what questions were presented to and considered by the court, and what general principles of law were followed in answering them. Hepburn "How to Study Cases" p 2.

[22] Hepburn "How to Study Cases" p 2; Brief Making § 17.

[a] **The judgment** is a brief summary of the result reached by the court. Hepburn "How to Study Cases" p 2.

[23] In re Printing of Supreme Court Reports, 153 N. C. 649, 70 SE 620.

[24] Peck v. Hooker, 61 Conn. 413, 23 A 741, 29 AmSR 215.

[a] **It is for the state to say** when and in what manner it will publish the official volumes of reports of decisions of its courts. Gould v. Banks, 53 Conn. 415, 2 A 886, 55 AmR 143.

[b] **The legislature may,** doubtless, provide for the publication of the decisions through an officer, or otherwise. Black v. Merrill, 51 Ind. 32.

[25] State v. State Journal Co., 77 Nebr. 752, 110 NW 763, 9 LRANS 174.

[26] Peo. v. State Auditors, 42 Mich. 422, 4 NW 274.

[27] Gillette v. Peabody, 19 Colo. A. 356, 75 P 18.

[28] **Contract for state printing generally** see States [36 Cyc 878].

[29] See constitutional and statutory provisions.

[a] **When the constitution requires the legislature to regulate** the reporting of the decisions of the courts, there is an implication that some one other than the legislature is to report them. Banks v. Hun, 20 App. Div. 501, 47 NYS 193.

[b] **Construction of statute.**—Where a statute provides that the publisher keep for sale sufficient volumes to supply the public demand therefor, and sell the advance sheets at fifty cents less per volume than for the bound volume, it does not confer upon a law book seller the right to demand the sale to him of 225 unbound copies of a particular volume, in order that he might bind them and resell them to his customers. Curlander v. King, 112 Md. 518, 77 A 60.

[c] **Volumes out of print.**—A statute making it the duty of the Secretary of State to supply missing volumes of the Supreme Court Reports to County and Circuit Clerks authorizes him to make a contract to reprint such of those volumes as were out of print. State v. McGrath, 60 Mo. 586.

[30] See constitutional and statutory provisions.

[a] **The supreme court** may select the printer and make a contract for the printing of its reports, subject to restrictions as to price and to the duty of the commissioner of labor and printing to examine the printing and binding and pass on the accounts rendered. In re Printing of Supreme Ct. Reports, 153 N. C. 649, 70 SE 620.

[b] **Supreme court reporter should coöperate** with the commissioner of printing in letting the contract for publishing the supreme court reports. Traphagen v. Lindsay, 95 Nebr. 823,

[§ 6] **2. Manner of Making Contract.** Sometimes the law requires the officers to advertise for, receive, and consider proposals for the printing and publishing before making the contracts therefor,[37] and the notice for bids should inform the bidders at what time the bids will be opened and examined[38] in order that they may be present[39] and see that the law allotting the contract to the lowest bidder is complied with.[40] In the absence of an imperative provision to the effect,[41] the contract need not necessarily be awarded to the lowest bidder,[42] as such officials have a discretion confided to them[43] which, in the absence of fraud,[44] or abuse,[45] is not subject to control by the courts.[46] A proposal in response to advertisement for bids to print reports is not vitiated by a statement therein that the work will be done within the state and by a certain class of persons.[47]

[§ 7] **3. Construction and Validity—a. Construction.** The general rules relating to the construction of contracts[48] apply.[49] A contract providing for the publication of reports must be construed in view of the statutes[50] and legislative resolutions[51] relating to the matter. Where a contract is for a definite time, the contractors have a right to complete any volume upon the publication of which they have entered in good faith[52] previous to termination of the contract,[53] and the fact that a sufficient number of opinions had not been delivered to complete the volume will not defeat such right.[54] The law will not imply an agreement on the part of a publisher not to manufacture and sell volumes of reports containing uncopyrighted literary matter on its own account, there being no such limitation in the contract between the parties,[55] but it will imply an agreement not to use the property of the state for any other purpose than that contemplated in the contract.[56] Where the contract provides that the publisher shall supply the volumes to law-book sellers, upon application, in quantities not exceeding one hundred copies to each applicant, the applicant may fix the number of volumes to the amount of one hundred copies[57] and the publisher, if he chooses, may deliver a larger number if applied for.[58] But where such contract is for a fixed period of time the publisher is required to keep the books on hand only during such period and for such a reasonable time thereafter as is necessary to finish volumes not com-

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146 NW 1026.

[c] **The clerk of the supreme court** of Hawaii is not authorized to enter into a contract for the publication of the reports of the supreme court. In re Thompson, 27 Hawaii 221 (holding that the statute requiring contracts for publication and printing of the supreme court reports of Hawaii to be executed in the name of the territory is not abrogated or suspended by a custom of clerks of the court, long approved by executive officers of the territory, to make and sign such contracts in their own names).

[31] See constitutional provisions.

[a] **That the work shall be done at the capital** may not be imposed as a condition of bidding. Peo. v. State Auditors, 42 Mich. 422, 4 NW 274.

[32] Little v. Banks, 85 N. Y. 258; Peo. v. Carr, 5 Silv. Sup. 304, 23 NYS 112.

[a] **Furnishing volumes.**—A provision that the publisher furnish at the contract price any volume published under the contract to any other law book seller in quantities not exceeding one hundred copies to each applicant unless the publisher should choose to deliver more, may be inserted in the contract. Little v. Banks, 85 N. Y. 258.

[33] Peo. v. Carr, 5 Silv. Sup. 304, 23 NYS 112.

[34] Little v. Banks, 85 N. Y. 258.

[a] **Such sum is not a penalty** but liquidated damages, and although the contract is between the state and an individual, a third person interested in its performance may take advantage of its provisions and enforce them by suit. Little v. Banks, 85 N. Y. 258.

[35] Little v. Banks, supra.

[36] Little v. Banks, supra.

[a] **Right of an aggrieved party** to recover the damages fixed is not affected by the fact that the contract makes provision for a forfeiture of a fixed sum to the state in case of a breach of any of its terms. Little v. Banks, 85 N. Y. 258.

[37] See constitutional and statutory provisions.

[38] Peo. v. State Auditors, 42 Mich. 422, 4 NW 274.

[39] Peo. v. State Auditors, supra.

[40] Peo. v. State Auditors, supra.

[41] See constitutional and statutory provisions.

[a] **Mandamus** in favor of the lowest bidder may be resorted to in a proper case to compel the award of the contract to him. Peo. v. State Auditors, 42 Mich. 422, 4 NW 274.

[42] Gillette v. Peabody, 19 Colo. A. 356, 75 P 18; In re Brown, 15 Nebr. 688, 50 NW 273; Peo. v. Carr, 5 Silv. Sup. 302, 23 NYS 112.

[43] Gillette v. Peabody, 19 Colo. A. 356, 75 P 18; Peo. v. Carr, 5 Silv. Sup. 302, 23 NYS 112.

[44] Gillette v. Peabody, 19 Colo. A. 356, 75 P 18.

[45] Peo. v. Carr, 5 Silv. Sup. 302, 23 NYS 112.

[46] Gillette v. Peabody, 19 Colo. A. 356, 75 P 18; Peo. v. Carr, 5 Silv. Sup. 302, 23 NYS 112.

[47] Gillette v. Peabody, 19 Colo. A. 356, 75 P 18.

[a] **While discriminating official action** in relation to public work, whether by way of statute, ordinance, resolution, or contract, is void, that doctrine does not apply to individuals who may discriminate as they choose in their private affairs and in the employment of union or non-union labor; and hence a proposal in a bid to print reports of a court of appeals, which contains the statement that the work will be done in the state and that only union labor will be employed, does not render the act of the state officers in awarding the contract to the bidder making such statement a discrimination in official action; nor is such award vitiated on the ground of the state's offer containing no corresponding stipulation. Gillette v. Peabody, 19 Colo. A. 356, 75 P 18.

[48] See Contracts §§ 481-592.

[49] See cases infra this section.

[a] **Actual cost of stereotyped plates.**—Where a contract regarding the printing of the future state reports required the secretary of state to sell the plates of the volumes already published by the state at the "actual cost" of the same to the state, as shown by the original bill from the state reporter, and the volumes had been printed by the state from the original type, and, in compliance with a subsequent act, stereotyped plates were made from the type, at a subsequent cost of fifty cents per plate, it was held that the actual cost of the plates was fifty cents per plate, and the state was not entitled to an additional sum for composition. State v. Price, 12 Wash. 653, 42 P 120.

[50] Banks v. De Witt, 42 Oh. St. 263.

[51] Banks v. De Witt, supra.

[52] Banks v. De Witt, supra.

[53] Banks v. De Witt, supra.

[54] Banks v. De Witt, supra.

[55] State v. State Journal Co., 77 Nebr. 752, 110 NW 763, 9 LRANS 174.

[56] State v. State Journal Co., supra.

[a] **Use of stereotyped plates** by the printer, which belong to the state, will render him liable for such damage as the state has suffered on that account. State v. State Journal Co., 77 Nebr. 752, 110 NW 763, 9 LRANS 174.

[57] Little v. Banks, 85 N. Y. 258 [aff 20 Hun 143].

[58] Little v. Banks, supra.

pleted at the expiration of the contract.[59] The contract with a printer to print and manufacture for the state volumes of reports, and to makes plates which shall become the property of the state, has been held not to constitute the printer the agent of the state in the publishing business;[60] nor is the state a party to the individual contract made by the official reporter for the publication of such reports where he is to derive his compensation from the sale of books to the state at a certain price.[61]

[§ 8] **b. Validity.** A contract made by a reporter for the publication of the reports reported by him for a period as long as his term of office has been held not to be unreasonable in length of time.[62] Where the contract does not comply with the governing statute[63] it is invalid[64] and should not be certified by the auditor.[65]

[§ 9] **4. Assignment of Contract.** A contract by a publisher to print and bind for the state volumes of the state reports may be assigned by the publisher[66] with the acquiescence of the state,[67] and such an assignment will vest in the assignee all the rights[68] and subject him to all the liabilities[69] of the original contractor.

[§ 10] **C. Expenses of Publication.** The expenses of publication may be borne wholly[70] or in part[71] either by the state[72] or the state reporter.[73] Where the publisher of reports is required to furnish copies for the use of the state and also keep them on hand so as to supply the legal profession, the state to pay the actual cost of the volumes it receives plus a commission, such publisher may stereotype all the volumes he prepares[74] and the state must pay a part of such expense therefor, proportionate to the number of volumes it receives.[75] If a statutes requires the publisher to pay for the services of a reporter,[76] then the state must also pay a proportionate part of this expense under such a contract.[77]

[§ 11] **D. Fixing Price.** The legislature of the state has the right to prescribe the maximum price which the reporter may charge per volume for the reports,[78] and the legislature also has the right to designate the price which any person may charge per volume for them,[79] and only the maximum amount prescribed by the statutes can be recovered,[80] although the buyer contracted with a private individual to pay a higher price therefor.[81] Where a statute fixes the number of volumes which the reporter is obliged to print and establishes the maximum price he may charge per volume therefor,[82] if he publishes a greater number, such additional volumes are his property,[83] but he may charge therefor no more than the price prescribed by statute,[84] and such statutes are not unconstitutional,[85] as depriving one person of his property and bestowing it upon another.[86] Where a contract has been made by the reporter for the publishing of the reports, a subsequent statute reducing the price to be charged for them is unconstitutional[87] as impairing the obligation of contracts.[88]

[§ 12] **E. Furnishing Copies.** The publisher is sometimes required by statute[89] or contract[90] to furnish a certain number of copies of the reports for the use of the state,[91] at a stipulated price per volume.[92] Where the statutes of the state make it the duty of some official to distribute or furnish copies of the reports to the various towns or counties for the use of their inhabitants and officers,[93] the latter cannot make any use of them inconsistent with that object.[94] Statutes requiring the librarian to deliver copies of the reports to certain officers and courts, and providing that if compliance therewith should exhaust the supply of volumes therein specified, the secretary of state should furnish a sufficient number of copies, published or to be published, to meet such requirement,[95] apply to future volumes as well as to those on hand,[96] and the reporter may compel the secretary to purchase the necessary copies of reports prepared after the passage of such law, so as to make the required distribution.[97]

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[59] Little v. Banks, 77 Hun 511, 29 NYS 87 [aff 151 N. Y. 669 mem, 46 NE 1149 mem].

[60] State v. State Journal Co., 77 Nebr. 752, 110 NW 763, 9 LRANS 174.

[61] Banks v. Hun, 20 App. Div. 501, 47 NYS 193.

[62] Banks v. Hun, supra.

[63] See statutory provisions.

[64] In re Thompson, 27 Hawaii 221.

[65] In re Thompson, supra.

[66] Banks v. De Witt, 42 Oh. St. 263.

[67] Banks v. De Witt, supra.

[68] Banks v. De Witt, supra.

[69] Banks v. De Witt, supra.

[70] Peo. v. State Auditors, 42 Mich. 422, 4 NW 274.

[71] Peo. v. State Auditors, supra.

[72] Peo. v. State Auditors, supra.

[a] **Discretion of legislature.**—It is within the discretion of the legislature to decide whether it will publish the reports at the state's expense. Peo. v. State Auditors, 42 Mich. 422, 4 NW 274.

[73] Peo. v. State Auditors, supra.

[a] **The publication and the expenses** of the same are sometimes left entirely within the hands of the official reporter. Peo. v. State Auditors, 42 Mich. 422, 4 NW 274 (under Rev. St. [1838] p 414).

[74] State v. McGrath, 60 Mo. 586.

[75] State v. McGrath, supra.

[76] See statutory provisions.

[77] State v. McGrath, supra.

[78] Black v. Merrill, 51 Ind. 32; Banks v. Hun, 20 App. Div. 501, 47 NYS 193.

[79] Welling v. Merrill, 52 Ind. 350.

[80] Welling v. Merrill, supra.

[81] Welling v. Merrill, supra.

[82] See statutory provisions.

[83] Black v. Merrill, 51 Ind. 32.

Right of reporter to copyright see Copyright and Literary Property § 163.

[84] Black v. Merrill, 51 Ind. 32.

[85] Black v. Merrill, supra.

[86] Black v. Merrill, supra.

[87] Banks v. Hun, 20 App. Div. 501, 47 NYS 193.

[88] Banks v. Hun, supra.

[89] See statutory provisions.

[90] See cases infra note 91.

[91] Black v. Merrill, 51 Ind. 32; State v. McGrath, 60 Mo. 586.

[92] Black v. Merrill, 51 Ind. 32; State v. McGrath, 60 Mo. 586.

Power of legislature to fix price see supra § 11.

[93] See statutory provisions.

[a] **Requirement is sometimes made** for the distribution and furnishing of copies of the official reports to certain officers, courts, and the like. Litchfield v. Parker, 64 N. H. 443, 14 A 725; Smith v. Thompson, 122 N. C. 215, 29 SE 223; Tripp v. Ringsrud, 2 S. D. 593, 51 NW 655.

[b] **The secretary of state** to whom the code commits the sale of the supreme court reports on a commission of five per cent upon the amount of such sale and who is authorized by statute to allow reasonable discount to booksellers in the state has no authority to contract with a firm of booksellers whereby all the reports are to be delivered to them for sale at a commission of twelve and a half per cent even though by such contract the secretary of state would be relieved of the distribution of the reports directed by statute and the state would be saved the expense of the rental or storage room for all the unsold reports on hand. Smith v. Thompson, 122 N. C. 215, 29 SE 223.

[94] Litchfield v. Parker, 64 N. H. 443, 14 A 725.

[a] **The selectmen of a town** cannot agree with an attorney that he should take the reports, which had been furnished, to his office and keep and use them free of charge and give them such advice as they should require in the conduct of their official business. Litchfield v. Parker, 64 N. H. 443, 14 A 725.

IV. REPORTERS

[§ 13] **A. Definition.** A reporter is a person who reports the decisions upon the questions of law in the cases adjudged in the courts of law and equity;[98] and a state reporter has been defined to be an official who edits and publishes decisions of the highest courts of the state.[99]

[§ 14] **B. Nature of Office.** An official reporter is a public officer,[1] and the presumption of faithfulness and honesty must be indulged in his favor[2] as in the case of other public officers.[3] Being an officer of the court,[4] he is, to some extent, under its control.[5] After the expiration of his term of office the outgoing reporter is to be considered as functus officio.[6]

[§ 15] **C. Appointment and Removal.** The constitutions of some of the states provide for the appointment of the reporter and specify his duties.[7] Where there is no such constitutional provision, the legislature may create,[8] control,[9] or abolish[10] the office of reporter. Under some constitutions and statutes,[11] the power to appoint and remove the reporter is vested in the governor,[12] and when the power to appoint a reporter is in the governor alone, he may remove the officer;[13] but where the appointment can only be made with the advice and consent of the council, there can be no removal by the governor alone.[14]

Deputy state reporters. Under some statutes[15] the reporter of the supreme court is authorized to appoint a deputy,[16] who shall hold his office at the will of the reporter.[17]

[§ 16] **D. Rights and Duties.** In the absence of constitutional inhibition, the rights and duties of a reporter may be changed at the will of the legislature.[18] It is not within the constitutional power of the legislature to enact that opinions should not be known to the public,[19] and as neither the judge, nor the reporter, have a copyrightable interest in the original opinions of the court,[20] copies of such opinions must be furnished to applicants who tender the proper fees therefor,[21] but in some jurisdictions, it has been held that the reporter is not obliged to furnish to applicants advance sheets containing the opinions of the court, for the purpose of publication,[22] where the state has entered into a contract for the publication of the reports and provided for a copyright to be taken for its benefit.[23] But while the reporter should allow the public free access to opinions in his custody, he has the right to make such reasonable regulations as to obtaining copies of them as he may deem necessary to secure the safety of his papers[24] and the orderly administration of the affairs of his office.[25] A reporter may have the exclusive right to print copies from plates belonging to the state where the volume was stereotyped at his expense.[26] Where a reporter who is a salaried officer has left unreported cases at the end of his term of office other than those he may need for the completion of the volume already begun, it is the duty of his successor to report such cases.[27]

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[95] See statutory provisions.

[96] Tripp v. Ringsrud, 2 S. D. 593, 51 NW 655.

[97] Tripp v. Ringsrud, supra.

[98] Black L. D.

[99] Anderson L. D.

[1] In re Opinion of Justices, 72 Me. 542; Banks v. De Witt, 42 Oh. St. 263.

[a] **Disbursing officer.**—In the publication of the reports, the reporter is, and must be regarded as, a disbursing officer and not as a contractor. In re Brown, 15 Nebr. 688, 697, 50 NW 273.

[2] Banks v. De Witt, 42 Oh. St. 263.

[3] **Presumption of regularity generally** see Evidence §§ 69–72.

[4] State Reporter's Case, 150 Pa. 550, 24 A 908.

[5] State Reporter's Case, supra.

[6] State Reporter's Case, supra.

[a] **Successor in office.**—A reporter of the supreme court of Ohio was held not to be the successor of the reporter of the late supreme court in bank, as the two courts were distinct tribunals. Ex p. Lawrence, 1 Oh. St. 431.

[7] See constitutional provisions.

[8] Black v. Merrill, 51 Ind. 32.

[9] Black v. Merrill, supra.

[10] Black v. Merrill, supra.

[11] See constitutional and statutory provisions.

[12] State Reporter's Case, 150 Pa. 550, 24 A 908.

[13] In re Opinion of Justices, 72 Me. 542.

[14] In re Opinion of Justices, supra.

[a] **Removal by executive.**—Where a statute provides for the appointment by the governor, with the advice and consent of the council, of a reporter who should be removable at the pleasure of the executive, the term executive comprehends both the governor and council. In re Opinion of Justices, 72 Me. 542.

[15] See statutory provisions.

[16] Baggett v. Dunn, 69 Cal. 75, 10 P 125.

[17] Baggett v. Dunn, supra.

[18] Black v. Merrill, 51 Ind. 32.

[19] Nash v. Lathrop, 142 Mass. 29, 6 NE 559.

[20] See Copyright and Literary Property § 163.

[21] Callaghan v. Myers, 128 U. S. 617, 9 SCt 177, 32 L. ed. 547; Banks v. Manchester, 128 U. S. 244, 9 SCt 36, 32 L. ed. 425; Wheaton v. Peters, 8 Pet. (U. S.) 591, 8 L. ed. 1055; State v. Gould, 34 Fed. 319; Banks v. West Pub. Co., 27 Fed. 50; Chase v. Sanborn, 5 F. Cas. No. 2,628, 4 Cliff. 306; Gould v. Hastings, 10 F. Cas. No. 5,639; Little v. Gould, 15 F. Cas. No. 8,394, 2 Blatchf. 165; Nash v. Lathrop, 142 Mass. 29, 6 NE 559.

[a] **Reason for rule.**—"The decisions and opinions of the justices are the authorized expositions and interpretations of the law which are binding upon all the citizens. They declare the unwritten law, and construe and declare the meaning of the statutes. Every citizen is presumed to know the law thus declared, and it needs no argument to show that justice requires that all should have free access to the opinions, and that it is against sound public policy to prevent this, or to suppress and keep from the earliest knowledge of the public the statutes or the decisions and opinions of the justices. Such opinions stand, upon principle, on substantially the same footing as the statutes enacted by the Legislature." Nash v. Lathrop, 142 Mass. 29, 35, 6 NE 559.

[22] Peck v. Hooker, 61 Conn. 413, 23 A 741, 29 AmSR 215; Gould v. Banks, 53 Conn. 415, 2 A 886, 55 AmR 143.

[a] **Mandamus will not issue** to compel the reporter of the decisions of the supreme court of errors of Connecticut to permit the applicant at all reasonable times to make copies of such opinions in the custody of the reporter, or to furnish certified copies thereof, at the usual and reasonable rates of compensation, for publication out of the state, in advance of their official publication by the reporter. Peck v. Hooker, 61 Conn. 413, 23 A 741, 29 AmSR 215.

[23] Gould v. Banks, 53 Conn. 415, 2 A 886, 55 AmR 143.

[§ 17] **E. Compensation.**[28] The compensation of state reporters is generally regulated by statute[29] and may be by way of salary[30] or by way of profits accruing from the sale of the books themselves.[31] A statute creating the office and fixing the salary of a reporter is not repealed by a general appropriation bill which appropriates a less amount than the salary fixed in the law creating the office.[32] A provision of law that the salary of the reporter for the last quarter of the year shall not be paid until the decisions of that year shall have been reported does not apply to a reporter whose term of office has expired.[33] Where the legislature of the state fixes the salary of the reporter he becomes entitled to demand and receive compensation at that rate from the commencement of his term so soon as the legislature appropriates money for that purpose.[34] But where a state constitution provides that no money shall be drawn from the treasury but in consequence of an appropriation, made by law,[35] when the amount of a prior appropriation for a reporter's salary has been exhausted, no more can be drawn until there is a new appropriation by a subsequent legislature.[36] Where the reporter receives a fixed salary, such compensation is exclusive of all other,[37] and though statutes may authorize the payment of a certain amount to him for printing, stereotyping, and binding each volume,[38] he may have only the actual cost of the work.[39] Where the duties of a reporter entitled to an annual salary may be fully performed in less than the year, he is entitled to his entire compensation if the duties for the year have been fully performed,[40] although the office is abolished before the end of the year.[41] But where there is only a partial performance before the abolishment of the office, the compensation will be apportioned to the duties performed,[42] and not to the lapse of time.[43]

***REPOSITORY.** A place where things are or may be deposited for safety or preservation; a depository; a storehouse; a magazine; a place where things are kept for sale; a shop.[1]

Phrase: "Repository of judicial power."[2]

REPOSSESS.[3] To possess again; to regain or recover possession of.[4]

Phrase: "Goods repossessed."[5]

REPRESENT.[6] To stand in the place of[7] and act for the one represented;[8] to stand in a person's place, to act his part, to exercise his right, or to take his share.[9] Also to declare; to set forth;[10] to describe or portray[11] in words;[12] to exhibit to another mind in language.[13]

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[24] Nash v. Lathrop, 142 Mass. 29, 6 NE 559.

[25] Nash v. Lathrop, supra.

[26] State Comptroller v. Hooker, 59 Conn. 332, 22 A 317.

Right of printer to use plates belonging to the state see supra § 7 text and note 56.

[27] State Reporter's Case, 150 Pa. 550, 24 A 908.

[28] **Compensation of officers generally** see Officers § 233 et seq.

[29] See statutory provisions.

[30] Smith v. Dunn, 64 Cal. 164, 28 P 32; Peo. v. State Auditors, 42 Mich. 422, 4 NW 274; State Reporter's Case, 150 Pa. 550, 24 A 908.

[31] Comptroller v. Hooker, 59 Conn. 332, 22 A 317.

[32] State v. Poindexter, 49 N. D. 201, 190 NW 818.

[a] **Where an act creating an office** provides that the incumbent of the office created shall receive a certain salary fixed by the act, this constitutes not only a legislative declaration as to the amount of the salary to be paid, but also an appropriation of the amount so fixed. State v. Poindexter, 49 N. D. 201, 190 NW 818.

[33] State Reporter's Case, 150 Pa. 550, 24 A 908.

[a] **Notwithstanding he leaves a large number of cases unreported,** a reporter who has faithfully performed his duties as such has been held to be entitled, upon his retirement from office, to his full salary. State Reporter's Case, 150 Pa. 550, 24 A 908.

[34] Smith v. Dunn, 64 Cal. 164, 28 P 232.

[a] **The constitution of California** prohibits the legislature from granting extra compensation or allowance to a public officer and special legislation affecting the salary of any officer. The reporter was appointed Jan. 7, 1880. The law fixing his salary did not go into effect until July 1, 1880. The legislature passed an act appropriating the pro rata amount of salary for the interim between the two dates. Such act was held not to be in conflict with the constitution of the state upon the ground that there was no additional allowance of money for the same purpose. Smith v. Dunn, 64 Cal. 164, 28 P 232.

[35] See constitutional provisions.

[36] Baggett v. Dunn, 69 Cal. 75, 10 P 125.

[37] In re Brown, 15 Nebr. 688, 50 NW 273.

[38] See statutory provisions.

[39] In re Brown, 15 Nebr. 688, 50 NW 273.

[a] **Expenses incurred by the reporter** for copy-preparing, reading proof, packing and shipping are not chargeable against the state where under the statute he is only entitled to draw from the treasury the cost of printing, stereotyping and binding each volume of the reports, not exceeding a certain amount. In re Brown, 15 Nebr. 688, 50 NW 273.

[40] Ex p. Lawrence, 1 Oh. St. 431.

[41] Ex p. Lawrence, supra.

[42] Ex p. Lawrence, supra.

[43] Ex p. Lawrence, supra.

[1] Century D. [quot State v. Sprague, 149 Mo. 409, 419, 50 SW 901].

[2] State v. Keener, 78 Kan. 649, 97 P 860, 861, 19 LRANS 615.

Judicial powers and functions see Constitutional Law §§ 375-400.

[3] **Repossess:**
Land by landlord see Landlord and Tenant §§ 1755-1912.
Mortgaged property see Chattel Mortgages § 267.
See also Possess 49 C. J. p 1090.

[4] Webster New Int. D.

[a] **"Dispossess" not equivalent.**—Kleinstein v. Gonsky, 134 App. Div. 266, 118 NYS 949, 950.

"Dispossessed" 18 C. J. p 1282.

[5] Cowie v. Sawyer-Massey Co., 9 Sask. L. 222, 27 DomLR 428, 524, 34 WestLR 274.

[6] See Representation post; Representative post.

[7] State v. McCarthy, 86 Mont. 100, 282 P 1045, 1047; Chase v. Swayne, 88 Tex. 218, 224, 30 SW 1049, 53 AmSR 742.

[8] State v. McCarthy, 86 Mont. 100, 282 P 1045, 1047.

*By Wm. Howard Buchanan (Repository-Rescript inclusive).

Phrases: "Act, perform, or represent,"[14] "represent and warrant,"[15] "represent deceased person,"[16] also "publishing, performing or representing,"[17] "representing a majority of the taxpayers of the town,"[18] "representing one third . . . of the unsecured debts,"[19] "representing two-thirds of the property owners."[20]

Represented. Stated.[21] The term may have the meaning of "occupied" or "developed."[22] Phrases: "Any concern represented by,"[23] "as represented,"[24] "represented in a special or particular manner,"[25] and "the body represented by the officer so appearing."[26]

REPRESENTATION.[27] The act of one person representing or standing in the place of another;[28] a fiction of the law, the effect of which is to put the representative in the place, degree, and rights of the person represented.[29] Also the act of representing to the mind or to the view; the act of portraying, depicting or exhibiting, as in imagination, in a picture or on the stage; portrayal.[30]

In the law of contracts in general, a statement, incidental to a contract, relative to some fact having reference thereto, and on the faith of which the contract is entered into;[31] a statement of an existing fact,[32] but distinguishable from "warranty."[33]

Phrases: "Doctrine of representation,"[34] "representation among collaterals,"[35] "representation of his solvency,"[36] "representations concerning the character, conduct, ability, trade or dealings,"[37] "representation to the corporation,"[38] and "take by representation."[39]

REPRESENTATIVE.[40] [§ 1] **A. As Noun.** An

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9. Abbot L. D. [quot U. S. v. Zucca, 11 Cust. A. 167, 171; Plummer v. Brown, 64 Cal. 429, 430, 1 P 703; Brown v. Massey, 13 Okl. 670, 678, 76 P 226].

[a] **One who occupies another's place** and succeeds to his beneficial rights in such a way that he may also in some degree be charged with his liabilities, represents him. Century D. [quot Seibert v. Dunn, 216 N. Y. 237, 110 NE 447, 450].

10. Century D. [quot Butts v. Long, 94 Mo. A. 687, 692, 68 SW 754]; Beck v. Budd, 44 Ind. A. 145, 88 NE 785, 786.

11. Century D. [quot Butts v. Long, 94 Mo. A. 687, 692, 68 SW 754]; Beck v. Budd, 44 Ind. A. 145, 88 NE 785, 786.

12. Century D. [quot Butts v. Long, 94 Mo. A. 687, 692, 68 SW 754].

13. Webster Int. D. [quot Butts v. Long, supra].

[a] **Does not import a promise,** and does not give notice to the opposite party that a mere promise is relied upon. Cooper v. Landon, 102 Mass. 58, 60.

14. Daly v. Palmer, 7 F. Cas. No. 3,552, 6 Blatchf. 256, 36 HowPr (N. Y.) 206.

15. Switzer v. Henking, 158 Fed. 784, 787, 86 CCA 140, 15 LRANS 1151.

16. McEntarffer v. Payne, 107 Nebr. 169, 185 NW 329, 331.

17. Manners v. Morosco, 258 Fed. 557, 560.

18. Solon v. Williamsburgh Sav. Bank, 114 N. Y. 122, 130, 21 NE 168. See also Municipal Corporations § 4097.

19. Maddox v. Lanier, 107 Ga. 290, 291, 33 SE 58. See Creditors' Suits § 113 note 22.

20. Maley v. Clark, 33 Ind. A. 149, 70 NE 1005, 1006. See also Municipal Corporations § 2419 note 6.

21. Peterson v. State, 83 Md. 194, 196, 34 A 834.

[a] **As meaning "misrepresented."**—Weimer v. Weimer, 21 N. D. 371, 130 NW 1015, 1017. See also Misrepresent 40 C. J. p 1224.

"Stated" [36 Cyc 817].

22. Consolidated Republican Mountain Min. Co. v. Lebanon Min. Co., 9 Colo. 343, 345, 12 P 212.

"Develop" 18 C. J. p 1031.

"Occupy" 46 C. J. p 898.

23. Tucker v. Hawley, 23 Cal. A. 460, 138 P 358, 359.

24. Crislip v. Cain, 19 W. Va. 438, 554; Reed v. Patterson, 7 W. Va. 263, 265.

[a] **Having substantially the same meaning as "as were stipulated for."**—Beck v. Budd, 44 Ind. A. 145, 88 NE 785, 786.

25. In re British Milk Products Co., [1915] 2 Ch. 202, 204.

26. State v. McCarthy, 86 Mont. 100, 282 P 1045, 1047.

27. **Representation:**
As to age see Infants § 35.
Constituting estoppel see Estoppel §§ 116–203.
False see False Pretenses §§ 11–38; Fraud § 7 et seq; Misrepresentation 40 C. J. p 1225.
Falsity or materiality of, as question of fact see Fire Insurance § 771; Life Insurance § 447.
Of intention see Contracts § 285.
Of law, as fraud see Contracts § 286.
Of opinion, as fraud see Contracts § 284.
On assignment of mortgage see Mortgages § 713.
Reliance on see Contracts §§ 274–309; Estoppel §§ 130–133; Master and Servant §§ 1041, 1042 (assurances of safety), § 1368 (after assumption of risk).
Within statute of frauds see Frauds, Statute of §§ 71–83.
See also Represent ante; Representative post.

Representation by or of:
Absentees §§ 10–41.
Officer, agent, board, or committee:
  Agency §§ 198–314, 385.
  Appearances § 11.
  Assignments for Benefit of Creditors §§ 316–372.
  Associations § 60.
  Attorney and Client §§ 122–205.
  Banks and Banking § 131.
  Brokers §§ 24–33.
  Carriers §§ 297–303.
  Corporations §§ 1841–1865.
  Counties §§ 102–117, 177–183.
  Factors §§ 12–31.
  Fire Insurance §§ 188–190.
  Husband and Wife §§ 169–177, 524–538.
  Infants §§ 262–314.
  Insane Persons §§ 583–610.
  Insurance §§ 133–166, 174, 492–527.
  Joint Stock Companies §§ 43–47.
  Liability Insurance §§ 35, 36.
  Life Insurance §§ 170–184.
Officer, agent, board, or committee: Continued
  Marine Insurance §§ 168–181.
  Mines and Minerals §§ 801–808, 827–829.
  Mortgages § 554.
  Municipal Corporations §§ 1186–1192, 4692.
  Mutual Benefit Insurance §§ 65–80.
  Partnership §§ 287–307, 363, 798.
  Schools and School Districts [35 Cyc 860, 867, 901–905].
  States [37 Cyc 865].
  Towns [38 Cyc 627, 628].
  United States [39 Cyc 706].

28. Black L. D. [quot Sweeney v. Independent Order of Foresters, 190 App. Div. 787, 181 NYS 4, 7].

29. Hawkins v. Williams, 146 La. 529, 83 S 796, 798.

30. Century D. [quot Peo. v. Eastman, 89 Misc. 596, 152 NYS 314, 317].

31. May Ins. § 181 [quot Fitzgerald v. Supreme Council C. M. B. A., 39 App. Div. 251, 257, 56 NYS 1005].

32. Clark v. Ralls, 50 Iowa 275, 277.

[a] **Used for convenience** as including both express and implied statements, and includes silence in certain cases. Foster v. McAlester, 3 Ind. T. 307, 324, 58 SW 679, 685. See Watson v. Prather, (Ky.) 65 SW 439 (as to representations arising from partial concealment and total silence).
Estoppel by silence see Estoppel § 154.
Misrepresentation by failure to disclose see Contracts §§ 281–283.

33. See Fidelity Insurance § 15; Fire Insurance § 197; Insurance §§ 492–500; Liability Insurance § 35; Life Insurance § 170; Mutual Benefit Insurance § 66.

34. See Equity §§ 284–291.

35. Hoffman v. Watson, 109 Md. 532, 540, 72 A 479, 481. See also Descent and Distribution § 60.

36. Christian v. State, 8 Ga. A. 371, 69 SE 29, 30. See also False Pretenses § 22.

37. Walker v. Russell, 186 Mass. 69, 71 NE 86, 88, 1 AnnCas 688.

38. Peo. v. Eaton, 122 App. Div. 706, 107 NYS 849, 854.

39. See Descent and Distribution §§ 30, 60.

40. **Representative:**
Legal see Legal § 11.
Liability for costs see Costs § 195.
Meaning of term in will see Wills [40 Cyc 1467].

For **later cases, developments** and **changes** in the law see **Annotations,** same title and section number.

uncertain term,[41] said to have no technical meaning in law.[42] In general, that which represents anything.[43] As a person, one being or acting as the agent or substitute for another especially through delegated authority;[44] one chosen by a principal to exercise for him a power or perform for him a trust;[45] one who exercises power derived from another;[46] one who represents another in a special capacity; an agent, deputy or substitute;[47] one who represents or is in the place of another;[48] one who represents or stands in place of another;[49] more particularly, one having legal authority to act in behalf of the property and bind the owner with reference thereto;[50] also one who occupies another's place, and succeeds to his rights and liabilities;[51] one that stands in the place of another, as heir, or in the right of succeeding to the estate by inheritance;[52] one who takes by representation.[53]

Phrases: "Representative in congress,"[54] "representative . . . of a deceased person,"[55] "representative of value,"[56] "representatives in congress,"[57] "representatives of deceased persons,"[58] "representatives of such children, if any;"[59] also "lawful representatives,"[60] "legal representative,"[61] "personal representative,"[62] and "real representative."[63]

[§ 2] **B. As Adjective.** Typifying; presenting by means of something; standing in the place of.[64]

Representative capacity.[65] A well understood term, and only applies to a party acting for and in behalf of some other party or estate, and not for himself personally.[66]

Representative democracy. A form of government where the powers of the sovereignty are delegated to a body of men, elected from time to time, who exercise them for the benefit of the whole nation.[67]

Other phrases: "Representative form of government,"[68] "representative taxpayer."[69]

REPRIEVE.[70]

REPRISAL.[71] A species of remedy by the mere act of the party injured.[72]

REPRISES. A word of very uncertain signification;[73] any deductions necessary to be made from a gross fund in order to show a net result;[74] deductions and duties paid yearly out of a manor and lands;[75] deductions and duties which are yearly paid out of a manor and lands, as rent charge, rent seck, pensions, corodies, annuities, etc.;[76] deductions and

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Personal see Executors and Administrators 23 C. J. p 984.
Right to appeal in capacity of see Appeal and Error §§ 475, 482.
See also Representation ante.

41. Amann v. Pantages, 90 Wash. 271, 155 P 1070, 1071.

42. Jackson v. Tibbits, 9 Cow. (N. Y.) 241, 252.

[a] **"It may signify heirs or executors,** or . . . may mean one who is substituted for another in any business." Jackson v. Tibbits, 9 Cow. (N. Y.) 241, 252.

43. Ex p. Williams, 7 Cal. Unrep. Cas. 301, 87 P 565, 568.

44. Webster New Int. D. [quot Fay, etc., Co. v. Brown Mach. Co., (Mo. A.) 14 SW (2d) 491, 496].

[a] **"Salesman" distinguished.**—Fay, etc., Co. v. Brown Mach. Co., (Mo. A.) 14 SW (2d) 491, 496.

45. Peo. v. Detroit, 28 Mich. 228, 245, 15 AmR 202.

46. Brown v. Forbes, 1 Nebr. (Unoff.) 888, 892, 96 NW 52.

47. Webster New Int. D. [quot Fay, etc., Co. v. Brown Mach. Co., (Mo. A.) 14 SW (2d) 491, 496].

"Agent" see Agency §§ 4, 5.

"Deputy" 18 C. J. p 784.

"Substitute" [37 Cyc 508].

48. Bouvier L. D. [quot Delaunay v. Burnett, 9 Ill. 454, 494].

49. U. S. v. Zucca, 11 Cust. A. 167, 171; State Fair Assoc. v. Townsend, 69 Ark. 215, 218, 63 SW 65.

[a] **"He who so represents or stands in the place of another** is termed his representative." Black L. D. [quot Sweeney v. Independent Order of Foresters, 190 App. Div. 787, 181 NYS 4, 7].

50. U. S. v. Zucca, 11 Cust. A. 167, 171; Chicago v. Sherwood, 104 Ill. 549, 554.

51. Burrill L. D. [quot Lee v. Dill, 39 Barb. (N. Y.) 516, 520, 16 AbbPr 92]; Webster D. [quot Lee v. Dill, 39 Barb. (N. Y.) 516, 520, 16 AbbPr 92, 96; Allen v. Stovall, 94 Tex. 618, 628, 63 SW 863, 64 SW 777]; U. S. v. Zucca, 11 Cust. A. 167, 171.

52. Webster D. [quot Lee v. Dill, 39 Barb. (N. Y.) 516, 520, 16 AbbPr 92, 96; Allen v. Stovall, 94 Tex. 618, 628, 63 SW 863, 64 SW 777].

53. Webster D. [quot Lee v. Dill, supra; Allen v. Stovall, supra].

54. Butler v. Hopper, 4 F. Cas. No. 2,241. See also United States [39 Cyc 696, 697].

[a] **Equivalent of "a member of congress,"** see Butler v. Hopper, 4 F. Cas. No. 2,241, 1 Wash. C. C. 499. See also infra note 57.

55. Auxier v. Auxier, 181 Ky. 614, 206 SW 789, 790. See also Executors and Administrators 23 C. J. p 984.

56. Kansas City Casualty Co. v. Westport Ave. Bank, 191 Mo. A. 287, 177 SW 1092, 1094; State v. Randall, 121 Or. 545, 256 P 393, 394.

57. In re Opinion to Governor, 41 R. I. 118, 228, 102 A 913. See also United States [39 Cyc 696–697], and supra note 54.

[a] **Distinct meaning from "Senators in Congress."**—In re Opinion to Governor, 28 R. I. 118, 228, 102 A 913, 914.

58. Bowne v. Ide, 109 Conn. 307, 311, 147 A 4, 66 ALR 1036, 1042. See also Executors and Administrators 23 C. J. p 984.

59. Murphy v. Murphy, 151 Ga. 438, 107 SE 37, 38.

60. Conley v. Jamison, 205 Iowa 1326, 219 NW 485, 486.

61. See Legal § 11.

62. See Executors and Administrators §§ 2–4.

63. See Executors and Administrators § 5.

64. Ex p. Williams, 7 Cal. Unrep. Cas. 301, 87 P 565, 568.

"Fiduciary" 25 C. J. p 1118.

65. **Fiduciary capacity"** see Fiduciary § 6.

66. Shaffer v. Chicago, etc., R. Co., 300 Mo. 477, 254 SW 257, 263; Van Brunt, etc., Co. v. Harrigan, 8 S. D. 96, 98, 65 NW 421. See also Actions §§ 261, 296; Witnesses [40 Cyc 2264].

67. Black L. D. [cit 1 Bouvier Inst. No. 31].

"Democracy" 18 C. J. p 484.

68. See Government § 8.

69. Universal Film Mfg. Co. v. New South Wales, 40 Austr. C. L. R. 333, 353.

70. **Reprieve:**
Defined see Pardons § 5.
Generally see Criminal Law § 3135; Pardons §§ 42–46.
Effect on death sentence see Criminal Law § 3138.
Judicial power to grant and revise see Constitutional Law § 395.

71. **Reprisal:**
As method of redress short of war see War [40 Cyc 306].
By capture and prize during war see War [40 Cyc 306].
Letters of mark and reprisal see Letters 36 C. J. p 993 notes 94, 95.
See also Recaption 52 C. J. p 1190.

72. 3 Blackstone Comm. p 4 [quot State v. Allen, 107 Kan. 407, 191 P 476, 480]. See also Recaption 52 C. J. p 1190.

73. Blandford v. Marlborough, 2 Atk. 542, 545, 26 Reprint 725 [cit Vide Cowell's Interpreter; Blount L. D. for "genuine definition"].

[a] **It ought to be construed "secundum subjectam materiam."**—Blandford v. Marlborough, 2 Atk. 542, 545, 26 Reprint 725.

Secundum subjectam materiam [35 Cyc 1282].

74. Delaware, etc., Canal Co. v. Von Storch, 196 Pa. 102, 106, 46 A 375.

75. Webster Int. D. [quot Delaware, etc., Canal Co. v. Von Storch, 196 Pa. 102, 104, 46 A 375].

76. Burrill L. D. [quot Delaware, etc., Canal Co. v. Von Storch, 196 Pa. 102, 104, 46 A 375].

Annuities § 1.

"Corody" 13 C. J. p 1238.

"Pensions" § 1.

"Rent charge" ante.

"Rent seck" ante.

payments (as for annuities) out of lands;[77] deductions and payments out of lands, annuities, and the like;[78] deductions or payments out of the value of lands;[79] deductions on account of payments and expenses;[80] yearly deductions, duties, or payments out of a manor and lands;[81] also a resumption or taking back, used for such deductions as rent charges or annuities.[82] The term has been held to include mortgages.[83]

REPROACH. A term said to be synonymous with "censure"[84] and "obloquy."[85]

REPROBATA PECUNIA LIBERAT SOLVENTEM.[86]

REPROBATION. In ecclesiastical law, the propounding exceptions either against facts, persons, or things; as, to allege that certain deeds or instruments have not been duly and lawfully executed; or that certain persons are such that they are incompetent as witnesses; or that certain things ought not, for legal reasons, to be admitted.[87]

REPRODUCE.[88] To produce again.[89]

Phrase: "Reproduce exactly."[90]

REPRODUCTION.[91] Repetition or the act of reproducing,[92] and carries the idea of a complete production over again.[93] Sometimes loosely used as meaning a copy, but not really different from a replica.[94]

As an adjective the term may be and has been employed,[95] as in the phrases "reproduction cost,"[96] and "reproduction value."[97]

REPUBLIC.[98] A government[99] for the protection of the citizen against the exercise of all unjust power; a government administered by a few, as the representatives of the people and for their benefit;[1] an independent sovereign power.[2]

REPUBLICAN.[3] Of or pertaining to, or having the form or characteristics of, a republic.[4]

Phrase: "Republican form of government."[5]

REPUBLICATION.[6] Act of republishing,[7] signifying, publishing, or declaring again.[8]

REPUBLISH.[9] To publish[10] again that which has been before published.[11]

REPUDIATE.[12] To put away, reject, disclaim, or renounce a right, duty, obligation, or privilege;[13] an odious term; [applied] to the denial of a valid obligation.[14]

Phrases: "Repudiate the consideration,"[15] and "repudiate the contract."[16]

REPUDIATION.[17] A common word, commonly understood;[18] rejection,[19] disclaimer,[20] renunciation,[21] or even abandonment;[22] the renunciation of a duty.[23]

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[77] Standard D. [quot Delaware, etc., Canal Co. v. Von Storch, 196 Pa. 102, 104, 46 A 375].

[78] Bouvier L. D. [quot in Delaware, etc., Canal Co. v. Von Storch, supra].

[79] Worcester D. [quot Delaware, etc., Canal Co. v. Von Storch, supra].

[80] Anderson L. D. [quot Delaware, etc., Canal Co. v. Von Storch, supra].

[81] Century D. [quot Delaware, etc., Canal Co. v. Von Storch, supra].

[82] Jacob L. D. [quot Delaware, etc., Canal Co. v. Von Storch, supra].

[83] In Pulaski v. King, 1 Yeates (Pa.) 477.

[84] Bettner v. Holt, 70 Cal. 270, 275, 11 P 713.

"Censure" 11 C. J. p 69.

[85] Bettner v. Holt, 70 Cal. 270, 11 P 713, 716.

"Obloquy" 46 C. J. p 852.

[86] A maxim meaning "Money refused (the refusal of money tendered) releases him who pays (or tenders it)." Black L. D. [cit Peytoe's Case, 9 Coke 77b, 79a, 77 Reprint 847].

[87] Bouvier L. D.

[88] See Repair ante.

"Reproduction" post.

[89] Webster New Int. D.

"Produce" 50 C. J. p 628.

[90] State v. Ogden, 20 N. M. 636, 151 P 758, 760.

[a] **Equivalent to "duplicate."**—State v. Ogden, 20 N. M. 636, 151 P 758, 760. See Duplicate 19 C. J. p 837 note 61.

[91] See Reproduce ante.

"Production" 50 C. J. p 632.

[92] Miller Hatcheries v. Buckeye Incubator Co., 41 F. (2d) 619, 622; American Bonding Co. v. Ottumwa, 137 Fed. 572, 579, 70 CCA 270; Goodyear Shoe Mach. Co. v. Jackson, 112 Fed. 146, 150, 50 CCA 159, 55 LRA 692.

[a] **"Repair" distinguished.**—Miller Hatcheries v. Buckeye Incubator Co., 41 F. (2d) 619, 622. "Repair" ante.

[93] American Bonding Co. v. Ottumwa, 137 Fed. 572, 579, 70 CCA 270.

[94] U. S. v. Twenty-Five Pictures, 260 Fed. 851.

"Copy" 13 C. J. p 933.

"Replica" ante.

[95] See cases infra notes 96, 97.

[96] New York Tel. Co. v. Prendergast, 36 F. (2d) 54, 60. See Public Utilities §§ 32–34.

[97] Cincinnati v. Public Utilities Commn., 112 Oh. St. 259, 148 NE 817, 826. See Public Utilities §§ 32–34.

[98] **"Democracy"** 18 C. J. p 484.

[99] **"Government"** 28 C. J. p 749 et seq.

[1] State v. Harris, 18 S. C. L. 598, 599.

[a] **Thomas Jefferson** in discussing the term "republic" wrote, "Indeed it must be acknowledged that the term republic is of very vague application in every language. . . . Were I to assign to this term a definite idea I would say, purely and simply, it means a government by its citizens in mass, acting directly and not personally, according to rules established by the majority, and that every other government is more or less republican, in proportion as it has in its composition more or less of this ingredient of the direct action of the citizens." Writings of Thomas Jefferson, vol. 15, p 19 [quot Kiernan v. Portland, 57 Or. 454, 473, 111 P 379, 112 P 402, 404, 37 LRANS 332].

[b] **"Monarchy" distinguished.**—Penhallow v. Doane, 3 Dall. (U. S.) 54, 93, 1 L. ed. 507. "Monarchy" 40 C. J. p 1488.

[2] Mexico v. De Arangoiz, 12 N. Y. Super. 634, 636.

[a] **"A republic is . . . a state** just as certainly, and in the same sense, as a monarchy, limited or absolute, and every state is a person, an artificial person, in a more extensive and far higher sense than an ordinary corporation." Mexico v. De Arangoiz, 12 N. Y. Super. 634, 636, 11 HowPr 576.

[3] See cross references supra note 98.

"Democratic" 18 C. J. p 484.

[4] Webster New Int. D.

[5] See Government § 9.

[6] See Publication 50 C. J. p 869.

[7] Webster New Int. D.

"Republish" post.

[8] Danley v. Jefferson, 150 Mich. 590, 114 NW 470, 121 AmSR 640.

[9] **Republish:**
Libel and Slander §§ 187–191.
Wills [40 Cyc 1212–1223].

[10] **"Publish"** 51 C. J. p 88.

[11] Matter of Stickney, 31 App. Div. 382, 386, 52 NYS 929.

[12] See Repudiation post.

[13] Black L. D.

[14] Wapello County v. Burlington, etc., R. Co., 44 Iowa 585, 610 (dis. op.).

[a] **"Never applied** to a refusal to perform a void contract." Wapello County v. Burlington, etc., R. Co., 44 Iowa 585, 610 (dis. op.).

[15] Coleman v. Hayes, 92 App. Div. 575, 578, 87 NYS 12, 14.

[16] See Contracts §§ 725–732, 736.

[17] **Repudiation of:**
Act of:
  Agent by principal see Agency §§ 151–168.

REPUGNANCE or **REPUGNANCY.**[24] Inconsistency;[25] contrary to or inconsistent with;[26] specifically, a disagreement or inconsistency between two or more clauses of the same instrument.[27]

REPURCHASE.[28] A term said to be synonymous with "redeem."[29]

REPUTABLE.[30] Being in good repute;[31] estimable;[32] having or worthy of good repute;[33] held in esteem;[34] honorable;[35] praiseworthy;[36] worthy of repute or distinctions;[37] "not mean or disgraceful."[38]

Phrases: "Reputable citizens,"[39] "reputable college,"[40] "reputable freeholder,"[41] "reputable lawyer,"[42] "reputable person,"[43] and "reputable school."[44]

REPUTATIO EST VULGARIS OPINIO UBI NON EST VERITAS. ET VULGARIS OPINIO EST DUPLEX, SCIL.: OPINIO VULGARIS ORTA INTER GRAVES ET DISCRETOS HOMINES, ET QUÆ VULTUM VERITATIS HABET; ET OPINIO TANTUM ORTA INTER LEVES ET VULGARES HOMINES, ABSQUE SPECIE VERITATIS.[45]

REPUTATION.[46] Reputation is a term derived from the Latin "puto," to count, think, and "reputo,"

Act of: Continued
  Broker by principal see Brokers §§ 31–33.
  Factor by principal see Factors § 31.
  Servant by master see Master and Servant §§ 78–152.
Agency by agent see Agency §§ 169–171.
Award see Arbitration and Award § 430.
Bet see Gaming §§ 315, 317–321.
Community see Husband and Wife §§ 1308–1315.
Compositions with Creditors § 100.
Contract:
  Generally see Contracts §§ 725–732, 736.
  Of infant see Infants §§ 162–168⅓.
  Of lunatic see Insane Persons §§ 508–517.
  Or lease of railroad by receiver see Railroads §§ 850–852.
Devise or legacy see Wills [40 Cyc 1898].
Legitimacy of child see Bastards § 27.
Office as affecting right to execute power see Powers § 103.
Right to administer decedent's estate see Executors and Administrators §§ 137–141, 266–272.
State debt see States [36 Cyc 871].
Title or right as ground of estoppel see Estoppel §§ 155–169.
Trust as affecting limitations see Limitations of Actions §§ 294–297.

"Release" ante.

"Rescission" post.

18. Iowa State Sav. Bank v. Black, 91 Iowa 490, 496, 59 NW 283.

19. In re Goldberg Enterprises, 130 Misc. 887, 225 NYS 513, 516.

"Rejection" 53 C. J. p 1184.

20. In re Goldberg Enterprises, 130 Misc. 887, 225 NYS 513, 516.

"Disclaimer" 18 C. J. p 1049.

21. In re Goldberg Enterprises, 130 Misc. 887, 225 NYS 513.

"Renunciation" ante.

22. In re Goldberg Enterprises, 130 Misc. 887, 225 NYS 513, 516.

"Abandonment" defined see Abandonment § 1.

"Abandonment" distinguished see Abandonment § 1 note 7 [b].

23. Parker Land, etc., Co. v. Ayres, 43 Ind. A. 513, 87 NE 1062, 1063.

24. See Repugnant post.

Repugnance or repugnancy:
Arbitration and Award § 373.
Boundaries § 114.
Contracts § 497.
Customs and Usages §§ 12, 77, 78.
Deeds §§ 224–228.
Equity § 426.
Forgery § 97.
Indictments and Informations § 182.
Mortgages § 338.
Municipal Corporations § 911.
Pleading § 92.
Statutes [36 Cyc 1073, 1130].
Trial [38 Cyc 1926, 1927, 1986].
Wills [40 Cyc 1416, 1417].

25. Presson v. Presson, 38 Nev. 203, 147 P 1081, 1083; Swan v. U. S., 3 Wyo. 151, 154, 9 P 931. See Groenendyke v. Fowler, 204 Iowa 598, 215 NW 718, 720.

Inconsistency see 31 C. J. p 406.

26. Century D. [quot Presson v. Presson, 38 Nev. 203, 147 P 1081, 1083].

[a] **Similar definition.**—"Contrary to or in conflict with something else." New Standard D. [quot Presson v. Presson, 38 Nev. 203, 147 P 1081, 1083].

27. Bouvier L. D. [quot Weller v. Carnew, 29 Ont. 400, 401]; Chapman v. Longworth, 71 Vt. 228, 232.

28. See Purchase 51 C. J. p 93.

Reservation of right to repurchase see Fraudulent Conveyances § 351; Mortgages § 76; Sales [35 Cyc 39]; Vendor and Purchaser [39 Cyc 1217].

29. See Redeem 53 C. J.

30. See also Reputation post.

31. Century D. [quot Wise v. State Veterinary Bd., 138 Mich. 428, 432, 101 NW 562; State v. Chittenden, 112 Wis. 569, 582, 88 NW 587].

[a] **"Respectable" as synonymous** see State v. Spivey, 191 Mo. 87, 106, 90 SW 81. "Respectable" post.

"Repute" post.

32. Century D. [quot Wise v. State Veterinary Bd., 138 Mich. 428, 432, 101 NW 562].

33. Webster D. [quot In re Consent to Sell Intoxicating Liquors, 155 Iowa 149, 134 NW 620, 623; Foster v. Crisman, 165 Iowa 189, 144 NW 1021, 1023; State v. Spivey, 191 Mo. 87, 106, 90 SW 81].

34. Century D. [quot Wise v. State Veterinary Bd., 138 Mich. 428, 432, 101 NW 562]; Webster D. [quot Illinois State Bd. of Dental Examiners v. Peo., 123 Ill. 227, 245, 13 NE 201; In re Consent to Sell Intoxicating Liquors, 155 Iowa 149, 134 NW 620, 623; State v. Spivey, 191 Mo. 87, 106, 90 SW 81; State v. Chittenden, 112 Wis. 569, 582, 88 NW 587].

[a] **Similar definition.**—"Held in esteem consistent with good faith." Century D. [quot State v. Chittenden, 112 Wis. 569, 582, 88 NW 587].

35. Webster D. [quot Illinois State Bd. of Dental Examiners v. Peo., 123 Ill. 227, 245, 13 NE 201; State v. Spivey, 191 Mo. 87, 106, 90 SW 81, 87; State v. Chittenden, 112 Wis. 569, 582, 88 NW 587].

"Honorable" 30 C. J. p 457.

36. Webster D. [quot Illinois State Bd. of Dental Examiners v. Peo., 123 Ill. 227, 245, 13 NE 201; State v. Spivey, 191 Mo. 87, 106, 90 SW 81, 87; State v. Chittenden, 112 Wis. 569, 582, 88 NW 587].

37. Webster D. [quot Illinois State Bd. of Dental Examiners v. Peo., 123 Ill. 227, 245, 13 NE 201; State v. Chittenden, 112 Wis. 569, 582, 88 NW 587]. But see State v. Chittenden, 127 Wis. 468, 532, 107 NW 500 (where this definition is criticized).

38. Century D. [quot Foster v. Crisman, 165 Iowa 189, 144 NW 1021, 1023].

"Disgraceful" 18 C. J. p 1139.

39. Taaffe v. Sanderson, 173 Ark. 970, 294 SW 74, 76; Bowers v. Hollis, 155 Ark. 35, 243 SW 864; Dewein v. State, 120 Ark. 302, 179 SW 346, 347.

40. See Druggists § 8 text and note 44 [e]; Physicians and Surgeons § 52 text and note 98 [c].

41. Austin v. Atlantic City, 48 N. J. L. 118, 120, 3 A 65.

42. In re Freshour, 174 Mich. 114, 140 NW 517, 519, 45 LRANS 67, Ann Cas1915A 726.

43. Dewein v. State, 120 Ark. 302, 179 SW 346, 347; Foster v. Crisman, 165 Iowa 189, 144 NW 1021; Jackman v. Blackhawk County, 156 Iowa 620, 137 NW 906, 910; In re Consent to Sell Intoxicating Liquors, 155 Iowa 149, 159, 134 NW 620; State v. Spivey, 191 Mo. 87, 106, 90 SW 81; State v. Caldwell, (Mo. A.) 245 SW 626, 628.

"Credible" person distinguished see Credible 15 C. J. text and note 22 [b].

44. See Physicians and Surgeons § 52 text and note 98 [c].

45. A maxim meaning "Reputation is common opinion where there is not truth. And common opinion is of two kinds, to-wit: Common reputation arising among grave or sensible men, and which has the appearance of truth; and mere opinion arising among foolish and ignorant men, without appearance of truth." Black L. D. [cit Adams' Case, 4 Coke 104b, 107b, 76 Reprint 1091].

46. **Reputation:**
Acquisition of corporate name by see Corporations § 370.
Conspiracy to injure see Conspiracy § 52.
Defense see Libel and Slander §§ 200, 645.
Element of offense see Disorderly Houses §§ 20, 24.
Evidence as to:
  Generally see Criminal Law §§ 1122–1131; Evidence §§ 561–568.
  For purpose of impeachment see Witnesses [40 Cyc 2594–2650].

to count over, think over.[47] When unqualified the word means "general reputation."[48] It has been defined as common knowledge of a community;[49] concurrence of many voices to the same fact;[50] hearsay of those who may be supposed to have been acquainted with the fact handed down from one to another;[51] opinion, or established opinion, or the opinion generally entertained;[52] public opinion in the community;[53] repute;[54] what is reported or understood from report to be the reality about a person or thing;[55] what the community thinks, believes, or says;[56] also character[57] in public opinion.[58]

Of a person, his reputation is the belief and the speech of the people who have an opportunity to know the parties, and have heard of and observed their manner of living;[59] the character imputed to [him] in the community in which he lives;[60] the character which [he] bears generally among the persons with whom he associates, and by whom he is known;[61] the estimate in which [he] is held by public fame in the place where he is known;[62] the estimate in which [he] is held in the community;[63] the estimate which the community has or expresses of his character;[64] the estimation in which [he] is held;[65] the estimation in which [he] is held by others;[66] the evidence of character;[67] the fruit of [his] walk and conversation—the result of deportment;[68] the general opinion of [him] held by the community;[69] the opinion of [his] character generally entertained by those who know him or her;[70] the opinion which others may have formed or expressed of [his] character;[71] the repute in which [he] is held by his intimates, associates, friends and neighbors;[72] the speech of the people who have an opportunity to know [him];[73] the sum of opinions entertained concerning [him];[74] what [his] neighbors generally say of him;[75] what is generally said of [him] by the

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- In action for:
  - Assault and Battery §§ 121–124.
  - Breach of Promise to Marry § 71.
  - False Imprisonment § 152.
  - Injury to servant see Master and Servant §§ 1250, 1255.
  - Libel and Slander §§ 422–430, 476, 477, 523, 535.
  - Malicious Prosecution §§ 159–164.
  - Negligence §§ 821–824.
  - Personal injuries see Damages §§ 327, 328.
  - Seduction [35 Cyc 1314–1316].
  - Wrongful attachment see Attachment § 1289.
- In proceedings to determine boundaries see Boundaries §§ 310, 311.
- In prosecution for:
  - Abduction §§ 36, 37, 41.
  - Adultery §§ 52, 53.
  - Assault and Battery §§ 308–312.
  - Bastards §§ 115–121.
  - Homicide §§ 390–397.
  - Incest §§ 36, 40.
  - Keeping bawdyhouse see Disorderly Houses §§ 96, 97, 107.
  - Leasing or permitting house to be used as bawdyhouse see Disorderly Houses § 113.
  - Rape [35 Cyc 1477–1482].
  - Seduction [35 Cyc 1350, 1351].
  - Violation of liquor law see Intoxicating Liquors §§ 496, 497, 535.
- Of witness see Witnesses [40 Cyc 2594–2650, 2759, 2782].

Evidence of:
- Agency § 718.
- Corporate existence see Corporations § 175.
- Legitimacy see Bastards § 13.
- Marriage see Adultery § 58; Bigamy § 43; Husband and Wife § 1058; Marriage §§ 57, 98, 99, 110–112.
- Matters of public or general interest see Evidence § 249.
- Partnership § 131.
- Pedigree see Evidence §§ 239, 1805; Incest, § 42.

Hearsay see Evidence §§ 170, 171.

Injury to, as element of damages see Attachment § 1325; Libel and Slander § 566; Malicious Prosecution § 99.

Judgment as evidence of fact provable by see Judgments § 1488.

Mitigating circumstance see Libel and Slander § 580.

Of witness, instruction as to see Criminal Law § 2441.

See generally Libel and Slander 36 C. J. p 1134.

[47] State v. Baldanzo, (N. J.) 148 A. 725, 726.

[48] State v. Poyner, 57 Wash. 489, 107 P 181.

[49] Smith v. Compton, 67 N. J. L. 548, 557, 52 A 386, 58 LRA 480; Chellis v. Chapman, 125 N. Y. 214, 221, 26 NE 308, 11 LRA 784. See Small v. State, 21 Okl. Cr. 99, 210 P 317, 318.

[a] **Similar definition.**—"The common knowledge of the community." Cohen v. New York Times Co., 153 App. Div. 242, 244, 138 NYS 206.

[50] Deputy v. Harris, 15 Del. 100, 104, 40 A 714; Moore v. Dozier, 128 Ga. 90, 97, 57 SE 110. See Small v. State, 21 Okl. Cr. 99, 210 P 317, 318.

[51] Bliss v. Johnson, 162 Mass. 323, 324, 38 NE 446; Haddock v. Boston, etc., R. Co., 85 Mass. 298, 301, 81 AmD 656; Higham v. Ridgway, 10 East 109, 120, 103 Reprint 717.

"Hearsay" 29 C. J. p 286. And see Evidence § 166.

[a] **Similar definition.**—"Hearsay derived from those who had the means of knowing the fact." Scott v. Blood, 16 Me. 192, 196.

[52] In re Hurlburt, 68 Vt. 366, 369, 35 A 77, 35 LRA 794.

"Opinion" § 1.

[53] Norwood v. Harness, 98 Ind. 134, 147, 49 AmR 739.

[54] Webster Int. D. [quot Harrison v. Lakenan, 189 Mo. 581, 601, 88 SW 53].

"Repute" post.

[55] Woodruff v. State, 72 Nebr. 815, 826, 101 NW 1114; State v. Wilson, 15 R. I. 180, 181, 1 A 415.

[56] Wolf v. State, (Ind. A.) 166 NE 883.

[57] **"Character"** 11 C. J. p 288.

[58] Webster Int. D. [quot Harrison v. Lakenan, 189 Mo. 581, 88 SW 53].

[a] **"Character attributed to a person, thing, or action."**—Webster Int. D. [quot Harrison v. Lakenan, 189 Mo. 581, 601, 88 SW 53].

[59] Cargile v. Wood, 63 Mo. 501, 513; Ashford v. Metropolitan L. Ins. Co., 80 Mo. A. 638, 644.

"Belief" 7 C. J. p 1034.

[60] Webster Int. D. [quot Harrison v. Lakenan, 189 Mo. 581, 601, 88 SW 53].

[a] **Similar definitions.**—"The character imputed to a person in a community, society, or public." State v. Baldanzo, (N. J.) 148 A 725, 726.

[61] Dave v. State, 22 Ala. 23, 39.

[62] Cooper v. Greeley, 1 Den. (N. Y.) 347, 365.

[63] Schwimmer v. State, (Tex. Cr.) 206 SW 521, 522.

[64] Moore v. Dozier, 128 Ga. 90, 96, 57 SE 110.

[a] **Similar definition.**—"The estimate generally held by those who know the party." Sloan v. U. S., 31 F. (2d) 902, 906.

"Character" compared and distinguished see Character 11 C. J. p 289 text and notes 19–42; Evidence § 560.

"Estimate" 21 C. J. p 1049.

[65] Webster D. [quot Harrison v. Lakenan, 189 Mo. 581, 601, 88 SW 53]; Webster New Int. D. [quot State v. Baldanzo, (N. J.) 148 A 725, 726]; Peters v. Bourneau, 22 Ill. A. 177, 180.

[66] State v. Ussery, 118 N. C. 1177, 1180, 24 SE 414.

[a] **Similar definitions.**—(1) "The esteem in which he is held by his fellowmen." State v. O'Hagan, 73 N. J. L. 209, 212, 63 A 95. (2) "The estimate in which others hold one." McGuire v. State, 3 Ala. A. 40, 43, 58 S 60.

[67] State v. Simmons, 74 Kan. 799, 801, 88 P 57.

[68] Cauley v. State, 92 Ala. 71, 73, 9 S 456.

[69] State v. Reed, 41 La. Ann. 581, 584, 7 S 132.

[a] **Similar definitions.**—(1) "The general opinion of the community." Anderson L. D. [cit Cohen v. New York Times Co., 153 App. Div. 242, 244, 138 NYS 206]. (2) "The general opinion, good or bad, held of a person by those of a community in which he resides." State v. Steen, 185 N. C. 768, 117 SE 793, 794.

[70] State v. Brown, 55 Kan. 766, 772, 42 P 363.

[71] Bucklin v. Ohio, 20 Oh. 18, 23.

[72] Com. v. Webb, 252 Pa. 187, 195, 97 A 189.

[73] Com. v. Stump, 53 Pa. 132, 135, 91 AmD 198.

[74] In re Spenser, 22 F. Cas. No. 13,234, 5 Sawy. 195, 7 CentLJ 84, 85.

[75] Moore v. Dozier, 128 Ga. 90, 96, 57 SE 110.

people of the community where he is known;[76] what is generally said of [him] in his community;[77] what is reported or understood from report to be the community's estimate of [his]. character;[78] what people generally in a community say and think of [him];[79] what people say of [him].[80] "Reputation is founded on what people say about a man's actions and character."[81]

Good reputation is good name; the credit, honor, or character which is derived from a favorable public opinion or esteem, and character by report.[82] The term has been said to be a sort of right to enjoy the good opinion of others.[83] Synonymous are "credit; repute; regard; estimation; esteem; honor; fame."[84]

Phrases: "Bad character and general reputation,"[85] "good standing and reputation,"[86] and "reputation of being a weak and unsafe bank."[87]

REPUTE. [§ 1] **A. As Noun.** Character attributed, public estimate, established opinion, reputation;[88] character reputed or attributed; established opinion.[89]

Phrases: "Good repute,"[90] and "female of good repute."[91]

[§ 2] **B. As Verb—1. In General.** To hold in thought; to esteem.[92]

[§ 3] **2. Reputed.** Considered,[93] accepted by general or public opinion;[94] generally supposed.[95]

Reputed character. The slow-spreading influence of opinion, arising out of the deportment of an individual in the society in which he moves.[96]

Reputed owner. A person who has to all appearances the title to and possession of property;[97] one who from all appearances, or from supposition, is the owner of a thing.[98]

Other phrases: "Or is reputed to be,"[99] "reputed ownership,"[1] and "reputed thieves."[2]

REQUEST. [§ 1] **A. In General.** A term the precise meaning of which must depend upon the circumstances in which it is employed.[3]

[§ 2] **B. As a Noun**[4] a request has been defined as the act of asking for anything desired;[5] an expression of desire.[6]

A request from one in authority is understood to be a mere euphemism. It is in fact a command in an inoffensive form.[7]

[§ 3] **C. As a Verb** to request has been defined as to ask;[8] to ask for earnestly; to entreat; to

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76. State v. Brown, 33 Utah 109, 112, 93 P 52.

77. State v. Clark, 9 Or. 466, 469; State v. Poyner, 57 Wash. 489, 107 P 181, 182.

78. Fine v. State, 70 Fla. 412, 70 S 379.

79. Brown v. Moon, 196 Ala. 391, 72 S 29.

80. Stegall v. Stegall, 151 Miss. 875, 119 S 802, 803; Peo. v. Montgomery, 176 N. Y. 219, 227, 68 NE 258.

81. Clark v. Hendricks, (Tex. Civ. A.) 164 SW 57, 58.

82. Webster D. [quot Andre v. State, 5 Iowa 389, 393, 68 AmD 708]. See also Good § 10.

"Credit" 15 C. J. p 1351 text and note 9.

"Good name" see Good § 16.

"Honor" 30 C. J. p 457.

83. Times-Democrat Pub. Co. v. Mozee, 136 Fed. 761, 763, 69 CCA 418; Johnson v. Bradstreet Co., 87 Ga. 79, 81, 13 SE 250; Cohen v. New York Times Co., 153 App. Div. 242, 244, 138 NYS 206.

84. Webster Int. D. [quot Harrison v. Lakenan, 189 Mo. 581, 602, 88 SW 53].

85. See Bad 6 C. J. p 879 text and note 42 [a].

86. See Good § 10.

87. Norwood v. Harness, 98 Ind. 134, 147, 49 AmR 739.

88. Com. v. Howe, 35 Pa. Super. 554, 568.

"Reputation" ante.

89. State v. Paterson, 88 Mo. 88, 104, 57 AmR 374.

90. See Good § 10.

[a] **"Good repute" synonymous** with "good reputation." State v. Wheeler, 108 Mo. 658, 665. Compare Com. v. Davis, 3 Pa. Dist. 271. "Good reputation" see Reputation ante.

91. See Good § 10.

92. Webster New Int. D.

93. Santa Cruz Rock Pav. Co. v. Lyons, 5 Cal. Unrep. Cas. 260, 43 P 599, 601; Bowman v. Howard, 182 N. C. 662, 666, 110 SE 98 [cit Cyc].

94. Black L. D. [cit Bowman v. Howard, supra].

95. Santa Cruz Rock Pav. Co. v. Lyons, 5 Cal. Unrep. Cas. 260, 43 P 599, 601; Bowman v. Howard, 182 N. C. 662, 666, 110 SE 98 [cit Cyc].

96. Moore v. Dozier, 128 Ga. 90, 97, 57 SE 110; Wright v. Crawfordville, 142 Ind. 636, 642, 42 NE 227 (distinguishing "real character").

97. Century D. [quot Santa Cruz Rock Pav. Co. v. Lyons, 5 Cal. Unrep. Cas. 260, 43 P 599, 601; Lowell Hardware Co. v. May, 59 Colo. 475, 149 P 831, 832].

98. Anderson L. D. [quot Santa Cruz Rock Pav. Co. v. Lyons, 5 Cal. Unrep. Cas. 260, 43 P 599, 601; Lowell Hardware Co. v. May, 59 Colo. 475, 149 P 831, 832].

99. Morse v. Brown, 206 Fed. 232, 233.

1. Nininger v. Knox, 8 Minn. 140.

2. Cowles v. Dunbar, 2 C. & P. 565, 567, 12 ECL 735, 172 Reprint 257.

3. Snodgrass v. Brandenburg, 164 Ind. 59, 64, 71 NE 137, 72 NE 1030.

4. **Request:**
As subject of forgery see Forgery § 38.
Use of term as creating trust see Trusts [39 Cyc 33]; Wills [40 Cyc 1737].

Request by:
Person defamed as making publication privileged see Libel and Slander § 215.
Servant to volunteers or fellow-servant see Master and Servant §§ 390, 402.

Request for:
Beneficial services see Work and Labor [40 Cyc 2809].
Findings see Trial [38 Cyc 1956–1959].
Further instructions see Criminal Law §§ 2554, 2555; Trial [38 Cyc 1849–1851].
Instructions see Criminal Law §§ 2497–2512; Trial [38 Cyc 1690–1724].
Payment of money to third person see Money Paid §§ 2, 3, 14, 15.
Special finding see Trial [38 Cyc 1914, 1915].
Submission of special issues to jury see Trial [38 Cyc 1936].
Work or materials as essential to mechanic's lien see Mechanics' Liens §§ 73, 119.

"Court of requests" 15 C. J. p 690.

5. Webster D. [quot Philomath College v. Wyatt, 27 Or. 390, 446, 31 P 206, 37 P 1022, 26 LRA 68]; In re Kreiders' Est., 212 Pa. 587, 61 A 1115, 1116.

6. In re Kreiders' Est., supra; Prows v. Hawley, (Utah) 271 P 31, 35.

[a] **"Instance" synonymous** see Instance 32 C. J. p 940.

[b] **"Wish" synonymous.**—Hopkins v. Glunt, 111 Pa. 287, 290, 2 A 183. See Wish [40 Cyc 2122].

[c] **"Order" distinguished.**—Reg. v. Illidge, 2 C. & K. 871, 874, 61 ECL 871, 175 Reprint 366, 1 Den. C. C. 404, 169 Reprint 300. See Order 46 C. J. p 1131.

[d] **"Request" for delivery of goods** distinguished from warrant for the delivery of goods or order for the delivery of goods see Reg. v. Illidge, 2 C. & K. 871, 874, 61 ECL 871, 175 Reprint 366, 1 Den. C. C. 404, 169 Reprint 300.

"Desire" 18 C. J. p 973.

7. State v. Scheve, 65 Nebr. 853, 91 NW 846, 93 NW 169, 59 LRA 927.

"Command" 11 C. J. p 1237.

8. Webster D. [quot Johnson v. Clem, 4 KyL 860, 867]; Prows v. Hawley, (Utah) 271 P 31, 35.

[a] **"Required" as synonymous with "requested"** see Linforth v. San Francisco Gas, etc., Co., 9 Cal. A. 434, 99 P 716, 718.

address with a request;[9] to solicit; to express desire for.[10]

"**Request by mail**" is a familiar phrase said not to import that the person to whom it is addressed shall receive it, but only that the person by whom it is made shall deposit in the post-office a written request, duly directed, so that, in the usual course of the mail, it will reach its destination.[11]

Other phrases: "After request,"[12] "at his special instance or request,"[13] "at its instance and request,"[14] "at their request and upon their credit,"[15] "authorize and empower and request,"[16] "hereby agree to request and do hereby so request,"[17] "performed labor, . . . at the request of another,"[18] "request, advise and incite,"[19] "request, advise and provoke,"[20] "request in writing,"[21] also "requested, advised, and incited."[22]

REQUIRE.[23] [§ 1] **A. In General.** A term derived from the Latin "requiro," compounded of "re" and "quaere," to seek for, or to seek to get back.[24] To require has been variously defined as meaning to ask;[25] to ask as a favor;[26] to ask as of right;[27] to ask as of right and by authority;[28] to ask for;[29] to ask, or claim, as of right and by authority;[30] to ask or order to do something;[31] call for;[32] to call on;[33] to call to account for;[34] to claim;[35] to claim as by right and authority;[36] to claim as indispensable;[37] to command;[38] to compel;[39] to demand;[40] to demand as a matter of right;[41] to demand as appropriate;[42] to demand authoritatively;[43] to demand or request, authoritatively;[44] to demand, or to re-

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[b] **"Instigated" distinguished from "requested"** see Instigate 32 C. J. p 941.

[9] Long v. State, 23 Nebr. 33, 45, 36 NW 310.

[a] **"Require" compared.**—Linforth v. San Francisco Gas, etc., Co., 9 Cal. A. 434, 99 P 716, 718; Snodgrass v. Brandenburg, 164 Ind. 59, 63, 71 NE 137, 72 NE 1030; Prentice v. Whitney, 8 Hun (N. Y.) 300, 301. "Require" post.

"Entreat" 20 C. J. p 1274.

"Need" as synonymous see Need 45 C. J. p 586 text and note 92 [a].

[10] Webster D. [quot Johnson v. Clem, 4 KyL 860, 867]; Long v. State, 23 Nebr. 33, 45, 36 NW 310.

"Solicit" post.

[11] Lothrop v. Greenfield Stock, etc., Ins. Co., 2 Allen (Mass.) 82, 85.

[12] Thornton v. Hawley, 10 Ves. Jr. 129, 137, 32 Reprint 793.

[13] Prows v. Hawley, (Utah) 271 P 31, 35.

[14] See Instance 32 C. J. p 940.

[15] Isitt v. Merritt Collieries, 28 B. C. 62, [1920] 1 WestWkly 879, 880.

"Credit" 15 C. J. p 1348.

[16] Hutton v. Hutton, 41 N. J. Eq. 267, 271, 3 A 882.

"Authorize" 6 C. J. p 865.

"Empower" 20 C. J. p 1246.

[17] Pitts v. Pendleton, 111 Md. 280, 284, 73 A 900.

[18] Young v. Borzone, 26 Wash. 4, 22, 66 P 135.

[19] U. S. v. Strong, 263 Fed. 789, 796.

"Incite" 31 C. J. p 393.

[20] U. S. v. Ault, 263 Fed. 800.

"Provoke" 50 C. J. p 836.

[21] Johnson v. Butler, (Alta.) 22 DomLR 347.

[22] See Procure 50 C. J. p 628 text and note 20.

[23] See Requirement post; Requisites post.

[24] Moran Bolt, etc., Mfg. Co. v. Caldwell, 240 Mo. 358, 368, 144 SW 472; Brewster v. Brewster, 52 N. H. 52, 58; Duhamel v. Port Angeles Stone Co., 59 Wash. 171, 109 P 597, 599, AnnCas1912A 1229.

[25] Webster New Int. D. [quot Ryan v. Litchfield, 162 Iowa 609, 144 NW 313, 314].

"Notify" distinguished see Notify 46 C. J. p 569 text and note 20 [a].

[26] Century D. [quot State v. Marron, 17 N. M. 304, 319, 128 P 485]; Tennessee Coal, etc., Co. v. Waller, 37 Fed. 545, 547; Johnson v. Clem, 4 KyL 860, 867; Meagher v. Van Zandt, 18 Nev. 230, 235, 2 P 57.

"Favor" 25 C. J. p 677.

[27] Standard D. [quot Duhamel v. Port Angeles Stone Co., 59 Wash. 171, 109 P 597, 599, AnnCas1912A 1229]; Mattingly v. Read, 3 Metc. (Ky.) 524, 526, 79 AmD 565; Boyce v. Stringfellow; 52 Tex. Civ. A. 504, 508, 114 SW 652.

[28] Webster D. [quot Federal Lead Co. v. Swyers, 161 Fed. 687, 692, 88 CCA 547; U. S. v. Armour, 142 Fed. 808, 822; Meagher v. Van Zandt, 18 Nev. 230, 234, 2 P 57; Brewster v. Brewster, 52 N. H. 52, 58]; Atkinson v. State, 190 Ind. 1, 128 NE 433; Johnson v. Clem, 4 KyL 860, 867.

[29] Metropolitan Water Bd. v. Johnson, [1913] 3 K. B. 900, 919.

[30] Century D. [quot State v. Marron, 17 N. M. 304, 319, 128 P 485].

[31] Century D. [quot State v. Marron, supra].

[32] Webster New Int. D. [quot Ryan v. Litchfield, 162 Iowa 609, 144 NW 313.

[33] Century D. [quot State v. Marron, 17 N. M. 304, 317, 128 P 485].

[34] Johnson v. Clem, 4 KyL 860, 867.

"Account for" see Account 1 C. J. p 586.

[35] Standard D. [quot Duhamel v. Port Angeles Stone Co., 59 Wash. 171, 109 P 597, 599, AnnCas1912A 1229]; Johnson v. Clem, 4 KyL 860, 867.

"Claim" 11 C. J. p 816.

[a] **"Claim" synonymous.**—Webster New Int. D. [quot American Ins. Co. v. Rodenhouse, 36 Okl. 211, 215, 128 P 502].

[36] Webster D. [quot Bain v. Coats, (Tex. Commn. A.) 244 SW 130, 134]; Webster Int. D. [quot American Ins. Co. v. Rodenhouse, 36 Okl. 211, 215, 128 P 502]; Kennedy v. Falde, 4 Dak. 319, 29 NW 667, 670; Union Mut. Ins. Co. v. Page, 65 Okl. 101, 164 P 116, LRA1918C 1.

[a] **Similar definition.**—"To claim by right and authority." Webster New Int. D. [quot Bank of Italy v. Johnson, 200 Cal. 1, 251 P 784, 792].

[37] Kennedy v. Falde, 4 Dak. 319, 29 NW 667, 670; Union Mut. Ins. Co. v. Page, 65 Okl. 101, 164 P 116, LRA 1918C 1.

[38] Medlock v. State, 108 Tex. Cr. 274, 1 SW (2d) 308, 310.

"Command" synonymous see Command 11 C. J. p 1237 text and note 1.

[39] Medlock v. State, 108 Tex. Cr. 274, 1 SW (2d) 308, 310.

"Compel" 12 C. J. p 223.

"Compel" as synonymous see Compel 12 C. J. p 223 text and note 36 [b].

[40] Century D. [quot State v. Marron, 17 N. M. 304, 319, 128 P 485]; Webster D. [quot Federal Lead Co. v. Swyers, 161 Fed. 687, 692, 88 CCA 547; Bain v. Coats, (Tex. Commn. A.) 244 SW 130, 134]; Webster New Int. D. [quot Bank of Italy v. Johnson, 200 Cal. 1, 251 P 784, 792; Ryan v. Litchfield, 162 Iowa 609, 144 NW 313, 314; American Ins. Co. v. Rodenhouse, 36 Okl. 211, 215, 128 P 502]; Miller v. Rouse, 276 Fed. 715, 716; U. S. v. Armour, 142 Fed. 808, 822; Tennessee Coal, etc., Co. v. Waller, 37 Fed. 545, 547; Kennedy v. Falde, 4 Dak. 319, 29 NW 667, 670; Vogrin v. American Steel, etc., Co., 263 Ill. 474, 479, 105 NE 332; Concordia F. Ins. Co. v. Bowen, 121 Ill. A. 35, 42; Mattingly v. Reed, 3 Metc. (Ky.) 524, 526, 79 AmD 565; Johnson v. Clem, 4 KyL 860, 867; Brewster v. Brewster, 52 N. H. 52, 58; Lippincott v. Ridgway, 11 N. J. Eq. 526, 534; Union Mut. Ins. Co. v. Page, 65 Okl. 101, 164 P 116, 119, LRA 1918C 1; Medlock v. State, 108 Tex. Cr. 274, 1 SW (2d) 308, 310 [cit Cyc]; In re Robinson, 101 Vt. 464, 144 A 457, 459; Canfield-Caulkins Impl. Co. v. Cowden, 70 Wash. 587, 589, 127 P 216, AnnCas1914B 857; Metropolitan Water Bd. v. Johnson, [1913] 3 K. B. 900, 919.

"Demand" 18 C. J. p 478.

[a] **"Demand" synonymous.**—Crabb Synonyms [cit Brewster v. Brewster, 52 N. H. 52, 58]; Webster New Int. D. [quot American Ins. Co. v. Rodenhouse, 36 Okl. 211, 215, 128 P 502]; Butler St. Fdy., etc., Co. v. State Industrial Bd., 277 Ill. 70, 72, 115 NE 122; Duhamel v. Port Angeles Stone Co., 59 Wash. 171, 109 P 597, 599, AnnCas1912A 1229.

[41] Boswell v. Hall, 8 Oh. S. & C. P. 590, 591.

[42] Webster New Int. D. [quot Bank of Italy v. Johnson, 200 Cal. 1, 251 P 784, 792].

[43] Dick v. Forshey, 71 Pa. Super. 439, 441.

[44] Standard D. [quot Moran Bolt, etc., Mfg. Co. v. Caldwell, 240 Mo. 358, 366, 144 SW 472].

quest something of, authoritatively;[45] to direct;[46] to enjoin;[47] to exact;[48] to find indispensable;[49] to have imperative need of;[50] to have need or necessity for;[51] to impose a command or compulsion upon one to do something;[52] to insist;[53] to insist upon;[54] to insist upon having;[55] to insist upon having as indispensable;[56] to make necessary;[57] to need;[58] to need or call for;[59] to need, want, or have occasion for;[60] to order or to compel;[61] to prescribe;[62] to render necessary as a duty, or something indispensable;[63] to render necessary or indispensable;[64] to render or find indispensable;[65] to request;[66] to want;[67] also to search for;[68] to seek;[69] and also to avenge;[70] to take satisfaction for.[71]

Phrases: "If he requires one,"[72] "in so far as he requires it,"[73] "require for the purpose of its business,"[74] "require or permit,"[75] "such as the said party of the second part may require for its own purpose,"[76] and "when she may require it."[77]

[§ 2] **B. Required.** Allowed;[78] called for;[79] commanded;[80] compelled;[81] demanded;[82] necessary;[83]

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[45] Standard D. [quot Moran Bolt, etc., Mfg. Co. v. Caldwell, 240 Mo. 358, 368, 144 SW 472; Duhamel v. Port Angeles Stone Co., 59 Wash. 171, 109 P 597, 599, AnnCas1912A 1229].

[46] Vogrin v. American Steel, etc., Co., 263 Ill. 474, 479, 105 NE 332.

"Direct" 18 C. J. p 1043.

[a] **"Direct" synonymous.**—Webster New Int. D. [quot American Ins. Co. v. Rodenhouse, 36 Okl. 211, 215, 128 P 502]; U. S. v. Dimmick, 112 Fed. 350, 351; U. S. v. San Francisco Bridge Co., 88 Fed. 891, 893; Kennedy v. Falde, 4 Dak. 319, 29 NW 667, 670; McLean County Coal Co. v. Bloomington, 234 Ill. 90, 98, 84 NE 624; Union Mut. Ins. Co. v. Page, 65 Okl. 101, 164 P 116, LRA1918C 1. See Beakey v. Knutson, 90 Or. 574, 174 P 1149, 177 P 955 ("substantially synonymous").

[47] Webster Int. D. [quot American Ins. Co. v. Rodenhouse, 36 Okl. 211, 215, 128 P 502].

[48] Century D. [quot State v. Marron, 17 N. M. 304, 319, 128 P 485]; Webster D. [cit Federal Lead Co. v. Swyers, 161 Fed. 687, 692, 88 CCA 547]; American Ins. Co. v. Rodenhouse, 36 Okl. 211, 215, 128 P 502]; Webster New Int. D. [quot Bank of Italy v. Johnson, 200 Cal. 1, 251 P 784, 792]; Concordia F. Ins. Co. v. Bowen, 121 Ill. A. 35, 42; Union Mut. Ins. Co. v. Page, 65 Okl. 101, 164 P 116, LRA1918C 1.

[a] **"Exact" synonymous.**—Webster Int. D. [quot American Ins. Co. v. Rodenhouse, 36 Okl. 211, 215, 128 P 502]; Kennedy v. Falde, 4 Dak. 319, 29 NW 667, 670; Union Mut. Ins. Co. v. Page, 65 Okl. 101, 164 P 116, LRA 1918C 1.

"Exact" 23 C. J. p 177.

[49] Dick v. Forshey, 71 Pa. Super. 439, 441.

[50] Standard D. [quot In re White, 135 Misc. 377, 238 NYS 559, 568; Duhamel v. Port Angeles Stone Co., 59 Wash. 171, 109 P 597, 599, AnnCas 1912A 1229]; Webster D. [quot Browning v. Hinerman, (Tex. Civ. A.) 224 SW 236, 238].

[51] Century D. [quot State v. Marron, 17 N. M. 304, 319, 128 P 485].

[52] Webster D. [quot Bain v. Coats, (Tex. Commn. A.) 244 SW 130, 134].

"Command" 11 C. J. p 1237.

"Compulsion" 12 C. J. p 370.

"Impose" 31 C. J. p 258.

[53] Tennessee Coal, etc., Co. v. Waller, 37 Fed. 545, 547.

"Insist" 32 C. J. p 795.

[54] Standard D. [quot Duhamel v. Port Angeles Stone Co., 59 Wash. 171, 109 P 597, 599, AnnCas1912A 1229]; Union Mut. Ins. Co. v. Page, 65 Okl. 101, 164 P 116, LRA1918C 1.

[55] Century D. [quot State v. Marron, 17 N. M. 304, 319, 128 P 485]; Webster D. [quot Federal Lead Co. v. Swyers, 161 Fed. 687, 692, 88 CCA 547]; Webster New Int. D. [quot American Ins. Co. v. Rodenhouse, 36 Okl. 211, 215, 128 P 502]; Kennedy v. Falde, 4 Dak. 319, 29 NW 667, 670.

[56] Concordia F. Ins. Co. v. Bowen, 121 Ill. A. 35, 42.

[57] Mattingly v. Reed, 3 Metc. (Ky.) 524, 526, 79 AmD 565; Johnson v. Clem, 4 KyL 860, 867; Medlock v. State, 108 Tex. Cr. 274, 1 SW (2d) 308, 310 [cit Cyc]; Boyce v. Stringfellow, 52 Tex. Civ. A. 504, 508, 114 SW 652.

[58] Century D. [quot State v. Marron, 17 N. M. 304, 319, 128 P 485]; Hull v. Holloway, 58 Conn. 210, 216, 20 A 445; Johnson v. Clem, 4 KyL 860, 867; Cole v. Littlefield, 35 Me. 439, 445; Corlies v. Allen, 36 N. J. Eq. 100, 101; In re Robinson, 101 Vt. 464, 144 A 457, 459; Hughes v. Chester, etc., R. Co., 1 Dr. & Sm. 524, 551, 62 Reprint 478.

"Need" equivalent see Need 45 C. J. p 586 text and note 92 [c].

"Need" not absolutely synonymous see Need 45 C. J. p 586 text and note 92 [b].

[59] Webster New Int. D. [quot Bank of Italy v. Johnson, 200 Cal. 1, 251 P 784, 792].

[60] Roget Int. Thesaurus of Words and Phrases [quot Bank of Italy v. Johnson, supra].

[61] Vogrin v. American Steel, etc., Co., 263 Ill. 474, 105 NE 332.

[a] **"Order" synonymous.**—Webster New. Int. D. [quot American Ins. Co. v. Rodenhouse, 36 Okl. 211, 215, 128 P 502]; U. S. v. Dimmick, 112 Fed. 350, 351; U. S. v. San Francisco Bridge Co., 88 Fed. 891, 893; Kennedy v. Falde, 4 Dak. 319, 29 NW 667, 670; McLean County Coal Co. v. Bloomington, 234 Ill. 90, 98, 84 NE 624.

[b] **"To require an act to be done** raises in mind some order or other direction to do it." State v. Peters, 25 OhNPNS 69, 71; Union Mut. Ins. Co. v. Page, 65 Okl. 101, 164 P 116, LRA1918C 1.

"Order" 46 C. J. p 1131.

"Permit" distinguished see Permit 48 C. J. p 926 text and note 36 [b].

[62] U. S. v. Dimmick, 112 Fed. 350, 351.

[a] **"Prescribe" synonymous.**—Webster New Int. D. [quot American Ins. Co. v. Rodenhouse, 36 Okl. 211, 215, 128 P 502].

[63] Johnson v. Clem, 4 KyL 860, 867.

[64] Century D. [quot State v. Marron, 17 N. M. 304, 319, 128 P 485].

[65] Standard D. [quot Duhamel v. Port Angeles Stone Co., 59 Wash. 171, 109 P 597, 599, AnnCas1912A 1229].

[66] Tennessee Coal, etc., Co. v. Waller, 37 Fed. 545, 547; Johnson v. Clem, 4 KyL 860, 867; Meagher v. Van Zandt, 18 Nev. 230, 235, 2 P 57; State v. Marron, 17 N. M. 304, 319, 128 P 485; Metropolitan Water Bd. v. Johnson, [1913] 3 K. B. 900, 919.

"Request" compared see Request ante.

[67] Century D. [quot State v. Marron, 17 N. M. 304, 319, 128 P 485]; Standard D. [quot Duhamel v. Port Angeles Stone Co., 59 Wash. 171, 109 P 597, 599, AnnCas1912A 1229].

[68] Century D. [quot State v. Marron, 17 N. M. 304, 319, 128 P 485].

[69] Century D. [quot State v. Marron, supra].

[70] Johnson v. Clem, 4 KyL 860, 867.

[71] Johnson v. Clem, supra.

[72] Canfield-Caulkins Impl. Co. v. Cowden, 70 Wash. 587, 589, 127 P 216, AnnCas1914B 857.

[73] In re Robinson, 101 Vt. 464, 144 A 457, 459.

[74] Kensington, etc., Electric Lighting Co. v. Notting Hill Electric Lighting Co., 87 L. J. K. B. 1076, 1079.

[75] See Permit 48 C. J. p 927 text and note 56.

[76] Albany Power, etc., Co. v. Albany, 133 Ga. 375, 382, 65 SE 886.

[77] Brewster v. Brewster, 52 N. H. 52, 58.

[78] Byrd v. State, 57 Miss. 243, 246, 34 AmR 440. But see State v. McCord, 8 Kan. 232, 239, 12 AmR 469.

[79] McReynolds' App., 66 Pa. 102, 111.

[80] Huey v. Waldrop, 141 Ala. 318, 322, 37 S 380.

[81] State v. McCord, 8 Kan. 232, 239, 12 AmR 469.

"Compelled" see Compel 12 C. J. p 223.

[82] Century D. [cit Graham v. German American Ins. Co., 75 Oh. St. 374, 403, 79 NE 930, 15 LRANS 1055, 9 AnnCas 79]; Western Coal, etc., Co. v. Greeson, 284 Fed. 510, 513; Mama Coal Co. v. Colo, 158 Ark. 408, 250 SW 327, 329; Norwich Union F. Ins. Soc. v. Rayor, 70 Colo. 290, 201 P 50; Dowdall v. Lenox, 2 Edw. (N. Y.) 267, 272.

[83] Peo. v. Central Pac. R. Co., 76 Cal. 29, 41, 18 P 90; Flint, etc., R. Co. v. Detroit, etc., R. Co., 64 Mich. 350, 360, 31 NW 281; State v. Marron, 17 N. M. 304, 319, 128 P 485. See Miller v. Leo, 35 App. Div. 589, 592, 55 NYS 165.

[a] **"Necessary" synonymous.**—Flint, etc., R. Co. v. Detroit, etc., R. Co., 64 Mich. 350, 360, 31 NW 281.

"Necessary" 45 C. J. p 580.

made necessary;[84] needed;[85] made an essential condition;[86] ordered;[87] rendered necessary or indispensable;[88] permitted;[89] requested;[90] that which is necessary;[91] to be requisite.[92] The term as sometimes used may not be synonymous with "caused,"[93] "occasioned,"[94] or "needed."[95]

Phrases: "As may be required,"[96] "as the same may be required,"[97] "desired and required,"[98] "fairly required,"[99] "has been required,"[1] "if by law recording or registering thereof is required,"[2] "if by law such recording or registering is required,"[3] "no charge or fee shall be required,"[4] "notice of required change,"[5] "plaintiff in error shall not be required to pay costs,"[6] "required and permitted,"[7] "required bond,"[8] "required by existing laws,"[9] "required by law,"[10] "required consent,"[11] "required for the purposes thereof,"[12] "required in a legal proceeding,"[13] "required or authorized by law,"[14] "required or permitted,"[15] "required to be reserved,"[16] "required to pay,"[17] "required to testify,"[18] "the amount required by my wife for her maintenance,"[19] "when an appraisal has been required,"[20] "when appraisal has been required,"[21] "when appraisal is required,"[22] "when required,"[23] "when required to be used,"[24] and "which shall no longer be required to be reserved."[25]

[§ 3] **C. Requiring.** Authoritatively demanding or requesting something to be done;[26] demanding;[27] having imperative need;[28] and requesting.[29]

Phrases: "Not requiring,"[30] "requiring his presence,"[31] and "persons requiring their services."[32]

REQUIREMENT. In its primary and usual sense, the act of requiring;[33] a demand;[34] an imperative or authoritative command;[35] a requisition.[36] Sudsidiary and exceptional definitions of the word are that of necessity;[37] or need.[38] It has also been defined as a thing which is required;[39] a thing made necessary;[40] and as an essential condition.[41]

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[84] Century D. [cit Graham v. German American Ins. Co., 75 Oh. St. 374, 403, 79 NE 930, 15 LRANS 1055, 9 AnnCas 79]. But see Norwich Union F. Ins. Soc. v. Rayor, 70 Colo. 290, 201 P 50, 51.

[85] Webster D. [quot Keigher v. General Electric Co., 173 App. Div. 207, 211, 158 NYS 939]; W. H. Purcell Co. v. Sage, 200 Ill. 342, 346, 65 NE 723; Dowdall v. Lenox, 2 Edw. (N. Y.) 267, 272.

[a] **As used in statute** the term has been held not to mean "needed." Western Coal, etc., Co. v. Greeson, 284 Fed. 510, 513; Mama Coal Co. v. Colo, 158 Ark. 408, 250 SW 327, 329.

[86] Century D. [cit Graham v. German American Ins. Co., 75 Oh. St. 374, 403, 79 NE 930, 15 LRANS 1055, 9 AnnCas 79.

"Condition" 12 C. J. p 398.

"Essential" 21 C. J. p 898.

[87] See Order 46 C. J. p 1131 text and note 13 [c].

[88] Century D. [quot Wilcox, etc., Co. v. Phœnix Ins. Co., 60 Fed. 929, 930; Keigher v. General Electric Co., 173 App. Div. 207, 211, 158 NYS 939].

[89] Bowler v. Pipestone First Nat. Bank, 21 S. D. 449, 455, 113 NW 618.

"Permitted" see Permit 48 C. J. p 925 text and note 5 [a].

[90] Western Coal, etc., Co. v. Greeson, 284 Fed. 510, 513; Mama Coal Co. v. Colo, 158 Ark. 408, 250 SW 327, 329; Norwich Union F. Ins. Soc. v. Rayor, 70 Colo. 290, 201 P 50; McKinnon v. Western Coal, etc., Co., 120 Mo. A. 148, 163, 96 SW 485 (where the construction "needed" put upon the term in Bowerman v. Lackawanna Min. Co., 98 Mo. 308, 316, 71 SW 1062, was disapproved); Graham v. German American Ins. Co., 75 Oh. St. 374, 403, 79 NE 930, 15 LRANS 1055, 9 AnnCas 79.

"Requested" as synonymous see Require ante.

[91] Com. v. Chesapeake, etc., R. Co., 128 Ky. 542, 546, 108 SW 851, 852, 32 KyL 1400.

[92] Hull v. Holloway, 58 Conn. 210, 216, 20 A 445.

"Requisite" post.

[93] Stapper v. Wolter, (Tex. Civ. A.) 85 SW 850, 851.

[94] Stapper v. Wolter, supra.

[95] Western Coal, etc., Co. v. Greeson, 284 Fed. 510, 513.

[a] **In a statute** the term has been held to mean requested or demanded and not to mean needed. Western Coal, etc., Co. v. Greeson, 284 Fed. 510, 513.

[96] McReynolds' App., 66 Pa. 102, 111; Boyce v. Stringfellow, 52 Tex. Civ. A. 504, 508, 114 SW 652.

[97] McReynolds' App., 66 Pa. 102, 111.

[98] See Desire 18 C. J. p 973 text and note 46 [b].

[99] Coe v. Aiken, 61 Fed. 24, 35.

[1] National Home Bldg., etc., Assoc. v. Dwelling House Ins. Co., 106 Mich. 236, 240, 64 NW 21; American Ins. Co. v. Rodenhouse, 36 Okl. 211, 215, 128 P 502.

[2] Carey v. Donohue, 240 U. S. 430, 36 SCt 386, 389, 60 L. ed. 726.

[3] In re Anderson, 252 Fed. 272, 273; Ragan v. Donovan, 189 Fed. 138, 144.

[4] Hoffman v. Lincoln County, 137 Wis. 353, 356, 118 NW 850.

[5] State v. Glaves, 268 Mo. 100, 186 SW 685.

[6] Sigmon v. Austin, 112 Ga. 570, 575, 37 SE 894.

[7] State v. Peters, 25 OhNPNS 69, 71.

[8] Babcock v. Cobb, 11 Minn. 247, 252.

[9] State v. Marron, 17 N. M. 304, 319, 128 P 485.

[10] Maryland Casualty Co. v. U. S., 251 U. S. 342, 40 SCt 155, 157, 64 L. ed. 297; Newport v. Silva, 144 Ky. 450, 137 SW 546, 549; Peo. v. Knapp, 147 App. Div. 436, 132 NYS 747, 750; Portland v. Portland State Bank, 107 Or. 267, 214 P 813, 815; Rex v. Nier, 9 Alta. L. 353, 28 DomLR 373, 33 West LR 180, 9 WestWkly 838.

[11] Atchison, etc., R. Co. v. Public Utilities Commn., 77 Colo. 42, 234 P 175.

[12] Hooper v. Bourne, 3 Q. B. D. 258, 280.

[13] Bowers v. Beck, 2 Nev. 157, 160.

[14] Rex v. Nier, 9 Alta. L. 353, 28 DomLR 373, 33 WestLR 180, 9 West Wkly 838.

[15] See Permit 48 C. J. p 927 text and note 56 [a].

[16] St. Louis, etc., R. Co. v. Guaranty Trust Co., 144 App. Div. 440, 445, 129 NYS 421 [aff 205 N. Y. 609 mem, 99 NE 162 mem].

[17] St. Louis, etc., R. Co. v. Elk City First Nat. Bank, 68 Okl. 68, 171 P 467, 470.

[18] Atkinson v. State, 190 Ind. 1, 128 NE 433.

[19] Blair v. Blair, 82 Kan. 464, 467, 108 P 827.

[20] Concordia F. Ins. Co. v. Bowen, 121 Ill. A. 35, 42.

[21] Norwich Union F. Ins. Soc. v. Rayor, 70 Colo. 290, 201 P 50, 51.

[22] Graham v. German American Ins. Co., 75 Oh. St. 374, 404, 79 NE 930, 15 LRANS 1055, 9 AnnCas 79.

[23] Wojtylak v. Kansas, etc., Coal Co., 188 Mo. 260, 296, 87 SW 506; McKinnon v. Western Coal, etc., Co., 120 Mo. A. 148, 163, 96 SW 485.

[24] Mama Coal Co. v. Colo, 158 Ark. 408, 250 SW 327, 328.

[25] St. Louis, etc., R. Co. v. Guaranty Trust Co., 205 N. Y. 609, 613, 99 NE 162.

[26] State v. Peters, 112 Oh. St. 249, 147 NE 81, 84.

[27] Hanson v. Maverick Oil Co., 67 N. H. 201, 202, 29 A 459.

[28] Standard D. [cit Park v. Candler, 114 Ga. 466, 479, 40 SE 523].

[29] Hanson v. Maverick Oil Co., 67 N. H. 201, 202, 29 A 459.

[30] Metropolitan Water Bd. v. Johnson, [1913] 3 K. B. 900, 919.

[31] Southern R. Co. v. Smith, 107 Va. 553, 556, 59 SE 372.

[32] Hanson v. Maverick Oil Co., 67 N. H. 201, 202, 29 A 459.

[33] Webster New Int. D. [quot Ryan v. Litchfield, 162 Iowa 609, 144 NW 313, 314].

"Requiring" see Require § 3.

[34] Webster New Int. D. [quot Ryan v. Litchfield, supra].

"Demand" 18 C. J. p 478.

[35] Webster Int. D. [quot Ohio Automatic Sprinkler Co. v. Fender, 108 Oh. St. 149, 141 NE 269, 275].

"Command" 11 C. J. p 1237.

[36] Webster New Int. D. [quot Ryan v. Litchfield, 162 Iowa 609, 144 NW 313, 314].

"Requisition" post.

Phrases: "Annual requirements,"[42] "for our requirements,"[43] "lawful requirement,"[44] "requirement of registration,"[45] and "requirements of this section."[46]

REQUISITE.[47] Essential, indispensable.[48]

Phrases: "Requisite bond,"[49] "requisite notice or notices,"[50] "such sums as may be requisite,"[51] and "the requisite majority."[52]

REQUISITION.[53] The act of requiring or demanding.[54]

Phrases: "Requisition and inquiry,"[55] "requisition for surrender,"[56] "requisition of a physician,"[57] "requisition to sue,"[58] and "to comply with a requisition."[59]

REREAPPRAISEMENT. A term said to be used in the sense of the word reappraisement.[60]

REREDOS. A sort of screen at the back of the altar.[61]

RERESTITUTION.[62]

RERUM ORDO CONFUNDITUR, SI UNICUIQUE JURISDICTIO NON SERVATUR.[63]

RERUM PROGRESSUS OSTENDUNT MULTA QUÆ IN INITIO PRÆCAVERI SEU PRÆVIDERI NON POSSUNT.[64]

RERUM SUARUM QUILIBET EST MODERATOR ET ARBITER.[65]

RES.[66] In the civil law, a term said to signify a thing, an object.[67] The term is one of somewhat wide content and it embraces not only land and chattels but also the status of individuals.[68]

Res adiratæ. An old action the gist of which was the fact that plaintiff had lost his goods, that they had come into the hands of defendant, and that defendant, on request, refused to give them up.[69]

Res communes. Those things which have remained common, or in the ancient state of negative community.[70]

RES ACCENDENT LUMINA REBUS.[71]

RES ACCESSORIA SEQUITUR REM PRINCIPALEM.[72]

RES ADJUDICATA.[73]

RESALE.[74] Where a person who has sold goods or other property to a purchaser, sells them again to someone else.[75]

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[37] Webster New Int. D. [cit Ryan v. Litchfield, 162 Iowa 609, 144 NW 313, 314].

"Necessity" 45 C. J. p 585.

[38] Webster New Int. D. [cit Ryan v. Litchfield, 162 Iowa 609, 144 NW 313, 314].

"Need" 45 C. J. p 586.

[a] **"Needs" synonymous with requirements.**—Minnesota Lumber Co. v. Whitebreast Coal Co., 160 Ill. 85, 93, 43 NE 774, 31 LRA 529.

[39] Webster Int. D. [quot Ohio Automatic Sprinkler Co. v. Fender, 108 Oh. St. 149, 141 NE 269, 275].

[40] Century D. [cit Graham v. German American Ins. Co., 75 Oh. St. 374, 404, 79 NE 930, 15 LRANS 1055, 9 AnnCas 79].

[41] Century D. [cit Graham v. German American Ins. Co., supra].

"Condition" 12 C. J. p 398.

"Essential" 21 C. J. p 898.

[42] Mathieson Alkali Works v. Virginia Banner Coal Corp., 147 Va. 125, 136 SE 673, 680.

[43] Russell v. Excelsior Stove, etc., Co., 120 Ill. A. 23, 33.

[a] **In a contract** to purchase goods the phrase means such amount as may be needed in the regular course of business and not what the purchaser may choose to require. Russell v. Excelsior Stove, etc., Co., 120 Ill. A. 23, 33.

[44] Ohio Automatic Sprinkler Co. v. Fender, 108 Oh. St. 149, 141 NE 269, 272.

[45] Mattley v. Geisler, 187 Fed. 970, 972, 110 CCA 90.

[46] Howe v. Chicago, 224 Ill. 95, 96, 79 NE 421, 422.

[47] See Require ante.

"Requirement" ante.

[48] Funkhouser v. Spahr, 102 Va. 306, 310, 46 SE 378.

[49] Smith v. Randlette, 98 Me. 86, 91, 56 A 199.

[50] Bowling v. Arthur, 34 Miss. 41, 54.

[51] Brooklyn Public Library v. New York, 250 N. Y. 495, 500, 166 NE 179.

[52] Funkhouser v. Spahr, 102 Va. 306, 310, 46 SE 378, 379.

[53] **Requisition:**
For military service see Army and Navy § 43; Militia § 71.
On private persons in time of war see War [40 Cyc 336, 337].
To procure extradition see Extradition §§ 20–27, 67.

[54] Webster New Int. D. [quot Sanborn v. Weir, 95 Vt. 1, 112 A 228, 231]; Atwood v. Charlton, 21 R. I. 568, 571, 45 A 580.

[a] **"Order by president calling forth the militia" distinguished** from "requisition directed to governor of a state, requiring a quota or detachment of militia to be furnished or held in readiness for the service of the United States." Mills v. Martin, 19 Johns. (N. Y.) 7, 26.

[b] **"Condemnation" compared.**—Filbin Corp. v. U. S., 266 Fed. 911, 913.

[55] See Inquiry 32 C. J. p 578 text and note 97.

[56] Castro v. De Uriarte, 16 Fed. 93, 96.

[57] Bain v. State, 61 Ala. 75, 79.

[58] Lockridge v. Upton, 24 Mo. 184, 185.

[59] Mills v. Martin, 19 Johns. (N. Y.) 7, 27.

[60] Gallagher v. U. S., 4 Cust. A. 308, 312 ("The word . . . seems not yet to have found a permanent place in the English language").

"Appraisement" 4 C. J. p 1408.

[61] Boyd v. Phillpotts, L. R. 4 A. & E. 297, 346.

[62] See Forcible Entry and Detainer § 37.

"Restitution" post.

[63] A maxim meaning "The order of things is confounded, if every one preserves not his jurisdiction." Peloubet Leg. Max. [cit 4 Inst. Proem.].

[64] A maxim meaning "The progress of events show many things which at the beginning could not be foreseen or guarded against." Morgan Leg. Max. [cit Mildmay's Case, 6 Coke 40a, 40b, 77 Reprint 311].

[65] A maxim meaning "Every one is the regulator and disposer of his own property." Burrill L. Dict. [cit Coke Litt. 223a].

[66] **Cross references:**
In rem see In 31 C. J. p 358 text and note 87.
Res gestæ see Criminal Law § 1114 et seq; Evidence § 535 et seq.
Res ipsa loquitur see Negligence § 768 et seq.
Res judicata see Judgments § 1154 et seq.

[67] See Lord v. Colvin, 4 Drew. 366, 374, 62 Reprint 141 (where the word was said to probably signify "business").

[68] Lister v. Lister, 86 N. J. Eq. 30, 35, 97 A 170.

[69] Bouvier L. D. [cit 2 Holdsw. Hist. E. L. 275].

[70] Geer v. Connecticut, 161 U. S. 519, 525, 16 SCt 600, 40 L. ed. 793 [quot Pothier's Traité du Droit de Propriété].

[71] A maxim meaning "One thing throws light upon others." Black L. D. [cit Keisselbrack v. Livingston, 4 Johns. Ch. (N. Y.) 144, 149].

[72] A maxim meaning "An accessory follows its principal." Peloubet Leg. Max. [cit Br. 491].

[73] See Res Judicata post. And see Judgments § 742 et seq.

[74] **Cross references:**
Auctions and Auctioneers § 50.
Chattel Mortgages § 528.
Executions § 618 et seq.
Executors and Administrators § 1622.
Frauds, Statute of § 237.
Guardian and Ward § 332.
Judicial Sales § 204 et seq.
Mortgages §§ 89, 1439, 1841, 1884.
Partition §§ 741, 742.

RES BONA FIDE VENDITA PROPTER MINIMAM CAUSAM INEMPTA.[76]

RESCEIT or **RECEIT.** The admission or receiving of a third person to plead his right in a cause formerly commenced between two other persons.[77] The admittance of a plea when the controversy is between the same two persons.[78]

RESCIND.[79] To abrogate, annul, avoid, or cancel[80]—in other words, to undo—a contract;[81] and, sometimes, to terminate.[82]

Phrase: "Rescind and cancel."[83]

RESCISSION.[84] The act of abrogating, cancelling, vacating, or annulling;[85] the undoing of a thing;[86] and has been distinguished from "abandonment,"[87] "cancellation,"[88] "determination,"[89] "modification,"[90] "reformation,"[91] "repudiation,"[92] and "termination."[93]

Act of both parties is ordinarily implied when the term is employed.[94]

Rescission in pais, as the term implies, is effected by an act out of court.[95]

RESCRIPT. At common law, a counterpart; duplicate; or copy.[96] In American law, the statement of the decision of the highest appellate tribunal;[97] also, the brief statement sent to the court a quo.[98]

Public Lands § 219 et seq.
Railroads § 794.
Receivers § 366.
Sales [35 Cyc 155, 475, 519, 647, 679].
Taxation [37 Cyc 1357].
Theaters and Shows [38 Cyc 267].
Vendor and Purchaser [39 Cyc 1321, 1940].

[75] Black L. D.

[76] A maxim meaning "A thing sold in good faith, for even the most trifling consideration, will be regarded as sold." Morgan Leg. Max. [cit Domat. 1, 2, § 11, art 3].

[a] **Applied** in Masterton v. Beers, 29 N. Y. Super. 368, 386.

[77] Bouvier L. D. [cit Jacob L. D.; Cowell].

[78] Bouvier L. D. [cit Coke Littleton 192].

[79] See Rescission post.

[80] Abbott L. D. [quot Powell v. F. C. Linde Co., 29 Misc. 419, 420, 60 NYS 1044]; Swan v. Great Northern R. Co., 40 N. D. 258, 168 NW 657, 659, LRA1918F 1063.

"Cancel" distinguished see Cancel 9 C. J. p 1153 text and note 11 [a].

[a] **"Revoke," "annul," or "blot out"** are not always and necessarily synonymous. Finlay v. Swirsky, 98 Conn. 666, 120 A 561, 562.

[81] Swan v. Great Northern R. Co., 40 N. D. 258, 168 NW 657, 659, LRA 1918F 1063.

[82] Hurst v. Trow Printing, etc., Co., 2 Misc. 361, 366, 22 NYS 371 (where it was said to be sometimes used in the narrower sense of terminate a contract as to future transactions).

[83] Pfeiffer v. Norman, 22 N. D. 168, 172, 133 NW 97, 38 LRANS 891.

[84] **Cross references:**
Abatement and Revival § 465.
Accord and Satisfaction § 102.
Adverse Possession § 370.
Agency §§ 149–171, 242, 243, 289.
Alteration of Instruments §§ 20, 79.
Apprentices §§ 158–183.
Auctions and Auctioneers §§ 44, 45.
Bills and Notes § 552.
Bonds § 75.
Boundaries § 186.
Bounties § 8.
Breach of Marriage Promise § 21.
Building and Construction Contracts §§ 56–65.
Chattel Mortgages § 152.
Compositions with Creditors § 117.
Compromise and Settlement § 38.
Contracts §§ 101–109, 307.
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Counties §§ 123, 230, 251.
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Deeds §§ 180–183.
Descent and Distribution § 233.
Elections § 144.
Exchange of Property §§ 46–55.
Executors and Administrators § 629.
Fire Insurance §§ 178, 414–417.
Frauds, Statute of §§ 150, 419.
Fraudulent Conveyances § 98.
Guaranty §§ 69–75.
Husband and Wife §§ 221–223, 228–232, 313–316½, 371, 384, 385, 661.
Judges § 99.
Landlord and Tenant §§ 26, 27, 1947.
Levees § 15.
Life Insurance §§ 469 et seq, 615 et seq.
Limitations of Actions §§ 621, 1178.
Master and Servant § 19.
Mechanics' Liens §§ 151, 169.
Mines and Minerals §§ 537, 538, 595, 596.
Modern Civil Law §§ 166, 211, 344.
Mortgages §§ 328, 815, 956.
Municipal Corporations §§ 783, 2239–2244, 2571–2573, 4106.
Mutual Benefit Insurance §§ 59–63, 193.
Partition §§ 45, 46.
Partnership § 310.
Payment §§ 71–74.
Public Lands §§ 291, 552.
Railroads §§ 184, 531.
Sales [35 Cyc 127 et seq].
Stipulations [36 Cyc 1293].
Vendor and Purchaser [39 Cyc 1354 et seq].
See generally Cancellation of Instruments 9 C. J. p 1154; Contracts § 621 et seq.

"Rescission at law" distinguished from "rescission in equity" see Cancellation of Instruments § 2.

[85] Bates v. United Constr. Co., 81 Cal. A. 295, 253 P 328, 329.

[86] Powell v. F. C. Linde Co., 29 Misc. 419, 421, 60 NYS 1044; Cheek v. Metzer, 116 Tex. 356, 291 SW 860, 863 [quot Cyc]; Adams v. Loftin, (Tex. Civ. A.) 1 SW (2d) 426, 430 [cit Cyc].

[87] Dooley v. Stillson, 46 R. I. 332, 128 A 217, 218.

"Abandonment" § 1 et seq.

[88] Sanborn v. Ballanfonte, 98 Cal. A. 482, 277 P 152, 153.

"Cancellation" 5 C. J. p 1153. See also Cancellation of Instruments §§ 1, 2.

[89] Vance v. Baldwin, (Man.) 59 DomLR 336, 337, [1921] 1 WestWkly 932.

"Determination" 18 C. J. p 983.

[90] R. J. Caldwell Co. v. Connecticut Mills Co., 225 App. Div. 270, 232 NYS 625, 632.

"Modification" 40 C. J. p 1486.

[91] Cancellation of Instruments § 3.

"Reformation" 53 C. J. p 820.

[92] Dooley v. Stillson, 46 R. I. 332, 128 A 217, 218.

"Repudiation" ante.

[93] Sanborn v. Ballanfonte, 98 Cal. A. 482, 277 P 152, 153.

[94] Bridgeton v. Fidelity, etc., Co., 88 N. J. L. 645, 650, 96 A 918.

[95] Bigelow Fraud [quot Mutual L. Ins. Co. v. Rose, 294 Fed. 122].

"In pais" see In 31 C. J. p 358 text and note 82.

[96] Black L. D.

"Counterpart" 15 C. J. p 378.

"Copy" 13 C. J. p 933.

"Duplicate" 19 C. J. p 836.

[97] Anderson L. D.

[98] Anderson L. D.

RESCUE

By Francis J. Ludes

[Matters not in this Title, treated elsewhere in this Work, see Cross References infra this page]

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CROSS REFERENCES

Breaking jail see **Escape** 21 C. J. p 825.
Civil liability:
  Generally see **Torts** [39 Cyc 408].
  Of officer permitting escape or rescue see **Prisons** §§ 65–69; **Sheriffs and Constables** [35 Cyc 1735].
  Rescuing animals see **Animals** §§ 679–682.
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Interference with officer making arrest see **Obstructing Justice** 46 C. J. p 867.
Obstructing execution of process see **Obstructing Justice** §§ 2–15.
Penal action for pound breach see **Animals** §§ 683, 684.
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Rescue as riot see **Riot** § 4.
Resisting officer see **Obstructing Justice** 46 C. J. p 867.

I. RESCUE OF PERSONS

[§ 1] **A. Definition.** Rescue at common law is the forcibly and knowingly freeing another from arrest or imprisonment.[1]

[§ 2] **B. Nature and Elements of Offense—1. In General—a. At Common Law.** Rescue consists in a high contempt of the law in preventing the operation of its process,[2] and may be either a capital offense or a misdemeanor.[3] The rescue of a traitor is treason;[4] of a felon, felony;[5] of a misdemeanant, a misdemeanor;[6] and of a person confined on civil process, a misdemeanor.[7] Rescuing a supposed felon, at common law, is felony, although he be not indicted.[8] The essential elements of the offense, at common law, are: (1) Valid arrest;[9] (2) actual custody;[10] (3) the forcibly and knowingly freeing a person from arrest or custody;[11] and (4) escape of the prisoner.[12]

[§ 3] **b. Under Statutes.** In some jurisdictions rescue is made an offense by statute, and such statutes are generally declaratory of the common law,[13] but some statutes enlarge the offense.[14] In the absence of a statutory requirement to the contrary no effort on the part of the prisoner is necessary,[15] and his deliverance may be effected by the intervention of others without his coöperation.[16] Further, it is immaterial whether the person liberated was charged with an offense against the state[17] or a municipality;[18] and the person rescued need not have been arraigned,[19] or his guilt established.[20] Such statutes do not apply to an evasion of punishment by a convicted defendant, who was on bail, by procuring another to serve his sentence for him.[21]

[§ 4] **2. Valid Arrest or Imprisonment—a. In General.** It is necessary that the arrest[22] or imprisonment[23] of the party rescued be legal, for it is lawful for another to rescue him without violence,[24] where unlawfully arrested[25] or imprisoned;[26] but the contrary has in the absence of a statutory requirement been held as to persons imprisoned.[27] Where the arrest is invalid, the officer is guilty of an affray in attempting to hold the prisoner by force against the efforts of himself and friends.[28] The validity of the arrest, however, cannot be determined by a rescue.[29] Even when the arrest is illegal, third parties have no right to assault an officer to effect a rescue.[30]

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[1] 4 Blackstone Comm. p 131 [quot Rome v. Omburg, 22 Ga. 67, 69].

[a] **Other definitions.**—(1) Rescue is "when a man, lawfully arrested and taken, is set at large wrongfully." Coke Litt. p 160*b*; Comyns Dig. [quot State v. Mazyck, 37 S. C. L. 291, 292]. (2) Rescue is a deliverance of a prisoner from lawful custody by any third person. State v. Carivey, 190 N. C. 319, 129 SE 802.

[b] **Statutory definitions.**—(1) "Every person who by force sets at liberty or rescues any person who, before conviction, stands committed for any capital crime against the United States, or who by force sets at liberty or rescues any person committed for or convicted of any offense other than capital, shall be fined not more than $500, and imprisoned not more than one year." Rev. St. (1878) § 5401 [quot U. S. v. Clapox, 35 Fed. 575, 13 Sawy. 349]. (2) "Rescue is the forcibly and knowingly freeing another from arrest or imprisonment." Cr. Code § 4478 [quot Robinson v. State, 82 Ga. 535, 9 SE 528]. (3) "Whoever obstructs the execution of any legal process, or who shall forcibly free any person from legal arrest knowing such person to be under arrest, shall be fined," etc. Rev. St. (1881) § 2034 [quot Brunson v. State, 97 Ind. 95, 96]. (4) "A person who, by force or fraud, rescues a prisoner from lawful custody, or from an officer or other person having him in lawful custody, is guilty of a felony, if the prisoner was held upon a charge, commitment, arrest, conviction, or sentence of felony; and if the prisoner was held upon a charge, arrest, commitment, conviction or sentence for misdemeanor, the rescuer is guilty of a misdemeanor." Pen. Code § 1692 [quot Peo. v. Marks, 75 Misc. 404, 135 NYS 523, 27 N. Y. Cr. 109].

Cross references:
"Escape" defined see Escape § 1.
"Prison breach" defined see Prisons § 6.
"Rescue" distinguished from "escape" and "prison breach" see Escape § 9.

[2] State v. Mazyck, 37 S. C. L. 291.

[3] State v. Mazyck, supra.

[4] 4 Blackstone Comm. p 131.

[5] Rex v. Haswell, R. & R. 458, 168 Reprint 896; 4 Blackstone Comm. p 131.

[6] Rex v. Pember, Cas. t. Hardw. 112, 95 Reprint 70; Rex v. Stokes, 5 C. & P. 148, 24 ECL 498, 172 Reprint 916; Rex v. Vaux, 11 Mod. 287, 88 Reprint 1044; Rex v. Belt, 2 Salk. 586, 91 Reprint 491; 4 Blackstone Comm. p 131.

[7] State v. Mazyck, 37 S. C. L. 291; Reg. v. Allan, C. & M. 295, 41 ECL 164, 174 Reprint 513.

[8] Anonymous, Jenk. 171, 145 Reprint 112; Dyer 99 pl. 60.

[9] See infra § 4.

[10] See infra § 6.

[11] See infra § 7.

[12] See infra § 8.

[13] See statutory provisions.

[a] **Burns St. Annot. (1908) § 2400,** providing that whoever, not being a person having the lawful custody of any prisoner charged with or convicted of a felony, shall aid in or accomplish the escape of such prisoner, shall, on conviction, be punished, etc., includes cases where the accused with force aids or accomplishes the escape of a prisoner charged with or convicted of a felony, under such circumstances as would be a rescue at common law. State v. Sutton, 170 Ind. 473, 84 NE 824.

[b] **Pen. Code § 1692** extends to a case where an officer or other person holds one in lawful custody prior to arraignment, "charge" and "arrest" relating to a case where an officer or other person holds a prisoner under lawful custody on a charge of, or arrest for, a felony or misdemeanor, and the terms "commitment," "conviction," and "sentence" relate to a case where an officer or another holds a person under lawful custody after he has been judicially held under a commitment, conviction, or sentence for felony or misdemeanor. Peo. v. Marks, 75 Misc. 404, 135 NYS 523, 27 N. Y. Cr. 109.

[14] See statutory provisions; and infra § 4.

[15] Robinson v. State, 82 Ga. 535, 9 SE 528; Peo. v. Marks, 75 Misc. 404, 135 NYS 523, 27 N. Y. Cr. 109.

[16] Robinson v. State, 82 Ga. 535, 9 SE 528; Peo. v. Marks, 75 Misc. 404, 135 NYS 523, 27 N. Y. Cr. 109.

[17] Dunson v. Baker, 144 La. 167, 80 S 238.

[18] Dunson v. Baker, supra.

[19] Peo. v. Marks, 75 Misc. 404, 135 NYS 523, 27 N. Y. Cr. 109.

[20] Fluty v. Com., 105 SW 138, 32 KyL 89.

[21] Biskind v. U. S., 281 Fed. 47, 28 ALR 1377.

[22] Com. v. Lee, 107 Mass. 207; State v. Dunn, 25 N. J. L. 214; Reg. v. Tooley, 2 Ld. Raym. 1296, 92 Reprint 349.

[a] **In England** an arrest, founded on a warrant of a justice of the peace, issued on the certificate of the clerk of the peace that an indictment for a misdemeanor had been found against the party named therein, is valid. Rex v. Stokes, 5 C. & P. 148, 24 ECL 498, 172 Reprint 916.

[23] Peo. v. Ah Teung, 92 Cal. 421, 28 P 577, 15 LRA 190.

[24] State v. Armistead, 106 N. C. 639, 10 SE 872.

[25] State v. Rollins, 113 N. C. 722, 18 SE 394.

[26] Peo. v. Ah Teung, 92 Cal. 421, 28 P 577, 15 LRA 190.

[a] **When the imprisonment is unlawful,** and itself a crime, the reason which makes rescue an offense does not exist; and in such a case the right of liberty is absolute, and he who assists the prisoner to regain it is not guilty of the technical offense of rescue. Peo. v. Ah Teung, 92 Cal. 421, 28 P 577, 15 LRA 190.

[b] **Informality of process** does not invalidate an arrest or confinement so as to justify a rescue. State v. Murray, 15 Me. 100; State v. Armistead, 106 N. C. 639, 10 SE 872.

[27] Starks v. State, 38 Tex. Cr. 233, 42 SW 379.

[a] **Omission of word "legally" in**

[§ 5] **b. Knowledge of Rescuers.** When the rescue is made from the custody of a private person, the rescuers must have actual knowledge of the lawfulness of the custody to be guilty,[31] but when the party rescued is in the custody of an officer, they act at their peril.[32]

[§ 6] **3. Actual Custody.** The party rescued must be in actual custody, but whether in the custody of an officer[33] or of a private person[34] is immaterial. Custody means in a prison,[35] jail,[36] or calaboose,[37] as well as in the hands of an officer.[38]

[§ 7] **4. Necessity of Force.** At common law[39] and under some statutes[40] the rescue must be made forcibly,[41] but under statutes in other jurisdictions[42] a rescue may be made by menaces of bodily harm[43] or other unlawful means.[44]

[§ 8] **5. Escape of Prisoner.** The escape of the party rescued is essential to the consummated offense of rescue.[45]

[§ 9] **C. Accomplices, Aiders, and Abettors.**[46] A prisoner who assists outsiders in effecting the escape of himself and other prisoners is an accomplice in the crime of rescue.[47] One who is present, aiding in the commencement of an assault with intent to rescue a prisoner, does not cease to be guilty because his fears prevent his going all lengths with his party.[48]

[§ 10] **D. Attempts**[49]**—1. In General.** At common law, upon a failure to accomplish a rescue, the "would be" rescuers may be convicted of an attempt,[50] and in some jurisdictions such attempts have been made criminal by statute,[51] some of them enlarging the common-law offense.[52]

[§ 11] **2. Rights of Officer Resisting Attempt.**[53] When an attempt is made to rescue persons lawfully arrested, an officer may arrest the persons attempting the rescue,[54] using such force as is necessary to make the arrest,[55] and is justified in using excessive force,[56] provided he acts in good faith and without malice.[57]

[§ 12] **E. Indictment or Information**[58]**—1. Essential Allegations and Averments—a. In General.** The indictment or information must charge the essential elements of the offense[59] such, for example, as that the party rescued was held under lawful arrest[60] or imprisonment,[61] or should state the facts or circumstances from which the court can see that the prisoners were lawfully in jail.[62] It should also state the nature[63] and cause[64] of the imprisonment of the person alleged to have been rescued, although the contrary has been held.[65] The indictment should state whether the person from whom the rescue was made was a public officer[66] or a private person.[67]

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the statute relating to persons confined in jail, authorizes a conviction of any person who shall break into jail for the purpose of effecting the rescue of a prisoner therein confined, regardless of whether his arrest was legal or illegal. Starks v. State, 38 Tex. Cr. 233, 42 SW 379.

[28] State v. Rollins, 113 N. C. 722, 18 SE 394.

Affray generally see 2 C. J. p 383.

[29] State v. Armistead, 106 N. C. 639, 10 SE 872. See State v. Garrett, 80 Iowa 589, 46 NW 748 (when charge was of resisting an officer).

[30] State v. Rollins, 113 N. C. 722, 18 SE 394; State v. Armistead, 106 N. C. 639, 10 SE 872; Rex v. Almey, 3 Jur. N. S. 750. See State v. Garrett, 80 Iowa 589, 46 NW 748 (where charge was of resisting an officer).

[31] State v. Sutton, 170 Ind. 473, 84 NE 824; State v. Hilton, 26 Mo. 199.

[32] U. S. v. Buck, 24 F. Cas. No. 14,680, 4 Phila. (Pa.) 161; State v. Sutton, 170 Ind. 473, 84 NE 824; State v. Hilton, 26 Mo. 199.

[a] **Failure to inquire,** when inquiry would readily show the custody lawful, is evidence of knowledge. U. S. v. Buck, 24 F. Cas. No. 14,680, 4 Phila. (Pa.) 161.

[33] 1 Hale P. C. p 606.

[a] **An affidavit charging that defendant** rescued a prisoner from the custody of a deputy sheriff shows a rescue from a public officer, deputy sheriffs being clothed with the same duties and powers devolving upon their principals. State v. Sutton, 170 Ind. 473, 84 NE 824.

[34] 1 Hale P. C. p 606.

[35] 1 Hale P. C. p 606.

[36] Hillian v. State, 50 Ark. 523, 8 SW 834; Starks v. State, 38 Tex. Cr. 233, 42 SW 379.

[37] State v. Watson, 66 Iowa 670, 24 NW 268; Starks v. State, 38 Tex. Cr. 233, 42 SW 379.

[38] 1 Hale P. C. p 606.

"Custody" defined see 17 C. J. p 440.

[39] State v. Armistead, 106 N. C. 639, 10 SE 872; 4 Blackstone Comm. p 131; Bacon Abr. tit "Rescue" A p 87.

[40] See statutory provisions.

[41] Biskind v. U. S., 281 Fed. 47, 28 ALR 1377.

[42] See statutory provisions.

[43] Hillian v. State, 50 Ark. 523, 8 SW 834.

[44] Hillian v. State, supra.

[45] Hillian v. State, supra.

[46] **Evidence of accomplice** see infra § 17.

Who are accomplices, aiders, abettors, or accessaries generally see Criminal Law §§ 99–161.

[47] Hillian v. State, 50 Ark. 523, 8 SW 834.

[48] State v. Morris, 10 N. C. 388.

[49] **Attempts generally** see Criminal Law §§ 90–96.

[50] State v. Murray, 15 Me. 100; State v. Morris, 10 N. C. 388; 2 Bishop Cr. L. § 1089 (8th ed 1892); 3 Wharton Cr. L. § 2011 (11th ed 1912).

[51] See statutory provisions; and U. S. v. Buck, 24 F. Cas. No. 14,680, 4 Phila. (Pa.) 161; State v. Carivey, 190 N. C. 319, 129 SE 802.

[52] See statutory provisions; and Starks v. State, 38 Tex. Cr. 233, 42 SW 379 (holding legality of imprisonment immaterial under Penal Code).

[53] **Homicide of rescuer** see Homicide § 199.

[54] State v. Rollins, 113 N. C. 722, 18 SE 394.

Arrest by officer of person interfering with him generally see Arrest § 34.

[55] State v. Rollins, 113 N. C. 722, 18 SE 394.

[56] State v. Rollins, supra.

[57] State v. Rollins, supra.

[58] **Indictment or information generally** see Indictments and Informations 31 C. J. p 548.

[59] **Elements of offense** see supra §§ 2–8.

[60] Com. v. Lee, 107 Mass. 207; State v. Dunn, 25 N. J. L. 214.

[61] State v. Jones, 78 N. C. 420.

[62] State v. Jones, supra.

[63] Com. v. Clark, 4 KyL 622; State v. Hilton, 26 Mo. 199.

[64] Com. v. Clark, 4 KyL 622; State v. Hilton, 26 Mo. 199.

[a] **Indictment held defective** which merely charged prisoner was lawfully in custody, without a presentation of facts. Com. v. Clark, 4 KyL 622.

[65] Com. v. Lee, 107 Mass. 207.

[66] State v. Hilton, 26 Mo. 199.

[67] State v. Hilton, supra.

It is not necessary to set forth in the indictment the process by which the party rescued was held.[68]

[§ 13] **b. Under Statutes.** The indictment should charge all the elements of the offense as defined by statute.[69] An affidavit on which an information is based must charge that defendant forcibly freed the person under custody[70] knowing him to be under arrest,[71] unless the facts and circumstances are alleged.[72] Some statutes so define the offense as to make certain averments unnecessary, which are essential to the validity of an indictment for the common-law offense.[73]

[§ 14] **2. Joinder of Offenses; Included Offenses.** When a general verdict of guilty is returned on an indictment charging assault and battery, as well as rescue, if the averments as to rescue are uncertain or bad they may be rejected as superfluous,[74] and judgment entered as for the assault and battery.[75] Statutes in some jurisdictions[76] permit a conviction for assault and battery upon an indictment for rescue.[77]

[§ 15] **3. Variance.** There is no variance between an allegation charging that the prisoner was rescued from the custody of a marshal, and proof that he was rescued from one claiming to be special constable, where it appears that the justice of the peace who committed him appointed the marshal special constable to place him in the county jail—under a mistake of law, thinking said marshal had no such power, whereas he had such power without a special appointment.[78]

[§ 16] **F. Evidence[79]—1. Admissibility.** General rules control as to the admissibility of evidence in prosecutions for rescue.[80] Evidence which tends to show the identity of the parties connected with the crime is admissible.[81]

[§ 17] **2. Weight and Sufficiency.** The weight and sufficiency of the evidence to support a conviction of rescue is determined by the rules governing the weight and sufficiency of the evidence in criminal prosecutions generally.[82] Testimony of an accomplice will not support a conviction,[83] unless corroborated in some material matter tending to show the guilt of the accused.[84]

[§ 18] **G. Defenses.** If the rescue was effected without violence[85] it is a good defense that the party rescued was unlawfully arrested[86] or imprisoned,[87] although in some jurisdictions rescue is an offense regardless of the legality of the imprisonment.[88] Ignorance of the lawfulness of the arrest or custody is a good defense, where the rescue is made from the custody of a private person;[89] but where the rescue is made from the custody of an officer, the rescuers must take notice of the lawfulness of the custody at their peril.[90] The accused can plead a conviction for aiding in the escape of one prisoner, to an indictment for rescuing and aiding in the escape of another, where both escaped at the same time and by the same means.[91] It is no defense to an indictment for an attempt to rescue, that the ordinance under which the prisoner was arrested was not proved,[92] or that the prisoner was not convicted.[93]

[§ 19] **H. Trial.** While it has been held that the rescuers could not be tried and convicted unless the person rescued had been convicted of his offense,[94] it has been held to the contrary that it is unnecessary that the guilt of the persons rescued should be established.[95]

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[68] Com. v. Lee, 107 Mass. 207.

[69] State v. Sutton, 170 Ind. 473, 84 NE 824; Brunson v. State, 97 Ind. 95.

[a] **Indictments held sufficient.**—Com. v. Malloy, 119 Mass. 347; Peo. v. Marks, 75 Misc. 404, 135 NYS 523, 27 N. Y. Cr. 109; State v. Carivey, 190 N. C. 319, 129 SE 802; Starks v. State, 38 Tex. Cr. 233, 42 SW 379; Williams v. State, 24 Tex. A. 17, 5 SW 655.

[b] **Indictment held insufficient** which charged a rescue of a person in the lawful custody of an officer under a warrant issued in bastardy proceedings, because the person rescued was not charged with an "offense." State v. Ward, 8 OhNPNS 561.

[c] **Following language of statute.**—An indictment which follows the language of the statute is ordinarily sufficient. State v. Sutton, 170 Ind. 473, 84 NE 824; Fulty v. Com., 105 SW 138, 32 KyL 89.

[d] **Attempt to commit rescue.**—An indictment charging release of a prisoner from a cell into the hallway of the jail, with the intent that the prisoner should escape jail, is a charge of an attempt to commit rescue. State v. Carivey, 190 N. C. 319, 129 SE 802.

[70] Brunson v. State, 97 Ind. 95.

[71] Brunson v. State, supra.

[72] State v. Sutton, 170 Ind. 473, 84 NE 824.

[a] **Knowledge of defendant.**—An indictment charging that defendant unlawfully and forcibly aided in the escape of a prisoner from the deputy sheriff by "drawing and pointing a shot gun" at such deputy and by assaulting his assistants, without alleging that accused knew that such prisoner was held in custody, was sufficient. State v. Sutton, 170 Ind. 473, 84 NE 824.

[73] See statutory provisions; and cases infra this note.

[a] **Knowledge of defendant.**—The statute does not make knowledge of the authority of the officer one of the ingredients of the offense, and it need not be averred. Com. v. Malloy, 119 Mass. 347.

[b] **"Willfully" and by "force."**—It is not necessary that the indictment charge the offense as done "willfully" and by "force," such words not occurring in the statute. Loggins v. State, 32 Tex. Cr. 358, 24 SW 408.

[74] State v. Morrison, 24 N. C. 9.

[75] State v. Morrison, 24 N. C. 9.

[76] See statutory provisions.

[77] Rose v. State, 33 Ind. 167.

[78] State v. Watson, 66 Iowa 670, 24 NW 268.

[79] **Evidence generally** see Criminal Law §§ 947–1999.

[80] See Criminal Law §§ 947–1558.

[81] Williams v. State, 24 Tex. A. 17, 5 SW 655; Gillian v. State, 3 Tex. A. 132.

[a] **Res gestæ.**—Evidence as to the names used by the rescuers to designate each other at the time of the rescue is admissible as part of the res gestæ. Gillian v. State, 3 Tex. A. 132.

[82] See Criminal Law §§ 1559–1999.

[a] **Evidence held sufficient.**—(1) In general. Bowlin v. State, 175 Ark. 1047, 1 SW (2d) 546. (2) To show a breaking into jail. Williams v. State, 24 Tex. A. 17, 5 SW 655.

[83] Hillian v. State, 50 Ark. 523, 8 SW 834; Gillian v. State, 3 Tex. A. 132.

[84] Hillian v. State, 50 Ark. 523, 8 SW 834; Gillian v. State, 3 Tex. A. 132.

[a] **Evidence held insufficient.**—Gillian v. State, 3 Tex. A. 132.

[85] State v. Garrett, 80 Iowa 589, 46 NW 748; State v. Rollins, 113 N. C. 722, 18 SE 394; State v. Armistead, 106 N. C. 639, 10 SE 872; Rex v. Almey, 3 Jur. N. S. 750.

[a] **The unlawfulness** of the arrest or imprisonment is no defense, where the rescue is violent. State v. Garrett, 80 Iowa 589, 46 NW 748.

[86] State v. Rollins, 113 N. C. 722, 18 SE 394.

[87] Peo. v. Ah Teung, 92 Cal. 421, 28 P 577, 15 LRA 190.

[88] Starks v. State, 38 Tex. Cr. 233, 42 SW 379.

[89] State v. Hilton, 26 Mo. 199.

[90] State v. Hilton, supra.

[91] Hurst v. State, 86 Ala. 604, 6 S 120, 11 AmSR 79.

[92] State v. Garrett, 80 Iowa 589, 46 NW 748.

[93] State v. Garrett, supra.

[§ 20] **I. Punishment.**[96] At common law a party convicted of rescue is guilty of the same grade of offense as the party rescued, and is punishable accordingly,[97] and the rescuer of one confined on civil process is punishable as for the commission of a misdemeanor;[98] but in most jurisdictions the punishment is now regulated by statute.[99]

II. RESCUE OF PROPERTY[1]

[§ 21] **A. Definition.** Rescue of property is the taking away and setting at liberty of a distrained animal against law,[2] or the reception of goods distrained.[3]

[§ 22] **B. Nature and Elements of Offense.**[4] To constitute a rescue of property there must be: (1) Actual possession in the party from whom the property is taken;[5] and (2) a taking away,[6] knowingly.[7] Rescuing goods distrained for rent is indictable at common law;[8] but an indictment for rescue will not lie for a trespass on property.[9] Although there is authority to the contrary,[10] it has been held that, where an officer makes an unlawful levy, defendants are not guilty of a rescue of the property, if they can retake possession of it peaceably;[11] aliter if they commit a breach of the peace.[12]

[§ 23] **C. Indictment and Information[13]—1. In General.** The indictment must lay the property in some person[14] and show the judgment and execution under which the goods were taken.[15] The indictment must aver that the rescue was made with knowledge of the lawfulness of the custody.[16]

[§ 24] **2. Under Statutes.** An indictment, under a statute, must contain all the circumstances which constitute the definition of the offense in the act, so as to bring defendants precisely within it.[17] An indictment following the language of the statute may be insufficient, as where it does not state with sufficient certainty what acts were done that constitute the offense charged.[18] In an indictment for taking goods from the custody of a sheriff, an allegation that the sheriff was the owner of the goods is not demurrable,[19] as the sheriff is the bailee in possession.[20]

[§ 25] **D. Evidence.**[21] The conduct of persons who attempt to rescue goods is competent for the consideration of the jury.[22]

[§ 26] **E. Defenses.** It is no defense in some jurisdictions that the seizure of the property was unlawful,[23] but in other jurisdictions the contrary has been held[24] unless a breach of the peace was committed in making the rescue.[25]

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[94] State v. Cuthbert, T. U. P. Charlt. (Ga.) 13.

[95] Fluty v. Com., 105 SW 138, 32 KyL 89.

[96] **Punishment generally** see Criminal Law §§ 3186-3255.

[97] State v. Mazyck, 37 S. C. L. 291.

[98] State v. Mazyck, supra; Reg. v. Allan, C. & M. 295, 41 ECL 164, 174 Reprint 513.

[99] See statutory provisions.

[1] **Rescue of animals** see Animals §§ 676-684.

[2] See Animals § 676.

[3] Com. v. Israel, 4 Leigh (31 Va.) 675; 6 Bacon Abr. tit "Rescue" A p 87.

[4] **Right to resist levy on property of third person** see Obstructing Justice § 13.

[5] Vinton v. Vinton, 17 Mass. 342; Hamlin v. Mack, 33 Mich. 103.

[6] Vinton v. Vinton, 17 Mass. 342; Hamlin v. Mack, 33 Mich. 103.

[7] Com. v. Israel, 4 Leigh (31 Va.) 675.

[a] **Where rescued from an officer,** defendant acts at his peril, but when rescued from a private person, defendant must actually know of the lawfulness of the possession. Com. v. Israel, 4 Leigh (31 Va.) 675.

[8] Com. v. Beale, 5 Pick. (Mass.) 514.

[9] State v. Mazyck, 37 S. C. L. 291.

[10] State v. Cassidy, 4 S. D. 58, 54 NW 928.

[11] Spencer v. McGowen, 13 Wend. (N. Y.) 256; Finn v. Com., 6 Pa. 460; State v. Sotherlen, 16 S. C. L. 414.

[12] Finn v. Com., 6 Pa. 460.

[13] **Indictment or information generally** see Indictments and Informations 31 C. J. p 548.

[14] Reg. v. Lilly, 7 Mod. 63, 87 Reprint 1097.

[15] Reg. v. Lilly, supra.

[16] Com. v. Israel, 4 Leigh (31 Va.) 675.

[a] **Indictment held defective** which charged defendant with the rescue of property, which had been distrained by the sheriff for public dues, from a bailee to whose safekeeping the the sheriff had committed it, as it did not aver defendant knew by what right such bailee held the property. Com. v. Israel, 4 Leigh (31 Va.) 675.

[17] State v. Barrett, 42 N. H. 466.

[a] **Indictment held sufficient.**—Com. v. Hubbard, 24 Pick. (Mass.) 98.

[b] **Indictment held insufficient.**—State v. Barrett, 42 N. H. 466.

[18] U. S. v. Ford, 34 Fed. 26.

[19] State v. Clapper, 59 Iowa 279, 13 NW 294.

[20] State v. Clapper, supra.

[21] **Evidence generally** see Criminal Law §§ 947-1999.

[22] U. S. v. Ford, 33 Fed. 861.

[23] State v. Cassidy, 4 S. D. 58, 54 NW 928.

[24] Shipman v. Clark, 4 Den. (N. Y.) 446, 47 AmD 264; Spencer v. McGowen, 13 Wend. (N. Y.) 256; Finn v. Com., 6 Pa. 460; State v. Sotherlen, 16 S. C. L. 414.

[25] Shipman v. Clark, 4 Den. (N. Y.) 446, 47 AmD 264; Spencer v. McGowen, 13 Wend. (N. Y.) 256; Finn v. Com., 6 Pa. 460.

***RES DENOMINATUR A PRINCIPALIORI PARTE.**[1]

RES DERELICTA.[2] That [property] from which the mind has simply withdrawn affection.[3]

RESEARCH. The method used by modern universities and scientific foundations to increase the sum of human knowledge.[4]

RESELL.[5] To sell again.[6]

Phrase: "Engaging in the business of reselling tickets."[7]

RESEMBLANCE.[8]

RESENTENCE.[9]

RESERVATION.[10] That which is reserved, kept back, withheld;[11] a keeping aside or providing.[12]

Phrases: "On said reservation,"[13] "reservation by widowed spouse,"[14] "reservation of public lands,"[15] "reservation of the minerals,"[16] "should constitute a reservation,"[17] and "statutory reservation;"[18] also "make such reservations in the order provided for their issuance."[19]

RESERVATIO NON DEBET ESSE DE PROFICUIS IPSIS QUIA EA CONCEDUNTUR, SED DE REDDITU NOVO EXTRA PROFICUA.[20]

RESERVATIO UT ET PROTESTATIO NON FACIT JUS, SED TUETUR.[21]

RESERVATIVO.[22]

RESERVE.[23] [§ 1] **A. In General.** Reserve cometh from the Latin word "reservo" that is to pro-

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[1] A maxim meaning "The thing is named from its principal part." Peloubet Leg. Max.

[a] **Applied in:** Littleton's Case, 5 Coke 47a, 47b, 77 Reprint 126, 127.

[b] **Another form** reads "principali" instead of "principaliori." See Black L. D.

[2] See Abandonment § 1 et seq; Dereliction 18 C. J. p 787.

[3] Rhodes v. Whitehead, 27 Tex. 304, 313, 84 AmD 631.

[a] **"Property in this predicament was considered** to have fallen back into the natural state of res nullius, and consequently to be again susceptible of becoming the property of the occupant." Rhodes v. Whitehead, 27 Tex. 304, 313, 84 AmD 631.

[4] In re Frasch, 245 N. Y. 174, 156 NE 656, 658.

[5] See Resale ante.

[6] Century D.

[a] **"We should interpret the meaning** of the word 'resell' in the light of general customs of trade and business with reference to the sale of the commodity dealt with." Arkansas Cotton Growers' Co-op. Assoc. v. Brown, 168 Ark. 504, 270 SW 946, 950.

[7] Com. v. Sovrensky, (Mass.) 169 NE 418, 419.

[8] See Evidence §§ 715–723.

[9] See Criminal Law §§ 3096–3101.

[10] **Reservation:**

- Creating easement see Easements §§ 97–101, 113.
- Distinguished from "exception" see Deeds § 339; Easements § 100.
- Including lands in school grant see Public Lands § 167.

Reservation as subject of:

- Construction see Covenants § 12.
- Estoppel § 36 note 47 [a].
- Parol in evidence see Evidence §§ 1480, 1498, 1507.

Reservation for:

- Indians §§ 46, 47.
- Public purposes see Eminent Domain § 74.

Reservation in:

- Deeds §§ 339, 366.
- Instrument relating to boundary see Boundaries § 35.
- Mining patent see Mines and Minerals § 368.
- Mortgages §§ 247, 335 note 74.

Reservation of:

- Assets see Executors and Administrators § 1423.
- Case for review see Appeal and Error § 46; Criminal Law § 3358.
- Fishing rights of Indians see Fish § 35.
- Grounds for review see Appeal and Error §§ 580–950; Criminal Law §§ 3328–3354.
- Growing crops see Vendor and Purchaser [39 Cyc 1627].
- Lien resulting in mortgage see Mortgages §§ 43, 46.
- Power:
  - Generally see Powers §§ 14, 15.
  - Of revocation see Fraudulent Conveyances § 348; Powers § 157.
  - To direct application of proceeds see Fraudulent Conveyances § 350.
  - To substitute trustee see Fraudulent Conveyances § 352.
- Property exempt by law see Fraudulent Conveyances § 354.
- Public lands:
  - Generally see Public Lands §§ 142–150.
  - On power to acquire mineral claim see Indians §§ 48–50.
  - To Indians see Indians §§ 43–100.
- Question:
  - For review see Appeal and Error §§ 46, 580–950, 1370; Criminal Law §§ 3328–3355; Insolvency § 288; Justices of the Peace §§ 416–418.
  - Of law, basis of judgment non obstante veredicto see Judgments § 115.
- Rents and profits see Vendor and Purchaser [39 Cyc 1629 note 91].
- Right to repurchase see Fraudulent Conveyances § 351.
- Surplus proceeds see Fraudulent Conveyances § 349.
- Timber see Logs and Logging §§ 19–24½.

Reservation to:

- Arbitrators of authority see Arbitration and Award § 340.
- Assignor:
  - For creditors see Assignments for Benefit of Creditors §§ 187–203.
  - Of judgment and right to collect see Judgments § 990 note 93.
- Creditor of obligee of rights against surety see Principal and Surety §§ 196, 253.
- Debtor see Assignments for Benefit of Creditors §§ 187–203; Fraudulent Conveyances § 51.
- Dedicator see Dedication § 136.
- Grantor:
  - As badge of fraud see Fraudulent Conveyances § 152.
  - In deed of trust, of right to possess and enjoy see Landlord and Tenant § 34.
- Infant, of day in court see Infants § 362.
- Insurance company, of right to cancel policy see Fire Insurance § 159.
- Landlord:
  - Of option to renew, sell, or extend see Landlord and Tenant § 198.
  - Of sporting rights see Game § 5.
  - Of rent see Landlord and Tenant § 8.
- Legislature, of power to amend or repeal corporate charter see Constitutional Law §§ 648–688.
- Lessee, in sublease, of rent and right of reëntry see Landlord and Tenant § 82.
- Married woman:
  - Of disposing power see Husband and Wife § 426 note 19 [a].
  - Of judgment lien in husband's land, in deed see Husband and Wife § 108.
- Other than owner of right to fish see Fish § 13 note 99.

Reserve post.

[11] Standard D. [quot Alberger v. Kingsbury, 6 Cal. A. 93, 97, 91 P 674]; Meehan v. Jones, 70 Fed. 453, 454, 455.

"Appropriation" distinguished see Appropriation 4 C. J. p 1458 note 60 [d].

[12] Jacob L. D. [quot Parsell v. Stryker, 41 N. Y. 480, 483; Stephens v. Reynolds, 6 N. Y. 454, 458; Wegner v. Lubenow, 12 N. D. 95, 102, 95 NW 442 (definition given under word "rent")].

[13] De Noya v. Hill Inv. Co., 33 Okl. 663, 127 P 444, 446.

[14] Dizon v. Galang, 48 Philippine 601, 602.

[15] U. S. v. Laughlin, 249 U. S. 440, 39 SCt 340, 63 L. ed. 696. See also Public Lands §§ 142–150.

[16] Eardley v. Granville, 3 Ch. D. 826, 834. See also Mines and Minerals §§ 554–581.

[17] Yoakum County v. Slaughter, 109 Tex. 42, 195 SW 1129, 1132.

[18] Carrier v. Roy, 46 Que. Super. 122, 123.

[19] Fales v. Multnomah County, 119 Or. 127, 248 P 151, 153.

[20] A maxim meaning "A reservation ought not to be of the profits themselves, because they are granted, but from the new rent and out of the profits." Peloubet Leg. Max.

[a] **Applied** in Coke Litt. 142a.

[21] A maxim meaning "Reservation and protest do not create a right, but protect a right." Peloubet Leg. Max.

[22] See Censo § 2 note 34.

[23] See also Reservation ante.

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*By Carolan Jefferson Walsh (Res Deucminatur a Principaliori Parte–Residuary inclusive).

vide for store.[24]

[§ 2] **B. As Noun.**[25] That which is reserved.[26]

Phrases: "Contingency reserve,"[27] "Indian reserve,"[28] "in reserve,"[29] "railroad reserve,"[30] "reinsurance reserve,"[31] "without reserve,"[32] and "with the reserve."[33]

[§ 3] **C. As Adjective.** The word is also used adjectively,[34] in which case it may be interchangeable with "emergency."[35]

Reserve section. In practice, a section of the day calendar, consisting of causes which appear on the day calendar for the first time, and which are not to be tried that day, but are called at the opening of court to see if they are ready.[36]

Other phrases: "Reserve dividend fund,"[37] "reserve dividend plan,"[38] and "reserve fund."[39]

[§ 4] **D. As Verb—1. In General.** To hold;[40] to hold back or except;[41] to hold or keep for future use;[42] to hold over for some future use;[43] to keep;[44] to keep back;[45] to retain;[46] "to retain something . . . already possessed;"[47] to set aside, or apart.[48]

Phrases: "Right to reserve,"[49] also "reserves all legal rights he may have."[50]

[§ 5] **2. Reserved.** Kept back;[51] kept for another or future use;[52] kept or set apart or aside for future or special use, or for an exigency;[53] retained;[54] withheld.[55] The term may be used as synonymous with "pledged,"[56] but has been distinguished from "created."[57]

Phrases: "Reserved bid,"[58] "reserved case,"[59] "reserved landing,"[60] "reserved or otherwise disposed of,"[61] "reserved or taken,"[62] "reserved percentage,"[63] and "reserved portion."[64]

[§ 6] **3. Reserving.** A keeping back or withholding.[65] The term may be used as having the force of "saving" or "excepting."[66]

Phrase: "Reserving or charging."[67]

RESERVOIR.[68] As ordinarily defined,[69] a place where water collects naturally or is stored for use when wanted,[70] as to supply a fountain, a canal,[71] or a city,[72] or for any other purpose.[73] In common speech a reservoir often signifies the water kept, not the structure in which it is kept.[74]

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[24] 2 Coke Litt. [quot Bowman v. Wathen, 3 F. Cas. No. 1,740, 2 McLean 376; Whitaker v. Brown, 46 Pa. 197, 198].

[25] **Reserve, in insurance** see Insurance § 65; Life Insurance § 18.

[26] Webster New Int. D.

[27] See Insurance § 65.

[28] See Indians § 46 note 40 [c].

[29] Nielsen v. Provident Sav. L. Assur. Soc., 139 Cal. 332, 337, 73 P 168, 96 AmSR 146. See also Life Insurance § 19.

[30] St. Louis, etc., R. Co. v. Tapp, 64 Ark. 357, 362, 42 SW 667.

[31] See Insurance § 65.

[32] See Auctions and Auctioneers § 28 note 96. See also Without [40 Cyc 2129 note 5].

[33] Palmer v. Dougherty, 33 Me. 502, 507, 54 AmD 636.

[34] See infra notes 35–39.

[35] State v. Vandiver, 213 Mo. 187, 213, 111 SW 911, 15 AnnCas 283.

"Emergency" 20 C. J. p 500 note 16 [a].

[36] Supreme Court Trial Term Calendar Rules in force in 1906 [quot Herbert Land Co. v. Lorenzen, 113 App. Div. 802, 803, 99 NYS 937].

[37] See Insurance §§ 82, 83; Life Insurance § 19.

[38] Fuller v. Metropolitan L. Ins. Co., 70 Conn. 647, 667, 41 A 4. See also Insurance §§ 82, 83; Life Insurance § 18.

[39] Figueras v. Rocha, 13 Philippine 504, 510. See also Insurance §§ 82, 83; Life Insurance § 18.

[40] Myers v. Conway, 90 Ala. 109, 111, 7 S 639; Wetzler v. Patterson, 73 Cal. A. 527, 238 P 1077, 1079.

[41] Long v. Fewer, 53 Minn. 156, 159, 54 NW 1071.

[42] Metropolitan Exhibition Co. v. Ward, 9 NYS 779, 24 AbbNCas (N. Y.) 393, 407.

[43] Webster New Int. D. [quot Grand Crossing Land, etc., Co. v. Mobridge, 39 S. D. 574, 165 NW 988, 989].

[44] Webster New Int. D. [quot Fales v. Multnomah County, 119 Or. 127, 248 P 151, 153]; Myers v. Conway, 90 Ala. 109, 111, 7 S 639; Wetzler v. Patterson, 73 Cal. A. 527, 238 P 1077, 1079.

[45] Webster New Int. D. [quot Fales v. Multnomah County, 119 Or. 127, 248 P 151, 153; Grand Crossing Land, etc., Co. v. Mobridge, 39 S. D. 574, 165 NW 988, 989].

[46] Webster New Int. D. [quot Fales v. Multnomah County, supra; Grand Crossing Land, etc., Co. v. Mobridge, supra]; Myers v. Conway, 90 Ala. 109, 111, 7 S 639; Wetzler v. Patterson, 73 Cal. A. 527, 238 P 1077, 1079; Long v. Fewer, 53 Minn. 156, 159, 54 NW 1071.

[47] Morgan v. U. S., 14 Ct. Cl. 319, 328.

[48] Webster [quot Smyth v. Brick Row Realty Co., 97 W. Va. 40, 124 SE 499, 500].

[49] Metropolitan Exhibition Co. v. Ewing, 42 Fed. 198, 201, 7 LRA 381, 24 AbbNCas 419.

[50] Masse v. Fraser, (Que.) 20 DomLR 866, 868.

[51] Century D. [quot Harris v. St. Helens, 72 Or. 377, 143 P 941, 944; Eugene v. Lowell, 72 Or. 237, 143 P 903, 904]; Zells Enc. [quot Lay v. Seago, 47 Ga. 82, 88].

[52] Century D. [quot Harris v. St. Helens, 72 Or. 377, 143 P 941, 944; Eugene v. Lowell, 72 Or. 237, 143 P 903, 904].

[53] Webster D. [quot Eugene v. Lowell, supra].

[54] Century D. [quot Harris v. St. Helens, 72 Or. 377, 143 P 941, 944; Eugene v. Lowell, 72 Or. 237, 143 P 903, 904]; Zells Enc. [quot Lay v. Seago, 47 Ga. 82, 88].

[55] Zells Enc. [quot Lay v. Seago, supra].

[56] Ferry v. Street, 4 Utah 521, 531, 7 P 712, 11 P 571 [aff 119 U. S. 385, 7 SCt 231, 30 L. ed. 439].

"Pledge" defined see Pledges § 1.

[57] Jameson v. Chanslor-Canfield Midway Oil Co., 176 Cal. 1, 167 P 369, 370.

"Create" 15 C. J. p 1344.

[58] Leckie v. Marshall, 4 OntWN 913.

[59] See Appeal and Error §§ 912–950.

[60] Grant v. Davenport, 18 Iowa 179, 186, 187.

[61] Cramer v. U. S., 261 U. S. 219, 43 SCt 342, 344, 67 L. ed. 622.

[62] Brickett v. Minot, 7 Metc. (Mass.)291, 294; Sloan v. Sommers, 14 N. J. L. 509, 514. See also Usury [39 Cyc 948].

[63] Barrett Bros. Co. v. St. Louis County, 165 Minn. 158, 206 NW 49, 50. See also Building and Construction Contracts § 31.

[64] Greenlaw's Succ., 148 La. 255, 86 S 786, 794. See also Descent and Distribution §§ 33, 116.

[65] Florida East Coast R. Co. v. Worley, 49 Fla. 297, 312, 38 S 618.

[a] **"Reserving" employed to indicate the right to redeem bonds serially.**—Fales v. Multnomah County, 119 Or. 127, 248 P 151, 153.

[66] 2 Coke Litt. 413 [quot Hicks v. Phillips, 146 Ky. 305, 142 SW 394, 395, 47 LRANS 878; Whitaker v. Brown, 46 Pa. 197, 198]. See also Deeds § 339.

[67] McCarthy v. Rapid City First Nat. Bank, 23 S. D. 269, 121 NW 853, 856, 23 LRANS 335, 21 AnnCas 437. See also Banks and Banking §§ 765–794.

[68] See Waters [40 Cyc 758, 782].

"Dam" distinguished see Dam 17 C. J. p 697 note 69.

[69] Howell v. Big Horn Basin Colonization Co., 14 Wyo. 14, 81 P 785, 787, 1 LRANS 596.

[70] Century D. [quot Peo. v. Neville, 183 App. Div. 799, 170 NYS 583, 585; Howell v. Big Horn Basin Colonization Co., 14 Wyo. 14, 81 P 785, 787, 1 LRANS 596].

[a] **Derived from French " 'reservoir,' a storehouse."**—Century D. [quot Peo. v. Neville, 183 App. Div. 799, 170 NYS 583, 585].

[71] Century D. [quot Howell v. Big Horn Basin Colonization Co., 14 Wyo. 14, 81 P 785, 787, 1 LRANS 596].

Phrases: "Equalizing reservoir,"[75] and "storage reservoir."[76]

RES EST MISERA UBI JUS EST VAGUM ET INCERTUM.[77]

RESETTLE.[78] A term which, as used in a restrictive provision in a contract of sale of practice, has been construed as referring both to residence and practice at once, and not to either alone.[79]

RES GESTÆ.[80]

RESIDE.[81] [§ 1] **A. In General.** An elastic words,[82] often defined and construed by the courts;[83] it is employed in a wide variety of significations,[84] and its meaning has been variously shaded according to the variant conditions of its application,[85] for it is capable of different meanings,[86] and may receive a different meaning according to the connection in which it is found.[87] Specifically, the word is used in two senses, the one, constructive, technical, legal, the other denoting the personal habitual habitation of individuals.[88]

Phrases: "Reside at a house,"[89] "reside permanently in the United States,"[90] also "coming to reside,"[91] "continue to reside,"[92] and "where I now reside."[93]

[§ 2] **B. In the Ordinary Sense.** To abide[94] continuously,[95] to sojourn,[96] to dwell[97] permanently or for a length of time;[98] to be present;[99] to be settled as in a home;[1] to have a settled abode[2] for a time,[3] or a dwelling, a home;[4] to have one's dwelling or home;[5] to live[6] in a place;[7] to make an abode for a considerable time;[8] to remain[9] for a long time;[10] to stay.[11] Also to be in official residence;[12] to continue to sit;[13] to exist as an attribute of, inhere.[14]

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[72] Century D. [quot Peo. v. Neville, 183 App. Div. 799, 170 NYS 583, 585; Howell v. Big Horn Basin Colonization Co., 14 Wyo. 14, 81 P 785, 787, 1 LRANS 596].

[73] Century D. [quot Howell v. Big Horn Basin Colonization Co., supra].

[74] Hutchinson v. Chicago, etc., R. Co., 37 Wis. 582, 604 (given merely to illustrate a figure of speech).

[75] Peo. v. Neville, 183 App. Div. 799, 170 NYS 583, 586.

[a] **As included in term "aqueducts."**—Peo. v. Neville, 183 App. Div. 799, 170 NYS 583, 585, 587.

[76] Peo. v. Neville, supra.

[77] A maxim meaning "It is a wretched state of things when law is vague and mutable." Black L. D.

[a] **Applied** in Rex v. Knollys, 2 Salk. 509, 512, 91 Reprint 434 (omitting the words "et incertum").

[78] **Resettle:**

- Case on appeal see Appeal and Error §§ 2037–2039.
- Order see Motions and Orders § 237 note 20.
- See also Settle [35 Cyc 1442]; Settlement [35 Cyc 1443].

[79] Haldeman v. Simonton, 55 Iowa 144, 145, 7 NW 493.

Agreements in restraint of trade see Contracts §§ 410–432.

[80] **Res gestæ:**

- In general see Evidence §§ 535–559.
- Consisting in declarations as to ownership:
  - By husband or wife as against creditors see Husband and Wife § 504 note 61.
  - Of thing given see Gifts § 138 note 7.
  - Of thing stolen see Larceny § 480 notes 13–21.
- In burglary see Burglary § 125 note 63 [a].
- In conspiracy see Criminal Law §§ 1334, 1340 note 50.
- In contract see Contracts § 965 note 35.
- In conveyance or transfer, declarations as to sufficiency of consideration see Fraudulent Conveyances § 756.
- In covenant see Covenants § 212.
- In criminal law in general:
  - Acts and declarations:
    - In general see Criminal Law §§ 1120, 1121.
    - Of conspirators or codefendants see Criminal Law §§ 1334, 1340 note 50.
    - Of participants see Criminal Law § 1334.
    - Of third persons see Criminal Law § 1121; Homicide §§ 428, 443.

In criminal law in general: Continued
  - Acts and declarations: Continued
    - Of victims:
      - In general see Criminal Law §§ 1117–1120, 1269 note 4.
      - Exculpating accused see Criminal Law § 1274.
  - Explaining matters in evidence see Criminal Law §§ 1116 notes 69–71, 1265 notes 37, 38.
  - Other crime than that in question see Criminal Law §§ 1115, 1165.
- In gift see Gifts § 138 notes 7, 8.
- In homicide:
  - In general see Homicide §§ 426–428, 432, 440–442.
  - Dangerous character of victim see Homicide § 396 note 8.
  - Declarations of:
    - Third persons see Homicide § 442 note 79.
    - Victim see Homicide §§ 464 note 73, 492 note 86, 493 note 93, 495 note 11, 512 note 69.
  - Declarations, self-incriminating, of persons other than accused see Homicide § 389 notes 29, 30.
  - Threats see Homicide §§ 366 note 47, 389 note 29, 477 note 92.
  - Trouble between accused and third person see Homicide § 373 note 36.
- Unsworn statement part of see Evidence § 261.

[81] See also Residence post; Resident post.

[82] Joggins v. Cumberland Poor Dist., (N. S.) [1925] 2 DomLR 663, 664.

[83] Baker v. Conway, 214 Ala. 356, 108 S 18.

[84] Gildersleeve v. Gildersleeve, 88 Conn. 698, 92 A 684, 685, AnnCas1916B 920 [quot Foss v. Foss, 105 Conn. 502, 136 A 98, 101].

[a] **It is "a verb and expresses action,** and refers to what is being done or has been done." A. H. Bélo Corp. v. Granberry, (Tex. Civ. A.) 9 SW (2d) 443, 445.

[85] Baker v. Conway, 214 Ala. 356, 108 S 18.

[86] U. S. v. Rockteschell, 208 Fed. 530, 532, 125 CCA 532.

[a] **When used in statutes or constitutions** (1) "reside has a variety of meanings according to the statute in which it is used." Joggins v. Cumberland Poor Dist., (N. S.) [1925] 2 DomLR 663, 664. (2) "[It] may, and sometimes does, have different meanings in the same or different articles or sections of a constitution or statute." Peo. v. Owers, 29 Colo. 535, 546, 69 P 515.

[87] Joggins v. Cumberland Poor Dist., (N. S.) [1925] 2 DomLR 663, 664.

[a] **"Exact meaning often depends upon connection** in which it is used." State v. Selleck, 76 Nebr. 747, 750, 107 NW 1022.

[b] **It has "different meanings in different connections."**—Greene v. Willis, 47 R. I. 375, 133 A 651.

[c] **"It must be construed in the light of the context** and purposes of such statute [employing it]." U. S. v. Rockteschell, 208 Fed. 530, 532, 125 CCA 532.

[88] Lisbon School Dist. No. 1 v. Landaff Town School Dist., 75 N. H. 324, 325, 74 A 186; Hart v. Lindsey, 17 N. H. 235, 244, 43 AmD 597, 602; Shattuck v. Maynard, 3 N. H. 123, 124.

[a] **Illustration.**—"When a person has a fixed abode, where he dwells with his family, there can be no doubt as to the place where he resides. The place of his personal and legal residence are the same. So, when a person has no permanent habitation or family, but dwells in different places, as he happens to find employment, there can be no doubt as to the place, where he resides. He must be considered as residing where he actually or personally resides. But some individuals have permanent habitations, where their families constantly dwell, yet pass a great portion of their time in other places. Such persons have a legal residence with their families, and a personal residence in other places; and the word 'reside,' may, with respect to them, be used to denote either their personal, or their legal residence." Shattuck v. Maynard, 3 N. H. 123, 124 [quot Hart v. Lindsey, 17 N. H. 235, 244, 43 AmD 597, 602].

[b] **It may refer** to a temporary personal existence, or dwelling, in a certain place, or it may refer to a person's legal residence. Greene v. Willis, 47 R. I. 375, 133 A 651.

[c] **State cannot reside.**—"The people, as individuals, reside in the state, but the political body called the state cannot be said, in the proper use of language, to reside anywhere." State v. Trenton, 40 N. J. L. 89, 91.

[89] In re Moir, 25 Ch. D. 605, 610 [cit Wilkinson v. Wilson, 26 Ont. 213, 215].

[90] U. S. v. Tod, 297 Fed. 385, 392.

[91] Middlebury v. Waltham, 6 Vt. 200, 202.

[92] Middletown v. Poultney, 2 Vt. 437, 439.

[93] Brice v. Sheffield, 118 Ga. 128, 44 SE 843, 844.

[94] Long v. Ryan, 30 Gratt. (71 Va.) 718, 720 [quot Lawson v. Adlard, 46 Minn. 243, 245, 48 NW 1019].

"Abide" 1 C. J. p 302.

[§ 3] **C. In Legal Sense.**[15] While the word does not necessarily apply to a legal residence,[16] still it may refer to a person's legal residence[17] and mean an established place of abode, adopted with no present intention of moving elsewhere,[18] being synonymous with "domicile"[19] in its strict legal sense;[20] and although it means something different from being bodily present,[21] yet in statutes it may be used as meaning actually to occupy,[22] or to live,[23] or it may be employed as synonymous with being a "citizen"[24] or an "inhabitant."[25]

[§ 4] **D. Continuity and Permanency.** While it is said that the word may signify a temporary abiding,[26] the word in its ordinary sense carries with it the idea of permanence, as well as continuity,[27] and embraces the idea of fixed or permanent residence,[28] to be construed as excluding the mere casual presence of a transient,[29] and implying a permanent abode as contradistinguished from a mere

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95. Webster D. [quot Quinn v. State, 35 Ind. 485, 490, 9 AmR 754]; Rex v. Fredericton, 44 N. B. 563.

96. Lisbon School Dist. No. 1 v. Landaff Town School Dist., 75 N. H. 324, 326, 74 A 186; Worcester v. East Montpelier, 61 Vt. 139, 142, 17 A 842; Smith v. Smith, 122 Va. 341, 94 SE 777, 778; Long v. Ryan, 30 Gratt. (71 Va.) 718, 720 [quot Lawson v. Adlard, 46 Minn. 243, 245, 48 NW 1019].

97. Standard D. [quot In re Seider, 163 Fed. 138, 139]; Walker D. [cit Lask v. U. S., 1 Pinn. (Wis.) 77, 79]; Webster D. [quot Ft. Worth, etc., R. Co. v. Monell, 50 Tex. Civ. A. 287, 110 SW 504, 506]; Worcester v. East Montpelier, 61 Vt. 139, 142, 17 A 842.

[a] **"Dwell" synonymous and interchangeable.**—Joggins v. Cumberland Poor Dist., (N. S.) [1925] 2 Dom LR 663, 664.

[b] **To reside in a place means to dwell there,** make it a place of abode. A. H. Belo Corp. v. Granberry, (Tex. Civ. A.) 9 SW (2d) 443, 445.

"Dwell" 19 C. J. p 843 note 98.

98. Webster D. [quot Quinn v. State, 35 Ind. 485, 490, 9 AmR 754; Hinds v. Hinds, 1 Iowa 36, 41; Warren v. Thomaston, 43 Me. 406, 418, 69 AmD 69; Drew v. Drew, 37 Me. 389, 393; Ex p. Blumer, 27 Tex. 734, 736]. See Graham v. Com., 51 Pa. 255, 258, 88 AmD 581; Ft. Worth, etc., R. Co. v. Monell, 50 Tex. Civ. A. 287, 110 SW 504, 506 [both quot Webster D. reading "any length of time"]. See also Kennedy v. Wiggins, 5 Humphr. (Tenn.) 125 [quot Brownsville v. Marr, 5 Tenn. Civ. A. 555, 562 (substituting "as" for "or"); Long v. Ryan, 30 Gratt. (71 Va.) 718, 720 [quot Lawson v. Adlard, 46 Minn. 243, 245, 48 NW 1019].

[a] **Similar definition.**—"To dwell permanently, or for a considerable time." Century D. [quot Less v. State, 93 Tex. Cr. 154, 246 SW 382, 383]; Webster New Int. D. [quot MacLeod v. Stelle, 43 Ida. 64, 249 P 254, 256]; McCormick v. Wall, (Ind.) 168 NE 454, 455 (defining word "resided"); Cousineau v. State, 110 Tex. Cr. 445, 10 SW (2d) 98, 99; Rex v. Fredericton, 44 N. B. 563, 36 DomLR 685.

99. Walker D.; Webster D. [cit Lask v. U. S., 1 Pinn. (Wis.) 77, 79].

1. Webster D. [quot Ft. Worth, etc., R. Co. v. Monell, 50 Tex. Civ. A. 287, 110 SW 504, 506].

2. [a] **"A settled abode,"** a definition attributed to Webster D. by Graham v. Cam, 51 Pa. 255, 258, 88 AmD 581; Ft. Worth, etc., R. Co. v. Monell, (Tex. Civ. A.) 110 SW 504, 506.

3. Century D. [quot Less v. State, 93 Tex. Cr. 154, 246 SW 382, 383]; Webster D. [quot Quinn v. State, 35 Ind. 485, 490, 9 AmR 754; Hinds v. Hinds, 1 Iowa 36, 41; Drew v. Drew, 37 Me. 389, 393]; Webster New Int. D. [quot MacLeod v. Stelle, 43 Ida. 64, 249 P 254, 256]; McCormick v. Wall, (Ind.) 168 NE 454, 455 (defining word "resided"); Kennedy v. Wiggins, 5 Humphr. (Tenn.) 125 [quot Brownsville v. Marr, 5 Tenn. Civ. A. 555, 562]; Ex p. Blumer, 27 Tex. 734, 736; Cousineau v. State, 110 Tex. Cr. 445, 10 SW (2d) 98, 99 (definition reading "as having a settled abode for a time"); Rex v. Fredericton, 44 N. B. 563, 36 DomLR 685.

4. Century D. [quot Less v. State, 93 Tex. Cr. 154, 246 SW 382, 383].

5. Webster D. [quot Quinn v. State, 35 Ind. 485, 490, 9 AmR 754].

[a] **Similar definition.**—"To have one's domicile or home." Rex v. Fredericton, 44 N. B. 563.

6. Standard D. [quot In re Seider, 163 Fed. 138, 139]; Walker D. [cit Lask v. U. S., 1 Pinn. (Wis.) 77, 79; Webster D. [quot Ft. Worth, etc., R. Co. v. Monell, 50 Tex. Civ. A. 287, 110 SW 504, 506].

"Live" synonymous see Live 38 C. J. p 70 note 7 [a].

7. Lisbon School Dist. No. 1 v. Landaff Town School Dist., 75 N. H. 324, 326, 74 A 186, 187; Worcester v. East Montpelier, 61 Vt. 139, 142, 17 A 842; Middlebury v. Waltham, 6 Vt. 200, 202.

8. Standard D. [quot In re Seider, 163 Fed. 138, 139; Trenton Bd. of Education v. Crill, 73 Misc. 472, 476, 133 NYS 394, 397 (as definition for "resided")]; Webster D. [quot Ft. Worth, etc., R. Co. v. Monell, (Tex. Civ. A.) 110 SW 504, 506].

9. Webster D. [quot Quinn v. State, 35 Ind. 485, 490, 9 AmR 754].

10. Webster D. [quot Quinn v. State, supra]; Rex v. Fredericton, 44 N. B. 563, 36 DomLR 685.

11. Lisbon School Dist. No. 1 v. Landaff Town School Dist., 75 N. H. 324, 326, 74 A 186, 187; Worcester v. East Montpelier, 61 Vt. 139, 142, 17 A 842.

12. Standard D. [quot In re Seider, 163 Fed. 138, 139].

13. Webster D. [quot Quinn v. State, 35 Ind. 485, 490, 9 AmR 754].

14. Webster D. [quot Ft. Worth, etc., R. Co. v. Monell, (Tex. Civ. A.) 110 SW 504, 506].

15. **In divorce statutes** see Divorce § 36.

16. State v. Selleck, 76 Nebr. 747, 749, 107 NW 1022. See also cases supra § 2.

[a] **"The word 'reside' is used in a sense** which includes all who are the actual, stated dwellers in any given place, even though they may have a technical domicil elsewhere." Kelsey v. Green, 69 Conn. 291, 301, 37 A 679, 38 LRA 471 (referring to its use in Connecticut statutes generally).

17. Hart v. Lindsey, 17 N. H. 235, 244, 43 AmD 597; Greene v. Willis, 47 R. I. 375, 133 A 651.

18. Foss v. Foss, 105 Conn. 502, 136 A 98, 101 [quot Gildersleeve v. Gildersleeve, 88 Conn. 689, 92 A 684, 685].

19. Foss v. Foss, 105 Conn. 502, 136 A 98, 101 [quot Gildersleeve v. Gildersleeve, 88 Conn. 689, 92 A 684, 685]; Greene v. Willis, 47 R. I. 375, 133 A 651. See also Domicile §§ 2, 3.

"The residence therein contemplated [by the word 'reside'] is synonymous with 'home' or 'domicile.'" Sharp v. McIntire, 23 Colo. 99, 46 P 115, 116.

[a] **In sense of "domicile."**—Avery v. Bower, 170 Ga. 202, 152 SE 239, 242.

[b] **Nothing more nor less than "domicile."**—U. S. v. Rockteschell, 208 Fed. 530, 532, 125 CCA 532.

20. Brown v. Brown, 150 Tenn. 89, 261 SW 959.

[a] **Equivalent of "legal domicile."**—Elam v. Maggard, 165 Ky. 733, 178 SW 1065.

21. Gulf, etc., R. Co. v. Lemons, 109 Tex. 244, 206 SW 75, 77, 5 ALR 943,

22. Heaton v. Jackson, 34 Oh. A. 424, 171 NE 364, 366.

23. Rix v. McHenry, 7 Cal. 89, 92.

24. U. S. v. Gronich, 211 Fed. 548, 550. See also Resident post.

"Citizen" see Citizens § 1.

25. U. S. v. Gronich, 211 Fed. 548, 550. See also Resident post.

"Inhabitant" 31 C. J. p 1194.

"Inhabitant" compared see Inhabitant § 6.

26. Taylor v. Chattanooga Medicine Co., 5 Ala. A. 419, 59 S 707, 708 ("reside" in the section under discussion was held, however, to mean a fixed and permanent home).

"Abide" 1 C. J. p 302.

27. Michael v. Michael, 34 Tex. Civ. A. 630, 79 SW 74, 75 [quot and adopted Longwell v. Longwell, 39 Tex. Civ. A. 612, 88 SW 416, 417].

28. Quinn v. State, 35 Ind. 485, 490, 9 AmR 754.

29. Ft. Worth, etc., R. Co. v. Monell, 50 Tex. Civ. A. 287, 110 SW 504, 506.

[a] **Implies a longer time** than "lodge," "stay," "remain," "abide." Hinds v. Hinds, 1 Iowa 36, 41.

"Lodge" 38 C. J. p 136.

"Remain" ante.

"Stay" [36 Cyc 1257].

temporary locality of existence.[30] Furthermore it imports a habitation of some degree of permanency, coupled with the home thought.[31]

[§ 5] **E. Resides. To have a home.**[32] It may be used to signify the act of one who temporarily abides,[33] or also of one who has a fixed and permanent home.[34] Where there is nothing to show that it is used in a more extensive sense,[35] it refers to the place where an individual eats, drinks, and sleeps, or where his family or his servants eat, drink, and sleep.[36]

Phrases: "Resides for purposes of taxation,"[37] and "resides out of Ontario;"[38] also "in the county in which he resides,"[39] "usually resides,"[40] and "where he resides."[41]

[§ 6] **F. Residing.** When used in statutes, or actions, or suits relating to taxation, right of suffrage, divorce, and the like ["residing"] is used in the sense of "legal residence;" that is to say the place of domicile or permanent abode; as distinguished from temporary residence.[42]

Phrases: "Residing in,"[43] "residing in his district,"[44] "residing in the United Kingdom,"[45] "residing in this country,"[46] "residing in vicinity,"[47] "residing therein,"[48] and "residing with;"[49] also "anyone residing,"[50] "'debtor having a family' residing in the state,"[51] and "personally residing."[52]

[§ 7] **G. Resided.** Domiciled;[53] lived;[54] the term is said to be interchangeable[55] or synonymous with "residence."[56] It may be used, not in the sense of actual pedal presence, but rather of legal residence.[57] It ordinarily refers to a fixed,[58] permanent,[59] and established[60] residence, one's home, as distinguished from a mere stopping place for the transaction of either business or pleasure.[61]

Phrases: "Resided continuously within the United States,"[62] and "the county in which plaintiff resided."[63]

RESIDENCE.[64]

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[30] Long v. Ryan, 30 Gratt. (71 Va.) 718, 720 [quot Lawson v. Adlard, 46 Minn. 243, 245, 48 NW 1019].

[a] **Permanent place of abode,** and not the place where he may be temporarily living, is the import of the word. McLauchlan's Pet., 1 F. (2d) 5, 7.

[31] Ft. Worth, etc., R. Co. v. Monell, 50 Tex. Civ. A. 287, 110 SW 504.

[32] McLauchlan's Pet., 1 F. (2d) 5, 6.

[a] **"This includes not only physical presence** in a place but the accompanying intent of choosing that place as a permanent residence." McLauchlan's Pet., 1 F. (2d) 5, 6.

[b] **"One 'resides' in a place** when he lives or dwells there; when it is his settled abode; his habitation; his home." White v. Martin, 2 Alaska 495, 500.

[c] **"'Resides' is but more formal than 'lives.'"**—Luvall v. Luvall, 228 Ky. 577, 15 SW (2d) 433.

[d] **"One 'resides' where he has his established home."**—Berry v. Wilcox, 44 Nebr. 82, 88, 62 NW 249, 48 AmSR 706.

[33] Taylor v. Chattanooga Medicine Co., 5 Ala. A. 419, 59 S 707, 708.

[34] Taylor v. Chattanooga Medicine Co., supra.

[a] **"One who 'resides' in a town** . . . is an actual, stated dweller as distinguished from a transient dweller." Chaplin v. Bloomfield, 92 Conn. 395, 396, 103 A 118.

[b] **"Expressing the general idea of continuing** or making one's home in a given place." Luvall v. Luvall, 228 Ky. 577, 15 SW (2d) 433, 434.

[35] Rex v. North Curry, 4 B. & C. 953, 959, 107 Reprint 1313 [quot Toronto Free Hospital v. Barrie, 39 Ont. L. 63, 67, 12 OntWN 2, 34 DomLR 691].

[36] Rex v. North Curry, supra [quot Toronto Free Hospital v. Barrie, supra; In re North Renfrew, 7 Ont. L. 204, 206].

[a] **"Where a person eats, drinks, and sleeps."**—Lancaster v. Toronto, 38 Ont. L. 374, 380, 11 OntWN 311.

[37] Clarke v. Addeman, 26 R. I. 168, 169, 58 A 623.

[38] United Electric Co. v. Clements Mfg. Co., 10 OntWN 303, 304.

[39] Less v. State, 93 Tex. Cr. 154, 246 SW 382, 383.

[40] The Underwriter, 3 F. (2d) 483, 487.

[41] Rex v. Clement, 50 CanLJ 67, 70.

[42] Herron v. Passailaigul, 92 Fla. 818, 110 S 539, 543. See also Domicile §§ 2, 3.

[a] **Residing implies a legal residence** in territory described. Laue v. Grand Fraternity, 132 Tenn. 235, 177 SW 941, 943, LRA1915F 1056, AnnCas1917A 376.

[b] **Duration implied.**—"The term imports not a mere stopping and being in a place, but 'abiding in it for some continuance of time.'" Trumbull v. Moss, 28 Conn. 253, 256.

[c] **"The word 'residing' refers to individual abode,** though it is sometimes used figuratively." State v. Trenton, 40 N. J. L. 89, 91.

[d] **Meaning "personally residing."**—In re Wright, [1907] 1 Ch. 231, 235.

[43] In re Doll, 47 Minn. 518, 521, 50 NW 607 (as not restricted to actual personal presence).

[44] Cooper v. Com., 121 Va. 338, 93 SE 680, 682.

[a] **"Residing in the district."**—Peo. v. Hendrickson, 54 Misc. 337, 104 NYS 122, 124. See also Schools and School Districts [35 Cyc 1112].

[45] Thomson v. Inland Revenue, [1919] S. C. 8.

[46] Dale v. Atkinson, 3 Jur. N. S. 41, 42.

[47] Canaday v. Scott County, 104 Kan. 785, 181 P 121, 122.

[48] Cooper v. Com., 121 Va. 338, 93 SE 680, 682.

[49] Maidstone Union v. Wadsworth Union, 95 L. T. Rep. N. S. 125.

Settlement of illegitimate children residing with parent see Paupers § 117.

[50] Laue v. Grand Fraternity, 132 Tenn. 235, 177 SW 941, 943, LRA1915F 1056, AnnCas1917A 376.

[51] Bonnel v. Dunn, 28 N. J. L. 153, 155. See also Exemptions § 24.

[52] In re Wright, [1907] 1 Ch. 231, 235.

[53] In re Bennett, 135 Misc. 486, 238 NYS 723, 737. See also Domicile §§ 1–3.

[a] **Referring to domiciliary residence.**—Fry's Election Case, 71 Pa. 302, 306, 307, 10 AmR 698.

[54] U. S. v. Griminger, 236 Fed. 285, 287.

[55] Evans v. American Pub. Co., (Tex. Commn. A.) 13 SW (2d) 358, 362.

[56] Evans v. American Pub. Co., (Tex. Civ. A.) 8 SW (2d) 809. See Residence post.

[57] Evans v. American Pub. Co., (Tex. Commn. A.) 16 SW (2d) 516.

[58] Madison v. Guilford, 85 Conn 55, 81 A 1046, 1048.

[59] Johnson v. Hoile, 205 App. Div. 633, 199 NYS 875; Kleinrock v Nantex Mfg. Co., 201 App. Div. 236, 194 NYS 142.

[a] **It carries with it the idea of permanency as well as continuity.**—Fleming v. Fleming, 36 Nev. 135, 134 P 445, 447.

[60] Madison v. Guilford, 85 Conn. 55, 81 A 1046, 1048.

[a] **As distinguished from a residence which is merely transient or temporary.**—Madison v. Guilford, 85 Conn. 55, 81 A 1046, 1048; Salem v. Lyme, 29 Conn. 74, 81 (definition given for "reside").

[61] Johnson v. Hoyle, 205 App. Div. 633, 199 NYS 875; Kleinrock v. Nantex Mfg. Co., 201 App. Div. 236, 194 NYS 142, 144; Washington v. Thomas, 103 App. Div. 423, 92 NYS 994, 996.

[62] See Aliens § 138 note 1.

[63] Ft. Worth, etc., R. Co. v. Monell, 50 Tex. Civ. A. 287, 110 SW 504, 506. See generally Venue [40 Cyc 93–103].

[64] **Residence:**
Actual residence:
- Adverse Possession § 8.
- Distinguished from "place of business" see Attachment § 49.

Choice of place see Constitutional Law § 1099½ notes 80–83.

[§ 1] **A. As Noun—1. In Ordinary Parlance—a. In General.** An ambiguous,[65] elastic,[66] flexible,[67] or relative term,[68] which, notwithstanding numerous definitions are to be found in the books,[69] is difficult of precise definition,[70] as it has no fixed meaning applicable alike to all cases,[71] but instead is used in different[72] and various senses[73] and has a great variety of meanings[74] and significations,[75] because its

Dependent on intention see Domicile § 13 notes 89–92.
Distinguished from:
  Domicile see Attachment § 48; Domicile §§ 2, 3; Guardian and Ward § 28.
  Home 29 C. J. p 768 note 19 [b].
Ordinary residence see Ordinary 46 C. J. p 1134 note 22.
Private residence see Private § 22.
See also Habitancy 29 C. J. p 200; Habitation 29 C. J. p 200; Nonresidence 46 C. J. p 493; Reside ante; Resident post.

Residence in relation to:
Administration of decedent's estate see Executors and Administrators §§ 122, 192, 297, 792, 1180.
Adverse Possession § 8.
Affidavits § 108 note 88.
Aliens § 138 note 1.
Animal property see Animals §§ 95, 274.
Appeals see Appeal and Error §§ 530, 1194, 1216.
Appearances § 42.
Arrest §§ 128, 145, 146.
Assignments § 158 note 62 [f].
Assignments for Benefit of Creditors § 18 note 42, § 178 notes 90, 92, 94, 99.
Attachment §§ 20, 44–56, 135, 180, 184, 221, 222, 269, 305.
Bankruptcy § 25.
Bastards § 60.
Bills and Notes §§ 466, 769, 771, 911, 920, 921, 927, 929–931, 934, 939.
Bonds see Appeal and Error §§ 1194–1216; Bonds § 9; Executors and Administrators § 193.
Bounties § 28 note 31 [a].
Champerty and Maintenance § 78.
Chattel Mortgages § 211 notes 13–23, §§ 212, 213.
Citizenship see Citizens §§ 3, 12, 18.
Continuances see Criminal Law § 846 notes 36, 41, 44.
Corporations §§ 33, 70, 143, 215, 245, 408–419, 1828, 2876–2879, 3933 (foreign), 4082, 4099, 4100, 4101, 4109–4112, 4119, 4121.
Costs §§ 465–476, 645 notes 48, 50–52.
Courts § 82 note 55, §§ 83–86, 87 notes 21–24.
Creditors' Suits § 25.
Depositions § 151.
Divorce §§ 36–45.
Elections §§ 26–33.
Exemptions §§ 17–24.
Federal Courts § 89.
Garnishment §§ 62, 214, 245, 270.
Homesteads §§ 47, 48, 50, 53, 63, 65, 107, 109, 472, 513.
Indictments and Informations § 233.
Insolvency §§ 44, 59, 267, 269, 270, 275 note 75 [e].
Interest §§ 20, 164.
Judgments §§ 47, 48, 50, 70, 1583, 1621–1628.
Laches see Equity § 233.
Larceny § 354.
Life Insurance §§ 173, 186.
Limitations of Actions § 52 notes 56–58, §§ 371, 750, 771.
Mandamus § 588 note 47 [f].
Marriage § 76 note 24 [f].
Process see Highways § 55; Infants § 321; Justices of the Peace § 156; Process §§ 69, 70, 94, 98, 99, 101, 105, 107, 109, 111, 113, 115, 132, 144, 145, 156–160, 226, 227, 321.
Public lands see Indians § 68; Public Lands § 93.
Taxation [37 Cyc 741, 769, 799–804, 908, 937, 947, 1192, 1293].
Venue [40 Cyc 93, 128, 130].

Residence of:
Absentees § 1 notes 1–4.
Accepter or maker see Bills and Notes §§ 769, 771.
Accused see Indictments and Informations § 233.
Administrator see Executors and Administrators § 122.
Aliens § 2 notes 7–8, § 138 note 1.
Appellant see Appeal and Error § 530.
Attorney and Client § 102 notes 21, 22, § 190 note 14.
Collector see Taxation [37 Cyc 1192].
Corporation see Corporations §§ 215, 408–419, 3933, 4082; Garnishment §§ 214, 215; Taxation [37 Cyc 959].
Creditor see Corporations §§ 4110–4112; Executors and Administrators § 1180; Insolvency §§ 267, 269, 270.
Debtor see Assignments § 158; Corporations § 4109; Creditors' Suits § 25.
Deceased owner see Attachment § 57.
Decedent see Executors and Administrators § 34 note 50.
Defendant see Attachment §§ 44–56, 135, 184, 222, 269; Corporations § 245; Garnishment § 270; Judgments §§ 47, 48, 50, 57.
Director see Corporations § 1828.
Drawee see Bills and Notes § 466.
Executor see Executors and Administrators §§ 192, 297.
Family see Executors and Administrators § 792.
Foreign corporation see Corporations §§ 4082, 4109, 4119; Garnishment § 70, 245.
Garnishee see Garnishment § 270.
Grand juror see Grand Juries §§ 11, 12.
Grantor see Champerty and Maintenance § 78.
Husband and wife see Homesteads § 472; Husband and Wife §§ 18, 444, 665.
Incorporator see Corporations § 143.
Indians § 58.
Infant see Infants §§ 43, 264, 321; Parent and Child §§ 4, 41; Process § 321.
Insane Persons §§ 176, 559.
Insolvent see Assignments for Benefit of Creditors §§ 18, 178; Insolvency §§ 44, 48, 59.
Instructor of educational institution see Taxation [37 Cyc 937].
Judges §§ 29, 55, 206.
Juror see Grand Juries §§ 11, 12; Juries § 189.
Justices of the Peace § 9 note 1.
Licensee see Licenses §§ 56–58, 122.
Minor see Guardian and Ward § 28.
Mortgagor see Chattel Mortgages §§ 211–213.
Officer see Corporations §§ 4039, 4109, 4121; Officers § 36.
Owner see Animals § 95.
Parties see Bills and Notes §§ 911, 920, 921, 927, 929, 931, 938, 939; Corporations §§ 2876–2879; Divorce §§ 36–45; Interest § 20; Judgments §§ 1583, 1621–1624, 1626–1628; Venue [40 Cyc 93, 128].
Paupers §§ 83–95, 208.
Plaintiff see Attachment §§ 20, 180, 221; Corporations §§ 4099–4101.
Principal defendant see Garnishment § 245.
Real estate broker see Brokers § 14 note 51 [d].
Stockholder see Corporations § 33.
Surety on bond see Appeal and Error §§ 1194, 1216; Attachment § 305; Bonds § 9; and other specific titles in Corpus Juris.
Taker of estray see Animals § 274.
Tenant see Landlord and Tenant § 661.
Voter see Elections §§ 26–33.
Widow see Executors and Administrators § 792; Homesteads § 472.
Witness see Criminal Law § 846; Depositions § 151.

65. McCuaig v. Hinds, (Man.) 11 WestLR 652, 654.

66. McLauchlan's Pet., 1 F. (2d) 5, 7; In re Deans, 208 Fed. 1018, 1019; In re Garneau, 127 Fed. 677, 679, 62 CCA 403.

[a] **"A word of very elastic meaning."**—Re Fitzmartin, 24 Ont. L. 102, 104, 2 OntWN 1114, 1177, 19 OntWR 267, 367.

67. Harding v. Standard Oil Co., 182 Fed. 421, 425; Willingham v. Swift, 165 Fed. 223, 224; McCuaig v. Hinds, (Man.) 11 WestLR 652, 654; Lancaster v. Toronto, 38 Ont. L. 374, 380, 11 OntWN 311.

[a] **"A word of flexible import."**—Re Sturmer, 24 Ont. L. 65, 66, 2 Ont WN 1116, 1227, 19 OntWR 255, 430.

68. Popejoy v. Boynton, 112 Or. 646, 229 P 370, 230 P 1016.

69. Tyler v. Murray, 57 Md. 418, 441.

70. McLauchlan's Pet., 1 F. (2d) 5, 7; In re Garneau, 127 Fed. 677, 679, 62 CCA 403.

[a] **"It is somewhat difficult to give any rule** defining 'residence.'" Nadal v. Ramos, 1 Porto Rico Fed. 363, 364.

71. State v. Smith, 64 Mo. A. 313, 319.

[a] **"Residence is a very broad and liberal term."**—Kidd v. Joint School Dist. No. 2, 194 Wis. 353, 216 NW 499, 501.

72. McLauchlan's Pet., 1 F. (2d) 5, 6; Wachusett Nat. Bank v. Fairbrother, 148 Mass. 181, 184, 19 NE 345, 347, 12 AmSR 530.

[a] **"Is used in two senses;** the one constructive, technical, legal; the other denoting personal actual habitation of individuals." Hart v. Lindsey, 17 N. H. 235, 43 AmD 597, 602 [quot Shattuck v. Maynard, 3 N. H. 123, 124 (where given under word "reside")].

73. Trask v. Karrick, 94 Vt. 70, 108 A 846, 847.

74. Naef v. Mutter, 12 C. B. N. S. 816, 821, 104 ECL 816, 142 Reprint 1363; Re Sturmer, 24 Ont. L. 65, 66, 2 OntWN 1116, 1227, 19 OntWR 255, 430.

[a] **"Capable of different meanings."**—Trenton Bd. of Education v. Crill, 73 Misc. 472, 133 NYS 394, 397.

[b] **"Is often used to express different meanings."**—Union Nat. Bank v. Finley, 180 Ind. 470, 103 NE 110, 113.

[c] **"Of multiple meanings."**—Moore v. Stevens, 90 Fla. 879, 106 S 901, 904, 43 ALR 1127.

[d] **"All agree that the word 'residence' is susceptible of different meanings."**—Shaeffer v. Gilbert, 73 Md. 66, 69, 20 A 434, 435.

75. Wade v. Wade, 93 Fla. 1004, 113 S 374, 375.

[a] **"Not a word of uniform signification."**—Wachusett Nat. Bank v. Fairbrother, 148 Mass. 181, 184, 19 NE 345, 347, 12 AmSR 530.

[b] **"It is used to signify different things."**—Harrison v. Harrison, 117 Md. 607, 84 A 57, 58.

meaning is variously shaded according to the variant conditions of its application.[76] Also, its meaning often depends upon the subject matter[77] and connection in which it is used,[78] and the sense in which it should be used is controlled by reference to the object;[79] hence it may be given a restricted or enlarged meaning, considering the connection in which it is used.[80]

[§ 2] **b. As a Place or Thing.**[81] "Residence" is a noun, the name of a place or thing,[82] and has been defined as an abode,[83] dwelling,[84] habitation,[85] or place where one actually lives;[86] a dwelling house[87] where a person lives in settled abode;[88] the dwelling place of a person;[89] the place of abode,[90] or dwelling, whether permanent or temporary,[91] or lodgment,[92] or residence;[93] a place where a person lives,[94] or where one remains when not called elsewhere on business, pleasure, or for other temporary purposes;[95] the place[96] or the house[97] where one resides;[98] also the place where anything rests permanently.[99]

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[c] **"Significations depending upon its various applications."**—Wade v. Wade, 93 Fla. 1004, 113 S 374, 375.

[d] **"Its exact significance** being left to construction, to be determined from the context, and the apparent object sought to be attained." Cincinnati, etc., R. Co. v. Ives, 3 NYS 895, 896.

76. Baker v. Conway, 214 Ala. 356, 108 S 18.

[a] **"Many shades of meaning** from mere temporary presence to the most permanent abode." Fisher v. First Trust Joint-Stock Land Bank, (Iowa) 231 NW 671, 672.

77. Towson v. Towson, 126 Va. 640, 102 SE 48, 52; Cooper v. Com., 121 Va. 338, 93 SE 680, 681.

[a] **"Great variety of meanings according to the subject-matter."**—Neaf v. Mutter, 12 C. B. N. S. 816, 821, 104 ECL 816, 142 Reprint 1363; Re Sturmer, 24 Ont. L. 65, 66, 2 OntWN 1116, 1227, 19 OntWR 255, 430.

[b] **"Frequently used to express different meanings according to the subject-matter."**—Newman v. U. S., 43 App. (D. C.) 53, 62; Raymond v. Leishman, 243 Pa. 64, 89 A 791, 792, LRA1915A 400, AnnCas1915C 780 (substituting "often" for "frequently").

[c] **Illustrations of different meanings of the term.**—(1) "As defined by lexicographers the word residence may refer either to a fixed and settled abode or to one merely of some duration." Kroge v. Modern Brotherhood of America, 126 Mo. A. 693, 701, 105 SW 685, 687. (2) "Different meanings including temporary residence or permanent domicile." Trenton Bd. of Education v. Crill, 73 Misc. 472, 133 NYS 394, 398.

[d] **"May refer to a temporary personal existence,** or dwelling, in a certain place, or it may refer to a person's legal residence." Greene v. Willis, 47 R. I. 375, 133 A 651.

78. Nadal v. Ramos, 1 Porto Rico Fed. 363, 364; Towson v. Towson, 126 Va. 640, 102 SE 48, 52; Cooper v. Com., 121 Va. 338, 93 SE 680, 681.

[a] **Exact meaning often depends on connection** in which the word is used. State v. Selleck, 76 Nebr. 747, 749, 107 NW 1022.

79. McLauchlan's Pet., 1 F. (2d) 5, 7; In re Garneau, 127 Fed. 677, 679, 62 CCA 403.

[a] **Its meaning depends upon the object and purpose** with which it is used and the subject-matter to which it refers. Shaeffer v. Gilbert, 73 Md. 66, 69, 20 A 434, 435.

80. Willingham v. Swift Co., 165 Fed. 223, 224 [quot Harding v. Standard Oil Co., 182 Fed. 421, 425].

81. **Of a corporation** see Corporations §§ 408–419, 3933.

82. A. H. Belo Corp. v. Granberry, (Tex. Civ. A.) 9 SW (2d) 443, 445.

83. Webster D. [quot Krumenacker v. Andis, 38 N. D. 500, 165 NW 524, 526]; Baird v. Baird, 193 Cal. 225, 223 P 974, 999; Wright v. Genesee Cir. Judge, 117 Mich. 244, 245, 75 NW 465; Rosenzweig v. Wood, 30 Misc. 297, 299, 63 NYS 447 [aff 52 App. Div. 631 mem, 65 NYS 1144 mem]; Watson v. North Carolina R. Co., 152 N. C. 215, 67 SE 502, 503; Curren v. McEachen, 5 Terr. L. 333, 336.

"Abode" 1 C. J. p 304.

84. Johnson D. [quot Reg. v. Hammond, 17 Q. B. 772, 781, 79 ECL 772, 8 EngL&Eq 356]; Webster D. [quot Trenton Bd. of Education v. Crill, 73 Misc. 472, 133 NYS 394, 398; Foot v. Harris, 2 AbbPr (N. Y.) 454, 457]; Cincinnati, etc., R. Co. v. Ives, 3 NYS 895; Graham v. Com., 51 Pa. 255, 258, 88 AmD 581; Smith v. Smith, 122 Va. 341, 94 SE 777, 778; Griffin v. Woolford, 100 Va. 473, 479, 41 SE 949; Long v. Ryan, 30 Gratt. (71 Va.) 718, 720; Re Fraser, 30 N. S. 272, 276.

[a] **"An abode or dwelling."**—Webster D. [quot Peo. v. Platt, 50 Hun 454, 470, 4 NYS 367].

"Dwelling" 19 C. J. p 843.

85. Burrill L. D. [quot Hall v. Hall, 25 Wis. 600, 607]; Webster D. [quot Peo. v. Platt, 50 Hun 454, 470, 4 NYS 367; Trenton Bd. of Education v. Crill, 73 Misc. 472, 133 NYS 394, 398; Foot v. Harris, 2 AbbPr (N. Y.) 454, 457]; Cincinnati, etc., R. Co. v. Ives, 3 NYS 895; Smith v. Smith, 122 Va. 341, 94 SE 777, 778; Long v. Ryan, 30 Gratt. (71 Va.) 718, 720; Re Fraser, 30 N. S. 272, 276.

[a] **"A dwelling or habitation."**—Webster D. [quot Krumenacker v. Andis, 38 N. D. 500, 165 NW 524, 526]; Wright v. Genesee Cir. Judge, 117 Mich. 244, 245, 75 NW 465 [quot Watson v. North Carolina R. Co., 152 N. C. 215, 67 SE 502, 503].

"Habitation" 29 C. J. p 200.

86. Baird v. Baird, 193 Cal. 225, 223 P 974, 999; Rosenzweig v. Wood, 30 Misc. 297, 299, 63 NYS 447 [aff 52 App. Div. 631, 65 NYS 1144].

87. **"Dwelling house"** 19 C. J. p 843.

88. Moore v. Stevens, 90 Fla. 879, 106 S 901, 904, 43 ALR 1127.

89. Raymond v. Leishman, 243 Pa. 64, 89 A 791, 792, LRA1915A 400, AnnCas1915C 780; Towson v. Towson, 126 Va. 640, 102 SE 48, 52; Cooper v. Com., 121 Va. 338, 93 SE 680, 681.

90. Johnson D. [quot Reg. v. Hammond, 17 A. B. 772, 781, 79 ECL 772, 8 EngL&Eq 356, 117 Reprint 1477]; Webster D. [quot Crawford v. Wilson, 4 Barb. (N. Y.) 504, 520]; Terrill v. Terrill, 2 Alaska 475, 477; In re Bennett, 135 Misc. 486, 238 NYS 723, 734; Cincinnati, etc., R. Co. v. Ives, 3 NYS 895; Mays v. State, 50 Tex. Cr. 391, 392, 97 SW 703; Middlebury v. Waltham, 6 Vt. 200, 202; Smith v. Smith, 122 Va. 341, 94 SE 777, 778; Griffin v. Woolford, 100 Va. 473, 479, 41 SE 949; Long v. Ryan, 30 Gratt. (71 Va.) 718, 720; Re Fraser, 30 N. S. 272, 276. See also Lafferty's Est., 14 Pa. Dist. 6 (stating "some delicacy of insight, not to say of imagination, is needed to detect a reason why a man's residence is not his place of abode").

[a] **Similar definition.**—"The place of one's abode." Webster D. [quot Crawford v. Wilson, 4 Barb. (N. Y.) 504, 520].

[b] **"Any place of abode or dwelling place, however temporary it might have been."**—Gluc v. Klein, 226 Mich. 175, 197 NW 691, 692.

[c] **"A residence is always a place of abode;** it never denotes simply the place where a man is, or happens to be." Perrine v. Evans, 35 N. J. L. 221, 223.

91. In re Titterington, 130 Iowa 356, 358, 106 NW 761.

92. State v. Shepherd, 218 Mo. 656, 117 SW 1169, 1172, 131 AmSR 568.

93. Bronaugh v. Com., 188 Ky. 103, 221 SW 531, 534.

94. Mays v. State, 50 Tex. Cr. 391, 392, 97 SW 703.

95. Younger v. Speckles, 12 Cal. A. 175, 106 P 895, 896 (in its "ordinary acceptation").

96. Burrill L. D. [quot Hall v. Hall, 25 Wis. 600, 607]; Webster D. [quot Peo. v. Platt, 50 Hun 454, 470, 3 NYS 367; Trenton Bd. of Education v. Crill, 73 Misc. 472, 133 NYS 394, 398; Krumenacker v. Andis, 38 N. D. 500, 165 NW 524, 526; Hall v. Hall, 25 Wis. 600, 607]; Wright v. Genesee Cir. Judge, 117 Mich. 244, 245, 75 NW 465; Watson v. North Carolina R. Co., 152 N. C. 215, 67 SE 502, 503.

[a] **"The residence of a person** is the place where he commonly resides; a place to which, when absent, he returns, like a bee to its hive, a bird to its nest." O'Hare v. Bismarck Bank, 45 N. D. 641, 178 NW 1017 (in court's syllabus).

[b] **"The residence of one means place of residence,** where such one resides." Bronaugh v. Com., 188 Ky. 103, 221 SW 531, 534.

97. Standard D. [quot Trenton Bd. of Education v. Crill, 73 Misc. 472, 133 NYS 394, 397].

98. Burrill L. D. [quot Hall v. Hall, 25 Wis. 600, 607]; Standard D. [quot Trenton Bd. of Education v. Crill, 73 Misc. 472, 133 NYS 394, 398]; Webster D. [quot Peo. v. Platt, 50 Hun 454, 470, 3 NYS 367; Board of Trenton Bd. of Education v. Crill, supra; Krumenacker v. Andis, 38 N. D. 500, 165 NW 524, 526; Hall v. Hall, supra]; Wright v. Genesee Cir. Judge, 117 Mich. 244, 245, 75 NW 465; Watson v. North Carolina R. Co., 152 N. C. 215, 67 SE 502, 503.

99. Webster D. [quot Peo. v. Platt, 50 Hun 454, 470, 4 NYS 367 (words

[§ 3] **c. As an Act or State.**[1] As an act[2] "residence" has been defined as the act of making one's home in a place,[3] or of residing,[4] abiding,[5] or dwelling[6] in a place for some continuance of time;[7] the act or state of being a resident, or inhabitant,[8] or of being seated or settled in a place;[9] the act, state or habit of dwelling or abiding in a place;[10] the continuance of a man in a place;[11] the dwelling in a place,[12] or habitation,[13] for some continuance of time,[14] for business or other purposes;[15] inhabitancy or habitancy;[16] living in a particular locality;[17] also it may be used in its loose sense of temporary lodging.[18]

[§ 4] **2. In Legal Parlance—a. In General.** Although often defined and construed by the courts,[19] the term has no actual[20] or definite[21] technical meaning,[22] or any uniform meaning in law.[23]

[§ 5] **b. As a Place or Thing.** An abiding place or home or a permanent address;[24] the abode or dwelling place as distinguished from a mere locality of existence;[25] domicile;[26] an established abode fixed for a considerable time, whether with or without a present intention of ultimate removal;[27] a fixed and permanent abode or dwelling place for the

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transposed to "permanently rests"); Krumenacker v. Andis, 38 N. D. 500, 165 NW 524, 526]; Baird v. Baird, 193 Cal. 225, 223 P 974, 999 (also reading "permanently rests").

[1] **Of a corporation** see Corporations §§ 408-419, 3933.

[2] [a] **"Residence is an act."**—Jarrell v. Leeper, 178 Ark. 6, 9 SW (2d) 778, 779; Fidelity, etc., Co. v. Sheahan, 37 Okl. 702, 133 P 228, 230, 47 LRANS 309.

[3] Webster New Int. D. [quot Wilson v. Danley, 165 Ark. 565, 265 SW 358, 360].

[a] **Illustration.**—"As the residence of an American in France or Italy for a year." Webster New Int. D. [quot Wilson v. Danley, 165 Ark. 565, 265 SW 358, 360].

[4] Webster D. [quot Peo. v. Platt, 50 Hun 454, 470, 3 NYS 367; Hall v. Hall, 25 Wis. 600, 607]; Harding v. Standard Oil Co., 182 Fed. 421, 425.

[5] Webster D. [quot Peo. v. Platt, supra; Hall v. Hall, supra]; Harding v. Standard Oil Co., 182 Fed. 421, 425; Willingham v. Swift Co., 165 Fed. 223, 224; Lawson v. Adlard, 46 Minn. 243, 245, 48 NW 1019; Cincinnati, etc., R. Co. v. Ives, 3 NYS 895; Smith v. Smith, 122 Va. 341, 94 SE 777, 778; Long v. Ryan, 30 Gratt. (71 Va.) 718, 720; Re Fraser, 30 N. S. 272, 276.

[6] Webster D. [quot Peo. v. Platt, 50 Hun 454, 470, 3 NYS 367; Hall v. Hall, 25 Wis. 600, 607]; Harding v. Standard Oil Co., 182 Fed. 421, 425; Willingham v. Swift Co., 165 Fed. 223, 224; Cincinnati, etc., R. Co. v. Ives, 3 NYS 895; Watson v. North Carolina R. Co., 152 N. C. 215, 67 SE 502, 503; Smith v. Smith, 122 Va. 341, 94 SE 777, 778.

[7] Webster D. [quot Peo. v. Platt, 50 Hun 454, 470, 3 NYS 367; Hall v. Hall, 25 Wis. 600, 607]; Harding v. Standard Oil Co., 182 Fed. 421, 425; Willingham v. Swift Co., 165 Fed. 223, 224; Lawson v. Adlard, 46 Minn. 243, 245, 48 NW 1019 (so defining the word "in its popular sense"); Cincinnati, etc., R. Co. v. Ives, 3 NYS 895; Watson v. North Carolina R. Co., 152 N. C. 215, 67 SE 502, 503; Smith v. Smith, 122 Va. 341, 94 SE 777, 778; Long v. Ryan, 30 Gratt. (71 Va.) 718, 720; Re Fraser, 30 N. S. 272, 276.

[a] **Similar definitions.**—(1) The abiding or dwelling in a place for some continuance of time. Brownsville v. Marr, 5 Tenn. Civ. A. 555, 562. (2) The act of dwelling or being in a place for a continuance of time. Webster D. [quot Crawford v. Wilson, 4 Barb. (N. Y.) 504, 520]. (3) The act or fact of residing, abiding, or dwelling in a place for some continuance of time. Webster D. [quot Krumenacker v. Andis, 38 N. D. 500, 165 NW 524, 526]. (4) Act or fact of abiding or dwelling in a place for some time. Webster New Int. D. [quot Wilson v. Danley, 165 Ark. 565, 265 SW 358, 360].

[8] Burrill L. D. [quot Hall v. Hall, 25 Wis. 600, 607].

[9] Burrill L. D. [quot Hall v. Hall, supra]; Harding v. Standard Oil Co., 182 Fed. 421, 425; Baird v. Baird, 193 Cal. 225, 223 P 974, 999; Matter of Collins, 64 HowPr (N. Y.) 63, 65.

[10] Burrill L. D. [quot Hall v. Hall, 25 Wis. 600, 607].

[11] Boucicault v. Wood, 3 F. Cas. No. 1,693, 2 Biss. 34, 38.

[12] Webster D. [quot Barney v. Oelrichs, 138 U. S. 529, 534, 11 SCt 414, 34 L. Ed. 1037; Tazewell County v. Davenport, 40 Ill. 197, 205; Bartlett v. New York, 7 N. Y. Super. 44, 47].

[a] **"Having his home there."**—Boucicault v. Wood, 3 F. Cas. No. 1,693, 2 Biss. 34, 38.

[13] Watson v. North Carolina R. Co., 152 N. C. 215, 67 SE 502, 503; Griffin v. Woolford, 100 Va. 473, 479, 41 SE 949.

[14] Webster D. [quot Barney v. Oelrichs, 138 U. S. 529, 534, 11 SCt 414, 34 L. ed. 1037; Tazewell County v. Davenport, 40 Ill. 197, 205; Bartlett v. New York, 7 N. Y. Super. 44, 47]; Griffin v. Woolford, 100 Va. 473, 479, 41 SE 949.

[15] Webster D. [quot Bartlett v. New York, 5 N. Y. Super. 44, 47].

[16] Burrill L. D. [quot Hall v. Hall, 25 Wis. 600, 607].

"Habitancy" 29 C. J. p 200.

[17] In re Newcomb, 192 N. Y. 238, 250, 84 NE 950; Flatauer v. Loser, 156 App. Div. 591, 593, 141 NYS 951; Trenton Bd. of Education v. Crill, 73 Misc. 472, 133 NYS 394, 397; Pecos, etc., R. Co. v. Thompson, 106 Tex. 456, 167 SW 801, 803.

[a] **"If a person actually 'lives'** in a certain place, with the intention of remaining there indefinitely, that place must be said to be his residence." Marston v. Watson, 20 Cal. A. 465, 468, 129 P 611, 612 [quot Smilie v. Smilie, 24 Cal. A. 420, 141 P 829, 831].

[18] In re Martin, 173 App. Div. 1, 158 NYS 915, 916.

[19] Baker v. Conway, 214 Ala. 356, 108 S 18.

[20] Ex p. Bruell, 16 Ch. D. 484, 487.

[21] Ex p. Bruell, supra; Rex v. Fredericton, 44 N. B. 563, 569, 36 DomLR 685. But see Atwood v. Tucker, 26 N. D. 622, 145 NW 587, 589, 51 LRANS 597 (declaring "the term 'residence' has a definite legal meaning—a place of one's abode, home or habitation").

[a] **"The legal definitions . . . vary with the circumstances** of the case, and the mental constitution of judges and authors." Chinese Tax Cases, 14 Fed. 338, 344, 8 Sawy. 384.

[22] Ex p. Bruell, 16 Ch. D. 484. 487; Rex v. Fredericton, 44 N. B. 563, 569, 36 DomLR 685; Toronto Free Hospital v. Barrie, 39 Ont. L. 63, 71, 12 OntWN 2, 34 DomLR 691.

[23] Barhydt v. Cross, 156 Iowa 271, 136 NW 525, 528, 40 LRANS 986, AnnCas1915C 792.

[a] **No exact definition,** which is applicable to all cases, can be given at law. In re Deans, 208 Fed. 1018, 1019.

[b] **Duality of meaning.**—"Sometimes it is to be construed as meaning the domicil of a party, and in others simply to indicate an abiding place for the time being without reference to domicil." Harrison v. Harrison, 117 Md. 607, 84 A 57, 58.

[c] **"Sometimes distinguished into 'residence' and 'legal residence.'"**—In re Kalpachnikoff, 28 F. (2d) 288, 290.

[24] Powell v. Credit Acceptance Corp., 131 Misc. 870, 228 NYS 427, 428.

[a] **Blackstone's definition.**—"The abode of a person or incumbent or his benefice—opposed to non-residence." State v. Shepherd, 218 Mo. 656, 666, 117 SW 1169, 131 AmSR 568; State v. Bunce, 187 Mo. A. 607, 173 SW 101, 102.

[25] Farmer v. Phillips, 12 Ga. A. 732, 78 SE 353, 355 (stating that it has been thus judicially defined); Roosevelt v. Kellogg, 20 Johns. (N. Y.) 208, 211 [quot In re Hughes, Tuck. Surr. (N. Y.) 38, where the definition is said to be "only modified" in Frost v. Brisbin, 19 Wend. (N. Y.) 11, 13, 32 AmD 423].

[a] **"A place of residence in the common law acceptation** of the term means a fixed and permanent abode and dwelling place for the time being as contradistinguished from mere temporal local residence." Silvey v. Lindsay, 42 Hun (N. Y.) 116, 120; Watson v. North Carolina R. Co., 152 N. C. 215, 67 SE 502; 503.

[26] Burrill L. D. [quot Hall v. Hall, 25 Wis. 600, 607]; Century D. [quot Brisenden v. Chamberlain, 53 Fed. 307, 311].

[a] **"Especially,** a settled or permanent home or domicile." Webster D. [quot Krumenacker v. Andis, 38 N. D. 500, 165 NW 524, 526]; Wright v. Genesee Cir. Judge, 117 Mich. 244, 245, 75 NW 465.

[b] **"Domicile" nearly or quite synonymous.**—Johnson v. Hoile, 205 App. Div. 633, 199 NYS 875 [quot Washington v. Thomas, 103 App. Div. 423, 92 NYS 994, 996].

Domicile compared and distinguished generally see Domicile §§ 2, 3.

[27] Century D. [quot Brisenden v. Chamberlain, 53 Fed. 307, 311].

time being;[28] the home or place of abode of the individual;[29] a permanent home or domicile, as distinguished from a temporary abode;[30] the place of actual abode,[31] or of one's domicile,[32] or to which one, wherever he may be, intends to return;[33] or the place where a man establishes his abode[34] and makes the seat of his property[35] and exercises his civil and political rights,[36] or where a person's habitation is fixed, without any present intention of removing therefrom;[37] or where a man is chiefly to be found,[38] or where a person lives and has his fixed, permanent home and principal establishment,[39] or where one habitually sleeps;[40] where one sleeps and lives.[41]

The best definition is that to be deduced from the Roman law; that a man's residence is the place where his family dwells, or which he makes the chief seat of his affairs and interests.[42]

[§ 6] **c. As an Act or State.** A person's habitual physical presence in a place or country, which may or may not be his home;[43] personal presence in a fixed and permanent abode.[44] Also the word is used in law to denote the fact that a person dwells in a given place.[45]

[§ 7] **d. In Statutes, Constitutions, or Actions**[46] **—(1) In General.** Residence is the favorite term employed in statutes to express the connection between person and place.[47] The meaning when employed in a statute is often provocative of dispute,[48] often making it difficult to give an exact definition of what is meant by "residence" as used in particular statutes,[49] for when used in statutes it has different meanings in different connections,[50] and may be used with difference meanings in different statutes;[51] and also, it sometimes has different shades of meaning in the statutes and even in the constitution.[52] An examination of the authorities discloses that it has received different definitions in various cases, principally involving franchise, taxation, and jurisdiction.[53] As its statutory definition depends upon the legislative purpose as well as the context of the statute,[54] it must be construed in every case in accordance with the object and intent of the statute in which it occurs;[55] hence its meaning is to be determined from the facts and circumstances taken together in each particular case.[56] However, it is said that when used in statutes,[57] or actions, or suits[58] relating to taxation, right of suffrage, divorce, limitation of actions, and the like, it is used in the sense of "legal residence,"[59] that is to say the place of domicile or permanent abode.[60]

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[28] In re Wrigley, 8 Wend. (N. Y.) 134, 140 (defining "inhabitancy" in like manner).

[a] **Similar definitions.**—(1) "A fixed and permanent abode, a dwelling house for the time being, as contradistinguished from a mere temporary locality of existence." Weitkamp v. Loehr, 53 N. Y. Super. Ct. 79, 82, 11 NYCivProc 36 (so defining "inhabitancy" also). (2) A fixed and permanent abode or dwelling place for the time being as contradistinguished from a mere temporary locality of existence. In re Wrigley, 8 Wend. (N. Y.) 134, 140 [quot Drew v. Drew, 37 Me. 389, 393]. (3) "A fixed and permanent abode or dwelling, as distinguished from a mere temporary locality of existence." Watson v. North Carolina R. Co., 152 N. C. 215, 67 SE 502, 503. (4) "A settled or fixed abode of a character indicating permanency, at least for an indefinite time." Jones v. Reser, 61 Okl. 46, 160 P 58, 59 [quot Pope v. Pope, 116 Okl. 188, 243 P 962, 964].

[29] Rindge v. Green, 52 Vt. 204, 208 (where such was said to be the well-defined meaning of the term in law).

[30] Brafman v. Brafman, 144 Md. 413, 125 A 161.

[31] Shelton v. Shelton, 180 Ark. 959, 23 SW (2d) 629, 631; Smith v. Union County, 178 Ark. 540, 11 SW (2d) 455, 456.

[a] **"If a person actually lives at a certain place** with the intention of remaining there indefinitely, that place must be said to be his residence." Marston v. Watson, 20 Cal. A. 465, 129 P 611, 612.

[32] Bouvier L. D. [quot Crawford v. Wilson, 4 Barb. (N. Y.) 504, 520; Hall v. Hall, 25 Wis. 600, 607]. See also Domicile §§ 2, 3.

[33] Hanson v. Hanson, 88 Misc. 244, 151 NYS 861, 863.

[a] **Similar definitions.**—(1) "The place to which, whenever he is absent, he has the intention of returning." Williams v. Farmers' Gin, etc., Co., 13 Okl. 5, 73 P 269. (2) "The place where a man has his true, fixed and permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning." Price v. Price, 156 Pa. 617, 626, 27 A 291 [quot Lesh v. Lesh, 13 Pa. Dist. 537, 538]. (3) The place where he intends to live, and to which, whenever he is absent, he has the intention of returning. Roberts v. Robertson, 123 Kan. 222, 254 P 1026, 1027.

[34] Chase v. Miller, 41 Pa. 403, 420; Wanzer Lamp Co. v. Woods, 13 Ont. Pr. 511, 512.

[a] **Similarly,** "the place where he has established his abode." Roberts v. Robertson, 123 Kan. 222, 254 P 1026, 1027.

[35] Chase v. Miller, 41 Pa. 403, 420; Wanzer Lamp Co. v. Woods, 13 Ont. Pr. 511.

[36] Chase v. Miller, 41 Pa. 403, 420.

[a] **Legal residence.**—The place of a man's fixed habitation, where his political rights, such as the right of the elective franchise are to be exercised, and where he is liable to taxation. Crawford v. Wilson, 4 Barb. (N. Y.) 504, 520 [quot Mead v. Carroll, 6 D. C. 338].

[37] McLauchlan's Pet., 1 F. (2d) 5, 7; In re Lemen, 208 Fed. 80, 82; In re Garneau, 127 Fed. 677, 679, 62 CCA 403; Tracy v. Tracy, 62 N. J. Eq. 807, 810, 48 A 533; Matter of Zerega, 20 NYS 417, 418, 1 Pow. Surr. 209 (substituting "man's" for "person's" and "moving" for "removing"); In re Assessment Act, 12 East LR 157, 162.

[a] **Similar definitions.**—(1) "The place where a man's habitation is fixed without any present purpose of removing therefrom." Century D. (defining term "in the legal sense") [quot Reckling v. McKinstry, 185 Fed. 842, 843; Brisenden v. Chamberlain, 53 Fed. 307, 311; McCarty v. Thornton, 38 N. D. 551, 165 NW 499, 500; Lesh v. Lesh, 13 Pa. Dist. 537, 538]; In re Turcick, 33 F. (2d) 364; Baird v. Baird, 193 Cal. 225, 223 P 974, 999. (2) "The home or habitation fixed in any place without a present intention of removing therefrom." Stratton v. Brigham, 2 Sneed (Tenn.) 420, 422.

[b] **"A man's residence is his home,** a habitation, fixed at any place, without a present intention of removing therefrom." In re Rowe, 179 Iowa 541, 161 NW 626, 627.

[c] **"Where he intends to remain** indefinitely and without a present intention to depart." Fry's Election Case, 71 Pa. 302, 309, 10 AmR 698.

[d] **"Used most frequently** to apply to a place where a person resides without a present purpose to remove therefrom." Kidd v. Joint School Dist. No. 2, 194 Wis. 353, 216 NW 499, 501.

[e] **"There must be a settled, fixed abode,** an intention to remain permanently, at least for a time, for business or other purposes, to constitute residence within the legal meaning of that term." Fidelity, etc., Co. v. Sheahan, 37 Okl. 702, 133 P 228, 230, 47 LRANS 309 [quot Jones v. Reser, 61 Okl. 46, 160 P 58, 59].

[38] Attenborough v. Thompson, 2 H. & N. 559, 563, 157 Reprint 230 (rather than the place where a person sleeps).

[39] Burrill L. D. sub verb. "Domicile" [quot Peo. v. Putnam County Surrogate's Ct., 36 Hun (N. Y.) 218, 220, 16 AbbNCas 241].

[a] **"Generally speaking residence means the place where a man lives** with his family, where he can be expected to be when his business does not call him away,—where he passes the night, and in respect of which he pays rates." Greenham v. Child, 24 Q. B. D. 29, 30 [quot McCuaig v. Hinds, (Man.) 11 WestLR 652, 654].

[b] **"It signifies** a party's permanent home and principal establishment, to which, whenever he is absent, he has the intention of returning." Fidelity, etc., Co. v. Sheahan, 37 Okl. 702, 133 P 228, 230, 47 LRANS 309 [quot Pope v. Pope, 116 Okl. 188, 243 P 962, 964; Jones v. Reser, 61 Okl. 46, 160 P 58, 59]; Miller v. Sovereign Camp W. O. W., 140 Wis. 505, 509, 122 NW 1126, 1128, 133 AmSR 1095, 28 LRANS 178 (substituting "person's" for "party's").

[40] Douglas v. O'Brien, 27 Man. 46, 47; Toronto Free Hospital v. Barrie, 39 Ont. L. 63, 71, 12 OntWN 2, 34 DomLR 691; Wanzer Lamp Co. v. Woods, 13 Ont. Pr. 511, 513.

Where person sleeps as determinative of domicile see Domicile § 11 note 75.

[a] **Sleeping quarters.**—"In order to constitute a residence, a party must possess at least a sleeping apartment, but an uninterrupted abiding at such dwelling is not required." Reg. v. Oxford Univ., L. R. 7 Q. B. 471, 473.

[41] Cesena Sulphur Co. v. Nicholson, 1 Ex. D. 428, 452.

[42] Matter of Hawley, 1 Daly (N. Y.) 531, 533 [cit N. Y. Dig. 50 tit I 16, 20, 27, 203; Code tit 39, 7].

[43] See In re Banff Election, 4 Terr. L. 140, 145.

[44] Bouvier L. D. [quot Curren v. McEachen, 5 Terr. L. 333, 336].

[45] Rapalje & L. L. D. 1113 [quot Pittsburgh, etc., R. Co. v. Indianapolis, 147 Ind. 292, 296, 46 NE 641]; Trenton Bd. of Education v. Crill, 73 Misc. 472, 133 NYS 394, 397.

As to corporations see Corporations §§ 408–419, 3933.

[46] **In relation to corporations** see Corporations §§ 408–419, 3933.

[47] Cincinnati, etc., R. Co. v. Ives, 3 NYS 895, 896.

[48] In re Kalpachnikoff, 28 F. (2d) 288, 289.

[§ 8] **(2) Statutory Definitions.** Among definitions of the term given in statutes[61] are the permanent home and the place to which, whenever absent for purposes of business or pleasure, one intends to return;[62] that place where the family of any person shall permanently reside in this state, and the place where any person having no family shall generally lodge, shall be deemed the place of residence of such person or persons respectively;[63] the place adopted by a person as his place of habitation, and to which whenever he is absent he has the intention of returning;[64] the place where one remains when not called elsewhere for labor or other special or temporary purposes, and to which he returns in seasons of repose.[65]

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[49] Williams v. Com., 116 Va. 272, 81 SE 61, 63.

[a] **"It is extremely difficult** to say what is meant by the word 'residence,' as used in particular statutes or to lay down any particular rules on the subject; general definitions are calculated to perplex and mislead." Cincinnati, etc., R. Co. v. Ives, 3 NYS 895.

[b] **In Pennsylvania constitution** it means (1) "home, fixed abode, domicile of the elector, as distinguished from a place of temporary sojourning. Com. v. Devine, 14 Pa. Dist. 1, 3. (2) "Home, abode, domicile of the elector. Fry's Election Case, 71 Pa. 302, 309, 10 AmR 698.

[c] **Under Virginia statutes** the term is said to mean "the place of abode, dwelling, or habitation for some continuance of time." 4 Minor Inst. pt 1 p 367 [quot Griffin v. Woolford, 100 Va. 473, 41 SE 949, 951].

[50] Greene v. Willis, 47 R. I. 375, 133 A 651.

[51] Goerz v. Bell, [1904] 2 K. B. 136, 144 [cit Ashland County v. Armstrong, 11 Ont. L. 414, 415].

[a] **Illustrations.**—(1) "What constitutes residence for registration purposes might not necessarily amount to residence for the purpose of assessment of the income tax." Goerz v. Bell, [1904] 2 K. B. 136, 144. (2) "To fulfill the intention and requirements of some statutes, a commercial or business residence might be all the law required; whilst to gratify the intention of another statute, it may be necessary to hold residence . . . to mean all that the word domicile means." Tyler v. Murray, 57 Md. 418, 441.

[52] Watson v. North Carolina R. Co., 152 N. C. 215, 67 SE 502, 503.

[a] **"The word residence has, like the word 'fixtures,'** different shades of meaning in the statutes." Watson v. North Carolina R. Co., 152 N. C. 215, 67 SE 502, 503.

[53] Trenton Bd. of Education v. Crill, 73 Misc. 472, 133 NYS 394, 396.

[a] **"When it becomes necessary to interpret** [the word 'residence'] much depends upon the nature of the action." Barhydt v. Cross, 156 Iowa 271, 136 NW 525, 528, 40 LRANS 986, AnnCas1915C 792.

[54] Ben Avon Borough School Dist. v. Pittsburgh School Dist., 77 Pa. Super. 75, 78.

[a] **Similar statements.**—(1) "A word whose statutory meaning depends upon the context and the purpose of the statute." Anderson L. D. [quot Wallace v. State, 147 Ind. 621, 623, 47 NE 131]; Shaeffer v. Gilbert, 73 Md. 66, 70, 20 A 434. (2) "The courts have held that 'residence' is a word whose statutory meaning depends upon the context and purpose of the statute." Raymond v. Leishman, 243 Pa. 64, 69, 89 A 791, LRA 1915A 400, AnnCas1915C 780. (3) "In the construction of statutes, the meaning of the word 'residence' depends upon the context and purpose of the statute." Towson v. Towson, 126 Va. 640, 102 SE 48, 52; Cooper v. Com., 121 Va. 338, 93 SE 680, 681. (4) "What the word means in any particular statute depends upon its purpose and the phraseology of the context." Tyler v. Murray, 57 Md. 418, 441. (5) "In determining the meaning of the word in a particular statute, the legislative purpose and the context must always be kept in view." Towson v. Towson, supra. (6) "Its statutory meaning depends upon the context." Raymond v. Leishman, 243 Pa. 64, 89 A 791, 793, LRA1915A 400, AnnCas 1915C 780; Dawson's Registration, 9 Pa. Dist. & Co. 9, 10.

[b] **Legislative intent.**—"In some cases cited the meaning given to the word . . . is said to depend in part, at least in some cases, on the legislative intent." Lippman v. Kehoe Stenograph Co., 11 Del. Ch. 190, 98 A 943, 948.

[55] In re Deans, 208 Fed. 1018, 1019.

[a] **It is "capable of various constructions** according to the statute in which it appears." Stoke-on-Trent v. Cheshire County, [1915] 3 K. B. 699, 706 [quot Re Hamilton, 50 Ont. L. 448, 451].

[b] **"As employed in statutory enactments,** its meaning, as interpreted by the courts, varies as the legislative intent appears, and in harmony with the subject matter, object, and purpose of the statute." State v. Aitkin County Probate Ct., 130 Minn. 269, 153 NW 520, 521 [quot Bechtel v. Bechtel, 101 Minn. 511, 112 NW 883, 884, 12 LRANS 1100 (in definition of word "inhabitant").

[56] Williams v. Com., 116 Va. 272, 81 SE 61, 63.

[a] **"Its meaning is dependent upon the circumstances** then surrounding the person, upon the character of the work to be performed, upon whether he has a family or a home in another place and largely upon his present intention." In re Garneau, 127 Fed. 677, 679, 62 CCA 403 [quot McLauchlan's Pet., 1 F. (2d) 5, 7].

[b] **"The word varies in its construction** according to the object for which the residence is acquired. Blackwell v. England, 8 E. & B. 541, 544, 92 ECL 541, 120 Reprint 202 [quot Rex v. Fredericton, 44 N. B. 563, 569, 36 DomLR 685].

[c] **As "depending upon the circumstances."**—Popejoy v. Boynton, 112 Or. 646, 229 P 370, 230 P 1016.

[57] Downs v. Downs, 23 App. (D. C.) 381, 388; Herron v. Passailaigue, 92 Fla. 818, 110 S 539, 543.

[58] Herron v. Passailaigue, supra.

[59] Downs v. Downs, 23 App. (D. C.) 381, 388; Herron v. Passailaigue, 92 Fla. 818, 110 S 539, 543.

[60] Herron v. Passailaigue, supra. See also supra §§ 5, 6.

"Domicile" synonymous or not, in statutes see Domicile § 3.

[61] See statutory provisions.

[a] **Legal residence of a person** with reference to his or her right of suffrage, eligibility to office, right of naturalization, right to maintain any suit at law or in equity, or any other right dependent on residence, is that place where he or she shall have been actually, physically and corporeally present within the state or county. Rev. L. § 3609; St. (1911) p 318 [quot Lewis v. Lewis, 50 Nev. 419, 264 P 981, 982, 267 P 399].

[62] Hislop v. Taaffe, 141 App. Div. 40, 41, 125 NYS 614 (construing "residence" in other sections of the Code [excluding those relating to attachment and service of process] and in other statutes [excluding those relating to taxation]).

[63] Rev. St. (1899) § 4160 cl 17 [quot State v. Snyder, 182 Mo. 462, 82 SW 12, 23]; State v. Wurdeman, 129 Mo. A. 263, 108 SW 144, 148 (construing the same statute to be "the place where the family of a person resides").

[a] **The place where a person's family "shall permanently reside** in this state." Rev. St. (1909) § 8057 [quot White v. Lee, (Mo. A.) 204 SW 936, 938].

[b] **"The place where a married man's family resides** shall be considered and held to be his residence." Gen. St. (1889) par 2668 (5) [quot Hatch v. Smith, 6 Kan. A. 645, 49 P 698, 699].

[64] Rev. St. 77–201 subd. 23 [quot Ford v. Peck, 116 Kan. 74, 225 P 1054, 1055; Osborne County v. Osborne, 104 Kan. 671, 180 P 233, 234; Hatch v. Smith, 6 Kan. A. 645, 49 P 698, 699]. See Pendleton v. Pendleton, 109 Kan. 600, 602, 201 P 62, 63 (construing Gen. St. [1915] § 10973 subd 23, giving its definition the same as text except the substitution of "as one's habitation" for "by a person as his place of habitation" and "he intends to return"

[§ 9] **3. Synonyms and Distinctions.** Among the terms said to be synonymous are "abode,"[66] "address,"[67] "domicile,"[68] "domiciliation,"[69] "dwelling,"[70] "dwelling house,"[71] "dwelling-place,"[72] "home,"[73] "inhabitancy,"[74] "mansion,"[75] "permanent abode,"[76] "post office,"[77] "settlement,"[78] "sojourn,"[79] and "stay."[80] While "citizenship" has been regarded as interchangeable,[81] it has often been held not to be synonymous;[82] "nonresidence" is its opposite of "residence,"[83] and "whereabouts" is not synonymous.[84]

[§ 10] **4. What the Term Implies, Imports, Involves, or Requires—a. In General.**[85] The term requires bodily presence as an inhabitant[86] in a given place,[87] but generally it is used to denote something more than mere physical presence,[88] for it is not possible to consider the term residence and disassociate it from the elements of home and habitation,[89] since it denotes[90] or implies[91] a place of abode,[92] or dwelling or the house or building in which one lives or resides.[93] It is not confined merely to the dwelling-house, but it may also include everything connected therewith used to make the home more

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for "he has the intention of returning"); Gen. St. (1909) § 9037 [quot O'Neil v. Eppler, 90 Kan. 314, 133 P 705].

65. Pol. Code § 52 [quot Marston v. Watson, 20 Cal. A. 465, 129 P 611, 612].

66. Webster D. [quot Peo. v. Platt, 50 Hun 454, 3 NYS 367, 375]; De Laval Separator Co. v. Hofberger, 161 Wis. 344, 154 NW 387, 389.

"Abode" 1 C. J. p 304 note 43 [b].

67. Atwood v. Tucker, 26 N. D. 622, 145 NW 587, 589, 51 LRANS 597.

"Address" 1 C. J. p 1192 note 13 [a].

68. Ruby v. Pierce, 74 Nebr. 754, 755, 104 NW 1142. See also Attachment § 48; Domicile §§ 2, 3; Guardian and Ward § 28 notes 81, 82.

69. Webster D. [quot Peo. v. Platt, 50 Hun 454, 3 NYS 367, 375].

70. Webster D. [quot Peo. v. Platt, supra]; Birmingham R., etc., Co. v. Abbott, 6 Ala. A. 643, 60 S 970, 972.

[a] **"Dwelling is another word for residence."**—Stevens v. Allen, 139 La. 658, 71 S 936, 943, LRA1916E 1115.

"Dwelling" 19 C. J. p 843.

71. Foot v. Harris, 2 Abb. Pr. (N. Y.) 454, 457.

"Dwelling house" 19 C. J. p 843.

72. North Yarmouth v. West Gardiner, 58 Me. 207, 210, 4 AmR 279; Warren v. Thomaston, 43 Me. 406, 418, 69 AmD 69.

"Dwelling place" 19 C. J. p 848.

73. Webster D. [quot Peo. v. Platt, 5 Hun 454, 3 NYS 367, 375]; North Yarmouth v. West Gardiner, 58 Me. 207, 210, 4 AmR 279; Warren v. Thomaston, 43 Me. 406, 418, 69 AmD 69.

[a] **"Home" equivalent with reference to a corporation.**—State v. Clay County Dist. Ct., 120 Minn. 99, 139 NW 135, 137. See also Corporations §§ 408–419, 3933.

[b] **"Home" not synonymous in ordinary meaning.**—State v. Clay County Dist. Ct., 120 Minn. 99, 139 NW 135, 137; Connly v. McElroy, 46 R. I. 93, 125 A 206.

"Home" 29 C. J. p 768 note 19 [c].

74. Webster D. [quot Peo. v. Platt, 5 Hun 454, 3 NYS 367, 375]; Peo. v. Allard, 99 Cal. A. 591, 279 P 182, 183. See also Habitancy or Inhabitancy 29 C. J. p 200 note 51 [a], 52.

[a] **"Inhabitancy" generally used as synonymous.**—Olson v. Olson, 4 Alaska 624, 625.

[b] **"Inhabitancy" usually synonymous.**—Tyler v. Murray, 57 Md. 418, 428.

[c] **Inhabitancy as "seeming to have the same meaning."**—Griffin v. Woolford, 100 Va. 473, 41 SE 949, 951.

75. Webster D. [quot Peo. v. Platt, 50 Hun 454, 3 NYS 367, 375].

"Mansion" 38 C. J. p 961.

76. Wade v. Wade, 93 Fla. 1004, 113 S 374, 375; Anderson v. Pifer, 315 Ill. 146, 146 NE 171, 173, 37 ALR 134. See also Permanent § 2 note 44.

77. Atwood v. Tucker, 26 N. D. 622, 145 NW 587, 589, 51 LRANS 597.

[a] **"Post office" interchangeable.**—Atwood v. Tucker, 26 N. D. 622, 145 NW 587, 589, 51 LRANS 597.

"Post office" see Post Office § 1.

78. Waterbury v. Bethany, 18 Conn. 424, 429.

Other synonyms in relation to acquisition of settlement see Paupers § 86.

79. Webster D. [quot Peo. v. Platt, 50 Hun 454, 3 NYS 367, 375].

"Sojourn" [36 Cyc 507].

80. Webster D. [quot Peo. v. Platt, 50 Hun 454, 3 NYS 367, 375].

"Stay" [36 Cyc 1257].

81. Baughman v. National Water-Works Co., 46 Fed. 4, 6.

[a] **In many state courts** residence and citizenship are regarded as convertible terms; but the federal courts have adopted a different rule. Harding v. Standard Oil Co., 182 Fed. 421, 425.

82. See Citizens § 2 note 35 [a].

83. Blackstone definition [quot State v. Shepherd, 218 Mo. 656, 666, 117 SW 1169, 131 AmSR 568; State v. Bunce, 187 Mo. A. 607, 173 SW 101, 102].

"Nonresidence" 46 C. J. p 493.

84. Krumenacker v. Andis, 38 N. D. 500, 165 NW 524, 526.

85. Implication of permanency see infra § 11.

86. In re Newcomb, 192 N. Y. 238, 250, 84 NE 950, 954 [quot Flatauer v. Loser, 156 App. Div. 591, 145 NYS 951, 953]; Pecos, etc., R. Co. v. Thompson, 106 Tex. 456, 167 SW 801, 803. But see Webster v. Minister of Health, 43 T. L. R. 36, 37 (stating that the term need not import actual physical presence).

[a] **"There is always one thing implied** and that is the personal residence of the party himself." Walcot v. Botfield, Kay 534, 69 Reprint 226.

[b] **"Generally imports personal presence."**—Chinese Tax Cases, 14 Fed. 338, 344, 8 Sawy. 384.

87. In re Newcomb, 192 N. Y. 238, 250, 84 NE 950.

[a] **"Necessarily involves the idea of a local habitation** or place of abode." Witbeck v. Marshall-Wells Hardware Co., 88 Ill. A. 101 [aff 188 Ill. 154, 58 NE 929, 930].

[b] **"Etymologically,** 'residence' carries with it the squatter thought." In re Kalpachnikoff, 28 F. (2d) 288, 289.

88. Fisher v. First Trust Joint-Stock Land Bank, (Iowa) 231 NW 671, 672.

[a] **"It imports not only physical presence in a place, but an attachment** to it by those acts or habits which express the closest connection between a person and a thing, as by usually sitting or lying there." Matter of Collins, 64 HowPr (N. Y.) 63, 65 [quot Newman v. U. S., 43 App. (D. C.) 53, 62].

89. In re Rowe, 179 Iowa 541, 161 NW 626, 627.

[a] **Similar statement.**—"A definition of residence, from which all the elements of home and habitation are excluded as a matter of no consideration, is beyond the ordinary conception." State v. Snyder, 182 Mo. 462, 82 SW 12, 26.

90. Connly v. McElroy, 46 R. I. 93, 125 A 206, 208.

91. Newman v. U. S., 43 App. (D. C.) 53, 64.

92. Newman v. U. S., supra; Connly v. McElroy, 46 R. I. 93, 125 A 206, 208.

[a] **"Carries with it the idea of an abode** a place of living or a home." Littlefield v. Clayton Bros., (Tex. Civ. A.) 194 SW 194, 198.

[b] **Implies an established abode fixed permanently** for a time, for business or other purposes, although there may be an intent, in the future, at some time or other to return to the original domicile. Morgan v. Nunes, 54 Miss. 308, 310.

[c] **"It indicates** the place where a man has his fixed and permanent abode, and to which, whenever he is absent he has the intention of returning." Watson v. North Carolina R. Co., 152 N. C. 215, 67 SE 502, 503.

[d] **"Indicates the place, abode, or dwelling."**—Mt. Hope School Dist. v. Hendrickson, 197 Iowa 191, 197 NW 47, 48.

93. Insurance Co. of North America v. Samuels, 31 Ga. A. 258, 120 SE 444, 445, 55 ALR 803.

[a] **What the term connotes:**—"When we say a person has his residence in the county it connotes many things in ordinary meaning, a house, an accustomed place to stay, a business, etc. But residence in the legal meaning does not necessarily require these things." State v. Davis, 199 Mo. A. 439, 203 SW 654, 657.

comfortable and enjoyable.[94]

[§ 11] **b. Permanency.** Many cases declare that the word indicates permanency of occupation[95] as distinct from lodging, or boarding,[96] or temporary occupation,[97] and hence involves the idea of something beyond a transient stay in a place.[98] On the other hand it has been held that the term may not imply permanency,[99] or that "residence" is not necessarily permanent,[1] and may be transient in its nature.[2]

[§ 12] **5. In Phrases.**[3] "Residence continuously within the United States,"[4] "residence in another state or territory,"[5] "residence of corporation,"[6] "residence of railroad corporation;"[7] "residence of the board,"[8] also "actual residence,"[9] "a double residence,"[10] "a residence,"[11] "a strictly first-class private residence,"[12] "bona fide residence,"[13] "change of residence,"[14] "constructive residence,"[15] "legal residence,"[16] "legal residence or domicile,"[17] "one residence,"[18] "ordinary residence,"[19] "permanent residence,"[20] "private residence,"[21] and "usual place of residence."[22]

[§ 13] **B. As Adjective.** The term may be used as an adjective[23] and as such it may be employed as equivalent to "residential" in contradistinction to the adjective "business."[24] The term "absent" has been contrasted.[25]

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[94] Ashton v. Ingle, 20 Kan. 670, 681, 27 AmR 197 [quot Linn v. Zeigler, 68 Kan. 528, 531, 75 P 489, 490] (both cases adding that the word "cannot be intended to include some other and independent family's home and residence").

[a] **However it "is not an appropriate word** to designate the housekeeping, with supply of provisions, and the various incidents connected with maintaining a home." Connly v. McElroy, 46 R. I. 93, 125 A 206, 208.

[95] Bouvier D. [quot Louisville R. Co. v. Mitchell, 162 Ky. 253, 172 SW 527, 529]; In re Garneau, 127 Fed. 677, 678, 62 CCA 403 [quot In re Lemen, 208 Fed. 80, 82]; Marston v. Watson, 20 Cal. A. 465, 468, 129 P 611, 612 [quot Smilie v. Smilie, 24 Cal. A. 420, 141 P 829, 831]; Watson v. North Carolina R. Co., 152 N. C. 215, 67 SE 502, 503; Coleman v. Terr., 5 Okl. 201, 208, 47 P 1079.

[a] **"Numerous definitions of residence** are to be found in the books, differing from each other mainly in respect to the greater or less degree of permanence of the inhabitancy or abode which they involve." Pells v. Snell, 130 Ill. 379, 23 NE 117 [quot Fidelity, etc., Co. v. Sheahan, 37 Okl. 702, 133 P 228, 229, 47 LRANS 309.

[b] **"It involves . . . some idea at least of permanency** and fixed intention to remain." Willingham v. Swift, 165 Fed. 223, 224 [quot Harding v. Standard Oil Co., 182 Fed. 421, 425].

[c] **Permanency as element of residence required by statutes.**—McDowell v. Friedman Bros. Shoe Co., 135 Mo. A. 276, 115 SW 1028, 1031.

[d] **Indicating permanency.**—Johnson v. Petty, 138 Okl. 208, 281 P 276, 279.

[e] **"The term implies permanency** or for an indefinite period." State v. Wimby, 119 La. 139, 141, 43 S 984, 985, 121 AmSR 507, 12 LRANS 98.

As being of a more temporary character than domicile see Domicile § 2 note 20.

[96] Bouvier L. D. [quot Louisville, etc., R. Co. v. Mitchell, 162 Ky. 253, 172 SW 527, 529]; Marston v. Watson, 20 Cal. A. 465, 468, 129 P 611, 612 [quot Smilie v. Smilie, 24 Cal. A. 420, 141 P 829, 831]; Watson v. North Carolina R. Co., 152 N. C. 215, 67 SE 502, 503; Coleman v. Terr., 5 Okl. 201, 208, 47 P 1079.

[97] Bouvier L. D. [quot Louisville, etc., R. Co. v. Mitchell, 162 Ky. 253, 172 SW 527, 529]; In re Garneau, 127 Fed. 677, 678, 62 CCA 403 [quot In re Lemen, 208 Fed. 80, 82] (cases reading "as distinguished from" etc.); Marston v. Watson, 20 Cal. A. 465, 468, 129 P 611, 612 [quot Smilie v. Smilie, 24 Cal. A. 420, 141 P 829, 831]; Watson v. North Carolina R. Co., 152 N. C. 215, 67 SE 502, 503; Coleman v. Terr., 5 Okl. 201, 208, 47 P 1079.

[a] **Cannot be referred to an occasional and temporary purpose.**—Bempde v. Johnstone, 3 Ves. Jr. 198, 201, 30 Reprint 967, 968 [cit Wanzer Lamp Co. v. Woods, 13 Ont. Pr. 511, 513].

[98] In re Turcick, 33 F. (2d) 364.

[a] **"Imports more than a temporary stay** in a place for the performance of a single piece or job of work." Farmer v. Phillips, 12 Ga. A. 732, 78 SE 353, 355.

[99] Estopinal v. Michel, 121 La. 879, 880, 46 S 907, 19 LRANS 759.

[1] Avery v. Bower, 170 Ga. 202, 152 SE 239, 242.

[a] **"No fundamental antithesis** between residence and temporary visits." Inland Revenue Comrs. v. Lysaght, [1928] A. C. 217.

[b] **"'Residence' may import temporary sojourn or permanent domicile."**—Anderson L. D. [quot Wallace v. State, 147 Ind. 621, 623, 47 NE 13].

[c] **"It may be either his permanent or temporary abode."**—Raymond v. Leishman, 243 Pa. 64, 89 A 791, 792, LRA1915A 400, AnnCas1915C 780 (omitting word "either"); Towson v. Towson, 126 Va. 640, 102 SE 48, 52; Cooper v. Com., 121 Va. 338, 93 SE 680.

[d] **"It does not mean one's permanent place of abode,** where he intends to live all of his days, or for an unlimited length of time; nor does it mean one's residence for a temporary purpose . . . but means . . . one's actual home, in the sense of having no other home, whether he intends to live there permanently or for a definite or indefinite length of time." Shaeffer v. Gilbert, 73 Md. 66, 69, 20 A 434 [quot Willingham v. Swift Co., 165 Fed. 223, 224].

[e] **"Simply indicates the place of abode, whether temporary or permanent."**—Corel v. Chicago, etc., Co., 123 Fed. 452, 454 [quot Harding v. Standard Oil Co., 182 Fed. 421, 424].

[f] **However temporary.**—"Any place of abode or dwelling place constitutes a residence however temporary it may be." Warren v. Warren, 73 Fla. 764, 75 S 35, 42, LRA1917E 490.

[g] **"Indicates the place of dwelling which may be either** permanent or temporary." Salem Independent School Dist. v. Kiel, 206 Iowa 967, 221 NW 519, 520.

[h] **"A residence simply for the purpose of carrying on business,** for the sake of making money, or for health or pleasure may be temporary." Farrow v. Farrow, 162 Iowa 87, 143 NW 856, 859.

[2] Bouvier L. D. [quot Brown v. Boulden, 18 Tex. 431, 433; Rindge v. Green, 52 Vt. 204, 206].

[3] **As an adjective** see infra § 13.

[4] In re Schradieck, 29 F. (2d) 24.

As qualification for naturalization see Aliens § 138 note 1.

[5] Diariotti v. Missouri Pac. R. Co., 262 Mo. 1, 170 SW 865, 867.

[6] See Corporations §§ 408–419, 3933.

[7] See Railroads § 18.

[8] Peo. v. Evans, 247 Ill. 547, 93 NE 388, 393.

[9] Sears v. Boston, 1 Metc. (Mass.) 250, 251 (meaning "personal presence in a place). See also Attachment § 47 note 65 [f], § 48 note 73 [b].

As circumstance determining domicile see Domicile § 10.

As unnecessary to retain domicile see Domicile § 51 note 41.

[10] Walker v. Haslett, 44 Cal. A. 394, 186 P 622, 623.

[11] Killian v. Goodman, 229 Mich. 393, 201 NW 454, 455.

[12] Walker v. Haslett, 44 Cal. A. 394, 186 P 622, 623.

[13] See Divorce §§ 42–43.

[14] See Domicile § 13 notes 90–92, §§ 49–53.

[a] **"Change of domicile" distinguished.**—Cartwright v. Hinds, 3 Ont. 384, 395.

[15] Re Sturmer, 24 Ont. L. 65, 74, 2 OntWN 1116, 1227, 19 OntWR 255, 430.

[a] **"Constructive legal residence."**—Reg. v. Oxford Univ., L. R. 7 Q. B. 471, 474.

[16] [a] **"'Legal residence' and 'inhabitancy' mean the same thing."**—Mead v. Carroll, 6 D. C. 338, 344 (same as "inhabitancy").

[17] Irwin v. Raymond, 58 Misc. 319, 321, 110 NYS 1100. And see appropriate cross references supra § 1 note 1.

[18] Fortesque v. Carroll, 76 N. J. Eq. 583, 75 A 923, 924, AnnCas1912A 79.

[19] Inland Revenue Comrs. v. Lysaght, [1928] A. C. 217; Denier v. Marks, 18 Ont. Pr. 465, 467.

[20] Insurance Co. of North America v. Samuels, 31 Ga. A. 258, 120 SE 444, 55 ALR 803 (of insured).

[21] See Burglary § 41.

[22] Ruby v. Pierce, 74 Nebr. 754, 104 NW 1142; Graham v. Com., 51 Pa. 255, 258, 88 AmD 581.

[23] See cases infra this section.

[24] Hunt v. Held, 90 Oh. St. 280, 107 NE 765, 766, LRA1915D 543, AnnCas1916C 1051. See also Deeds § 452.

[25] Webster v. Minister of Health,

Phrases: "Residence address,"[26] "residence district,"[27] "residence purposes,"[28] and "residence street."[29]

RESIDENT.[30] [§ 1] **A. In General.** Although there are many definitions to be found in the books,[31] it is not easy to give a satisfactory definition of this term,[32] for it is a flexible,[33] somewhat ambiguous word,[34] used in many[35] and various senses,[36] with the sense in which it should be used controlled by reference to the object,[37] thus having different meanings according to the context,[38] or the subject-matter under discussion.[39] It has a great variety of meanings.[40] It is difficult to give an exact definition of what is meant by "resident" as used in particular statutes,[41] for, although often construed by the courts,[42] the term has no technical meaning,[43] but is differently construed in courts of justice, according to the purposes for which inquiry is made into the meaning of the term.[44] The construction is generally governed by the connection in which the word is used,[45] and the meaning is to be determined from the facts and circumstances taken together in each particular case.[46]

[§ 2] **B. As Noun.** A dweller, or one who dwells or resides permanently in a place,[47] or who has a fixed residence, as distinguished from an occasional lodger or visitor;[48] an inhabitant;[49] one dwelling or having his abode in any place;[50] one who dwells, abides, or lies in a place;[51] one who has his residence in a place;[52] one who resides[53] or dwells in a place[54]

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43 T. L. R. 36, 37.

"Absent" 1 C. J. p 341.

[26] Peo. v. Newell, 49 Colo. 349, 113 P 643, 645.

In application for local option election see Intoxicating Liquors § 271 note 73 [f].

[27] Spann v. Dallas, 111 Tex. 350, 235 SW 513, 514, 19 ALR 1387. See also Municipal Corportions § 372.

[28] See Deeds § 452.

[29] Holst v. Savannah Electric Co., 131 Fed. 931, 935.

[30] See also Reside ante; Residence ante.

"Nonresident" 46 C. J. p 493.

[31] In re Assessment Act, (N. S.) 12 EastLR 157, 162.

[32] Brisenden v. Chamberlain, 53 Fed. 307, 310.

[33] In re Hector, 24 NYS 475, 479.

[a] **"Very flexible in meaning.** . . . This flexibility is more noticeable in the use of the words . . . for legal purposes than in connection with their ordinary use." Australasian Temperance, etc., L. Assur. Soc., Ltd. v. Howe, 31 Austr. C. L. R. 290, 337 (also discussing "reside," "residing" and "resident").

[34] Stadtmuller v. Miller, 11 F. (2d) 732, 734, 45 ALR 895.

[a] **"Capable of ambiguity."**—Levene v. Inland Revenue, 95 L. J. K. B. 998, 1001 [aff [1928] A. C. 234].

[b] **"A word of doubtful import when used with no localization."**—Burdick v. Harbor Springs Lumber Co., 167 Mich. 673, 677, 133 NW 822.

[35] Davies v. Western Australia, 2 Austr. C. L. R. 29, 39.

[36] Trask v. Karrick, 94 Vt. 70, 108 A 846, 847.

[37] Mellish v. VanNorman, 13 U. C. Q. B. 451, 455 [quot Lancaster v. Toronto, 38 Ont. L. 374, 382, 11 OntWN 311].

[a] **"Easily controllable by the subject matter** and the context in which it is found." Australasian Temperance, etc., L. Assur. Soc., Ltd. v. Howe, 31 Austr. C. L. R. 290, 337.

[38] In re Hector, 24 NYS 475, 479; Edwards v. St. John, 22 N. B. 297, 305.

[39] Parcher v. Reese, 202 Ill. A. 509, 513.

[40] In re Hector, 24 NYS 475, 479.

[a] **"Meaning has been variously shaded** according to the variant conditions of . . . application." Baker v. Conway, 214 Ala. 356, 108 S 18.

[41] Williams v. Com., 116 Va. 272, 81 SE 61, 63.

[42] Baker v. Conway, 214 Ala. 356, 108 S 18.

[a] **"As used in constitutions and statutes** . . . often construed by the courts." Baker v. Conway, 214 Ala. 356, 108 S 18.

[43] U. S. v. Nardello, 15 D. C. 503, 512; Toronto Free Hospital v. Barrie, 39 Ont. L. 63, 71, 12 OntWN 2, 34 DomLR 691.

[a] **No uniformity.**—"In some statutes, and for some purposes, it means one thing; in other statutes, and for other purposes, it means another thing." U. S. v. Nardello, 15 D. C. 503, 512.

[44] Toronto Hospital v. Toronto, 58 Ont. L. 273, 279, [1926] 1 DomLR 646 [app dism 59 Ont. L. 16, [1926] 3 DomLR 279]; Lancaster v. Toronto, 38 Ont. L. 374, 380, 11 OntWN 311; Mellish v. VanNorman, 13 U. C. Q. B. (Ont.) 451, 455.

[a] **"This word . . . has received various interpretations** by many different courts, depending largely on the scope of the statute and the connections in which it is used." Sankey's Case, 4 Pa. Co. 624, 631.

[45] In re Hector, 24 NYS 475, 479.

[46] Williams v. Com., 116 Va. 272, 81 SE 61, 63.

[47] Wanzer Lamp Co. v. Woods, 13 Ont. Pr. 511, 513 [quot Douglas v. O'Brien, 27 Man. 46, 47] (both cases so defining the word as used "in ordinary phraseology").

[a] **Similar definitions.**—(1) "One who resides or dwells in a place permanently, or for a considerable time." Lancaster v. Toronto, 38 Ont. L. 374, 380, 11 OntWN 311. (2) "One . . . who resides permanently in a place." Oxford D. [quot Australasian Temperance, etc., L. Assur. Soc., Ltd. v. Howe, 31 Austr. C. L. R. 290, 295].

[48] Wanzer Lamp Co. v. Woods, 13 Ont. Pr. 511, 513 [quot Douglas v. O'Brien, 27 Man. 46, 47] (the Wanzer case adding "unless the statutory signification gives to the term when used in a particular connection, a meaning different from its grammatical import or that which it bears in common parlance," the Douglas case quotes so much including the word "connection" and adds "etc.").

[a] **Applied to locality.**—"According to the natural, ordinary and usual meaning of the word 'resident,' a man is a resident of the locality in which he occupies with his wife a dwelling house, which he regards as his home, and where he habitually sleeps and stays when not engaged in his business occupation, and is none the less a resident of that locality because his residence is in another locality." Lippman v. Kehoe Stenograph Co., 11 Del. Ch. 190, 98 A 943, 949.

[49] Burrill L. D. [quot Reckling v. McKinstry, 185 Fed. 842, 843; Brown v. Ashbough, 40 HowPr (N. Y.) 260, 263]; Roosevelt v. Kellogg, 20 Johns. (N. Y.) 208, 211 [quot Frost v. Brisbin, 19 Wend. (N. Y.) 11, 13, 32 AmD 423 (where it is "doubted if the position is accurate" because "approved lexicographers give a more fixed and definite character to the place of abode of the one than the other"), and both cases with the above statement quot Isham v. Gibbons, 1 Bradf. Surr. (N. Y.) 69, 81].

"Inhabitant" § 6.

[50] Roosevelt v. Kellogg, 20 Johns. (N. Y.) 208, 210 [quot Newman v. U. S., 43 App. (D. C.) 53, 64].

[51] Burrill L. D. [quot Reckling v. McKinstry, 185 Fed. 842, 843; Brown v. Ashbough, 40 HowPr (N. Y.) 260, 263; Houghton v. Ault, 16 HowPr (N. Y.) 77, 85] (all substituting "lives" for "lies").

[a] **Literally** a resident is one who sits, abides, inhabits, or dwells in a certain place. Collinson v. Teal, 6 F. Cas. No. 3,020, 4 Sawy. 241 [quot Newman v. U. S., 43 App. (D. C.) 53, 64].

[52] Bouvier L. D. [quot State v. Bunce, 187 Mo. A. 607, 173 SW 101, 102; Coleman v. Terr., 5 Okl. 201, 208, 47 P 1079].

[a] **Similar definition.**—"One who has a residence." Century D. [quot Reckling v. McKinstry, 185 Fed. 842, 843].

[53] Burrill L. D. [quot Reckling v. McKinstry, 185 Fed. 842, 843; Brown v. Ashbough, 40 HowPr (N. Y.) 260, 263]; Ex p. Blumer, 27 Tex. 734, 736.

[a] **Similar definitions.**—(1) "One that resides in a place." Roosevelt v. Kellogg, 20 Johns. (N. Y.) 208, 210 [quot Frost v. Brisbin, 19 Wend. (N. Y.) 11, 13, 32 AmD 423; Isham v. Gibbons, 1 Bradf. Surr. (N. Y.) 69, 81]. (2) "One who resides in a place." Webster New Int. D. [quot MacLeod v. Stelle, 43 Ida. 64, 249 P 254, 256].

[54] Burrill L. D. [quot Reckling v. McKinstry, 185 Fed. 842, 843; Brown v. Ashbough, 40 HowPr (N. Y.) 260, 263]; Ex p. Blumer, 27 Tex. 734, 736.

[a] **Similar definition.**—"One who dwells in a place for a period of more or less duration." Webster New Int. D. [quot MacLeod v. Stelle, 43 Ida. 64, 249 P 254, 256].

[b] **"The necessary element** in its

for some time;[55] also one who has a seat or settlement in a place.[56]

In the legal sense, a person coming into a place with intent to establish a domicile or permanent residence, and who in consequence actually remains there;[57] one who has a residence in a legal sense.[58]

Phrases: "Resident of another state,"[59] "resident of the state,"[60] "resident within the state,"[61] also "an actual bona fide resident,"[62] "bona fide resident,"[63] "inhabitant or resident of the said city,"[64] and "not a resident;"[65] also "residents of different states,"[66] and "bona fide residents."[67]

[§ 3] **C. As Adjective.** Dwelling or having abode in any place,[68] living, inhabiting, abiding, residing.[69] The term is intended to describe an attribute of a person and has nothing to do with a house or place of abode.[70]

Resident freeholder.[71] In legal terminology the words have a well recognized and generally accepted meaning,[72] obviously a person within that description must be first, a resident of the particular locality; and second, he must own a freehold in lands situated therein;[73] and when used in the plural the term has the same meaning.[74]

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signification is locality of existence." In re Hector, 24 NYS 475, 479.

[55] Burrill L. D. [quot Reckling v. McKinstry, 185 Fed. 842, 843; Brown v. Ashbough, 40 HowPr (N. Y.) 260, 263]; Ex p. Blumer, 27 Tex. 734, 736.

[56] Burrill L. D. [quot Reckling v. McKinstry, supra; Brown v. Ashbough, supra; Houghton v. Ault, 8 AbbPr (N. Y.) 89, 16 HowPr 77, 85].

[57] Bouvier L. D. [quot Houghton v. Ault, 16 HowPr (N. Y.) 77, 85; In re Assessment Act, (N. S.) 12 EastLR 157, 162]; Brown L. D. (Rawls Revision) [quot Brownsville v. Marr, 5 Tenn. Civ. A. 555, 562].

"Domicile" distinguished see Domicile §§ 2, 3.

[a] **"Perhaps the most satisfactory definition** is that one is a resident of a place from which his departure is indefinite as to time, definite as to purpose, and for this purpose he has made the place his temporary abode." Brisenden v. Chamberlain, 53 Fed. 307, 311.

[b] **"A mere transitory coming** for a special purpose, a mere transient visit, does not fall within the legal meaning of the word 'resident.'" U. S. v. Penelope, 27 F. Cas. No. 16,024, 2 Pet. Adm. 438.

[c] **"A resident of a place** is one whose place of abode is there, and who has no present intention of removing therefrom." Dorsey v. Bringham, 177 Ill. 250, 52 NE 303, 307, 69 AmSR 228, 42 LRA 809 [quot Baugh v. Little, 140 Okl. 206, 282 P 459, 461, 462].

[58] Century D. [quot Brisenden v. Chamberlain, 53 Fed. 307, 311]. See also Residence ante.

[a] **"The word has been variously construed to mean** an occupier of lands, . . . one having a domicile, a citizen, or a qualified voter." In re Hector, 24 NYS 475, 479.

[b] **"A person may 'live' at a place and still not be a 'resident'** thereof in the legal sense of the term." O'Brien v. O'Brien, 16 Cal. A. 103, 116 P 692, 694.

[c] **Absentee.**—"He is a resident who, though absent in person, has here his home and permanent abiding place." So defined within the meaning of the Virginia statutes see 2 Barton L. Pr. 915 [quot Griffin v. Woolford, 100 Va. 473, 479, 41 SE 949, 951].

[d] **Meaning an individual or natural person.**—(1) "Occurring in the constitution or in a statute [it] means an individual or a citizen and does not mean a corporation." Wachtel v. Diamond State Engineering Corp., 215 App. Div. 15, 213 NYS 77, 78. (2) "The ordinary reference of the word is to a natural person, and when construed otherwise the general purpose and spirit of the law must require it." State v. Haight, 35 N. J. L. 279, 283. (3) "In its primary meaning [it] signifies . . . a natural person." Australasian Temperance, etc., L. Assur. Soc. Ltd. v. Howe, 31 Austr. C. L. R. 290, 337.

Corporation as a "resident" see Corporations § 31.

[59] Baker v. Wise, 16 Gratt. (57 Va.) 139, 212, 213, 219 (where the word is used to indicate nonresidence of such a character that one is not amenable to the process of the courts of the state).

[60] Mann v. Taylor, 78 Iowa 355, 362, 363, 43 NW 220.

[61] In re Wrigley, 4 Wend. (N. Y.) 602, 8 Wend. 134 [quot Houghton v. Ault. 8 AbbPr (N. Y.) 89, 16 HowPr 77, 85].

[62] Stevens v. Union Graded School Dist. No. 2, 136 Okl. 10, 275 P 1056.

[63] Farmers L. & T. Co. v. Chicago, etc., R. Co., 27 Fed. 146, 148; Wachtel v. Diamond State Engineering Corp., 215 App. Div. 15, 213 NYS 77, 78.

[64] Rex v. Fredericton, 44 N. B. 563, 36 DomLR 685, 688.

[65] Chandler v. Chandler, 132 Va. 418, 112 SE 856, 859.

"Nonresident" 46 C. J. p 493.

[66] Watson v. Cameron, 40 Austr. C. L. R. 446, 448; Australasian Temperance, etc., L. Assur. Soc., Ltd. v. Howe, 31 Austr. C. L. R. 290, 307, 327.

[67] Stevens v. Union Graded School Dist. No. 2, 136 Okl. 10, 275 P 1056.

[68] Dr. Johnson D. [quot U. S. v. Penelope, 27 F. Cas. No. 16,024, 2 Pet. Adm. 438]; Worcester D. [quot Reckling v. McKinstry, 185 Fed. 842, 843 (given as definition of "residence" and omitting "or" between "dwelling" and "having"); Brisenden v. Chamberlain, 53 Fed. 307, 310].

[a] **Similar definitions.**—(1) "Dwelling or having an abode in a particular place, for some time." Houghton v. Ault, 8 AbbPr (N. Y.) 89, 16 HowPr 77, 85 [cit Webster D.]. (2) "Dwelling, or having an abode, in a place for a continued length of time . . . abiding, present." Webster New Int. D. [quot MacLeod v. Stelle, 43 Ida. 64, 249 P 254, 256].

[b] **Person resident** is one "dwelling or having his abode in any place." Roosevelt v. Kellogg, 20 Johns. (N. Y.) 208, 211 [quot Crawford v. Wilson, 4 Barb. (N. Y.) 504, 520]; Drake Attachm. § 59 [quot Munroe v. Williams, 37 S. C. 81, 86, 16 SE 533, 535, 19 LRA 665]; Atkinson v. Washington, etc., College, 54 W. Va. 32, 47, 46 SE 253.

[c] **Construed to mean "having his home."**—Kennebunkport v. Buxton, 26 Me. 61, 68.

[69] Worcester D. [quot Reckling v. McKinstry, 185 Fed. 842, 843; Brisenden v. Chamberlain, 53 Fed. 307, 310].

[70] Levene v. Inland Revenue Comrs., 95 L. J. K. B. 998, 1001 [aff [1928] A. C. 234].

[a] **"In law it clearly means a quality in a person."**—Levene v. Inland Revenue Comrs., 95 L. J. K. B. 998, 1001 [aff [1928] A. C. 234].

[71] **"Freeholder"** 27 C. J. p 896 and cross references thereunder.

[72] Campbell v. Moran, 71 Nebr. 615, 99 NW 498, 499.

[73] Damp v. Dane, 29 Wis. 419, 427.

[a] **Meaning "resident freeholder of the state."**—"When not limited by other words, by the sense of the context or by the subject matter, [it] must be construed to mean 'resident freeholder' of the state." McCormick v. Johnson County, 68 Ind. 214, 218.

[b] **Statutory definition.**—"For the purposes of this act, the term 'resident freeholder' shall be construed to mean any citizen of the United States who owns land within the district or the evidence of title to said land, or who is an entryman under the public land laws of the United States or a purchaser under contract of purchase of state lands, and shall also include corporations, associations and copartnerships owning land within the district." L. (1919) c 41 § 3 [quot Davy v. McNeill, 31 N. M. 7, 240 P 482, 487].

[74] State v. Kokomo, 108 Ind. 74, 78, 8 NE 718, 720. See Cohn v. Welliver, 84 Nebr. 230, 121 NW 107, 109 (meaning "those living within the subdivision holding title to real estate").

[a] **Thus** the "resident freeholders" within, near to, along, or upon a given place are frequently used in statutes and the meaning is usually limited to the locality so designated, unless some other signification is shown by the context. Kirkland v. Indianapolis Public Works, 142 Ind. 123, 129, 41 NE 374, 376.

[b] **"Resident freeholders in the territory sought to be annexed."**—Taggart v. Claypool, 145 Ind. 590, 592, 44 NE 18, 32 LRA 586 [quot Pittsburgh, etc., R. Co. v. Indianapolis, 147 Ind. 292, 294, 46 NE 641].

[c] **"'Resident freeholders upon such street'** . . . was intended to mean persons residing upon the street and owning property thereon." Pittsburgh, etc., R. Co. v. Indianapolis, 147 Ind. 292, 294, 46 NE 641 (also stating the phrase is not equivalent to "residents of the city of Indianapolis owning property upon such street").

Other phrases: “Resident brother,”[75] “resident citizen,”[76] “resident elector,”[77] “resident householder,”[78] “resident inhabitant,”[79] “resident lands,”[80] “resident license,”[81] “resident manager,”[82] “resident occupant,”[83] “resident owner,”[84] “resident pauper,”[85] “resident population,”[86] “resident proprietor,”[87] “resident ratepayer,”[88] “resident taxpayer;”[89] also “actually resident,”[90] “inhabitant or usually resident,”[91] “is resident,”[92] “ordinarily resident,”[93] “usually resident,”[94] and “was not resident.”[95]

[§ 4] **D. What Term Imports.** While on the one hand it is said that the term imports a fixed abode for the time being as contradistinguished from a place of temporary sojourn,[96] it is also said that it does not necessarily import permanence, nor yet any definite stay.[97] When applied in the case of an owner of land the word imports actual visible occupation.[98]

[§ 5] **E. Synonyms and Distinctions.** “Citizen,” while not a convertible term, is often used synonymously,[99] and a similar condition exists in the relation of the word “inhabitant.”[1] “Occupant” is distinguishable,[2] and “settler” is a comparable term;[3] but “present” in none of its applications, is synonymous, under any circumstances;[4] and “transient,”[5] and “nonresident”[6] are the opposites of the term.

Convicts are not “residents” within the city as the term is usually understood.[7]

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[75] Walsh v. Consumnes Tribe No. 14 I. O. R. M., 108 Cal. 496, 500, 41 P 418.

Members of fraternal organizations generally see Beneficial Associations §§ 52–72.

[76] Powers v. Bryant, 7 Port. (Ala.) 9, 15. See also Citizens § 1.

[77] Hackett v. New Haven, 103 Conn. 157, 130 A 121, 125.

“Elector” see Elections § 11.

[78] See Householder 30 C. J. p 474. See also Exemptions § 36.

[a] **As implying or requiring residence in the state.**—Ross v. Banta, 140 Ind. 120, 34 NE 865, 871 (stating also that if residence in the state is meant, householding in the state is also meant); McCormick v. Johnson County, 68 Ind. 214, 216; Marks v. State, 15 Ind. 98, 100.

[79] Mellish v. VanNorman, 13 U. C. Q. B. 451, 455.

“Inhabitant” 31 C. J. p 1194 et seq.

[80] Peo. v. Durey, 126 Misc. 642, 214 NYS 418, 425. See also Taxation [37 Cyc 100 note 77].

[81] State v. Koock, (Mo. A.) 96 SW 721, 723. See also Game § 18.

[82] Palmer v. Chrisp, 7 Austr. C. L. R. 612, 614.

“Manager” 38 C. J. p 524.

[83] Senger v. Blucher No. 343, (Sask.) [1923] 4 DomLR 153, 155, [1923] 2 WestWkly 1137.

“Occupant” 46 C. J. p 894.

[84] Burdick v. Harbor Springs Lumber Co., 167 Mich. 673, 133 NW 822, 824; Palmer v. Farmington, 25 N. M. 145, 179 P 227, 231; Alexander v. Baker, 74 Oh. 258, 266, 78 NE 366, 368.

[a] **“Resident owners.”**—Osborne County v. Osborne, 104 Kan. 671, 180 P 233 (as not applicable to a county); Sullwold v. St. Paul, 138 Minn. 271, 164 NW 983, 984, AnnCas1918E 835 (referring to those residing within the city as distinguished from nonresidents); Catron v. Dailey, 84 Nebr. 487, 121 NW 462, 463; Alexander v. Baker, 74 Oh. St. 258, 266, 268, 78 NE 366, 368, 369 (as residents of county).

[b] **“A majority of the resident owners. . . .”**—Shaw v. Goben, 167 Mo. A. 125, 126, 151 SW 209, 210.

“Owner” see Property § 48.

[85] Topsham v. Williamstown, 60 Vt. 467, 471, 12 A 112.

Relief and support of paupers resident in another town see Paupers § 21.

Residence as necessary for settlement see Paupers §§ 83–95.

[86] State v. Island Lake, 130 Minn. 100, 153 NW 257. See also Municipal Corporations § 19 note 96.

[87] Hobbs v. Clements, 32 Me. 67, 68.

“Proprietor” 50 C. J. 791.

[88] Reg. v. Dinnin, 3 Terr. L. 112, 115.

“Ratepayer” 52 C. J. p 1144.

[89] Baugh v. Little, 140 Okl. 206, 282 P 459, 461.

[a] **As synonymous with** “qualified property tax paying voters.” Baugh v. Little, 140 Okl. 206, 282 P 459, 461.

“Taxpayer” [37 Cyc 1597].

[90] Curren v. McEachren, 5 Terr. L. 333, 337 (which, it states “must be something more limited than simply ‘resident’ ”).

[91] Coleman v. Terr., 5 Okl. 201, 207, 47 P 1079.

[92] Toronto Free Hospital v. Barrie, 39 Ont. L. 63, 67, 12 OntWN 2, 34 DomLR 691.

[93] Levene v. Inland Revenue Comrs., 95 L. J. K. B. 998, 1001 [aff [1928] A. C. 234]; Wanzer Lamp Co. v. Woods, 13 Ont. Pr. 511, 513.

[94] McDowell v. Friedman Bros. Shoe Co., 135 Mo. A. 276, 283, 115 SW 1028, 1032.

[95] Re Fitzmartin, 24 Ont. L. 102, 108, 2 OntWN 1114, 1177, 19 OntWR 267, 367.

[96] Stadtmuller v. Miller, 11 F. (2d) 732, 739, 45 ALR 895.

[a] **“The permanency of residence indicated** . . . depends in a great degree upon the context.” In re Hector, 24 NYS 475, 479.

[b] **As affecting jurisdiction** the word “involves the idea of both a dweller and of permanency.” Routenberg v. Schweitzer, 50 App. Div. 218, 220, 63 NYS 746 [rev 165 N. Y. 175, 177, 58 NE 880 (without objection to the proposition above quoted)].

[c] **“The term ‘a resident,’ in a broad sense,** includes any person who comes into this state and remains here with the intention to make it his permanent abode.” Mansefield Tp. Bd. of Education v. State Bd. of Education, 101 N. J. L. 474, 129 A 765, 766.

[d] **In New York Constitution and laws.**—“So far as our own constitution and laws speak of residents, the idea of a fixed and permanent dwelling generally seems to be involved.” Isham v. Gibbons, 1 Bradf. Surr. (N. Y.) 69, 81.

[97] La Pointe v. Grand Trunk R. Co., 26 U. C. Q. B. (Ont.) 479, 487.

[a] **As including both permanent and temporary residence** see Brown’s Adoption 25 Pa. Super. 259, 263.

[98] Toronto Bank v. Fanning, 17 Grant Ch. (Ont.) 514, 516.

[99] See Citizens § 1 notes 16, 17.

[1] See Inhabitant § 6.

[2] Toronto Bank v. Fanning, 17 Grant Ch. (Ont.) 514, 516.

“Occupant” 46 C. J. p 894.

[3] Hume v. Gracy, 86 Tex. 671, 673, 27 SW 584.

[a] **“ ‘Settler’ hardly more restricted** than the word ‘resident.’ ” Hume v. Gracy, 86 Tex. 671, 673, 27 SW 584.

“Settler” [35 Cyc 1446].

[4] Evans v. Perrine, 35 N. J. L. 221, 223.

“Present” 49 C. J. p 1337.

[5] New Haven v. Middlebury, 63 Vt. 399, 404, 21 A 608, 610 [quot Reckling v. McKinstry, 185 Fed. 842, 843].

[a] **“The latter describes a person at rest** in a town, while the former describes him in his passage through or across it.” New Haven v. Middlebury, 63 Vt. 399, 404, 21 A 608, 610 [quot Reckling v. McKinstry, 185 Fed. 842, 843].

[b] **“A mere transient is not a resident.”**—Atty.-Gen.’s Report in re Claim No. 5,869 [quot Stadtmuller v. Miller, 11 F. (2d) 732, 739, 45 ALR 895].

“Transient” [38 Cyc 943].

[6] McCormick v. Johnson County, 68 Ind. 214, 216.

[a] **“Antithesis of nonresident.”**—McDowell v. Friedman Bros. Shoe Co., 135 Mo. A. 276, 287, 115 SW 1028.

[b] **Comparative frequency of use.**—The word resident, either as a noun or adjective, is not as frequently used in statutes or legal proceedings as is its opposite term, nonresident, because the rights of all persons under the law and our courts are the same, unless some exception is shown to the contrary. McCormick v. Johnson County, 68 Ind. 214, 216.

“Nonresident” 46 C. J. p 493.

[7] Gray v. Waupun, 185 Wis. 157, 200 NW 362, 363.

***RESIDUAL.**[8] Relating to the residue,[9] or the part remaining.[10]

Phrase: "Residual value."[11]

RESIDUARY.[12] Pertaining to the residue; receiving or entitled to the residue.[13]

Residuary account. In English practice, the account which every executor and administrator after paying the debts and particular legacies of the deceased and before paying over the residuum must pass before the Board of Inland Revenue.[14]

RESIDUE.[15] [§ 1] **A. In General.** That which remains[16] after a part is designated,[17] taken, separated, removed,[18] or dealt with in some other way;[19] that which remains of something after taking away a part of it;[20] the arithmetical remainder;[21] the balance;[22] the remainder;[23] the rest;[24] what is left[25] after something else has been taken out;[26] what is left of a number or a quantity after something has been abstracted;[27] what remains[28] after deduction.[29]

[§ 2] **B. With Reference to Estates.** All that property which remains after paying charges and debts and satisfying all legacies and devises;[30] that portion of an estate that remains,[31] or that which is left,[32] or what remains,[33] after the payment of[34] all[35] debts,[36] expenses of administration,[37] funeral charges,[38] and other proper charges and commissions,[39] and legacies[40] both specific as well as general-eral,[41] and after satisfying the other specific gifts;[42] that portion of the estate which is left after payment of charges, debts, and particular legacies;[43] that which remains after all paramount claims are satisfied,[44] or after discharging all legal and testamentary claims on the estate;[45] the entire balance;[46] the surplus[47] of a testator's or intestate's estate remaining after all the debts and particular legacies have been discharged,[48] or after discharging all his liabilities;[49] what is left after all liabilities are discharged and all the purposes of the testator are carried into effect.[50]

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[8] See also Residuary post; Residue post.

[9] Black L. D.

"Residue" post.

[10] Black L. D.

"Remaining" see Remain ante.

[11] Briggs Mfg. Co. v. U. S., 30 F. (2d) 962, 967.

[12] **Residuary:**
Beneficiary see Wills [40 Cyc 1447].
Bequest see Wills [40 Cyc 994, 1488, 1563].
Clause see Wills [40 Cyc 1563–1571, 1580].
Devise see Wills [40 Cyc 994, 1488, 1563–1571].
Devisee see Wills [40 Cyc 951, 994].
Estate see Wills [40 Cyc 1488, 1565–1571, 1580].
Interest see Wills [40 Cyc 1488].
Legacy see Wills [40 Cyc 994, 995, 1488, 1563–1571].
Legatee see Executors and Administrators §§ 66, 1819, 2015; Wills [40 Cyc 995, 1488, 1565–1571].
Personal estate see Wills [40 Cyc 1488, 1569, 1609].
See also Residue post; Wills [40 Cyc 1488, 1563–1580].

[13] Black L. D.

[a] **As residue.**—It has been used in the sense of the residue itself. In re Wiley, 111 App. Div. 590, 97 NYS 1017, 1023 (so construing the words "said residuary," etc.).

"Residue" post.

[14] Black L. D. See also Executors and Administrators § 2303.

[15] See also Residuum post; Rest post; Wills [40 Cyc 1563].

[16] Century D.; Webster D. [both quot Young v. Quimby, 98 Me. 167, 170, 56 A 656]; Chicago Title, etc., Co. v. Waukegan, 333 Ill. 577, 165 NE 348, 350; Dunn v. Kearney, 288 Ill. 49, 123 NE 105, 108 [cit Cyc]; Barker v. Petersburg, 41 Ind. A. 447, 82 NE 996, 997; Faison v. Middleton, 171 N. C. 170, 88 SE 141, 142, AnnCas 1917E 72 [quot Van Winkle v. Catholic Missionary Union, 192 N. C. 131, 133 SE 431, 433].

[17] Webster D. [quot Young v. Quimby, 98 Me. 167, 170, 56 A 656].

[18] Century D.; Webster D. [both quot Young v. Quimby, supra].

[19] Century D. [quot Young v. Quimby, supra].

[20] Bouvier L. D. [quot Morgan v. Huggins, 48 Fed. 3, 5 (reading "some" instead of "a"); Phelps v. Robbins, 40 Conn. 250, 264; Gahan v. Golden, 330 Ill. 624, 162 NE 164, 167; Jewett v. Jewett, 21 Oh. Cir. Ct. 278, 280, 12 Oh. Cir. Dec. 131]. See Woolverton v. Johnson, 69 Kan. 708, 719, 77 P 559; In re Chisholm, 50 N. S. 341, 349.

[21] Stokes v. Prance, [1898] 1 Ch. 212.

[22] Atkins v. Kron, 37 N. C. 58, 62; Davis v. Hutchings, 15 Oh. Cir. Ct. 174, 177, 8 Oh. Cir. Dec. 52. See Ex p. Artz, 9 Md. 65, 67.

[a] **"Balance" equivalent.**—Davis v. Hutchings, 15 Oh. Cir. Ct. 174, 177, 8 Oh. Cir. Dec. 52.

"Balance" 6 C. J. p 1170.

[23] Cook v. Sackett, 110 App. Div. 322, 96 NYS 1085, 1087; Hulin v. Squires, 63 Hun 352, 360, 18 NYS 309; Edwards v. Newland, 271 Pa. 1, 5, 113 A 742 (describing this as "the technical sense"). See Johnson v. Poulson, 32 N. J. Eq. 390, 394.

"Remainder" ante.

[24] Bragaw v. Bolles, 51 N. J. Eq. 84, 90, 25 A 947; Hulin v. Squires, 63 Hun 352, 360, 18 NYS 309.

[a] **Equivalent to "rest."**—Bragaw v. Bolles, 51 N. J. Eq. 84, 90, 25 A 947.

"Rest" post.

[25] Berger v. Burnett, 95 N. J. Eq. 643, 123 A 879, 881; Hulin v. Squires, 63 Hun 352, 360, 18 NYS 309; Addeman v. Rice, 19 R. I. 30, 32, 31 A 429.

[26] Addeman v. Rice, supra.

[27] Johnson v. Poulson, 32 N. J. Eq. 390, 395 [quot Stevens v. Flower, 46 N. J. Eq. 340, 344, 19 A 777].

[a] **"The residue of a farm** is what remains of it after something has been taken away." Johnson v. Poulson, 32 N. J. Eq. 390, 393.

[b] **"'Residue' of a fund** means that which remains after the withdrawal of any part or parts of the fund." Cock v. Aitken, 6 Austr. C. L. R. 290, 297.

[28] Ordinary v. Cooley, 30 N. J. L. 271, 273; Cock v. Aitken, 6 Austr. C. L. R. 290, 302.

[29] Cock v. Aitken, supra.

[30] Leahy v. Cardwell, 14 Or. 171, 172, 12 P 307.

[a] **"The residue of the estate"** in a statute providing that after certain enumerated expenditures the decree may assign it "evidently embraces all the estate, both real and personal, which is to be affected by the 'decree.'" Wood v. Myrick, 16 Minn. 494 (per McMillan, J.).

[31] Stanley v. Stanley, 108 Conn. 100, 142 A 851, 855.

[32] In re Hartung, 39 Nev. 200, 155 P 353, 355, 159 P 864; Berger v. Burnett, 95 N. J. Eq. 643, 123 A 879, 880 ("what is left"); In re Hamlin, 185 App. Div. 153, 172 NYS 787, 790. See Frelinghuysen v. New York L. Ins., etc., Co., 31 R. I. 150, 160, 77 A 98, AnnCas1912B 237 (using "was" instead of "is") [quot Berger v. Burnett, supra].

[33] McDougald v. Low, 164 Cal. 107, 110, 127 P 1027; Ordinary v. Cooley, 30 N. J. L. 271, 273; Hagen's Est., 85 Pa. Super. 123, 131 [quot Cyc]; Addeman v. Rice, 19 R. I. 30, 32, 31 A 429.

[34] See McDougald v. Low, 164 Cal. 107, 110, 127 P 1027 ("after paying").

[35] Berger v. Burnett, 95 N. J. Eq. 643, 123 A 879, 880.

[36] McDougald v. Low, 164 Cal. 107, 110, 127 P 1027; Stanley v. Stanley, 108 Conn. 100, 142 A 851, 855; In re Hartung, 39 Nev. 200, 155 P 353, 355, 159 P 864; Ordinary v. Cooley, 30 N. J. L. 271, 273; Berger v. Burnett, 95 N. J. Eq. 643, 123 A 879, 880; In re Hamlin, 185 App. Div. 153, 172 NYS 787, 790; Hagen's Est., 85 Pa. Super. 123, 131 [quot Cyc]; Frelinghuysen v. New York L. Ins., etc., Co., 31 R. I. 150, 160, 77 A 98, AnnCas1912B 237; Addeman v. Rice, 19 R. I. 30, 32, 31 A 429.

[37] McDougald v. Low, 164 Cal. 107, 110, 127 P 1027; Berger v. Burnett, 95 N. J. Eq. 643, 123 A 879, 880; Ordinary v. Cooley, 30 N. J. L. 271, 273; Hagen's Est., 85 Pa. Super. 123, 131 [quot Cyc]; Addeman v. Rice, 19 R. I. 30, 32, 31 A 429. See Stanley v. Stanley, 108 Conn. 100, 142 A 851, 855 ("administration charges").

[38] Hagen's Est., 85 Pa. Super. 123, 131 [quot Cyc]; Addeman v. Rice, 19 R. I. 30, 32, 31 A 429.

[39] Berger v. Burnett, 95 N. J. Eq. 643, 123 A 879, 880.

[40] McDougald v. Low, 164 Cal. 107, 110, 127 P 1027; Stanley v Stanley, 108 Conn. 100, 142 A 851, 855; In re Hartung, 39 Nev. 200, 155 P 353, 355, 159 P 864; Berger v. Burnett, 95 N. J. Eq. 643, 123 A 879, 880; Hagen's Est., 85 Pa. Super. 123, 131 [quot Cyc]; Frelinghuysen v. New York L. Ins., etc., Co., 31 R. I. 150, 160, 77 A 98, AnnCas1912B 237; Addeman v. Rice, 19 R. I. 30, 32, 31 A 429; Ward v. Grey, 26 Beav. 485, 492, 53 Reprint 986.

[a] **Similar definitions.**—(1) "That portion which remains after the payment in full of all charges, debts and legacies." Patterson's Est., 3 Pa. Dist. 796, 15 Pa. Co. 520. (2) "What is left after the payment of debts and other charges against the estate and of the specific bequests and legacies." In re Hamlin, 172 NYS 787, 790. (3) "What remains

*By CARLOS M. SANDOVAL (Residual-Resolve inclusive).

Property undisposed of. "Residue" is used frequently as designating and including all [property] of which no effectual disposition is made by the will, other than by the residuary clause,[51] with certain possible exceptions;[52] all property subject to be bequeathed by a person, not otherwise effectually disposed of;[53] that only which remains undisposed of after satisfying all particular legacies and devises including any which may be made by codicil;[54] that part of a testator's estate not otherwise disposed of;[55] whatever is not specifically devised or bequeathed;[56] what has not been particularly devised by will.[57]

Unconsumed property. When aided by context, "residue" has been held to mean whatever may be left unconsumed of an estate at the death of a devisee.[58]

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after the legacies have been taken out." Gallagher's App., 48 Pa. 121, 122.

[b] **"Residue means** 'ex vi termini' what may be left after satisfying the debts, legacies, etc." Choat v. Yeats, 1 Jac. & W. 102, 105, 37 Reprint 314.

[41] In re Hartung, 39 Nev. 200, 155 P 353, 355, 159 P 864; Frelinghuysen v. New York L. Ins., etc., Co., 31 R. I. 150, 160, 77 A 98; AnnCas 1912B 237 [quot Berger v. Burnett, 95 N. J. Eq. 643, 123 A 879, 880].

[42] In re Hartung, 39 Nev. 200, 156 P 353, 355, 159 P 864; Frelinghuysen v. New York L. Ins., etc., Co., 31 R. I. 150, 160, 77 A 98, AnnCas 1912B 237 [quot Berger v. Burnett, 95 N. J. Eq. 643, 123 A 879, 880].

[a] **Similar definition.**—" 'Residue' can only mean what remains after satisfying the previous gifts." Hill Trustees (4th Am. ed) 360 [quot Tyler v. Tallman, 29 R. I. 57, 63, 68 A 948]; Gould v. Winthrop, 5 R. I. 319, 324.

[b] **Residue of personal estate** (1) is "the personal estate which remains after payment of the testator's debts, funeral and testamentary expenses, and the costs of administration of the estate including the costs of an administration suit." Kennedy v. Protestant Orphan's Home, 25 Ont. 235, 239. (2) "It appears to have been long-settled law that there is no residue of personal estate until after payment of the debts, funeral and testamentary expenses, and all costs of the administration of the estate of the testator. Therefore, until you have paid the costs, you do not arrive at the net residue." Trethewy v. Helyar, 4 Ch. D. 53, 56 [cit Kennedy Protestant Orphan's Home, supra, and foll Fenton v. Wills, 7 Ch. D. 33, 34]. (3) "That which remains after payment of all that is properly a charge upon it, that is to say, the debts, the funeral and testamentary expenses, and the legacies." Field v. Peckett, 29 Beav. 568, 571, 54 Reprint 748.

[43] Phelps v. Robbins, 40 Conn. 250, 264 [quot Stevens v. Underhill, 67 N. H. 68, 72, 36 A 370, substituting "bequests" for "legacies"]; Leahy v. Cardwell, 14 Or. 171, 173, 12 P 307 (substituting "bequests" for "legacies" and adding: "It is the proper ascertainment of these, their payment and discharge, which creates the residue and makes it tangible as such"); In re Bradley, 123 Wis. 186, 188, 101 NW 393].

[a] **Similar definition.**—"What remains after the payment of charges and specific legacies." Woolverton v. Johnson, 69 Kan. 708, 719, 77 P 559.

[44] In re Bradley, 123 Wis. 186, 188, 101 NW 393 [adapting the definition from Tomlinson v. Bury, 145 Mass. 346, 347, 14 NE 137, 1 AmSR 464 (where it was said: "Nothing is given by a residuary clause except upon the condition that something remains after all paramount claims upon the testator's estate are satisfied")].

[a] **Similar definition.**—"That which is left after all previous demands have been fully satisfied." Vance's Est., 6 Pa. Co. 649, 650.

[45] Eyre v. Marsden, 3 Jur. 450, 452, 18 EngCh 231, 41 Reprint 91 [quot In re Bradley, 123 Wis. 186, 188, 101 NW 393]. See Ansin v. Taylor, 262 Mass. 159, 159 NE 513, 515.

[a] **Similar definition.**—"That which is left after satisfying the specific legacies and bequests." In re Spier, 224 Mich. 658, 195 NW 430, 432.

[b] **"A gift of the residue of an estate."**—(1) "In the absence of language to the contrary, [it] means the estate which remains after satisfying all previous gifts." Ansin v. Taylor, 262 Mass. 159, 159 NE 513, 515. (2) "It is a gift of what remains after the debts and legacies are paid." Bullard v. Redwood Library, 37 R. I. 107, 91 A 30, 32.

[46] Taylor's Est., 239 Pa. 153, 163, 86 A 708.

[a] **" 'Entire balance of my estate'** is equivalent to the 'residue.' " Taylor's Est., 239 Pa. 153, 163, 86 A 708.

[47] 2 Blackstone Comm. p 514 [quot Leahy v. Cardwell, 14 Or. 171, 172, 12 P 307].

[a] **"Surplus" equivalent.**—Jauretche v. Proctor, 48 Pa. 466, 471.

[b] **"Surplusage" distinguished.**—Bragaw v. Bolles, 51 N. J. Eq. 84, 90, 25 A 947.

[c] **"Remainder" contrasted.**—Jauretche v. Proctor, 48 Pa. 466, 471.

[48] 2 Blackstone Comm. p 514 [quot Leahy v. Cardwell, 14 Or. 171, 172, 12 P 307]; Morgan v. Higgins, 48 Fed. 3, 5; Jauretche v. Proctor, 48 Pa. 466, 471; Hagen's Est., 85 Pa. Super. 123, 131 [quot Cyc].

[49] Morgan v. Huggins, 48 Fed. 3, 5.

[50] Graves v. Howard, 56 N. C. 302, 305 [quot Morgan v. Huggins, 48 Fed. 3, 5; Taylor's Est., 239 Pa. 153, 163, 86 A 708].

[51] 1 Jarman Wills p 764 [quot Morton v. Woodbury, 153 N. Y. 243, 257, 47 NE 283 [quot In re Watts, 112 Misc. 300, 182 NYS 910, 911; Gallavan v. Gallavan, 31 Misc. 282, 284, 64 NYS 329)]; Sturgis v. Work, 122 Ind. 134, 138, 22 NE 996, 17 AmSR 349; Beekman v. Peo., 27 Barb. (N. Y.) 260, 282; Kent v. Kent, 106 Va. 199, 202, 55 SE 564; Skrymsher v. Northcote, 1 Swanst. 566, 570, 36 Reprint 507, 1 Wis. Ch. 248, 37 Reprint 108 [quot Floyd v. Carow, 88 N. Y. 560, 571; Prison Assoc. v. Russell, 103 Va. 563, 568, 49 SE 966; In re Bradley, 123 Wis. 186, 188, 101 NW 393].

[52] See Wills [40 Cyc 1563–1580].

[53] See Harrington v. Pier, 105 Wis. 485, 499, 82 NW 345, 76 AmSR 924, 50 LRA 307 [quot In re Bradley, 123 Wis. 186, 188, 101 NW 393].

[a] **Similar definitions.**—(1) "All property subject to testamentary disposition which is not otherwise effectively disposed of." In re Radcliffe, 194 Wis. 330, 216 NW 501, 502. (2) "The property of the testator the disposition of which has not otherwise been indicated." Woolverton v. Johnson, 69 Kan. 708, 719, 77 P 559.

[54] Duffield v. Pike, 71 Conn. 521, 526, 42 A 641.

[55] Woerner Am. L. Adm. (2d ed) § 462 [quot Prison Assoc. v. Russell, 103 Va. 563, 568, 49 SE 966 (quot Jordan v. Richmond Home for Ladies, 106 Va. 710, 56 SE 730, 735)].

[56] Bouvier L. D. [cit In re Willard, 68 Pa. 327, 332 (quot In re Pittman, 182 Pa. 355, 360, 38 A 133; Sproul's Est., 105 Pa. 438, 441; Klein's Est., 9 Pa. Dist. & Co. 20; Collins' Est., 26 Pa. Dist. 384, 385, 35 Pa. Co. 545)]; Hofius v. Hofius, 92 Pa. 305, 307.

[a] **"In whatever part of a will** it may happen to be found it ought to have that meaning, unless the whole will, taken together, shows clearly that it was not so intended." Willard's Est., 68 Pa. 327, 332 [quot Sproul's App., 105 Pa. 438, 441; Kleins's Est., 9 Pa. Dist. & Co. 20]. See Hofius v. Hofius, 92 Pa. 305, 307.

[57] Bouvier L. D. [quot Morgan v. Huggins, 48 Fed. 3, 5; Phelps v. Robbins, 40 Conn. 250, 264; Gahan v. Golden, 330 Ill. 624, 162 NE 164, 167; Jewett v. Jewett, 21 Oh. Cir. Ct. 278, 280, 12 Oh. Cir. Dec. 131].

[58] Edwards v. Newland, 271 Pa. 1, 5, 113 A 742. See Jauretche v. Proctor, 48 Pa. 466, 471.

[a] **Right of consumption is implied.**—Hence the residue, left to children of testator after death of his widow, was held to be the part she

Phrases: "Residue and remainder,"[59] "residue and remainder of all my estate,"[60] "residue and ultimate surplus,"[61] "residue of his estate,"[62] "residue of my estate,"[63] "residue of my property, if any remains . . .,"[64] "residue of the capital and the surplus money and funds,"[65] "residue of the testator's estate[66] and effects,"[67] and "residue . . . which is represented in money."[68]

RESIDUUM.[69] In general, what is left;[70] what there is left after a process of separation.[71] As residue of an estate,[72] the residuary estate;[73] the surplus of a testator's or intestate's estate after discharging all his liabilities;[74] the surplus when all the debts and particular legacies are discharged;[75] that which remains of a decedent's estate after debts have been paid and legacies deducted;[76] what remains after administration, properly so called, is concluded.[77]

RESIGN.[78] As relating to an office or employment, to give back,[79] to give up,[80] in a formal manner, an office; or to terminate the contract;[81] to withdraw.[82] As used in an inartificial instrument, it has been construed as a word of release, indicating clearly an intention of surrendering up possession.[83]

RESIGNATIO EST JURIS PROPRII SPONTANEA REFUTATIO.[84]

RESIGNATION.[85] The resignation of an office

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had not consumed. Jauretche v. Proctor, 48 Pa. 466, 471.

[59] In re Grainger, [1900] 2 Ch. 756, 762.

[60] Stevens v. Underhill, 67 N. H. 68, 36 A 370, 373 (dis. op.).

[61] Cock v. Aitken, 6 Austr. C. L. R. 290, 299.

[62] Re Aldridge, 9 Alta. L. 512, 28 DomLR 531, 537, 34 WestLR 546, 10 WestWkly 701.

[63] Applegate v. Birdsall, 20 N. J. L. 244, 247; Miller v. Worrall, 62 N. J. Eq. 776, 780, 48 A 586, 90 AmSR 480.

[64] Re Prieur, 26 OntWN 124.

[65] Firemen's Ins. Co. v. Beha, 30 F. (2d) 539, 541.

[66] Graves v. Howard, 56 N. C. 302, 305 [quot Morgan v. Huggins, 48 Fed. 3, 5; In re Taylor, 239 Pa. 153, 163, 86 A 708].

[67] Graves v. Howard, 56 N. C. 302, 305 [quot Morgan v. Huggins, 48 Fed. 3, 5].

[68] Re Sydere, 31 OntWN 117, 119.

[69] See Residue ante.

[70] In re Stark, 149 Wis. 631, 646, 134 NW 389.

[71] Parsons v. Colgate, 15 Fed. 600, 603, 21 Blatchf. 171 (applying term to chemical substances).

[a] **Various residuums of one substance** may exist, resulting from different processes, and where one residuum of a substance has been used in a patented preparation, the use of a different residuum of the same substance in a preparation of like use is not in itself an infringement on the patent. Parsons v. Colgate, 15 Fed. 600, 603, 21 Blatchf. 171.

[72] See Residue ante §§ 2–5.

[73] In re Stark, 149 Wis. 631, 646, 134 NW 389.

"Residuary estate" see Wills [40 Cyc 1488, 1565–1580].

[74] Wharton L. Lex. [quot Morgan v. Huggins, 48 Fed. 3, 5, 9 LRA 540]; In re Stark, 149 Wis. 631, 646, 134 NW 389, 395 [quot Cyc].

[a] **"General residuum."**—Homer v. Shelton, 2 Metc. (Mass.) 194, 197, 209.

[b] **A residuum of the residuum** results where a will having described what is left of the estate after certain deductions, as the "residue" of the estate, subjects it to further deductions and disposes of the residue then remaining. U. S. Trust Co. v. Black, 9 Misc. 653, 655, 30 NYS 453.

[75] 2 Blackstone Comm. p 514 [quot In re Stark, 149 Wis. 631, 646, 134 NW 389].

[76] Black L. D. [quot In re Stark, supra].

[77] Robinson v. Millard, 133 Mass. 236, 239; In re Stark, 149 Wis. 631, 646, 134 NW 389, 395 [quot Cyc].

[a] **Not part to be administered.**—"The residuum of an estate is not a part of it to be administered." Robinson v. Millard, 133 Mass. 236, 239.

[78] See Resignation post. See also Renounce ante; Renunciation ante.

[79] Richardson D.; Webster D. [both quot Biddle v. Willard, 10 Ind. 62, 66 (quot State v. Huff, 172 Ind. 1, 7, 87 NE 141, 139 AmSR 355; State v. Murphy, 30 Nev. 409, 425, 97 P 391, 18 LRANS 1210)].

[80] Richardson D.; Webster D. [both quot Biddle v. Willard, supra (10 Ind. 62, 66; State v. Huff, 172 Ind. 1, 7, 87 NE 141, 139 AmSR 355; State v. Murphy, 30 Nev. 409, 425, 97 P 391, 18 LRANS 1210)]. See also Officers §§ 129–136.

[a] **Mere offer to resign** is not resigning. Le Masters v. Grant Dist. Bd. of Ed., 105 W. Va. 81, 141 SE 515, 516.

[81] Le Masters v. Grant Dist. Bd. of Ed., 105 W. Va. 81, 141 SE 515, 516.

[82] Peo. v. Metropolitan Dist. Police Bd., 26 Barb. (N. Y.) 487, 501 (where the words are said to be equivalent, as used in Act of [1857] § 12).

[a] **"Withdraw" synonymous.**—Peo. v. Metropolitan Dist. Police Bd., 26 Barb. (N. Y.) 487, 500, 501.

[b] **Mere withdrawing distinguished.**—See Peo. v. Metropolitan Dist. Police Bd., 26 Barb. (N. Y.) 487, 501.

[83] See In re Narragansett Indians, 20 R. I. 715, 736, 737, 40 A 347 (so holding in case of a deed from Chief Ninigret of the Narragansetts to the colony of Rhode Island). See also Release ante.

[84] A maxim meaning "Resignation is a spontaneous relinquishment of one's own right." Black L. D.

[85] **Resignation of:**

Army officer see Army and Navy § 59.
Assignee see Assignments for Benefit of Creditors §§ 301, 302.
Clerk see Clerks of Courts § 24.
Club member see Clubs § 17.
County board member see Counties § 99.
Curator ad hoc see Absentees § 39.
Director see Banks and Banking § 120; Corporations § 1836.
District and Prosecuting Attorneys § 28.
Executor or administrator:
  In general see Executors and Administrators §§ 266–272, 1910, 2435, 2490, 2567.
Executor or administrator:—Continued
  Affecting:
    Compensation see Executors and Administrators § 2435.
    Right to appeal see Appeal and Error § 490.
    Right to execute power see Powers § 103.
    Settlement of estate see Executors and Administrators § 2490.
    Sureties on bond see Executors and Administrators § 2567.
  Not abating action see Abatement and Revival § 227.
Guardian:
  In general see Guardian and Ward § 120; Insane Persons § 285.
  Affecting right to appeal see Appeal and Error § 490.
  Not abating action see Abatement and Revival § 228.
Judges § 43.
Justices of the Peace § 18.
Militia officer see Militia § 36.
Municipal officer:
  In general see Municipal Corporations §§ 1071–1075.
  From board of education see Municipal Corporations § 1573.
  From fire department see Municipal Corporations §§ 1478, 1487.
  Police commissioner see Municipal Corporations § 1276.
  Policeman see Municipal Corporations § 1382.
Naval officer see Army and Navy § 59.
Official, not abating action see Abatement and Revival §§ 227, 228, 232, 233.
Public officer:
  In general see Officers §§ 129–136.
  As bar to mandamus see Mandamus § 81.
  By acceptance of incompatible office see Officers § 55.
  Change in incumbency of office, not abating action see Abatement and Revival § 230.
  Not constituted by:
    Acceptance of nomination to incompatible office see Officers § 55.
    Attempted acceptance of forbidden office see Officers § 55.
  Resignation of second office after vacating first by its acceptance see Officers § 135.
  Right of, as affected by statute providing for holding over see Officers § 129.
  Validity of contract tending to resignation see Contracts § 375.
Receiver:
  In general see Receivers § 115.
  As affecting caption of action see Abatement and Revival § 239.
  In supplementary proceedings see Executions § 1040.
Servant as defense to action, for discharge see Master and Servant § 105.
Sheriffs and Constables [35 Cyc 1500].
State officer see States [36 Cyc 861].

is the act of giving it up;[86] the act by which an officer renounces the further exercise of his office and returns the same into the hands of those from whom he received it;[87] the act of an officer by which he declines his office, and renounces the further right to use it.[88] The term may be used as equivalent to "abdicate"[89] or to "withdraw."[90] "Resignation" has been compared with "nonacceptance;"[91] and it has been said to be synonymous with "abandonment,"[92] "relinquishment,"[93] "renunciation,"[94] and "surrender."[95]

In ecclesiastical law. Resignation is generally where a parson, vicar, or other beneficial clergyman voluntarily surrenders his charge.[96]

In Scotch law. The return of a fee into the hands of a superior.[97]

Resignation by implication. A resignation of a public office by implication may take place by an abandonment of official duty without leave of absence or without good cause shown.[98]

RESIGNEE. One in favor of whom a resignation is made.[99]

RESILIATION. A word of law French, applicable to leases and analogous to "forfeiture."[1]

RESILIENCE.[2] The act of rebounding;[3] the act of resiling (that is, starting back, recoiling) leaping or springing back;[4] the energy given out by a body which is released after being strained up to its elastic limit, or the energy to deform a bar to its elastic limit.[5]

RESILIENCY.[6] The tendency to spring back to its form.[7]

RESILIENT.[8] Having resilience;[9] inclined to leap or spring back;[10] leaping,[11] or springing,[12] back;[13] rebounding;[14] recoiling;[15] returning to or resuming the original position or shape;[16] yielding.[17] Mechanically, of a body, capable of withstanding sudden shock without permanent deformation or rupture.[18] Figuratively, buoyant;[19] elastic;[20] possessing power of recovery.[21] The term has been compared with and distinguished from "deformable,"[22] "elastic,"[23] and "flexible."[24]

Phrase: "Resilient connection."[25]

RESINOUS BODY. One like resin,[26] partaking

Trustee:
  In general see Trusts [39 Cyc 258 et seq].
  Of express trust as affecting caption of action see Abatement and Revival § 240.
  Testamentary trustee who is also executor see Powers § 103.
United States officer see United States [39 Cyc 727].

[86] Richardson D.; Webster D. [both quot Biddle v. Willard, 10 Ind. 62, 66 (quot State v. Huff, 172 Ind. 1, 7, 87 NE 141, 139 AmSR 355; State v. Murphy, 30 Nev. 409, 425, 97 P 391, 18 LRANS 1210)]; Jacobsen v. Chicago, 191 Ill. A. 511, 513.

[87] Black L. D.

[88] Bouvier L. D. [quot Biddle v. Willard, 10 Ind. 62, 66 (quot State v. Huff, 172 Ind. 1, 7, 87 NE 141, 139 AmSR 355; State v. Murphy, 30 Nev. 409, 425, 97 P 391, 18 LRANS 1210)].

[a] **"A prospective resignation** may, in point of law, amount but to a notice of intention to resign at some future day, or a proposition to so resign." Biddle v. Willard, 10 Ind. 62, 66 [quot State v. Murphy, 30 Nev. 409, 425, 97 P 391, 18 LRANS 1210].

[89] Peo. v. Metropolitan Dist. Police Bd., 26 Barb. (N. Y.) 487, 501.

Compared with "abdication" see Abdication 1 C. J. p 280 note 33 [b].

[90] Peo. v. Metropolitan Dist. Police Bd., 26 Barb. (N. Y.) 487, 500, 501 (where the word was said to be used in St. [1857] § 12, as equivalent to "withdraw" but not in the sense of "to 'desert,'" or of "a 'bare withdrawing, a temporary quitting of a thing,'" from which it greatly differs).

[91] Johnston v. Wilson, 2 N. H. 202, 204, 9 AmD 50.

[92] Jacobsen v. Chicago, 191 Ill. A. 511, 513.

[a] **"Abandonment" and "resignation."**—(1) "Abandonment is a species of resignation." Steingruber v. San Antonio, (Tex. Commn. A.) 220 SW 77, 78. (2) "Resignation and abandonment are voluntary acts. The former is a formal relinquishment; the latter a relinquishment through nonuser." Steingruber v. San Antonio, supra.

"Abandonment" § 1.

[93] Jacobsen v. Chicago, 191 Ill. A. 511, 513.

"Relinquishment" ante.

[94] Jacobsen v. Chicago, 191 Ill. A. 511, 513.

"Renunciation" ante.

[95] Jacobsen v. Chicago, 191 Ill. A. 511, 513.

"Surrender" [37 Cyc 616–619].

[96] Black L. D. [cit Phillimore Eccl. L.].

[a] **It is usually done** by an instrument attested by a notary. Black L. D. [cit Phillimore Eccl. L.].

[97] Black L. D. [cit Bell L. D.].

[98] Jacobsen v. Chicago, 191 Ill. A. 511, 513. See also Officers § 132.

[99] Black L. D. [cit 1 Bell Comm. p 125n].

[1] See Beaudry v. Champagne, 12 L. C. Jur. 288 (use of house for immoral purpose held cause for "resiliation of lease"). See also Landlord and Tenant §§ 231–264.

[2] See Resiliency post; Resilient post.

[3] Century D. [quot Palmer v. Jordan Mach. Co., 186 Fed. 496, 502, 503].

[4] Century D. [quot Palmer v. Jordan Mach. Co., supra].

[5] Webster D. [quot Palmer v. Jordan Mach. Co., supra].

[6] See Resilience ante; Resilient post.

[7] Besser v. Merillat Culvert Core Co., 226 Fed. 783, 786.

[8] See Resilience ante; Resiliency ante.

[9] Century D. [quot Palmer v. Jordan Mach. Co., 186 Fed. 496, 503].

[10] Century D. [quot Kitson Co. v. Lattimer-Stevens Co., 37 F. (2d) 562, 563; Palmer v. Jordan Mach. Co., 186 Fed. 496, 503].

[a] **"In ordinary parlance,** the word connotes a readily perceptible tendency to spring back to its original position." Kitson Co. v. Lattimer-Stevens Co., 37 F. (2d) 562, 563.

[11] Century D.; Webster D. [both quot Palmer v. Jordan Mach. Co., 186 Fed. 496, 502, 503].

[12] Century D. [quot Palmer v. Jordan Mach. Co., supra].

[13] Century D.; Webster D. [both quot Palmer v. Jordan Mach. Co., supra].

[14] Century D.; Webster D. [both quot Palmer v. Jordan Mach. Co., supra].

[15] Webster D. [quot Palmer v. Jordan Mach. Co., supra].

[16] Webster D. [quot Palmer v. Jordan Mach. Co., supra].

[17] See Mergenthaler Linotype Co. v. International Typesetting Mach. Co., 229 Fed. 168, 192.

[a] **"'Yielding' in the sense of 'being resilient,'** i. e. when it is pressed back by one's fingers it returns to its original position when the fingers are removed." Mergenthaler Linotype Co. v. International Typesetting Mach. Co., 229 Fed. 168, 192 (describing part of machine).

[18] Webster D. [quot Palmer v. Jordan Mach. Co., 186 Fed. 496, 502].

[19] Webster D. [quot Palmer v. Jordan Mach. Co., supra].

[20] Webster D. [quot Palmer v. Jordan Mach. Co., supra]. But see infra note 23.

"Elastic" 19 C. J. p 1256.

[21] Webster D. [quot Palmer v. Jordan Mach. Co., 186 Fed. 496, 502].

[22] Kitson Co. v. Lattimer-Stevens Co., 37 F. (2d) 562, 563.

[23] Kitson Co. v. Lattimer-Stevens Co., supra. See also supra note 20.

[24] Kitson Co. v. Lattimer-Stevens Co., supra.

[25] Palmer v. Jordan Mach. Co., 186 Fed. 496, 503.

[26] Standard Paint Co. v. Bird, 175 Fed. 346, 350.

of the properties of resin,[27] or pertaining to resin;[28] something containing resins.[29]

RES INTEGRA. A Latin phrase meaning "a whole thing; a new or unopened thing."[30] It is applied to those points of law untouched by dictum or decision;[31] and not affected by precedent.[32]

RES INTER ALIOS ACTA. A thing done between others, or between third parties or strangers;[33] the usual abbreviation of the maxim "res inter alios acta alteri nocere non debet."[34]

RES INTER ALIOS ACTA, ALIOS NEC PRODEST NEC NOCET.[35]

RES INTER ALIOS ACTA ALTERI NOCERE NON DEBET.[36]

RES INTER ALIOS JUDICATÆ NULLUM ALIIS PRÆJUDICIUM FACIUNT.[37]

RES IPSA LOQUITUR.[38]

RESIST.[39] A word derived from the Latin[40] variously defined as meaning to act against;[41] to antagonize;[42] to baffle;[43] to bring to naught;[44] to exert physical or moral force in opposition to;[45] to make opposition;[46] to obstruct;[47] to offer resistance;[48] to oppose[49] passively or actively;[50] to oppose by direct, active and quasi-forcible means;[51] to stand against;[52] to strive against;[53] to withstand.[54]

Phrases: "Resist horses, cattle and live stock,"[55] "resist horses, cattle, swine and like stock,"[56] and "resist or prevent."[57]

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27. Standard Paint Co. v. Bird, supra.

[a] **"Must partake of all the essential properties** of resin—not necessarily those of all resins, but of resins generally, or of some resin." Standard Paint Co. v. Bird, 175 Fed. 346, 351.

[b] **"Stearin pitch" held resinous body.**—Standard Paint Co. v. Bird, 175 Fed. 346, 350, 352.

28. Standard Paint Co. v. Bird, supra.

29. Standard Paint Co. v. Bird, supra.

[a] **Need not contain resin.**—"I do not think that, to constitute a 'resinous body,' that body must necessarily have resin in its composition, or contain resin. It is a resinous body if it has the essential attributes of such a body; that is, if it 'partakes of the properties of resin.'" Standard Paint Co. v. Bird, 175 Fed. 346, 351.

30. Black L. D. (sub verbo "res").

31. See Worrall v. Jacob, 3 Meriv. 256, 268, 36 Reprint 98 [cit Black L. D.].

32. See Bruce County v. Cromar, 22 U. C. Q. B. (Ont.) 321, 328.

33. Black L. D. (sub verbo "res"). See also Evidence §§ 832, 833.

[a] **Another form** of the phrase: "Res inter alios actae" given same effect. Chicago, etc., R. Co. v. Schmitz, 211 Ill. 446, 71 NE 1050, 1054.

34. See post.

35. A maxim meaning "A transaction between other parties neither benefits nor injures those not interested." Henry v. Woods, 77 Mo. 277, 281 (where it was applied in the same manner as "res inter alios acta alteri nocere non debet"). See also post.

36. A maxim meaning "A transaction between two parties ought not to operate to the disadvantage of a third." Morgan Leg. Max.; Carroll v. Rye Tp., 13 N. D. 458, 465, 101 NW 894 (adding "it relates only to the law of evidence").

[a] **Other forms:** (1) "Res inter alios acta, aliis non nocet." Compania General de Tabacos v. Ganson, 13 Philippine 472, 477. (2) "Res inter alios acta alteria nocere non debet." Hamburg Bank v. George, 92 Ark. 472, 123 SW 654, 656.

[b] **As a rule of evidence** (1) generally see Criminal Law § 1113; Evidence §§ 832, 833. (2) In prosecution for particular offense see specific titles.

[c] **Exception to the principle** see Fraud § 198 text and notes 65–67.

37. A maxim meaning "Matters adjudged in a cause do not prejudice those who were not parties to it." Bouvier L. D.

Strangers not concluded by judgment see Judgments §§ 1480–1490.

38. See Negligence §§ 768–786.

39. See also Resistance post.

40. [a] **"The word is Latin,** and its use seems to be singularly true to its etymology ['re,' back or against and 'sto,' stand] and to retain the exact classical meaning." State v. Welch, 37 Wis. 196, 201.

41. Century D. [quot In re Boyd, 228 Fed. 1003, 1004].

42. Century D. [quot In re Boyd, supra]; Webster New Int. D. [quot McAlpine v. State, 19 Ala. A. 391, 97 S 612, 613].

43. Standard D. [quot Powell v. State, 152 Ga. 81, 108 SE 464, 465]. See Herring v. State, 165 Ga. 254, 140 SE 491, 492.

[a] **"Baffle" contrasted.**—An officer "may be balked, baffled, circumvented, frustrated, and yet not be resisted." State v. Welch, 37 Wis. 196, 202.

44. Standard D. [quot Powell v. State, 152 Ga. 81, 108 SE 464, 465]. See Herring v. State, 165 Ga. 254, 140 SE 491, 492.

45. Century D. [quot In re Boyd, 228 Fed. 1003, 1004].

46. Webster New Int. D. [quot McAlpine v. State, 19 Ala. A. 391, 97 S 612, 613].

47. Standard D. [quot Powell v. State, 152 Ga. 81, 108 SE 464, 465]; McAlpine v. State, 19 Ala. A. 391, 97 S 612, 613. See Herring v. State, 165 Ga. 254, 140 SE 491, 492.

[a] **"Obstruct" means same thing.**—McAlpine v. State, 19 Ala. A. 391, 97 S 612, 613.

48. Webster New Int. D. [quot McAlpine v. State, supra].

49. Black L. D.; Webster New Int. D. [both quot McAlpine v. State, supra]; Century D. [quot In re Boyd, 228 Fed. 1003, 1004]; Standard D. [quot Powell v. State, 152 Ga. 81, 108 SE 464, 465]. See Herring v. State, 165 Ga. 254, 140 SE 491, 492.

[a] **"Oppose" synonymous.**—McAlpine v. State, 19 Ala. A. 391, 97 S 612, 613.

[b] **"'Oppose' would cover the meaning** of the word 'resist.'" McAlpine v. State, 19 Ala. A. 391, 97 S 612, 613 (means same thing).

50. Century D. [quot In re Boyd, 228 Fed. 1003, 1004].

51. State v. Welch, 37 Wis. 196, 201.

[a] **As used in statute.**—It has been held that the word as used in Rev. St. c 167 § 18, providing for the punishment of persons who shall knowingly "resist" an officer executing process, is intended to exclude the less directly active conduct described by such words as "oppose, obstruct, hinder, prevent, interrupt, intimidate," and to include only resistance, active and direct, toward the officer. State v. Welch, 37 Wis. 196, 201, 202.

[b] **"Properly describes an opposition** by direct action and quasi forcible means." Black L. D. [quot McAlpine v. State, 19 Ala. A. 391, 97 S 612, 613].

52. State v. Welch, 37 Wis. 196, 201 (taking this as "the popular, the scholarly and the legal sense of it").

53. Standard D. [quot Powell v. State, 152 Ga. 81, 108 SE 464, 465]; Webster New Int. D. [quot McAlpine v. State, 19 Ala. A. 391, 97 S 612, 613]. See Herring v. State, 165 Ga. 254, 140 SE 491, 492.

54. Century D. [quot In re Boyd, 228 Fed. 1003, 1004]; State v. Welch, 37 Wis. 196, 201 (describing this as "the popular, the scholarly and the legal sense of it").

55. Deal v. St. Louis, etc., R. Co., 144 Mo. A. 684, 691, 129 SW 50.

[a] **In describing lawful fence,** as required by statute, an instruction using the words "turn stock" instead of the statutory words "resist horses, cattle and live stock" is not erroneous, the court saying: "We see no difference between the meaning of the words 'turn stock' and 'to resist.'" Deal v. St. Louis, etc., R. Co., 144 Mo. A. 684, 691, 129 SW 50.

56. Hax v. Quincy, etc., R. Co., 123 Mo. A. 172, 177, 100 SW 693.

57. U. S. v. Huff, 13 Fed. 630, 637; U. S. v. Peterson, 27 F. Cas. No. 16,037, 1 Woodb. & M. 305, 310.

[a] **"To resist or prevent" the master of a vessel** "in the free and lawful exercise of his authority" under Act March 3, 1835 c 40 (4 U. S. St. at L. 75), is an offense constituted by the mere resistance to the latter's authority, and it is enough to disobey lawful orders and with violence resist their enforcement. U. S. v. Peterson, 27 F. Cas. No. 16,037, 1 Woodb. & M. 305, 310 [cit U. S. v. Huff, 13 Fed. 630, 637 (charge to jury)].

[b] **"Resist" and "prevent" compared.**—"The phrase 'to resist' is not as strong as the phrase 'to prevent'"

RESISTANCE.[58] In its ordinary sense, an act of standing against or obstructing;[59] an evidence of unwillingness;[60] the opposition of force to force;[61] willful purpose to interfere;[62] also not retreating from force.[63] Phrase: "Encourage resistance."[64]

In electricity, the opposition offered by a substance or body to the passage through it of an electrical current.[65]

"Resistance" wire, sheet or strip. Product of some alloy of copper used in the manufacture of electrical apparatus which does not conduct electricity as freely as does pure copper.[66]

RES JUDICATA.[67]

RES JUDICATA EXCEPTIONEM PARIT PERPETUAM.[68]

RES JUDICATA FACIT EX ALBO NIGRUM, EX NIGRO ALBUM, EX CURVO RECTUM, EX RECTO CURVUM.[69]

RES JUDICATA INTER ALIOS ALIIS NEQUE NOCET NEQUE PRODEST.[70]

RES JUDICATA INTER PARTES JUS FACIT.[71]

RES JUDICATA PRO VERITATE ACCIPITUR.[72]

RES JUDICATA PRO VERITATE HABETUR.[73]

RES LOCATA PERIT DOMINO.[74]

RES LOQUITUR IPSA, QUÆ SEMPER VALET.[75]

RES MAGIS VALEAT QUAM PEREAT. A rule of construction[76] whereby doubtful instruments are so construed that they may rather stand than fall;[77] and which may be translated "Let the thing have effect rather than be destroyed."[78]

RES NULLIUS NATURALITER FIT PRIMI OCCUPANTIS.[79]

RESOLUTION.[80] According to ordinary parlia-

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in an instruction defining a lawful fence as one sufficient "to resist horses, cattle, swine and' like stock" instead of in the statutory language "sufficient to prevent stock getting on the track." Hax v. Quincy, etc., R. Co., 123 Mo. A. 172, 177, 100 SW 693.

[58] **As element of rape** see Rape § 29.

Resistance to:

- Arrest:
  - As justification of homicide by officer see Homicide § 255.
  - As provocation reducing homicide to manslaughter see Homicide § 123.
  - When justifiable see Assault and Battery § 237.
- Customs official see Customs Duties § 321.
- Execution of process in general see Obstructing Justice §§ 2–15.
- Inspection of premises where liquor sold see Obstructing Justice § 19.
- Officer:
  - In general see Obstructing Justice §§ 17–21.
  - In act of arresting see Homicide § 170.

[59] Webster D. [quot U. S. v. Ault, 263 Fed. 800, 811; U. S. v. Strong, 263 Fed. 789, 796].

[60] State v. Schwab, 109 Oh. St. 29, 143 NE 29, 31.

[a] **"Unwillingness" not synonymous.**—State v. Schwab, 109 Oh. St. 29, 143 NE 29, 31.

[61] Bouvier L. D. [quot State v. Welch, 37 Wis. 196, 201 and cit Brown v. State, 127 Wis. 193, 200, 106 NW 536, 7 AnnCas 258 (where it is defined as "opposing force to force")].

[a] **"Is always direct**, and applied to persons, always implies more or less force." State v. Welch, 37 Wis. 196, 201 [cit Crabb Synonyms].

[62] See U. S. v. José, 63 Fed. 951, 954.

[a] **As contempt.**—As used in U. S. Rev. St. (1878) § 725, relating to the power of the United States courts to punish as contempt "resistance" to process, orders, etc., the word "is to be understood as implying a willful purpose to interfere so as to prevent the execution or enforcement of process or the court's orders." U. S. v. José, 63 Fed. 951, 954. See also Contempt §§ 26, 43.

[63] Brown v. State, 127 Wis. 193, 200, 106 NW 536, 7 AnnCas 258.

[64] Webster D. [quot U. S. v. Ault, 263 Fed. 800, 811; U. S. v. Strong, 263 Fed. 789, 796].

[65] Webster New Int. D. See Driver-Harris Wire Co. v. Driver, 70 N. J. Eq. 34, 38, 62 A 461; Anglo-American Brush Electric Light Corp. v. King, [1892] A. C. 367, 371 (stating rules applicable to electric resistance without specifically defining term). See also Ohm 46 C. J. p 1087.

[66] Driver-Harris Wire Co. v. Driver, 70 N. J. Eq. 34, 38, 62 A 461.

[67] See Judgments §§ 1154, 1525.

Particular applications of doctrine see Constitutional Law § 39; Corporations § 4008; Estoppel § 22; Husband and Wife § 988; Infants § 365; Injunctions § 798; Insane Persons § 373; Insurance § 474; Intoxicating Liquors § 145; Landlord and Tenant § 1329; Libel and Slander § 316.

Procedure with respect to judgment as estoppel see Judgments § 1491.

[68] A maxim meaning "A matter judicially decided begets a perpetual exception."

[a] **Applied in:** Hamilton v. Dutch East India Co., 8 Bro. P. C. 264, 269, 3 Reprint 573.

[69] A maxim meaning "A thing adjudged makes white, black; black, white; the crooked, straight; the straight, crooked." Bouvier L. D.

[70] A maxim meaning "A thing decided between two litigants ought neither to work advantage or disadvantage to third persons." Morgan Leg. Max.

[71] A maxim meaning "A question adjudicated between the parties after hearing them, makes the law of that question." Morgan Leg. Max.

[72] A maxim meaning "A thing adjudged is taken for truth." Peloubet Leg. Max.

[a] **Applied in:** Hutton v. Camden, 39 N. J. L. 122, 127, 23 AmR 203 note; Bartolet v. Faust, 5 Phila. (Pa.) 316, 317.

[73] A maxim meaning "A thing adjudged is held as truth." Trayner Leg. Max. (giving it as alternative form of maxim: "Res judicata pro veritate accipitur" ante).

[a] **Applied in:** Mendez v. Martinez, 29 Porto Rico 213, 218; Hamilton v. Dutch East India Co., 8 Bro. P. C. 264, 269, 3 Reprint 573; Ralston v. Rowat, 1 Cl. & F. 424, 435, 6 Reprint 975.

[74] A maxim meaning "Located property perishes to the owner." That is, where located property perishes the loss is to the owner. See Res Perit Domino Suo post.

[a] **Applied in:** Bayne v. Walker, 3 Dow. 233, 236, 3 Reprint 1049.

[75] A maxim meaning "Facts speak for themselves and are always invaluable, since they cannot be gainsaid." Morgan Leg. Max.

[76] Barthel v. Scotten, 24 Can. S. C. 367, 371, 373 ("The maxim . . . is only a rule authorizing a certain presumption to be made in arriving at what must govern in all cases of construction, namely the intention of the parties;" and again "is only a rule to aid in arriving at the intention and does not in any case authorize the court to overrule the intention").

[77] See Moore v. Hinnant, 89 N. C. 455, 462; Barthel v. Scotten, 24 Can. S. C. 367, 371, 373; British America Assur. Co. v. Law, 21 Can. S. C. 325, 329.

[78] See Black L. D. (giving the more usual form "ut res magis," etc.).

[79] A maxim meaning "A thing which has no owner naturally belongs to the first finder." Bouvier L. D.

[a] **"Occupantis," literally** person "taking possession." See Black L. D., sub verb. "Occupare."

[80] **Resolution of:**

- Board of health:
  - Declaring nuisance see Health §§ 58–61.
  - Power to enforce see Health §§ 69–83.
- Corporation:
  - Distinguished from by-law see Corporations § 427.
  - For execution of corporate mortgage see Corporations §§ 2227, 2656.
  - For taking by eminent domain see Eminent Domain § 316.
- County board see Counties §§ 122–129.

mentary practice,[81] it is merely a suggestion or direction in writing, concurred in by the two houses of the assembly, if there be two houses,[82] or passed by one house if there be but one, and not submitted to the executive for approval, ordinarily passed without the forms and delays which are generally required by constitutions and municipal charters as prerequisites of the enactment of valid laws or ordinances.[83] The term has been defined as a formal expression of the opinion or will of an official body or a public assembly adopted by a vote;[84] a mere expression of the opinion or mind of the council concerning some matter of administration coming within its official cognizance;[85] merely the form in which the legislative body expresses an opinion;[86] an agreement to a law or other thing adopted by a legislature or popular assembly;[87] the determination or decision with regard to its opinion or intention of a deliberative or legislative body,[88] public assembly, town council, board of directors, or the like;[89] also a motion or formal proposition offered for adoption by such a body;[90] a measure required by law to complete legislation.[91] The term has been held equivalent to a "motion,"[92] or an "ordinance";[93] and it has been distinguished from a "bill,"[94] "law,"[95] "or-

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Municipal resolution:

- In general see Municipal Corporations §§ 796–970.
- Abolishing office see Municipal Corporations § 1384.
- For:
  - Election on bond issue see Municipal Corporations § 4170.
  - Issue of bonds see Municipal Corporations § 4163.
  - Levy of assessments for public improvements see Municipal Corporations §§ 3024–3030.
  - Levy of tax see Municipal Corporations §§ 4378–4387.
  - Public improvements see Municipal Corporations §§ 2386–2483.

Municipal resolution in relation to streets:

- As evidence of:
  - Duty of municipality, to show negligence in care of street see Municipal Corporations § 2016.
  - Knowledge of defect in street see Municipal Corporations §§ 2025, 2036.
- Modifying franchise to use street see Municipal Corporations § 3804.
- Recognizing street see Municipal Corporations § 3601.
- Vacating street see Municipal Corporations § 3647.

[81] Cape Girardeau v. Fougeu, 30 Mo. A. 551, 556. See Parliamentary Law § 12 et seq.

[82] Cape Girardeau v. Fougeu, supra.

"Joint resolution" infra notes 5–8.

[83] Cape Girardeau v. Fougeu, 30 Mo. A. 551, 556.

[a] **Passing and taking effect.**—It need be read but once and may be passed by a viva voce vote, without the ayes and noes, whereupon, when engrossed, it becomes operative. Cape Girardeau v. Fougeu, 30 Mo. A. 551, 556.

[84] Webster Int. D. [quot Sawyer v. Collins, 148 Iowa 712, 127 NW 1015; State v. Summers, 33 S. D. 40, 144 NW 730, 733, 50 LRANS 206, AnnCas1916B 860]. See El Paso Gas, etc., Co. v. El Paso, 22 Tex. Civ. A. 309, 312, 54 SW 798.

[a] **As used in charter** of El Paso, Texas, providing for submission of resolutions to the mayor, "it is nothing more than the formal expression of the will of the city council." El Paso Gas, etc., Co. v. El Paso, 22 Tex. Civ. A. 309, 312, 54 SW 798.

[85] Sawyer v. Lorenzen, 149 Iowa 87, 127 NW 1091, 1093, AnnCas1912C 940; McCarthy v. McElvaney, (Tex. Civ. A.) 182 SW 1181, 1183.

[86] Chicago, etc., R. Co. v. Chicago, 174 Ill. 439, 444 [quot McDowell v. Peo., 204 Ill. 499, 502, 68 NE 378; Paxton v. Bogardus, 201 Ill. 628, 640, 66 NE 853; Altamont v. Baltimore, etc., R. Co., 184 Ill. 47, 51, 56 NE 340]. See Moulton v. Scully, 111 Me. 428, 89 A 944, 954; San Antonio v. Micklejohn, 89 Tex. 79, 82, 33 SW 735.

[a] **Form of expressing opinion.**— . . . "A legislative body may in that form express an opinion, may govern its own procedure within the limitations imposed upon it by its constitution or charter, and, in case it have ministerial functions, may direct their performance; but it can not adopt that mode of procedure in making laws where the power which created it has commanded that it shall legislate in a different form." San Antonio v. Micklejohn, 89 Tex. 79, 82, 33 SW 735.

[b] **"Be it resolved" requisite.**—"A characteristic feature of a resolution is its enacting clause, 'Be it resolved;' were any other term used, it would cease to be a resolution." State v. Delesdenier, 7 Tex. 76, 95. Compare In re Senate File 31, 25 Nebr. 864, 876, 41 NW 981 (holding that "Be it enacted" includes "be it resolved" and so may be used in passing a mere resolution).

[c] **"Be it resolved" held not requisite** where resolution was introduced as such and on its face purports to be resolution. McCarthy v. McElvaney, (Tex. Civ. A.) 182 SW 1181, 1183.

[87] Bouvier L. D. [quot Gas, etc., Securities Co. v. Manhattan, etc., Tract Corps., 266 Fed. 625, 636].

[88] Black L. D. [quot Sawyer v. Collins, 148 Iowa 712, 127 NW 1015; State v. Summers, 33 S. D. 40, 144 NW 730, 733, 50 LRANS 206, AnnCas 1916B 860].

[89] Black L. D. [quot State v. Summers, supra].

[90] Black L. D. [quot Sawyer v. Collins, 148 Iowa 712, 127 NW 1015; State v. Summers, 33 S. D. 40, 144 NW 730, 733, 50 LRANS 206, AnnCas1916B 860].

[91] McFarlan v. Norwood, 19 Oh NPNS 145, 151.

"Measure" 40 C. J. p 19.

Not a law see infra text and note 95.

[92] Sylvestre v. St. Landry Parish School Bd., 164 La. 204, 113 S 818, 820; Com. v. Bitner, 294 Pa. 549, 144 A 733, 735; State v. Summers, 33 S. D. 40, 144 NW 730, 733, 50 LRANS 206, AnnCas1916B 860; El Paso Gas, etc., Co. v. El Paso, 22 Tex. Civ. A. 309, 312, 54 SW 798; Spokane v. Ridpath, 74 Wash. 4, 8, 132 P 638 [cit Cyc]; Meade v. Dane County, 155 Wis. 632, 642, 145 NW 239. But see Galveston v. Morton, 58 Tex. 409, 414.

[a] **"There is no substantial difference** between a motion and a resolution." Sylvestre v. St. Landry Parish School Bd., 164 La. 204, 113 S 818, 820; Com. v. Bitner, 294 Pa. 549, 144 A 733, 735 ("there is no difference"); State v. Summers, 33 S. D. 40, 144 NW 730, 734, 50 LRANS 206, AnnCas1916B 860 [quot Spokane v. Ridpath, 74 Wash. 4, 8, 132 P 638 ("in substance there is no difference")].

[b] **"Motion" synonymous.**—State v. Summers, 33 S. D. 40, 144 NW 730, 733, 50 LRANS 206, AnnCas1916B 860 (in some of its uses); Spokane v. Ridpath, 74 Wash. 4, 8, 132 P 638 [cit Cyc].

[c] **"Motion" and "resolution."**—"A motion is a proposal made to evoke action upon the part of the council or other assembly. When the motion had been acted upon, it became the formal expression of the will, or resolution, of the city council." El Paso Gas, etc., Co. v. El Paso, 22 Tex. Civ. A. 309, 312, 54 SW 798.

[d] **"Motion" compared.**—Rice v. State, 95 Ind. 33, 46.

[e] **Mere affirmative vote in verbal motion** in the council accepting a contract is not a resolution in the proper sense of the word. Galveston v. Morton, 58 Tex. 409, 414.

"Motion" 42 C. J. p 456. See also Parliamentary Law § 12.

[93] Hellman v. Shoulters, 114 Cal. 136, 157, 44 P 915, 45 P 1057; Los Angeles v. Waldron, 65 Cal. 283, 285, 3 P 890, 1 P 883; Mulberry v. O'Dea, 4 Cal. A. 385, 387, 88 P 367.

[a] **In construing statute** governing public improvements, the court said: "An ordinance is also a resolution, or, at least so far as this statute is concerned, they are equivalent." Hellman v. Shoulters, 114 Cal. 136, 157, 44 P 915, 45 P 1057 [quot Mulberry v. O'Dea, 4 Cal. A. 385, 387, 88 P 367].

"Ordinance" see Municipal Corporations § 796.

[94] State v. Delesdenier, 7 Tex. 76, 95.

[a] **"Bill" compared.**—Rice v. State, 95 Ind. 33, 46.

"Bill" 7 C. J. p 1178.

[95] Johnson v. Craft, 205 Ala. 386, 403, 87 S 375, 390 [cit Cyc]; Reynolds v. Blue, 47 Ala. 711, 713; Chicago, etc., R. Co. v. Chicago, 174 Ill. 439, 444 [quot McDowell v. Peo., 204 Ill. 499, 502, 68 NE 379; Paxton v. Bogardus, 201 Ill. 628, 640, 66 NE 853; Altamont v. Baltimore, etc., R. Co., 184 Ill. 47, 51, 56 NE 340]; Cape Girardeau v. Fougeu, 30 Mo. A. 551, 556; Ex p. Hague, (N. J. Ch.) 144 A 546, 559; Com. v. Bitner, 294 Pa. 549, 144 A 733, 735; State v. Summers, 33 S. D. 40, 144 NW 730, 734, 50 LRANS 206, AnnCas1916B 860; San Antonio v. Micklejohn, 89 Tex. 79, 82, 33 SW 735; Conley v. United Daughters of the Confederacy, (Tex. Civ. A.) 164 SW 24, 26. See Moulton v. Scully, 111 Me. 428, 89 A 944, 954; Swann v. Buck, 40 Miss. 268, 293.

[a] **"The chief distinction** between a resolution and a law seems to be that the former is used whenever the legislative body passing it wishes to merely express an opinion as to some

der,"[96] and also "ordinance."[97]

Phrases: "Act or resolution,"[98] "concurrent resolution,"[99] "ordinance or resolution,"[1] "resolution of expediency,"[2] "resolution of intention,"[3] and "resolution or ordinance . . . of permanent operation."[4]

"Joint resolution" is described as being a form of legislation which is in frequent use in this country chiefly for administrative purposes of a local or temporary character;[5] merely a rule for the guidance of the agents and servants of the government;[6] merely a suggestion or direction in writing, concurred in by the two houses of the legislature.[7] Phrase: "Bill or joint resolution."[8]

RESOLUTIVE CONDITION. In French and Lower Canadian law, a condition[9] pertaining to gifts, which exists when the gift takes effect immediately with the effects which it should produce, to the profit of the donee, but under the condition that if such an uncertain event takes place the gift shall terminate and the property shall be restored to the same state as if there had been no gift.[10]

RESOLUTO JURE CONCEDENTIS RESOLVITUR JUS CONCESSUM.[11]

RESOLUTO JURE DANTIS, RESOLVITUR JUS ACCIPIENTIS.[12]

RESOLUTORIA. A Spanish word used to describe a condition,[13] which, on being fulfilled, produces the revocation or invalidity of the contract;[14] and restores things to the state in which they were before the contract was entered into.[15] It may be analogous to a condition subsequent.[16]

RESOLUTORY CONDITION.[17] The condition[18] on which depends an obligation which is to take effect immediately, but is liable to be defeated when the contingent event happens;[19] the dissolving condition.[20]

RESOLVE. [§ 1] **As Verb,** in a legislative or parliamentary sense, to express as an opinion or determination by resolution or vote;[21] and in the past tense, it may be equivalent to "enacted."[22] In

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given matter or thing, and is only to have a temporary effect on such particular thing; while by the latter it is intended to permanently direct and control matters applying to persons or things in general." Conley v. United Daughters of the Confederacy, (Tex. Civ. A.) 164 SW 24, 26 [quot Ex p. Hague, (N. J. Ch.) 144 A 546, 559].

[b] **"A very different thing** from a law." Cape Girardeau v. Fougeu, 30 Mo. A. 551, 556.

[c] **"Law" distinguished from "resolve" [or resolution].**—Moulton v. Scully, 111 Me. 428, 89 A 944, 954.

[d] **Law in form of resolution.**—"A resolution may or may not take effect as a law, depending upon the occasion and object of its use. It may be resorted to as a vehicle to convey the opinions or wishes of the legislature on any subject, without prescribing any rule of conduct to be observed. But whenever a joint resolution does undertake to lay down a rule of conduct for any portion of the people of the State, it becomes a law, and will take effect as such, notwithstanding the use of the word 'resolved' in its style, instead of the word 'enacted.'" Swann v. Buck, 40 Miss. 268, 293.

[e] **A resolution of the senate** of Febr. 26, 1872, authorizing the issue of certificates to officers of the senate, is not a law within the meaning of U. S. Const. art 4 § 31, providing that "no money shall be drawn from the treasury but in pursuance of an appropriation made by law." Reynolds v. Blue, 47 Ala. 711, 713.

"Law" 36 C. J. p 957–967.

96. See Moulton v. Scully, 111 Me. 428, 89 A 944, 954.

[a] **"When the legislature commands,** it is by an order; but when it gives expression to a fact, a principle, its own opinions and purposes, it is expressed in the form of a resolution." Moulton v. Scully, 111 Me. 428, 89 A 944, 954.

[b] **Compared with "order."**—State v. Ames, 31 Minn. 440, 443, 18 NW 277.

"Order" 46 C. J. p 1131.

97. See Municipal Corporations § 798.

98. Johnson v. Craft, 205 Ala. 386, 403, 87 S 375, 390.

99. See Kelley v. Secretary of State, 149 Mich. 343, 112 NW 978, 979.

1. Meade v. Dane County, 155 Wis. 632, 642, 145 NW 239.

2. Eaton v. Hanlon, 193 Cal. 715, 227 P 484, 485.

[a] **"Resolution of intention" compared and distinguished.**—Eaton v. Hanlon, 193 Cal. 715, 227 P 484, 485, 486.

3. Eaton v. Hanlon, supra. See Cooper v. Bozeman, 54 Mont. 277, 283, 169 P 801.

4. Holley v. Brunson, (Ala.) 130 S 173; Pierce v. Huntsville, 185 Ala. 490, 64 S 301, 304.

5. 26 A. & E. Enc. L. (2d ed) p 560 [quot Ex p. Hague, (N. J. Ch.) 144 A 546, 560]. See Swann v. Buck, 40 Miss. 268, 293.

6. Hawes v. Wm. R. Trigg Co., 110 Va. 165, 201, 65 SE 538 [quot Ex p. Hague, (N. J. Ch.) 144 A 546, 560].

7. Ex p. Hague, supra.

[a] **"Bill" distinguished.**—"Under our constitution a 'joint resolution' is not placed on the same footing as a 'bill.'" Ex p. Hague, (N. J. Ch.) 144 A 546, 560. "Bill" 7 C. J. 1178.

[b] **"Statute" distinguished.**—Ex p. Hague, (N. J. Ch.) 144 A 546, 559. "Statute" see Statutes [36 Cyc 940].

8. See Kelly v. Secretary of State, 149 Mich. 343, 112 NW 978, 979.

9. **Condition in civil law** see Condition § 4.

10. See Dalloz Repertoire de Jurisprudence, art. 1740 [quot Herse v. Dufaux, L. R. 4 P. C. 468, 490, 9 Moore P. C. N. S. 281, 17 Reprint 520].

[a] **Operates as revocation** of the gift and divests the donee of the property in the subject of the gift. Herse v. Dufaux, L. R. 4 C. P. 468, 490, 9 Moore P. C. N. S. 281, 17 Reprint 520.

Conditional gift see Gifts §§ 41, 117.

11. A maxim meaning "The right of the grantor being extinguished, the right granted is extinguished." Black L. D.

[a] **Cited in:** Broom Leg. Max. (7th Eng. ed) 351; McIntyre v. Clark. 6 Misc. 377, 379, 26 NYS 744.

12. A maxim meaning "The right of the giver having ceased, or become void, the right of the receiver ceases also." Trayner Leg. Max.

[a] **Applied in:** Barsalou v. Royal Inst., 5 Que. Q. B. 383, 387.

13. Escriche Diccionario.

14. Barretto v. Manila, 7 Philippine 596, 597.

"Resolutory condition" post.

15. Escriche Diccionario.

16. See Barretto v. Manila, 7 Philippine 596, 597. See also Condition § 4.

17. See also Resolutive Condition ante.

18. See Condition § 4 note 74⅙.

19. Moss v. Smoker, 2 La. Ann. 989, 991.

20. See Miguez v. Delcambre, 125 La. 176, 191, 51 S 108.

[a] **Statutory definition.**—"Under the subtitle 'Of the Resolutory Condition,' article 2045 Civil Code provides 'The dissolving condition is that which, when accomplished, operates the revocation of the obligation, placing matters in the same state as though the obligation had not existed.'" Miguez v. Delcambre, 125 La. 176, 191, 51 S 108.

21. Webster D. [quot In re Senate File 31, 25 Nebr. 864, 876, 41 NW 981].

22. Swann v. Buck, 40 Miss. 268, 293; Smith v. Jennings, 67 S. C. 324, 335, 45 SE 821.

[a] **"Resolved" and "enacted."**—(1) "The word 'resolved' is as potent to declare the legislative will as the word 'enacted.'" Swann v. Buck, 40 Miss. 268, 293 [quot Smith v. Jennings, 67 S. C. 324, 330, 45 SE 821]. (2) When used in the title of a resolutive declaration undertaking to lay down a rule of conduct for any portion of the people of the state, it does not preclude such declaration from being a law. Swann v. Buck, supra. (3) Several definitions of "enact," namely, "to establish by law," "to perform or effect," "to decree," would be of equal force to the word "resolved;" therefore "Be it enacted" may mean "Be it resolved." In re Senate File 31, 25 Nebr. 864, 876, 41

another sense, to reduce to the constituent elements;[23] to separate the component parts of.[24]

[§ 2] **As Noun**, it is used as an equivalent of "resolution."[25]

*__RESORT.__ [§ 1] **A. As Noun.**[26] A place of frequent assembly;[27] a haunt;[28] also act of visiting;[29] assembly, concourse, frequent assembling, meeting.[30]

Place of resort. A place frequented.[31]

Other phrases: "Court of last resort,"[32] places of resort,"[33] "public resort,"[34] "resort for gambling,"[35] "sea side resort,"[36] and "summer resort."[37]

[§ 2] **B. As Verb.** To go, to betake one's self, or to repair;[38] especially, to go or repair frequently, customarily, or usually;[39] to frequent.[40] The word implies an assembling or going to or frequenting in numbers;[41] it means something of a common occurrence,[42] the habitual frequenting of a place,[43] the habitual frequenting of a place by more than one person.[44] However, while the word ordinarily implies a going to a place "a number of times,"[45] in construing a particular statute, "to go once" may mean "to resort."[46]

Phrases: "Outhouse where people resort,"[47] and "permitted to resort;"[48] also "resorted,"[49] and "resorted to."[50]

RESOURCES. Money or any property that can be converted into supplies; means of raising money or supplies; capabilities of producing wealth or supplying necessary wants; available means or capability of any kind.[51] Phrase: "Available assets and resources."[52]

RESPECT. [§ 1] **A. As Noun.** The voluntary tribute of the public to worth, virtue, and intelligence.[53]

Phrases: "In respect of,"[54] "in respect thereof,"[55] and "in respect to."[56]

NW 981.

[b] **"Be it resolved" held included** in the formula: "Be it enacted." In re Senate File 31, 25 Nebr. 864, 876, 41 NW 981.

"Be it resolved" as the form requisite to a resolution see Resolution ante note 86 [b].

[23] Webster Int. D. [quot Miguez v. Delcambre, 125 La. 176, 191, 51 S 108].

[24] Webster Int. D. [quot Miguez v. Delcambre, supra].

[25] See Moulton v. Scully, 111 Me. 428, 89 A 944, 954.

[a] **"Parliamentary rules of order** everywhere make use of the word 'resolve' as the most apt in serving the legislative purpose." Moulton v. Scully, 111 Me. 428, 89 A 944, 954.

"Resolution" ante.

[26] See Disorderly Houses 18 C. J. p 1230.

"Entertainment" correlative see Entertainment 20 C. J. p 1268 text and note 92.

[27] Webster D. [quot In re Sic, 73 Cal. 142, 152, 14 P 405; State v. Fogg, 107 Me. 177, 77 A 714, 716 ("the natural meaning")].

[28] Webster D. [quot In re Sic, 73 Cal. 142, 152, 14 P 405].

[29] Webster D. [quot Bandalow v. Peo., 90 Ill. 218, 220].

[30] Webster D. [quot Bandalow v. Peo., supra].

"Assembly" 5 C. J. p 811.

"Meeting" 40 C. J. p 628.

[31] Webster D. [quot Bandalow v. Peo., 90 Ill. 218, 220].

[a] **"As** alehouses, or the resort of the idle and dissolute." Webster D. [quot Bandalow v. Peo., 90 Ill. 218, 220].

"Place of public resort" see Public § 70.

"Places of resort" see infra text and note 33.

[32] See Courts §§ 308, 445.

[33] In re Sic, 73 Cal. 142, 152, 14 P 405.

[34] See Public § 70.

[35] Davis v. State, 68 Tex. Cr. 259, 151 SW 313, 314. See also Gaming §§ 79–94.

[36] In re Delaware Bay, etc., R. Co., (N. J. Ch.) 11 A 261 263.

[37] In re Delaware Bay, etc., R. Co., supra (as used in a statute not including places where in general the occupants reside and do business the entire year).

[38] Webster D. [quot State v. Poggmeyer, 91 Kan. 633, 138 P 593, 594].

[39] State v. Poggmeyer, supra.

[40] State v. Seba, (Mo. A.) 200 SW 300.

"Frequent" 27 C. J. p 905.

[41] Winslow v. State, 5 Ind. A. 306, 315, 32 NE 98.

[42] State v. Owens, 9 Kan. A. 595, 58 P 240, 241.

[43] Burns v. Columbus, 13 OhNP NS 508, 517 [cit Cyc].

[44] State v. Owens, 9 Kan. A. 595, 58 P 240, 241.

[45] State v. Seba, (Mo. A.) 200 SW 300; and cases supra notes 39–44.

[46] See Disorderly Houses § 13 note 93 [a] (2).

[47] See Gaming § 87.

[48] State v. Poggmeyer, 91 Kan. 633, 138 P 593, 594.

[49] Peo. v. Gastro, 75 Mich. 127, 133, 42 NW 937; State v. Seba, (Mo. A.) 200 SW 300 ("the word . . . implies that the house was visited frequently by that class of persons" [quot O'Brien v. Peo., 28 Mich. 213, 214]).

[50] In re Sic, 73 Cal. 142, 152, 4 P 405; Com. v. Lambert, 12 Allen (Mass.) 177, 179; Peo. v. Gastro, 75 Mich. 127, 42 NW 937; Burns v. Columbus, 13 OhNPNS 508.

[a] **Common occurrence.**—Peo. v. Pinkerton, 79 Mich. 110, 115, 44 NW 180. See supra text and notes 42–44.

"Used:"

Equivalent see Disorderly Houses § 68 text and note 8.
Not equivalent see Disorderly Houses § 68 text and note 7; Intoxicating Liquors § 458 note 26.

[51] Webster D. [quot Ming v. Woolfolk, 3 Mont. 380, 386 (aff 116 U. S. 599, 6 SCt 489, 29 L. ed. 740)].

[a] **Not necessarily money.**—Sacry v. Lobree, 84 Cal. 41, 49, 23 P 1088 (a debtor may have ample resources to pay his debts as they become due, and yet have no money in his pocket or in bank).

[b] **"Resources" of a county** (1) include its land, timber, coal, crops, improvements, railways, factories, and everything that goes to make up its wealth or to render it desirable. Jefferson County v. Peter, 127 Ky. 453, 105 SW 887, 888, 32 KyL 374. (2) Products of farm, forest, manufacture, art and education. Shelby County v. Tennessee Centennial Exposition Co., 96 Tenn. 653, 666, 36 SW 694, 33 LRA 717 (construing a statute authorizing counties to appropriate money to provide for the exhibit of their resources at an exposition). (3) "In the broad and liberal sense, the public schools of a county may well be classed among her resources." Shelby County v. Tennessee Centennial Exposition Co., 96 Tenn. 653, 666, 36 SW 694, 33 LRA 717.

"Means" synonymous see 40 C. J. p 18 text and note 45.

[52] Rice v. Milwaukee, 100 Wis. 516, 519, 521, 76 NW 341 ("tangible property in the treasury, legally available, and properly applicable to the payment of debts, and readily convertible into money for that purpose" and the phrase does not include, as an offset against the city's debt, uncertain amounts receivable, such as a street railway tax or license dependent upon its earnings); Earles v. Wells, 94 Wis. 285, 298, 299, 68 NW 964, 59 AmSR 886.

[53] Stuart v. Peo., 4 Ill. 395, 405 (of courts); State v. Frew, 24 W. Va. 416, 439, 49 AmR 257 (of courts).

[a] **Similar definition.**—"Respect is the voluntary tribute of the people to worth, virtue, and intelligence." State v. Frew, 24 W. Va. 416, 478, 49 AmR 257 [quot Carter v. Com., 96 Va. 791, 813, 32 SE 780, 45 LRA 310].

[54] Woodruff v. Oswego Starch Factory, 70 App. Div. 481, 484, 74 NYS 961 ("in relation to" construing a covenant).

[55] Woodruff v. Oswego Starch Factory, supra.

[56] Muzzey v. Reardon, 57 N. H. 378, 381 (construing Gen. St. c 134 § 13, enabling a married woman holding property in her own right to sue and be sued upon contract made by her "in respect to" such property,

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*By CHARLES REZNIKOFF (Resort—Restrictive inclusive).

[§ 2] **B. As Verb,** to be concerned with or to relate to.[57]

Phrase: "Respecting titles to land."[58]

RESPECTABLE. Worthy of respect;[59] deserving regard;[60] fitted to awaken esteem;[61] hence, of good repute;[62] not mean.[63]

Applied to witnesses "respectable" may mean "competent,"[64] "credible,"[65] or "reputable."[66]

Phrases: "Respectable and commendable burial,"[67] "respectable and responsible person,"[68] "'respectable' burial,"[69] "respectable character,"[70] and "respectable witnesses;"[71] also "not . . . a respectable house."[72]

RESPECTIVE.[73] Pertaining or relating severally to each of those under consideration;[74] relating to particular persons or things, each to each;[75] also particular;[76] several.[77]

Phrases: "Heirs of their respective bodies,"[78] "heirs of their respective body and bodies,"[79] "in proportion to their respective claims,"[80] "in the respective states,"[81] "respective heirs,"[82] "respective rights,"[83] "respective services,"[84] "several and respective heirs of the body,"[85] "several and respective heirs . . . of the several and respective bodies,"[86] "several and respective issues of their bodies,"[87] and "their respective heirs and assigns."[88]

"wherever a married woman has been held liable on her contracts, they were contracts made by her with reference to property which she held to her sole and separate use,—that is, contracts connected with and growing out of that property, and entered into with a view to improve, protect, use, enjoy, manage, or dispose of such property for her support or benefit"); Peo. v. Dowling, 84 N. Y. 478, 487 (construing statute providing that an indictment might be found for any crime committed "in respect to" freight in any county through which the train passed, "the word respect in [the statute] is not used with a clear notion of its primary or its acquired meaning. Yet it is plain that the legislature meant any offense which, in the doing of it, acted upon the freight as the subject of the commission of the offense. To receive the freight, after it had been stolen, with guilty knowledge was such an offense"); Peo. v. Clarke, 9 N. Y. 349, 368 (an action, not to recover the possession of lands but to vacate letters-patent, is "certainly a proceeding 'in respect to' lands, although not a suit or proceeding for lands").

[57] Webster New Int. D.

[58] Builders Supply Co. v. Hobbs, 169 Ga. 777, 151 SE 485; Brown v. Martin, 137 Ga. 338, 73 SE 495, 498, 39 LRANS 16; Marshall v. Whatley, 136 Ga. 805, 72 SE 244, 245, 36 LRANS 552; Norton v. Graham, 130 Ga. 391, 60 SE 1049; Hix v. Kiser, 103 Ga. 738, 30 SE 583; Saffold v. Scottish American Mortg. Co., 98 Ga. 785, 27 SE 208; Black v. Fritz, 98 Ga. 32, 25 SE 188; Beckwith v. McBride, 70 Ga. 642, 644; Bivins v. Bivins, 37 Ga. 346; Smith v. Bryan, 34 Ga. 53; Kennedy v. Smith, 23 Ga. A. 724, 99 SE 318; Batson v. Higginbothem, 7 Ga. A. 835, 68 SE 455, 456. See Courts § 465 text and note 41; Venue [40 Cyc 58 text and note 89].

[59] Webster D. [quot State v. Spivey, 191 Mo. 87, 90 SW 81, 87].

[60] Webster D. [quot State v. Spivey, supra].

[61] Webster D. [quot State v. Spivey, supra].

[62] Webster D. [quot State v. Spivey, supra].

[63] Webster D. [quot State v. Spivey, supra].

[64] Cox v. U. S., 5 Okl. 701, 707, 50 P 175 [cit Freleigh v. State, 8 Mo. 606]. See Criminal Law § 320 note 67 [a].

"Competent witness" see Competent 12 C. J. p 236 text and notes 36–39.

[65] See Criminal Law § 320 note 67 [a].

"Credible witness" 15 C. J. p 1347.

[66] Bowling v. Bowling, 8 Ala. 538, 539; State v. Spivey, 191 Mo. 87, 90 SW 81, 87 ("practically . . . the same thing").

"Reputable" ante.

[67] Peter v. Griffin, 184 Iowa 1061, 169 NW 441 (as used in a contract, does not include erection of a monument).

[68] See Landlord and Tenant § 78 note 42 [b].

[69] Seaton v. Com., 149 Ky. 498, 149 SW 871, 872, 42 LRANS 211 (a relative term, varying "with the financial and social standing of the deceased and his relatives, and not infrequently affected by the community and the rules of the religious, social or political organizations, of which the deceased may have been a member or with which he was affiliated").

[70] Woods v. Garvey, 82 Nebr. 776, 118 NW 1114 (application for liquor license). See also Intoxicating Liquors § 121.

[71] See supra text and notes 64–66.

[72] See Libel and Slander § 67 note 94 [a] (2).

[73] See also "Respectively" post.

[74] Standard D. [quot In re Stixrud, 58 Wash. 339, 109 P 343, 346, 33 LRANS 632, AnnCas1912A 850].

[75] Webster D. [quot Sandford v. Stagg, (N. J. Ch.) 150 A 187, 188].

[76] Standard D. [quot In re Stixrud, 58 Wash. 339, 109 P 343, 346, 33 LRANS 632, AnnCas1912A 850]; Webster D. [quot Sandford v. Stagg, (N. J. Ch.) 150 A 187, 188].

[77] Standard D. [quot In re Stixrud, 58 Wash. 339, 109 P 343, 346, 33 LRANS 632, AnnCas1912A 850]; Webster D. [quot Sandford v. Stagg, (N. J. Ch.) 150 A 187, 188].

[78] Williams v. Browne, Str. 996, 93 Reprint 991 (construing will) Comber v. Hill, Str. 969, 970, 93 Reprint 973.

Construction of wills see Wills [40 Cyc 1382 et seq].

[79] Watson v. Foxon, 2 East 36, 41, 102 Reprint 281 (in construing a will, per Kenyon, C. J., "but great stress is laid here on the word 'respective' as disjoining the title; and the authority of Lord Hardwicke is referred to. . . . No person regards whatever fell from that great judge with more reverence than I do; but it is unworthy of his great learning and ability to lay such stress as he is stated to have done on the word 'respective'). See infra text and note.

[80] Allen v. Danielson, 15 R. I. 480, 484, 8 A 705, 706, 707 (in an assignment for the benefit of creditors, "in proportion to the claims which they respectively held when the assignment was made," "not in proportion to their claims less the value of any securities which they hold").

[81] In re Stixrud, 58 Wash. 339, 109 P 343, 346, 33 LRANS 632, AnnCas 1912A 850 (construing treaty).

Construction of treaties in general see Treaties [38 Cyc 969].

[82] Sandford v. Stagg, (N. J. Ch.) 150 A 187, 188 (in holding that distribution under a will is to be made per stirpes, "the determining factor is the use of the word 'respective' in connection with use of the word 'heirs' "). But see Re Smith, 6 Ont WR 45, 46 (where a bequest is made to the children of A and B, "share and share alike, to hold unto and to the use of them and their respective heirs," etc., the children take per capita; "the word ['respective'] is used not in describing the beneficiaries but as part of a definition of the nature or quality of the estate they are to take"). Division per stirpes or per capita in general see Wills [40 Cyc 1490 et seq].

[83] Fuller v. Azusa Irr. Co., 138 Cal. 204, 214, 71 P 98.

[a] **In a deed of water rights** to a corporation from its stockholders, "what the words 'the respective rights as fixed by our agreement' mean is not clear. . . . The terms most likely referred to the general right to water as measured by the acreage owned by each stockholder." Fuller v. Azusa Irr. Co., 138 Cal. 204, 214, 71 P 98.

[84] U. S. v. Morton, 65 Fed. 204, 208, 13 CCA 151 (construing Act March 3, 1891 [26 U. S. St. at L. 826 § 9] "used to distinguish between the different classes of officers named").

[85] Leach v. Jackson [cit Comber v. Hill, 2 Str. 969, 971, 93 Reprint 974].

[86] Atherton v. Pye, 4 T. R. 710, 713.

[87] Davenport v. Oldis, 1 Atk. 579, 580, 26 Reprint 363 (where, by will, A devises land to his wife for life, and after her decease to his son and daughter, J and M, to be equally divided between them, and the several and respective issues of their bodies, and for want of such issue, to his wife in fee, the will will not create a cross remainder, for per Hardwicke, L. Ch., "the words 'several and respective' effectually disjoin the title"). Cross remainders see Deeds § 290; Estates § 139; Wills [40 Cyc 1642].

[88] Den v. Manners, 20 N. J. L. 142, 145 (as used in a will, the words "mean more than the quantity of estate the children . . . were to take. They seem to repel the idea of a survivorship"). Survivorship see Wills [40 Cyc 1507].

RESPECTIVELY.[89] As each belongs to each;[90] as relating to each;[91] as singly or severally considered;[92] each to each;[93] in particular;[94] singly in the order designated.[95] It is a word of division—of separation.[96]

Phrases: "After the present term of the officers hereinbefore named, respectively, shall have expired,"[97] "equally to our heirs at law respectively,"[98] "for themselves, their heirs, executors, administrators, and assigns, respectively,"[99] "inherit from its parents respectively,"[1] "in trust for my said children respectively,"[2] and "until my children shall respectively attain to the age of majority."[3]

RES PERIT DOMINO SUO.[4]

RES PER PECUNIAM ÆSTIMATUR, ET NON PECUNIA PER REM.[5]

RESPITE.[6] A delay, forbearance, or continuation of time;[7] a privilege granted to a debtor;[8] a postponement of execution;[9] a temporary suspension of the execution of a sentence;[10] the withholding of a sentence for an interval of time.[11]

Respite of appeal. Adjourning an appeal to some future time.[12]

RESPOND.[13] To answer.[14]

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[89] **Respectively:**
Applied to assessment of damages see Death § 68 note 66 [a] (2).
Creating tenancy in common see Wills [40 Cyc 1637 text and note 55].
"Distributively" compared see Distributively 18 C. J. p 1292 text and note 8.
"Severally" synonymous see Severally [35 Cyc 1447 text and note 50].
"Respective" ante.

[90] Webster New Int. D. [quot State v. Gaughan, 124 Ark. 584, 187 SW 918, 920].

[a] **"Alternately" synonymous.**—"While the word 'respectively' is not given precisely the same meaning by lexicographers as the word 'alternately' yet the legislature used the word 'respectively' in the act of 1901 in the same sense as that of 1860 used the word 'alternately.'" Com. v. Conroy, 207 Pa. 212, 216, 56 A 427. Order of peremptory challenges see Juries § 482.

[b] **"Severally" synonymous.**—"Where the power to call a term was conferred originally upon the justices of the supreme court, not acting collectively or together, but severally; that is, upon each individual acting as circuit judge in his respective district, and in reference to the court over which he had authority to preside, and not in respect to the circuit court of some other district of which he was not primarily ex officio the judge, "severally" is "equivalent in meaning to 'respectively.'" Hanley v. Medford, 56 Or. 171, 108 P 188, 192. "Severally" defined as "respectively" see [35 Cyc 1447 text and note 50]. Authority to call special terms see Courts § 245.

[c] **"Successively" synonymous.**—Pery v. White, Cowp. 777, 781, 98 Reprint 1356. "Successively" [37 Cyc 512].

[91] Webster D. [quot State v. Gaughan, 124 Ark. 548, 187 SW 918; Wolf v. Lake Erie, etc., R. Co., 55 Oh. St. 517, 535, 45 NE 708, 36 LRA 812]; Theberath v. Celluloid Mfg. Co., 3 Fed. 143, 148 ("its obvious and most usual meaning").

[92] Standard D. [quot Wolf v. Lake Erie, etc., R. Co., 55 Oh. St. 517, 535, 45 NE 708, 36 LRA 812].

[93] Webster New Int. D. [quot State v. Gaughan, 124 Ark. 584, 187 SW 918, 920].

[94] Webster New Int. D. [quot State v. Gaughan, supra].

[95] Standard D. [quot Wolf v. Lake Erie, etc., R. Co., 55 Oh. St. 517, 535, 45 NE 708, 36 LRA 812.

[96] Alsop v. Russell, 38 Conn. 99, 103. See also infra text and note 3; Wills [40 Cyc 1637 text and note 55].

[97] Montgomery County v. Glass, 4 Kan. A. 286, 291, 45 P 935 ("'respectively,' . . . is intended to limit and qualify the words 'after the present term of the officers hereinbefore named shall have expired,' and applies to each of said officers singly; and as thus construed the act was to go into force, as to each officer named, as the term of his office expired, and for this reason this act is obnoxious to the constitutional provision requiring the legislature to fix a definite time for all of its acts to take effect").

[98] State v. Gaughan, 124 Ark. 548, 187 SW 918, 920 (construing a will, "we attach some, though not controlling, importance to the use of the word 'respectively'").

[99] Theberath v. Celluloid Mfg. Co., 3 Fed. 143, 148 (construing contract "it is not easy to say what the parties meant by its [the word 'respectively'] use").

[1] Messer v. Jones, 88 Me. 349, 355, 34 A 177 (construing a statute enumerating cases in which an illegitimate child might inherit from one of its parents, and further providing that "in either of the foregoing cases such child and its issue shall inherit from its parents respectively, and from their lineal and collateral kindred," "the right thus given to the child to inherit from the kindred of his respective parents is coextensive with his right to inherit from his respective parents. The use of the word respectively strengthens the construction thus given to the statute. The world conveys the idea that such child shall inherit, in each case, from the parent or parents, of whom the act has declared him to be an heir, and from the kindred of such parent or parents"). Right of inheritance see Bastards §§ 41–48.

[2] Lipman's App., 30 Pa. 180, 185, 72 AmD 692.

[3] Alsop v. Russell, 38 Conn. 99, 103 (in a will, "these are apt words, none more so could readily be chosen, to express the idea that each child on coming of age should take its portion of the estate").

[4] A maxim meaning "The destruction of the thing is the loss of its owner." Peloubet Leg. Max. [cit 2 Kent Comm. 591].

[a] **Applied in:** Haynes v. Second Baptist Church, 12 Mo. A. 536, 540.

[b] **Other forms** are: (1) "Res periit domino." Applied in: Stern v. Rosenthal, 56 Misc. 643, 644, 107 NYS 772. (2) "Res perit domino." Applied in: Alderman Bros. Co. v. Westinghouse Air Brake Co., 92 Conn. 419, 426, 103 A 267; Gage v. Libby, 14 Allen (Mass.) 261, 269; Boston, etc., Ice Co. v. Royal Ins. Co., 12 Allen (Mass.) 381, 90 AmD 151; Sammis v. Sly, 54 Oh. St. 511, 520, 44 NE 508, 56 AmSR 731; Diamond v. Harris, 33 Tex. 634, 637; Smith v. Drummond, 1 Cab. & E. 160; Espir v. Todd, 1 Cab. & E. 154, 155; Northern El. Co. v. Western Jobbers, 25 Man. 705, 714. (3) "Res perit suo domino." Applied in: Osborn v. Nicholson, 13 Wall. (U. S.) 654, 660, 20 L. ed. 689; Lewis v. Woodfolk, 2 Baxt. (Tenn.) 25, 46. (4) "Res suo perit domino." Applied in: Bayne v. Walker, 3 Dow. 233, 238, 3 Reprint 1049 ("the meaning of the maxim . . . is that no person is bound to answer the consequences of the accident")

[c] **"Quoted in our law** chiefly in a class of cases to which it did not apply in the Roman law." Harvard L. Rev. Vol 9 p 106 note 1.

[5] A maxim meaning "The value of a thing is estimated according to its worth in money, but the value of money is not estimated by reference to a thing." Black L. D.

[6] See also Criminal Law §§ 3041–3050 (suspension of sentence), §§ 3135–3138 (stay of execution), §§ 3139, 3140 (suspension of execution); Insolvency §§ 216–221; Pardons § 5 (reprieve).

[7] Bouvier L. D.; Wharton L. Lex. [both quot Mishler v. Com., 62 Pa. 55, 60, 1 AmR 377].

[8] Dauphin v. Soulie, 3 Mart. N. S. (La.) 446, 448.

[9] State v. Blaine County Eighteenth Judicial Dist. Ct., 73 Mont. 541, 237 P 525, 527.

[10] Bouvier L. D. [quot Mishler v. Com., 62 Pa. 55, 60, 1 AmR 377].

[a] **Similar definitions.**—(1) A temporary suspension of execution. State v. Blaine County Eighteenth Judicial Dist. Ct., 73 Mont. 541, 237 P 525, 528. (2) The suspension, for a time, of the execution of a sentence which has been pronounced. Butler v. State, 97 Ind. 373, 374 [quot 1 Bishop Cr. Proc. § 1299].

[b] **"Reprieve" synonymous.**—State v. Blaine County Eighteenth Judicial Dist. Ct., 73 Mont. 541, 237 P 525, 527. See Butler v. State, 97 Ind. 373, 374 [quot 1 Bishop Cr. Proc. § 1299] ("nearly synonymous"); Pardons § 5 note 12 [a] (5). "Reprieve" ante.

[11] State v. Blaine County Eighteenth Judicial Dist. Ct., 73 Mont. 541, 237 P 525, 527 [cit 4 Blackstone Comm. p 394].

[12] Black L. D.

Postponement of hearing see Appeal and Error § 2474.

[13] **"Respondent"** post.

[14] The Mary F. Barrett, 279 Fed. 329, 334, 25 ALR 148.

[a] **"To be accountable" synonymous.**—The Mary F. Barrett, 279 Fed. 329, 334, 25 ALR 148. "Accountable" 1 C. J. p 586.

[b] **"Responsible" synonymous.**—The Mary F. Barrett, 279 Fed. 329, 334, 25 ALR 148. "Responsible" see post.

RESPONDEAT OUSTER.[15]

RESPONDEAT RAPTOR QUI IGNORARE NON POTUIT QUOD PUPILLUM ALIENUM ABDUXIT.[16]

RESPONDEAT SUPERIOR.[17] Literally, "Let the principal answer."[18]

RESPONDENT.[19] A party answering.[20] Any one who answers or responds may properly be called a "respondent."[21] "Respondent" is not a technical word, but is often used as meaning the defendant in a suit in personam or the claimant in a suit in rem.[22] Originally, "respondent" was the term used to designate the person against whom a bill in equity was exhibited;[23] the party who makes an answer to a bill or other proceeding in chancery;[24] the person upon whom an ordinary petition in the court of chancery, or a libel in admiralty is served, and who is, as it were, a defendant thereto.[25] It is used also to designate the party who makes an answer to a libel in divorce;[26] or him who contends against an appeal.[27]

Phrase: "Respondent or claimant."[28]

RESPONDENTIA.[29]

RESPONSIBILITY.[30] The primary meaning of "responsibility" is the state of being answerable for an obligation;[31] liability, obligation, bounden duty.[32] A secondary meaning is the ability to answer in payment,[33] the ability to pay.[34] "Responsibility," it has been said, includes judgment, skill, ability, capacity, and integrity,[35] and is implied by "power."[36]

Phrases: "Credit and responsibility,"[37] "his responsibility ceases as soon as the cargo is on board,"[38] and "responsibility of eviction."[39]

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[15] See Judgments § 14 text and note 13. See also Pleading § 563 text and notes 6–11.

[16] A maxim meaning "Let the ravisher answer, for he could not be ignorant that he has taken away another's ward." Peloubet Leg. Max.

[a] **Applied in:** Moore v. Hussey, Hob. 93, 99, 80 Reprint 243.

[17] **Respondeat superior:**
Agency §§ 532–540 (liability of principal for torts of agent), § 533 note 19 [b] (reason for maxim).
Corporations §§ 2829–2861 (liability for torts of agents).
Counties § 274 (liability for torts of officers or agents).
Hospitals §§ 16, 17 (liability for torts of professional staff).
Master and Servant §§ 1451–1510 (liability of master upon doctrine of respondeat superior).
Municipal Corporations §§ 1715–1729 (liability for torts of officers or agents).
Negligence § 578 (of servant imputed to master).
Schools and School Districts [35 Cyc 971 text and note 88 (maxim not applying to members of school board)].
States [36 Cyc 881, 882 (liability for torts of officers or agents)].

[18] Bouvier L. D.

[a] **Origin.**—"The maxim . . . was first applied to public officers by the Statute of Westminster the Second, Cap. 2, from the words of which statute it is taken." Larkin v. McNutt, 2 Pr. Edw. Isl. 300, 303.

[19] **"Respond"** ante.

[20] Burrill L. D. [quot State v. Duncan, 265 Mo. 26, 175 SW 940, 943, AnnCas1916D 1]. See Parties §§ 138–183.

[21] Lorenzen v. The Clavering, 2 Hawaii Fed. 32, 41 [quot Benedict Adm. § 363]. But see infrà notes [a], [b].

[a] **In bankruptcy,** one whose property has been seized as that of the bankrupt, on petition of a creditor and the ancillary receiver, is not entitled to recover costs, expenses, and attorney's fees expended in recovering possession in the bankruptcy court, but must bring an independent action, for such owner is not a "respondent" in involuntary proceedings, within Bankruptcy Act § 3e (11 U. S. C. A. § 21). In re Comins, 1 F. (2d) 388. Costs and fees see Bankruptcy §§ 780–790.

[b] **In a quo warranto proceeding** "this designation ['respondent'] of a defendant, or him who answers (the history of the law regarded), belongs more nearly to equity and proceedings in admiralty, than to the common law side, yet the great weight of practice is to so style a defendant . . ., and while outside the great weight of practice as shown by the text books and the adjudged cases, there is not any very satisfactory reason in either analogy, history, or logic to style him a respondent who in a proceeding in quo warranto is called on to make his answer, yet such is by the weight of authority the well-nigh universal practice, and we ought to defer to it, so that uniformity may serve to prevent confusion and avoid obscurity." State v. Duncan, 265 Mo. 26, 36, 175 SW 940, AnnCas1916D 1. See Quo Warranto §§ 49–51.

[22] Lorenzen v. The Clavering, 2 Hawaii Fed. 32, 41 [quot Benedict Adm. § 363].

"Claimant" in admiralty proceeding see Claimant 11 C. J. p 825 text and notes 4, 5. See also Admiralty §§ 151, 152.

[23] Brower v. Nellis, 6 Ind. A. 323, 33 NE 672, 673. See also Equity §§ 253–356.

[24] Black L. D.

[25] Black L. D.

[26] Bouvier L. D. See Divorce §§ 232–238.

"Corespondent" 13 C. J. p 1236.

[27] Black L. D. See also Appeal and Error §§ 970–973.

[28] Lorenzen v. The Clavering, 2 Hawaii Fed. 32, 41 ("claimant" and "respondent" synonymous in a rule of court providing that "the respondent or claimant" may make an offer, "claimant", not referring especially to the ship). See supra text and note 22.

[29] See Shipping [36 Cyc 180].

[30] See Responsible post.

Tests of see Criminal Law §§ 74–80.

[31] Niagara Fire Extinguisher Co. v. Hibbard, 179 Fed. 844, 848, 103 CCA 330.

[32] Crockett v. Barre, 66 Vt. 269, 272, 29 A 147 [quot Sams v. Cochran, etc., Co., 188 N. C. 731, 125 SE 626, 629].

[a] **"Liability" synonymous.**—Lovitt v. Snowball, 32 N. B. 217, 227 (per Allen, C. J., construing charter-party [cit Encyclopedic D.; Imperial D.]). See also Liability 36 C. J. p 1050. But see Lovitt v. Snowball, 32 N. B. 217, 230 (per Palmer, J., "It is true the word 'liability' may be more strictly applicable to a known ascertained debt, and 'responsibility' may be more applicable to something in the future that may be more or less uncertain, or that may or may not attach; and there may be some show of reason for saying that it would not aptly express an ascertained debt actually due at the time the responsibility was to cease"); Schofield v. Gibson, 17 N. B. 619, 625 (per Duff, J., "assuming that the two terms are synonymous, which I much doubt").

[b] **In French law,** responsabilité is distinguished from garantie. See 2 Sourdal Traité de Responsabilité No. 760 [quot Central Vermont R. Co. v. La Compagnie d'Assur., etc., 2 Quebec Q. B. 450, 452] (civil responsibility has a place independent of agreement between the responsible party and the other); 3 Dalloz Dictionnaire du Droit, art 1 No. 4 [quot Central Vermont, etc., R. Co. v. La Compagnie d'Assur., etc., supra] (the responsibility is not derived from contract, but from that natural principle of justice that each repairs the damage caused by his act).

[33] Webster New Int. D. [quot Ex p. Hawley, (S. D.) 115 NW 93, 95 ("ability to respond in damages for actual injuries" is the meaning of the word as used in Dak. St. [1907] c 194 § 1, requiring evidence of responsibility of owners of tree nurseries desiring to sell nursery stock within the state)].

[34] Niagara Fire Extinguisher Co. v. Hibbard, 179 Fed. 844, 848, 103 CCA 330.

[35] State v. Rickards, 16 Mont. 145, 151, 40 P 210, 50 AmSR 476, 28 LRA 298.

[36] See Power 49 C. J. p 1241 text and note 19.

[37] Norris v. Graham, 33 Md. 56, 58 (an instruction that if the jury find from the evidence that the wood in question was furnished "on the credit and responsibility of the defendant," then the verdict must be for the plaintiff is erroneous; "the credit and responsibility of a party may attach as well to his liability as security as to his sole undertaking. When, therefore, the general term 'credit and responsibility' is used, it

RESPONSIBLE.[40] A word of many different meanings.[41] In one sense the word is synonymous with "accountable;"[42] as accountable to a judge, master, creditor, ruler, or rightful superior;[43] "answerable,"[44] legally or morally, for the discharge of a duty, trust, debt, service, or other obligation;[45] "bound;"[46] subject to obligations;[47] and in this sense the word includes to some extent "trust."[48] In its other sense, the word means ability to respond;[49] reliable;[50] and in this sense it is an appropriate word to designate one who is able to discharge an obligation, or having an estate adequate to the payment of a debt,[51] to respond or answer for one's conduct or obligations,[52] or to respond or answer in accordance with what is expected or demanded;[53] and in this sense, the word applied to an undertaking to pay money only means "financial ability."[54] Strictly speaking, the word means "liable," "answerable," rather than "able to discharge an obligation."[55]

Responsible bidder.[56] The words "responsible bidder" generally carry the idea of being able to respond or to answer according to what is expected or demanded under the contract;[57] one who is not only financially responsible, but who is possessed of the judgment, skill, ability, capacity and integrity requisite and necessary to perform the contract according to its terms.[58] By statute,[59] the term may exclude nonresidents.[60]

Other phrases: "Articles usually kept in stock . . . for which the assured is held to be responsible,"[61] "be held responsible,"[62] "be responsible,"[63] "competent and responsible person,"[64] "individual-

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may include a collateral as well as an original and exclusive liability").

"Credit" 15 C. J. p 1348.

38. Lovitt v. Snowball, 32 N. B. 217; Schofield v. Gibson, 17 N. B. 619 (construing charter party).

39. Muller v. Bernstein, 198 Ill. A. 104.

40. **Promise to be responsible** see Guaranty § 6 text and notes 61, 62.

"Responsibility" post.

41. Gravelle v. Pollock Stores Co., 131 Okl. 20, 267 P 473, 475.

42. Century D. [quot The Mary F. Barrett, 279 Fed. 329, 334, 25 ALR 148]; Webster D. [quot Bright v. Ball, 138 Miss. 508, 103 S 236, 237; Gutta-Percha Co. v. Stokely, 11 Phila. (Pa.) 219, 221]; Mutual L. Ins. Co. v. Schlein, 32 F. (2d) 937; Peo. v. Kent, 160 Ill. 655, 661, 43 NE 760.

"In that sense, a bidder, entering into a contract, becomes responsible for its fulfillment." Peo. v. Kent, 160 Ill. 655, 651, 43 NE 760.

[a] **Similar definitions.**—(1) Liable to account. Webster D. [quot Gutta-Percha Co. v. Stokely, 11 Phila. (Pa.) 219, 221]. (2) Liable to accounting. Webster D. [quot Bright v. Ball, 138 Miss. 508, 103 S 236, 237].

"Accountable" 1 C. J. p 586.

43. Century D. [quot The Mary F. Barrett, 279 Fed. 329, 334, 25 ALR 148].

44. Century D. [quot The Mary F. Barrett, supra]; Webster D. [quot Bright v. Ball, 138 Miss. 508, 103 S 236, 237; Gutta-Percha Co. v. Stokely, 11 Phila. (Pa.) 219, 221]; Peo. v. Kent, 160 Ill. 655, 661, 43 NE 760.

"Answerable" 3 C. J. p 228.

45. Century D. [quot The Mary F. Barrett, 279 Fed. 329, 334, 25 ALR 148]; Peo. v. Kent, 160 Ill. 655, 661, 43 NE 760.

46. Century D. [quot The Mary F. Barrett, 279 Fed. 329, 334, 25 ALR 148].

47. Century D. [quot The Mary F. Barrett, supra].

48. Leader Printing Co. v. Lowry, 9 Okl. 89, 96, 59 P 242 ("the element of trust embraced in the word 'responsible' as used in the statute [providing that the governor is to contract with a 'responsible person' to do the printing, etc., for the territory] would be a confident opinion or expectation that the person to whom the printing a contract is let will faithfully carry out its provisions; in other words, the contract should be let to some trustworthy person. The element of trust embraced in the word 'responsible' is not that trust which alone induces contracts, and by reason thereof takes them out of the general rule of assignment, because the governor is required to take a bond for the faithful performance thereof").

49. Peo. v. Kent, 160 Ill. 655, 660, 43 NE 760.

"In that sense, 'responsible' means to be able to answer or respond in accordance with what is expected or demanded, and to discharge a claim or duty. Peo. v. Kent, supra.

[a] **"The scope of the term** depends upon the subject-matter to which it is applied. If it is applied to a surety, or to the maker of a bond, note, or other instrument, to be satisfied or discharged by the payment of money, it means ability to discharge the obligation under which the party is thereby placed, by the payment of the sum of money. So far as such an obligation is concerned, financial ability makes a party responsible; and, perhaps, on account of the frequency of such obligations, this is the sense in which it is most often used. But a party may be bound or obliged by duty or contract to meet and discharge claims and obligations other and different from the payment of money, such as a trust or the keeping of stipulations or conditions; and in such cases 'responsibility' means ability to perform or discharge what may be expected or demanded under the duty or contract." Peo. v. Kent, 160 Ill. 655, 661, 43 NE 760. See also infra text and notes 50–54. But see Middendorf v. Alexander Milburn Co., 137 Md. 583, 113 A 348, 354 ("a broker might be 'responsible' without being efficient, honest, or loyal").

50. Peo. v. Kent, 160 Ill. 655, 660, 43 NE 760.

51. Webster D. [quot Bright v. Ball, 138 Miss. 508, 103 S 236, 237; Gutta Percha Co. v. Stokely, 11 Phila. (Pa.) 219, 221].

[a] **Similar definition.**—"Able to pay a sum for which he is or may become liable, or to discharge an obligation which he may be under." Black L. D. [quot Sams v. Cochran, etc., Co., 188 N. C. 731, 125 SE 626, 629].

52. Gravelle v. Pollock Stores Co., 131 Okl. 20, 267 P 473, 475.

53. Webster D. [quot State v. Nebraska State Institutions, 105 Nebr. 570, 181 NW 530, 531; Peo. v. Dorsheimer, 55 HowPr (N. Y.) 118, 119].

54. Sanderlin v. Luken, 152 N. C. 738, 68 SE 225, 227 (but in a statute for letting contracts for public improvements, which requires a "responsible bidder," it has the wider meaning of ability to respond to the requirements of the contract). See supra note 51. See also infra text and note 55.

55. Farley v. Day, 26 N. H. 527, 531 (used in the latter sense in a statute requiring that a writ be indorsed by some "responsible person," where the plaintiff resides out of the state) [quot Sams v. Cochran, etc., Co., 188 N. C. 731, 125 SE 626, 629]. See Costs § 523 note 80 [b].

56. **"Lowest responsible bidder"** see Counties § 247 note 25 [a]; Law 38 C. J. p 325 text and note 28; Municipal Corporations §§ 2208, 2510–2514; States [36 Cyc 875].

57. Bright v. Ball, 138 Miss. 508, 103 S 236, 237.

58. Wilson v. Lord-Young Engineering Co., Ltd., 21 Hawaii 87, 94.

59. See statutory provisions.

60. Dixon-Paul Printing Co. v. Board of Public Contracts, 117 Miss. 83, 77 S 908 (Const. [1890] § 107, providing that contracts for printing be let to "lowest bidder" and giving the legislature power to regulate letting of contracts, not violated by L. [1916] c 135 § 1, defining "responsible bidder" as excluding nonresidents without a printing plant in the state).

61. Lake v. Simmons, [1926] 2 K. B. 51. See Burglary and Theft Insurance 9 C. J. p 1095 et seq.

[a] **"Goods held in trust or for which they are responsible."**—North British, etc., Ins. Co. v. London, etc., Ins. Co., 5 Ch. D. 569, 578 [quot Engel v. Lancashire, etc., Assur. Co., 41 T. L. R. 408 (the responsibility in question legal liability only, not the general responsibility of a bailee for goods entrusted to him)].

62. The Mary F. Barrett, 279 Fed. 329, 335, 25 ALR 148 (construing Harter Act § 3 [Comp. St. § 8031] "answerable, accountable, liable—'for damages or loss resulting from faults or error in navigation' "). See Shipping [36 Cyc 377–379].

63. See Bailments § 43 text and note 45.

64. Matter of Mang, 50 N. Y. Super. 96 (construing Code Civ. Proc. § 469 providing that guardian of infant ly responsible,"[65] "personally responsible,"[66] "responsible citizens,"[67] "responsible for damage or loss resulting from failure and error in navigation,"[68] "responsible man,"[69] "responsible person,"[70] "stand responsible for the payment of the goods,"[71] "that responsible bidder who offers the terms most advantageous to the city,"[72] "that such lands are responsible for damages to low lands from seepage and saturation by irrigation water,"[73] "will not be responsible for any package exceeding the value of" [a specified amount],[74] and "will not be responsible for articles left by passengers at the station."[75]

RESPONSIO UNIUS NON OMNINO AUDIATUR.[76]

RESPONSIVENESS.[77]

RES PRIVATÆ SUNT QUÆ SINGULORUM SUNT.[78]

RES PROFECTO STULTA EST NEQUITIÆ MODUS.[79]

RES PROPRIA EST QUÆ COMMUNIS NON EST.[80]

RES PUBLICA EST CŒTUS MULTITUDINIS JURIS CONSENSU, ET UTILITAS COMMUNIONE.[81]

RES QUÆ INTRA PRÆSIDIA PERDUCTÆ NONDUM SUNT, QUANQUAM AB HOSTIBUS OCCUPATÆ, IDEO POSTLIMINII NON EGENT, QUIA DOMINUM NONDUM MATURUNT EX GENTIUM JURE.[82]

RES SACRA NON RECIPIT ÆSTIMATIONEM.[83]

RES STULTA EST NEQUITIÆ MODUS.[84]

RES SUA NEMINI SERVIT.[85]

RES SUO PERIT DOMINO.[86]

REST. As a noun, freedom from activity;[87] also what is left or remainder;[88] a stopping place.[89]

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plaintiff be "competent and responsible person").

[65] See Individually 31 C. J. p 885 note 73 [a].

[66] See Personally 48 C. J. p 1049 text and note 17.

[67] Yale College v. Runkle, 8 Fed. 576, 580 (where a bequest was conditional upon "responsible citizens" of the place pledging a sum for the same purpose within six months after the testator's decease, a number of subscriptions for small amounts by a large number of persons of limited means, some of them conditional, was not a subscription by "responsible citizens").

[68] The Mary F. Barrett, 279 Fed. 329, 25 ALR 148 (construing Harter Act § 3 [Comp. St. § 8031]). See Shipping [36 Cyc 377–379].

[69] Clopton v. Cozart, 21 Miss. 363, 368 (where a certificate to enable one to purchase goods on credit stated that he was a "responsible man," "responsible, in that connection, must have been intended to mean capability to discharge an obligation. It conveyed the idea that he possessed the means of making payment").

Representation of financial condition see Fraud §§ 92–115.

[70] Robertson v. Robertson, 3 Paige (N. Y.) 387, 388 (where a rule of court provided that the next friend of the wife who prosecuted a suit for divorce should be "a responsible person," "by the term . . . is meant that the next friend should be possessed of property sufficient to pay the costs which may be adjudged against him, if in the end it should appear that the suit was instituted without any reasonable or justifiable cause. The statute having fixed the amount of security for costs in this court at two hundred and fifty dollars, the next friend should, by analogy, be worth at least that sum over and above all his debts"); Leader Printing Co. v. Lowry, 9 Okl. 89, 96, 59 P 242, 244 (a statute requiring the governor to contract with some responsible person [to do the printing, etc., for the territory], "only means that the governor shall contract with some person who is able to do the printing and discharge the obligations required of him"). See Costs § 523 note 80 [b].

[71] Gravelle v. Pollock Stores Co., 131 Okl. 20, 267 P 473, 475 ("most people would understand, by the expression, that the customer agreed to pay for the goods"). See Guaranty § 2.

[72] McDermott v. Jersey City Street, etc., Comrs., 56 N. J. L. 273, 275 (construing city charter).

"Responsible bidder" supra text and notes 56–57.

[73] In re Canyon County Drain. Dist. No. 1, 29 Ida. 377, 161 P 315, 320 (construing Sess. L. (1915) § 9a, "physically responsible, whether legally responsible . . . or not").

[74] Pratt v. South Eastern R. Co., [1897] 1 Q. B. 718, 720, 721 ("not be responsible at all [either for loss or damage]").

[75] Pratt v. South Eastern R. Co., supra ("responsible not only for damage to, but also for the loss of, the article").

[76] A maxim of the Roman law of evidence meaning "The answer of one witness shall not be heard at all." Black L. D. See Watson v. Palmer, 5 Ark. 501, 505 ("the general rule is that where a material fact is put in issue by the answer, courts of equity follow the maxim of the civil law").

[77] **Responsiveness:**
Admiralty § 195 (answer).
Criminal Law § 2203 (evidence, motion to strike out), § 2587 (verdict).
Depositions § 209 (answers).
Discovery § 35 text and notes 91–96 (answer), § 39 text and notes 26, 27 (answer as evidence), § 91 (answers to interrogatories).
Dower § 326 (plea or answer).
Equity § 573 (answer), §§ 695, 696 (answer as evidence).
Mandamus § 612 (return or answer).
Partnership § 942 (answer or plea).
Pleading § 222 (plea or answer).
Sales [35 Cyc 554 (plea, answer, or affidavit of defense)].
Trade-Marks, Trade Names, and Unfair Competition [38 Cyc 897 (answer)].
Trial [38 Cyc 1374 (answer, motion to strike out), 1435 (answer to improper question), 1884 (verdict), 1925 (special interrogatories, verdict, or findings)].
Vendor and Purchaser [39 Cyc 1867 (plea or answer)].
Waste [40 Cyc 531 (plea or answer)].
Witnesses [40 Cyc 2444 (answers), 2520 (answers on cross-examination)].

[78] A maxim meaning "Private things are those which belong to one individual, and are not common to all." Morgan Leg. Max.

[79] A maxim meaning "There is no mean in wickedness." Morgan Leg. Max. See Res Stulta Est Nequitiæ Modus post.

[80] A maxim meaning "A thing is private which is not common." Peloubet Leg. Max.

[a] **Applied in:** Le Breton v. Miles, 8 Paige (N. Y.) 261, 270.

[81] A maxim meaning "A commonwealth is the assemblage of a multitude, by a legal agreement, with a mutual participation of advantage." Morgan Leg. Max.

[82] A maxim meaning "Things which have not yet been introduced within the enemy's lines, although held by the enemy, do not need the fiction of postliminy on this account, because their ownership by the law of nations has not yet changed." Black L. D. [cit 3 Grotius de Jure Bellum c 6 § 3, c 9 § 16]. See Postliminy 49 C. J. p 1122.

[83] A maxim meaning "A sacred thing does not admit of valuation." Bouvier L. D.

[84] A maxim meaning "A stupid act is a manner of wickedness." Lofft Max. No. 208. See also Res Profecto Stulta Est Nequitiæ Modus ante. But see Morgan Leg. Max ("Moderation in wickedness adds foolishness to crime").

[85] A maxim meaning "No one can have a servitude over his own property." Trayner Leg. Max.

[a] **Other form:** "Res sua nemini jure servitutis servit." Cortes v. Yu-Tibo, 2 Philippine 24, 38.

[86] See Res Perit Domino Suo ante.

[87] Webster New Int. D.

"Surplusage" distinguished see Surplusage [37 Cyc 614 text and note 72].

[88] Webster New Int. D.

Phrases:
"All the rest and residue" see All § 3 text and note 85; Wills [40 Cyc 565 note 61].
"All the rest, residue, and remainder" see Wills [40 Cyc 1567 text and notes 76, 77, 1568 note 80].
"Rest and residue" see Wills [40 Cyc 1568 note 80].
"Rest of my estate" see Wills [40 Cyc 1568 note 80].

"Residue" synonymous see Residue ante.

"Rest" in residuary clause see Wills [40 Cyc 1563].

[89] Webster New Int. D.

As adjective the word may be used[90] as in the phrase "rest home."[91]

RESTAURANT.[92] [§ 1] **A. As Noun.** The word has no defined meaning.[93] It seems to be used indiscriminately for all places[94] where refreshments can be had,[95] from a mere eating house or workshop[96] to any other place where eatables are furnished to be consumed on the premises,[97] to the more common shops or stores, where the chief business is vending articles of consumption and confectionery, and the furnishing of eatables to be consumed on the premises is subordinate;[98] an eating house;[99] an establishment for the sale of refreshments, both food and drink;[1] an establishment where meals and refreshments are served;[2] an establishment where refreshments or meals may be procured by the public;[3] a house where liquors and cooked food are sold;[4] a place for refreshment;[5] a place to which a person resorts for the temporary purpose of obtaining a meal or something to eat;[6] a place where any person who conducts himself properly and is able and willing to pay for same has a right to demand that food be furnished him;[7] a place where eatables can be obtained at all reasonable hours,[8] and not a mere drinking house;[9] a place where meals and refreshments are served;[10] a place where meals are served;[11] a place where refreshments and meals are provided to order,[12] especially one not connected with an hotel;[13] a place where refreshments, food, and drink are served;[14] a place where something to eat, ready prepared, or which can readily be prepared, may be obtained;[15] a place where viands are sold, and not where intoxicants are dispensed;[16] a public eating house;[17] a public eating place;[18] the dining-room of an hotel conducted on the European plan.[19] "Cafe" has been said to be a synonymous term.[20] A restaurant may be in addition a "dramshop"[21] a "saloon,"[22] or a "tippling house."[23] "Res-

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Rest in computing interest see Executors and Administrators § 510; Guardian and Ward § 248; Interest § 167; Trusts [39 Cyc 428 et seq]; Usury [39 Cyc 951].

90. See Sherman v. Congregational Home Missionary Soc., 176 Mass. 349, 351, 57 NE 702.

91. Sherman v. Congregational Home Missionary Soc., supra (as used in a will, devising property for the establishment of a rest home for worthy working girls, a place of rest for girls who are working for small wages where they may go and board in the country at a low price). See also Charities 11 C. J. p 297 et seq.

"Home" 29 C. J. p 767.

92. Restaurant:
Civil Rights § 18 (discrimination).
Constitutional Law § 428 (public morals).
Gaming § 152 (prohibited).
Intoxicating Liquors § 228 note 15 [k] (sale prohibited).
Licenses § 73 text and note 29.
Municipal Corporations § 565 (regulation), § 4026 (in public park).
"Refreshment saloon" 53 C. J. p 1063.
Sunday [37 Cyc 553 (open on)].
"Victualers" [40 Cyc 204].

93. Richards v. Washington F. & M. Ins. Co., 60 Mich. 420, 426, 27 NW 586; State v. Shoaf, 179 N. C. 744, 102 SE 705. See Lewis v. Hitchcock, 10 Fed. 4, 6 ("In Webster's Dictionary it is not even recognized as a word yet Anglicised"). See also Innkeepers § 4 note 34.

94. As a "place" see 48 C. J. p 1211 text and note 71.

95. Richards v. Washington F. & M. Ins. Co., 60 Mich. 420, 426, 27 NW 586; State v. Shoaf, 179 N. C. 744, 102 SE 705. But see Ex p. Lemon, 143 Cal. 558, 77 P 455, 456, 65 LRA 946 ("it is clear that as a general rule a restaurant . . . where the meals are wholly cooked and served by the proprietor and members of his family, must be a very small affair, hardly rising to the dignity of a 'restaurant' ").

96. Richards v. Washington F. & M. Ins. Co., 60 Mich. 420, 426, 27 NW 586; State v. Shoaf, 179 N. C. 744, 102 SE 705.

"Cookshop" 13 C. J. p 931.

"Eating house" 19 C. J. p 1008.

97. State v. Shoaf, 179 N. C. 744, 102 SE 705.

98. Richards v. Washington F. & M. Ins. Co., 60 Mich. 420, 426, 27 NW 586.

99. Century D. [quot Potson v. Chicago, 222 Ill. A. 50]; Webster D. [quot Cecil v. Green, 60 Ill. A. 61, 63 ("Webster's only definition of 'restaurant.' " "Eating house" defined as "a house where provisions are sold ready cooked, and generally eaten on the premises"); Cleveland v. O'Neil, 4 Pa. C. Pl. 148, 149]; Lewis v. Hitchcock, 10 Fed. 4, 6 ("as currently understood, only, or chiefly, an eating house"); State v. Hogan, 30 N. H. 268, 272; In re Liquor Licenses, 4 Montg. Co. (Pa.) 77, 79; Savage v. State, 50 Tex. Cr. 199, 88 SW 351, 353; Donahue v. Conant, (Vt.) 146 A 417, 419; Rex v. Wells, 24 Ont. L. 77, 81, 2 OntWN 1232, 19 OntWR 452, 18 CanCrCas 377.

1. Century D. [quot Page v. District of Columbia, 20 App. (D. C.) 469, 475 (the "modern definition"); Potson v. Chicago, 222 Ill. A. 50].

2. Standard Brewing Co. v. Weil, 129 Md. 487, 99 A 661, 663 [cit Century D.; Webster D.].

3. Webster D. [quot Ft. Smith v. Gunter, 106 Ark. 371, 154 SW 181; Potson v. Chicago, 222 Ill. A. 50, 52; Donahue v. Conant, (Vt.) 146 A 417, 419].

4. Encyclopedia D. [quot Page v. District of Columbia, 20 App. (D. C.) 469, 475].

5. Encyclopedia D. [quot Page v. District of Columbia, supra].

"Places of refreshment" 53 C. J. p 1063.

6. State v. Shoaf, 179 N. C. 744, 102 SE 705.

7. Debenham v. Short, (Tex. Civ. A.) 199 SW 1147, 1148.

8. In re Liquor Licenses, 4 Montg. Co. (Pa.) 77, 79.

9. In re Liquor Licenses, supra.

10. Donahue v. Conant, (Vt.) 146 A 417.

11. Century D. [quot Potson v. Chicago, 222 Ill. A. 50].

12. Rex v. Wells, 24 Ont. L. 77, 81, 2 OntWN 1232, 19 OntWR 452, 18 Can CrCas 377.

13. Rex v. Wells, supra.

14. State v. Shoaf, 179 N. C. 744, 102 SE 705 ("generally understood") [quot Manesis v. Sulunias, 150 Ga. 315, 103 SE 459, 460].

"Whether they [refreshments, food and drink] are served to guests seated at a table or on stools at a counter does not affect the definition; that being merely a detail in the operation of the restaurant." State v. Shoaf, 179 N. C. 744, 102 SE 705 [quot Manesis v. Sulunias, 150 Ga. 315, 103 SE 459, 460].

[a] **For example,** where one "had no tables in his place, but had a counter with stools arranged along in front of it, and to the guests seated on these stools he sold lunches, wieners, and egg sandwiches," this was "strictly a restaurant business." State v. Shoaf, 179 N. C. 744, 102 SE 705.

15. State v. Hogan, 30 N. H. 268, 372; Donahue v. Conant, (Vt.) 146 A 417, 419.

16. Savage v. State, 50 Tex. Cr. 199, 88 SW 351, 356. But see Lewis v. Hitchcock, 10 Fed. 4, 6 ("not infrequently a bar forms part of it"); Babb v. Elsinger, 147 NYS 98, 99 ("in a restaurant . . . food is supplied, though the furnishing of drinks, spirituous or otherwise, is not necessarily excluded").

17. Webster D. [quot Ft. Smith v. Gunter, 106 Ark. 371, 154 SW 181; Potson v. Chicago, 222 Ill. A. 50, 52; Donahue v. Conant, (Vt.) 146 A 417, 419].

18. San Francisco v. Larsen, 165 Cal. 179, 131 P 366, 367.

19. Rex v. Wells, 24 Ont. L. 77, 81, 2 OntWN 1232, 19 OntWR 452, 18 Can CrCas 377.

20. State v. Shoaf, 179 N. C. 744, 102 SE 705 ("in common parlance, and . . . as used in the statute [Sunday closing]"); Rex v. Wells, 24 Ont. L. 77, 81, 2 OntWN 1232, 19 OntWR 452, 18 CanCrCas 377.

21. Scanlon v. Denver, 38 Colo. 401, 88 P 156, 157.

"Dramshop" 19 C. J. p 761.

22. Lendholm v. Peo., 55 Colo. 467, 136 P 70 (in its generic sense the word "saloon" includes "restaurant"). But see Lendholm v. Peo., 55 Colo. 467, 136 P 70, 72 (per Gabbert, J., dissenting, "No one would think of designating a . . . regular restaurant, where liquors are furnished in connection with meals, a saloon").

"Saloon" [35 Cyc 714].

23. Scanlon v. Denver, 38 Colo. 401, 88 P 156, 157 (Denver City Ordinance [1892] No. 102 § 1, providing that no person or corporation within the city shall directly or indirectly sell or give away any intoxicating or malt liquors, taurant" has been defined by an ordinance as "every place where food or refreshments of any kind—not including spirituous, vinous or malt liquors—are prepared for casual visitors and sold for consumption therein."[24]

"Restaurant" held not to include: An apartment where only soft drinks are sold, at a single stand and by the glass;[25] a boarding house;[26] a concert saloon;[27] a drug store selling soda water and ice cream;[28] a hotel;[29] an inn;[30] an ordinary;[31] a place merely for the sale of soft drinks, cigars, cigarettes, and ice cream;[32] a place of amusement;[33] a shop or store,[34] used merely for the manufacture and sale of tobacco, snuff, and cigars.[35]

Phrases: "Business of operating a restaurant,"[36] "public restaurant,"[37] and "servant-girl at a restaurant."[38]

[§ 2] **B. As Adjective.** The word is sometimes employed as an adjective,[39] as in the phrase "restaurant business."[40]

Restaurant keeper[41] is a caterer[42] who keeps a place for serving meals, and provides, prepares, and cooks raw materials to suit the taste of his patrons,[43] and who has been distinguished from an "innkeeper,"[44] a merchant, manufacturer, or tradesman,[45] and "saloon keeper."[46]

RESTAURATEUR.[47]

REST HOME.[48]

RESTITUABLE. By statute[49] defined as "cannot be relieved against."[50]

RESTITUTIO IN INTEGRUM. A phrase, originally of the civil law, meaning "Restoration or restitution to the previous condition."[51]

RESTITUTION.[52] [§ 1] **A. In General.** Act of making good, or of giving an equivalent for any

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to be drunk on the premises where sold or given away, without a license first obtained from the city, was applicable to a person who was a bona fide restaurant keeper, and who sold liquor only to customers to be drunk only in connection with a meal). But see cases infra notes 24–35 passim.

[24] Louisville License Ord. § 37 [quot New Galt House v. Louisville, 111 SW 351, 352, 33 KyL 869, 17 LRA NS 566].

[25] Cecil v. Green, 60 Ill. A. 61, 63.

[26] See cases infra this note.

[a] **Boarding house is "less public** in character and . . . [arranges] with its guests to provide for them during some more or less definite period." State v. Brown, 112 Kan. 814, 212 P 663, 664, 31 ALR 338 [quot Independence v. Richardson, 117 Kan. 656, 232 P 1044].

"Boarding house" 8 C. J. p 1132.

[27] Cleveland v. O'Neil, 4 Pa. C. Pl. 148, 149.

[28] In re Henery, 124 Iowa 358, 100 NW 43, 44.

[29] Debenham v. Short, (Tex. Civ. A.) 199 SW 1147, 1148. See also Intoxicating Liquors § 109 note 81 [a].

[a] **In common parlance,** a restaurant is never denominated a "hotel," nor a hotel a "restaurant." Debenham v. Short, (Tex. Civ. A.) 199 SW 1147, 1148.

[30] See Innkeepers § 4.

[31] See Ordinary 46 C. J. p 1135 note 49 [b].

[32] Donahue v. Conant, (Vt.) 146 A 417, 419.

[33] Cleveland v. O'Neil, 4 Pa. C. Pl. 148, 149.

[34] Debenham v. Short, (Tex. Civ. A.) 199 SW 1147, 1148 ("a restaurant, notwithstanding cigars are sold in it . . . is not a 'store' or a 'shop' within the popular meaning of those words"). But see Davidson v. Chinese Republic Restaurant Co., 201 Mich. 389, 167 NW 967, 969 ("One eats, perhaps drinks, in a restaurant, pays for what is served, and goes away. The business resembles more nearly that of a storekeeper [than that of an inn] who sells wares to the public, which is invited to come and inspect and buy or decline to buy what is offered for sale").

"Shop" [36 Cyc 431].

"Store" [36 Cyc 1326].

[35] State v. Hogan, 30 N. H. 268, 273.

[36] Donahue v. Conant, (Vt.) 146 A 417, 419.

[37] Rex v. Mercier, (Que.) 6 Can CrCas 44.

"Public" as an adjective 50 C. J. p 845.

[38] Cleveland v. O'Neil, 4 Pa. C. Pl. 148, 149 (does not include a girl employed as a singer and dancer in a concert saloon among those entitled to a preferred lien for wages).

[39] See cases infra notes 40–46.

[40] State v. Shoaf, 179 N. C. 744, 102 SE 705.

[a] **"Business of manufacturing or selling goods" distinguished.**—San Francisco v. Larsen, 165 Cal. 179, 131 P 366, 367.

"Mercantile pursuit" as not including a restaurant see Mercantile 40 C. J. p 634 note 24 [a] (8), (9).

"Restaurant keeper" distinguished from merchant or tradesman see Restaurant Keeper post.

[41] **Restaurant keeper:**
Aliens § 88 ("Chinese laborer").
Food § 28 (notice of imitation or substitute), § 95 (liability for injury or loss).
Innkeepers § 61 (loss of patron's property), § 69 (injury to patron).
Trader as not including see Trader [38 Cyc 916].
"Victualing house" [40 Cyc 204].
See also Restaurant ante; Restaurateur post.

[42] **"Caterer"** 11 C. J. p 33.

[43] In re Ah Yow, 59 Fed. 561, 562; State v. Shoaf, 179 N. C. 744, 102 SE 705.

[44] See cases infra this note. See also Innkeepers §§ 4, 7 note 52 [b].

[a] **Restaurant keeper differs from an innkeeper** (1) in that he furnishes only food, or food and drink, and not lodging or shelter. Merrill v. Hodson, 88 Conn. 314, 91 A 533, 534 [cit Beale Innkeepers §§ 35, 301]. (2) The keeper of a restaurant, so far as the term is used to designate a mere eating house, where no provision is made for lodging the guest, is not an innkeeper. Independence v. Richardson, 117 Kan. 656, 232 P 1044, 1046 [quot State v. Brown, 112 Kan. 814, 212 P 663, 664, 31 ALR 338]. (3) The keeper of a restaurant who has no beds for the accommodation of travelers is not an innkeeper. Independence v. Richardson, 117 Kan. 656, 232 P 1044; State v. Brown, supra [quot Wandell Inns 27].

[45] See cases infra this note.

[a] **According to ordinary usage** (1) a restaurant keeper is not either a merchant or a manufacturer. San Francisco v. Larsen, 165 Cal. 179, 131 P 366, 367. (2) A restaurant keeper is not a "merchant" or "tradesman." Although a restaurant keeper does "purchase goods, and . . . sell goods, this is not the essential thing. The services they render to their guests are in the nature of 'work and labor' rather than of the 'sale of goods.'" Rex v. Wells, 24 Ont. L. 77, 80, 2 OntWN 1232, 19 OntWR 452, 18 CanCrCas 377. (3) A restaurant keeper is not a merchant. In re Ah Yow, 59 Fed. 561, 562 (Chinese Exclusion Act). See Merchant § 4 note 56 [b].

"Restaurant" distinguished from:
"Business of manufacturing or selling goods" see supra § 1.
"Store" or "shop" see supra § 1.

[46] Savage v. State, 50 Tex. Cr. 199, 88 SW 351, 353.

[47] See Restaurant keeper ante.

[48] See Rest ante.

[49] La. Rev. Civ. Code arts 2223, 2225.

[50] See Harper v. Moore, (Miss.) 107 S 385 ("a minor, carrying on commerce, or being an artisan, is not restituable against the engagements into which he has entered in the way of his business").

Contract of infant see Infants §§ 148–202.

[51] Black L. D.

[a] **Condition of rescission.**—American Educational Co. v. Taggert, 124 Ill. A. 567, 572 (where, attempting to rescind a contract for board and tuition, board and tuition for two weeks had been had); Fullers' Theatres Ltd. v. Musgrove, 31 Austr. C. L. R. 524, 540. See also Contracts §§ 678–681.

[b] **Admiralty rule of damages.**—The Baltimore v. Rowland, 8 Wall. (U. S.) 377, 385, 19 L. ed. 463 [quot In re The Loch Trool, 150 Fed. 429, 432]; In re The Rickmers, 142 Fed. 305, 309, 73 CCA 415; The Northumbria, L. R. 3 A. & E. 6, 12; The Black Prince, Lush. 568, 573 [cit The City of Peking, 15 App. Cas. 438, 442, 6 Aspin. 572]. See also Collision § 330 et seq.

[52] **Restitution:**
Accord and Satisfaction §§ 107–109 (as a condition of relief).

loss, damage, or injury;[53] act of restoring;[54] indemnification;[55] restoration;[56] restoration of anything to its rightful owner.[57]

[§ 2] **B. In Practice.** The return of something to the owner of it or to the person entitled to it, upon the reversal or setting aside of the judgment or order of court under which it was taken from him.[58] Properly speaking, made only to a defendant whose money or property has been taken from him by the erroneous order of a court, and . . . not available to third parties.[59]

At common law it is a remedy or writ[60] whose object was to restore to the appellant the specified thing or its equivalent, of which he had been deprived by the enforcement of the judgment against him during the pendency of his appeal.[61]

Ambassadors and Consuls § 35 (property of countrymen).
Appeal and Error § 560 (as restoring right to appeal), § 1446 (effect of supersedeas or stay), § 1460 (bond), §§ 3293–3298 (upon reversal of judgment or decree).
Attachment §§ 677–783 (release or security), § 1034 (request for, upon application for dissolution), §§ 1091–1095 (upon dissolution), § 1208 (demand as a condition precedent to action for wrongful), § 1232 (as a defense to action for wrongful), § 1337 (in mitigation of damages for wrongful).
Attorney and Client § 97 (of right to practice after disbarment).
Auctions and Auctioneers § 34 (as a condition of avoiding sale because of puffing), § 46 (of deposit).
Cancellation of Instruments §§ 93–114 (as a condition of relief).
Certiorari § 384 (upon annulment of proceedings below).
Champerty and Maintenance § 102 (upon execution of agreement).
Collision §§ 330–347 (damages for injuries less than total loss).
Contracts §§ 678–681 (as a condition of rescission).
Criminal Law § 3255 (upon conviction).
Damages § 66 (nominal).
Deeds § 183 (as a condition of cancellation).
Detinue 18 C. J. p 987 et seq.
Dower §§ 198–200 (inchoate right).
Ejectment §§ 341–345.
Entry, Writ of § 77.
Embezzlement § 50 (as a defense).
Equity §§ 37, 38 (of personal property), § 39 (of real property), § 120 (of real or personal property), § 920 (on bill of review), § 936 (on original bill to impeach a decree).
Exchange of Property § 37 (reëxchange), § 52 (as a condition of rescission), §§ 74–100 passim (action for).
Executions § 294 (recovery of property by officer), § 502 (effect of injunction).
Finding Lost Goods § 12.
Fines, Forfeitures, and Penalties §§ 38, 39 (of fines).
Fire Insurance §§ 148, 149 (of premium or assessment), § 166 (upon cancellation by insurer), § 175 (upon surrender by insured).
Forcible Entry and Detainer §§ 34–36 (criminal proceeding), § 37 (rerestitution), §§ 149, 151 (in civil proceeding), §§ 153–156 (execution of judgment), § 186 (proceeding by inquisition).
Fraud § 130 (as a condition precedent to action).
Homesteads § 340 (as a condition of avoidance of transfer or encumbrance).
Husband and Wife §§ 20–27 (conjugal rights), §§ 316, 371 (upon avoidance of contract), § 384½ (upon avoidance of deed), § 1283 (judgment upon petition for restitution of paraphernal property).
Infants § 71 (as a condition of avoidance of transactions in respect to property), § 166 (as a condition of avoidance of contracts).
Injunctions § 889 (damages as indemnity), § 890 (undoing the wrong).
Insane Persons § 516 (as a condition of avoidance of a contract), §§ 540, 541 (as a condition of avoidance of a conveyance).
Insurance §§ 403–422 (of premium or assessment), §§ 440–442 (upon cancellation by insurer), § 457 (upon surrender by insured), § 475 (as a condition of cancellation or rescission).
Judgments § 598 (upon vacating), § 816 (collateral attack upon order of).
Judicial Sales §§ 197–203 (upon invalid or vacated sale).
Justices of the Peace § 674 (upon certiorari).
Landlord and Tenant §§ 1687–1692 (release on bond of property distrained), §§ 1755–1912 (reëntry and recovery of possession by landlord).
Larceny §§ 585–595 (of stolen property).
Mandamus § 152 (to courts and judicial officers), § 294 (of books, records, appurtenances), §§ 295–303 (of office or employment), § 338 (reinstatement of teachers), § 339 (reinstatement of pupils), § 355 (of license), § 447 (of membership in corporation).
Marine Insurance §§ 117–130 (of premium), § 429 (after capture or seizure).
Marriage § 138 (upon annulment).
Mines and Minerals § 505 (injunction to restore possession).
Money Received § 39 (on judgment or execution).
Mortgages § 328 (as a condition of cancellation).
Mutual Benefit Insurance § 60 (of dues and assessments as a condition of cancellation by society).
Pardons § 36 (of costs), § 37 (of fine), § 38 (of office).
Payment §§ 72, 73 (as condition of rescission), §§ 280–341 (recovery of).
Pledges §§ 180–189 (on discharge of debt).
Public Lands § 140 (of amount paid for entry upon abandonment), § 408 (of price from railroad companies), § 479 (of amount paid upon cancellation), § 522 (of purchase money in proceeding to cancel patent), § 595 (as condition precedent to action by state to cancel patent), § 633 (money paid for Texas lands not patentable).
Release [34 Cyc 1071 (as a condition of avoidance)].
Replevin § 334.
Sales [35 Cyc 144 (as a condition of rescission), 506 (recovery of goods by seller), 513 (as a condition of seller's right to goods), 697 (recovery of goods from buyer upon conditional sale), 704 (of purchase money upon conditional sale), 708 (recovery of goods from third persons upon conditional sale)].
Trover and Conversion [38 Cyc 2031 (demand and refusal), 2058 (as a condition precedent upon rescission of contract), 2102 (mitigation of damages)].
Usury [39 Cyc 1010, 1050 (as a condition to relief in equity), 1049 (of usury paid)].
Vendor and Purchaser [39 Cyc 1377 (as a condition of rescission by vendor), 1423 (as a condition of rescission by purchaser), 1886 (recovery of possession by vendor), 2001 (recovery of purchase money by purchaser), 2088 (as a condition to right of action for damages against vendor)].
War [40 Cyc 336 (postliminy)].

[53] Webster Int. D. [quot Holloway v. People's Water Co., 100 Kan. 414, 167 P 265, 270, 2 ALR 161.

[a] **Similar definition.**—That [action] of making restoration to one for loss or injury previously inflicted. Oxford English D. [quot Holloway v. People's Water Co., 100 Kan. 414, 167 P 265, 270, 2 ALR 161 ("the first meaning given")].

[54] Holloway v. People's Water Co., supra.

[55] Webster Int. D. [quot Holloway v. People's Water Co., supra].

[56] Webster Int. D. [quot Holloway v. People's Water Co., supra].

"Restoration" post.

[57] Webster Int. D. [quot Holloway v. People's Water Co., 100 Kan. 414, 167 P 265, 270, 2 ALR 161].

[a] **Similar definition.**—The action of restoring or giving back something to its proper owner. Oxford English D. [quot Holloway v. People's Water Co., 100 Kan. 414, 167 P 265, 270, 2 ALR 161 ("the first meaning given")].

[58] Black L. D.

[a] **"Not of mere right."**—"It is ex gratia, resting in the exercise of a sound discretion, and the Court will not order it where the justice of the case does not call for it, or where the process is set aside for a mere slip." Harger v. Washington County Com'rs, 12 Pa. 251, 254 [quot Gould v. McFall, 118 Pa. 455, 456–457, 12 A 336, 4 AmSR 606 (quot State v. Horton, 70 Nebr. 334, 341, 97 NW 434)].

[59] Pawnee City First Nat. Bank v. Avery Planter Co., 69 Nebr. 329, 333, 95 NW 622, 624, 111 AmSR 541.

[60] See Appeal and Error § 3298.

[61] Haebler v. Myers, 132 N. Y. 363, 366, 30 NE 963, 28 AmSR 589, 15 LRA 588 [quot Ashcroft v. Goodman, 139 Tenn. 625, 202 SW 939, 940] ("It was not created by statute, but was exercised by the appellate tribunal as incidental to its power to correct errors, and hence the court not only reversed the erroneous judgment but restored to the aggrieved party that which he had lost in consequence thereof. It was usually a part of the judgment of reversal which directed 'that the defendant be restored to all things which he has lost on occasion of the judgment aforesaid.' A writ of restitution was thereupon issued, provided the amount that the appellant had lost, or paid under compulsion, appeared of record, as by the return of an execution satisfied. Otherwise process in the nature of an order to show cause was first issued, known as a scire facias quare restitutionem habere non debet"). See also Holloway v. People's Water Co., 100 Kan. 414, 167 P 265, 270, 2 ALR 161 ("the word was used to denote the return or restoration of a specific thing or condition, and the writ of restitution lay to restore after reversal of a judgment, what the party had lost"). But see Cummings v. Noyes, 10 Mass. 433, 434, 435 (of the right to recover the value of the mesne profits

In equity, the restoration of both parties to their original condition (when practicable) upon the rescission of a contract for fraud or similar cause.[62]

In maritime law, the replacing, by general contribution among the owners of a cargo, of articles lost by jettison from a cargo saved in part.[63]

"Writ of restitution" is one which issues to restore a party to the possession of property of which he had been wrongfully deprived by some previous order of the same court or some previous writ issuing from the same court.[64]

Phrases: "For the restoration and enjoyment of her paraphernal property,"[65] and "to make immediate restitution to the party injured."[66]

RESTITUTORY INTERDICT.[67]

RESTORATION.[68]

RESTORE.[69] To bring back;[70] to bring back or put back to a former position or condition;[71] to bring back to a former and better state;[72] to heal.[73] The word relates to something having a previous existence.[74] Terms that may be used as synonymous are "cure,"[75] "deliver,"[76] "preserve,"[77] "redeliver,"[78] "repair,"[79] "restate,"[80] and "substitute."[81]

Phrases: "If the property is not forthwith restored,"[82] and "the property shall be restored to the mortgagee."[83]

RESTRAIN.[84] [§ 1] **A. In General.** To abridge,[85] check,[86] confine,[87] curb,[88] debar,[89] en-

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taken by virtue of a judgment which was afterwards reversed, "at common law, a writ of restitution . . . issues to the sheriff, commanding him to restore the plaintiff in error to his seisin of the land, and also to inquire by a jury of the value of the issues and profits for the meantime; and the amount, when ascertained by this inquisition, to levy of the land and chattels of the defendant, and to pay the same to the plaintiff. This mode of recovering the mean issues has never been adopted in this state. . . . The only mode, therefore, under our laws, of ascertaining the value of the issues and profits, is by the verdict of a jury upon a trial in open court. Such a trial could not regularly be had, without some new suit or process, instituted by the plaintiff in error to bring the defendant into court. A scire facias does not seem adapted to the case, because the amount to which the plaintiff is entitled depends upon evidence in pais, and there is nothing on the record by which the Court could estimate it. Such a process may be conveniently used in personal actions, where damages have been recovered by the original plaintiff; because the record shows the amount to which the plaintiff in error is entitled. There seems, therefore, to be no other course for the plaintiff in error, but to bring a new action for the issues and profits"—either assumpsit or trespass for the mesne profits, the latter, perhaps, "a more apt remedy"). Scire facias [35 Cyc 1147].

[62] Black L. D. [quot Holloway v. People's Water Co., 100 Kan. 414, 167 P 265, 270, 2 ALR 161].

[63] See Black L. D.

[a] **After a collision,** a vessel, although injured without her fault, was not entitled to recover demurrage, where it did not appear how much the owner had actually lost by her detention while under repairs; "restitution means indemnity for actual pecuniary loss, and nothing more." The Saginaw, 95 Fed. 703, 704. See Collision §§ 340–341.

[64] Herrin v. Franklin, 1 Tenn. Ch. A. 95, 106 (the chancery court has no power to issue a writ of restitution to supersede a writ or order of the circuit court).

[a] **"Same court"** includes an appellate court passing on the same case in review. Ashcroft v. Goodman, 139 Tenn. 625, 202 SW 939, 940 [quot Herrin v. Franklin, 1 Tenn. Ch. A. 95, 106].

[65] Viguerie v. Viguerie, 133 La. 406, 63 S 89, 92 (construing Code, "does not include the right to sue for a loan made to her husband").

[66] Holloway v. People's Water Co., 100 Kan. 414, 167 P 265, 2 ALR 161 (construing statute providing punishment for the violation of an injunction).

[67] See Real Actions § 48. See also Feced v. Abella, 1 Philippine 150 (interdicto de recobrar).

[68] See Restore post. See also Restitution ante.

Restoration:
Alteration of Instruments §§ 12, 13 (as obviating vitiating effect).
Attachment § 546 (of lien).
Executions § 922½ (after satisfaction).
Insane Persons §§ 323–336 (to sanity).
Judgments § 965 (of judgment illegally vacated).
Justices of the Peace § 111 (of jurisdiction).
Motor Vehicles §§ 1166–1186 (damages).
Railroads §§ 314, 347–356 (highways), §§ 451, 453 (watercourses).

"Repair" synonymous see ante.

"Replacement" synonymous see Replacement ante.

[69] See also Restoration ante.

[70] Bowman v. McLaughlin, 45 Miss. 461, 486.

[71] Century D. [quot Hempstead v. New York, 52 App. Div. 182, 187, 65 NYS 14].

[a] **Similar definition.**—"To bring back to its former state." Webster D. [quot Gilwee v. Pabst Brewing Co., 195 Mo. A. 487, 193 SW 886].

To restore railroad see Railroads § 347 note 10 [e].

[72] Century D. [quot Hempstead v. New York, 52 App. Div. 182, 187, 65 NYS 14].

[73] Bowman v. McLaughlin, 45 Miss. 461, 486.

[74] Chicago Sanitary Dist. v. Chicago, etc., R. Co., 267 Ill. 252, 108 NE 312, 315; Chicago, etc., R. Co. v. Milwaukee, 97 Wis. 418, 433, 72 NW 1118 (Rev. St. § 1836, requiring railroads to restore highways crossed by them, applies only to highways already existing). See Railroads § 347 et seq.

[75] See Gilwee v. Pabst Brewing Co., 195 Mo. A. 487, 488, 193 SW 886 [dist Harrison v. Missouri Pac. R. Co., 88 Mo. 625].

[76] Marsden v. Walsh, 24 R. I. 91, 95, 52 A 684.

"Deliver" 18 C. J. p 476.

[77] Gilwee v. Pabst Brewing Co., 195 Mo. A. 487, 488, 193 SW 886.

[a] **"Preserve" compared.**—As used in an instruction that in addition to the market value of a cow that was killed, plaintiff might recover the reasonable expense incurred or value of time spent in reasonable endeavors to "preserve" or "restore" the cow, the words, as used, are synonymous. But, applying the words to an automobile, "restore" means "something more than the preservation of the car . . . To restore it would be to bring it back, as near as possible, to its former state. In other words, the expense of restoring a car would include repair bills." Gilwee v. Pabst Brewing Co., 195 Mo. A. 487, 193 SW 886, 888 [dist Harris v. Missouri Pac. R. Co., 88 Mo. 625].

[78] See Redeliver 52 C. J. p 664.

[79] State v. Gibson County, 80 Ind. 478, 481, 41 AmR 821 (according to the lexicographers).

"Repair" ante.

[80] Bowman v. McLaughlin, 45 Miss. 461, 487.

[81] Bowman v. McLaughlin, supra (to restore lost pleadings and proceedings).

[82] Marsden v. Walsh, 24 R. I. 91, 95, 52 A 684 (construing Gen. L. c 207 § 13, "the mortgagee is to 'restore' the property to the mortgagor; that is, he is to deliver it to him").

[83] Esson v. Tarbell, 9 Cush. (Mass.) 407, 414 (as used in Rev. St. c 9 §§ 78, 79, providing that on demand and default of payment from the attaching officer, mortgaged property attached should be restored to the mortgagee, the word may imply that the property was taken out of the constructive, not the actual possession of the mortgagor; but more satisfactory, perhaps, is the larger and more generic meaning, equivalent to the direction that it shall be surrendered and delivered to the mortgagee from whom it is detained by the officer without law and against right).

[84] See also Restraint post.

[85] In re Charge to Grand Jury, 62 Fed. 828, 831 [quot State v. Cochran, 55 Or. 157, 104 P 419, 421, 105 P 884]; Smith v. Madison, 7 Ind. 86, 89.

[86] Chicago Packing, etc., Co. v. Chicago, 88 Ill. 221, 226, 30 AmR 545; Ogden v. Madison, 111 Wis. 413, 419, 87 NW 568, 55 LRA 506 ("the lexicographers all agree").

[87] In re Charge to Grand Jury, 62 Fed. 828, 831 [quot State v. Cochran, 55 Or. 157, 104 P 419, 421, 105 P 884]; Smith v. Madison, 7 Ind. 86, 89.

[88] Chicago Packing, etc., Co. v. Chicago, 88 Ill. 221, 226, 30 AmR 545; Ogden v. Madison, 111 Wis. 413, 419, 87 NW 568, 55 LRA 506 ("the lexicographers all agree").

[89] Ogden v. Madison, supra ("the legicographers all agree").

join,[90] forbid,[91] hinder,[92] hold back,[93] hold in,[94] hold in check,[95] impede,[96] keep in,[97] limit,[98] prevent,[99] prohibit,[1] repress,[2] restrict,[3] restrict within certain bounds;[4] or stay;[5] also to destroy,[6] "to govern,"[7] to license,[8] or to obstruct.[9] The ordinary meaning of the word, it has been said, is to abridge, confine, keep in, hold in, and the like;[10] and likewise, the essential element of its meaning is to hold in or back, curb, check.[11] However, it has been held that the primary meaning of the word is to keep from action, to repress, to prevent, to debar;[12] and that one of its primary meanings is to suppress.[13] The term has been compared with and distinguished from "to prohibit,"[14] "to regulate,"[15] and "to suppress."[16]

Phrases: "License, regulate, and restrain,"[17] "regulate and restrain,"[18] "restrain and prohibit,"[19] "restrain and punish,"[20] "restrain or prevent competition,"[21] "restrain or prohibit,"[22] "suppress and restrain,"[23] and "tax, regulate, restrain, and prohibit the running at large of dogs."[24]

[§ 2] **B. Restrained.** Hindered, obstructed, or destroyed.[25]

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[90] Standard D. [quot State v. Cochran, 55 Or. 157, 104 P 419, 421, 105 P 884].

[91] Century D. [quot State v. Cochran, supra].

[92] Chicago Packing, etc., Co. v. Chicago, 88 Ill. 221, 226, 30 AmR 545; Ogden v. Madison, 111 Wis. 413, 419, 87 NW 568, 55 LRA 506 ("the lexicographers all agree").

[93] Chicago Packing, etc., Co. v. Chicago, 88 Ill. 221, 226, 30 AmR 545; Burlington v. Lawrence, 42 Iowa 681, 682.

[94] Chicago Packing, etc., Co. v. Chicago, 88 Ill. 221, 226, 30 AmR 545; Smith v. Madison, 7 Ind. 86, 89.

[95] Burlington v. Lawrence, 42 Iowa 681, 682.

[96] Gouge v. Hart, 250 Fed. 802, 803.

[97] Smith v. Madison, 7 Ind. 86, 89.

[98] In re Charge to Grand Jury, 62 Fed. 828, 831 [quot State v. Cochran, 55 Or. 157, 104 P 419, 421, 105 P 884]; Smith v. Madison, 7 Ind. 86, 89.

[99] Chicago Packing, etc., Co. v. Chicago, 88 Ill. 221, 226, 30 AmR 545; Ogden v. Madison, 111 Wis. 413, 419, 87 NW 568, 55 LRA 506 ("the lexicographers all agree").

"Prevent" synonymous see Prevent 49 C. J. p 1343 text and note 85.

[1] Century D.; Standard D. [both quot State v. Cochran, 55 Or. 157, 104 P 419, 421, 105 P 884]; In re Charge to Grand Jury, 62 Fed 828, 831 [quot State v. Cochran, supra].

[a] **"Prohibit" compared and distinguished.**—(1) "If there is any difference between them ["prohibit" and "restrain"], 'restrain' is the more general and comprehensive term, as it necessarily includes not only the right to regulate, but to prohibit as well, while the converse is not essentially true. However, the words are usually treated as synonymous." State v. Cochran, 55 Or. 157, 104 P 419, 421, 105 P 884 (construing powers of council as authorized by city charter). See Smith v. Warrior, 99 Ala. 481, 482, 12 S 418 (as used in a statute authorizing the corporate authorities of a town "to license, tax, regulate, and restrain" the retailing of spirituous liquors within the corporate limits, "restrain," in the connection used, is the legal equivalent of the verb "to prohibit"). But see Intoxicating Liquors § 71 text and note 16. (2) "Prohibit" is not synonymous. Emporia v. Volmer, 12 Kan. 622, 630 [cit Madden v. State, 68 Kan. 658, 661, 75 P 1023; Stebbins v. Mayer, 38 Kan. 573, 577, 16 P 745; In re Hauck, 70 Mich. 396, 408, 38 NW 269]. See also "restrain and prohibit" infra text and note 19.

"Prohibit" 50 C. J. p 649.

[2] Burlington v. Lawrence, 42 Iowa 681, 682; Ogden v. Madison, 111 Wis. 413, 419, 87 NW 568, 55 LRA 506 ("the lexicographers all agree").

[3] Standard D. [quot State v. Cochran, 55 Or. 157, 104 P 419, 421, 105 P 884].

"Restrict" equivalent see Intoxicating Liquors § 71.

[4] St. Louis v. Smith, 2 Mo. 113, 116 (dis. op.).

[a] **For example,** of tippling houses, "to prescribe the hours within which their doors may be kept open; to make regulations to prevent, more effectually, all disorderly practices peculiar to the habits of persons frequenting such places in a city." St. Louis v. Smith, 2 Mo. 113, 116 (dis. op.).

[b] **In statutes to restrain animals from running at large,** "the word 'restrain' is used variably and relatively, and the duty which it denotes varies with the various relations to which the statutes are applicable." Hansen v. Kemmish, 201 Iowa 1008, 208 NW 277. See also Animals §§ 579–653.

[5] Gouge v. Hart, 250 Fed. 802, 803.

[6] U. S. v. Keystone Watch Case Co., 218 Fed. 502, 515.

[7] Chicago Packing, etc., Co. v. Chicago, 88 Ill. 221, 226, 30 AmR 545 (after defining "restraint," as "to hold back, to curb, to hold in, to check, to prevent, to hinder," to that extent it may mean "to govern"). See also Govern 28 C. J. p 749 text and note 21.

[8] See Intoxicating Liquors § 72.

Power to license:
Implied from power to suppress or restrain see Licenses § 19.
Or prohibit, of power to suppress, regulate, license or restrain see Licenses § 29.

[9] U. S. v. Keystone Watch Case Co., 218 Fed. 502, 515.

[10] Ensley v. State, 172 Ind. 198, 88 NE 62, 65.

[11] Nashville v. Linck, 12 Lea (Tenn.) 499, 512 (concurring opinion).

[12] Smith v. Warrior, 99 Ala. 481, 482, 12 S 418.

[13] Smith v. Madison, 7 Ind. 86, 89.

[a] **"Suppress" distinguished.**—(1) "Suppress" is not synonymous. Emporia v. Volmer, 12 Kan. 622, 630 [cit Matter of Hauck, 70 Mich. 396, 408]; In re Snell, 58 Vt. 207, 209, 1 A 566. (2) As used in a village charter, authorizing the village to "suppress and restrain" all descriptions of gambling, including the game of billiards, " 'restrain' contemplates the continued existence of the business, placing it within bounds; in effect, licensing it." In re Snell, supra. See Smith v. Madison, 7 Ind. 86, 89 ("each of these definitions [keep in, hold in, abridge, limit, confine] clearly imports that the thing shall be permitted to exist, only in a modified form; that it shall not be suppressed, but regulated"); Burlington v. Lawrence, 42 Iowa 681, 682 ("while the subject is not suppressed, it is held in check and under control"); Emporia v. Volmer, 12 Kan. 622, 630 (" 'restrain' does not contemplate an absolute destruction of a business, but rather a placing it within bounds").

Power to "restrain" not equivalent to "suppress" see Intoxicating Liquors § 71.

"Suppress" [37 Cyc 610].

[14] See supra text and note 1.

[15] See cases infra this note.

[a] **"Regulate" compared and distinguished.**—(1) "Restrain" is not more comprehensive than "regulate." Chicago Packing, etc., Co. v. Chicago, 88 Ill. 221, 226, 30 AmR 545. (2) "Restrain" is not strictly synonymous with "regulate," since it has a more limited meaning. "The word 'regulate' inevitably involves all that is meant by 'restrain,' and more, as it carries with it the affirmative element somewhat of continued action in a defined direction." Nashville v. Linck, 12 Lea (Tenn.) 499 (concurring opinion). See In re Schneider, 11 Or. 288, 298, 8 P 289 (a bond with sureties possessing certain prescribed qualifications, as well as a license fee, may be required under the power to "regulate and restrain"; "the word 'restrain,' appearing as it does in immediate association with the word 'regulate' in the charter, must be accorded some additional effect").

"Regulate" 53 C. J. p 1172.

[16] See supra note 13.

[17] Vinson v. Monticello, 118 Ind. 103, 104, 19 NE 734 (as a necessary incident includes the power to prohibit the barter or giving away of any intoxicating liquors).

As not including power to require removal of screens see Intoxicating Liquors § 70 note 9 [a].

[18] See supra note 1.

[19] St. Louis v. Smith, 2 Mo. 113, 115 [quot State v. Fay, 44 N. J. L. 474, 476] ("the Legislature . . . intended to give the corporation, by the words . . . two powers. One was to prohibit their existence altogether [of tippling houses], if they thought it best to do so, and the other was to keep them within certain limits as to the number and order, as they should think best"). See also supra note 1.

[20] Ogden City v. McLaughlin, 5 Utah 387, 389, 16 P 321 (as used in the charter of a city does not embrace the "offense of resorting to a house of ill-fame for lewdness," or the restraining of lewdness, "unless it be the lewdness of prostitutes").

[21] McKinley Tel. Co. v. Cumberland Tel. Co., 152 Wis. 359, 140 NW 38. See Restraint of Trade post.

[22] See Intoxicating Liquors § 71 note 17 [c].

[23] Chariton v. Barber, 54 Iowa 360, 361, 6 NW 528, 37 AmR 209; Mt. Pleasant v. Breeze, 11 Iowa 399, 400.

[24] See Animals § 25 note 20 [a].

[25] U. S. v. Keystone Watch Case

Phrases: "No person within the state shall . . . be hurt, molested, or restrained, in his religious sentiments or persuasions;"[26] and "no subject shall be hurt, molested, or restrained . . . for his religious profession or sentiments."[27]

[§ 3] **C. Restraining.** In a broad popular sense, hindering or impeding,[28] preventing,[29] prohibiting or staying;[30] in its narrowest, technical sense, applicable only to suits praying for restraining orders or injunctions.[31]

RESTRAINING ORDER.[32]

RESTRAINT.[33] Confinement;[34] hindrance;[35] restriction;[36] also abridgment of liberty or hindrance of the will;[37] holding or pressing back from action;[38] prohibition of action.[39] Any impediment thrown in the way of an unlimited exercise of a power is a restraint.[40] "Restraint" does not mean only corporal confinement or the fear of bodily harm—[41] taking away the will of a person by threats or by improper means of any kind not willingly assented to by the person, but brought about by the exercise of authority or by fear, or apprehension of loss of any kind, must be a restraint.[42] Nor, according to common understanding, does the word imply that the limitation, restriction, or confinement must be imposed by those who are in possession of the person or thing which is limited, restricted, or confined;[43] the word may imply a restriction[44] or hindrance[45] created by the application of external force.

By statute, the word has been defined as the kind of control which one person exercises over another, not to confine him within certain limits, but to subject him to the general authority and power of the person claiming such right.[46]

Restraint of trade.[47] A very old phrase of the

Co., 218 Fed. 502, 515 (Sherman Anti-Trust Act). See also Monopolies § 54 et seq.

[26] Frolickstein v. Mobile, 40 Ala. 725, 727 (one whose religious sentiments and persuasions lead him to the conviction that it is his duty to labor the other six days in the week besides Saturday, is "in fact" not restrained in his religious sentiments or persuasions by a municipal regulation, which forbids him to sell goods from his store on the first day of the week).

Religious liberty and freedom of conscience see Constitutional Law §§ 450–457.

[27] Thurston v. Whitney, 2 Cush. (Mass.) 104, 110 (as used in a constitutional provision, without reference to atheists and their competency as witnesses). See also Constitutional Law § 452.

[28] Gouge v. Hart, 250 Fed. 802, 803 (construing Rev. St. § 3224 [Comp. St. (1916) § 5947], providing "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court," "congress used the word 'restraining' . . . in its popular and broad sense, rather than in a technical and very narrow sense"). See Internal Revenue § 278.

[29] Whitlock v. West, 26 Conn. 406, 413.

[a] **"Preventing" or "hindering" synonymous.**—See Whitlock v. West, 26 Conn. 406, 413 (as used in a statute authorizing towns to restrain certain animals from going at large, "the language . . . is . . . more appropriate to authorize them [towns] to impose a specific restraint on the animals themselves than a mere prohibition upon their owners. It provides that they may pass by-laws for restraining, that is, for preventing or hindering the animals from going at large, and implies direct action upon the animals themselves").

[30] Gouge v. Hart, 250 Fed. 802, 803. But see infra this note; and supra note 1.

[a] **"Prohibiting" distinguished.**—Stebbins v. Mayer, 38 Kan. 573, 577, 16 P 745 (in the title of a statute not broad enough to authorize an ordinance "restraining").

[31] Gouge v. Hart, 250 Fed. 802, 803.

Restraining order post.

[32] See Injunctions § 10; Prohibition 50 C. J. p 651 et seq.

[33] See also Restraint ante; Restrict post; Restriction post.

Restraint:
Brassiere 9 C. J. p 319 note 8 [a].
Distinguished from "constraint" 12 C. J. p 1294 note 11 [a].
Elections §§ 230–237 (intimidation and violence).
False Imprisonment §§ 8–67 (as element).
Habeas Corpus 29 C. J. p 1 et seq.
Insane Persons §§ 341–367.
Marine Insurance §§ 282–285 (insurance against), §§ 429–430 (as constructive total loss).
Municipal Corporations § 250 (power to regulate as implying power of).
Prisons §§ 38–51.
Synonymous with:
  "Confinement" see 12 C. J. p 422.
  "Constraint" see 12 C. J. p 1294.
  "Detainment" see Marine Insurance § 282 note 50 [a].
Wills [40 Cyc 1144 (undue influence)].

Restraint on alienation:
Deeds § 375.
Estates § 10.
Perpetuities 48 C. J. p 929 et seq.
Wills [40 Cyc 1713].

Restraint on anticipation see Trusts [39 Cyc 237].

Restraint of marriage:
Bills and Notes § 385.
Contracts § 404.
Deeds § 375 (condition).
Wills [40 Cyc 1699 (condition)].

Restraint of princes:
Marine Insurance §§ 282–285 (arrests, restraints, and detentions).
Shipping [36 Cyc 56 (charities), 203 (carriage of goods), 351 text and note 28 (demurrage)].

[34] U. S. v. Elliott, 64 Fed. 27, 30.

[35] U. S. v. Elliott, supra.

[36] U. S. v. Elliott, supra.

[37] Edmondson v. Harris, 2 Tenn. Ch. 427, 434 ("one of the recognized definitions").

[38] U. S. v. Elliott, 64 Fed. 27, 30. See Starratt v. Miller, HodgElRep (Ont.) 458, 467 (of "restraint," "it is said to be, to keep from action by any means; to hold back; to hold on; to curb; to curb, check, repress, coerce, constrain, debar, prevent, abridge, hinder." But as an example of its use, the following: "'I have promised to restrain him hurting any man's reputation.'—Addison.").

[39] U. S. v. Elliott, 64 Fed. 27, 30. See also infra note 40 [a]. But see State v. Calloway, 11 Ida. 719, 84 P 27, 33, 114 AmSR 285, 4 LRANS 109 (construing an ordinance as a regulation and restraint, not a prohibition. "Restraint does not contemplate an absolute destruction of business, but rather places it within certain bounds"); Madden v. State, 68 Kan. 658, 75 P 1023, 1024 ("restraint" not synonymous with "prohibit" [quot Stebbins v. Mayer, 38 Kan. 573, 577, 16 P 754 (where the word is "restrain")]).

[40] St. Louis v. Smith, 2 Mo. 113, 115.

[a] **"The restraint may be so great** that it amounts almost or entirely to an exclusion of the exercise of the power." St. Louis v. Smith, 2 Mo. 113, 115.

[41] Starratt v. Miller, HodgElRep (Ont.) 458, 467.

[42] Starratt v. Miller, supra.

[43] Olivera v. Union Ins. Co., 3 Wheat. (U. S.) 183, 189, 4 L. ed. 365.

[44] Olivera v. Union Ins. Co., supra; U. S. v. Elliott, 64 Fed. 27, 30.

[a] **Distinguished from "seizure" and "arrest."**—"'Seizure' is a taking possession of goods for the purpose of confiscating them. 'Arrest' is a taking with the intention of restoring them at one time or other. 'Restraint' is the preventing the goods from being got away, without laying hands upon them." Rodocanachi v. Elliott, L. R. 8 C. P. 649, 659 (per Brett, J., construing "restrainments and detainments of all kings, princes, and people" in marine policy).

[45] U. S. v. Elliott, 64 Fed. 27, 30.

[46] Tex. Code Cr. Proc. art 172 [quot Ex p. Snodgrass, 43 Tex. Cr. 359, 361, 65 SW 1061].

[47] **Restraint of trade:**
Bills and Notes § 384.
  "Boycott" 9 C. J. p 315.
Conspiracy §§ 43, 175.
Contracts §§ 410–432.
Corporations §§ 472–474 (by-laws).
Injunctions §§ 209–280 (trade, business, or occupation), §§ 335–346 (contracts).
Monopolies 41 C. J. p 76 et seq.

law,[48] meaning undue and unreasonable restraint;[49] at common law, acts, contracts, agreements or combinations which operate to the prejudice of the public interests by unduly restricting competition or by unduly obstructing the due course of trade.[50]

Other phrases. "Any restraint . . . or in any manner practice intimidation,"[51] "restraint of commerce,"[52] and "that the testator . . . not under restraint."[53]

RES TRANSIT CUM SUO ONERE.[54]

RESTRICT.[55] To confine;[56] to limit;[57] to prevent (a person or thing) from passing a certain limit in any kind of action;[58] to restrain;[59] to restrain without bounds.[60]

Power to restrict is not the power to destroy or prohibit.[61]

Regulate and restrict.[62] To attach limitations to (a proposition or conception) so that it shall not apply to all the subjects to which it would otherwise seem to apply.[63]

Other phrases: "Regulated and restricted,"[64] and "restricted lands;"[65] also "restricting or limiting."[66]

RESTRICTION.[67] Confinement within bounds;[68] limitation;[69] restraint;[70] that which restricts;[71] the act of restraining or the state of being restrained;[72] the act of restricting, confining, or limiting;[73] the state of being restricted, limited, or confined within bounds;[74] also reservation, reserve.[75]

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[48] Trenton Potteries Co. v. U. S., 300 Fed. 550, 553.

"A term of art generations before the Sherman Act was enacted." Trenton Potteries Co. v. U. S., supra.

[49] Trenton Potteries Co. v. U. S., supra.

[50] Pulp Wood Co. v. Green Bay Paper, etc., Co., 168 Wis. 400, 170 NW 230, 232.

[51] Starratt v. Miller, HodgElRep (Ont.) 458, 466 (construing Election L. [1868] § 72, "restraint" used "in connection with force or violence, and so may be said to mean some physical restraint").

[52] U. S. v. Elliott, 64 Fed. 27, 30 (construing Act of July 2, 1890 § 1, the term was used "in its ordinary business understanding and acceptation").

[53] In re Hermann, 178 App. Div. 182, 165 NYS 298 (construing Code Civ. Proc. § 2614 the word "restraint" refers to "a restraint exercised, at the time of the preparation and execution of the will offered for probate, upon the testator by relatives or third persons, leading to and overcoming his free will in the testamentary disposition of his property").

[54] A maxim meaning "The thing passes with its burden." Black L. D. ("Where a thing has been incumbered by mortgage, the incumbrance follows it wherever it goes").

[55] See also Restrain ante; Restriction post; Restrictive post.

[56] Webster D. [quot Atlantic Coast Line R. Co. v. Beazley, 54 Fla. 311, 361, 45 S 761, 777; Mumford v. Chicago, etc., R. Co., 128 Iowa 685, 104 NW 1135, 1138; State v. Stewart, 53 Mont. 18, 161 P 309, 312]; Dart v. Gulfport, 146 Miss. 534, 113 S 441, 444.

"Confine" 12 C. J. p 422.

[57] Century D. [quot State v. Stewart, 53 Mont. 18, 161 P 309, 312]; Webster D. [quot Atlantic Coast Line R. Co. v. Beazley, 54 Fla. 311, 361, 45 S 761, 777; Mumford v. Chicago, etc., R. Co., 128 Iowa 685, 104 NW 1135, 1138; State v. Stewart, 53 Mont. 18, 161 P 309, 312]; Dart v. Gulfport, 146 Miss. 534, 113 S 441, 444.

"Limit" 37 C. J. p 664.

[58] Century D. [quot State v. Stewart, 53 Mont. 18, 161 P 309, 312].

[59] Century D. [quot State v. Stewart, supra].

"Restrain" ante.

[60] Webster D. [quot Atlantic Coast Line R. Co. v. Beazley, 54 Fla. 311, 361, 45 S 761; Mumford v. Chicago, etc., R. Co., 128 Iowa 685, 691, 104 NW 1135; State v. Stewart, 53 Mont. 18, 161 P 309, 312]; Dart v. Gulfport, 146 Miss. 534, 113 S 441, 444; Gulf, etc., R. Co. v. Trawick, 68 Tex. 314, 319, 4 SW 567, 570.

[61] Dart v. Gulfport, 146 Miss. 534, 113 S 441, 444 (construing Zoning Act [L. (1924) c 195], authorizing a city to regulate and restrict erection of buildings).

Prohibition or regulation see Municipal Corporations § 250.

[62] See Regulate 53 C. J. p 1172. See also infra text and note 64.

[63] Century D. [quot State v. Stewart, 53 Mont. 18, 161 P 309, 312].

[64] In re Opinion of Justices, 232 Mass. 605, 124 NE 319, 321 (as used in Const. Amendm. art 50, of advertising to the public, the words do not confer power to prohibit "utterly and without bound," but only to establish reasonable limitation). See Regulate post.

[65] Kenny v. Miles, 250 U. S. 58, 39 SCt 417, 418, 63 L. ed. 841 (construing Act [1912] § 6, "lands the alienation of which is subject to restrictions imposed by congress to protect the Indians from their own incompetency"). See Rogers v. Rogers, 263 Fed. 160; Gypsy Oil Co. v. Clinton, 98 Okl. 282, 220 P 587; Stewart v. Burrows, 80 Okl. 23, 193 P 881; King v. Shults, 72 Okl. 254, 180 P 550; Chupco v. Chapman, 76 Okl. 201, 170 P 259 [quot Seiffert v. Jones, 77 Okl. 204, 186 P 472, 187 P 223; King v. Mitchell, 69 Okl. 207, 171 P 725, 726] (construing act of May 27, 1908 [35 St. at L. 312], relating to Indians).

[66] Heller v. Grand Trunk R. Co., 25 Ont. L. 117, 120, 20 OntWR 478 (construing § 340 of the Railway Act, "the words . . . meet the case of a partial exemption from liability," distinguished from "impairing," "intended to cover the case of total exemption from liability").

"Impair" 31 C. J. p 252.

[67] **Restriction:**
Assignments § 134.
Carriers §§ 167–249 (liability for goods), §§ 1151–1164 (liability for passengers).
Constitutional Law §§ 109–114 (as self-executing).
Corporations §§ 1035–1040 (right to transfer stock), §§ 3948–3957 (foreign, power of state over).
Courts § 29 (jurisdiction).
Covenants 15 C. J. p 1204 et seq.
Criminal Law §§ 2154–2157 (effect of evidence).
Deeds §§ 367–469.
Indians §§ 36, 79–81 (alienation).
Injunctions §§ 315–346 (restrictive covenants).
Landlord and Tenant §§ 54–119 (assignment, sublease, and mortgage), § 486 (covenant affecting lessor's other property), §§ 710–733 (use of premises).
Mines and Minerals §§ 610–614 (use under lease).
Municipal Corporations §§ 216–232 (extent and limit of powers), §§ 2815–2821 (power to levy assessments and special taxes).
Partnership §§ 296, 297 (partner's authority).
Patents §§ 416–425 (rights conveyed by license), §§ 431–433 (assignments of license and sublicense).
Perpetuities 48 C. J. p 929 et seq.
Powers § 36.
Shipping [36 Cyc 279 (statutory exemption from liability for goods), 287 (contractual limitation of liability for goods), 329 (limitation of liability for baggage), 344 (contractual limitation of liability for passengers), 407 (statutory limitation of shipowner's liability)].
Synonymous:
  "Condition," in connection with a grant of interest in real property see Condition § 2 text and notes 39, 40.
  "Limitation" 37 C. J. p 664.
Telegraphs and Telephones [37 Cyc 1684 (modification of liability by contract)].
Trial [38 Cyc 1340 (evidence for specific purpose)].
Vendor and Purchaser [39 Cyc 1499 (encumbrance)].
Wills [40 Cyc 1683].

[68] Century D. [quot State v. Stewart, 53 Mont. 18, 161 P 309, 312]; Curry v. Marvin, 2 Fla. 411, 415 (as defined "by the best lexicographers").

[69] Century D.; Webster D. [both quot State v. Stewart, 53 Mont. 18, 161 P 309, 312]; Curry v. Marvin, 2 Fla. 411, 415 (as defined "by the best lexicographers").

"Limitation" 37 C. J. p 664.

[70] Webster D. [quot State v. Stewart, 53 Mont. 18, 161 P 309, 312].

"Restraint" ante.

[a] **"Restraint" distinguished.**—Starratt v. Miller, HodgElRep (Ont.) 458, 467 ("'restraint' is an act of power; 'restrict' is an act of authority").

[71] Century D.; Webster D. [both quot State v. Stewart, 53 Mont. 18, 161 P 309, 312].

[72] Century D. [quot State v. Stewart, supra].

[73] Webster D. [quot Curless v. Watson, 180 Ind. 86, 102 NE 497, 502].

[74] Webster D. [quot Curless v. Watson, supra].

[75] Century D. [quot State v. Stewart, 53 Mont. 18, 161 P 309, 312].

Phrases: "Appellate jurisdiction . . . under such restrictions and regulations not repugnant to this constitution, as may . . . be prescribed by law,"[76] "before the removal of restrictions therefrom,"[77] "existing restrictions and easements,"[78] "municipal corporations of the same class shall possess the same powers and be subject to the same restrictions,"[79] "restriction against alienation,"[80] "restrictions as to buildings,"[81] "restrictions on alienation,"[82] and "under the restrictions to be provided by law."[83]

RESTRICTIVE.[84] Serving or tending to restrict.[85]

***RESULT.** [§ 1] **A. As Noun.** Consequences;[86] the effect of one or more concurrent causes;[87] also that which springs or rebounds back from some pre-ëxisting thing.[88] As sometimes used the term means a production or product of some sort, and not a service.[89]

Phrases: "Affect the result,"[90] "direct result,"[91] "result of any civil action or proceeding,"[92] "result of any previous election,"[93] "result of his examination,"[94] and "result of the election;"[95] also, "results of preëxisting disease."[96]

[§ 2] **B. As Verb.** To terminate, or to end.[97]

Phrases: "Death resulting from infection,"[98] "disease resulting,"[99] "resulting from,"[1] and "resulting from employment."[2]

RESULTING POWERS. A term which has been used in constitutional law to designate the powers exercised by Congress which are not expressly given nor ancillary to any single enumerated power.[3]

RESULTING TRUST.[4]

RESUME.[5] To begin anew; to take again; to take back; to take up again after an interruption.[6]

In reference to the taking by the public of a road from its owners, the term has an allusion to one of the alleged sources of the public right to take private property, whether held in fee or otherwise, and not a suggestion that the owner's title is exceptionally defeasible.[7]

Phrases: "Resume possession,"[8] and "resume work;"[9] also, "resumed area."[10]

"Reservation" ante.

"Reserve" ante.

76. Curry v. Marvin, 2 Fla. 411, 415 (as used in the constitution, "restriction" applies "to the amount and to the time within which an appeal might be taken, or a writ of error sued out").

77. Barnett v. Kunkel, 259 Fed. 394, 398 (as used in the Acts of 1906 and 1908, relating to Indians, "restrictions" refers to "prohibitions against alienation").

78. Ritter v. Hill, 282 Pa. 115, 127 A 455, 457 (construing a contract for the purchase of property, does not include the right of the city to open a street laid out and adopted as part of the city plan).

79. Peo. v. Earl, 42 Colo. 238, 94 P 294, 301 (construing Const. art 14 § 13, providing that the General Assembly shall provide by general laws for the classification of cities and towns into four classes, the powers of each to be defined by general laws so that all municipal corporations of the same class shall possess the same powers and be subject to the same restrictions, "restrictions" refers to such "as relate to subjects pertaining to local self-government, such as may be designated as purely corporate, municipal subjects, as distinguished from such subjects as involve the relations of the citizens or the cities and towns to the state").

80. Hewitt First State Bank v. Lowery, 72 Okl. 115, 178 P 983 (construing 35 St. at L. p 312 c 199 § 4, relating to Indians).

81. See Auctions and Auctioneers § 44 note 60 [e].

82. Marcy v. Seminole County, 45 Okl. 1, 144 P 611 (as used in 35 St. at L. p 312 c 199, relating to Indians, "those restraints or limitations imposed by law upon the power of the owners of the lands mentioned to voluntarily convey the same free from supervision or control of some agency designated by Congress").

83. State v. Stewart, 53 Mont. 18, 161 P 309, 312 (construing Const. § 3 art 11).

84. Restrictive:
Indorsement see Bills and Notes §§ 544–547.
Provision see Insurance § 214.
Title see Statutes [36 Cyc 1029].

85. Webster New Int. D.

"Restrict" ante.

"Restriction" ante.

86. Southern Bell Tel., etc., Co. v. Shamos, 12 Ga. A. 463, 77 SE 312, 315.

[a] **In reference to the law of negligence** it is said: "One must distinguish somewhat between the term . . . as applied to the injury and . . . as applied to the proximate consequences of the injury." Fisher v. Western Union Tel. Co., 119 Wis. 146, 153, 96 NW 545.

"Consequence" 12 C. J. p 521.

87. Thompson v. Louisville, etc., R. Co., 91 Ala. 496, 498, 8 S 406, 11 LRA 146.

"Cause" 11 C. J. p 36.

"Concurrent" 12 C. J. p 393.

"Effect" 19 C. J. p 1016.

88. Transatlantic Ins. Co. v. Bamberger, 11 SW 595, 596, 11 KyL 101.

89. Jensen v. Barbour, 15 Mont. 582, 593, 39 P 906; Texas, etc., R. Co. v. Parsons, 109 SW 240, 247; Pyle v. 2-Miracle Concrete Corp., 126 Wash. 384, 218 P 246, 247.

"Product" 50 C. J. p 631.

"Production" 50 C. J. p 632.

"Service" distinguished see Master and Servant 39 C. J. p 1315 text and note 1 [c].

90. Hobson v. Morin, 1 OntElCas 383, 393.

91. See Direct 18 C. J. p 1044 text and note 58.

"Consequential result" distinguished see Direct 18 C. J. p 1044 text and note 58 [a].

92. Sorensen v. Sorensen, 56 Nebr. 729, 734, 77 NW 68.

93. Reed v. Independence Tp., 93 N. J. L. 101, 107 A 174.

94. Good v. San Diego, 5 Cal. A. 265, 90 P 44, 47.

95. Hobson v. Morin, 1 OntElCas 383, 393.

96. Robinson-Pettet Co. v. Workmen's Compensation Bd., 201 Ky. 719, 258 SW 318, 319.

97. Home Mut. Ben. Assoc. v. Mayfield, 142 Ark. 240, 218 SW 371, 373.

"End" 20 C. J. p 1253.

98. Ballagh v. Interstate Business Men's Acc. Assoc., 176 Iowa 110, 155 NW 241, 245, 157 NW 726.

99. Home Mut. Ben. Assoc. v. Mayfield, 142 Ark. 240, 218 SW 371, 373.

1. Crozier v. Hawkeye Stages, Inc., (Iowa) 228 NW 320, 325.

[a] **Synonymous phrases** are: "Sustained by," "due to," "sustained by means of," "sustained in consequence of," and "sustained through." Webster New Int. D. [cit Federal L. Ins. Co. v. White, (Tex. Civ. A.) 23 SW (2d) 832, 834].

2. Archibald v. Workmen's Compensation Comr., 77 W. Va. 448, 87 SE 791, 792, LRA1916D 1013.

3. Knox v. Lee, 12 Wall. (U. S.) 457, 535, 20 L. ed. 287 (where the right to sue and make contracts, requiring an oath from officers of the government, building a capitol or presidential mansion, and the enactment of a penal code are given as instances of such power).

4. See Trusts [39 Cyc 104 et seq].

5. Failure to resume work see Mines and Minerals § 306.

6. Century D.

7. In re Opinion of Justices, 66 N. H. 629, 635, 33 A 1076.

8. Ashton Holding Co. v. Ross, 98 Misc. 586, 163 NYS 99; Landesman v. Hauser, 45 Misc. 603, 91 NYS 6.

9. McCormick v. Baldwin, 104 Cal. 227, 229, 37 P 903.

10. Colless v. Minister for Lands, [1899] A. C. 90, 95.

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*By Wm. Howard Buchanan (Result—Review inclusive).

RESURVEY.[11] To survey again;[12] also, to relocate.[13]

Defined by Commissioner of the General Land Office "a resurvey, properly considered, is but a retracing, with a view to determine and establish lines and boundaries of an original survey."[14]

In proceedings to determine division line between towns term has been held to mean to locate.[15]

RETAIL.[16] [§ 1] **A. As Noun.** Sale of commodities in small quantities or parcels.[17]

Sales at retail. Those made in small quantities such as are adapted to the wants of individual purchasers.[18]

Other phrases: "At retail,"[19] and "by retail."[20]

[§ 2] **B. As Verb.** To deal out in small quantities;[21] to deal out or dispose of in small quanties;[22] to dispose of in small quantities;[23] to sell by small parcels and not in gross;[24] to sell by small quantities, in broken parts, in small lots or parcels, not in bulk;[25] to sell directly to the consumer;[26] to sell in small quantities;[27] to sell in small quantities, a little at a time;[28] to sell in small parcels or quantities, and not in gross;[29] to sell in small quantities or at second hand;[30] to sell in small quantities or parcels;[31] to sell in small quantities, such as are immediately called for by consumers;[32] to vend in small quantities for gain.[33]

Retailing. Selling by small quantities, to suit customers, articles which are bought in larger quantities generally.[34]

[§ 3] **C. As Adjective—1. In General.** "Retail" may be and frequently is employed as an adjective,[35] as in the phrases "regular retail price,"[36] "retail coal dealer,"[37] "retail dealer,"[38] "retail fish dealer,"[39] "retail merchant,"[40] and "retail trade."[41]

[§ 4] **2. Retail Liquor Dealer.**[42] A dealer in intoxicating liquor who sells to individuals for consumption;[43] any one who sells in small quantities directly to the consumer;[44] one who sells by small quantities, to suit customers, liquors which are bought in larger amounts generally;[45] one who sells to persons or customers for purposes of consumption.[46]

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[11] **Resurvey of:**
Highways § 137.
Public Lands § 54.

[12] Trudeau v. Sheldon, 62 Vt. 198, 202, 20 A 161.

"Survey" [37 Cyc 621].

[13] Culver v. Fair Haven, 67 Vt. 163, 166, 31 A 143.

"Relocation" ante.

[14] Cragin v. Powell, 128 U. S. 691, 698, 9 SCt 203, 32 L. ed. 566.

[15] Underhill v. Jericho, 101 Vt. 41, 140 A 156, 157.

"Locate" 38 C. J. p 131.

[16] See also Retailer post.

[17] Webster D. [quot Kentucky Consumers' Oil Co. v. Com., 192 Ky. 437, 439, 233 SW 892; Katzman v. Com., 140 Ky. 124, 129, 130 SW 990, 140 AmSR 359, 30 LRANS 519 (cit Cyc)].

[18] Com. v. Greenwood, 205 Mass. 124, 127, 91 NE 141.

[a] **A vegetable dealer** in the market conducts a business of "selling at retail." State v. Cendo, 38 La. Ann. 828, 829.

[19] Bettencourt v. Sheehy, 157 Cal. 698, 109 P 89, 90; Standard Oil Co. v. Com., 119 Ky. 1, 7, 82 SW 970, 83 SW 557; Tripp v. Hennessy, 10 R. I. 129, 132; State v. Scampini, 77 Vt. 92, 107, 59 A 201.

[a] **"At wholesale" distinguished.**—Com. v. Poulin, 187 Mass. 568, 569, 73 NE 655.

[20] Bettencourt v. Sheehy, 157 Cal. 698, 109 P 89, 90.

[21] Century D. [quot Raines' Case, 38 Pa. Co. 233, 234].

[22] Standard Oil Co. v. Com., 119 Ky. 1, 4, 82 SW 970, 83 SW 557.

[23] Markle v. Akron, 14 Oh. 586, 591.

[a] **May be either for or without a consideration.**—Markle v. Akron, 14 Oh. 586, 592.

[24] Bouvier L. D. [quot Bryan v. Sparks, 36 Nev. 573, 137 P 522, 523; State v. Lowenhaught, 11 Lea (Tenn.) 13, 15].

[25] Bryan v. Sparks, 36 Nev. 573, 137 P 522, 523 [quot Cyc]; State v. Hawkins, 91 N. C. 626, 627.

"Bulk" 9 C. J. p 1003.

[26] Webster New Int. D. [quot In re Metz Bros. Brewing Co., 88 Nebr. 164, 167, 129 NW 443, 32 LRANS 622].

"Consumer" 12 C. J. p 1309.

[27] Webster New Int. D. [quot In re Metz Bros. Brewing Co., 88 Nebr. 164, 167, 129 NW 443, 32 LRANS 622]; Harris v. Livingston, 28 Ala. 577, 579; Com. v. Poulin, 187 Mass. 568, 569, 73 NE 655; Com. v. Kimball, 7 Metc. (Mass.) 304, 308; State v. Cassety, 30 S. C. L. 90, 91; Koenig v. State, 33 Tex. Cr. 367, 378, 26 SW 835, 47 AmSR 35.

[28] Century D. [quot Kentucky Consumers' Oil Co. v. Com., 192 Ky 437, 439, 233 SW 892].

[29] Bridges v. State, 37 Ark. 224, 226.

"In gross" see Gross § 2.

[30] Standard Oil Co. v. Com., 119 Ky. 1, 7, 82 SW 970, 83 SW 557.

[31] McArthur v. State, 69 Ga. 444, 446; Bryan v. Sparks, 36 Nev. 573, 576, 137 P 522.

[32] Standard D. [quot In re Metz Bros. Brewing Co., 88 Nebr. 164, 167, 129 NW 443, 32 LRANS 622].

[a] **"Wholesale" distinguished.**—Ex p. Reineger, 184 Cal. 97, 193 P 81, 83; Bettencourt v. Sheehy, 157 Cal. 698, 109 P 89, 90; Kentucky Consumers' Oil Co. v. Com., 192 Ky. 437, 233 SW 892; Com. v. Poulin, 187 Mass. 568, 569, 73 NE 655; Peo. v. Abraham, 16 App. Div. 58, 62, 44 NYS 1077; Tripp v. Hennessy, 10 R. I. 129, 131; State v. Scampini, 77 Vt. 92, 108, 59 A 201; Gorsuth v. Butterfield, 2 Wis. 237, 243. See also Intoxicating Liquors 33 C. J. p 573 text and note 14 [b].

[33] State v. Mooty, 21 S. C. L. 187, 189.

[34] Bryan v. Sparks, 36 Nev. 573, 137 P 522, 523; State v. Lowenhaught, 11 Lea (Tenn.) 13, 15.

[a] **"Compounding" and "dispensing" distinguished.**—Peo. v. Abraham, 16 App. Div. 58, 62, 44 NYS 1077. See also Compound 12 C. J. p 302 text and note 21; Dispense 18 C. J. p 1278.

[35] See cases infra this section; and § 4.

[36] See Price 49 C. J. § 1 text and note 83.

[37] Carlisle v. Lovell, 171 NYS 996, 998 (as defined by the United States Fuel Administrator, every person, partnership, corporation or association physically handling and delivering coal or coke to customers).

[a] **"Coal jobber" distinguished.**—Carlisle v. Lovell, 171 NYS 996, 998.

"Coal" 11 C. J. p 934.

"Dealer" 17 C. J. p 1154.

[38] Com. v. Greenwood, 205 Mass. 124, 127, 91 NE 141, 18 AnnCas 185 (one who "sells in small quantities or parcels").

[a] **Of gasoline.**—Askren v. Continental Oil Co., 252 U. S. 444, 40 SCt 355, 64 L. ed. 654. See also Licenses 37 C. J. p 224 text and note 68 [c].

[b] **Of oleomargine.**—Under statute regulating sale of oleomargarine, one who sells in less quantities than ten pounds at one time. Ripper v. U. S., 178 Fed. 24, 28, 101 CCA 152. "Oleomargarine" 46 C. J. p 1089.

[c] **"Wholesale dealer" distinguished.**—Com. v. Greenwood, 205 Mass. 124, 127, 91 NE 141, 18 AnnCas 185; In re Metz Bros. Brewing Co., 88 Nebr. 164, 168, 129 NW 443, 32 LRA NS 622; State v. Lowenhaught, 11 Lea (Tenn.) 13, 15.

"Dealer" 17 C. J. p 1154.

[39] Ex p. Powell, 70 Fla. 363, 70 S 392, 394 (as defined by statute, is any one who sells fish directly to the consumer).

[40] See Merchant § 13.

[41] See Intoxicating Liquors, §§ 103, 111, 182, 262.

[42] **Generally** see Intoxicating Liquors 33 C. J. p 480.

[43] State v. Cunningham, 130 La. 749, 758, 58 S 558, LRA1915B 389.

[44] Thibaut v. Kearney, 45 La. Ann. 149, 151, 12 S 139, 18 LRA 596.

[45] Webb v. State, 11 Lea (Tenn.) 662, 665; State v. Lowenhaught, 11 Lea (Tenn.) 13, 15.

[a] **Less than five gallons.**—Goldberg v. U. S., 280 Fed. 89, 91; U. S. v. Morfew, 136 Fed. 491, 492; U. S. v. Alexis Club, 98 Fed. 725, 727.

[b] **Less than quart.**—Lemons v. State, 50 Ala. 130, 132; Bryant v.

RETAILER.[47] One who deals[48] in merchandise in smaller quantities than he buys, generally with a view to profit;[49] one who sells goods by small quantities or parcels;[50] one who sells to the consumer.[51]

RETAIN.[52] To continue to hold, have, use, recognize, etc.,[53] not to lose, part with, dismiss or permit to escape;[54] to continue to hold, to keep in possession;[55] to hold back;[56] to hold or keep that which one already owns,[57] not to lose or part with or dismiss it;[58] to keep;[59] to keep back that which one then owns;[60] to keep in possession, control, use, custody, etc.,[61] to keep in possession or hold back;[62] also, to keep in pay, to hire.[63] As used in a pleading the term has been held to mean the same as "detain."[64] Phrases: "Retain and employ,"[65] "retain and have the use of,"[66] and "retain or employ."[67]

Retained. Employed for reward.[68] Phrase: "A lien is retained."[69]

RETAINER.[70] A dependent or hanger on;[71] also, a remedy by mere operation of law.[72]

Compensation for disbursements and services. In a technical sense a "retainer" is the name of a payment in advance, to cover future services and disbursements until further provision is made;[73] a sum of money paid to secure the services of the person to be employed.[74]

Phrase: "Retainers to the camp."[75]

May be used as adjective, as in the phrase "retainer pay."[76]

RETAKING.[77]

RETALIATION. The act of returning evil for evil, or disfavors for disfavors.[78]

RETALIATORY STATUTE.[79]

State, 46 Ala. 302, 303; Elam v. State, 25 Ala. 53, 55.

[c] **Three gallons or less.**—Peters v. Eaton Cir. Judge, 153 Mich. 467, 468, 117 NW 68, 69; Peo. v. Wilcox, 152 Mich. 39, 115 NW 973; State v. Minnesota Club, 106 Minn. 515, 119 NW 494, 497, 20 LRANS 1101.

46. State v. Tarver, 11 Lea (Tenn.) 658, 660.

47. See also Retail ante.

48. **"Dealer"** 17 C. J. p 1154.

49. Bouvier L. D. [quot State v. Lowenhaught, 11 Lea (Tenn.) 13, 15]; Bryan v. Sparks, 36 Nev. 573, 576, 137 P 522, 523 [quot Cyc].

[a] **Term includes:** (1) Keeper of a woodyard. Washington v. Casanave, 29 F. Cas. No. 17,225, 5 Cranch C. C. 500. (2) Lumber dealer. Campbell v. Anthony, 40 Kan. 652, 20 P 492.

[b] **"Wholesaler" distinguished.**—Great Atlantic, etc., Tea Co. v. Cream of Wheat Co., 227 Fed. 46, 141 CCA 594, 596.

50. Campbell v. Anthony, 40 Kan. 652, 654, 20 P 492; Bryan v. Sparks, 36 Nev. 573, 576, 137 P 522, 523 [quot Cyc].

51. Great Atlantic, etc., Tea Co. v. Cream of Wheat Co., 227 Fed. 46, 141 CCA 594, 596.

52. **Retain:**
Bill to subject interest of judgment debtor as legatee see Wills [40 Cyc 2088].
Jurisdiction to give complete relief see Equity §§ 117–129.
Person to enlist in foreign service see Neutrality Laws § 10.
See also Retainer post.

53. Webster New Int. D. [quot Kimbell Trust, etc., Bank v. Hartford Acc., etc., Co., 333 Ill. 318, 164 NE 661, 662].

54. Webster New Int. D. [quot Kimbell Trust, etc., Bank v. Hartford Acc., etc., Co., supra].

55. Richardson v. Seevers, 84 Va. 259, 269, 4 SE 712.

56. Donahoe v. Franks, 199 Fed. 262, 269.

57. Webster Int. D. [quot Featherston v. Merrimon, 140 N. C. 199, 205, 61 SE 675].

[a] **Ownership implied.**—In re Hildebrand, 262 Pa. 112, 104 A 866.

[b] **"Take" not synonymous.**—Kimbell Trust, etc., Bank v. Hartford Acc., etc., Co., 333 Ill. 318, 164 NE 661.

"Own" 46 C. J. p 1164.

"Hold" 29 C. J. p 758.

58. Webster New Int. D. [quot Featherston v. Merrimon, 148 N. C. 199, 205, 61 SE 675].

"Dismiss" 18 C. J. p 1141.

"Lose" 38 C. J. p 243.

59. Webster New Int. D. [quot Kimbell Trust, etc., Bank v. Hartford Acc., etc., Co., 333 Ill. 318, 164 NE 661, 662].

"Keep" 35 C. J. p 898.

60. Featherston v. Merrimon, 148 N. C. 199, 61 SE 675, 678.

61. Webster New Int. D. [quot Kimbell Trust, etc., Bank v. Hartford Acc., etc., Co., 333 Ill. 318, 164 NE 661, 662].

"Control" 13 C. J. p 837.

"Custody" 17 C. J. p 440.

"Possession" 49 C. J. p 1092.

"Use" [39 Cyc 845].

62. Cudworth v. Bostwick, 69 N. H. 536, 537, 45 A 408.

63. Elderton v. Emmons, 6 C. B. 160, 176, 60 ECL 160. See also Employ 20 C. J. p 1238; Neutrality Laws 46 C. J. p 4 text and note 41 [3].

[a] **Consideration not necessarily implied.**—Elsee v. Gatward, 5 T. R. 143, 151, 101 Reprint 82.

"Hire" 29 C. J. p 756.

"Pay" 48 C. J. p 572.

Retaining fee see Attorney and Client § 122.

Retaining lien see Attorney and Client § 363.

64. Sheridan First Nat. Bank v. Yocum, 96 Or. 438, 189 P 220.

"Detain" 18 C. J. p 978.

65. See Employ 20 C. J. p 1239 text and note 33 [a].

66. Legout v. Price, 318 Ill. 425, 431, 149 NE 427.

67. Elderton v. Emmons, 6 C. B. 160, 177, 60 ECL 160, 136 Reprint 1213.

68. Clark v. Baird, 29 N. B. 620, 629.

"Employed" see Employ 20 C. J. pp 1238, 1239 text and notes 50–63. See also Attorney and Client §§ 122, 363.

69. Wells v. Moore, 163 Ark. 542, 260 SW 411, 413.

70. **Cross references:**
Appearances § 26.
Attorney and Client § 122.
Executors and Administrators § 1193 et seq.
Witnesses [40 Cyc 2187 text and note 38].
See also Retain ante.

71. Luty v. Purdy, 2 Overt. (Tenn.) 163, 167.

"Dependent" 18 C. J. p 554.

72. Miller v. Irby, 63 Ala. 477, 483.

[a] **Blackstone** says: "If a person, indebted to another, makes his creditor, or debtee, his executor; or, if such a creditor obtains letters of administration to his debtor; in these cases, the law gives him a remedy for his debt, by allowing him to 'retain' so much as will pay himself, before any other creditors whose debts are of equal degree." 3 Blackstone Comm. p 18 [quot Miller v. Irby, 63 Ala. 477, 483].

[b] **"The general principle in cases of retainer** is, that where the party unites in himself, by representation or otherwise, the character of debtor and creditor, inasmuch as he cannot sue himself, he is entitled to retain, and the law will presume a retainer in satisfaction of the debt, if there are assets in his hands." Taylor v. Deblois, 23 F. Cas. No. 13,790, 4 Mason 131.

73. Severance v. Bizallion, 67 Misc. 103, 121 NYS 627, 629. See also Attorney and Client §§ 122, 363.

"Disbursement" 18 C. J. p 1048.

"In advance" see In 31 C. J. p 363 text and note 82.

"Payment" 48 C. J. § 1.

"Services" [35 Cyc 1434].

74. Hough v. State, 68 Misc. 26, 124 NYS 878, 880.

75. Ex p. Weitz, 256 Fed. 58, 59.

76. See Pay 48 C. J. p 573 text and note 16.

77. See Recaption ante.

78. State v. Fidelity, etc., Ins. Co., 49 Oh. St. 440, 31 NE 658, 34 AmSR 573, 16 LRA 611.

79. See Corporations § 3971 et seq.

RETAXATION.[80]

RETENTION. Act of retaining, or state of being retained.[81]

Phrases: “Retention of any such tree,”[82] and, as an adjective, in the phrase “retention money.”[83]

RETINOSCOPE. A form of ophthalmoscope for reviewing the retina.[84]

RETIRE.[85] The term may be used in either a transitive or intransitive sense.[86] This word is susceptible of various meanings according as it is applied to various circumstances;[87] and it has been variously defined as meaning to recover;[88] to redeem;[89] to regain by the payment of a sum of money;[90] to separate or withdraw;[91] to withdraw from active service.[92]

Retire bill of exchange. If an acceptor retires a bill at maturity, he takes it entirely from circulation, and the bill is in effect paid; but, if an indorser retires it, he merely withdraws it from circulation in so far as he himself is concerned, and may hold the bill with the same remedies as he would have had had he been called upon in due course, and had paid the amount to his immediate indorsee.[93]

Terms not synonymous are: “Dismiss,”[94] “expel,”[95] “remove,”[96] and “retreat.”[97]

Phrases: “Shall retire such disabled members;”[98] also, “shall be retired,”[99] “retired and dismissed,”[1] “retired from active service,”[2] “retired judge,”[3] and “retired officer;”[4] also, “retiring of jury.”[5]

RETIREMENT.[6] The act of retiring;[7] also, the state of being retired,[8] seclusion,[9] or withdrawal;[10] voluntary withdrawal.[11] The term connotes something like a voluntary act.[12]

Retirement of capital stock of a corporation means permanent retirement.[13]

As adjective the word may be used,[14] as in the phrase “retirement allowance.”[15]

RETORNO HABENDO.[16]

RETORSION.[17]

RETORT. In chemistry and the arts, a vessel of glass,[18] earthenware,[19] metal,[20] etc., employed to distill or effect decomposition by the aid of heat.[21]

RETRACTION.[22]

RETRAITE. The French term for a bill for reexchange.[23]

RETRAXIT.[24]

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[80] See Costs §§ 446 et seq. 657 et seq.

[81] Webster New Int. D.

[82] Cody v. North Adams, 265 Mass. 65, 164 NE 83, 84.

[83] West Yorkshire Bank v. Isherwood, 28 T. L. R. 593, 594.

[84] Swanz v. Clark, 71 Mont. 385, 229 P 1108, 1109.

“Ophthalmoscope” 46 C. J. p 1117.

[85] See also Retirement post.

[86] Brown v. Little, Brown & Co., Inc., (Mass.) 168 NE 521, 526.

[87] Elsam v. Denny, 15 C. B. 87, 94, 80 ECL 94, 139 Reprint 351.

[88] Century D. [quot Empire Security Co. v. Berry, 211 Ill. A. 278].

“Recover” ante.

[a] **“Apply” as not synonymous** see Apply 4 C. J. p 1400 text and note 22 [a].

[89] Century D. [quot Empire Security Co. v. Berry, 211 Ill. A. 278].

“Redeem” ante.

[90] Century D. [quot Empire Security Co. v. Berry, 211 Ill. A. 278].

[91] Standard D. [quot State v. Love, 95 Nebr. 573, 145 NW 1010, AnnCas1915D 1078].

“Active service” see Active 1 C. J. p 1172.

“Separate” [35 Cyc 1379].

“Withdraw” [40 Cyc 2125].

[92] Standard D. [quot State v. Love, 95 Nebr. 573, 145 NW 1010, AnnCas1915D 1078].

[93] Elsam v. Denny, 15 C. B. 87, 94, 80 ECL 94, 139 Reprint 351.

[94] Brown v. Little, Brown & Co., Inc., (Mass.) 168 NE 521, 526.

“Dismiss” 18 C. J. p 1141.

[95] Brown v. Little, Brown & Co., Inc., (Mass.) 168 NE 521, 526.

“Expel” 25 C. J. p 171.

[96] Brown v. Little, Brown & Co., Inc., (Mass.) 168 NE 521, 526.

“Remove” ante.

[97] Delaney v. State, 14 Wyo. 1, 81 P 792, 794.

[98] State v. Policemen's Pension Fund Bd. of Trustees, 123 Wis. 245, 101 NW 373, 374.

[99] Haag v. New York, 130 Misc. 124, 222 NYS 676, 679.

[1] Peo. v. Bingham, 166 NYS 28, 29.

[2] Denby v. Berry, 263 U. S. 29, 44 SCt 74, 76, 68 L. ed. 148.

[3] Macdonnell v. Blake, 17 Ont. A. 312, 314.

[4] Reed v. Schon, 2 Cal. A. 55, 83 P 77, 79.

[5] Brackin v. McGannon, 137 Tenn. 207, 192 SW 922, 923; Nashville, etc., R. Co. v. Sansom, 113 Tenn. 683, 84 SW 615, 616.

“Jury” see Juries § 1.

[6] See also Retire ante.

Retirement of:
Agent or employee of municipal corporation see Municipal Corporations § 1661.
Army or navy officer see Army and Navy §§ 60–62½.
Enlisted men see Army and Navy § 341.
Fireman see Municipal Corporations §§ 1492–1508.
Partner see Partnership §§ 569–605.
Policeman see Municipal Corporations §§ 1413–1417.

[7] Feeney v. Metropolitan L. Ins. Co., 262 Mass. 238, 159 NE 608, 610; Henley v. Metropolitan L. Ins. Co., 25 OhNPNS 424, 427.

[8] Feeney v. Metropolitan L. Ins. Co., 262 Mass. 238, 159 NE 608, 610; Henley v. Metropolitan L. Ins. Co., 25 OhNPNS 424, 427.

[9] Webster New Int. D.

“Seclusion” [35 C. J. p 1279].

[10] Webster New Int. D.

“Withdrawal” [40 Cyc 2125].

[11] Brown v. Little, Brown & Co., Inc., (Mass.) 168 NE 521, 526.

“Voluntary withdrawal” see Voluntary [40 Cyc 220].

[12] Earle v. Cow, 36 T. L. R. 713.

[a] **Antithesis** of “enforced resignation.” Brown v. Little, Brown & Co., Inc., (Mass.) 168 NE 521, 526.

[13] Knickerbocker Importation Co. v. State Bd. of Assessors, 74 N. J. L. 583, 65 A 913, 915, 7 LRANS 885.

[14] Lyon v. Corporations, etc., Comr., 258 Mass. 450, 155 NE 440.

[15] Lyon v. Corporations, etc., Comr., supra (“an allowance paid by the commonwealth or by some of its subdivisions, or by one who has been a private employer to one who has ceased to render active service”).

[16] See De Retorno Habendo, 18 C. J. p 787.

[17] See International Law § 47.

[18] **“Glass”** 28 C. J. p 710.

[19] **“Earthenware”** 19 C. J. p 855.

[20] **“Metal”** 40 C. J. p 653.

[21] MacKinnon Boiler, etc., Co. v. Central Michigan Land Co., 156 Mich. 11, 15, 120 NW 26.

[a] **Glass retorts** are commonly used to distill liquids, and consist of a flask-shaped vessel to which a long neck is attached. The liquid to be distilled is placed in the flask, and heat is applied. The name is also generally given to almost any apparatus in which solid substances, such as coal, wood, or bones, are submitted to destructive distillation, as retorts to produce coal gas, which vary much in dimensions and in shape. MacKinnon Boiler, etc., Co. v. Central Michigan Land Co., 156 Mich. 11, 15, 120 NW 26.

“Apparatus” 3 C. J. p 252.

“Distillation” 18 C. J. p 1287.

[22] **Of libel or slander** see Libel and Slander §§ 319, 584.

[23] Suse v. Pompe, 8 C. B. N. S. 538, 564, 98 ECL 538, 141 Reprint 1276.

[24] **Retraxit:**
In general see Dismissal and Nonsuit §§ 3, 4.

RETREAT. To retire from an enemy, or from any advanced position;[25] not necessarily synonymous with "to retire"[26] or "to run."[27]

RETRIAL.[28]

RETROACTIVE or **RETROSPECTIVE.**[29]

RETROCESSION. The restitution of an ancient title to a true owner.[30]

RETTING. In the process of flax manufacture, steeping or watering with a view to decomposing the gummy substance which binds together the outer membranes and the inner stalk.[31]

RETURN or **RETURNS.**[32] [§ 1] **A. As Noun.** Restoration;[33] restitution.[34] In another sense, a formal report of duty discharged.[35]

Returns, in the plural, is a term used to designate the profit on, or advantage from labor, an investment, undertaking, etc.[36]

Phrases: "After his return to the state,"[37] "at the time of the return of such property or sale thereof,"[38] "in case a return cannot be had,"[39] "net return,"[40] "return according to law,"[41] "return into the state,"[42] "return of sale,"[43] "return of the execution,"[44] and "sale or return."[45]

[§ 2] **B. As Verb.** To bring, carry, put, or send back;[46] to cause to take again a former position; put, carry, or send back as to a former place or holder;[47] also, to come back after an interval, to appear again;[48] to come or go back to the same place;[49] to go, or come again, to the same place or condition;[50]

Authority to enter see Attorney and Client § 151.
Judgment on, as, bar see Judgments § 1202.
Right of retractor to join in writ of error see Appeal and Error 3 C. J. p 688 text and note 29 [a].

25. Webster D. See also Assault and Battery §§ 31, 236; Homicide §§ 238–248.

26. See Retire ante.

27. State v. Burdette, 118 S. C. 664, 101 SE 664, 666; State v. Jordan, 109 S. C. 409, 96 SE 221, 222.

28. See New Trial 46 C. J. p 46.

29. **Retroactive or retrospective:**
Law or statute see Constitutional Law § 778 et seq; Law § 22; Statutes [36 Cyc 1210].
License see Intoxicating Liquors § 92; Licenses § 102.
Naturalization see Aliens § 165.

Relation back see Relation 53 C. J. p 1185.

30. Amet v. Boyer, 43 La. Ann. 562, 578, 9 S 622.

"Restitution" ante.

[a] **"Such an act confers no new title;** it merely recognizes and confirms a previously existing title in another." Amet v. Boyer, 43 La. Ann. 562, 578, 9 S 622.

"Owner" see Property § 48.

"Title" see Property § 57.

31. In re Eckstein, 8 Treas. Dec. 25710.

32. **Return of:**
Aliens §§ 46–127.
Award see Arbitration and Award §§ 286–288.
Bail §§ 64, 114, 344.
Consideration see Cancellation of Instruments §§ 93–114; Sales [35 Cyc 144 et seq, 434]; Vendor and Purchaser [39 Cyc 1378 et seq].
Depositions §§ 246–304, 365.
Elections §§ 245–249, 345, 346.
Indictments and Informations § 54.
Marriage § 87.
Ordinance after approval see Municipal Corporations §§ 538, 3063, 3143, 3560.
Prisoner see Prisons §§ 71–75.
Property:
  Converted see Trover and Conversion [38 Cyc 2102].
  Stolen see Larceny §§ 594, 595.
Report of commissioners and the like see cross references under Report ante.
Writ, process, or the like:
  Admiralty § 155.
  Alteration of Instruments § 195.
  Appeal and Error §§ 691, 1295, 1297, 1315, 1340, 1383, 2112–2153, 2158, 2184–2224, 2232.
Writ, process, or the like: Continued
  Appearances § 44.
  Arrest §§ 207–209.
  Attachment §§ 339, 447–519, 714, 805.
  Certiorari §§ 249–292.
  Contempt § 98.
  Corporations § 2917.
  Evidence § 915.
  Executions §§ 167, 191, 275, 495, 496, 858–906, 1030, 1144, 1214, 1215.
  False Imprisonment § 64.
  Forcible Entry and Detainer § 98.
  Fraudulent Conveyances § 601.
  Garnishment §§ 319–325.
  Grand Juries § 44.
  Habeas Corpus §§ 172–182.
  Highways §§ 63, 115–127.
  Husband and Wife § 744.
  Infants § 326.
  Injunctions § 631.
  Insane Persons §§ 207, 208.
  Intoxicating Liquors § 384.
  Judgments §§ 493, 702, 839, 1006, 1038, 1108.
  Juries §§ 243, 244.
  Justices of the Peace §§ 154, 158, 159, 167, 178, 346, 364, 437–441, 471, 486–510, 609, 647–651.
  Landlord and Tenant § 1682.
  Logs and Logging § 222.
  Mandamus §§ 324, 604–616, 716.
  Mortgages §§ 1602, 1844.
  Ne Exeat § 38.
  Paupers § 107.
  Pleading § 929.
  Principal and Surety §§ 325, 429.
  Process §§ 31, 74, 127, 257–302, 319–340, 360–370.
  Prohibition §§ 119–123.
  Replevin [34 Cyc 1462].
  Scire Facias [35 Cyc 1156 et seq].
  Searches and Seizures [35 Cyc 1268].
  Sequestration [35 Cyc 1404].
  Sheriffs and Constables [35 Cyc 1720 et seq].
Return to:
Preliminary examination see Criminal Law §§ 627–632.
State after absence see Limitations of Actions §§ 403–405.

33. Webster New Int. D. [quot United Shoe Mach. Co. v. Hirst, 26 Pa. Dist. 401, 408].

"Restoration" ante.

34. Webster New Int. D. [quot United Shoe Mach. Co. v. Hirst, 26 Pa. Dist. 401, 408].

[a] **"The return of a thing** is the giving or sending it back to the person from whom it was received." In re Session Laws 1923 c 184, 98 N. J. L. 586, 121 A 736, 738.

"Restitution" ante.

35. Field v. Field, 38 N. J. L. 290, 294; Baker v. Smith, 118 Misc. 548, 551, 194 NYS 827.

36. Webster New Int. D.

"Advantage" 2 C. J. p 34.

"Investment" 33 C. J. p 808.

"Proceeds" synonymous see Proceeds 50 C. J. p 429 text and note 24 [a].

"Profits" as "periodical return" see Profit or Profits 50 C. J. p 643 text and note 80 [a].

"Undertaking" [39 Cyc 673].

37. Palmer v. Shaw, 16 Cal. 93, 96.

38. Goodlett v. Goodman Coal, etc., Co., 192 Fed. 775, 782, 113 CCA 61.

39. Longley v. Daly, 1 S. D. 257. 267, 46 NW 247.

40. See Net 45 C. J. p 1399 text and note 76.

"Net" 45 C. J. p 1384.

41. Missouri State L. Ins. Co. v Rhyne, (Tex. Civ. A.) 276 SW 757, 762; Gibson v. Holmes, 78 Vt. 110, 121, 62 A 11, 14, 4 LRANS 451.

"According to law" see According 1 C. J. p 584 text and note 5; Law 36 C. J. p 965 text and note 36.

42. Fowler v. Hunt, 10 Johns. (N Y.) 464, 465.

43. Massey v. Tucker, (Okl.) 284 P 648, 650.

44. Lovegrove v. Brown, 60 Me. 592, 600.

45. See Sales [35 Cyc 253].

46. Webster New Int. D. [quot United Shoe Mach. Co. v. Hirst, 26 Pa. Dist. 401, 408]. See Maxwell Impl. Co. v. Fitzgerald, 85 Ind. A. 206, 146 NE 883, 885.

[a] **"To 'return' anything which has been received** is, plainly, to hand it over, or deliver the thing to the person or body from whom it came." Com. v. Fitler, 7 Pa. Co. 33, 37.

[b] **"Returning" money raised on pledge** means simply "repaying" the money borrowed. Baltimore v. Gill, 31 Md. 375, 388.

47. Standard D. [quot Clyatt v. U. S., 197 U. S. 207, 219, 25 SCt 429, 49 L. ed. 726; Johnson v. Curlee Clothing Co., 112 Okl. 220, 240 P 632, 633].

48. Webster D. [quot State v. Freely, 105 S. C. 243, 89 SE 643, 644].

[a] **"Enter" as equivalent.**—Irving Nat. Bank v. Law, 10 F. (2d) 721, 722.

49. Waterbury First Soc. v. Platt, 12 Conn. 181, 187.

50. Webster D. [quot Clyatt v. U. S., 197 U. S. 207, 219, 25 SCt 429, 49 L. ed. 726; McDonald v. U. S., 292 Fed. 593, 595; Johnson v. Curlee to turn back;[51] to revisit.[52]

Term implies going back to a former location;[53] the prior existence of some state or condition.[54]

In a will the term has been held to mean to come back;[55] to remain.[56]

Phrases: "From the place where the process is returned to the place of service,"[57] "offer to return,"[58] "return into court,"[59] "return on demand,"[60] "return the record,"[61] "return the writ,"[62] "return to employment,"[63] "return to the state,"[64] and "to return all papers;"[65] also "returned premiums,"[66] "returned soldier,"[67] "returned soldier's fund,"[68] "returned unpaid;"[69] also, "returning to his employment."[70]

[§ 3] **C. As Adjective—1. In General.** The word may be and has been employed,[71] as in the phrases "return charges,"[72] "return premium,"[73] "return transportation to Seattle,"[74] and "return trip."[75]

[§ 4] **2. Return Commissions.** A term which, in reference to commission merchants, is said to mean that on goods taken away by a consignor before sale, the consignee receives an equitable allowance to cover the expense of handling, insuring, and storing the goods while in his charge.[76]

[§ 5] **3. Return Day.**[77] The day on which a defendant is ordered to appear in court and on which the sheriff is to bring in the writ and report how far he has observed it;[78] the day when a defendant can properly be called upon to appear and plead or suffer default;[79] also, the last day on which any process[80] can be returned;[81] the last day on which a suit may be filed to a given term of court;[82] the last day on which suits returnable to the next term may be filed.[83]

In case of an order to show cause, the "return-day" is the day of the hearing.[84]

With respect to contractual rights of parties in a given case the return day may be whatever they contract it to be.[85]

Return day of election is the day on which votes cast in the election are counted and the official result thereof declared;[86] the day on which the board actually commences the canvass; or, rather, the day on which they ought to do so.[87]

RETURNABLE.[88] Capable of being returned;[89] in law, legally required to be returned.[90]

Phrases: "Returnable according to law,"[91] "returnable process,"[92] and "returnable to a day cer-

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Clothing Co., 112 Okl. 220, 240 P 632, 633].

[51] Webster D. [quot Clyatt v. U. S., 197 U. S. 207, 219, 25 SCt 429, 49 L. ed. 726; McDonald v. U. S., 292 Fed. 593, 595; Johnson v. Curlee Clothing Co., 112 Okl. 220, 240 P 632, 633].

[52] Waterbury First Soc. v. Platt, 12 Conn. 181, 187.

[53] McDonald v. U. S., 292 Fed. 593, 595. And see Hyman v. Bayne, 83 Ill. 256, 260 (where it was said: "A person cannot return to a place until he has previously been at that place").

[54] Johnson v. Curlee Clothing Co., 112 Okl. 220, 240 P 632, 633.

[55] Den v. Crawford, 8 N. J. L. 90, 112.

[56] Den v. McMurtrie, 15 N. J. L. 276, 286.

[57] In re Crittenden, 6 F. Cas. No. 3,393, 2 Flipp. 212.

[58] See Offer 46 C. J. p 909 text and note 95.

[59] Trump v. Mikell, 105 S. C. 280, 89 SE 643, 644.

[60] Laforge v. Jayne, 9 Pa. 410, 412.

"On demand" see On or Upon § 10.

[61] Mossberg v. Nutter, 124 Fed. 966, 967, 60 CCA 98.

[62] Ellis v. Outler, 25 Okl. 469, 106 P 957, 958.

[63] Inland Rubber Co. v. Industrial Commn., 309 Ill. 43, 140 NE 26, 29.

[64] See Come 11 C. J. p 1231 text and note 37.

[65] Norman v. Smith, 131 Ga. 69, 71, 61 SE 1039.

[66] New York L. Ins. Co. v. Chaves, 21 N. M. 264, 153 P 303, 304.

[67] Stevens v. Fraser, 53 N. D. 228, 205 NW 622.

"Soldier" [36 Cyc 509].

[68] State v. Fraser, 53 N. D. 909, 208 NW 397, 398.

"Fund" 27 C. J. p 926.

[69] Brewster v. Arnold, 1 Wis. 264, 275.

[70] American Glyco Metal Co. v. Industrial Commn., 306 Ill. 421, 138 NE 176, 178.

"Employment" 20 C. J. p 1245.

[71] See cases infra notes 72–75 and §§ 4, 5.

[72] United Shoe Mach. Co. v. Hirst, 26 Pa. Dist. 401, 408.

[73] Northwestern Mut. L. Ins. Co. v. Roberts, 177 Cal. 540, 171 P 313, 314.

"Premium" 49 C. J. p 1330.

[74] McDonald v. U. S., 292 Fed. 593, 595.

[75] Rhodes v. Honolulu Rapid Transit, etc., Co., 16 Hawaii 319, 323.

[76] Botany Worsted Works v. Wendt, 22 Misc. 156, 48 NYS 1024. See also Factors §§ 74–108.

"Commission" 12 C. J. p 143.

"Commission merchant" 12 C. J. p 147.

"Consignee" 12 C. J. p 527.

"Consignor" 12 C. J. p 528.

[77] **Return day:**
Allowance of temporary alimony before see Divorce § 504.
Answer by garnishee prior to see Garnishment § 423.
Service of writ of garnishment on see Garnishment § 305.
Specification of in writ see Appeal and Error § 1207; Process § 35 et seq.
Time of making return of process see Process §§ 261–263.

[78] Anderson L. D. [quot Likins v. Conn, 35 Pa. Co. 561, 562].

[a] **"Days in banc."**—"In Blackstone's time return-days were called 'days in banc'; that is, days of appearance in the court of common bench." Likins v. Conn, 35 Pa. Co. 561, 562.

[79] Wilkins v. Troutner, 66 Iowa 557, 560, 24 NW 37.

[80] **"Process"** see Process § 1.

[81] Carlson v. Burt, 111 Cal. 129, 131, 132, 43 P 583.

[a] **Under Federal Equity Rules.**—"Whenever a bill is filed the clerk shall issue process of subpœna which shall be returnable into the clerk's office 20 days from the issuing thereof. This constitutes the return day of such bill." Perry v. John Hancock Mut. L. Ins. Co., 2 F. (2d) 250, 251.

[82] White v. Chambers, 29 Ga. A. 482, 116 SE 26, 28.

[83] Mount Vernon Bank v. Gibbs, 1 Ga. A. 662, 666, 58 SE 269.

[a] **Similar definition.**—"The last day on which suits may be filed so as to be returnable to the next term." Davenport v. Richards, 138 Ga. 611, 612, 75 SE 648, 649; Everett v. Ferst, 126 Ga. 662, 55 SE 916.

[b] **Return day for an attachment suit** is "the last day within which the attachment could be issued, returnable to a given term of court." Watters v. O'Neill, 151 Ga. 680, 108 SE 35, 37.

[c] **"Filing day" synonymous.**—Davenport v. Richards, 138 Ga. 611, 612, 75 SE 648; Everett v. Ferst, 126 Ga. 662, 55 SE 916.

[84] Carlson v. Burt, 111 Cal. 129, 131, 43 P 583. See also Motions and Orders § 76.

[85] White v. Chambers, 29 Ga. A. 482, 116 SE 26, 28.

[86] Swinson v. McKay, (Tex. Civ. A.) 106 SW 934, 935. See Wilkinson v. La Combe, 59 Mont. 518, 197 P 836, 838. See also Elections §§ 238–249.

[87] Carlson v. Burt, 111 Cal. 129, 132, 43 P 583.

[88] See Return ante.

[89] Webster D. [quot Daniels v. Lewis, 7 Colo. 430, 434, 4 P 57].

[90] Webster D. [quot Daniels v. Lewis, supra].

"Legally required" see Legally 36 C. J. p 983 text and note 69.

[91] Densmore v. Hall, 109 Me. 438, 442, 84 A 983.

[92] See Process § 13.

tain."[93]

REUNION. When used without qualification, the resumption of a former relation.[94]

REUS. The defendant[95] in an action or suit.[96]

REUS EXCIPIENDO FIT ACTOR.[97]

REUS LÆSÆ MAJESTATIS PUNITUR, UT PEREAT UNUS NE PEREANT OMNES.[98]

REVALUATION. A synonym for reassessment.[99]

REVEALED LAW.[1]

REVEL.[2] To behave in a noisy,[3] boisterous[4] manner, like a bacchanalian.[5]

REVENDICATION. The right to reclaim, to demand the restoration of;[6] the right of an unpaid vendor on the insolvency[7] of the vendee to reclaim in specie[8] such part of the goods as remain in the hands of the vendee entire, and without having changed its quality.[9]

As an action. "Revendication" is also the name of an action of ownership;[10] a real action[11] which relates to claims made on immovable property,[12] or to the immovable rights to which they are subjected.[13]

Stoppage in transitu[14] appears to have been derived from, or to be analogous to, the revendication of the civil law.[15]

REVENGE.[16] A malicious injury inflicted in return for an injury.[17]

REVENUE. [§ 1] **A. As Noun—1. In General.** A word used in many senses,[18] and variously defined as meaning a return or reward;[19] more particularly, a return for capital invested or labor bestowed;[20] that which returns, or comes back, from an investment;[21] income or annual profit received from lands or other property;[22] net income;[23] the annual rents,[24] profits,[25] interests,[26] or issues[27] of any species of property, real or personal;[28] the yearly income of a government or a person natural or artificial, from the property belonging to such government or person.[29]

Revenues from a water plant are the net revenues or the gross receipts less necessary operating expenses.[30]

Revenues of a ward are all moneys belonging to the minor that come into the hands of the tutor in the course of his administration.[31]

[§ 2] **2. As Public Income.**[32] While, perhaps, in its exact definition the term may be confined to money raised by some of the modes of taxation,[33] the income of the government arising from taxation,[34] duties and the like;[35] the product or fruit of taxation,[36] embracing all taxes and assessments imposed by public authority;[37] an annual tax,[38] nevertheless the term ordinarily is not limited to moneys raised by taxation but includes moneys derived from all sources required by law to be paid into the treasury,[39] all money belonging to the state, nation, or municipality,[40] municipal income,[41] all public moneys[42] which the state collects and receives, from whatever source and in whatever manner;[43] and according to some correct lawyers under the idea of revenue is also included the proceeds of the sale of stocks, lands, and other property owned by the government.[44] In its broader sense and general use "public revenue" has been variously defined as meaning public income of any kind;[45] the annual and current income of the state, however derived, which is subject to appropriation for general public uses;[46] the annual income of a state[47] derived from the taxation, customs, excise,[48] or other sources and appropriated to the payment of the national expenses;[49] the annual or periodical yield of taxes, excise, customs, duties,[50] rents,[51] etc., which a nation, state, or municipality collects and receives into the treasury for public use;[52] the annual produce or yield of taxes, excise, customs, duties, rents, etc., which a nation, state, or municipality collects and receives into the treasury for public use;[53] the current income of the state from whatsoever source derived which is subject to appropriation for public uses;[54] the income of the state[55] or nation derived from the duties, taxes, and other sources for the payment of the national expenses;[56] the income which a state collects and receives into its treasury, and is appropriated for the payment of its expenses;[57] the total current income of a government, however derived, subject to appropriation for public uses.[58]

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[93] Harrison v. Bay Shore Dev. Co., 92 Fla. 875, 111 S 128.

[94] Clark v. Brown, (Tex. Civ. A.) 108 SW 421, 439.

[95] **"Defendant"** 18 C. J. p 459.

[96] Matter of Miller, 1 Daly (N. Y.) 562, 574. See Accousi v. G. A. Stowers Furniture Co., (Tex.) 83 SW 1104, 1105. See also generally Parties §§ 138–183.

"Action" see Actions § 1.

"Suit" see Actions § 42.

[97] A maxim meaning "The defendant by a plea becomes plaintiff." Peloubet Leg. Max. [cit Best Evid. p 144].

[a] **Applied** in McLachlan v. Accident Ins. Co., 3 Que. Super. 230, 234.

[98] A maxim meaning "A traitor is punished, that one may die lest all perish." Peloubet Leg. Max. [cit Beverley's Case, 4 Coke 123b, 124b, 76 Reprint 1118].

[99] See Reassessment 52 C. J. p 1189.

[1] See Law § 4.

[2] See Breach of the Peace 9 C. J. p 385; Disorderly Conduct 18 C. J. p 1221 text and note 94 [a] (8).

[3] **"Noisy"** 46 C. J. p 16.

[4] **"Boisterous"** 8 C. J. p 1142.

[5] Webster D. [cit In re Began, 12 R. I. 309, 310].

[6] Smart v. Bibbins, 109 La. 986, 989, 34 S 49.

[7] **"Insolvency"** § 1.

[8] **"Specie"** [36 Cyc 525].

[9] Benedict v. Schaettle, 12 Oh. St. 515, 520.

Recovery of goods by seller see Sales [35 Cyc 506 et seq].

[10] Kung Ching Chong v. Wing Chong, 2 Canal Zone 25.

Possessory action see Actions § 18.

[11] See Real Actions § 1.

[12] See Property § 14 et seq.

"Res immobilis" see Modern Civil Law § 220.

[13] Ellis v. Davis, 109 U. S. 485, 502, 3 SCt 327, 27 L. ed. 1006.

[14] **"Stoppage in transitu"** see Carriers §§ 320–322; Sales [35 Cyc 493–506].

[15] Benedict v. Schaettle, 12 Oh. St. 520.

[16] **Revenge:**
As included in "malice" see Homicide 29 C. J. p 1086 text and note 49 [a].
"Malice aforethought" as more comprehensive see Homicide 29 C. J. p 1087 text and note 60 [c].
Necessity that malice be actuated by see Malice 38 C. J. p 349 text and note 71.

[17] Peo. v. Pierson, 2 Ida. (Hasb.) 76, 3 P 688.

"Malicious injury" see Malice § 14.

[18] Bates v. Porter, 74 Cal. 224, 240, 15 P 732.

[a] **"Funds" synonymous.**—In re Watson, 51 La. Ann. 1641, 1644, 26 S 409. "Funds" see Funds § 2.

[19] Webster D. [quot Bates v. Porter, 74 Cal. 224, 239, 15 P 732].

"Return" ante.

"Reward" post.

[20] Webster D. [quot Peo. v. New York Cent. R. Co., 24 N. Y. 485, 490].

"Fruit" synonymous see 27 C. J. p 912 text and note 61 [a].

[21] Webster D. [quot Bates v. Porter, 74 Cal. 224, 239, 15 P 732].

"Investment" 33 C. J. p 808.

[22] Worcester D. [quot Bates v. Porter, 74 Cal. 224, 239, 15 P 732; Cromie v. Wabash, etc., Canal, 71 Ind. 208, 216].

[a] **"The revenues of a person, natural or artificial, are not the person,** nor in any proper use of the language a part of the person." Peo. v. New York Cent. R. Co., 34 Barb. (N. Y.) 123, 131.

"Income" compared see Income 31 C. J. p 401 text and note 21.

[23] Bates v. Porter, 74 Cal. 224, 240, 15 P 732.

"Net income" see Income § 8.

[24] **"Rent"** ante.

[25] **"Profit"** 50 C. J. p 641.

"Rents and profits" ante.

[26] **"Interest"** 33 C. J. p 261.

[27] **"Issue"** 33 C. J. p 817.

[28] Webster D. [quot Bates v. Porter, 74 Cal. 224, 239, 15 P 732].

[a] **Similar definition.**—"The annual rents, profits, interests or issues of any species of property, real or personal, belonging to an individual or the public." Webster D. [cit Peo. v. New York Cent. R. Co., 24 N. Y. 485, 490].

"Personal property" see Property § 32.

"Property" § 1 et seq.

"Real property" see Property § 19.

[29] State v. Gordon, 266 Mo. 394, 181 SW 1016, 1020, AnnCas1918B 191 [quot Cyc]; Peo. v. New York Cent. R. Co., 34 Barb. (N. Y.) 123, 134.

[30] Montana Public Serv. Commn. v. Helena, 52 Mont. 527, 159 P 24, 27.

[31] Carter v. Ætna Casualty, etc., Co., 165 La. 478, 115 S. 661, 662; In re Watson, 51 La. Ann. 1641, 1644, 26 S 409.

[32] **Revenue proceedings:**
Admiralty §§ 100–103.
Appeal and Error § 168.
Federal Courts § 327 note 40 [a] (6).
Removal of Causes §§ 90–101.

Sources of revenue:
Customs Duties 17 C. J. p 528.
Internal Revenue 33 C. J. p 271.
Intoxicating Liquors § 21.
Licenses 37 C. J. p 162.
Post Office § 83.
Taxation [37 Cyc 672].

In a statute limiting appropriations the term has been held to mean the revenue fixed in the budget, or the budget estimates of revenues.[59]

[§ 3] **3. Phrases.** "Act for raising revenue,"[60] "all bills[61] for raising revenue,"[62] "all sums of money received from all sources of revenue whatsoever,"[63] "annual amount of revenues of property committed to the tutor's charge,"[64] "cases relating to the revenue,"[65] "in all cases relating to the revenue,"[66] "income and revenue provided for each year,"[67] "income, revenue and avails,"[68] "obtain revenue,"[69] "ordinary revenue,"[70] "ordinary revenue of the state,"[71] "public revenue,"[72] "revenue arising from said licenses,"[73] "revenue collected and money received by the state from any source whatsoever,"[74] "revenue from water rents collected and paid into the treasury,"[75] "revenue of the post office department,"[76] "revenue of the county for current expenses,"[77] "revenue or levy,"[78] and "state revenue;"[79] also, "canal revenues,"[80] "fruits or revenues,"[81] "minor's revenues,"[82] "revenues applicable within one year to the payment,"[83] "revenues of the canals,"[84] and "surplus revenues of the canals."[85]

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[33] Donelson v. State, 3 Lea (Tenn.) 692, 695.

[34] Bouvier L. D. [quot Dumas v. Bryan, 35 Ida. 557, 207 P 720, 723].

[a] **In the absence of qualifying words** or circumstances implying an intention to employ the term in different sense, the term is confined to the usual public income—taxation. Laughlin v. Santa Fe County, 3 N. M. 264, 266, 5 P 817.

[35] Bouvier L. D. [quot The Nashville, 17 F. Cas. No. 10,023, 4 Biss. 188, 192; Com. v. Bailey, 3 KyL 110, 117; Sullivan v. Galveston, (Tex. Civ. A.) 17 SW (2d) 478, 491]; State v. Gordon, 266 Mo. 394, 181 SW 1016, 1020, AnnCas1918B 191 [quot Cyc].

[a] **Similar definition.**—"The income of the government arising from taxation, excise and the like." State v. School Fund Comrs., 4 Kan. 261, 268.

[36] U. S. v. Wright, 28 F. Cas. No. 16,770, 3 Pittsb. 192; State v. Gordon, 266 Mo. 394, 181 SW 1016, 1020, Ann Cas1918B 191 [quot Cyc].

[37] Peo. v. Springer, 106 Ill. 542, 544; Potwin v. Johnson, 106 Ill. 532, 533; Webster v. Peo., 98 Ill. 343, 346; Claypool Drain, etc., Dist. v. Chicago, etc., R. Co., 81 Ill. A. 433, 434; Gunning v. Peo., 76 Ill. A. 574, 578. See Phœnix Grain, etc., Exch. v. Gleason, 22 Ill. A. 373, 374.

[38] Pottsville Borough v. Pottsville Gas Co., 15 Pa. Dist. 979, 980, 32 Pa. Co. 7.

"Tax" see Taxation [37 Cyc 707].

[39] Fergus v. Brady, 277 Ill. 272, 274, 115 NE 393.

[40] Donelson v. State, 3 Lea (Tenn.) 692, 695.

[41] State v. Gordon, 266 Mo. 394, 181 SW 1016, 1020, AnnCas1918B 191.

[a] **"Taxation" compared.**—State v. Gordon, 266 Mo. 394, 181 SW 1016, 1020, AnnCas1918B 191.

[42] [a] **"Public money" synonymous.**—Hays v. State, 22 Okl. Cr. 99, 210 P 728, 729. "Public money" see Money § 10.

[43] State v. Ewing, 22 Kan. 708, 712 [quot State v. Stanton County, 100 Nebr. 747, 752, 161 NW 264; Omaha v. Hodgskins, 70 Nebr. 229, 233, 97 NW 346; Sullivan v. Galveston, (Tex. Civ. A.) 17 SW (2d) 478, 491].

[44] Bouvier L. D. [quot Sullivan v. Galveston, (Tex. Civ. A.) 17 SW (2d) 478, 491].

[45] State v. Stanton County, 100 Nebr. 747, 751, 161 NW 264.

[46] State v. Gordon, 266 Mo. 394, 181 SW 1016, 1020, AnnCas1918B 191.

[47] **"Customs"** see Customs Duties § 1.

[48] **"Excise"** see Internal Revenue § 3.

[49] Standard D. [quot State v. Gordon, 266 Mo. 394, 181 SW 1016, Ann Cas1918B 191].

[50] **"Duty"** 19 C. J. p 841.

[51] **"Rent"** ante.

[52] Webster New Int. D. [quot State v. Stanton County, 100 Nebr. 747, 751, 161 NW 264].

"Public use" see Public § 94.

[53] Webster D. [quot Fletcher v. Oliver, 25 Ark. 289, 299; Bates v. Porter, 74 Cal. 224, 239, 15 P 732; State v. Ewing, 22 Kan. 708, 712; State v. Hill, 38 Nebr. 698, 718, 57 NW 548; Pottsville Borough v. Pottsville Gas Co., 15 Pa. Dist. 979, 980, 32 Pa. Co. 7].

[a] **Similar definitions.**—Bates v. Porter, 74 Cal. 224, 239, 15 P 732; Yancey v. New Manchester Mfg. Co., 33 Ga. 622, 624; State v. Gordon, 266 Mo. 394, 181 SW 1016, 1020, AnnCas 1918B 191 [quot Cyc]; Omaha v. Hodgskins, 70 Nebr. 229, 232, 97 NW 346.

[54] State v. Northeast Missouri State Teacher's College, 305 Mo. 57, 264 SW 698, 700.

[55] U. S. v. Bromley, 12 How. (U. S.) 88, 13 L. ed. 905; Com. v. Bailey, 3 KyL 110, 117; State v. Gordon, 266 Mo. 394, 181 SW 1016, 1020, AnnCas 1918B 191 [quot Cyc]. See also U. S. v. James, 26 F. Cas. No. 15,464, 13 Blatchf. 207, 209.

[56] Worcester D. [quot Bates v. Porter, 74 Cal. 224, 239, 15 P 732]; State v. Gordon, 266 Mo. 394, 181 SW 1016, 1020, AnnCas1918B 191 [quot Cyc].

[a] **Similar definitions.**—(1) "The income of a nation, derived from its taxes, duties, or other sources, for the payment of national expenses." Webster D. [quot U. S. v. Norton, 91 U. S. 566, 568, 23 L. ed. 454; People's U. S. Bank v. Goodwin, 162 Fed. 937, 941; Sullivan v. Galveston, (Tex. Civ. A.) 17 SW (2d) 478, 491]. (2) "The income of a nation or state derived from the duties, taxes, and other sources for the payment of the national expenses." Worcester D. [quot Bates v. Porter, 74 Cal. 224, 239, 15 P 732].

[57] State v. Gordon, 266 Mo. 394, 181 SW 1016, 1020, AnnCas1918B 191 [quot Cyc]; Com. v. Brown, 91 Va. 762, 779, 21 SE 357, 28 LRA 110.

[58] Standard D. [quot State v. Gordon, 266 Mo. 394, 181 SW 1016, 1019, AnnCas1918B 191].

[59] State v. New Orleans, 40 La. Ann. 299, 306, 3 S 584.

[60] U. S. v. James, 26 F. Cas. No. 15,464, 13 Blatchf. 207, 209.

[61] **"Bill"** 7 C. J. p 1178.

[62] Harper v. Elberton, 23 Ga. 566, 570. See also Raise § 3 text and note 54.

[63] Sullivan v. Galveston, (Tex. Civ. A.) 17 SW (2d) 478, 491.

[64] In re Ratcliffe Minors Tutorship, 139 La. 996, 1002, 72 S 713, LRA 1917C 188.

[65] Aachen, etc., F. Ins. Co. v. Omaha, 72 Nebr. 112, 100 NW 137.

[66] Peo. v. Springer, 106 Ill. 542, 544; Webster v. Peo., 98 Ill. 343, 346; Phœnix Grain, etc., Exch. v. Gleason, 22 Ill. A. 373, 374.

[67] See Income 31 C. J. p 403 text and note 76.

[68] See Income 31 C. J. p 403 text and note 96.

[§ 4] **B. As Adjective.** The word is sometimes employed as an adjective.[86]

Revenue bills[87] are those that levy taxes in the strict sense of the word and are not bills for other purposes which may incidentally create revenue;[88] those which have for their object the levying of taxes in the strict sense of the words.[89]

Revenue measure[90] is one which has for its object the levying of taxes in the strict sense of the words.[91]

Revenue train. A train is a revenue train when it is moved for the purpose of transporting traffic for revenue.[92]

Other phrases: "Revenue officers,"[93] "revenue producing improvements,"[94] and "revenue provisions of any law."[95]

EVEREND. An epithet;[96] an adjective used as a laudatory or complimentary epithet, a mark of respect and of reverence, as the name imports, but nothing more.[97]

REVERSAL.[98] A word which when used with regard to a judgment is said to mean to vacate the decree reversed and leave it as if it had never been rendered;[99] and the term has been held to apply to the action of any court vacating a judgment.[1]

Phrases: "Judgment reversed and cause remanded,"[2] and "reversal of a judgment on appeal."[3]

REVERSE.[4] To overthrow, set aside, make void, annul, repeal, or revoke;[5] more specifically, to vacate a decree or judgment, and leave it as if it had never been rendered.[6] Phrase: "Reverse or affirm, wholly or partly."[7]

Reversed in its technical sense, applies to the ultimate decision, annulling what has been before done.[8] As used in a statute it may be read as "changed and altered" in order to preserve the meaning of the legislature.[9]

Phrases: "Reversed on appeal and settled,"[10] and

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[69] Com. v. Brown, 91 Va. 762, 779, 21 SE 357, 28 LRA 110.

[70] See Ordinary 46 C. J. p 1134 text and note 23.

[71] State v. Gordon, 266 Mo. 394, 181 SW 1016, 1020, AnnCas1918B 191.

[72] See Public § 71.

[73] Vansant v. Harlem Stage Co., 59 Md. 330, 334.

[74] State v. Northeast Missouri State Teacher's College, 305 Mo. 57, 264 SW 698, 700.

[75] Webster D. [quot Bates v. Porter, 74 Cal. 224, 240, 15 P 732].

[76] U. S. v. Bromley, 12 How. (U. S.) 88, 97, 13 L. ed. 905.

Postal revenues see Post Office § 83.

[77] Babcock v. Goodrich, 47 Cal. 488, 513.

"Current expenses" 17 C. J. p 408.

[78] In re Monsell, (Okl.) 285 P 836, 838.

"Levy" 36 C. J. p 1031.

[79] State v. Gordon, 266 Mo. 394, 181 SW 1016, 1020, AnnCas1918B 191.

[80] Peo. v. New York Cent. R. Co., 24 N. Y. 485, 488 [aff 34 Barb. 123].

"Canal" see Canals § 1.

[81] Hurlbut v. Gainor, 45 Tex. Civ. A. 588, 593, 103 SW 409.

"Fruits" 27 C. J. p 911.

[82] Sims v. Billington, 50 La. Ann. 968, 976, 24 S 637.

"Minor" 40 C. J. p 1211.

[83] McAnulty v. Pittsburgh, 284 Pa. 304, 131 A 263, 264.

[84] Peo. v. New York Cent. R. Co., 24 N. Y. 485, 490 [aff 34 Barb. 123].

[85] Peo. v. New York Cent. R. Co., 34 Barb. (N. Y.) 123, 134.

[86] See cases infra this section.

[87] **"Bill"** 7 C. J. p 1178.

[88] Hart v. Burke County, 192 N. C. 161, 134 SE 403, 404; Lusk v. Ryan, 69 Okl. 165, 171 P 323, 324; In re Sprankle Co., 69 Okl. 178, 170 P 1147, 1148.

[89] Colorado Nat. L. Assur. Co. v. Clayton, 54 Colo. 256, 130 P 330, 332.

[90] **"Measure"** 40 C. J. p 19.

[91] Ard v. Peo., 66 Colo. 480, 182 P 892, 893. See Lusk v. Ryan, 69 Okl. 165, 171 P 323, 324; In re Sprankle Co., 69 Okl. 178, 170 P 1147, 1148.

[a] **"If the principal object is another purpose,** the incidental production of revenue growing out of the enforcement of the act will not make it one for raising revenue." Ard v. Peo., 66 Colo. 480, 182 P 892, 893. See also Colorado Nat. L. Assur. Co. v. Clayton, 54 Colo. 256, 130 P 330, 332.

[b] **Phrase includes** an ordinance which imposes a license tax greatly in excess of the probable amount necessary to issue the license and inspect and regulate the business. Tulsa v. Metropolitan Jewelry Co., 74 Okl. 107, 176 P 956, 959.

[c] **Phrase does not include act to regulate:** (1) Insurance companies and the insurance business in the state. Colorado Nat. L. Assur. Co. v. Clayton, 54 Colo. 256, 130 P 330, 332. (2) The practice of medicine. In re Ambler, 11 Okl. Cr. 449, 148 P 1061, 1067.

[92] Denver, etc., R. Co. v. U. S., 249 Fed. 822, 826, 162 CCA 56.

[93] Smith v. Gilliam, 282 Fed. 628, 633.

[94] Schieffelin v. Craig, 183 App. Div. 515, 170 NYS 603, 609.

"Improvement" 31 C. J. p 262.

[95] U. S. v. McConnell, 10 F. (2d) 973, 977.

[96] **"Epithet"** 20 C. J. p 1298.

[97] Keet v. Smith, 1 P. D. 73, 79 ("not a title of honor or dignity").

[98] See also Reverse post.

"Modification" 40 C. J. p 1486.

[99] Cowdery v. London, etc., Bank, 139 Cal. 298, 304, 73 P 196, 96 AmSR 115. See also Appeal and Error §§ 3174–3251; Criminal Law §§ 3750–3761.

Title affected by reversal see Judicial Sales § 127; Mortgages §§ 1918, 1919.

[1] Kazebeer v. Nunemaker, 82 Nebr. 732, 118 NW 646, 648. See Manfull v. Graham, 55 Nebr. 645, 649, 76 NW 19, 70 AmSR 412 ("by any court authorized to set aside the judgment").

[2] Myers v. McDonald, 68 Cal. 162, 166, 8 P 809; Ryan v. Tomlinson, 39 Cal. 639, 646.

[3] Anderson v. National Ice, etc., Co., 40 Cal. A. 649, 183 P 273.

[4] See also Reversal ante.

[5] Century D. [quot Cowdery v. London, etc., Bank, 139 Cal. 298, 303, 73 P 196, 96 AmSR 115].

[a] **To set aside or annul.**—Laithe v. McDonald, 7 Kan. 254, 268.

[b] **"Repeal" synonymous.**—St. Louis v. Kellman, 235 Mo. 687, 139 SW 443, 445. "Repeal" ante.

[c] **"Vacate" as synonymous.**—Loanes v. Gast, 216 Mass. 197, 199, 103 NE 473.

"Annul" 3 C. J. p 222.

"Overthrow" 46 C. J. p 1163.

"Revoke" post.

"Set aside" [35 Cyc 1439].

[6] Burrows v. Carson, 23 Pa. Dist. 308, 42 Pa. Co. 31 [cit Cyc].

[7] Buffalo v. Delaware, etc., R. Co., 176 N. Y. 308, 68 NE 587, 588.

[8] King v. Sloan, 1 Serg. & R. (Pa.) 77, 79.

[9] King v. Sloan, supra.

[10] Bradshaw v. Gunter, 135 Ala. 240, 246, 33 S 549.

"reversed without ordering new trial."[11]

Reversing. Setting aside or annulling.[12]

REVERSED CURRENT.[13] An electric current, which is periodically reversed by a commutator, which thus breaks the current between the changes in direction and takes off the current in sections.[14]

REVERSIBLE ERROR. Error materially affecting the merits of the action;[15] substantial error;[16] such an error as warrants the appellate court in reversing the judgment and remanding the cause.[17]

REVERSION.[18] In a general sense, a returning;[19] a term which signifies a return to a preëxistence of former state or place.[20]

REVERT.[21] A word of Latin derivation, from revertere meaning to turn backward,[22] the meaning of which depends very largely on the connection in which it is used.[23] In its ordinary meaning, to come back;[24] to go or pass;[25] to go to or pass to;[26] to return;[27] to return, come or fall back;[28] to return, to come or go back;[29] to turn back;[30] to turn or throw back.[31]

In another sense, meaning to fall back into,[32] the term implies devolution[33] upon one having an already existing interest;[34] and in this its legal and technical signification the term, when used in reference to property, means to fall back into the possession of the donor or of the former proprietor,[35] to go back, or return, to a person who formerly owned it but who parted with the possession or title to it, by creating an estate in another which has terminated by his act or by operation of law;[36] or to return to the proprietor after the determination of a particular estate granted by him.[37]

In a devise, the term has been employed to create remainders to take effect after the expiration of particular estates.[38]

Phrases: "Balance shall revert,"[39] "I desire one half his portion to revert to,"[40] "revert back to,"[41] "revert in the same way,"[42] "revert to,"[43] "revert to and become a part of my estate,"[44] "revert to and become a part of my residuary estate,"[45] "revert to and become the property of,"[46] "revert to my estate,"[47] "revert to my other children,"[48] "revert to the use of said hospital fund,"[49] "revert to their children,"[50] "said sum to revert to,"[51] "shall revert to my estate,"[52] and "shall revert to the United States;"[53] also, "reverts to the owner of the land from which said right of way was taken."[54]

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[11] Peo. v. Marshall, (Cal.) 289 P 629, 632; Peo. v. Marshall, (Cal. A.) 283 P 119, 122.

[12] Laithe v. McDonald, 7 Kan. 254, 267 [cit Webster D.].

[13] **"Current"** 17 C. J. p 408. See also Electricity 20 C. J. p 303.

[14] Westinghouse Electric, etc., Co. v. New England Granite Co., 103 Fed. 951, 952.

Cross references:
"Alternated current" see Alternate 2 C. J. p 1295 note 4 [a].
"Alternating current" see Alternate 2 C. J. p 1295 note 4 [d].
"Continuous current" see Continuous 13 C. J. p 206 note 78.
"Pulsatory current" see Current 17 C. J. p 408.
"Reversed alternative current" see Continuous 13 C. J. p 206 note 78 [a].
"Vibratory or undulatory current" see Current 17 C. J. p 408.

[15] Shinn v. United R. Co., 248 Mo. 173, 181, 154 SW 103.

[16] Condello v. U. S., 297 Fed. 200, 201.

[17] New Mexican R. Co. v. Hendricks, 6 N. M. 611, 615, 30 P 901. See also Appeal and Error §§ 2878–3055; Criminal Law §§ 3600–3722.

[18] **With respect to property:**
Cemeteries § 21.
Charities § 100.
Curtesy § 30.
Deeds §§ 285–292.
Descent and Distribution §§ 23, 24.
Eminent Domain §§ 289, 598.
Estates §§ 179–194, 253.
Executions § 68.
Husband and Wife § 44.
Insolvency § 282.
Highways § 258.
Judgments § 907.
Landlord and Tenant §§ 537–626, 840, 1206–1217.
Logs and Loggings § 46.
Mechanics' Liens § 26.
Mines and Minerals § 657.
Partition § 4.
Perpetuities § 28.
Public Lands § 380.

[19] Matter of Sharp, 86 Misc. 569, 149 NYS 470, 473.

[20] Clute v. New York Cent., etc., R. Co., 120 N. Y. 267, 272, 24 NE 317.

[21] See Reversion ante.

[22] Pearce v. Lott, 101 Ga. 395, 399, 29 SE 276.

[23] Armstrong v. Barber, 239 Ill. 389, 402, 88 NE 246.

[24] Pearce v. Lott, 101 Ga. 395, 399, 29 SE 276; Cochran v. Lee, (Ky.) 84 SW 337, 338.

[25] Warrum v. White, 171 Ind. 574, 86 NE 959, 960; Busick v. Busick, 65 Ind. A. 655, 115 NE 1025, 1029, 116 NE 861; Goerlitz v. Malawista, 56 Hun 120, 8 NYS 832, 833; Brown v. Guthery, 190 N. C. 822, 824, 130 SE 836.

"Go" 28 C. J. p 711.

"Pass" 47 C. J. p 1372.

[26] Hiller v. Loring, 126 Me. 78, 136 A 350, 351; Beatty v. Cory Universalist Soc., 39 N. J. Eq. 452, 463; Smith's Pet., 291 Pa. 129, 139 A 832, 835; In re Owens, 164 Wis. 260, 265, 159 NW 906.

"Go to" see Go 28 C. J. p 711 text and note 80.

[27] Standard D. [quot American Brake, etc., Co. v. New York R. Co., 293 Fed. 612, 622]; Sweet L. D. [quot McPheeters v. Wright, 124 Ind. 560, 576, 24 NE 734, 9 LRA 176]; Pearce v. Lott, 101 Ga. 395, 399, 29 SE 276; Cochran v. Lee, (Ky.) 84 SW 337, 338.

[a] **Implies a return.**—Battey v. Hopkins, 6 R. I. 443, 446.

"Return" ante.

[28] Standard D. [quot Armstrong v. Barber, 239 Ill. 389, 402, 88 NE 246, 250].

[29] Goldstein v. Montreal Trust Co., 31 Que. K. B. 157, 165.

[a] **Conveys the thought of going back,** in some manner or to some extent. Smith's Pet., 291 Pa. 129, 139 A 832, 835.

[30] Re Cutter, 37 Ont. L. 42, 31 DomLR 382, 388.

[31] Standard D. [quot American Brake, etc., Co. v. New York R. Co., 293 Fed. 612, 622].

[32] Carter v. Goldstein, 63 Can. S. C. 207, 66 DomLR 34, 35.

[33] **"Devolution"** 13 C. J. p 1034.

[34] Phillips' Est., 10 Pa. Co. 374, 380.

[35] Worcester D. [quot McPheeters v. Wright, 124 Ind. 560, 576, 24 NE 734, 9 LRA 176].

[36] Anderson L. D. [quot Pearce v. Lott, 101 Ga. 395, 399, 29 SE 276]. And see Smith's Pet., 291 Pa. 129, 139 A 832, 835.

[37] Webster D. [quot McPheeters v. Wright, 124 Ind. 560, 576, 24 NE 734, 9 LRA 176]; Hadley v. Henderson, 214 Mich. 157, 183 NW 75, 77.

[38] Smith's Pet., 291 Pa. 129, 139 A 832, 835.

[39] Re Cutter, 37 Ont. L. 42, 10 OntWN 203, 31 DomLR 382, 388.

[40] Matter of Briggs, 186 Cal. 351, 199 P 322, 324.

[41] Beatty v. Cory Universalist Soc., 39 N. J. Eq. 452, 463.

[42] Jardine v. Wilson, 32 U. C. Q. B. 498, 502.

[43] American Brake, etc., Co. v. New York R. Co., 293 Fed. 612, 622; Mastellar v. Atkinson, 94 Kan. 279, 282, 146 P 367, AnnCas1917B 502.

[44] Pearce v. Lott, 101 Ga. 395, 399, 29 SE 276.

[45] Carmichael v. Cole, 83 Colo. 575, 267 P 408, 410.

[46] Marvel v. Wilmington Trust Co., 10 Del. Ch. 163, 87 A 1014, 1015.

[47] Downing v. Grigsby, 251 Ill. 568, 96 NE 513, 614; Cochran v. Lee, (Ky.) 84 SW 337, 338.

[48] In re Owens, 164 Wis. 260, 265, 159 NW 906.

[49] Ingraham v. Ingraham, 169 Ill. 432, 461, 48 NE 561, 49 NE 320.

[50] Dole v. Keyes, 143 Mass. 237, 239, 9 NE 625; Smith's Pet., 291 Pa. 129, 139 A 832, 835.

[51] Carter v. Goldstein, 63 Can. S. C. 207, 66 DomLR 34, 35.

REVERTER. Reversion.[55]

REVEST. To vest[56] again.[57]

REVIEW. A judicial reëxamination[58] of proceedings of a court.[59]

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[52] Goldstein v. Montreal Trust Co., 31 Que. K. B. 157, 165.

[53] Bybee v. Oregon, etc., R. Co., 139 U. S. 663, 675, 11 SCt 641, 35 L. ed. 305 [quot Spokane, etc., R. Co. v. Washington, etc., R. Co., 49 Wash. 280, 95 P 64, 66].

[54] Remey v. Iowa Cent. R. Co., 116 Iowa 133, 89 NW 218, 220.

[55] Black L. D.

"Reversion" ante.

"Possibility of reverter" see Ejectment § 22; Estates § 180.

[56] **"Vest"** [40 Cyc 197].

[57] Black L. D.

Revesting title conveyed see Deeds §§ 470–480.

[58] **"Examination"** 23 C. J. p 178.

[59] Webster New Int. D.

Methods of review:

Action to review see Judgments §§ 630–649.
Appeal and Error 3 C. J. p 256.
Application, motion, or petition to:
  Amend, correct, or review see Judgments § 449 et seq.
  To open or vacate see Judgments §§ 484–600; Justices of the Peace § 308.
Audita Querela 6 C. J. p 849.
Bill of review see Equity § 886 et seq.
Certiorari 11 C. J. p 80.
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REVIEW, WRIT OF

By John F. McDonald

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I. NATURE AND SCOPE OF REMEDY

[§ 1] The proceeding by way of writ of review,[1] or, as it is sometimes called, a petition for review,[2] or action of review,[3] or a review,[4] is a statutory remedy[5] unknown to the common law.[6] It is in its nature a new trial of the issues previously tried between the parties.[7] In some respects it resembles a writ of error,[8] and also a new trial,[9] but is distinguishable from either of such remedies.[10] It is in one aspect a new and independent proceeding,[11] commenced by a writ which is a new process,[12] but, as regards the merits of the controversy, it is the same action and cannot properly be regarded as an independent one.[13] The nature of a review as regards its purpose and effect also differs according to whether it is brought by the original plaintiff who has failed to sustain his suit or by the original defendant against whom judgment has been obtained,[14] it being in the first instance in effect a continuation of the original suit, plaintiff in review still seeking to recover the debt or damages for which his original action was instituted,[15] while in the latter, although the review arises out of and involves the same matters as were in controversy in the original suit, it is in effect a new action to recover back in the shape of damages what defendant alleges has been wrongfully obtained from him upon the first trial,[16] and when thus brought by defendant is somewhat analogous to an action for money had and received.[17]

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[1] Barron v. Jackson, 42 N. H. 419; Society for Propagating Gospel v. Whitcomb, 2 N. H. 227, 229.

"The words, 'writ of review' are frequently used as synonymous with 'action of review.'" Society for Propagating Gospel v. Whitcomb, supra.

[2] Donnell v. Hodsdon, 102 Me. 420, 67 A 143.

[3] Knox v. Knox, 12 N. H. 352, 358; Bell v. Bartlett, 7 N. H. 178.

"The proceeding is often called an action of review." Knox v. Knox, supra.

Action to review judgment see Judgments §§ 630–649.

[4] Vermeule v. Brazer, 128 Me. 437, 148 A 566.

[5] Donnell v. Hodsdon, 102 Me. 420, 67 A 143; Howe v. Hapgood, 13 Mass. 490; Enos v. Boardman, 2 Tyler (Vt.) 271.

[a] **Statutes not retroactive.**—Statutes giving a right to review are not retroactive and would not be constitutional if they permitted a review of judgments which at the time of their enactment had become final and conclusive, all existing remedies having been exhausted and rights having become permanently vested. Atkinson v. Dunlap, 50 Me. 111.

[6] Swett v. Sullivan, 7 Mass. 342, 345; Barron v. Jackson, 42 N. H. 419; Knox v. Knox, 12 N. H. 352.

"The writ of review in civil actions is provided by statute to correct errors in judgments rendered on verdicts and is unknown at the common law." Swett v. Sullivan, supra.

[a] **"Singular process."**—Swett v. Sullivan, 7 Mass. 342.

[b] **Historical.**—The remedy of review existed in Massachusetts from a very early date (Mass. Charters p 93; Plymouth Colony L. p 254) and in New Hampshire as early as 1701 (N. H. Prov. L. p 27). Under the early practice new trials were not granted for any error in the proceedings, but after judgment the aggrieved party was at liberty by new process to review the case once as a matter of right under statutes so providing. Knox v. Knox, 12 N. H. 352.

[7] Haynes v. Ordway, 52 N. H. 284; Zollar v. Janvrin, 49 N. H. 114, 6 AmR 469; Knox v. Knox, 12 N. H. 352; Burley v. Burley, 6 N. H. 204.

[a] **Another definition.**—"A new action, in which the merits of the former [the original action] may be again tried." Bell v. Bartlett, 7 N. H. 178, 180.

[b] **Review has been referred to** as a "new trial by way of review." Woodworth v. Wilson, 50 N. H. 220.

[8] Little v. Bunce, 7 N. H. 485, 28 AmD 363.

[a] **A writ of review resembles a writ of error** in that the party prevailing upon a review is to be restored to all that he has lost by the first judgment. Little v. Bunce, 7 N. H. 485, 28 AmD 363.

[b] **In the nature of a writ of error.**—Barron v. Jackson, 42 N. H. 419.

Origin, nature and scope of writ of error see Appeal and Error §§ 4–27.

[9] Whitney v. Porter, 251 Mass. 547, 146 NE 771; Brown v. Fairhall, 218 Mass. 495, 106 NE 177; Barron v. Jackson, 42 N. H. 419.

"A review is said to be equivalent to a new trial after judgment." Whitney v. Porter, supra.

Nature and scope of remedy by new trial see New Trial §§ 1–25.

[10] See cases infra this note.

[a] **A review differs from a writ of error** in that: (1) Review is not to reverse a judgment for errors in the record of law or fact, but assumes that the original judgment is to stand, the party bringing the review seeking to obtain a new judgment in his favor equal to the former judgment against him or some part thereof. Bradstreet v. Partridge, 59 Me. 155. (2) "A review is not a writ of error by which a judgment is reversed, nullified, and rendered void ab initio." Dyer v. Wilbur, 48 Me. 287, 288.

[b] **Review is distinguished from new trial** in that: (1) Proceedings in

Legal or equitable nature. Although it seems to have been borrowed from courts of equity,[18] review is not an equitable proceeding.[19]

II. RIGHT TO, AND GROUNDS FOR, REVIEW

[§ 2] **A. Right to Remedy—1. In General.** The remedy being statutory,[20] the terms of the particular statute by which it is conferred control as to the right thereto,[21] which is limited and confined to such cases as the statute enumerates.[22] Although the statutes authorizing reviews must be strictly complied with,[23] such statutes are remedial[24] and should be liberally construed[25] in order to advance the remedy.[26]

[§ 3] **2. Review as of Right.**[27] The remedy by way of a review may be resorted to as a matter of right where the statute so provides.[28]

[§ 4] **3. Existence of, or Recourse to, Other Remedies.**[29] A review is proper to correct errors in the original action or proceeding or judgment rendered therein where the party prejudiced thereby has no other adequate remedy;[30] but ordinarily a review will not be granted where there is a regular and ade-

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review do not operate to vacate the original judgment. See infra § 38; New Trial § 511. (2) Nor is it like a new trial granted before final judgment. Bradstreet v. Partridge, 59 Me. 155; Barron v. Jackson, 42 N. H. 419. (3) A review is obtained on petition rather than on motion. Barron v. Jackson, supra. And see New Trial § 26.

[11] Bradstreet v. Partridge, 59 Me. 155; Barron v. Jackson, 42 N. H. 419.

[12] See infra § 42.

Proceedings on trial of review see infra §§ 39–62.

[13] Knox v. Knox, 12 N. H. 352.

[a] **Identity of action.**—"The court may grant leave to amend the pleadings of the original suit which shows that the old suit is still pending undetermined; while the defendant can plead no new matter arising after the first judgment, in bar of the original cause of action, because the controversy rests on the merits as they originally existed. The judgment also which is recovered, relates to the commencement of the suit and is final as to the whole matter." Knox v. Knox, 12 N. H. 352, 354.

[14] Knox v. Knox, supra.

[15] Knox v. Knox, supra.

[16] Pike v. Pike, 24 N. H. 384; Knox v. Knox, 12 N. H. 352.

[a] **The mode by which defendant attempts to recover** is by trying over again the original cause of action and making it appear that plaintiff has no right to sustain a suit against him, or at least was not entitled to recover so much as he obtained. Knox v. Knox, 12 N. H. 352.

[17] Knox v. Knox, supra.

[18] Burrell v. Burrell, 10 Mass. 221; Barron v. Jackson, 42 N. H. 419.

[a] **"The same process** (1) is in use in courts of equity and at an early period after the migration of our ancestors was adopted as a part of their processes at law probably with the intention of giving to courts of law the powers and the remedies to which they had been accustomed both in courts of law and equity." Burrell v. Burrell, 10 Mass. 221, 222. (2) Bill of review see Equity §§ 886–924.

[19] McDonough v. Blossom, 111 Me. 66, 88 A 89, 92.

"Whatever may be said of the petition for a review, the review when granted is a strict legal remedy." McDonough v. Blossom, supra.

[20] See supra § 1.

[21] Vermeule v. Brazer, 128 Me. 437, 148 A 566; Booth Bros., etc., Granite Co. v. Smith, 115 Me. 89, 97 A 826; Chesman v. Lane, 17 Vt. 88; Enos v. Boardman, 2 Tyler (Vt.) 271.

"The right of review is derived entirely from, and must be regulated . . . by the statute." Enos v. Boardman, supra.

[22] Booth Bros., etc., Granite Co. v. Smith, 115 Me. 89, 97 A 826; Chesman v. Lane, 17 Vt. 88; Enos v. Boardman, 2 Tyler (Vt.) 271.

[a] **A statute prohibiting review in appealed cases** does not repeal a statute permitting review in certain cases where new matter which could not have been pleaded in the original action is pleaded on appeal, since after the pleading of the new matter the action is no longer the same. Bloss v. Kittridge, 4 Vt. 272.

[23] Smith v. Paige, 4 Allen (Mass.) 94 (writ of error); Barron v. Jackson, 42 N. H. 419; Chesman v. Lane, 17 Vt. 88.

Grounds of review see infra §§ 8–16.

[24] McNamara v. Carr, 84 Me. 299, 24 A 856.

[25] McNamara v. Carr, supra; Davis v. Beebe, 5 Vt. 560.

[26] Davis v. Beebe, supra.

[27] **Review as matter of discretion** see infra § 35.

[28] See statutory provisions; and cases infra this note.

[a] **In Maine** (1) it is stated in a case decided in 1824 that the legislature had repealed the provision of the statute authorizing reviews as a matter of right (Haskell v. Becket, 3 Me. 92); (2) but under the statute of 1852 it was held that the granting of writs to review judgments against bankrupts was not discretionary with the court but imperative as to all cases coming within the purview of the statute (Colby v. Dennis, 36 Me. 9); (3) and the statute of 1859 was held to authorize a review as a matter of right upon certain specified grounds (Sturtevant v. Randall, 49 Me. 446).

[b] **In Massachusetts** (1) review was originally granted as of right under the early statutes (Howe v. Hapgood, 13 Mass. 490; Burrell v. Burrell, 10 Mass. 221; Swett v. Sullivan, 7 Mass. 342), (2) but the policy of these statutes was criticized (Burrell v. Burrell, supra), (3) and they were said to have been repealed (Bowditch Mut. F. Ins. Co. v. Winslow, 3 Gray 415).

[c] **In New Hampshire** (1) under the early statutory provisions, the aggrieved party was at liberty to review the case once, as a matter of right. Knox v. Knox, 12 N. H. 352. (2) But these provisions have been repealed. Rowell v. Boston, etc., R. Co., 59 N. H. 35 (the repealing statute did not take away the right of review in actions in which judgment had been rendered and the limitation of time for review had not expired at the time of the passage of the act); Dickinson v. Lovell, 36 N. H. 364 (the repealing statute did not take away the right of review in actions pending at the time the statute went into effect).

[29] **Loss of other remedies as ground of review** see infra § 11.

[30] Denison v. Portland Co., 60 Me. 519; Hagar v. Springer, 60 Me. 436; Reynard v. Brecknell, 4 Pick. (Mass.) 302; Loring v. Mansfield, 17 Mass. 394.

[a] **Illustrations.**—(1) A writ of error will not lie to reverse a judgment founded on a report of referees, on the ground that their report was based on advice given them by a third person, but the remedy to correct irregularities which do not appear upon the record is by review. Denison v. Portland Co., 60 Me. 519. (2)

quate remedy, as by writ of error or appeal.[31] A review may, however, be granted where a party has been deprived of his remedy by writ of error or appeal without fault on his part,[32] in the absence of a statute to the contrary.[33] Where a party must make an election he cannot pursue a different remedy and at the same time reserve a right to prosecute a review.[34]

[§ 5] **4. Persons Entitled.** Subject to specific limitations, if any, imposed by the governing statutes,[35] either party to the original action may maintain the proceeding,[36] and they alone[37] or those representing their interests are entitled to the remedy.[38] Furthermore the petitioner must also be a party to[39] or bound by[40] the original judgment or else someone representing the interest of such a party.[41] Under some statutes[42] a review may be granted on the petition of a party in interest[43] who was not a party to the record.[44] But a person having no interest in the subject matter of the original action,[45] or one who is merely interested in or affected by the result of the action and who is not "a party in interest" in the legal sense of that phrase has no such right.[46] An action of review is a chose in action[47] which by

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Where a party is aggrieved by a determination of a court on matters clearly in its discretion, such as the postponement or continuance of an action, he can obtain a remedy only by review. Reynard v. Brecknell, 4 Pick. (Mass.) 302. (3) Where a debtor has made partial payments, but the creditor takes judgment for the full amount of the debt, the debtor cannot recover the partial payments, but his remedy is by a review of the action in which the judgment was rendered. Hagar v. Springer, 60 Me. 436. (4) Likewise where in an action on a promissory note on which partial payments had been indorsed, defendant appeared and entered his defense, and judgment was rendered against him for the amount appearing due on the note, after deducting the sums indorsed, he cannot maintain an action against plaintiff for money had and received, on the ground that he had made certain other payments not indorsed and not allowed in the action; his remedy, if any, being by an application for a review of the action on the note. Loring v. Mansfield, 17 Mass. 394.

31. Elden v. Cole, 8 Me. 211; Manning v. Nettleton, 140 Mass. 421, 4 NE 802; Bowditch Mut. F. Ins. Co. v. Winslow, 3 Gray (Mass.) 415; Hart v. Huckins, 5 Mass. 260.

[a] **Illustrations.**—(1) St. (1821) c 67, regulating reviews, does not apply to a judgment from which an appeal was claimed but by mistake was not entered; the remedy, if any, being by writ of error. Elden v. Cole, 8 Me. 211. (2) Under Pub. St. c 187 § 22, by which a petition for reviewing a judgment rendered in the absence and without the knowledge of the petitioner might be filed within one year after notice, it was held that a party who brought suit as next friend to a minor, cannot claim the provisions of the act as applying to him on the ground that judgment for costs complained of should have been rendered against the minor, his remedy being by writ of error. Manning v. Nettleton, 140 Mass. 421, 4 NE 802. (3) Where, upon a petition for a review, it appears from the record that the judgment complained of would be reversed upon a writ of error, a review will not be granted. Hart v. Huckins, 5 Mass. 260.

32. Keene v. White, 136 Mass. 23 (under statute); Petersham v. Dana, 12 Mass. 429 (omission of necessary formalities on the part of the presiding justice and clerk, in bringing up the case by writ of error); Champion v. Brooks, 9 Mass. 228 (misapprehension of the parties and of the lower court).

33. Smith v. McDaniel, 15 N. H. 474.

[a] **A creditor, having the right to appeal** from the determination of commissioners of an insolvent estate is not entitled to a writ of review, where he fails to enter his appeal at the term of court prescribed by the statute allowing such appeals, the statute expressly providing that, in case the creditor failed to enter his appeal as there allowed, he should be forever barred. Smith v. McDaniel, 15 N. H. 474.

34. Barker v. Wendell, 12 N. H. 119.

35. See statutory provisions.

36. Swett v. Sullivan, 7 Mass. 342; Knox v. Knox, 12 N. H. 352; Bloss v. Kittridge, 4 Vt. 272.

[a] **The right in mutual** between the original parties if it exists at all. Bloss v. Kittridge, 4 Vt. 272.

37. Johnson v. Johnson, 81 Me. 202, 16 A 661; Elwell v. Sylvester, 27 Me. 536.

Parties see infra § 23.

38. Taylor v. Sewall, 69 Me. 148; Elwell v. Sylvester, 27 Me. 536.

39. Taylor v. Sewall, 69 Me. 148.

40. Vermeule v. Brazer, 128 Me. 437, 148 A 566.

41. Taylor v. Sewall, 69 Me. 148.

[a] **An administrator de bonis non** cannot maintain a petition to review a judgment rendered against his predecessor for any cause, since he is neither a party to such judgment nor in privity with, nor the representative of the interests of, any one who is. Taylor v. Sewall, 69 Me. 148.

42. See statutory provisions.

[a] **In Maine** "prior to 1859 a petition for review could be brought only by a party of record or one representing the interests of such party. Elwell v. Sylvester, 27 Me. 536; Nowell v. Sanborn, 44 Me. 80 (1857). Perhaps in consequence of a suggestion . . . the latter case the Legislature of 1859 . . . passed the act . . . [Pub. L. (1859) c 94 § 3] giving the right [of review] to a 'party in interest' who was not a party to the record fixes beyond doubt the precise meaning of the term." Glovsky v. Maine Realty Bureau, 116 Me. 378, 380, 102 A 113.

43. Vermeule v. Brazer, 128 Me. 437, 148 A 566; Glovsky v. Maine Realty Bureau, 116 Me. 378, 102 A 113; Farnsworth v. Kimball, 112 Me. 238, 91 A 954; Winch v. Hosmer, 122 Mass. 438.

[a] **"The party in interest"** within the meaning of such a statute is: (1) A person having the care or responsibility of the original action. Johnson v. Johnson, 81 Me. 202, 16 A 661. (2) Or one who has taken part in the prosecution or defense of the original suit. Glovsky v. Maine Realty Bureau, 116 Me. 378, 102 A 113. (3) If he be bound by the original judgment it is immaterial whether he appeared or defended the original action. Vermeule v. Brazer, 128 Me. 437, 148 A 566.

44. Glovsky v. Maine Realty Bureau, 116 Me. 378, 102 A 113; Farnsworth v. Kimball, 112 Me. 238, 91 A 954; Winch v. Hosmer, 122 Mass. 438.

[a] **One avouched in to defend** a suit to quiet title under his ancestor's warranty but failing to do so and judgment going against the defendant of record, may file a petition for review. Farnsworth v. Kimball, 112 Me. 238, 91 A 954.

[b] **A grantor** voluntarily assuming defense of a suit against grantee for possession of land is a party in interest entitled to petition for review. Vermeule v. Brazer, 128 Me. 437, 148 A 566.

[c] **Where the original action is brought by or against a nominal party,** the real party in interest may maintain a writ of review. Winch v. Hosmer, 122 Mass. 438.

[d] **Notice** to one avouched in to defend an action, as required to make him a party in interest entitled to a petition for review, need not appear of record nor be in any particular form. Vermeule v. Brazer, 128 Me. 437, 148 A 566.

45. Berry v. Whitaker, 58 Me. 422.

[a] **The administrator** of an original party cannot prosecute a writ of review in a real action not brought to foreclose a mortgage, since he has no interest in the subject-matter. Berry v. Whitaker, 58 Me. 422.

46. Glovsky v. Maine Realty Bureau, 116 Me. 378, 102 A 113; Johnson v. Johnson, 81 Me. 202, 16 A 661.

[a] **Distinction between "a party in interest" and "a person in interest."**—Glovsky v. Maine Realty Bureau, 116 Me. 378, 102 A 113.

[b] **Indemnitor,** who took no part in defense of the original suit against indemnitee, was not requested to assume defense, and knew nothing of it, was not such "party in interest." Glovsky v. Maine Realty Bureau, 116 Me. 378, 102 A 113.

[c] **Residuary legatee.**—Under the Maine statute which expressly provides that a review may be obtained on petition by "a party in interest, who was not a party to the record," a widow who is a residuary legatee is not a party in interest who may obtain a review of an action by the administrator cum testamento annexo against an alleged debtor of the estate. Johnson v. Johnson, 81 Me. 202, 16 A 661.

47. Zollar v. Janvrin, 49 N. H. 114, 6 AmR 469.

virtue of an adjudication in bankruptcy vests in the assignee who alone is empowered to prosecute or defend it.[48]

One of several parties. One of several parties plaintiff or defendant may be entitled to a writ of review either under a statute so providing[49] or in the absence of such statute.[50]

[§ 6] **5. Successive Writs or Proceedings.** A party may be entitled to only one review under some statutes[51] but under others there is no such restriction.[52] A judgment upon review which does not pass upon the merits is not a bar to a new petition for review,[53] and a review commenced and discontinued is not a bar to another review in the same action, if not prevented by other limitations.[54] However, it has been intimated that the dismissal of one petition may bar a later one,[55] but in the absence of the record of dismissal the later petition will not be barred.[56]

[§ 7] **6. Estoppel or Waiver.**[57] The right to a review may be waived by the party or parties entitled thereto,[58] as by an agreement that one trial shall be final as to the parties or party making the agreement;[59] or by agreements to that effect in submitting an action to a reference.[60] But a party is not precluded by such an agreement from his right of review where he recovers judgment in the trial court and the other party reverses the judgment on appeal,[61] nor does a party waive his right to review by voluntarily directing that judgment be entered in favor of one of several opposite parties in the absence of anything to show that such judgment is final.[62] Mere payment of the original judgment does not waive a right of review,[63] but a payment accompanied by a special agreement may do so.[64] A conveyance of the premises by a party in a real action after a verdict in his favor but before judgment does not preclude a judgment in his favor on a review of the action, provided he is otherwise entitled thereto.[65]

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[48] Zollar v. Janvrin, supra.

[49] See statutory provisions.

[a] **Under a provision that one of several defendants** may review the action, one of four defendants sued in quare clausum fregit was held entitled to a review. Emerson v. Pattee, 1 Mass. 482.

[50] Nowell v. Sanborn, 44 Me. 80; Paine v. Tilden, 20 Vt. 554.

[a] **Historical.**—"Our statutes, since the separation [from Massachusetts], have made no provision, in direct terms, for such a contingency. It has been otherwise in the parent state from 1786 to the present time." Nowell v. Sanborn, 44 Me. 80, 84.

[b] **Unsuccessful defendants.**—(1) One of several unsuccessful defendants in an original tort action may be entitled to a review (Paine v. Tilden, 20 Vt. 554) (2) when the judgment is final as to the other defendants (Paine v. Tilden, supra), (3) but the review does not affect the other defendants as to whom the judgment is final (Paine v. Tilden, supra).

Effect on several defendants of a statute limiting each party to one trial see infra § 6 text and note 51.

[51] See statutory provisions.

[a] **In Vermont** under a statute providing that "either party may once, and no more, review his cause," where plaintiff in an action of ejectment against two defendants recovered a verdict against only one of them who entered a review, plaintiff at the same time entering a review against the other defendant, and on the second trial a verdict was rendered in favor of both defendants, plaintiff was not entitled to review the action as to defendant against whom he obtained a verdict at the first trial. Frost v. Philbrook, 28 Vt. 736.

[b] **Under Rev. St. c 91 § 6,** providing that a second review may within a limited time be granted when the full court thinks that justice requires it but not otherwise the petitioner must show diligence and that a second review is likely to change the result. Trask v. Unity, 74 Me. 208.

[52] See statutory provisions; and cases infra this note.

[a] **In Massachusetts.**—(1) In an early case St. (1791) c 17, vesting a discretionary power in the supreme judicial court to grant reviews, was held not to repeal the provision of St. (1786) c 11, that but one review should be granted, and therefore not to authorize the court to grant a second review after one had been granted and prosecuted. Ruggles v. Freeland, 6 Mass. 513. (2) But in a later case construing the same statutes it was held that while a party against whom judgment by default was rendered on one review brought by the other party was not entitled to a second review as a matter of right under the statute of 1786, his remedy is to petition the court, which by St. (1791) c 17, may, in all cases, and as often as justice requires, grant reviews upon petition. Howe v. Hapgood, 13 Mass. 490. (3) A statutory limitation to one review as a matter of right where a verdict had been given against a party was held to refer only to cases where there had been a verdict of a jury. Perry v. Goodwin, 6 Mass. 498. (4) Such limitation was not applicable to a party in a case where there had been two counts for different causes of action, and there had been two trials, resulting in one verdict in his favor and one against him on each count, since in effect there had been but one verdict against him on each cause of action. Rice v. Townsend, 14 Mass. 366.

Discretion of court in granting writs generally see infra § 35.

[53] Hayes v. Collins, 114 Mass. 54.

[a] **Judgment on first petition merely for costs.**—Hayes v. Collins, 114 Mass. 54.

[54] Burrell v. Burrell, 10 Mass. 221.

[55] See case infra this note.

[a] **"The record of the dismissal** of a former petition upon its merits might be a bar to a second petition." Nantasket Beach R. Co. v. Ransom, 147 Mass. 240, 244, 17 NE 640.

[56] Nantasket Beach R. Co. v. Ransom, supra.

[57] **Waiver of objections to writ** see infra § 46 text and notes 27, 28.

[58] Hatch v. Dennis, 10 Me. 244; Hall v. Wolcott, 10 Mass. 218; Rand v. Merchants' Despatch Transp. Co., 60 N. H. 276; Carroll v. Locke, 58 N. H. 163; Bennett v. Atwood, 57 N. H. 216. And see infra text and notes 59, 60.

[a] **Reason for rule.**—"Statutory provisions . . . for the benefit of individuals . . . may be waived by those for whose benefit they are intended." Carroll v. Locke, 58 N. H. 163.

[59] Hatch v. Dennis, 10 Me. 244; Golden v. Blaskopf, 126 Mass. 523; Hall v. Wolcott, 10 Mass. 218.

[a] **The other party,** by accepting the proposed benefit, is not deprived of his right of review. Hall v. Wolcott, 10 Mass. 218.

[b] **Waiver not conclusive on court.**—While a previous agreement may be a waiver of review as of right, it cannot control the discretion of the court in granting a review on petition. Golden v. Blaskopf, 126 Mass. 523.

Discretion of court as to grant of writ see infra § 35.

[60] Parsons v. Hilliard, 61 N. H. 642; Rand v. Merchants' Despatch Transp. Co., 60 N. H. 276; Carroll v. Locke, 58 N. H. 163; Bennett v. Atwood, 57 N. H. 216.

[a] **Where the agreement itself provides that the report of the referee shall be final** and that judgment shall be rendered thereon, the right of review is waived. Carroll v. Locke, 58 N. H. 163.

[b] **Where an action is submitted by agreement to a reference under a statute** which provides that judgment rendered upon the report shall be final and conclusive, the right to review is waived. Rand v. Merchants' Despatch Transp. Co., 60 N. H. 276 (a party by agreeing to a reference under such a statute accepts all the provisions of the statute); Bennett v. Atwood, 57 N. H. 216.

[61] Hatch v. Dennis, 10 Me. 244.

[62] Lyndon v. Cook, 19 Vt. 35.

[a] **Illustration.**—In an action of tort against several defendants, plaintiff voluntarily entered judgment in favor of one of defendants and then called him as a witness, and, on the trial of the action, a verdict was rendered in favor of the other defendants, and plaintiff entered a review as to all of defendants. Lyndon v. Cook, 19 Vt. 35.

[63] Watson v. Joselyn, 29 Vt. 455.

[64] Smith v. O'Brien, 146 Mass. 294, 15 NE 645.

[a] **Where execution was about to be enforced** against the property of the party against whom the original judgment was rendered, and he paid a part of the judgment and agreed to pay the balance on a certain day upon condition that the attorney for the successful party would

Restoration of right. The right of review will sometimes be restored to a party who has waived it through a mistake.[66]

[§ 8] **B. Grounds—1. In General.** The grounds upon which a review may be obtained are generally specified by the statutes providing for the remedy.[67] While ordinarily the statutes authorizing reviews are remedial and should be liberally construed,[68] a review cannot be procured except upon the grounds authorized by a statute which expressly limits the grounds to specified cases.[69]

[§ 9] **2. Newly Discovered Evidence.** Under some of the statutes[70] newly discovered evidence is a ground for a review[71] which should be granted where petitioner is not chargeable with any fault in regard to not discovering or producing such evidence at the first trial,[72] and where the evidence is sufficient to sustain a verdict in his favor.[73] While to authorize a review upon the ground of newly discovered evidence it must generally appear that such evidence is admissible[74] and that it is not merely cumulative,[75] collateral,[76] or for the purpose of discrediting a witness,[77] a review may be allowed within certain limitations for newly discovered evidence which is cumulative.[78] A review will not be granted on the ground of newly discovered evidence where such evidence would not be likely to change the result,[79] or for the purpose of admitting testimony which was, or with reasonable diligence might have been, within petitioner's knowledge and reach at the original trial[80] and was either willfully suppressed or negligently omitted;[81] or for the purpose of admitting testimony which under the rules of evidence in force at the time of the original trial was not then admissible.[82] The court must be satisfied from the evidence introduced in support of the petition that the alleged newly discovered evidence could not have been obtained by diligent inquiry prior to the trial of the original action.[83]

[§ 10] **3. Want of Notice.** Under statutes permitting the review of an action where judgment is rendered against a party who had no notice of the pendency of the suit,[84] a review will be granted on his showing probable grounds of defense.[85]

[§ 11] **4. Fraud, Accident, Surprise, Mistake, or Misfortune—a. In General.** Fraud, accident, surprise, mistake, or misfortune, by reason of which justice has not been done, is a ground for review.[86]

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refrain from enforcing it until that time, there was a waiver of the right to review the judgment. Smith v. O'Brien, 146 Mass. 294, 15 NE 645.

[65] Berry v. Whitaker, 58 Me. 422.

[66] McFadden v. Otis, 6 Mass. 323.

[a] **Illustration.**—Where a party waives his right of review, acting on the advice of his counsel that he could have relief by writ of error, which he could not, the right of review will be restored. McFadden v. Otis, 6 Mass. 323.

[67] See statutory provisions.

[68] See supra § 2.

Discretion of court see infra § 35.

[69] Donnell v. Hodsdon, 102 Me. 420, 67 A 143; Pierce v. Bent, 67 Me. 404.

[a] **"Special cases."**—Donnell v. Hodsdon, 102 Me. 420, 67 A 143.

[70] See statutory provisions.

[71] Buck v. Pierce, (Me.) 1 A 137; Dwinel v. Godfrey, 44 Me. 65; Warren v. Hope, 6 Me. 479; Ward v. Clapp, 6 Metc. (Mass.) 414.

[72] Buck v. Pierce, (Me.) 1 A 137; Ward v. Clapp, 6 Metc. (Mass.) 414.

[73] Dwinel v. Godfrey, 44 Me. 65.

[74] Crooker v. Randall, 53 Me. 355.

[75] Trask v. Unity, 74 Me. 208; Crooker v. Randall, 53 Me. 355; Warren v. Hope, 6 Me. 479; Merrill v. Crocket, 6 Me. 412.

[a] **Evidence held to be merely cumulative.**—Trask v. Unity, 74 Me. 208; Warren v. Hope, 6 Me. 479; Merrill v. Crocket, 6 Me. 412.

[76] Trask v. Unity, 74 Me. 208.

[77] Trask v. Unity, supra.

[78] Warren v. Hope, 6 Me. 479.

[a] **Newly discovered evidence, although cumulative, is a ground for review** (1) where a witness whose testimony on the trial was against petitioner has ascertained that by mistake he testified incorrectly (Warren v. Hope, 6 Me. 479), (2) or where the newly discovered evidence was placed beyond the knowledge or control of petitioner by means of the other party and with a view to prejudice petitioner's case (Warren v. Hope, supra), (3) or where the newly discovered evidence relates to confessions or declarations of the other party as to a material fact unknown to petitioner at the time of the original trial and inconsistent with the evidence adduced by such party at that trial (Warren v. Hope, supra).

New trial for newly discovered evidence which is cumulative see New Trial § 242.

[79] Trask v. Unity, 74 Me. 208; Todd v. Chipman, 62 Me. 189.

[80] Todd v. Chipman, supra; Watson v. Wenz, 223 Mass. 341, 111 NE 856.

[81] Todd v. Chipman, 62 Me. 189.

[82] Berry v. Lisherness, 50 Me. 118.

[a] **Change by the legislature in the rules of evidence.**—Berry v. Lisherness, 50 Me. 118.

[83] Pickering v. Cassidy, 93 Me. 139, 44 A 683; Buck v. Pierce, (Me.) 1 A 137; Trask v. Unity, 74 Me. 208; Atkinson v. Conner, 56 Me. 546; Carpenter v. Sellers, 38 Me. 427.

[a] **Where the same efforts** that were made after the trial if made before would have discovered the same evidence that is made the basis of the petition a review will not be granted. Pickering v. Cassidy, 93 Me. 139, 44 A 683.

[b] **A second review** for newly discovered evidence will not be granted after the lapse of eight years from the time of the commencement of the action and after two verdicts adverse to the petitioner and after one review has been had on account of newly discovered evidence, unless the court is fully satisfied that the alleged newly discovered evidence was unattainable by the utmost diligence at any of the former proceedings and that such evidence would change the result. Trask v. Unity, 74 Me. 208.

[c] **The discovery of a document, before supposed to be lost,** when the former action failed by reason of improperly admitting evidence as to the contents of such document, without first properly proving its loss, is not a ground of review. Carpenter v. Sellers, 38 Me. 427.

[84] See statutory provisions.

[85] McNamara v. Carr, 84 Me. 299, 24 A 856; Holmes v. Fox, 19 Me. 107; Brewer v. Holmes, 1 Metc. (Mass.) 288; Chase v. Brown, 32 N. H. 130.

[a] **Illustrations.**—(1) Under Rev. St. c 89 § 1, a review has been granted for the review of an action brought against defendant during his absence from the state, and of which he had no notice, where he showed that an attorney who appeared for him and consented to a judgment by default, did so without his knowledge or authority. McNamara v. Carr, 84 Me. 299, 24 A 856. (2) Where process was served on a resident defendant, who was temporarily absent from the state, by leaving a copy of the summons at the last and usual place of abode of his agent, defendant was held entitled to a writ of review. Holmes v. Fox, 19 Me. 107. (3) Under Rev. St. c 192 § 2, where judgment has been rendered against defendant in his absence without actual notice, and for a larger sum than it is shown plaintiff was willing to take in settlement in full for his claim, defendant is entitled to a review. Chase v. Brown, 32 N. H. 130.

Admissibility of evidence to show want of notice see infra § 34.

[86] Donnell v. Hodsdon, 102 Me. 420, 67 A 143; Pickering v. Cassidy, 93 Me. 139, 44 A 683; Hutchinson v. Gurley, 8 Allen (Mass.) 23; Woodworth v. Wilson, 50 N. H. 220;

Thus a review may be granted to a party who through any of the foregoing causes has lost his ordinary legal rights or remedies.[87] Before a review will be granted, the court must be satisfied not only of the fact of such accident, surprise, etc.,[88] but it must also appear that by reason thereof justice has not been done,[89] in the case sought to be reviewed[90] whether the injustice be in the result of the original trial[91] or in a subsequent deprivation of the right to an appeal,[92] new trial,[93] or review as of right.[94]

[§ 12] **b. What Constitutes.** Since the words "accident, mistake, or misfortune" ordinarily import something outside of petitioner's control,[95] or at least something that a reasonably prudent man would not be expected to guard against or provide for,[96] a review will not be granted on this ground where a party fails to prepare his case with reference to all the probable contingencies of the trial,[97] or for the purpose of otherwise relieving him of the results of his own negligence[98] or that of his attorney.[99] A review may be allowed for a mistake consisting in an error of computation[1] or for a mistake which is the result of accident or misfortune.[2] It is not every mistake either of the tribunal or of the party, or of his attorney which will justify a review.[3] Thus

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Nashua, etc., R. Co. v. Stimpson, 35 N. H. 286; Chase v. Brown, 32 N. H. 130.

What must be shown see infra § 34 note 68 [a].

[87] See cases infra this note.

[a] **A review may be granted** where a party has been deprived: (1) Of the opportunity of being heard upon the original trial. Nashua, etc., R. Co. v. Stimpson, 35 N. H. 286; New England Mut. F. Ins. Co. v. Lisbon Mfg. Co., 22 N. H. 170. (2) Of his right to an appeal. Hutchinson v. Gurley, 8 Allen (Mass.) 23; Woodworth v. Wilson, 50 N. H. 220. But see Hilton v. Wiggin, 46 N. H. 120 (under a statute which provides that if a creditor fails to appeal from the decision of the commissioners within the time limited his claim shall be forever barred, the court cannot grant a review, although the failure to appeal was due to accident, mistake, or misfortune). (3) Of his right to a new trial. Woodworth v. Wilson, supra.

[b] **Loss of right to exceptions.**—(1) Where the judge died within the time allowed a party to file his exceptions he is entitled to a review. McDonough v. Blossom, 109 Me. 141, 83 A 323. (2) And where the accidental failure to enter in the appellate court, exceptions taken upon the trial, results in an affirmance of a judgment against a party he may be granted a review. Bowditch Mut. F. Ins. Co. v. Winslow, 3 Gray (Mass.) 415.

[c] **Where it distinctly appears** that a trial has not been had by reason of accident, mistake, or misfortune, the court will generally grant a review without inquiring into the merits, if satisfied that a matter of controversy actually exists which the party claiming the review desires and intends to try. Nashua, etc., R. Co. v. Stimpson, 35 N. H. 286.

[88] **Exercise of discretion in interest of justice generally** see infra § 35.

[89] Pierce v. Bent, 67 Me. 404; Weld v. Sabin, 20 N. H. 533, 51 AmD 240.

[a] **Where a judgment by default** is rendered against a party through accident or misfortune a review will not be granted where it does not appear that he had any defense or that anything could be gained in the promotion of justice by granting the review. Weld v. Sabin, 20 N. H. 533, 51 AmD 240.

[90] Pierce v. Bent, 67 Me. 404, 408.

"It is the failure of justice actually experienced in the case sought to be reviewed, and not future conjectural inconvenience or loss in another case, that the statute contemplates." Pierce v. Bent, supra.

[91] Woodworth v. Wilson, 50 N. H. 220.

[92] Woodworth v. Wilson, supra.

[93] Woodworth v. Wilson, supra.

[94] Woodworth v. Wilson, supra.

[95] Farnsworth v. Kimball, 112 Me. 238, 91 A 954 [quot Pickering v. Cassidy, 93 Me. 139, 44 A 683].

[96] Pickering v. Cassidy, supra.

[97] Pickering v. Cassidy, supra; Atkinson v. Connor, 56 Me. 546; Clark v. Brigham, 22 Pick. (Mass.) 81.

[a] **Judgment erroneous because of imperfect and scanty data furnished by the parties.**—Pickering v. Cassidy, 93 Me. 139, 44 A 683.

[b] **Where a party has reasonable cause to expect that a certain point will be controverted** and he might, by proper diligence, have obtained evidence to substantiate the point, he cannot have a review on the ground of surprise or mistake. Atkinson v. Connor, 56 Me. 546.

[c] **Where defendant neglected to procure evidence as to the amount of damages,** thinking that if a verdict should be found against him the damages would be the subject of a future inquiry, he is not entitled to a review. Clark v. Brigham, 22 Pick. (Mass.) 81.

[98] Farnsworth v. Kimball, 112 Me. 238, 91 A 954; Pickering v. Cassidy, 93 Me. 139, 44 A 683; Atkinson v. Connor, 56 Me. 546; Clark v. Brigham, 22 Pick. (Mass.) 81.

[99] Donnell v. Hodsdon, 102 Me. 420, 67 A 143; Crooker v. Randall, 53 Me. 355; Watson v. Wenz, 223 Mass. 341, 111 NE 856; Stillman v. Donovan, 170 Mass. 360, 49 NE 628; Sylvester v. Hubley, 157 Mass. 306, 32 NE 166.

[a] **Illustrations.**—(1) A default entered through negligence of applicant's attorney who, although notified of the assignment of the case for trial, did not notify applicant or appear to defend the action is not a ground of review. Donnell v. Hodsdon, 102 Me. 420, 67 A 143. (2) Absence of petitioner's counsel when referee's report was received in court is not a ground of review. Crooker v. Randall, 53 Me. 355. (3) Failure of counsel to except to alleged erroneous rulings and instructions of trial court does not constitute a ground of review. Stillman v. Donovan, 170 Mass. 360, 49 NE 628. (4) Attorney's negligent failure to use testimony from another trial does not provide a ground of review. Watson v. Wenz, 223 Mass. 341, 111 NE 856.

[b] **While recognizing the general rule** that a review should not be granted where the only cause of complaint grows out of the negligence or misconduct of petitioner's attorney, there has been a reluctance to lay down an absolute rule that in no case would a review be granted on this ground, since cases might arise where such a rule would work great injustice. Sylvester v. Hubley, 157 Mass. 306, 32 NE 166.

[1] Starbird v. Eaton, 42 Me. 569; Wilbur v. Dyer, 39 Me. 169; Ilsley v. Knight, 1 Mass. 467.

[a] **Amount due on note.**—Ilsley v. Knight, 1 Mass. 467.

[b] **Interest on a judgment.**—Starbird v. Eaton, 42 Me. 569.

[c] **Mistake in computing the area of land** in a partition proceeding (1) is ground for review under Rev. St. c 123 (Wilbur v. Dyer, 39 Me. 169 [dist Sturdivant v. Greeley, 4 Me. 534]), (2) although under St. (1821) c 57 § 4 it was held not to justify a review (Sturdivant v. Greeley, 4 Me. 534).

[2] Shurtleff v. Thompson, 63 Me. 118; Sylvester v. Hubley, 157 Mass. 306, 32 NE 166; Thayer v. Goddard, 19 Pick. (Mass.) 60; Woodworth v. Wilson, 50 N. H. 220; New England Mut. F. Ins. Co. v. Lisbon Mfg. Co., 22 N. H. 170; Riley v. Emerson, 5 N. H. 531.

[a] **Illustrations.**—(1) Defendant was entitled to a review to plead his discharge in bankruptcy, where his counsel failed to appear for him in defense, through a mistaken belief that counsel employed by another defendant also represented defendant and would protect his interests. Shurtleff v. Thompson, 63 Me. 118. (2) Where it appeared that there might have been a misunderstanding between petitioner and his attorney, not wholly imputable to negligence on the part of either of them, a review is authorized. Sylvester v. Hubley, 157 Mass. 306, 32 NE 166. (3) Mistake of an attorney in not entering an appearance, when the mistake was due to accident and not to carelessness or inattention is good ground for review. Thayer v. Goddard, 19 Pick. (Mass.) 60. (4) A petition for review was granted a nonresident on the ground of accident and mistake, in that a miscarriage of letters between his attorneys prevented a seasonable application for a new trial or appeal. Woodworth v. Wilson, 50 N. H. 220. (5) Where the attorney failed to enter an appearance through a mistake as to the date of the session of court review may be granted. New England Mut. F. Ins. Co. v. Lisbon Mfg. Co., 22 N. H. 170.

[3] Booth Bros., etc., Granite Co. v. Smith, 115 Me. 89, 97 A 826; Farnsworth v. Kimball, 112 Me. 238, 91 A 954; Pickering v. Cassidy, 93 Me. 139, 44 A 683; Heath v. Marshall, 46 N. H. 40.

[a] **Erroneous decisions** of a court are a cause for review (1) only when based on a mistaken assumption that something is true which the record shows is not (Booth Bros., etc., Granite Co. v. Smith, 115 Me. 89, 97 A 826), (2) or where the court has

mere mistakes of opinion or judgment[4] where no data were accidentally overlooked[5] are not grounds of review. Although a mistake made without want of due diligence[6] may be sufficient ground for review, a review will not be allowed where the petitioner had knowledge of[7] or access to[8] facts which could have cured the mistake,[9] or where he could have avoided its consequences by ordinary diligence.[10]

Person guilty of mistake. A review may be granted because of the mistakes of parties[11] or of their attorneys[12] as well as for the mistakes of the court,[13] clerk of court,[14] or of the commissioners in a partition proceeding.[15]

[§ 13] **5. Conduct or Testimony of Witness.** While a review will not be granted simply to discredit a witness who testified at the trial,[16] it is sufficient ground for granting a review where a witness who has testified to material facts adverse to petitioner upon the first trial subsequently discovers that through mistake he testified incorrectly,[17] or where such witness is subsequently convicted of perjury in regard to such testimony.[18]

[§ 14] **6. Qualification or Conduct of Juror.** It is not sufficient ground for granting a review that a member of the jury in the original action had expressed a general opinion in regard to the case before the trial, if he had formed no judgment of the merits and stood indifferent between the parties,[19] or that a juror was hostile to petitioner, if this fact was known at the time of the trial and no objection was made on this ground;[20] but a review will be granted on account of the interest of a juror, which was not known to petitioner until after a verdict against him and adjournment of the court.[21]

[§ 15] **7. Discretionary Matters.** A review will not ordinarily be granted because of matters within the discretion of the trial court,[22] such as the refusal of a continuance or postponement,[23] or the denial of a new trial,[24] or ordering a case for trial out of its regular order on the docket,[25] unless some misapprehension, corruption, or incompetency on the part of the trial court is clearly shown;[26] but if a party is seriously injured by any ruling of the trial court as to matters within its discretion, a petition for review is the proper remedy.[27]

[§ 16] **8. Miscellaneous.** A review may be granted to enable defendant to set up a discharge in bankruptcy by way of defense;[28] but a review will not be granted merely because the original action was brought in petitioner's name without his authority,[29] or for the sole purpose of striking out the name of the original plaintiff and substituting that of another party.[30] A review will not be granted to permit a party to supply an omission in the original action,[31] or to cure his own negligence in the original action.[32]

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palpably failed to consider facts that have been proved (Booth Bros., etc., Granite Co. v. Smith, supra).

[4] Booth Bros., etc., Granite Co. v. Smith, supra; Farnsworth v. Kimball, 112 Me. 238, 91 A 954; Pickering v. Cassidy, 93 Me. 139, 44 A 683; Heath v. Marshall, 46 N. H. 40; Johnson v. Atlantic, etc., R. Co., 43 N. H. 410.

[a] **Illustrations.**—(1) "If a party was erroneously of the opinion that a particular piece of evidence was valueless, and so omitted to produce it, such a mistake does not entitle him to a new trial." Pickering v. Cassidy, 93 Me. 139, 147, 44 A 683. (2) An error in the judgment of the court in refusing to add interest from the time of verdict to judgment is not ground for review. Johnson v. Atlantic, etc., R. Co., 43 N. H. 410. (3) An attorney's error of judgment as to some point involved in the proceedings is not a ground of review. Heath v. Marshall, 46 N. H. 40.

[5] Pickering v. Cassidy, 93 Me. 139, 44 A 683.

[6] Stockbridge v. West Stockbridge, 13 Mass. 302.

[a] **Error in statement of case.**—Stockbridge v. West Stockbridge, 13 Mass. 302.

[7] Ryder v. Phœnix Ins. Co., 101 Mass. 548.

[a] **Error in agreed statement of facts.**—Ryder v. Phœnix Ins. Co., 101 Mass. 548.

[8] Brooks v. Belfast, etc., R. Co., 72 Me. 365.

[a] **It might be different if the party had been entrapped** or misled into making the fatal admission, without laches on his part, or had been prevented from ascertaining and procuring evidence of the real facts. Brooks v. Belfast, etc., R. Co., 72 Me. 365.

[9] Brooks v. Belfast, etc., R. Co., supra; Ryder v. Phœnix Ins. Co., 101 Mass. 548.

[10] Heath v. Marshall, 46 N. H. 40.

[11] Brooks v. Belfast, etc., R. Co., 72 Me. 365; Ryder v. Phœnix Ins. Co., 101 Mass. 548; Stockbridge v. West Stockbridge, 13 Mass. 302.

[12] Shurtleff v. Thompson, 63 Me. 118; Sylvester v. Hubley, 157 Mass. 306, 32 NE 166; Thayer v. Goddard, 19 Pick. (Mass.) 60; Woodworth v. Wilson, 50 N. H. 220; New England Mut. F. Ins. Co. v. Lisbon Mfg. Co., 22 N. H. 170; Riley v. Emerson, 5 N. H. 531.

[13] Starbird v. Eaton, 42 Me. 569.

[14] Ilsley v. Knight, 1 Mass. 467.

[15] Wilbur v. Dyer, 39 Me. 169.

[16] Trask v. Unity, 74 Me. 208; Haskell v. Becket, 3 Me. 92.

[17] Warren v. Hope, 6 Me. 479.

[18] Sturtevant v. Randall, 49 Me. 446; Morrell v. Kimball, 1 Me. 322.

[a] **Where the petitioner himself had summoned the witness.**—Morrell v. Kimball, 1 Me. 322.

[a] **A person is entitled to review as a matter of right** under St. (1859) c 94 upon proof: (1) That, upon the original trial, a witness testified falsely against petitioner to material facts. Sturtevant v. Randall, 49 Me. 446. (2) That he was taken by surprise, so that he was unable then to produce evidence that it was false. Sturtevant v. Randall, supra. (3) That such witness has been convicted of perjury in such testimony, or that petitioner has discovered sufficient proof of its falsity in the opinion of the court. Sturtevant v. Randall, supra.

[19] Haskell v. Becket, 3 Me. 92.

[20] Haskell v. Becket, supra.

[a] **The objection not being taken** at the trial is waived. Haskell v. Becket, 3 Me. 92.

[21] Davis v. Allen, 11 Pick. (Mass.) 466, 22 AmD 386.

[22] Dearborn v. Mathes, 128 Mass. 194; Weeks v. Adamson, 106 Mass. 514; Converse v. Carter, 8 Allen (Mass.) 568.

[23] Weeks v. Adamson, 106 Mass. 514.

[24] Dearborn v. Mathes, 128 Mass. 194.

[25] Converse v. Carter, 8 Allen (Mass.) 568.

[26] Converse v. Carter, supra.

[27] Reynard v. Brecknell, 4 Pick. (Mass.) 302.

[28] Golden v. Blaskopf, 126 Mass. 523. But see Bush v. Hovey, 124 Mass. 217 (the court may refuse to grant a review to enable defendant to set up a discharge in bankruptcy where no substantial benefit would thereby enure to the petitioners).

[29] Fullam v. McKenny, 16 Gray (Mass.) 579.

[30] Skillings v. Massachusetts Ben. Assoc., 155 Mass. 581, 30 NE 367.

[31] Browne v. Fairhall, 218 Mass. 495, 106 NE 177.

[a] **To take advantage of the law of a foreign state.**—Browne v. Fairhall, 218 Mass. 495, 106 NE 177.

[32] Browne v. Fairhall, supra.

[a] **Reason for rule.**—"The petitioner, in other words, has had his day in court." Browne v. Fairhall, 218 Mass. 495, 497, 106 NE 177.

III. DECISIONS AND MATTERS REVIEWABLE

[§ 17] **A. In General.** The question as to what judgments, decrees, or decisions are reviewable depends upon the provisions of the statutes,[33] and a review can be granted only in cases coming within their application.[34] In this regard it is to be observed that there is a lack of uniformity not only between the statutes of the different jurisdictions,[35] but also between the successive statutes of the same jurisdiction.[36] Further the court, the decision of which may be reviewed, depends upon the provisions of the applicable statute.[37] Some statutes expressly exclude from the right of review cases where judgment has been twice rendered in favor of the same party.[38]

[§ 18] **B. Character of Action or Proceeding.** As a general rule, the right of review provided by statutes of the character under consideration, extends to any civil action[39] in which a judgment has been rendered[40] in a judicial tribunal[41] whether rendered upon a verdict,[42] upon a report of referees,[43] upon an agreement of the parties open to review,[44] or upon an agreed state of facts submitted to the court.[45] A review cannot be granted in a criminal case,[46] or any suit or proceeding in equity.[47]

A "civil action," as the term is employed in these statutes, is by some decisions restricted to an action begun by writ[48] and having the characteristics of a common-law action.[49] On the other hand it has been held that a review may be granted of an action commenced by petition,[50] or by trustee process.[51] It is no objection to a review that the pleadings in the action sought to be reviewed are not in the same form as in ordinary actions at law.[52]

Joinder of issue. For an action to be subject to review it may be necessary by specific statutory provision[53] that there be a joinder of issue in the original action[54] and a review may be granted where an issue has been joined followed by a default.[55]

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[33] See statutory provisions.

[34] Wells' Case, 2 Me. 322; Solomons v. Chesley, 57 N. H. 163.

[35] Solomons v. Chesley, supra.

[36] Gooding v. Baker, 60 Me. 52; Solomons v. Chesley, 57 N. H. 163.

[37] See cases infra this note.

[a] **In Massachusetts.**—(1) Decisions either by the supreme judicial court or of court of common pleas are subject to a review (Bowditch Mut. F. Ins. Co. v. Winslow, 3 Gray 415), (2) as is also a judgment of a lower court, affirming a judgment of a justice of the peace, rendered on the complaint of the defendant in review (Anderson v. Brown, 10 Gray 92).

[b] **In New Hampshire.**—A review may be had of a cause appealed to the supreme court from the judgment of a police court. Moulton v. Fellows, 51 N. H. 421 (under Gen. St. c 215, § 1, which makes no distinction between actions which are in the supreme court by appeal from a justice of the peace, or police court, and those originally there).

[38] See statutory provisions; and case infra this note.

[a] **Where defendant filed a plea in offset** to plaintiff's demand, but at the first trial submitted no proof thereof, and plaintiff recovered a judgment for his whole claim, and defendant then, by leave of court, filed an additional plea in offset, founded upon the same subject-matter, and at a subsequent term introduced evidence and so far sustained his offset that plaintiff recovered judgment for but a part of his claim, plaintiff is not entitled to a review, judgment having been rendered for him twice in the same cause. Chesman v. Lane, 17 Vt. 88.

[39] Gooding v. Baker, 60 Me. 52; Nantasket Beach R. Co. v. Ransom, 147 Mass. 240, 17 NE 640; Bowditch Mut. F. Ins. Co. v. Winslow, 3 Gray (Mass.) 415; Sheafe v. Sheafe, 29 N. H. 269; Nichols v. Nichols, 28 Vt. 228, 67 AmD 699; Allen v. Taylor, 26 Vt. 599.

[40] Nantasket Beach R. Co. v. Ransom, 147 Mass. 240, 17 NE 640 (construing Pub. St. c 187 §§ 16, 22, authorizing writs of review, and holding that a judgment of the superior court, upon the verdict of a jury, assessing damages upon the petition of one whose land has been taken for a railroad, is a judgment in a "civil action" within the meaning of the above statute).

[41] Gooding v. Baker, 60 Me. 52.

[a] **A judgment rendered in the superior court,** upon a report of referees, is included in the rule. Gooding v. Baker, 60 Me. 52.

Necessity that decision be that of judicial tribunal in appeal and error generally see Appeal and Error § 129.

[42] Gooding v. Baker, 60 Me. 52.

[a] **In Massachusetts** (1) in some early cases it was held that a review was authorized only where judgment in the original action was rendered upon a verdict (Perry v. Goodwin, 6 Mass. 498), (2) but later cases have held that review is not limited to cases where judgment has been rendered on a verdict (Hubon v. Bousley, 123 Mass. 368; Bowditch Mut. F. Ins. Co. v. Winslow, 3 Gray 415; Stockbridge v. West Stockbridge, 13 Mass. 302).

[43] Gooding v. Baker, 60 Me. 52.

[44] Messer v. Smyth, 60 N. H. 436; Solomons v. Chesley, 57 N. H. 163; Coburn v. Rogers, 32 N. H. 372 (prior to statute specifically allowing review where there is an agreement subject to review).

[45] Stockbridge v. West Stockbridge, 13 Mass. 302.

"Nor do we perceive any reason against such an application as the present which does not equally apply to a judgment rendered upon a verdict." Stockbridge v. West Stockbridge, supra.

[46] Wells' Case, 2 Me. 322.

[47] Brooks v. Howard, 55 N. H. 69.

[a] **"The word judgment** [in statutes authorizing review in actions in which judgment has been rendered] seems to import a judgment at law [rather than] a final decision of a court of equity which is commonly spoken of as the more specific name of decree." Brooks v. Howard, 55 N. H. 69, 70.

[48] Sheafe v. Sheafe, 29 N. H. 269; Nichols v. Nichols, 28 Vt. 228, 67 AmD 699.

[a] **In Massachusetts.**—(1) In some of the earlier cases it was held that a review was authorized only where the original action was commenced by writ. Borden v. Brown, 7 Mass. 93; Dickenson v. Davis, 4 Mass. 520. (2) But in a later case the statements of the earlier cases were said to be dicta, and it was held that the decisive question is whether the proceeding is in substance a civil action, and not the form of the process. Nantasket Beach R. Co. v. Ransom, 147 Mass. 240, 17 NE 640.

[b] **Petition relating to divorce or alimony.**—Sheafe v. Sheafe, 29 N. H. 269.

[49] Sheafe v. Sheafe, supra.

[a] **Another statement of rule.**—"The statute has reference only to those suits or actions, which are commenced and prosecuted according to the course of the common law." Nichols v. Nichols, 28 Vt. 228, 233, 67 AmD 699.

[b] **Petition for partition** being a statutory proceeding cannot be reviewed. Nichols v. Nichols, 28 Vt. 228, 67 AmD 699.

[50] Nantasket Beach R. Co. v. Ransom, 147 Mass. 240, 17 NE 640. See Hubon v. Bousley, 123 Mass. 368 (holding that a review will lie of a judgment rendered on a petition, inserted in a writ of summons, to enforce a mechanic's lien).

[a] **In Maine.**—(1) Under an early statute the court, while denying the application for review upon other grounds, expressed a doubt as to whether a petition for partition was a "civil action" within the application of the statute (Sturtivant v. Greeley, 4 Me. 534), (2) but Revision (1840) c 123 expressly included petitions for partition (Gooding v. Baker, 60 Me. 52).

[51] Allen v. Seaver, 38 Vt. 673.

[a] **There is no right of review** (1) of a judgment that defendant, trustee in trustee process, has assets of an absconding debtor (Huntington v. Bishop, 5 Vt. 186), (2) nor is there any right of review of a judgment on a plea that the person, as whose trustee defendant is sued, is not an absconding or concealed debtor (Emerson v. Paine, 9 Vt. 271).

[52] Hubon v. Bousley, 123 Mass. 368.

[53] See statutory provisions.

[54] Solomons v. Chesley, 57 N. H. 163.

[a] **What constitutes joinder of issue.**—(1) By "issue joined" is meant an issue of fact reached by the parties as distinguished from cases where defendant does not plead or appear

[§ 19] **C. Character of Decision.** Decisions which under these statutes have been held reviewable include, among others,[56] a judgment on a bond given by a deputy to the sheriff,[57] a judgment rendered on a scire facias against bail,[58] a judgment against a trustee,[59] a judgment rendered on a writ of scire facias,[60] and a judgment by default.[61] On the other hand, it has been held that no review can be granted from a judgment or decree which by statute is final and conclusive,[62] of a judgment on a writ of error,[63] or of a decree granting[64] or refusing[65] a divorce, or of a decree of a judge of probate,[66] or of a report of a referee.[67]

[§ 20] **D. Matters Not before Court, and Incidental Matters.** A review cannot be granted as to a matter not before the court at the original trial and as to which no adjudication or decree was made.[68] The statutes authorizing the review of an action apply only to the cause itself and not to a separate issue, adjunct or incident of such cause,[69] such as a declaration for betterments,[70] or, a plea in offset in an action of book account.[71]

IV. JURISDICTION AND PROCEEDINGS

[§ 21] **A. Jurisdiction.** The jurisdiction of particular courts with regard to proceedings for review is, as a rule, specifically established by the statutes affording the remedy.[72] An appellate court will not grant a writ of review upon a petition over which an inferior court has jurisdiction.[73] But the denial by an inferior court of a motion for a new trial does not deprive the appellate court of its jurisdiction to grant a writ of review.[74] A court may acquire jurisdiction of the subject matter, and person by a petition for review,[75] or by the suing out of a writ as of right,[76] and having once acquired such jurisdiction the court retains it until a final judgment is rendered.[77] An objection that a court lacked jurisdiction to grant a review may be made at the trial on review.[78]

[§ 22] **B. Proceedings To Procure Review—1. In General.** Where a review is a matter of right[79] the writ may be sued out without application to the court for leave to do so,[80] and the writ will not be granted upon petition;[81] but where review is not a matter of right the party aggrieved must first apply to the court, by petition, praying for leave to sue out a

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and thus no issue is raised (Solomons v. Chesley, 57 N. H. 163) (2) and it is sufficient where defendant pleads the general issue, although plaintiff does not file a similiter (Solomons v. Chesley, supra), (3) or where a party appears in opposition to the claim and agrees to a judgment, although no plea is filed or issue formally joined (Messer v. Smyth, 60 N. H. 436).

[55] Solomons v. Chesley, 57 N. H. 163.

[56] See cases supra § 18.

[57] Page v. Barney, Brayt. (Vt.) 23.

[58] Safford v. Knight, 117 Mass. 281; Thayer v. Goddard, 19 Pick. (Mass.) 60.

[59] Brigham v. Elliot, 12 Pick. (Mass.) 172 (where it appeared that a trustee has been charged by accident or mistake, when he ought to have been discharged); Ex p. Packard, 10 Mass. 426 (where the judgment against the trustee was by default on a scire facias).

[60] Aldrich v. Williams, 10 Vt. 295.

[a] **The writ of scire facias is subject to review** under the statute of 1824 because it is not like the common and ordinary writs, to carry into effect a former judgment, but it is in the nature of an original action. Aldrich v. Williams, 10 Vt. 295.

[61] James v. Townsend, 104 Mass. 367.

[a] **In New Hampshire.**—(1) Under the earlier statutes it was held that no review could be granted where judgment in the original action was rendered by default. Smith v. Gilman, 3 N. H. 501. (2) But under later statutes a review may be granted where judgment was by default. Solomons v. Chesley, 57 N. H. 163 [dist Smith v. Gilman, supra (which was decided under a statute authorizing reviews of "actions tried," while the later statutes authorize reviews of actions where "issue has been joined and judgment rendered")].

[62] Smith v. McDaniel, 15 N. H. 474.

[63] Enos v. Boardman, 2 Tyler (Vt.) 271.

[64] Lucas v. Lucas, 3 Gray (Mass.) 136.

[65] Lucas v. Lucas, supra.

[66] Barnes v. Abbott, 55 N. H. 147.

[a] **Decree approving will.**—Barnes v. Abbott, 55 N. H. 147.

[67] Stone v. Davis, 14 Mass. 360.

[a] **Illustration.**—Upon a report of referees where the party found to be indebted has paid the sum awarded, and the report with the acknowledgment of satisfaction has been returned and recorded no review will be granted. Stone v. Davis, 14 Mass. 360.

[b] **Reason for rule.**—"Were we to grant . . . a review we are not able to conceive by what course of proceedings we could set aside the award of the referees." Stone v. Davis, 14 Mass. 360.

[68] Henderson v. Henderson, 64 Me. 419.

[a] **Reason for rule.**—"The statute provides for a review of that which does exist, and which was obtained 'through fraud, accident, mistake or misfortune,' and not that which never has been obtained by any means." Henderson v. Henderson, 64 Me. 419, 420.

[b] **Where a husband obtains a judgment of divorce,** the wife cannot review such judgment as to alimony and dower alone, where the judgment contains no mention of dower or alimony, and no decree was made as to either. Henderson v. Henderson, 64 Me. 419.

[69] Allen v. Taylor, 26 Vt. 599; Hall v. Hall, 24 Vt. 637.

[70] Allen v. Taylor, 26 Vt. 599; Gage v. Ladd, 6 Vt. 174.

[71] Hall v. Hall, 24 Vt. 637.

[72] See statutory provisions; cases infra this note; and notes 73, 74.

[a] **In Massachusetts.**—The supreme judicial court may grant a review of its own judgment, affirming the judgment of the court below, to which exceptions were taken and accidently omitted in the supreme court, on being satisfied that the exceptions affect the substantial merits of the case. Bowditch Mut. F. Ins. Co. v. Winslow, 3 Gray 415 (construing Rev. St. c 99 § 19, and holding that the statute seems designed to reach every case, whether it could be foreseen or not, with no other limitation than that the court should think it, under all the circumstances, reasonable).

[73] Merrill v. Crocket, 6 Me. 412.

[a] **The supreme court,** in the exercise of its general power to grant reviews in all cases, will not sustain an application for the review of an action in a justice's court, where the party aggrieved may have redress in the court of common pleas. Merrill v. Crocket, 6 Me. 412.

[74] Stillman v. Whittemore, 165 Mass. 234, 42 NE 1126.

[75] Bodurtha v. Goodrich, 3 Gray (Mass.) 508; Davenport v. Holland, 2 Cush. (Mass.) 1.

[76] Bodurtha v. Goodrich, 3 Gray (Mass.) 508.

[77] Davenport v. Holland, 2 Cush. (Mass.) 1.

[78] See infra § 54.

[79] See supra § 3.

[80] Jackson v. Gould, 72 Me. 335.

[81] Byrnes v. Piper, 5 Mass. 363; Smith v. Cole, 18 N. H. 280.

writ of review.[82] This application for a review is not in itself a review of the action named[83] but is in effect a motion for a new trial after judgment.[84]

[§ 23] **2. Parties.**[85] An application or petition for a review should be in the name of the party or parties who actually appear on the record as plaintiff or defendant,[86] or in the names of their representatives.[87] Whether the court may permit the substitution of a proper party by amendment depends upon statutes providing therefor.[88] Upon indemnifying the nominal party of record against costs, a writ of review in his name may be sued out by the real party in interest, where the original action is brought by or against a nominal party.[89]

[§ 24] **3. Notice.** Where notice is required by statute[90] no review should be granted until due notice of the application for review has been given to the adverse party.[91] While the court is not obliged to quash a writ of review for want of notice,[92] and may subsequently hear the parties upon the merits of the application[93] a rule to show cause, why such writ should not be quashed, should ordinarily be granted upon affidavit of the adverse party that he had no notice.[94] Under statutes prescribing no particular mode of notice[95] or the term to which it shall be made returnable,[96] if the parties interested have substantial notice of the application, it is sufficient.

[§ 25] **4. Time.** Generally, the time within which an application for a review may be made, is specified by statute.[97] Under some statutes a petition for review must be brought within a certain period after the rendition of the judgment complained of,[98] or after notice of such judgment if it was rendered in the absence of petitioner and without his knowledge.[99] The period of the limitation has been held under some statutes to be computed from the term of which the judgment was entitled,[1] under others from the time of the actual judgment[2] but excluding the day on which judgment was rendered.[3]

Laches. Review will not be granted to a party who is guilty of laches.[4]

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82. Bradstreet v. Partridge, 59 Me. 155.

Petition for writ see infra § 32.

83. Bradstreet v. Partridge, 59 Me. 155; Green v. French, 1 Allen (Mass.) 265.

"The petition for review and the review itself if granted are two separate and independent proceedings." Green v. French, supra.

84. Browne v. Fairhall, 218 Mass. 495, 106 NE 177.

[a] **A petition for a review** "is in effect a motion for a new trial after judgment." Browne v. Fairhall, 218 Mass. 495, 106 NE 177.

85. Persons entitled to writ see supra § 5.

86. Elwell v. Sylvester, 27 Me. 536; Fling v. Trafton, 13 Me. 295; Skillings v. Massachusetts Ben. Assoc., 155 Mass. 581, 30 NE 367; Carrique v. Bristol Print Works, 8 Metc. (Mass.) 444.

[a] **Parties to the original judgment.**—Skillings v. Massachusetts Ben. Assoc., 155 Mass. 581, 30 NE 367; Winch v. Hosmer, 122 Mass. 438.

[b] **Where the name of one of two defendants is stricken out** on motion of plaintiff's attorney, by leave of court and with the consent of the other defendant, a writ of review must be sued out in the name of defendant of record alone, and a motion made by the original plaintiff, at the trial of the review, to restore the name stricken out, will not be allowed. Fling v. Trafton, 13 Me. 295.

87. Elwell v. Sylvester, 27 Me. 536; Skillings v. Massachusetts Ben. Assoc., 155 Mass. 581, 30 NE 367; Winch v. Hosmer, 122 Mass. 438.

[a] **A petitioner who would hold in his own right** the money recovered and not for the benefit of the original party of record cannot maintain a petition for review in his own name. Skillings v. Massachusetts Ben. Assoc., 155 Mass. 581, 30 NE 367.

[b] **Under Gen. St.** c 146 §§ 30-38 (now Gen. St. [1921] c 250 § 2), a writ of review, like a writ of error, must be in the name of the party to the original judgment or in the name of those who have by law succeeded to his rights by death or bankruptcy. Skillings v. Massachusetts Ben. Assoc., 155 Mass. 581, 30 NE 367; Winch v. Hosmer, 122 Mass. 438.

88. See statutory provisions.

[a] **In Massachusetts.**—Gen. St. c 129 §§ 41, 82, authorizing amendments in any civil suit permit the substitution of a new party and are applicable to petitions for review. Winch v. Hosmer, 122 Mass. 438.

[b] **In Maine.**—Rev. St. c 123 § 1, and c 124, by failing to provide for the introduction of new parties, has been held not to authorize the substitution of the name of one not a party in the original proceedings. Elwell v. Sylvester, 27 Me. 536.

89. Winch v. Hosmer, 122 Mass. 438; Fuller v. Storer, 111 Mass. 281.

90. See statutory provisions.

91. Collby v. Dennis, 36 Me. 9; Clap v. Joslyn, 1 Mass. 129.

92. Clap v. Joslyn, supra.

93. Clap v. Joslyn, supra.

94. Clap v. Joslyn, supra.

95. Colby v. Dennis, 36 Me. 9; Ferrill v. Simpson, 8 Pick. (Mass.) 359.

[a] **Where a nominal party's attorney** of record received notice and the real parties in interest were present, such notice is sufficient. Ferrill v. Simpson, 8 Pick. (Mass.) 359.

96. Colby v. Dennis, 36 Me. 9.

[a] **A notice allowing such time** as the law prescribes for notice in other cases and returnable where respondent may be heard is all that is required. Colby v. Dennis, 36 Me. 9.

Notice generally see Notice 46 C. J. p 534.

97. See statutory provisions.

[a] **Statute of 1852** authorized writs of review on judgments against certified bankrupts without regard to the time when the judgments were rendered. Colby v. Dennis, 36 Me. 9.

[b] **A statute** limiting the time within which a review may be granted applies to nonresident defendants as well as residents temporarily absent. Jackson v. Gould, 72 Me. 335.

98. Jackson v. Gould, supra (within one year after judgment when brought as a matter of right); Leighton v. Lithgow, 2 Me. 114 (within three years); Manning v. Nettleton, 140 Mass. 421, 4 NE 802; Matthewson v. Moulton, 135 Mass. 122 (within one year after rendition of judgment unless rendered in absence of and without knowledge of petitioner); Hobbs v. Whidden, 27 N. H. 386 (three years); Howard v. Hunt, 17 N. H. 449 (one year); French v. Wilkins, 17 Vt. 341 (three years).

99. Riley v. Hale, 146 Mass. 465, 16 NE 276; Smith v. Brown, 136 Mass. 416; Matthewson v. Moulton, 135 Mass. 122; James v. Townsend, 104 Mass. 367.

[a] **"It was the intention of the legislature** to authorize any party to file his petition for review within one year after notice of a judgment against him whenever by any means and for any cause there was in fact no service of process upon him and no notice of the pendency of the suit, so that he was deprived of the opportunity to appear and defend his rights in the original action." James v. Townsend, 104 Mass. 367, 372 [quot Matthewson v. Moulton, 135 Mass. 122, 124].

[b] **Absence.**—(1) The term "absence" in such a statute does not necessarily mean out of the state (James v. Townsend, 104 Mass. 367), (2) and if defendant has notice of the suit by service of process upon him, he is constructively and by legal intendment present in court, and a judgment upon his default is not rendered in his absence within the meaning of the statute (Riley v. Hale, 146 Mass. 465, 16 NE 276; Smith v. Brown, 136 Mass. 416; Matthewson v. Moulton, 135 Mass. 122).

1. Leighton v. Lithgow, 2 Me. 114; New Hampshire Strafford Bank v. Cornell, 2 N. H. 324.

[a] **Where judgment is rendered in one county as of a prior term** in another county, a writ of review must be brought within one year from the last day of such prior term. New Hampshire Strafford Bank v. Cornell, 2 N. H. 324.

2. French v. Wilkins, 17 Vt. 341.

3. French v. Wilkins, supra.

4. Welch v. Chase, 213 Mass. 519, 100 NE 634; Bowditch Mut. F. Ins. Co. v. Winslow, 3 Gray (Mass.) 415.

[a] **Delay in filing exceptions** may constitute laches justifying the refusal of a writ of review. Welch v. Chase, 213 Mass. 519, 100 NE 634.

[b] **Failure of a party to obtain**

[§ 26] **5. Bond or Other Security[5]—a. Necessity, Form, and Contents.** In the absence of statutory requirements,[6] no bond or other security is ordinarily taken or can be required of either party to an application for a review[7] unless a supersedeas or stay of execution is asked.[8] But since the review does not of itself operate as a supersedeas or stay of execution,[9] and sometimes because of express statutory requirements,[10] a bond must be given if a supersedeas or stay is desired.[11]

Form and contents. While the statutes sometimes provide the form and conditions of whatever bonds are to be given,[12] a bond is not vitiated because it is not drawn in strict conformity to the statute,[13] or because it omits certain conditions prescribed by the court if it is still a good bond under the requirements of the statute.[14]

[§ 27] **b. Performance or Breach of Condition.** Rules governing the performance or breach of the conditions of bonds generally[15] apply to bonds given on a petition for review.[16] What will constitute a breach of the petitioner's bond so as to authorize an action thereon necessarily depends upon the terms of its conditions,[17] which are to be strictly construed.[18] There is a breach of condition where the petitioner is nonsuited[19] or where the petition is denied,[20] and while a breach of condition may be caused by the dismissal of the petition,[21] this is not necessarily so.[22]

[§ 28] **c. Effect of Giving Bond.** Proceedings for review, where a bond is given to stay execution, must be promptly brought.[23]

[§ 29] **d. Discharge.** A review bond is discharged by the payment of the original judgment

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the judgment of the court on the merits of his case whether those merits depended mainly on contested facts or controverted principles of law constitutes laches. Bowditch Mut. F. Ins. Co. v. Winslow, 3 Gray (Mass.) 415.

[5] **Order of court requiring bond and grant of supersedeas or stay thereon** see infra § 35.

[6] See statutory provisions.

[7] Bacon v. Otis, 11 Mass. 407; Bell v. Bartlett, 7 N. H. 178.

[a] **Bond limited to original action.**—A bond given by a party in the original action as security for the payment of such costs and damages as might be recovered is discharged by the rendition of judgment in his favor in that action, and does not cover any judgment that may be recovered against him on review. Bell v. Bartlett, 7 N. H. 178.

[8] Crehore v. Pike, 47 Me. 435; Bacon v. Otis, 11 Mass. 407.

[9] See infra § 38.

Discretion of court as to grant of writ see infra § 35.

[10] See statutory provisions.

[11] Crehore v. Pike, 47 Me. 435; Nowell v. Sanborn, 44 Me. 80; Randall v. Bancroft, 10 Allen (Mass.) 346; Bacon v. Otis, 11 Mass. 407.

[12] See statutory provisions.

[13] Green v. French, 1 Allen (Mass.) 265; Bingham v. Pepoon, 9 Mass. 239.

[14] Leavitt v. Lyons, 118 Mass. 470.

[a] **Imposing additional conditions.**—(1) Under some early statutes (Rev. St. c 99 § 22) the court was authorized to impose such terms and conditions in addition to those prescribed by the statute as it might think just and reasonable. Lehan v. Good, 8 Cush. (Mass.) 302. (2) But under a later statute (Gen. St. c 146 § 38) the court cannot impose additional conditions. Leavitt v. Lyons, 118 Mass. 470.

[15] See Bonds §§ 111-136.

[16] See cases infra this section.

[17] Crehore v. Pike, 47 Me. 435; Green v. French, 1 Allen (Mass.) 265.

[a] **Original judgment affirmed as to one of two defendants.**—Where defendants gave a bond with sureties to prosecute a review to final judgment, and to "pay such judgment as may be recovered against them," and on review plaintiff in the original action discontinued as to one of defendants and recovered judgment against the other, which was not paid, it was held that the sureties on the bond were liable for the amount of the judgment. Happenny v. Trayner, 111 Mass. 279.

[b] **Failure to enter review at term specified.**—On a bond conditioned to procure a writ of review by causing the same to be entered at the next term of court, and the petitioner is not able before the expiration of the term mentioned in the bond to procure service of the writ, alters it so as to make it returnable at the next ensuing term, and serves and enters it at that term, the condition of the bond is broken by the failure to enter the writ at the term specified, and his inability to get service of the writ is no defense to an action on the bond. Lehan v. Good, 8 Cush. (Mass.) 302.

[c] **Condition to pay intervening damages and additional costs.**—(1) Where a bond on review is conditioned to pay "all intervening damages occasioned to the adverse party by delay, with additional costs in case judgment be affirmed," a mere affirmance of the judgment gives no right of action on the bond, unless it appear that intervening damages have been sustained or additional costs recovered. Brown v. Clark, 27 Vt. 576. (2) And the fact that judgment is rendered for a given sum in damages and for a given sum for costs is insufficient to create a liability on the bond unless it is shown that such costs were costs accruing after the review was entered. Brown v. Clark, 28 Vt. 690. (3) The extra expense in procuring witnesses and employing counsel and the time and money necessarily expended in defense of the suit are not "intervening damages" within the application of such condition. Peasely v. Buckminster, 1 Tyler (Vt.) 264. (4) If there have been additional costs but no intervening damages, only such costs can be recovered. Roberts v. Warner, 17 Vt. 46.

[18] Green v. French, 1 Allen (Mass.) 265.

[19] Hicks v. Atkins, 4 Mass. 103.

[20] Kenney v. Burke, 61 Me. 134.

[a] **An action on the bond** is maintainable after denial of the petition even though a new petition and a new bond have been filed and a stay of execution ordered. Kenney v. Burke, 61 Me. 134.

[21] Quinn v. Brennan, 148 Mass. 562, 20 NE 184; Randall v. Bancroft, 10 Allen (Mass.) 346.

[a] **Illustrations.**—(1) Where a bond is given by petitioner conditioned that he shall "forthwith prosecute a review of said action to final judgment, and satisfy such execution as may be issued against him on the review," and the petition is dismissed upon the hearing, it is a breach of the condition of the bond. Randall v. Bancroft, 10 Allen (Mass.) 346. (2) Where the bond is conditioned that plaintiff in review shall "forthwith prosecute a review to final judgment," and because of unreasonable delay in prosecuting the writ it is subsequently dismissed, there is a breach of the condition of the bond. Quinn v. Brennan, 148 Mass. 562, 20 NE 184.

[22] Roberts v. Pepper, 108 Mass. 356; Green v. French, 1 Allen (Mass.) 265.

[a] **Illustrations.**—(1) Where a bond is given conditioned that petitioner shall prosecute the petition to final judgment and pay costs and damages, and the petition is dismissed without costs, there is no breach of the condition. Roberts v. Pepper, 108 Mass. 356. (2) Where a bond is given providing for the payment of whatever shall be due to the obligee "upon the judgment aforesaid, after the final judgment in review," and the petition is dismissed, there is no breach of condition, the order of dismissal not being a final judgment in review. Green v. French, 1 Allen (Mass.) 265.

[23] Di Filippo v. Allen, 163 Mass. 528, 40 NE 856; Quinn v. Brennan, 148 Mass. 562, 20 NE 184.

[a] **A bond conditioned to "forthwith** prosecute a review to final judgment:" (1) Is satisfied by doing so within such time as the court having jurisdiction of the petition may order. Bamforth v. Raddin, 14 Allen (Mass.) 66. (2) But in the absence of such an order although the statutes do not set any time within which a writ of review must be brought, they impliedly require promptness. Di Filippo v. Allen, 163 Mass. 528, 40 NE 856 (delay of ten months is too long); Quinn v. Brennan, 148 Mass. 562, 20 NE 184 (delay of one year is too long).

[b] **Sickness is no excuse** for delay, and the fact that after his petition was granted plaintiff in proceedings for review was forced to leave the commonwealth on private business, and to remain absent for several months through illness, will not excuse a failure to prosecute a review to final judgment within a reasonable time. Di Filippo v. Allen, 163 Mass. 528, 40 NE 856.

together with the additional statutory costs and interest,[24] but it is not discharged by the death of the petitioner.[25]

[§ 30] **e. Actions.** Principles governing actions on bonds generally[26] are applicable to actions on bonds given on a petition for a review.[27] To authorize a recovery on the bond a breach of its conditions must be clearly shown.[28] An averment that defendant failed to prosecute his writ of review to final judgment is a sufficient allegation of a material breach of his bond.[29] It is not necessary to describe fully the writ of review[30] and to set out all the proceedings that were had thereon,[31] nor is it necessary to describe the original judgment where a copy of the bond is annexed to the pleading.[32] It is unnecessary to allege that demand has been made upon the principal debtor,[33] and since the action may be maintained without any prior issuance of execution against the principal debtor,[34] it is unnecessary to allege the issuance of execution.[35] A lack of particularity in unnecessary averments is immaterial.[36]

[§ 31] **f. Damages and Amount of Recovery.** While the extent of liability on a breach of the bond depends upon the terms of its conditions,[37] there may be in any event a recovery of nominal damages and costs.[38] A condition for the payment of interest does not include interest on the costs of the review,[39] and double interest, secured by a bond to review an action, is to be computed only to the time of the rendition of the judgment on review,[40] after which simple interest should be charged.[41] The court should render judgment[42] and award execution for only so much of the penal sum as is then due and payable in equity and good conscience for the breach of the condition.[43]

[§ 32] **6. Pleading.** The rules governing pleading in civil actions generally[44] are applicable to the pleadings on an application to procure a review.[45] The petition on an application for a review must state all the facts required by statute to be alleged,[46] and the petition must also, in order to apprise respondent as to what may be necessary in the arrangement of his defense,[47] set out the facts upon which the petitioner relies as a ground for the relief asked.[48] Facts sufficient to authorize the court to grant the petition must be alleged.[49] A separate petition is required for each action sought to be reviewed,[50] but where the same facts are common to several cases, the petitioner may obtain a review of one on discontinuance of the others.[51] The rules relating to pleas[52] and replications[53] in civil actions generally are applicable to pleas[54] and replications[55] on an application for review. Thus the petition may be met by plea or demurrer,[56] but a party cannot by plea deny the theory on which he and the court proceeded in the original action.[57] As in the case of pleading generally[58] the court may permit the pleadings in an application for review to be amended.[59] The amendment may be allowed after a bond has been filed[60] and supersedeas has been granted[61] or after the expiration of the time within which a new petition could be filed.[62]

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[24] Whittaker v. Berry, 64 Me. 236.

[25] Whittaker v. Berry, supra; Hoy v. Herrington, Brayt. (Vt.) 36.

[a] **Where the administrator appears** and judgment is rendered in favor of defendant in review the bond is not discharged. Whittaker v. Berry, 64 Me. 236; Hoy v. Herrington, Brayt. (Vt.) 36.

[26] See Bonds §§ 137-240.

[27] See cases infra this section.

[28] Ellis v. Pulsifer, 4 Allen (Mass.) 165.

[a] **Where the record of the proceedings** on the writ of review does not show that the former judgment was affirmed in full or in part, but only a judgment that defendant in review recover his costs of suit an action will not lie upon a bond conditioned to pay the sum for which judgment was rendered with interest and costs "in case the former judgment shall be affirmed in full or in part, and the sum for which judgment shall be rendered, if the said judgment shall be affirmed in part." Ellis v. Pulsifer, 4 Allen (Mass.) 165.

[29] Jagoe v. Robinson, 197 Mass. 416, 83 NE 1095.

Sufficiency of assignment of breach in actions on bonds generally see Bonds §§ 179-185.

[30] Jagoe v. Robinson, 197 Mass. 416, 83 NE 1095.

[31] Jagoe v. Robinson, supra.

[32] Jagoe v. Robinson, supra.

[33] Jagoe v. Robinson, supra.

[34] Smith v. Ingraham, 22 Vt. 414.

[35] Jagoe v. Robinson, 197 Mass. 416, 83 NE 1095.

[36] Jagoe v. Robinson, supra.

[37] Whittaker v. Berry, 64 Me. 236; Crehore v. Pike, 47 Me. 435; Roberts v. Warner, 17 Vt. 46.

[38] Brown v. Clark, 28 Vt. 690.

[a] **Illustration.**—If it appears that the original debt has been paid after the commencement of the suit but without the costs, plaintiff is entitled to recover nominal damages and costs. Brown v. Clark, 28 Vt. 690.

[39] Whittaker v. Berry, 64 Me. 236.

[40] Bacon v. Otis, 11 Mass. 407.

[41] Bacon v. Otis, supra.

[42] Jenkins v. New England Mar. Ins. Co., 6 Mass. 335.

[a] **Illustration.**—Where the jury on review affirmed the original judgment and added six per cent interest as damages such interest is regarded as equivalent to part payment on the petitioner's bond conditioned to pay twelve per cent interest on the affirmance. Jenkins v. New England Mar. Ins. Co., 6 Mass. 335.

[43] Quinn v. Brennan, 148 Mass. 562, 20 NE 184.

[a] **Illustration.**—Where there has been a breach of condition by failure promptly to prosecute the review after leave granted but plaintiff in review has satisfied the claim against him, execution is properly awarded for a merely nominal sum on the bond with costs. Quinn v. Brennan, 148 Mass. 562, 20 NE 184.

[b] **Plaintiff must prove** how much is thus due. Quinn v. Brennan, 148 Mass. 562, 20 NE 184.

[44] See Pleading 49 C. J. p 1.

[45] See cases infra this section.

[46] See statutory provisions.

[47] Thompson v. Hinds, 33 Me. 584.

[48] Berry v. Lisherness, 50 Me. 118; Thompson v. Hinds, 33 Me. 584; Davis v. Beebe, 5 Vt. 560.

[a] **Names of witnesses and evidence to be proved.**—(1) Under a statute so providing, the names of the witnesses to prove newly discovered evidence and to what each is expected to testify must be stated in the petition (Berry v. Lisherness, 50 Me. 118; Thompson v. Hinds, 33 Me. 584) (2) upon oath (Berry v. Lisherness, supra).

Grounds for review see supra §§ 8-16.

[49] Donnell v. Hodsdon, 102 Me. 420, 67 A 143; Berry v. Lisherness, 50 Me. 118; Thompson v. Hinds, 33 Me. 584.

[50] McDonough v. Blossom, 109 Me. 141, 83 A 323.

[51] McDonough v. Blossom, supra.

[a] **Illustration.**—Where two actions involving the same parties were brought on two promissory notes and the defense of forgery by a specified third person was set up in both actions the petitioning party was entitled to a review on one action after discontinuing as to the other. McDonough v. Blossom, 109 Me. 141, 83 A 323.

[52] See Pleading § 197 et seq.

[53] See Pleading § 392 et seq.

[54] See cases infra text and notes 56, 57.

[55] See cases infra this note.

[a] **A replication is bad** (1) where it contains a departure (Watson v. Joslyn, 29 Vt. 455), (2) repugnance (Watson v. Joslyn, supra), (3) introduces new parties (Watson v. Joslyn, supra), (4) or fails to traverse the plea (Watson v. Joslyn, supra).

[56] Davis v. Beebe, 5 Vt. 560.

[57] Davis v. Beebe, supra.

[a] **Thus,** where plaintiff in the original action, furnished security, and the court granted a continuance for notice, on the ground that defendant was out of the state and without notice, plaintiff cannot deny either fact by a plea in the application for review. Davis v. Beebe, 5 Vt. 560.

[§ 33] **7. Issues, Proof, and Variance.** In accordance with the rules in civil actions generally[63] on the hearing of an application for review ordinarily evidence must be submitted in support of the allegations of the petition,[64] and the petitioner will be confined to the facts alleged in the petition.[65] Where the petition must state what each witness is expected to prove[66] he will be confined to the matters set forth in the petition to be proved by him.[67]

[§ 34] **8. Evidence.** The petitioner has the burden of establishing his right to a review,[68] that he has not been guilty of laches,[69] that neither he[70] nor his attorney[71] have been negligent, and that the ground of review existed at the time the petition was filed.[72]

Admissibility. General rules as to the admissibility of evidence in civil actions generally[73] apply to the admissibility of evidence in hearings on an application for review.[74] Where respondent offers competent evidence in opposition to that offered by petitioner in support of his application, it is error for the court to exclude it.[75] Evidence may be admitted to contradict the return of an officer,[76] to prove that an appearance, shown by the record, was made by an attorney without petitioner's knowledge and authority,[77] or to show that the record is erroneous.[78] Petitioner will not be allowed to testify to facts known to him at the time of the trial and which the rules of evidence then in force precluded him from testifying to.[79] The affidavit of the petitioner is admissible to prove facts known only to himself,[80] but affidavits of other persons will not be received in evidence,[81] unless presented as regular depositions,[82] nor will the affidavit of petitioner be received as to facts not known exclusively to himself.[83] A juror may be examined generally in support of the verdict in the former action.[84]

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[58] See Pleading § 581 et seq.

[59] Haskell v. Hazard, 33 Me. 585; Davenport v. Holland, 2 Cush. (Mass.) 1; Watson v. Joslyn, 29 Vt. 455.

[a] **A newly discovered cause of review,** which existed at the time of filing the petition but was not then known to petitioner may be inserted by amendment. Davenport v. Holland, 2 Cush. (Mass.) 1.

[b] **The names of witnesses** who are to prove the facts alleged as ground of review may be inserted by amendment. Haskell v. Hazard, 33 Me. 585.

Introduction of new party by amendment see supra § 23.

[60] Haskell v. Hazard, 33 Me. 585.

[61] Haskell v. Hazard, supra.

[62] Davenport v. Holland, 2 Cush. (Mass.) 1.

[a] **Reason for rule.**—"It is often held to be a good reason for granting amendments on terms, instead of nonsuiting a party, and compelling him to bring a new action, that such action would be barred by the statute of limitations." Davenport v. Holland, 2 Cush. (Mass.) 1, 15 (per Shaw, C. J.).

[63] See Pleading §§ 1160, 1167.

[64] Willard v. Ward, 3 Mass. 24.

[a] **Effect of costs.**—(1) While the legal costs which respondent may tax in case petitioner fails of success are not a sufficient recompense for being compelled to appear and answer to a complaint which may be idle and vexatious (Willard v. Ward, 3 Mass. 24), (2) in a case of particular hardship and where petitioner stipulates to pay double costs, the court may make a rule to show cause without affidavits (Willard v. Ward, supra).

[65] Warren v. Hope, 6 Me. 479; Simmons v. Apthorp, 1 Mass. 99.

[a] **Thus,** on an application based upon the ground of newly discovered evidence, petitioner will not be permitted to offer testimony as to any newly discovered evidence other than that stated in the petition. Warren v. Hope, 6 Me. 479.

Time to object for variance see infra § 36 note 39 [b].

[66] See supra § 32 note 48 [a].

[67] Berry v. Lisherness, 50 Me. 118.

[68] McDonough v. Blossom, 109 Me. 141, 83 A 323; Taylor v. Morgan, 107 Me. 334, 78 A 377; Donnell v. Hodsdon, 102 Me. 420, 67 A 143; Richardson v. Lloyd, 99 Mass. 475.

[a] **Fraud, accident, mistake or misfortune** as a ground of review requires that petitioner show: (1) That justice has not been done. McDonough v. Blossom, 109 Me. 141, 83 A 323; Donnell v. Hodsdon, 102 Me. 420, 67 A 143. (2) That the consequent injustice was through fraud, accident, mistake or misfortune. McDonough v. Blossom, supra; Donnell v. Hodsdon, supra. (3) What a further hearing will be just and equitable. McDonough v. Blossom, supra; Donnell v. Hodsdon, supra.

[b] **Newly discovered evidence.**—Where newly discovered evidence is relied on as a ground of review, it must be established that such evidence is in fact new and that it is material. Richardson v. Lloyd, 99 Mass. 475.

Grounds for review see supra §§ 8-16.

[69] Bowditch Mut. F. Ins. Co. v. Winslow, 3 Gray (Mass.) 415.

[70] Taylor v. Morgan, 107 Me. 334, 78 A 377.

[71] Taylor v. Morgan, supra.

[72] Davenport v. Holland, 2 Cush. (Mass.) 1.

[a] **"The petitioner is bound, after amendment** as well as before, to prove a good cause existing at the time when his petition was filed." Davenport v. Holland, 2 Cush. (Mass.) 1, 15.

[73] See Evidence §§ 89-156.

[74] See infra text and notes 75-84.

[75] Richardson v. Lloyd, 99 Mass. 475.

[76] James v. Townsend, 104 Mass. 367; Brewer v. Holmes, 1 Metc. (Mass.) 288.

[a] **The return of an officer stating that he summoned the petitioner to appear** in the original action may be contradicted. James v. Townsend, 104 Mass. 367; Brewer v. Holmes, 1 Metc. (Mass.) 288.

Want of notice as a ground of review see supra § 10.

[77] Brewer v. Holmes, 1 Metc. (Mass.) 288.

[78] Hutchinson v. Gurley, 8 Allen (Mass.) 23.

Sufficiency of evidence to vary or contradict record of judgment see infra note 86 [a] (2).

[79] Berry v. Lisherness, 50 Me. 118.

[a] **Such facts are clearly not newly discovered evidence,** but a new way to make testimony available, which was before known but unavailable; and were this a ground for review, then upon every change in the law of evidence, or in relation to competency of witnesses, reviews might be granted. Berry v. Lisherness, 50 Me. 118.

[80] Browne v. Fairhall, 218 Mass. 495, 106 NE 177; Coffin v. Abbot, 7 Mass. 252.

[81] Browne v. Fairhall, 218 Mass. 495, 106 NE 177; Gray v. Moore, 7 Gray (Mass.) 215; Coffin v. Abbot, 7 Mass. 252.

[a] **Reason for rule.**—The testimony of any witness should be taken either viva voce or by deposition, so as to afford an opportunity for cross-examination. Browne v. Fairhall, 218 Mass. 495, 106 NE 177; Gray v. Moore, 7 Gray (Mass.) 215.

[b] **Affidavit of notary public and attorney as to law of a foreign jurisdiction.**—Browne v. Fairhall, 218 Mass. 495, 106 NE 177.

Affidavits as evidence generally see Affidavits §§ 138-150.

[82] Coffin v. Abbot, 7 Mass. 252.

Use of depositions as evidence generally see Depositions § 342 et seq.

[83] Rogers v. Hill, 4 Mass. 349.

[a] **An affidavit of a petitioner alleging that he had learned that a certain witness** would have testified to facts therein recited material to his defense, and that at the trial he was ignorant thereof, is insufficient without the deposition or personal testimony of such witness of the facts to which he will testify. Rogers v. Hill, 4 Mass. 349.

[84] Haskell v. Becket, 3 Me. 92; Ferrill v. Simpson, 8 Pick. (Mass.) 359.

[a] **Illustrations.**—(1) A juror

Weight and sufficiency. Rules as to the weight and sufficiency of evidence in civil actions generally[85] are applicable to the weight and sufficiency of evidence on an application for review.[86] On an application for a review of an action in which petitioner was defaulted, slight evidence is sufficient to sustain the application.[87]

[§ 35] **9. Hearing and Determination.** An application for review will be granted only in accordance with provisions of the statute conferring the remedy[88] and upon the court's being satisfied as to the existence of the requisite grounds,[89] otherwise, the application should be dismissed.[90] A review should not be granted where it does not appear that a review would be likely to change the result,[91] nor should it be granted merely to relieve petitioner of the results of his own culpable negligence.[92] Requested rulings on a detached portion of the case[93] and dealing with only a part of the evidence before the court[94] are properly denied.

Discretion as to grant of writ. Ordinarily, and except where it can be claimed as a matter of right,[95] the granting of a review rests in the court's discretion[96] which cannot be disturbed except for errors in matters of law.[97] While this discretion is usually, and sometimes by provision of the statute,[98] very broad,[99] it is not to be exercised arbitrarily[1] by the court hearing the petition.[2] So except in so far as the authority of the court is limited by the provisions of the statute as to the grounds and requisites for granting reviews,[3] it may in its discretion grant a review in cases where the applicant cannot claim it as a matter of right,[4] or where having had such right it has been lost through accident, misfortune, or mistake.[5]

In interest of justice.[6] The court may, sometimes under statutes,[7] grant a review where injustice has been done[8] or whenever, in the exercise of its discretion, it satisfactorily appears that injustice has been done,[9] and the court is satisfied that it would be for the furtherance of justice.[10] And the court is not

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was properly called on to explain his own feelings and declarations, on an application for a review on the ground that he was hostile to petitioner, and had expressed a general opinion of the cause before the trial. Haskell v. Becket, 3 Me. 92. (2) A juror may be called to testify that a misapprehension as to certain matters on the former trial had no influence upon the verdict. Ferrill v. Simpson, 8 Pick. (Mass.) 359.

Qualification or conduct of juror as ground of review see supra § 14.

[85] See Evidence §§ 1730–1806.

[86] See cases infra this note.

[a] **Evidence held insufficient:** (1) to entitle applicant to a review. Taylor v. Morgan, 107 Me. 334, 78 A 377. (2) To vary or contradict a record of judgment. Hutchinson v. Gurley, 8 Allen (Mass.) 23.

[b] **Evidence held sufficient to prove:** (1) That justice had not been done in the original action. McDonough v. Blossom, 109 Me. 141, 83 A 323. (2) That the consequent injustice was through fraud, accident, mistake or misfortune. McDonough v. Blossom, supra. (3) That a further hearing would be just and equitable. McDonough v. Blossom, supra.

[87] Coffin v. Abbot, 7 Mass. 252.

[a] **Reason for rule.**—Slight evidence is sufficient to sustain the petition because the granting of the petition is not the trial of the cause but merely a determination that the petitioner shall not be precluded from making a defense. Coffin v. Abbot, 7 Mass. 252.

[88] Donnell v. Hodsdon, 102 Me. 420, 67 A 143; Davis v. Beebe, 5 Vt. 560.

[89] Donnell v. Hodsdon, 102 Me. 420, 67 A 143; Atkinson v. Connor, 56 Me. 546.

[90] D. E. McCann's Sons v. Foley, (Me.) 149 A 837.

[91] Trask v. Unity, 74 Me. 208; Todd v. Chipman, 62 Me. 189; Parker v. Currier, 24 Me. 168.

[a] **The court will not exercise its discretion** in granting a writ of review, when it is satisfied that a review of the action would result in a verdict similar to the one before returned. Parker v. Currier, 24 Me. 168.

[92] Pickering v. Cassidy, 93 Me. 139, 44 A 683; Sylvester v. Hubley, 157 Mass. 306, 22 NE 166; Clark v. Brigham, 22 Pick. (Mass.) 81.

[a] **The discretion of the court should be exercised** in such a way as to promote an orderly and proper administration of justice, and not to encourage carelessness, ignorance, or laxity of practice in the conduct of cases. Sylvester v. Hubley, 157 Mass. 306, 22 NE 166.

[93] Welch v. Chase, 213 Mass. 519, 100 NE 634.

[94] Welch v. Chase, supra.

[95] See supra § 3.

[96] D. E. McCann's Sons v. Foley, (Me.) 149 A 837; Thomaston v. Starrett, 128 Me. 328, 147 A 427; Collins v. Lawson, 113 Me. 569, 94 A 943; Taylor v. Morgan, 107 Me. 334, 78 A 377; Sherman v. Ward, 73 Me. 29; Bradstreet v. Partridge, 59 Me. 155; Parker v. Currier, 24 Me. 168; Precious v. O'Rourke, (Mass.) 170 NE 110; Watson v. Wenz, 223 Mass. 341, 111 NE 856; Browne v. Fairhall, 218 Mass. 495, 106 NE 177; Winthrop v. Athol, 216 Mass. 79, 102 NE 900; Welch v. Chase, 213 Mass. 519, 100 NE 634; Stillman v. Donovan, 170 Mass. 360, 49 NE 628; Scituate Water Co. v. Simmons, 167 Mass. 313, 45 NE 750; Sylvester v. Hubley, 157 Mass. 306, 32 NE 166; Hayes v. Collins, 114 Mass. 54; Wright v. Boynton, 40 N. H. 353.

[a] **Rulings, that independently of the court's discretion** or any other consideration petitioner is entitled to a review if certain facts are found, are properly denied. Welch v. Chase, 213 Mass. 519, 100 NE 634.

[97] See infra § 36.

[98] See statutory provisions.

[99] Pickering v. Cassidy, 93 Me. 139, 44 A 683; Holmes v. Fox, 19 Me. 107; Morrell v. Kimball, 1 Me. 322; Bowditch Mut. F. Ins. Co. v. Winslow, 3 Gray (Mass.) 415.

[a] **Reason for rule.**—"It has become more necessary that the Court should be governed by liberal principles in the exercise of their discretion, that there may be no occasion again to resort to . . . a writ of right, which was formerly productive of such mischief in practice." Morrell v. Kimball, 1 Me. 322, 324.

[1] See cases infra this note.

[a] **Sound discretion.**—D. E. McCann's Sons v. Foley, (Me.) 149 A 827; Taylor v. Morgan, 107 Me. 334, 78 A 377.

[b] **Judicial discretion.**—Collins v. Lawson, 113 Me. 569, 94 A 943.

[c] **Sound judicial discretion.**—Welch v. Chase, 213 Mass. 519, 100 NE 634.

[2] Thomaston v. Starrett, 128 Me. 328, 147 A 427; Browne v. Fairhall, 218 Mass. 495, 106 NE 177; Winthrop v. Athol, 216 Mass. 79, 102 NE 900; Welch v. Chase, 213 Mass. 519, 100 NE 634; Hayes v. Collins, 114 Mass. 54.

[3] See infra §§ 2, 8.

[4] Sherman v. Ward, 73 Me. 29.

[5] Jackson v. Gould, 72 Me. 335; Coburn v. Rogers, 32 N. H. 372.

[a] **Failing to institute the proceeding within the time limited by the statute.**—Jackson v. Gould, 72 Me. 335. But see Hobbs v. Whidden, 27 N. H. 386 (holding that the supreme court has no authority to grant a writ of review unless the petition is filed within the statutory period after the rendition of the judgment complained of).

Time for bringing a petition of review see supra § 25.

[6] **Necessity that injustice result from fraud, accident, mistake, or misfortune as ground of review** see supra § 11.

[7] See statutory provisions.

[a] **"Any other case,"** in a provision that the court may grant a review in any other case where it shall appear injustice has not been done through specified causes, has been held not to be confined to actions other than those specified in a preceding section allowing reviews as of right. Coburn v. Rogers, 32 N. H. 372.

[8] Reynard v. Brecknell, 4 Pick. (Mass.) 302.

[a] **By hurrying a party to trial unprepared.**—Reynard v. Brecknell, 4 Pick. (Mass.) 302.

[9] Holmes v. Fox, 19 Me. 107.

[10] Gooding v. Baker, 60 Me. 52, 53; Wilbur v. Dyer, 39 Me. 169; Morrell v. Kimball, 1 Me. 322.

limited to such grounds as would authorize the granting of a new trial at common law.[11] On the other hand, the court will not grant a review where upon the whole case made by the petition it cannot perceive any probability that injustice was done,[12] or that anything in the promotion of justice would be gained by granting a review.[13]

Judgment or order. While ordinarily the only judgment that can be granted on an application for a review is that it be granted[14] or not granted[15] with an allowance of costs[16] the court in a proper case may impose such terms and conditions in granting the application as it may deem reasonable and proper,[17] and a failure to perform such conditions may be pleaded in bar of the action of review;[18] but the court may in its discretion grant a review without imposing any conditions.[19] The court may order the bond required by statute for allowing a supersedeas or stay of execution[20] and may grant a supersedeas or stay of execution upon such a bond being given.[21] The court may also in its discretion upon cause shown require security for costs.[22] The decision on an application for a writ of review has been held to be a final judgment.[23]

Operation and effect of decision. Upon the granting of an application for review, all proceedings under the petition for the writ are ended,[24] and the whole cause may be fully tried on the review,[25] but the decree or judgment in the original action is left unaffected.[26]

[§ 36] **10. Appeal and Error.** Where an application or petition for review is addressed to the discretion of the court[27] the decision of the court in granting or refusing the same is not ordinarily subject to exception,[28] and can be reviewed on exceptions only for erroneous rulings in regard to matters of law.[29] The findings of the court on questions of fact are also conclusive and cannot be reviewed on exceptions.[30] The decision of the court may, however, and sometimes by virtue of express statutory provisions,[31] be reviewed on exceptions for errors in matters of law,[32] as in disregarding the express requirements of the statute as to the grounds and conditions necessary for granting a review,[33] or in granting the writ to a

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"The great object in view is the furtherance of justice and the preventing of injustice." Gooding v. Baker, supra.

[11] Morrell v. Kimball, 1 Me. 322, 324.

"This is an appeal to the discretion of the Court, in . . . which the utmost latitude is given by the statute. We are not therefore confined to the reasons which . . . are deemed . . . sufficient ground for granting new trials at common law, but are authorized . . . where we are satisfied that it would be for the furtherance of justice." Morrell v. Kimball, supra.

[12] Todd v. Chipman, 62 Me. 189.

[13] Weld v. Sabin, 20 N. H. 533, 51 AmD 240; Emery v. Chesley, 18 N. H. 198.

[14] Green v. French, 1 Allen (Mass.) 265; Davenport v. Holland, 2 Cush. (Mass.) 1.

[15] Green v. French, 1 Allen (Mass.) 265; Davenport v. Holland, 2 Cush. (Mass.) 1.

[16] Davenport v. Holland, 2 Cush. (Mass.) 1.

Costs on application for review see infra § 37.

[17] Berry v. Titus, 76 Me. 285 (where the review was granted so far only as was necessary to revise the assessment of damages); Jackson v. Gould, 72 Me. 335 (review granted as a matter of discretion after time for review as a matter of right had expired upon condition that petitioner should waive the right to plead the statute of limitations in defense of the action); Austin v. Dunham, 65 Me. 533 (holding that where after a trial a party becomes insane, and his guardian petitions for a review, a review may be granted upon the condition that the petitioner will stipulate that no objection shall be made to the respondent's testifying generally upon the trial of the case in review); Jones v. Eaton, 51 Me. 386; Tuttle v. Gates, 24 Me. 395; Bowditch Mut. F. Ins. Co. v. Winslow, 3 Gray (Mass.) 415; Howe v. Hapgood, 13 Mass. 490.

[18] See infra § 48.

[19] Sherman v. Ward, 73 Me. 29.

[20] Bush v. Hovey, 124 Mass. 217.

[21] Leavitt v. Lyons, 118 Mass. 470; Lehan v. Good, 8 Cush. (Mass.) 302; Bacon v. Otis, 11 Mass. 407; Nickols v. Foster, 7 Mass. 63.

[a] **Second stay of execution.**—Where on a petition for review a stay of execution is granted upon petitioner giving a bond, and notice is ordered returnable at the same term, and petitioner fails to serve the notice as required, a second stay of execution will not be granted where before a second notice would be returnable the year within which execution must issue would expire, and the successful party in the original suit would be put to his scire facias or an action of debt upon the judgment. Nickols v. Foster, 7 Mass. 63.

Bond or other security generally see supra §§ 26-31.

[22] Sanford v. Candia, 54 N. H. 419; Gale v. French, 16 N. H. 95.

[a] **Under general statutes relating to costs.**—(1) Under a statute empowering the court, upon cause shown, in actions generally to order reasonable security for costs to be furnished, it has been held that, on an application for a review, mere insolvency of petitioner affords no ground for the exercise of the discretion conferred. Gale v. French, 16 N. H. 95. (2) But the discretion may be exercised where a decision had once, prior to the trial of the action to be reviewed, gone against the petitioner in a trial of the same issues. Gale v. French, supra. (3) Or where plaintiff in review is not an inhabitant of the state. Sanford v. Candia, 54 N. H. 419.

[b] **Substitution of bail.**—The county court has the power to change bail taken for a review, upon the substitution of other sufficient and satisfactory bail, and the bail so substituted is liable for the costs and intervening damages accruing from the time the review was granted. Colgate v. Hill, 20 Vt. 56.

[23] Green v. French, 1 Allen (Mass.) 265; Davenport v. Holland, 2 Cush. (Mass.) 1.

[a] **"Such judgment is . . . final."**—Davenport v. Holland, 2 Cush. (Mass.) 1, 11.

[24] Bradstreet v. Partridge, 59 Me. 155.

[25] Howe v. Hapgood, 13 Mass. 490.

[26] Henderson v. Henderson, 64 Me. 419.

[a] **Decree of divorce.**—Henderson v. Henderson, 64 Me. 419.

[27] See supra § 35.

[28] Grant v. Spear, 105 Me. 508, 74 A 1130; Donnell v. Hodsdon, 102 Me. 420, 67 A 143; Sherman v. Ward, 73 Me. 29; York, etc., R. Co. v. Clark, 45 Me. 151; Browne v. Fairhall, 218 Mass. 495, 106 NE 177; Welch v. Chase, 213 Mass. 519, 100 NE 634; Stillman v. Donovan, 170 Mass. 360, 49 NE 628; Scituate Water Co. v. Simmons, 167 Mass. 313, 45 NE 750; Stillman v. Whittemore, 165 Mass. 234, 42 NE 1126; Todd v. Barton, 117 Mass. 291; Boston v. Robbins, 116 Mass. 313; Weeks v. Adamson, 106 Mass. 514.

[29] Thomaston v. Starrett, 128 Me. 328, 147 A 427; Scruton v. Multon, 45 Me. 417; Moody v. Larrabee, 39 Me. 282; Watson v. Wenz, 223 Mass. 341, 111 NE 856; Stillman v. Donovan, 170 Mass. 360, 49 NE 628; Stillman v. Whittemore, 165 Mass. 234, 42 NE 1126; Sylvester v. Hubley, 157 Mass. 306, 22 NE 166; Boston v. Robbins, 116 Mass. 313; Hayes v. Collins, 114 Mass. 54.

[30] Sturtevant v. Randall, 49 Me. 446; Moody v. Larrabee, 39 Me. 282; Sylvester v. Hubley, 157 Mass. 306, 22 NE 166.

[a] **Judge's determination of facts** established by the testimony is not within St. (1852) c 246 § 13, providing for exceptions on matters of law. Moody v. Larrabee, 39 Me. 282.

[31] See statutory provisions.

[32] Welch v. Chase, 213 Mass. 519, 100 NE 634; Boston v. Robbins, 116 Mass. 313; Richardson v. Lloyd, 99 Mass. 475; Davenport v. Holland, 2 Cush. (Mass.) 1.

[33] Donnell v. Hodsdon, 102 Me. 420, 67 A 143.

Grounds of review see supra §§ 8-16.

For **later cases, developments** and **changes** in the law see **Annotations,** same title and section number.

person not entitled under the statute to make application therefor,[34] or for error in regard to the admission of evidence,[35] or in regard to permitting[36] or refusing[37] amendments to the petition.

Presentation and reservation in lower court of grounds of review. In accordance with the general rules,[38] questions not raised and preserved at the hearing of the application for a review will not be noticed on appeal.[39]

The bill of exceptions must show the nature of the action sought to be reviewed.[40]

[§ 37] **11. Costs.** In accordance with the general rule as to costs[41] the recovery of costs on an application for review depends upon statutory provisions.[42] On the application for a writ of review it is said that there is no fixed rule as to costs, but that the question should be determined by the court upon the particular circumstances of each case,[43] but costs will not be allowed respondents, upon the dismissal of a petition for review, where the petition does not appear vexatious, but is founded upon a mistake of remedy.[44] Under a statute authorizing the court to impose costs, they may be given for[45] or against[46] the petitioner. Statutes expressly allowing costs to the prevailing party in all actions[47] do not authorize the allowance of costs on the application for a writ of review,[48] but under a provision authorizing costs for respondents on an application for a writ of certiorari, mandamus, quo warranto, or any like process,[49] the court may award costs to respondents on application for a writ of review.[50]

[§ 38] **12. Effect of Proceedings.**[51] A writ of review does not operate to vacate the judgment in the original action,[52] nor as a supersedeas or stay of execution,[53] except by special order of the court[54] upon a proper bond being given.[55] The foregoing principles are applicable whether the review is brought as a matter of right[56] or after a petition.[57] Pending review, the judgment in the original action is not final or conclusive between the parties,[58] and cannot be pleaded in bar[59] or given in evidence[60] as affecting the rights of the parties thereto in any other suit. But the original judgment remains in full force as a judgment although execution be stayed,[61] and is not reversed[62] or otherwise affected.[63]

[§ 39] **C. Proceedings on Trial of Review—1. In General.** The trial of a review is in the nature of a new and independent action both as regards the original action[64] and also as regards the proceedings on the application for the writ.[65] The trial is begun by the suing out of the writ of review[66] which is the process in this new action,[67] and the review cannot properly be said to be pending until the writ is sued out.[68] The trial of the review is not necessarily in the same court where the original judgment was rendered.[69]

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[34] Hall v. Wolcott, 10 Mass. 218.

Persons entitled to review see supra § 5.

[35] Welch v. Chase, 213 Mass. 519, 100 NE 634; Gray v. Moore, 7 Gray (Mass.) 215.

[a] **Admission of affidavits** of witnesses other than the petitioner. Gray v. Moore, 7 Gray (Mass.) 215. But see York, etc., R. Co. v. Clark, 45 Me. 151 (admissibility of evidence held discretionary and not subject to exception).

Affidavits as evidence on application for review see supra § 34.

[36] Davenport v. Holland, 2 Cush. (Mass.) 1.

[37] Davenport v. Holland, supra.

[38] See Appeal and Error § 580 et seq.

[39] See cases infra this note.

[a] **Form of the petition** for review not objected to at the hearing is not open to exception on appeal. Winch v. Hosmer, 122 Mass. 438.

[b] **A variance** between the petition for review and the proof at the hearing cannot be taken for the first time in the appellate court. Hutchinson v. Gurley, 8 Allen (Mass.) 23.

[c] **Sufficiency of evidence.**—Winch v. Hosmer, 122 Mass. 438.

[40] Collins v. Lawson, 113 Me. 569, 94 A 943.

[a] **Exception held insufficient.**—Collins v. Lawson, 113 Me. 569, 94 A 943 (nothing to show newly discovered evidence was relevant or material).

Form and sufficiency of bills of exceptions generally see Appeal and Error § 803.

[41] See Costs § 3.

[42] See statutory provisions; and infra this section.

[43] Ilsley v. Knight, 1 Mass. 467.

[a] **Where a review is granted to correct a clerk's miscalculation** of interest on a note which mistake petitioner's counsel should have discovered when it was made, costs will not be allowed. Ilsley v. Knight, 1 Mass. 467.

[44] Byrnes v. Piper, 5 Mass. 363.

[45] Davenport v. Holland, 2 Cush. (Mass.) 1.

[46] Davenport v. Holland, supra.

[47] See statutory provisions.

[48] Hopkins v. Benson, 21 Me. 399.

[49] See statutory provisions.

[50] Hopkins v. Benson, 21 Me. 399.

[a] **Reason for rule.**—" 'Like processes' are such, undoubtedly, as have some features in common with all those which are named" in statute allowing costs. Hopkins v. Benson, 21 Me. 399.

[51] **Effect of giving bond** see supra § 28.

Operation and effect of:
Decision on application for review see supra § 35.
Judgment on review see infra § 56.

[52] Sanford v. Candia, 54 N. H. 419; Barron v. Jackson, 42 N. H. 419.

[53] Dyer v. Wilbur, 48 Me. 287; Swett v. Sullivan, 7 Mass. 342; Barron v. Jackson, 42 N. H. 419; Pike v. Pike, 24 N. H. 384; Knox v. Knox, 12 N. H. 352.

[54] Dyer v. Wilbur, 48 Me. 287; Brown v. Brigham, 5 Allen (Mass.) 582.

[a] **In New Hampshire** under rule of court No. 48, where plaintiff obtains a verdict and defendant can show that plaintiff is insolvent or that by reason of his pecuniary condition it would be difficult to collect from him the sum by which the damages might be reduced upon the review he is entitled to a stay of execution as a matter of right. Wiggin v. Janvrin, 47 N. H. 295.

[55] Dyer v. Wilbur, 48 Me. 287; Brown v. Brigham, 5 Allen (Mass.) 582; Swett v. Sullivan, 7 Mass. 342.

[a] **"If no bond is given,** the original judgment may be executed while the suit in review is pending." Brown v. Brigham, 5 Allen (Mass.) 582, 584.

Bond to procure stay of execution see supra §§ 26-28.

[56] Barron v. Jackson, 42 N. H. 419.

Review as of right see supra § 3.

[57] Barron v. Jackson, 42 N. H. 419.

[58] Haynes v. Ordway, 52 N. H. 284; Eastman v. Amoskeag Mfg. Co., 47 N. H. 71.

[a] **Although technically the first judgment is not reversed** but a new judgment is rendered on the trial of the action on review, yet it is in its nature and effect so far a reversal of the former verdict as the second verdict differs from the first, and is substantially, although not technically, either a reversal of the former judgment or a correction of any errors that may have occurred therein. Haynes v. Ordway, 52 N. H. 284.

[59] Haynes v. Ordway, supra.

[60] Haynes v. Ordway, supra.

[61] McDonough v. Blossom, 111 Me. 66, 88 A 89; Bradstreet v. Partridge, 59 Me. 155; Whitney v. Porter, 251 Mass. 547, 146 NE 771; Knox v. Knox, 12 N. H. 352.

[a] **The original judgment stands** until the judgment on the review is rendered. Whitney v. Porter, 251 Mass. 547, 146 NE 771.

[62] Sanford v. Candia, 54 N. H. 419; Badger v. Gilmore, 37 N. H. 457; Pike v. Pike, 24 N. H. 384; Knox v. Knox, 12 N. H. 352.

[63] McDonough v. Blossom, 111 Me. 66, 88 A 89; Sanford v. Candia, 54 N. H. 419; Badger v. Gilmore, 37 N. H. 457.

[64] Bradstreet v. Partridge, 59 Me. 155; Sanford v. Candia, 54 N. H. 419; Barron v. Jackson, 42 N. H. 419; Badger v. Gilmore, 37 N. H. 457.

[65] Bradstreet v. Partridge, 59 Me. 155.

[§ 40] **2. Parties.** General rules[70] as to parties are applicable.[71] On a review by the original defendant in an action by a husband for injury to his wife it is necessary to join the wife for conformity.[72] Where in the original action there are several parties plaintiff or defendant a review brought by one of them affects him alone.[73] Under a statute which does not authorize a review of a judgment by default, if one of two defendants suffers judgment by default, a review by plaintiff must be brought only against defendant with whom issue was joined.[74]

[§ 41] **3. Time.** The time within which the trial of the action on review may be brought is sometimes provided by statutes[75] and is usually dependent on the time the writ of review is sued out.[76]

[§ 42] **4. Writ or Process—a. Nature and Effect.** A writ of review is the process by which the proceedings on review are commenced.[77] The writ has been held to be a new process[78] to which there may be pleadings,[79] upon which the proceedings on the trial of a review are based,[80] and by which the parties[81] and the cause of action are again brought into court.[82] A writ of review, although termed a writ of right,[83] has been held to be under some aspects a judicial[84] as distinguished from an original writ,[85] to which it has also been compared.[86]

[§ 43] **b. Time for Suing Out.** The time within which a writ of review may be sued out is sometimes provided by statutes[87] which are strictly construed.[88] The running of the limitation for bringing the proceedings on a trial of review stops when the writ is sued out.[89] The writ cannot be sued out until after the proceedings for review are ended by final

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[a] **Reason for rule.**—"There would be great difficulty in making up a judgment after a trial of the new case, under a petition." Bradstreet v. Partridge, 59 Me. 155, 156.

66. Bradstreet v. Partridge, supra; Barron v. Jackson, 42 N. H. 419; Badger v. Gilmore, 37 N. H. 457.

67. See infra § 42.

68. Zollar v. Janvrin, 49 N. H. 114, 6 AmR 469; Badger v. Gilmore, 37 N. H. 457.

69. Barron v. Jackson, 42 N. H. 419.

[a] **In Massachusetts** the provision of Rev. St. c 99 § 25, that all reviews granted by the supreme judicial court should be tried in that court, was not affected by St. (1859) c 196. Day v. Croak, 13 Gray 461.

[b] **In New Hampshire** (1) under the statute of 1832, it was held that a writ of review of an action wherein judgment was rendered in the superior court must issue from and be made returnable in the court of common pleas (Exeter Bank v. Gilman, 8 N. H. 332), (2) and that on a review of a judgment rendered by a justice of the peace the writ should be brought in the court of common pleas (Rigney v. Hutchins, 9 N. H. 257).

70. See Parties 47 C. J. p 1.

71. See cases infra this section.

72. Knox v. Knox, 12 N. H. 352.

[a] **Defendant** in the original action for injuries to a wife may proceed in review against the administrator of the husband who had recovered a judgment which was satisfied. Knox v. Knox, 12 N. H. 352.

[b] **Whether execution should issue** against the wife of plaintiff in the original action for injury to her, when on review the original defendant prevails, is questionable. Knox v. Knox, 12 N. H. 352.

73. Emerson v. Pattee, 1 Mass. 482; Paine v. Tilden, 20 Vt. 554.

[a] **Illustrations.**—(1) Where one of several defendants prosecutes a review in the name of all, and further damages are allowed against defendants on review, judgment for the additional damages should be entered against defendant prosecuting the review and him only. Emerson v. Pattee, 1 Mass. 482. (2) A review brought by one of several defendants will not have the effect of carrying the case forward as to the defendants who do not review. Paine v. Tilden, 20 Vt. 554.

One of several parties entitled to review see supra § 5.

74. Perry v. Goodwin, 6 Mass. 498 (construing St. [1786] c 66); Smith v. Gilman, 3 N. H. 501.

75. See statutory provisions.

76. See infra § 43.

Effect of bond on time for bringing proceedings see supra § 28.

77. Badger v. Gilmore, 37 N. H. 457. And see infra text and notes 78-82.

78. Bradstreet v. Partridge, 59 Me. 155; Green v. French, 1 Allen (Mass.) 265; Davenport v. Holland, 2 Cush. (Mass.) 1; Barron v. Jackson, 42 N. H. 419; Pike v. Pike, 24 N. H. 384.

79. Society for Propagating Gospel v. Whitcomb, 2 N. H. 227.

[a] **Reason for rule.**—"As a writ here [under 1 N. H. L. pp 103, 82] embraces the declaration, it is manifestly such a process." Society for Propagating Gospel v. Whitcomb, 2 N. H. 227, 229.

80. McDonough v. Blossom, 111 Me. 66, 88 A 89; Bradstreet v. Partridge, 59 Me. 155, 156.

"The writ of review is to be regarded as the foundation of the action." Bradstreet v. Partridge, supra.

Definition and nature of the remedy of review generally see supra § 1.

81. Davenport v. Holland, 2 Cush. (Mass.) 1; Barron v. Jackson, 42 N. H. 419; Knox v. Knox, 12 N. H. 352.

82. Bradstreet v. Partridge, 59 Me. 155; Pike v. Pike, 24 N. H. 384; Knox v. Knox, 12 N. H. 352.

83. Burrell v. Burrell, 10 Mass. 221; Badger v. Gilmore, 37 N. H. 457.

Review as of right see supra § 3.

84. Burrell v. Burrell, 10 Mass. 221, 222; Tracy v. Perry, 5 N. H. 172.

"It is issued by the officer of the court and in that respect may be regarded as of the nature of a judicial writ." Burrell v. Burrell, supra.

[a] **In the nature of a judicial writ.**—Hall v. Wolcott, 10 Mass. 218.

85. Bradstreet v. Partridge, 59 Me. 155; Tracy v. Perry, 5 N. H. 172.

[a] **A party cannot sue out a writ** of review at his own motion as he can an original writ. Bradstreet v. Partridge, 59 Me. 155.

86. Burrell v. Burrell, 10 Mass. 221.

[a] **"It is . . . sometimes issued in the form of a capias and attachment,** and with the same efficacy, and seems therefore to be, to some purposes, an original writ." Burrell v. Burrell, 10 Mass. 221, 222.

"Original process" defined see Process § 12.

87. See statutory provisions.

[a] **In Massachusetts,** prior to the enactment of Gen. L. c 250 § 27 requiring the writ to be sued out within a specified time, it was held that in the absence of statutes expressly limiting the time within which the writ must be sued out after application therefor has been granted, this must be done promptly, or at least within a reasonable time. Di Filippo v. Allen, 163 Mass. 528, 40 NE 856 (a writ of review brought ten months after leave of court obtained is not seasonably prosecuted); Quinn v. Brennan, 148 Mass. 562, 20 NE 184 (a writ not brought for more than a year after leave granted was too late).

88. Agel v. Steuer, 226 Mass. 126, 115 NE 242.

[a] **Pendency of certiorari proceedings** to quash a writ of review at most extends the time for suing out the writ after order only for the time between the institution of the certiorari proceedings and the expiration of the time for excepting to its dismissal. Agel v. Steuer, 226 Mass. 126, 115 NE 242.

89. Howard v. Hunt, 17 N. H. 449; Society for Propagating Gospel v. Whitcomb, 2 N. H. 227.

[a] **A review is brought in season** if the writ is issued within the time limited, although not served until after the expiration thereof. Howard v. Hunt, 17 N. H. 449; Society for Propagating Gospel v. Whitcomb, 2 N. H. 227.

Discretion of court in granting review lost by lapse of time see supra § 35 note 5 [a].

judgment on the petition.[90]

[§ 44] **c. Issuance, Form, and Contents.** Subject to statutory provisions governing the manner of suing out writs of review and their form and contents,[91] they must be sued out like original writs,[92] should recite briefly the former proceedings,[93] and like other writs[94] should bear the seal[95] and teste of the court.[96] But a writ of review will not be dismissed because it does not appear from the writ itself what the judgment was as regards all the parties to the original suit,[97] and in a writ to review a judgment of the court of common pleas, an omission to allege that the judgment was in affirmance of a judgment of a justice of the peace is no variance.[98] Under a statute requiring the indorsement of original writs, a writ of review need not be indorsed.[99]

A writ of review may be altered by the party suing it out[1] or by his attorney[2] at any time before service by changing the return day[3] but not after service.[4]

[§ 45] **d. Service, Return, and Entry.** The service of writs of review is sometimes expressly provided for by statutes[5] which must be complied with.[6] Under some statutes the writ of review is to be served the same as other writs[7] and must be served personally upon such defendants in review as are residents of the state,[8] but where such a party lives outside of the state a good service may be made by leaving a copy of the writ with his original attorney of record.[9] Service of the writ upon a person not an original party according to the record without any leave of court to connect him therewith is a mere nullity.[10]

Return. Rules governing the return of process generally[11] are applicable to the return on a writ of review.[12] The court to which the writ should be made returnable depends upon the provisions of the statutes.[13]

Entry. A writ of review must be served before it can be entered in court,[14] and under some statutes the writ must be entered at the term next following that in which it was granted,[15] unless the order of the court specifies otherwise,[16] but if plaintiff fails to enter the writ at the next term after it is granted, the court has power, in its discretion, to allow it to be entered at the second term.[17]

[§ 46] **e. Defects and Objections.** Defects in the writ can only be taken advantage of in abatement[18] or motion to quash.[19] On a motion based on a defect of service the court may in its discretion quash the writ[20] or put defendant in review to plead the matter in abatement.[21] A writ of review will abate for a mistake in the name of the place of residence of one of the parties,[22] and a writ of review sued out in the name of a person not entitled thereto may be quashed on motion[23] or abated by the court ex officio on the discovery of the defect,[24] and notice to show cause why a writ of review should not be quashed may be made on an attorney of the adverse party in court without inserting the name of the attorney in the rule[25] and without any special order of the court for service on him.[26]

Waiver. Objections which go merely to the form of the writ must be made at the return-term of the writ or will be held to be waived,[27] and a general appearance by defendant, although afterward withdrawn, waives any error or defect in the writ.[28]

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[90] McDonough v. Blossom, 111 Me. 66, 88 A 89; Bradstreet v. Partridge, 59 Me. 155.

[a] **"The continuance** of the case, after entry of review granted, operated to prevent a final judgment at the term, and so long as it was kept on the docket by a continuance." Bradstreet v. Partridge, 59 Me. 155, 157.

[91] See statutory provisions.

[92] Green v. French, 1 Allen (Mass.) 265; Davenport v. Holland, 2 Cush. (Mass.) 1; Knox v. Knox, 12 N. H. 352.

Process generally see Process 50 C. J. p 432.

[93] Pike v. Pike, 24 N. H. 384.

[94] See Process §§ 44, 46.

[95] McDonough v. Blossom, 111 Me. 66, 88 A 89; Brewer v. Sibley, 13 Metc. (Mass.) 175.

[a] **The want of a seal is merely a formal defect** which is waived if no objection is made upon the return of the writ. Brewer v. Sibley, 13 Metc. (Mass.) 175.

[96] McDonough v. Blossom, 111 Me. 66, 88 A 89.

[97] Allen v. Seaver, 38 Vt. 673.

[a] **Illustration.**—Where a judgment in a trustee suit is sought to be reviewed, the fact that the writ does not allege that a judgment was obtained against the trustee furnishes no ground for dismissing the writ of review. Allen v. Seaver, 38 Vt. 673.

[98] Anderson v. Brown, 10 Gray (Mass.) 92.

[99] Tracy v. Perry, 5 N. H. 172.

Indorsement of writs generally see Process § 48.

[1] Plumer v. Fogg, 18 N. H. 559.

[2] Plumer v. Fogg, supra.

[3] Plumer v. Fogg, supra.

[4] Plumer v. Fogg, supra.

[a] **After service the writ becomes a record** and cannot be altered but upon motion and as an amendment. Plumer v. Fogg, 18 N. H. 559.

Corrections or alterations of return of process generally see Process § 291.

[5] See statutory provisions.

[6] Tilton v. Parker, 4 N. H. 142.

[a] **Service insufficient.**—Tilton v. Parker, 4 N. H. 142.

[7] McDonough v. Blossom, 111 Me. 66, 88 A 89; Davenport v. Holland, 2 Cush. (Mass.) 1.

Service of process generally see Process §§ 56-256.

[8] Tilton v. Parker, 4 N. H. 142.

[a] **Where there were two defendants** in an action sought to be reviewed, one of whom was supposed, both in the original writ and in the writ of review, to be an inhabitant of the state, the service of the writ of review on their attorney, who had appeared in the cause, was insufficient, the statute authorizing such service only as to non-residents. Tilton v. Parker, 4 N. H. 142.

[9] Smith v. Hill, 45 N. H. 403.

[10] Smith v. Hill, supra.

[11] See Process §§ 257-302.

[12] Green v. French, 1 Allen (Mass.) 265.

"A writ of review is . . . to be . . . returned like original writs." Green v. French, supra.

[13] See statutory provisions; and Day v. Croak, 13 Gray (Mass.) 461 (a writ to review a judgment of the court of common pleas granted by the supreme judicial court is returnable to the latter court, under Rev. St. c 99 § 25); Exeter Bank v. Gilman, 8 N. H. 332 (under the statute of 1832, a writ to review a judgment of the superior court must issue from and be made returnable to the court of common pleas).

[14] McDonough v. Blossom, 111 Me. 66, 68, 88 A 89.

"If writs of review, which must be served 'as other writs,' follow the analogy of other writs, it would seem that they must be served before entry in court." McDonough v. Blossom, supra.

[15] Hobart v. Tilton, 1 Me. 399.

[16] Hobart v. Tilton, supra.

[17] Look v. Ramsdell, 68 Me. 479.

[18] Eldridge v. Bellows, Smith (N. H.) 356.

[19] Eldridge v. Bellows, supra.

[20] Tilton v. Parker, 4 N. H. 142

[21] Tilton v. Parker, supra.

[22] Ballard v. McLean, Quincy (Mass.) 106.

[23] Hall v. Wolcott, 10 Mass. 218.

Persons entitled to writ of review see supra § 5.

[24] Hall v. Wolcott, 10 Mass. 218.

[25] Clap v. Joslyn, 1 Mass. 129.

[26] Clap v. Joslyn, supra.

Amendment. Defects in the writ may be amended.[29]

[§ 47] **5. Pleading—a. In General.** On the trial of an action on review, sometimes by express statutory provisions,[30] if an issue has been joined in the original suit[31] the case is tried on the original pleadings,[32] unless an amendment is allowed,[33] but if no issue was joined in the original action the parties may plead to an issue on the action in review,[34] and the case will be tried on any issue of fact[35] or of law[36] joined upon such pleadings.

[§ 48] **b. Pleas in Bar.** On review generally matters arising since judgment in the original cause cannot be pleaded in bar of the maintenance of the suit;[37] but a failure to perform the conditions imposed in granting a review may be so pleaded,[38] and the courts have intimated that a release may be pleaded.[39]

[§ 49] **c. Demurrers.** It has been held that there can be no demurrer filed to the declaration on review,[40] at least not as a matter of right,[41] although the court may in its discretion permit or refuse to permit it to be filed.[42]

[§ 50] **d. Amendments—(1) In General.** Under applicable statutes[43] the court may permit an amendment.[44]

[§ 51] **(2) Extent and Limitations of Power.** Subject to specific statutory provisions[45] rules governing amendments to pleading in civil actions generally, such as those relating to the discretion of the court,[46] formal defects,[47] changes in the nature or form of the action,[48] and the introduction of new causes of action,[49] are applicable to the amendments of the pleadings in an action on the trial of a review.[50] Under a statute permitting amendments

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27. Brewer v. Sibley, 13 Metc. (Mass.) 175.

Omission of seal as formal defect see supra § 44 note 95 [a].

28. Fay v. Hayden, 7 Gray (Mass.) 41.

29. Tilton v. Parker, 4 N. H. 142.

30. See statutory provisions.

31. Whitney v. Porter, 251 Mass. 547, 146 NE 771; Fuller v. Storer, 111 Mass. 281.

32. Bradstreet v. Partridge, 59 Me. 155; Whitney v. Porter, 251 Mass. 547, 146 NE 771; Fuller v. Storer, 111 Mass. 281; Swett v. Sullivan, 7 Mass. 342; Perry v. Goodwin, 6 Mass. 498; Otis v. Currier, 17 N. H. 463; Knox v. Knox, 12 N. H. 352.

33. Whitney v. Porter, 251 Mass. 547, 146 NE 771; Fuller v. Storer, 111 Mass. 281; Zollar v. Janvrin, 49 N. H. 114, 6 AmR 469; Otis v. Currier, 17 N. H. 463; Knox v. Knox, 12 N. H. 352.

34. Wilbur v. Dyer, 39 Me. 169; Whitney v. Porter, 251 Mass. 547, 146 NE 771.

35. Whitney v. Porter, supra.

36. Whitney v. Porter, supra.

37. Foster v. Plummer, 3 Cush. (Mass.) 381; Zollar v. Janvrin, 49 N. H. 114, 6 AmR 469; Otis v. Currier, 17 N. H. 463; Knox v. Knox, 12 N. H. 352; Barker v. Wendell, 12 N. H. 119; Burley v. Burley, 6 N. H. 204 (there is no new matter which can be pleaded by plaintiff in review).

[a] **Illustrations.**—(1) Where plaintiff in the original action attached defendant's property and recovered judgment, and the attachment was dissolved upon defendant giving bond to prosecute his review, defendant, plaintiff in review, cannot plead his discharge in bankruptcy, granted subsequently to his giving bond to dissolve the attachment. Zollar v. Janvrin, 49 N. H. 114, 6 AmR 469. (2) The original defendant cannot avail himself of a discharge in insolvency, obtained in pursuance of proceedings commenced since the rendition of the original judgment against him. Foster v. Plummer, 3 Cush. (Mass.) 381. But see Todd v. Barton, 117 Mass. 291 (where defendant prior to the original judgment has suggested his bankruptcy and filed a motion for a continuance to await a discharge, he may, upon obtaining a review of the judgment against him, plead his discharge in bar of the action, although it was granted after the rendition of the original judgment, as in so doing he merely perfects the same defense which was set up in the original action).

[b] **Reason for rule.**—"If the verdict and judgment were originally right, nothing which has since occurred can make them wrong." Zollar v. Janvrin, 49 N. H. 114, 117, 6 AmR 469; Burley v. Burley, 6 N. H. 204, 205.

[c] **A plea in bar** setting forth matter arising subsequent to the original judgment is irregular, and is not cured or strengthened by a replication. Zollar v. Janvrin, 49 N. H. 114, 6 AmR 469; Otis v. Currier, 17 N. H. 463.

Review as new trial of issues originally tried see supra § 1.

Introducing evidence of matter subsequent to original judgment see infra § 53.

38. Jones v. Eaton, 51 Me. 386.

Authority of court to grant review on condition see supra § 35.

39. See cases infra this note.

[a] **"A release of the original judgment,** which is a voluntary extinguishment of that which constitutes the sub-stratum of the review, may stand on a different footing [than a discharge in bankruptcy]." Foster v. Plummer, 3 Cush. (Mass.) 381, 383.

[b] **"A defendant in review** may, perhaps, plead a release of the right of review." Burley v. Burley, 6 N. H. 204, 205.

40. Eldridge v. Bellows, Smith (N. H.) 356.

41. Colebrook v. Merrill, 49 N. H. 213.

42. Colebrook v. Merrill, supra.

[a] **Demurrer properly refused.**—Colebrook v. Merrill, 49 N. H. 213.

43. See statutory provisions.

44. Wilbur v. Dyer, 39 Me. 169; Colebrook v. Merrill, 49 N. H. 213; Knox v. Knox, 12 N. H. 352; Frost v. Chesley, Smith (N. H.) 202.

[a] **A statute** providing that actions on review shall be tried on the pleas made on the former trial on record, merely means that no new pleadings shall be required, and not that no amendment of the declaration may be permitted on review. Frost v. Chesley, Smith (N. H.) 202.

[b] **In Massachusetts** (1) it was held in a few early cases that the pleadings on the trial of an action on review could not be amended (Swett v. Sullivan, 7 Mass. 342; Perry v. Goodwin, 6 Mass. 498; Bowman v. Whittemore, 1 Mass. 242), (2) or at least not unless the opposite party consented (Bowman v. Whittemore, supra). (3) But other cases have held that such amendments may generally be allowed. Bowditch Mut. F. Ins. Co. v. Winslow, 3 Gray 415; Judd v. Buchanan, 4 Mass. 579.

New evidence receivable on review without amendment see infra § 52.

45. See statutory provisions.

[a] **In Maine,** under the statute of 1821, the court had no power to amend the pleadings on review, but under a later statute (Rev. St. c 123 § 6), the court was authorized to allow such amendments as it might have done in the original action. Wilbur v. Dyer, 39 Me. 169.

46. See Pleading §§ 597-604.

47. See Pleading § 628.

48. See Pleading §§ 685-694.

49. See Pleading §§ 671-684.

50. See cases infra this note.

[a] **The allowance or refusal** of amendments to the pleading in an action on review is within the discretion of the court. Colebrook v. Merrill, 49 N. H. 213.

[b] **Pleadings may be amended** in matters of form. Foster v. Plummer, 3 Cush. (Mass.) 381; Edgerly v. Emerson, 4 N. H. 147; Tilton v. Parker, 4 N. H. 142.

[c] **The pleading on review cannot be so amended** as to change the form or cause of action. Whitney v. Porter, 251 Mass. 547, 146 NE 771 (tort to contract); Pearson v. Smith, 54 N. H. 65 (contract to tort).

[d] **The form and cause of action must be preserved,** and amendments must be consistent with the original declaration, so that the court can see that plaintiff will offer in evidence only some matter for which the original action was instituted. Pearson v. Smith, 54 N. H. 65.

[e] **An amendment cannot be used to introduce a new cause** of action.

the same as in the original action, the new pleadings must be confined to cases where such amendments would have been allowed in the original suit.[51]

[§ 52] **6. Issues, Proof, and Variance.** On the trial of the review evidence may be presented on the issue reached on the original pleadings[52] as at the former trial,[53] but an issue not joined in the original action may be reached by proper pleadings on the review[54] and evidence introduced on that issue.[55] Matter which has arisen since the original judgment but which avoids plaintiff's cause of action from the beginning, may be given in evidence by defendant under the general issue filed in the original action.[56] Irrespective of the right, in the action on review, to amend the original pleadings,[57] and where the right to amend them was expressly denied,[58] it has been held that either party is entitled to introduce new evidence,[59] without amending the original pleadings.[60]

[§ 53] **7. Evidence.**[61] General rules relating to evidence in civil actions generally[62] apply to the evidence in a trial on the review of an action.[63] Each party is entitled, sometimes under statutes, to all the evidence used on the original trial,[64] which at that time was not subject to any legal objection,[65] or which may not on the review be obtained from the same source in a better or more authentic form,[66] but a copy of a paper used as evidence in the original trial may be inadmissible.[67] Neither the judgment rendered in the original action[68] nor an agreed case as to the original action[69] are admissible in the trial on review although an agreement not limited to the original action is competent on review upon the question of the amount in controversy.[70]

[§ 54] **8. Trial or Hearing.** It is generally held, and sometimes under statutory provisions,[71] that actions on review must be tried substantially as if no verdict[72] or judgment[73] had ever been rendered. Since a review is a new trial of the issues originally tried,[74] everything is open on review as it would have been in the original action.[75] Thus, issues of law,[76] as well as issues of fact,[77] may again be tried; and, as in the case of the trial of civil actions generally,[78] the issues of law are to be tried by the court[79] and issues of fact by the jury,[80] and the questions to be tried by a jury on review must be comprehended in the pleadings on which the former trial was had.[81] The trial on a review is conducted

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Edgerly v. Emerson, 4 N. H. 147 (set-off).

[51] Foster v. Plummer, 3 Cush. (Mass.) 381.

[52] Wilbur v. Dyer, 39 Me. 169.

[53] Wilbur v. Dyer, supra.

Conformity of pleadings and proof in civil actions generally see Pleading §§ 1167–1186.

[54] See supra § 47.

[55] Wilbur v. Dyer, 39 Me. 169.

[56] Barker v. Wendell, 12 N. H. 119.

Evidence admissible under the general issue in civil actions generally see Pleading §§ 1177–1181.

Pleading of matter arising subsequent to original judgment see supra § 48.

[57] Foster v. Plummer, 3 Cush. (Mass.) 381, 383.

"It was always admissible to offer new evidence and the allowance of amendments was provided for by statute in order to prevent parties from being turned out of court with a good case, upon mere insufficiency of form." Foster v. Plummer, supra (per Shaw, C. J.).

[58] See supra § 50 note 44 [b] (1).

[59] Foster v. Plummer, 3 Cush. (Mass.) 381; Perry v. Goodwin, 6 Mass. 498.

[60] Perry v. Goodwin, supra.

Amendment of pleadings on review see supra §§ 50, 51.

[61] **Competency of witnesses** see Witnesses [40 Cyc 2135 et seq].

[62] See Evidence 22 C. J. p 1.

[63] See infra text and notes 64–67.

[64] Gold v. Eddy, 1 Mass. 1; Pickering v. De Rochemont, 60 N. H. 179.

[a] **Illustrations.**—(1) A deposition taken for the original action of one who had since become a party to the suit was allowed in evidence. Gold v. Eddy, 1 Mass. 1. (2) An auditor's report, admissible on the original trial, is also admissible on review. Pickering v. De Rochemont, 60 N. H. 179.

[65] Gold v. Eddy, 1 Mass. 1.

[66] Gold v. Eddy, supra.

[67] Belknap v. Wendell, 31 N. H. 92.

[a] **"It has never been understood** . . . that a copy . . . can be used, if objection is made, where the original is within reach." Belknap v. Wendell, 31 N. H. 92, 103.

[68] Good v. Lehan, 8 Cush. (Mass.) 299, 300; Messer v. Swan, 4 N. H. 481.

"Whether the judgment was rightfully rendered was the question and . . . must surely be determined by other evidence than merely the judgment itself." Good v. Lehan, supra.

[a] **Under a statute** providing that the cause on review be tried the same as if no judgment had been rendered (1) the first judgment has no weight in the trial on review (Messer v. Swan, 4 N. H. 481), (2) and is no evidence of the real facts of the case either for (Messer v. Swan, supra) (3) or against (Messer v. Swan, supra) either party.

[b] **Prima facie evidence.**—A judgment for plaintiff in an action on a promissory note is not prima facie evidence on review of the execution of the note, for the note is the foundation on which the judgment, the superstructure, rests, and to receive the judgment as prima facie evidence of the genuineness of the note would be relying on the superstructure to sustain the foundation. Good v. Lehan, 8 Cush. (Mass.) 299.

[69] Page v. Brewster, 58 N. H. 126.

[a] **Illustration.**—Where the parties to the original suit make an agreed case "for the purposes of this suit" the word "suit" is synonymous with "action," and a review being in effect, as well as in form, a new action to recover in the shape of damages what, it is alleged, has been wrongfully taken in the original suit, the agreed case is not evidence on review. Page v. Brewster, 58 N. H. 126.

[70] Russell v. Babbitt, 60 N. H. 373.

[a] **Illustration.**—Where there was an agreement by the parties at the original trial that if plaintiff was entitled to recover anything, it would be fifty-seven dollars and fifty-five cents, evidence of the agreement was held competent as to the amount in controversy, so that the action might be referred without consent of parties. Russell v. Babbitt, 60 N. H. 373.

[71] See statutory provisions.

[72] Johnson v. Atlantic, etc., R. Co., 43 N. H. 410.

[73] Sturdivant v. Greeley, 4 Me. 434; Johnson v. Atlantic, etc., R. Co., 43 N. H. 410; Pike v. Pike, 24 N. H. 384; Messer v. Swan, 4 N. H. 481.

[a] **Without such trial,** an error in the former judgment cannot be corrected. Johnson v. Atlantic, etc., R. Co., 43 N. H. 410.

[74] See supra § 1.

[75] Whitney v. Porter, 251 Mass. 547, 146 NE 771.

[76] Bowditch Mut. F. Ins. Co. v. Winslow, 3 Gray (Mass.) 415; Perry v. Goodwin, 6 Mass. 498; Hazen v. Smith, 2 Tyler (Vt.) 59.

[a] **"There seems to be nothing in the reason** of the thing, any more than in the terms of the statute, which limits this right of a review to the retrial of questions of fact." Bowditch Mut. F. Ins. Co. v. Winslow, 3 Gray (Mass.) 415, 422.

[77] Bowditch Mut. F. Ins. Co. v. Winslow, supra; Perry v. Goodwin, 6 Mass. 498.

[78] See Trial [38 Cyc 1511 et seq, 1925].

[79] Perry v. Goodwin, 6 Mass. 498.

[80] Perry v. Goodwin, supra.

[81] Hart v. Johnson, 7 Mass. 472.

[a] **Illustration.**—Where judgment was recovered in the original action for seizin of the demanded premises, plaintiff in review cannot file a claim for the jury to inquire into the increased value of the property on account of betterments, no such allegation or claim being included in the original action. Hart v. Johnson, 7 Mass. 472.

in the same manner whether the writ of review has been granted on an application[82] or claimed as a matter of right.[83] It is no peremptory ground for a nonsuit, when a plaintiff has produced the usual copies upon a review, certified to be copies of all papers used and filed upon the former trial, that a paper so used is not copied.[84]

The question of jurisdiction may be raised at the hearing upon the writ.[85]

Verdict. The jury may find their verdict for the original defendant,[86] or for the original plaintiff[87] with greater[88] or less[89] damages than he recovered at the former trial, and, when the jury have found the amount of damages, they may compare the amount with the former verdict, and if the difference is merely nominal and unsubstantial, they may, in their discretion, return a verdict for the same amount as the former verdict.[90]

[§ 55] **9. Judgment—a. In General.** The judgment which may be rendered on the trial of a review is usually prescribed by statutes providing for the remedy.[91] Under these statutes it has been held that on the review, a new judgment is rendered, which provides the proper remedy as the rights of the parties then appear,[92] and this judgment may be varied and adapted so as to meet and protect those rights.[93] Thus the original judgment may be affirmed[94] or reversed[95] in whole[96] or in part[97] or modified in any other respect,[98] and the court is not limited to any particular form of judgment[99] but will render such special judgment as the just and legal rights of the parties require.[1] On the other hand, it has been held that the original judgment cannot be reversed in whole[2] or in part,[3] but that if the original judgment were wrong plaintiff in review will have judgment to recover back the money erroneously recovered in the first suit,[4] and if the original judgment were right defendant in review will have judgment for his costs.[5] The judgment rendered on the trial of the review is a final judgment[6] and should be such as to correct the error, if any, in the former judgment,[7] although required by statute to be rendered without regard to the original judgment.[8]

[§ 56] **b. Operation and Effect.**[9] The judgment rendered on a review does not operate in form as a reversal of the original judgment,[10] either in whole or in part.[11] The original judgment stands,[12] and any proceedings which have been regularly taken thereunder are valid,[13] and the party in whose favor it was rendered is entitled to whatever he has obtained thereby.[14] On the other hand it has been held that the judgment on review is a substitute for the original judgment[15] which thereupon becomes inoperative so that no action can be maintained thereon.[16] But on the contrary it is held that this is not necessarily the case,[17] but that the original judgment remains in force.[18] Since the judgment on review is final judgment,[19] it concludes the rights of the parties.[20]

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[82] Thayer v. Goddard, 19 Pick. (Mass.) 60; Barron v. Jackson, 42 N. H. 419.

[83] Thayer v. Goddard, 19 Pick. (Mass.) 60; Barron v. Jackson, 42 N. H. 419.

[84] Belknap v. Wendell, 31 N. H. 92 (construing Rev. St. c 192 § 8, and holding that the court has, in such a case, as in others, a discretion as to the manner of conducting a trial and ample power to suspend the proceedings to give time to supply any casual omissions, where substantial justice seems to require it).

[85] Smith v. Brown, 136 Mass. 416.

[86] Swett v. Sullivan, 7 Mass. 342.

[87] Swett v. Sullivan, supra.

[88] Swett v. Sullivan, supra; Dame v. Twombly, Smith (N. H.) 262.

[a] **A remittitur in the original action** does not preclude defendant from recovering a larger amount on review. Dame v. Twombly, Smith (N. H.) 262.

[89] Swett v. Sullivan, 7 Mass. 342.

[90] Carpenter v. Pierce, 13 N. H. 403.

[91] See statutory provisions. See also infra this section; and infra §§ 56-59.

[92] Foster v. Plummer, 3 Cush. (Mass.) 381; Otis v. Currier, 18 N. H. 85.

[93] Foster v. Plummer, 3 Cush. (Mass.) 381.

[94] Whitney v. Porter, 251 Mass. 547, 146 NE 771; Foster v. Plummer, 3 Cush. (Mass.) 381; Carrique v. Bristol Print Works, 8 Metc. (Mass.) 444.

[a] **Such part of the former judgment** as may be found right will be affirmed, especially if it has been executed. Carrique v. Bristol Print Works, 8 Metc. (Mass.) 444.

[95] Whitney v. Porter, 251 Mass. 547, 146 NE 771; Fuller v. Storer, 111 Mass. 281; Whitton v. Bicknell, 3 Allen (Mass.) 472; Foster v. Plummer, 3 Cush. (Mass.) 381. But see supra § 38.

[a] **A judgment of reversal** is the proper judgment on review where the original judgment was erroneous and there has been no satisfaction of it. Whitton v. Bicknell, 3 Allen (Mass.) 472.

[96] Whitney v. Porter, 251 Mass. 547, 146 NE 771; Foster v. Plummer, 3 Cush. (Mass.) 381.

[97] Whitney v. Porter, 251 Mass. 547, 146 NE 771; Foster v. Plummer, 3 Cush. (Mass.) 381; Johnson v. Wetherbee, 3 Pick. (Mass.) 247.

[98] Foster v. Plummer, 3 Cush. (Mass.) 381.

[99] Fuller v. Storer, 111 Mass. 281; Whitton v. Bicknell, 3 Allen (Mass.) 472; Carrique v. Bristol Print Works, 8 Metc. (Mass.) 444.

[1] Whitney v. Porter, 251 Mass. 547, 146 NE 771; Fuller v. Storer, 111 Mass. 281; Whitton v. Bicknell, 3 Allen (Mass.) 472; Carrique v. Bristol Print Works, 8 Metc. (Mass.) 444.

[2] Curtis v. Curtis, 47 Me. 525.

Effect of review generally see supra § 38.

[3] Curtis v. Curtis, 47 Me. 525.

[4] Curtis v. Curtis, supra.

[5] Curtis v. Curtis, supra.

[6] Dunlap v. Burnham, 38 Me. 112, 114; Haynes v. Ordway, 52 N. H. 284, 285; Eastman v. Amoskeag Mfg. Co., 47 N. H. 71; Knox v. Knox, 12 N. H. 352.

"Until that judgment is rendered there cannot properly be said to be any final judgment in the cause." Haynes v. Ordway, supra.

"It is manifest that it was designed that the judgment to be rendered . . . was to be such as also to do final and complete justice between the parties." Dunlap v. Burnham, supra.

[7] Dyer v. Wilbur, 48 Me. 287; Swett v. Sullivan, 7 Mass. 342; Otis v. Currier, 18 N. H. 85; Knox v. Knox, 12 N. H. 352.

[8] Dunlap v. Burnham, 38 Me. 112.

[9] **Operation and effect of judgments generally** see Judgments §§ 804-814.

[10] Whittaker v. Berry, 64 Me. 236; Curtis v. Curtis, 47 Me. 525; Ely v. Forward, 7 Mass. 25; Pike v. Pike, 24 N. H. 384; Otis v. Currier, 18 N. H. 85; Knox v. Knox, 12 N. H. 352; Hart v. Little, Smith (N. H.) 52. But see Haynes v. Ordway, 52 N. H. 284 (although technically the first judgment is not reversed, the second judgment is practically a reversal in so far as it differs from the first).

[a] **If the original action is for the recovery of land** and plaintiff obtains judgment, a recovery by defendant upon review operates more nearly like a technical reversal. In such case defendant has judgment for the land or for the part to which it appears he has title and he has a writ of possession. Otis v. Currier, 18 N. H. 85.

[11] Curtis v. Curtis, 47 Me. 525; Ely v. Forward, 7 Mass. 25.

[12] Whittaker v. Berry, 64 Me. 236; Otis v. Currier, 18 N. H. 85; Knox v. Knox, 12 N. H. 352; Hart v. Little, Smith (N. H.) 52.

[13] Dyer v. Wilbur, 48 Me. 287; Curtis v. Curtis, 47 Me. 525; Drew v. Munsey, Smith (N. H.) 317; Haven v. Libbey, Smith (N. H.) 109; Hodgdon v. Lougee, Smith (N. H.) 104.

[a] **If the first judgment has been satisfied** by levy upon real estate, the levy is valid and conveys a good title, although subsequently on a review of such judgment the original defendant recovers a judgment against the original plaintiff for a sum equal to the whole amount of the first judgment. Curtis v. Curtis, 47 Me. 525.

[14] Knox v. Knox, 12 N. H. 352.

[§ 57] **c. Amount of Recovery.** The amount for which judgment may be rendered on the trial of a review is generally regulated by statute.[21] Under such statutes it has been held that if the judgment in the original action was wrong plaintiff in review will have judgment to recover what he should previously have recovered if he is the original plaintiff and failed upon his first trial,[22] or to recover back what was erroneously recovered on the first trial if he is the original defendant against whom judgment was rendered,[23] together with interest from the time of payment if the amount has been paid.[24] If the original judgment was for plaintiff and the damages are increased on review,[25] or if defendant is shown on review to be indebted for a greater amount than the original judgment,[26] the original plaintiff takes judgment for the amount of the increase.[27] without regard to the party by whom the review is brought,[28] and if the damages are decreased the original defendant takes judgment for the amount of the decrease,[29] whether he has paid the original judgment or not.[30] If it is determined that the original judgment was correct, defendant in review merely takes judgment for costs,[31] and execution may be issued thereon if it has not already been satisfied,[32] and the original judgment is not affected.[33]

[§ 58] **d. Set-Off.** One judgment may be set off against the other under the provisions of some of the statutes.[34] Thus if the plaintiff in review is successful he may be permitted to set off his judgment in review against the original unsatisfied judgment,[35] as where the sum first recovered is reduced.[36]

[§ 59] **e. Enforcement.** Judgment recovered on a review may be enforced the same as any original judgment,[37] but a judgment on review gives a right of restitution only as against some party to the record.[38]

[§ 60] **10. Appeal and Error.** An appeal will lie from the decision rendered on the trial of a review,[39] and a judgment on a writ of review, sued out as of right by a party not entitled to it by statute, will be reversed on a writ of error;[40] but under a statute providing for the recovery of costs unless the court should otherwise order,[41] the decision of the court on review as to costs is conclusive and not subject to exception.[42]

[§ 61] **11. Costs—a. In General.** The statutes providing for the remedy of review usually contain provisions for the allowance of costs on the trial of a review.[43] Either under these statutes or by virtue of other applicable statutes,[44] and in accordance

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[a] **Satisfaction.**—(1) "If the former judgment has been satisfied, if affirmed, the satisfaction shall remain unaffected." Foster v. Plummer, 3 Cush. (Mass.) 381, 383. (2) "If affirmed in part the satisfaction shall still stand." Foster v. Plummer, supra.

[15] Dunlap v. Burnham, 38 Me. 112 (under a statute providing that judgment should be entered without regard to the former judgment); Stevens v. Sabin, 20 N. H. 529.

[16] Dunlap v. Burnham, 38 Me. 112. See Whitton v. Bicknell, 3 Allen (Mass.) 472 (construing Rev. St. c 99 § 10, and Gen. St. c 146 §§ 32, 38, and holding that an action cannot be maintained on a recognizance given by a defendant arrested on an execution, when the judgment upon which the execution issued has been reversed on a review).

[a] **"[A] provision** in [Gen. St. c 146] § 38, that the execution [of the original judgment] shall not be superseded or stayed by the writ of review . . . has no application to the operation of the judgment in review." Whitton v. Bicknell, 3 Allen (Mass.) 472, 473.

[17] Dyer v. Wilbur, 48 Me. 287, 289.

"The court, undoubtedly, has power to consider one [judgment on review] a substitute for the other [original judgment], when necessary to prevent gross injustice. But, the mere fact, that . . . a different result [is] arrived at from that on the first trial does not, necessarily, render void the former judgment ab initio, and all acts under it." Dyer v. Wilbur, supra.

[18] Whittaker v. Berry, 64 Me. 236.

[a] **Debt lies upon the original judgment,** although the result has been partially reversed on review. Hart v. Little, Smith (N. H.) 52.

[19] See supra § 55 text and note 6.

[20] Haynes v. Ordway, 52 N. H. 284; Eastman v. Amoskeag Mfg. Co., 47 N. H. 71.

[21] See statutory provisions. See also infra this section.

[22] Otis v. Currier, 18 N. H. 85.

[23] Curtis v. Curtis, 47 Me. 525; Carrique v. Bristol Paint Works, 8 Metc. (Mass.) 444; Ely v. Forward, 7 Mass. 25; Otis v. Currier, 18 N. H. 85.

[a] **If the original judgment is affirmed in part,** plaintiff in review is entitled to recover back a sum for which the original judgment was too much. Foster v. Plummer, 3 Cush. (Mass.) 381.

[24] Ordway v. Haynes, 54 N. H. 346.

[25] Whittaker v. Berry, 64 Me. 236; Dyer v. Wilbur, 48 Me. 287; Andrews v. Foster, 42 N. H. 376.

[26] Church v. Church, 122 Me. 459, 120 A 428.

[27] Church v. Church, supra; Whittaker v. Berry, 64 Me. 236; Dyer v. Wilbur, 48 Me. 287; Andrews v. Foster, 42 N. H. 376.

[a] **Review by one of several defendants.**—Where judgment is rendered in the original action against several defendants and a review is brought by only one of them, and plaintiff again recovers judgment but for an increased amount, judgment should be rendered against defendant bringing the review for the damages found by the last verdict and the costs of the review, and the former judgment be affirmed to stand as a joint judgment against all of the original defendants. Emerson v. Pattee, 1 Mass. 482.

[28] Andrews v. Foster, 42 N. H. 376.

[29] Whittaker v. Berry, 64 Me. 236; Dyer v. Wilbur, 48 Me. 287; Lincoln v. Goulding, 3 Mass. 234; Shepard v. Hatch, 54 N. H. 96; Otis v. Currier, 18 N. H. 85.

[30] Shepard v. Hatch, 54 N. H. 96.

[31] Curtis v. Curtis, 47 Me. 525; Ely v. Forward, 7 Mass. 25; Knox v. Knox, 12 N. H. 352.

Costs on:
Proceedings for review generally see supra § 37.
Review generally see infra §§ 61, 62.

[32] Curtis v. Curtis, 47 Me. 525; Ely v. Forward, 7 Mass. 25.

[33] Dyer v. Wilbur, 48 Me. 287.

[34] See statutory provisions.

[35] McDonough v. Blossom, 111 Me. 66, 88 A 89; Curtis v. Curtis, 47 Me. 525.

[36] Curtis v. Curtis, supra.

[37] McDonough v. Blossom, 111 Me. 66, 88 A 89.

Enforcement of judgments generally see Judgments §§ 1139-1153.

[38] Little v. Bunce, 7 N. H. 485, 28 AmD 363.

[a] **Illustration.**—Where A lodged with B, as collateral security, a note made by C and payable to A, but not to order, and B brought a suit on the note against C in the name of A, and recovered judgment which was paid by C to B, and the judgment was reversed on review, and C sued B to recover back the amount of the costs, the damages having been paid by B, and it was held that the action could not be maintained. Little v. Bunce, 7 N. H. 485, 28 AmD 363.

[39] Tay v. Piage, 37 N. H. 468.

[40] Hall v. Wolcott, 10 Mass. 218.

[41] See statutory provisions.

[42] Lunt v. Stimpson, 73 Me. 245.

[43] See statutory provisions.

[44] See statutory provisions.

with the general rule as to costs,[45] on a review the prevailing party is ordinarily entitled to costs,[46] unless the court in granting the review otherwise orders.[47] If it is determined that the original judgment was correct, defendant in review takes judgment for costs alone.[48] Interest will not be allowed on costs of review,[49] and under a statute authorizing the court to limit and allow such costs as law and justice shall require, if defendant reviews and merely succeeds in obtaining a slight reduction in the amount of damages the court may in its discretion limit his costs.[50] A party who obtains a verdict on review by means of a certificate in bankruptcy, which is in effect a reversal of the original judgment, is not entitled to recover costs.[51] An indorser of the original writ is not liable as such for the costs which defendant may recover upon review.[52]

[§ 62] **b. Costs of Original Action.** Under some statutes it has been held that the party prevailing on review is entitled to costs both of the review and also of the original action,[53] or that he is so entitled unless the court otherwise orders,[54] while under others it has been held that the prevailing party can recover only the costs of the review,[55] or that he is not entitled to costs of the original action where the second judgment merely reduces the damages and is not in effect a complete reversal of the first.[56]

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[45] See Costs §§ 10-40.

[46] Dodge v. Reed, 40 Me. 331; Pasche v. Graham, 180 Mass. 157, 61 NE 883; Nashua, etc., R. Co. v. Stimpson, 35 N. H. 286, 289; Woodbury v. Parshley, 10 N. H. 392.

"We see no occasion as yet to interfere with the general provision of the statute, that costs follow the event of every suit or proceeding." Nashua, etc., R. Co. v. Stimpson, supra.

[a] **Who is the prevailing party.**—(1) On review of an action in which debt, damages, or land is demanded, the party in whose favor the error in the original judgment is corrected is the prevailing party and is entitled to costs. Bruce v. Learned, 4 Mass. 614 (construing St. [1784] c 28 § 9). (2) A party who, on the trial of a review, obtains a result more favorable to him than that of the original action is the prevailing party. Williams v. Williams, 133 Mass. 587. (3) Where on review a party reduces the damages recovered against him in the original action, he is the prevailing party and entitled to costs. Dodge v. Reed, 40 Me. 331; Billerica v. Carlisle, 2 Mass. 158. (4) Where judgment in the original action was had against a defendant, who, as plaintiff in review, pleaded a set-off by way of amendment, and recovered judgment thereon against plaintiff in the original suit, although the amendment could have been filed in the original action, the new issue presented thereby was triable in review, under the statute, and therefore plaintiff in review was the prevailing party and entitled to costs. Pasche v. Graham, 180 Mass. 157, 61 NE 883. (5) Where in an action on contract defendant filed a general denial, and also a declaration in set-off, but defaulted and judgment was entered against him for one thousand dollars and costs and on review the original plaintiff recovered one dollar, it was held that plaintiff in review was entitled to costs, even though the sum recovered by the original plaintiff was reduced by set-off. Williams v. Williams, supra. (6) A plaintiff in review who succeeds in correcting an error in the former verdict against him is entitled to judgment for costs, as the prevailing party, notwithstanding the amount of the judgment on review is larger than the original verdict, due to the accumulation of interest. Kavanagh v. Askins, 2 Me. 397. (7) Where plaintiff in review finds that he cannot prevail and becomes nonsuited, defendant in review is the prevailing party and entitled to costs. Treat v. Hathaway, 7 Mass. 503. (8) Where plaintiff in the original action recovers damages in a larger amount on review than he did in the original action, he is the prevailing party, and is entitled to recover costs of the original action and also the costs of the review. Avery v. Holmes, 10 N. H. 574. (9) If the party bringing the review fails to change the decision of the case, so that defendant in review is, upon the new trial, entitled to the same judgment that was rendered in the first action, defendant in review takes a judgment for his costs, as the prevailing party. Knox v. Knox, 12 N. H. 352. (10) Where, upon the review of a real action brought by the original demandant, the land and improvements are each estimated by the jury at a less sum than by the former verdict, the tenant is the prevailing party. Erving v. Pray, 1 Me. 255.

[b] **Several parties plaintiff or defendant.**—(1) Where, in an action for trespass for assault and battery against two defendants, the jury assessed the damages against them in a certain sum, and on review there was a verdict of not guilty as to one defendant and guilty as to the other, against whom damages for a greater amount were assessed, it was held that defendant found not guilty on review was the prevailing party and entitled to recover his costs, while the original plaintiff was entitled to recover his costs against defendant found guilty. Galloway v. Pitman, 3 Mass. 408. (2) Where, in trespass against three, judgment was rendered against all, and on a review by them a verdict was rendered against two only, the third, who had paid no part of the first judgment, may tax the costs of travel and attendance for himself and all the witnesses used in the defense, both on the first trial and on the review. Durgin v. Leighton, 10 Mass. 56.

[47] Pasche v. Graham, 180 Mass. 157, 61 NE 883.

[48] See supra § 57 text and note 31.

[49] Whittaker v. Berry, 64 Me. 236.

[50] Woodbury v. Parshley, 10 N. H. 392.

[51] Foster v. Hinckley, 40 Me. 54.

[52] Sanford v. Candia, 54 N. H. 419.

[53] Durgin v. Leighton, 10 Mass. 56.

[a] **Rule applied.**—Where in the original action judgment was rendered against three defendants and on review against only two of them, the third defendant prevailing on review is entitled to costs both of the original action and of the review. Durgin v. Leighton, 10 Mass. 56.

[54] Lunt v. Stimpson, 73 Me. 245; Brown v. Cousens, 51 Me. 301.

[a] **In the absence of any order** by the court to the contrary it must be taken for granted that in his opinion justice requires that the prevailing party shall recover the costs of both actions. Lunt v. Stimpson, 73 Me. 245.

[55] Taylor v. Gilman, 61 N. H. 636; Barron v. Jackson, 42 N. H. 419.

[a] **Prior to the act of 1838** (1) limiting the costs recoverable to those of the review, the prevailing party on review was entitled to the costs both of the review and the original action. Avery v. Holmes, 10 N. H. 574. (2) But since 1838 the review does not affect the costs of the original suit whether the review was brought of right or by grant upon petition. Barron v. Jackson, 42 N. H. 419.

[56] Billerica v. Carlisle, 2 Mass. 158.

[a] **Where on review by defendant** the original judgment is merely reversed in part as to damages, the costs of the original action are not affected. Billerica v. Carlisle, 2 Mass. 158.

***REVISE.**[1] To correct, to amend, to change;[2] to go over in order to suggest or make desirable changes and corrections;[3] to look carefully over with a view to correction;[4] to review;[5] to review, alter, or amend;[6] to review or reëxamine for correction.[7]

Phrases: "Receive, revise and cause to be recorded,"[8] "revise, amend, and consolidate,"[9] "revise and consolidate,"[10] and "revise, simplify, arrange, and consolidate;"[11] also "revised act,"[12] and "Revised Statutes."[13]

REVISING BARRISTERS. Barristers[14] appointed to revise the list of voters for county and borough members of parliament,[15] and who hold courts for that purpose.[16]

REVISION.[17] The act of reëxamination to correct, review, alter or amend;[18] review, reëxamination, looking at again.[19]

Phrases: "Justice requires a revision,"[20] and "revision and correction."[21]

REVISORY.[22] Having the power or purpose of revision.[23]

Phrase: "Revisory jurisdiction."[24]

REVIVAL.[25] The act of reviving, or the state of being revived;[26] giving energy and efficacy to that which was dormant.[27]

REVIVE.[28] To bring again to life, to reanimate, to renew, to bring into action after a suspension;[29] to give life to again;[30] to restore or bring again to life.[31]

Includes both the revitalization of a dead cause of action and the restoring of the lapsed period of its statutory life.[32]

Applied to dormant judgment, to restore or bring the judgment back to life.[33]

Applied to legislative proceedings, the term signifies the reconference of validity, force, and effect; at least, the reconference of such validity, force, and effect as the measure, law, or bill formerly possessed.[34]

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[1] See also Revision post.

[2] Gamble v. State, 159 Tenn. 446, 19 SW (2d) 279, 280.

[a] **"Amend"** (1) may be an equivalent term. Pierce v. Solano County, 62 Cal. A. 465, 217 P 545, 546. "Amend" 2 C. J. p 1316. (2) But "amend" and "revise" have been distinguished in their meanings when used with respect to changes in a constitution. State v. Taylor, 22 N. D. 362, 367, 133 NW 1046 ("to revise" meaning to submit the subject to the people through a constitutional convention).

"Change" 11 C. J. p 286.

"Correct" 14A C. J. p 1426.

[3] Century D. [quot State v. Griffiths, 137 Wash. 448, 451, 242 P 969].

"Correction" 14A C. J. p 1427.

[4] Century D. [quot State v. Griffiths, 137 Wash. 448, 451, 242 P 969].

[5] Century D. [quot State v. Griffiths, supra].

[a] **"Review" equivalent.**—State v. Griffiths, 137 Wash. 448, 451, 242 P 969. "Review" ante.

[6] Webster D. [quot State v. Towery, 143 Ala. 48, 49, 39 S 309; Vinsant v. Knox, 27 Ark. 266, 272].

"Alter" 2 C. J. p 1165.

[7] Casey v. Harned, 5 Iowa 1, 12.

[8] Ex p. Mason, 256 Fed. 384, 387.

[9] Graham v. Muskegon County Clerk, 116 Mich. 571, 572, 74 NW 729.

[10] Atty.-Gen. v. Parsell, 100 Mich. 170, 173, 58 NW 839.

[11] Mathis v. State, 31 Fla. 291, 297, 12 S 681.

[12] Pierce v. Solano County, 62 Cal. A. 465, 217 P 545, 546 ("a new and original piece of legislation").

[13] Matter of Norton, 39 App. Div. 369, 371, 57 NYS 407.

[14] **"Barrister"** see Attorney and Client § 4.

[15] Black L. D.

[16] St. 6 Vict. c 18.

[a] **Revising barristers' courts.**—Courts held in the autumn throughout the country, to revise the list of voters for county and borough members of parliament. Black L. D.

[17] See also Revise ante.

Revision board see Municipal Corporations §§ 1595, 3187 et seq, 3376; Taxation [37 Cyc 1079].

Revision of:
Assessment see Eminent Domain § 435; Municipal Corporations § 3187 et seq; Taxation [37 Cyc 1079].
Constitution see Constitutional Law §§ 14–34.
Insolvency proceedings see Insolvency §§ 283–290.
Jury list see Juries § 223.
Ordinance see Municipal Corporations §§ 881 et seq, 2459.
Sentence see Criminal Law §§ 3096–3101.
Statute see Statutes [36 Cyc 1067].

[18] Webster D. [quot State v. King County Super. Ct., 9 Wash. 369, 373, 37 P 489].

[a] **"Amendment" compared** see State v. Taylor, 22 N. D. 362, 133 NW 1046, 1048.

[19] Century D. [quot Goodwin v. Prime, 92 Me. 355, 363, 42 A 785].

[20] Goodwin v. Prime, supra.

[21] See Correction 14A C. J. p 1427 text and note 93 [e].

[22] See Revise ante; Revision ante.

[23] Webster D. [quot State v. King County Super. Ct., 9 Wash. 369, 373, 37 P 489].

[24] State v. King County Super. Ct., supra.

[25] See also Revive post; Revivor post; Scire Facias [35 Cyc 1147].

Revival of:
Action or suit:
  In general see Abatement and Revival 1 C. J. p 13 et seq; Appeal and Error §§ 695–906, 1001, 3381; Mandamus §§ 563–571.
  By attorney see Attorney and Client § 155.
  Compelling see Mandamus § 115.
  Taking depositions after see Continuances § 88.
Annuities § 49.
Easements § 180.
Indebtedness see Limitations of Actions § 564 et seq.
Judgment see Constitutional Law § 305; Equity § 870; Executors and Administrators §§ 2232, 2233; Guardian and Ward § 459; Insane Persons § 648; Judgments §§ 896, 949, 991, 1008–1056, 1163; Justices of the Peace § 325.
Lease see Landlord and Tenant §§ 445, 1140.
Lien see Attachment §§ 533, 534; Executions § 502; Maritime Liens § 140; Mortgages §§ 431 note 36 [a], 438, 2168.
Offense see Divorce §§ 203–206.
Ordinance see Municipal Corporations § 900.
Policy see Fire Insurance §§ 240, 249; Insurance §§ 642–646; Life Insurance §§ 237–244.
Statutes [36 Cyc 1099].
Trust as separate estate see Husband and Wife § 511.
Wills [40 Cyc 1212 et seq].

[26] Webster Int. D.

[27] Kelsey v. Smith, 2 Miss. 68, 84.

[28] See Revival ante; Revivor post.

[29] Webster D. [quot Lindsey v. Lyman, 37 Iowa 206, 207]; Rockwell v. Blaney, 5 OhNPNS 580, 583.

[a] **Derivation.**—The syllable "re" indicates the use of old matter and the syllable "vive" means to "give life to." In re Bank of Commerce, 153 Ind. 460, 53 NE 950, 55 NE 224, 47 LRA 489 [quot Leman v. Cunningham, 12 Ida. 135, 141, 85 P 212].

[b] **Implies** bringing back to life or action after suspension. In re Zeis, 229 Fed. 472, 474.

"Renew" ante.

[30] In re Bank of Commerce, 153 Ind. 460, 471, 53 NE 950, 55 NE 224, 47 LRA 489.

[31] Leman v. Cunningham, 12 Ida. 135, 85 P 212, 214 [quot Prier v. Traders' Nat. Bank, 24 Wash. 695, 64 P 831]; Thornhill v. Hargreaves, 76 Nebr. 582, 590, 107 NW 847; Tacoma Nat. Bank v. Sprague, 33 Wash. 285, 288, 74 P 393, 394.

"Restore" ante.

[32] Bullard v. Lopez, 7 N. M. 561, 566, 37 P 1103.

[33] Thornhill v. Hargreaves, 76

*By WM. HOWARD BUCHANAN (Revise—Revolving Fund inclusive).

Phrases: "No promise shall operate to revise any action from the bar and limitations,"[35] and "revised, saved, and enacted."[36]

REVIVOR.[37] Revival of a suit which is abated by the death or marriage of any of the parties.[38]

REVOCABILITY.[39] The property of being revocable; revocableness.[40]

REVOCATION.[41] The act of revoking by one having the right;[42] recall;[43] more particularly, the recall of a power or authority conferred,[44] or the vacating of an instrument previously made;[45] the annulment[46] or cancellation[47] of the instrument, act, or promise by or on behalf of the party who made it.[48]

Phrases: "Dependent relative revocation,"[49] "power of revocation,"[50] "reserved power of revocation,"[51] "revocation by marriage and birth of issue,"[52] and "upon the revocation."[53]

REVOKE.[54] To abolish;[55] to annul;[56] to recall, cancel, or set aside;[57] to recall, to take back, to repeal;[58] to recall what one has done or promised;[59] to rescind.[60]

Applied to testamentary disposition, to annul it, so that in legal contemplation it ceases to exist and becomes as inoperative as if it had never been written.[61]

REVOLT.[62]

REVOLUTION.[63]

Nebr. 582, 590, 107 NW 847. See generally Judgments § 1008 et seq.

[34] Maclean v. Brodigan, 41 Nev. 468, 172 P 375, 376. See generally Statutes [36 Cyc 1099 et seq].

[a] **"Reënact" synonymous.**—Police Jury v. Shreveport, 137 La. 1032, 1041, 69 S 828 [quot State v. Walters, 135 La. 1070, 1086, 66 S 364].

[35] Briscoe v. Anketell, 28 Miss. 361, 373, 61 AmD 553.

[36] State v. Maryland Bank, 6 Gill & J. (Md.) 205, 224, 26 AmD 561.

[37] See also Revival ante; Revive ante.

Bill of revivor see Equity § 669.

[38] Webster New Int. D.

[39] See also Revocation post; Revoke post.

Revocability of:
Assignments § 101.
Bills and Notes § 89.
Power to take possession see Chattel Mortgages § 47.

[40] Century D.

[41] **Revocation of:**
Abandonment see Marine Insurance §§ 455, 456.
Adoption of Children §§ 103–112.
Advancement see Descent and Distribution § 233.
Appointment see Guardian and Ward §§ 122–138; Insane Persons § 284 et seq; Judges § 86; Officers § 69; Receivers § 93.
Assignments § 101.
Assignments for Benefit of Creditors §§ 101, 181–184.
Authority see Agency §§ 151–168; Alteration of Instruments § 134 note 20 [a]; Appeal and Error §§ 666, 1123, 3342; Attorney and Client § 184 et seq; Brokers § 22; Factors § 10; Insurance § 136 et seq; Judgments §§ 296, 297.
Bills and Notes §§ 89, 320, 335 note 84 [a], 491, 552, 681, 829, 1377. See also Banks and Banking § 429.
Bonds § 75.
Charter or franchise see Corporations § 3679 et seq; Franchises § 111; Monopolies § 45; Railroads §§ 45, 46, 102 et seq, 180.
Contract or agreement see Contracts § 621 et seq; Frauds, Statute of § 154; Husband and Wife §§ 221–223, 288; Parent and Child §§ 12, 150, 193.
Dedication §§ 148–158½.
Deed or grant see Deeds § 470; Insolvency §§ 215, 220, 252; Public Lands §§ 291, 380, 386, 695.
Devise see Conversion § 71.
Discharge see Bankruptcy §§ 697–703.
Gifts §§ 45–48, 119–123.
Letters see Executors and Administrators §§ 274–295, 871, 1277, 2682.
License or permit see Attorney and Client § 37 et seq; Auctions and Auctioneers §§ 8, 16; Insurance §§ 26, 136; Landlord and Tenant § 267; Licenses §§ 109–113, 193–204; Mandamus §§ 212, 355; Municipal Corporations §§ 380–382, 982, 3806; Patents § 434; Physicians and Surgeons §§ 64–83; Pilots § 27; Post Office §§ 89–91; Schools and School Districts [35 Cyc 1089].
Offer see Compromise and Settlement § 12; Contracts §§ 101–107; Guaranty §§ 20, 70–72.
Order see Courts § 249; Indians § 132 note 75 [a]; Motions and Orders § 237 et seq.
Pardons § 41.
Pension see Municipal Corporations §§ 1422, 1504; Pensions § 31.
Power:
  Generally see Powers §§ 20, 21, 157–159.
  Of sale see Mortgages §§ 1347–1351; Pledges § 246.
References § 72.
Right to continue improvement see Improvements § 11.
Submission see Arbitration and Award §§ 91–127.
Subscription see Corporations §§ 783, 3691 et seq., 3948, 3960, 4063 note 36 [c]; Subscriptions [37 Cyc 492].
Trusts [39 Cyc 92].
Waiver of exemption see Exemptions § 210.
Warrant see Extradition § 41.
Will see Wills [40 Cyc 1171 et seq, 1234].

Reservation of power of revocation see Fraudulent Conveyances § 348.

[42] Webster D. [quot Ford v. Greenawalt, 292 Ill. 121, 126 NE 555, 557].

[43] Wilmington City R. Co. v. Wilmington, etc., R. Co., 8 Del. Ch. 468, 495, 46 A 12.

"Recall" ante.

[44] Bouvier L. D. [Baker v. Fifth Ave. Bank, 225 App. Div. 238, 232 NYS 238].

[a] **"Revocation not only means** the recalling of the power, but may denote 'the vacating' of the grant for cause." Houston v. Houston City St. R. Co., 83 Tex. 548, 557, 19 SW 127, 29 AmSR 679.

"Authority" 6 C. J. p 864.

"Power" 49 C. J. p 1241.

[45] Bouvier L. D. [quot Baker v. Fifth Ave. Bank, 225 App. Div. 238, 232 NYS 238].

[46] **"Annulment"** 3 C. J. p 222.

[47] **"Cancellation"** 9 C. J. p 1153.

"Alteration" distinguished see 2 C. J. p 1167 note 93 [a].

[48] Standard D. [quot Ford v. Greenawalt, 292 Ill. 121, 126 NE 555, 557].

[49] Henry v. Fraser, 29 F. (2d) 633, 634.

[50] Wilmington City R. Co. v. Wilmington, etc., R. Co., 8 Del. Ch. 468, 46 A 12, 18.

[51] Wilmington City R. Co. v. Wilmington, etc., R. Co., supra.

[52] In re Schuster, 111 Misc. 534, 181 NYS 500, 505.

[53] New South Wales v. Com., 38 Austr. C. L. R. 74, 129.

[54] See also Revocation ante.

[55] Houston v. Houston City St. R. Co., 83 Tex. 548, 557, 19 SW 127, 29 AmSR 679.

"Abolish" 1 C. J. p 305.

[56] Eschbach v. Collins, 61 Md. 478, 499, 48 AmR 123; Houston v. Houston City St. R. Co., 83 Tex. 548, 557, 19 SW 127, 29 AmSR 679.

[a] **"Revoked," as applied to an order of removal** "imports that the order is in force until it is recalled." Taber v. New Bedford, 177 Mass. 197, 199, 58 NE 640.

"Annul" distinguished see 3 C. J, p 222 text and note 3 [b].

[57] Ford v. Greenawalt, 292 Ill. 121, 126 NE 555, 557.

"Cancel" 9 C. J. p 1153.

"Recall" 52 C. J. p 1190.

[58] In re Morrow, 204 Pa. 484, 486, 54 A 342; Sloan's App., 168 Pa. 422, 430, 32 A 42, 47 AmSR 889.

"Repeal" ante.

[59] Langdon v. Astor, 16 N. Y. 9, 39.

[60] Houston v. Houston City St. R. Co., 83 Tex. 548, 557, 19 SW 127, 29 AmSR 679.

"Rescind" ante.

[61] Gardiner v. Gardiner, 65 N. H. 230, 231, 19 A 651, 8 LRA 383. See Langdon v. Astor, 10 N. Y. Super. 477, 561.

Revocation of will see Wills [40 Cyc 1171].

[62] See Seamen [35 Cyc 1255]; and generally Insurrection and Sedition 33 C. J. p 158.

[63] See Insurrection and Sedition § 11.

REVOLUTIONARY. As a noun, one who instigates or favors revolution;[64] one who takes part in a revolution.[65] As an adjective, pertaining to or connected with, characterized by, of by the nature of, revolution.[66]

REVOLVER.[67] A firearm,[68] especially a pistol,[69] having a breechloading chambered cylinder so arranged that the cocking of the hammer or movement of the trigger in its return motion revolves it and brings the next cartridge in line for firing.[70]

REVOLVING FUND. An expression of recent coinage which usually refers to a renewable credit[71] over a definite period.[72] It may also mean a fund[73] which when reduced is replenished by new funds from specified sources.[74]

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[64] Gitlow v. Kiely, 44 F. (2d) 227, 233.

"Instigate" 32 C. J. p 941.

"Revolution" see Insurrection and Sedition § 11.

[65] Gitlow v. Kiely, 44 F. (2d) 227, 233.

[66] Gitlow v. Kiely, supra.

[67] **Revolver:**
Generally see Weapons [40 Cyc 851].
As personal baggage see Carriers 10 C. J. p 1192 text and note 31.

[68] **"Firearm"** see Weapons [40 Cyc 852].

[69] **"Pistol"** 48 C. J. p 1210.

"This term is sometimes applied to a pistol not recognized as an army weapon." State v. Wilburn, 7 Baxt. (Tenn.) 57, 59, 32 AmR 551.

[a] **"As to the pistol designated as a revolver,** we hold this may or may not be such a weapon as is adapted to the usual equipment of the soldier, or the use of which may render him more efficient as such, and therefore hold this to be a matter to be settled by evidence as to what character of weapon is included in the designation 'revolver.' We know there is a pistol of that name which is not adapted to the equipment of the soldier, yet we also know that the pistol known as the repeater is a soldier's weapon—skill in the use of which will add to the efficiency of the soldier." Andrews v. State, 3 Heisk. (Tenn.) 165, 186, 8 AmR 8.

[70] Schraeder v. State, 28 Oh. A. 248, 250.

[a] **Rifle** is not included within the term. Taylor v. Seil, 120 Wis. 32, 97 NW 498.

"Rifle" post.

[71] **"Credit"** 15 C. J. p 1348.

[72] U. S. v. Butterworth-Judson Corp., 297 Fed. 971, 979.

[a] **"In simple parlance,** it relates usually to a situation where a banker or merchant extends credit for a certain amount which can be paid off from time to time, and then credit is again given not to exceed the same amount." U. S. v. Butterworth-Judson Corp., 297 Fed. 971, 979.

[73] **"Fund"** 27 C. J. p 926.

[74] U. S. v. Butterworth-Judson Corp., 297 Fed. 971, 979.

REWARDS

By Carolan Jefferson Walsh

[Matters not in this Title, treated elsewhere in this Work, see Cross References infra p 776]

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For **later cases, developments** and **changes** in the law see **Annotations,** same title and section number.

CROSS REFERENCES

Bounties 9 C. J. p 299.
Finding Lost Goods § 14.
Informers see **Customs Duties** 17 C. J. p 528; **Fines, Forfeitures, and Penalties** 25 C. J. p 1143; **Internal Revenue** 33 C. J. p 271.
Receiving stolen goods to obtain see **Receiving Stolen Goods** 53 C. J. p 500.
Taking and withholding property to obtain see **Larceny** § 122.

I. DEFINITION AND NATURE

[§ 1] **A. Definition.** A reward is a sum of money or other compensation offered to the public generally, or to a class of persons, for the performance of a designated service.[1]

[§ 2] **B. Nature.** The basis of the right to a reward is "in the nature of a contract."[2] Being contractual,[3] a binding and enforceable contract to pay a reward rests on the one side upon a valid offer,[4] and on the other side upon an acceptance of such offer,[5] including its terms and conditions,[6] by a performance of the service requested in the offer[7] before the offer lapses[8] or is revoked.[9] Until acceptance by performance of the services, it is a mere proposition;[10] but when accepted by performance it becomes a binding contract[11] based on the principles[12] and subject to the laws of contracts generally.[13]

Statutory rewards. A distinction has been advanced[14] and held by some few cases that the contractual element may not be necessary in general statutory rewards, a legal right being conferred without it,[15] as such rewards are in the nature of bounties.[16]

II. STATUTORY REGULATION

[§ 3] The legislature may by statute affect the right of third parties to offer a reward[17] or may declare certain contracts for rewards contrary to public policy.[18]

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1. U. S.—Shuey v. U. S., 92 U. S. 73, 23 L. ed. 697.

Ill.—Madison First Nat. Bank v. Hart, 55 Ill. 62.

Mont.—Kirk v. Smith, 48 Mont. 489, 494, 138 P 1088.

Pa.—Smith v. Lancaster County, 29 Pa. Dist. 902.

Eng.—Carlill v. Carbolic Smoke Ball Co., [1893] 1 Q. B. 256.

[a] **Other definitions.**—(1) "Compensation or remuneration for services; a sum of money paid or taken for doing or forbearing to do some act." Burrill L. D. [quot State v. Dustin, 5 Or. 375, 377, 20 AmR 746]. (2) "A recompense or premium offered by the government or an individual for special or extraordinary services to be performed." Black L. D. [quot Campbell v. Mercer, 108 Ga. 103, 107, 33 SE 871]. To same effect Henderson v. U. S. Fidelity, etc., Co., (Tex. Commn. A.) 298 SW 404; Zwolanek v. Baker Mfg. Co., 150 Wis. 517, 137 NW 769, 44 LRANS 1214, AnnCas1914A 793; Kinn v. First Nat. Bank, 118 Wis. 537, 95 NW 969, 99 AmSR 1012. (3) "A sum paid for the performance of some specific act to some person or persons." Kircher v. Murray, 54 Fed. 617, 624.

[b] **"Bounty" distinguished.**—Abbe v. Allen, 39 HowPr (N. Y.) 481, 488; Hagan v. Black, 159 Tenn. 290, 17 SW (2d) 908. See also Bounties § 1 note 1.

[c] **Purse** (1) as synonymous with reward or premium see Bronson Agricultural, etc., Assoc. v. Ramsdell, 24 Mich. 441. (2) Defined generally see Gaming § 46.

"Bet" distinguished see Gaming § 44 note 67.

2. Mass.—Freeman v. Boston, 5 Metc. 56, 57.

Mo.—Hoggard v. Dickerson, 180 Mo. A. 70, 72, 165 SW 1135.

N. J.—Union County v. Hopkins, 95 N. J. Eq. 444, 123 A 365.

N. Y.—Vitty v. Eley, 51 App. Div. 44, 64 NYS 397.

Pa.—Smith v. Lancaster County, 29 Pa. Dist. 902.

Tenn.—Stamper v. Temple, 6 Humphr. 113, 44 AmD 296.

3. Arkansas Bankers' Assoc. v. Ligon, 174 Ark. 234, 295 SW 4, 53 ALR 534; Furman v. Parke, 21 N. J. L. 310; Union County v. Hopkins, 95 N. J. Eq. 444, 123 A 365.

Contracts generally see Contracts 13 C. J. p 214.

4. **Offer** see § 4 et seq.

5. **Acceptance** see § 25 et seq.

6. See infra § 25 note 9.

7. **Performance** see infra § 36 et seq.

8. **Lapse of offer** see infra § 17.

9. **Revocation** see infra §§ 15-16.

10. See infra § 4 note 21.

11. Van Vlissingen v. Manning, 105 Ill. A. 255; Genesee County v. Pailthorpe, 246 Mich. 356, 224 NW 418; Pierson v. Morch, 82 N. Y. 503; Zwolanek v. Baker Mfg. Co., 150 Wis. 517, 137 NW 769, 44 LRANS 1214, AnnCas 1914A 793.

Effect of acceptance see § 35.

12. Van Vlissingen v. Manning, 105 Ill. A. 255.

13. Campbell v. Mercer, 108 Ga. 103, 33 SE 871; Umatilla County v. Estes, 105 Or. 248, 208 P 761; Tobin v. McComb, (Tex. Civ. A.) 156 SW 237.

14. Broadnax v. Ledbetter, 100 Tex. 375, 99 SW 1111, 9 LRANS 1057.

15. Smith v. State, 38 Nev. 477, 151 P 512, LRA1916A 1276; Choice v. Dallas, (Tex. Civ. A.) 210 SW 753.

16. Choice v. Dallas, (Tex. Civ. A.) 210 SW 753. See Bounties 9 C. J. p 299.

17. See Kozler v. New York Tel. Co., 93 N. J. L. 279, 108 A 375.

[a] **Rule applied.**—A statute rendering inadmissible the record of a conviction of a juvenile offender in any action or proceeding of a civil nature, may operate to prevent the admission of such record in an action to recover a reward offered for the arrest and conviction of any person guilty of receiving property stolen from the defendant Kozler v. New York Tel. Co., 93 N. J. L. 279, 108 A 375.

18. See Kozler v. New York Tel. Co., supra.

III. THE OFFER

[§ 4] **A. Nature of Offer—1. In General.** There must of course be an actual[19] and valid[20] offer, but an offer alone or promise to pay a reward is merely a proposal[21] or a conditional promise[22] on the part of the offerer, and not a consummated contract.[23]

[§ 5] **2. Subject Matter and Terms.** It is entirely optional with the offerer of a reward to offer it on any terms that please him,[24] and such terms as he sees fit to require must be substantially complied with before recovery can be had upon the contract.[25] Subject to the rule which forbids illegal contracts,[26] the performance of any act or service may constitute the subject matter of an offer of reward.[27] An offer of reward may be made for the procuring of information and evidence[28] leading to the arrest[29] and conviction of a certain person or persons;[30] which will lead to the return or recovery of certain property.[31] Also the offer may be for the arrest[32] and delivery,[33] or the arrest and conviction of a certain person or persons,[34] or for the

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[19] Hosier v. Northampton Horse Ins. Co., 21 Pa. Dist. 1001.

[a] **A reward cannot be exacted** for services even though one has at the peril of his life voluntarily joined in capturing robbers, and saved the victim of the robbery a considerable sum of money. Work v. People's Bank, 18 Que. Super. 486.

[20] Freeman v. Boston, 5 Metc. (Mass.) 56, 57; Smith v. Lancaster County, 29 Pa. Dist. 902; Stamper v. Temple, 6 Humphr. (Tenn.) 113, 44 AmD 296; Zwolanek v. Baker Mfg. Co., 150 Wis. 517, 522, 137 NW 769, 44 LRANS 1214, AnnCas1914A 793.

[21] Ark.—Amis v. Conner, 43 Ark. 337.

Cal.—Wilson v. Stump, 103 Cal. 255, 37 P 151, 42 AmSR 111; Ryer v. Stockwell, 14 Cal. 134, 73 AmD 634.

Conn.—Bull v. Talcot, 2 Root 119, 1 AmD 62.

Ga.—Campbell v. Mercer, 108 Ga. 103, 33 SE 871; Biggers v. Owen, 79 Ga. 658, 5 SE 193.

Ind.—Vigo Agricultural Soc. v. Brumfiel, 102 Ind. 146, 1 NE 382, 52 AmR 657; Harson v. Pike, 16 Ind. 140.

Me.—Haskell v. Davidson, 91 Me. 488, 40 A 330, 64 AmSR 254, 42 LRA 155; Mitchell v. Abbott, 86 Me. 338, 29 A 1118, 41 AmSR 559, 25 LRA 503.

Mich.—Genesee County v. Pailthorpe, 246 Mich. 356, 224 NW 418.

N. H.—Janvrin v. Exeter, 48 N. H. 83, 2 AmSR 185.

N. Y.—Pierson v. Morch, 82 N. Y. 503; Grady v. Crook, 2 AbbNCas 53 [aff 72 N. Y. 612].

Pa.—Patton v. Hassinger, 69 Pa. 311; Cummings v. Gann, 52 Pa. 484.

Tex.—Kasling v. Morris, 71 Tex. 584, 9 SW 739, 10 AmSR 797.

Wis.—Zwolanek v. Baker Mfg. Co., 150 Wis. 517, 137 NW 769, 44 LRANS 1214, AnnCas1914A 793.

[22] U. S.—McClaughry v. King, 147 Fed. 463, 79 CCA 91, 7 LRANS 216, 8 AnnCas 856.

Ala.—Central R., etc., Co. v. Cheatham, 85 Ala. 292, 4 S 828, 7 AmSR 48.

Ark.—Chambers v. Ogle, 117 Ark. 242, 174 SW 532.

Cal.—Wilson v. Stump, 103 Cal. 255, 37 P 151, 42 AmSR 111.

Ga.—Campbell v. Mercer, 108 Ga. 103, 33 SE 871.

Ill.—Williams v. West Chicago, etc., R. Co., 191 Ill. 610, 61 NE 456, 85 AmSR 278.

Ind.—Harson v. Pike, 16 Ind. 140.

Mass.—Besse v. Dyer, 9 Allen 151, 85 AmD 747; Freeman y. Boston, 5 Metc. 56.

[23] Wilson v. Stump, 103 Cal. 255, 37 P 151, 42 AmSR 111; Ryer v. Stockwell, 14 Cal. 134, 73 AmD 634; Harson v. Pike, 16 Ind. 140; Cummings v. Gann, 52 Pa. 484.

[24] Freeman v. Boston, 5 Metc. (Mass.) 56.

[a] **Additional condition** that accused be convicted may be embodied in an offer of reward by the governor, under statute authorizing him to offer rewards for apprehension. Caryl v. State, 135 Wash. 1, 236 P 792.

[25] See infra § 36.

[26] See infra §§ 21, 22.

[27] See cases infra notes 28–50.

[28] U. S.—Shuey v. U. S., 92 U. S. 73, 23 L. ed. 697.

Conn.—In re Kelly, 39 Conn. 159.

Ill.—Higgins v. Lessig, 49 Ill. A. 459.

Mass.—Besse v. Dyer, 9 Allen 151, 85 AmD 747.

N. M.—Cunningham v. Fiske, 13 N. M. 331, 83 P 789.

N. Y.—Atwood v. Armstrong, 102 App. Div. 601, 92 NYS 596; Fargo v. Arthur, 43 HowPr 193.

Eng.—Williams v. Carwardine, 4 B. & Ad. 621, 24 ECL 274, 110 Reprint 590, 5 C. & P. 566, 24 ECL 711, 172 Reprint 1101, 6 ERC 132.

What constitutes performance see infra §§ 42–47.

[29] Umatilla County v. Estes, 105 Or. 248, 208 P 761.

[30] Brown v. Bradlee, 156 Mass. 28, 30 NE 85, 32 AmSR 430, 15 LRA 509; Union County v. Hopkins, 95 N. J. Eq. 444, 123 A 365; Rogers v. McCoach, 66 Misc. 85, 120 NYS 686; Choice v. Dallas, (Tex. Civ. A.) 210 SW 753.

Performance of offer see infra § 42.

[31] Neville v. Kelly, 12 C. B. N. S. 740, 104 ECL 740, 140 Reprint 1333.

[32] U. S.—McClaughry v. King, 147 Fed. 463, 79 CCA 91, 7 LRANS 216, 8 AnnCas 856.

Ark.—Stroud v. Garrison, 24 Ark. 53.

Ill.—Montgomery County v. Robinson, 85 Ill. 174.

Ind.—Everman v. Hyman, 26 Ind. A. 165, 28 NE 1022, 84 AmSR 284.

Ky.—Moseley v. Stone, 108 Ky. 492, 56 SW 965, 22 KyL 173; Heather v. Thompson, 78 SW 194, 25 KyL 1554.

Me.—Haskell v. Davidson, 91 Me. 488, 40 A 330, 64 AmSR 254, 42 LRA 155.

Md.—Goldsborough v. Cradie, 28 Md. 477.

Mass.—Crawshaw v. Roxbury, 7 Gray 374.

Miss.—Oktibbeha County v. Cottrell, 70 Miss. 117, 12 S 156.

Mo.—Cummings v. Clinton County, 181 Mo. 162, 79 SW 1127; Ralls County v. Stephens, 104 Mo. A. 115, 78 SW 291.

Nev.—Sias v. Hallock, 14 Nev. 332.

N. J.—Furman v. Parke, 21 N. J. L. 310.

N. C.—Washburn v. Humphreys, 35 N. C. 88.

Oh.—Gilmore v. Lewis, 12 Oh. 281.

Pa.—Juniata County v. McDonald, 122 Pa. 115, 15 A 696.

Tex.—Blain v. Pacific Express Co., 69 Tex. 74, 6 SW 679.

Eng.—Bent v. Wakefield Bank, 4 C. P. D. 1.

Performance of condition see infra §§ 48–52.

[33] Ga.—Hewitt v. Lamb, 130 Ga. 709, 61 SE 716.

Kan.—Stone v. Dysert, 20 Kan. 123.

Ky.—Stephens v. Brooks, 2 Bush 137; Nall v. Proctor, 3 Metc. 447.

Md.—Goldsborough v. Cradie, 28 Md. 477.

Miss.—Gould v. Chickasaw County, 85 Miss. 123, 37 S 710.

N. C.—Currie v. Swindall, 33 N. C. 361.

Pa.—Juniata County v. McDonald, 122 Pa. 115, 15 A 696.

S. C.—Clanton v. Young, 45 S. C. L. 546.

Tex.—Adair v. Cooper, 25 Tex. 548.

Performance of condition see infra § 53.

[34] U. S.—Williams v. U. S., 12 Ct. Cl. 192.

Ala.—Central R., etc., Co. v. Cheatham, 85 Ala. 292, 4 S 828, 7 AmSR 48.

Cal.—Van Horn v. Ricks Water Co., 115 Cal. 448, 47 P 361.

Ill.—Williams v. West Chicago St. R. Co., 191 Ill. 610, 61 NE 456, 85 AmSR 278.

Ky.—Louisville, etc., R. Co. v. Goodnight, 10 Bush 552, 19 AmR 80.

La.—Salbadore v. Crescent Mut. Ins. Co., 22 La. Ann. 338.

Me.—Haskell v. Davidson, 91 Me. 488, 40 A 330, 64 AmSR 254, 42 LRA 155.

Mass.—Mead v. Boston, 3 Cush. 404.

Mo.—Lovejoy v. Atchison, etc., R. Co., 53 Mo. A. 386.

N. J.—Furman v. Parke, 21 N. J. L. 310.

N. Y.—Fitch v. Snedaker, 38 N. Y. 248, 97 AmD 791.

Pa.—Wilmoth v. Hensel, 151 Pa. 200, 25 A 86, 31 AmSR 738.

Vt.—Russell v. Stewart, 44 Vt. 170.

Wis.—Kinn v. Mineral Point First

detection, apprehension, and bringing to justice of an offender or offenders.[35] Likewise the offer may require the detection[36] and conviction[37] of persons for offenses committed, or thereafter to be committed;[38] the recovery of stolen property[39] and the apprehension of the thief;[40] the return of lost property;[41] or the recovery or rescue of a person.[42]

A prize or premium[43] may constitute a valid offer of a reward[44] for exhibits,[45] architects' plans,[46] the best picture,[47] or the best showing in a tournament.[48] It may be for the suggestion of a name[49] or even to the owner of a horse making the best time on a designated occasion.[50]

[§ 6] **3. Intent, Interest, and Motive of Offerer.** An offer must have been made with a contracting intention[51] and it must have been capable of creating a legal relation between the offerer and acceptor.[52] The requisite intention to contract is often not present in offers made under stress of great excitement,[53] anxiety,[54] or physical and mental affliction.[55] Likewise there is no actual offer of reward if the offer is in reality an expression of wrath coupled with boast and bluster,[56] or nothing more than a strong expression of feeling.[57] A mere suggestion to induce offers by others is not an offer.[58] But if it contains the assurance that the money offered has been deposited to show the offerer's sincerity, such an offer is no mere puffing statement[59] but is intended as a promise.[60] It is not necessary that the offerer should have any personal interest in the subject matter,[61] and his motive in making the offer is immaterial[62] so far as the validity of the contract is concerned.[63] Hence the fact that the offerer expected another than the one arrested and convicted to be arrested does not relieve him from liability.[64]

[§ 7] **B. Who May Make Offer—1. In General—a. Capacity To Offer.** Any person capable of making a contract[65] may bind himself by an offer of a reward.[66]

Nat. Bank, 118 Wis. 537, 95 NW 969, 99 AmSR 1012.

Ont.—Fortier v. Wilson, 11 U. C. C. P. 495.

Performance of condition see infra §§ 54-57.

35. Central R., etc., Co. v. Cheatham, 85 Ala. 292, 4 S 828, 7 AmSR 48.

36. Gardner v. Hartford, 14 Conn. 195.

37. Gardner v. Hartford, supra.

38. Gardner v. Hartford, supra; Wilmoth v. Hensel, 151 Pa. 200, 25 A 86, 31 AmSR 738.

[a] **Offenses against election laws** to be committed at future election. Wilmoth v. Hensel, 151 Pa. 200, 25 A 86, 31 AmSR 738.

Whether offer applies to past or future offenses see infra § 19.

39. Schirm v. Wieman, 103 Md. 541, 63 A 1056, 115 AmSR 373, 7 LRANS 175; Atwood v. Armstrong, 102 App. Div. 601, 92 NYS 596; Mirams v. Our Dogs Pub. Co., [1901] 2 K. B. 564.

Performance of condition see infra §§ 58-60.

40. Jones v. Phœnix Bank, 8 N. Y. 228.

Performance of condition see infra § 59.

41. U. S.—Tome v. Four Cribs of Lumber, 24 F. Cas. No. 14,083, Taney 533.

Iowa.—Hawk v. Marion County, 48 Iowa 472.

La.—Deslondes v. Wilson, 5 La. 397, 25 AmD 187.

Md.—Wilson v. Guyton, 8 Gill 213.

Mass.—Chase v. Corcoran, 106 Mass. 286.

Mich.—Wood v. Pierson, 45 Mich. 313, 7 NW 888.

N. Y.—Amory v. Flyn, 10 Johns. 102, 6 AmD 316.

Or.—Watts v. Ward, 1 Or. 86, 62 AmD 299.

Pa.—Cummings v. Gann, 52 Pa. 484.

Performance of condition see infra §§ 61-63.

42. Reif v. Paige, 55 Wis. 496, 13 NW 473, 42 AmR 731.

43. **"Premium" defined** see Premium 49 C. J. p 1330.

"Prize" defined see Prize § 1.

"Purse" defined see Gaming § 46.

44. See infra § 22.

45. Murray v. Walker, 83 Iowa 202, 48 NW 1075.

Agricultural exhibits and fairs generally see Agriculture §§ 10-21.

46. Audsley v. New York, 74 Fed. 274, 20 CCA 426; Walsh v. St. Louis Exposition, etc., Assoc., 16 Mo. A. 502; Cope v. Hastings, 183 Pa. 300, 38 A 717.

47. Trego v. Pennsylvania Academy of Fine Arts, 2 Pa. Cas. 313, 3 A 819.

48. In re Hempstead Fire Dept., 66 Misc. 381, 121 NYS 359.

49. Holt v. Wood, 14 Pa. Co. 499.

50. Ill.—West v. Carter, 129 Ill. 249, 21 NE 782.

Ind.—Alvord v. Smith, 63 Ind. 58.

Iowa.—Delier v. Plymouth Agricultural Soc., 57 Iowa 481, 10 NW 872.

N. Y.—Peo. v. Fallon, 152 N. Y. 12, 46 NE 296, 57 AmSR 492, 37 LRA 227.

Or.—Misner v. Knapp, 13 Or. 135, 9 P 65, 57 AmR 6.

Wis.—Moshier v. La Crosse County Agricultural Soc., 90 Wis. 37, 62 NW 932; Porter v. Day, 71 Wis. 296, 37 NW 259.

Power of agricultural society to offer see Agriculture § 12.

51. Stamper v. Temple, 6 Humphr. (Tenn.) 113, 44 AmD 296.

52. Higgins v. Lessig, 49 Ill. A. 459; Stamper v. Temple, 6 Humphr. (Tenn.) 113, 44 AmD 296.

53. Higgins v. Lessig, 49 Ill. A. 459.

54. Stamper v. Temple, 6 Humphr. (Tenn.) 113, 44 AmD 296.

55. Stamper v. Temple, supra.

56. Higgins v. Lessig, 49 Ill. A. 459.

[a] **An offer out of all proportion** to the supposed cause of the offerer's excitement should be regarded as the extravagant exclamation of an excited man rather than as manifesting an intention to contract. Higgins v. Lessig, 49 Ill. A. 459.

57. Stamper v. Temple, 6 Humphr. (Tenn.) 113, 44 AmD 296.

58. Anderson v. St. Louis Public Schools, 122 Mo. 61, 27 SW 610, 26 LRA 707.

59. Carlill v. Carbolic Smoke Ball Co., [1893] 1 Q. B. 256.

60. Carlill v. Carbolic Smoke Ball Co., supra.

61. Campbell v. Mercer, 108 Ga. 103, 33 SE 871; Furman v. Parke, 21 N. J. L. 310.

62. Furman v. Parke, supra; Fitch v. Snedaker, 38 N. Y. 248, 97 AmD 791; Morris v. Kasling, 79 Tex. 141, 15 SW 226, 11 LRA 398.

63. Furman v. Parke, 21 N. J. L. 310.

[a] **The secret motives** of one making an offer of reward form no part of the contract. Kasling v. Morris, 71 Tex. 584, 9 SW 739, 10 AmSR 797.

64. Campbell v. Mercer, 108 Ga. 103, 33 SE 871; Kasling v. Morris, 71 Tex. 584, 9 SW 739, 10 AmSR 797.

65. Campbell v. Mercer, 108 Ga. 103, 33 SE 871; Mountain v. Multnomah County, 16 Or. 279, 281, 18 P 464.

[a] **Applications of rule:** (1) An old, weak, illiterate woman may still be competent to offer a reward. Campbell v. Mercer, 108 Ga. 103, 33 SE 871. (2) One may offer a reward where he was not a citizen of the state or community where the crime was committed and was to derive no benefit and had no moral obligation to offer it. Furman v. Parke, 21 N. J. L. 310.

Capacity to contract see Contracts § 44.

66. Cal.—Ryer v. Stockwell, 14 Cal. 134, 73 AmD 634.

Ga.—Campbell v. Mercer, 108 Ga. 103, 108, 33 SE 871.

Ind.—Hayden v. Souger, 56 Ind. 42, 25 AmR 1.

Ky.—Marking v. Needy, 8 Bush 22.

La.—Murray v. Kennedy, 15 La. Ann. 385, 76 AmD 189.

N. H.—Janvrin v. Exeter, 48 N. H. 83, 2 AmR 185.

N. J.—Furman v. Parke, 21 N. J. L. 310, 312.

Or.—Mountain v. Multnomah County, 16 Or. 279, 281, 18 P 464.

[§ 8] **b. Agent.** An offer may be made by an agent of the offerer.[67] The offer must be the authorized act of the party on whose behalf it purports to be made.[68] This rule is, of course, applicable to private persons[69] and corporations,[70] and to municipal corporations,[71] and public officers as well.[72]

[§ 9] **2. Private Corporation.** A corporation may[73] offer a reward for the arrest and conviction of a person or persons who unlawfully offend against its property or business.[74] Among those which have been held to have such power are banks,[75] insurance companies,[76] railroads,[77] and telephone companies.[78] Furthermore, in accordance with general rules,[79] such offers for rewards may be made by officers and agents of corporations,[80] as for example, banks[81] and railroad companies.[82]

[§ 10] **3. State or Federal Governments.** The legislature has the power to offer rewards for the doing of acts which will be of public benefit;[83] and it may, as will be shown, delegate this power to municipal corporations.[84] So too it may empower designated officers,[85] as for example, the governor,[86] prosecuting attorney,[87] United States attorney-general,[88] or United States marshal,[89] to offer rewards for certain purposes. But one acting as agent for an officer may not, without proper authority offer a reward.[90] The authority of such officials to offer rewards must be governed by the construction of the statutory provisions.[91] Where a statute provides for an award in a stated amount for the ar-

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[a] **Offer by executor or administrator.**—Campbell v. Mercer, 108 Ga. 103, 107, 33 SE 871.

[67] Central R., etc., Co. v. Cheatham, 85 Ala. 292, 4 S 828, 7 AmSR 48.

[68] Central R., etc., Co. v. Cheatham, supra.

[69] See cases infra this note.

[a] **A writing which "guarantees" the payment of a sum offered by a third person** for an arrest and conviction is in effect the offer of a reward by the person signing it. Campbell v. Mercer, 108 Ga. 103, 33 SE 871.

[b] **Estoppel.**—Where a reward is published in the names of defendants who did not authorize it but did not object to or countermand it, there is no estoppel. To make them liable their silence must amount to fraud upon the plaintiff, which requires an intent or implied admission on the part of the defendants. The plaintiff's belief cannot of itself affect the defendants. Hugill v. Kinney, 9 Or. 250, 42 AmR 801.

[70] See infra § 9 notes 79-82.

[71] See infra § 11 note 96.

[72] See infra § 10 note 90.

[73] **Capacity of corporation to contract** see Corporations §§ 2506-2828.

[74] Ala.—Central R., etc., Co. v. Cheatham, 85 Ala. 292, 4 S 828, 7 AmSR 48.

Ark.—Arkansas Southwestern R. Co. v. Dickinson, 78 Ark. 483, 95 SW 802, 115 AmSR 540.

Ill.—Minneapolis Bank v. Griffin, 168 Ill. 314, 48 NE 154.

Ind.—American Express Co. v. Patterson, 73 Ind. 430.

Miss.—Norwood, etc., Co. v. Andrews, 71 Miss. 641, 16 S 262.

Pa.—Kelsey v. Crawford County Nat. Bank, 69 Pa. 426.

[75] Minneapolis Bank v. Griffin, 168 Ill. 314, 48 NE 154; Kelsey v. Crawford County Nat. Bank, 69 Pa. 426.

[76] Salbadore v. Crescent Mut. Ins. Co., 22 La. Ann. 338.

[a] **A board of underwriters** may authorize the insurance companies to offer a reward in matters connected with their insurance business. Salbadore v. Crescent Mut. Ins. Co., 22 La. Ann. 338.

[77] Arkansas Southwestern R. Co. v. Dickinson, 78 Ark. 483, 95 SW 802, 115 AmSR 54.

[a] **A general standing offer of reward** for the detection, arrest, and bringing to justice of those obstructing its tracks or offending against its property, is within the implied powers of a railroad corporation. Central R., etc., Co. v. Cheatham, 85 Ala. 292, 4 S 828, 7 AmSR 48.

[78] Southwestern Tel., etc., Co. v. Priest, 31 Tex. Civ. A. 345, 72 SW 241.

[79] **Who may represent a corporation** see Corporations § 2215.

[80] Central R., etc., Co. v. Cheatham, 85 Ala. 292, 4 S 828, 7 AmSR 48.

[81] See cases infra this note.

[a] **When the president of a bank** offers a reward for information leading to the arrest of a defaulter, it is binding on the bank unless it be proved that the president exceeded his authority. Minneapolis Bank v. Griffin, 168 Ill. 314, 48 NE 154.

[b] **The act of a cashier** in offering a reward may become binding on the bank by acquiescence of the directors. Kelsey v. Crawford County Nat. Bank, 69 Pa. 426.

[82] See cases infra this note.

[a] **The general manager** of a railroad company has authority to offer a general reward for the arrest and conviction of any person found maliciously obstructing its tracks. Arkansas Southwestern R. Co. v. Dickinson, 78 Ark. 483, 95 SW 802, 115 AmSR 54.

[b] **Superintendent.**—It is within the purposes and scope of the agency of a superintendent of a railroad company to offer a reward for bringing to justice all persons who obstruct its road or offend against its property rights. Central R., etc., Co. v. Cheatham, 85 Ala. 292, 4 S 828, 7 Am SR 48.

[c] **An offer signed by a superintendent** signing his name as such has been held to be sufficient as a binding offer of the company itself. Central R., etc., Co. v. Cheatham, 85 Ala. 292, 4 S 828, 7 AmSR 48.

[83] Glisper v. Com., 186 Ky. 276, 217 SW 348; Butler County v. Leibold, 107 Pa. 407; Cutting v. Taylor, 3 S. D. 11, 51 NW 949, 15 LRA 691.

[a] **Thus** the legislature may offer a reward to fire companies complying with certain conditions which would benefit the public by protecting property against fires. Cutting v. Taylor, 3 S. D. 11, 51 NW 949, 15 LRA 691.

[b] **Horse thieves.**—A statute providing a reward for the apprehension and conviction of horse thieves is constitutional. Glisper v. Com., 186 Ky. 276, 217 SW 348.

[c] **Statute requiring payment of fees** to police officers for arrest of prohibition law violators is valid police regulation. Hutchins v. Granville County, 193 N. C. 659, 137 SE 711.

Construction of statutory reward see infra § 20.

[84] See infra § 11.

[85] See notes infra this section.

[86] Lees v. Colgan, 120 Cal. 262, 52 P 502, 40 LRA 355; Crawford County v. Spenney, 21 Ill. 288; Hager v. Sidebottom, 130 Ky. 687, 113 SW 870; State v. Dinkins, 77 Miss. 874, 27 S 832; Jones v. Gibbs, 51 Miss. 401.

[87] State v. Greenbrier County, 93 W. Va. 481, 117 SE 135.

[a] **For the purpose of apprehending** of violators of prohibition laws. State v. Greenbrier County Ct., 93 W. Va. 481, 117 SE 135.

[88] U. S. v. Matthews, 173 U. S. 381, 19 SCt 413, 43 L. ed. 738 (under 26 U. S. St. at L. 985).

[89] U. S. v. Matthews, supra.

[90] See case infra this note.

[a] **The governor's private secretary,** authorized by Acts (1906) p 260 c 30, to assist him in the labors of the office, cannot in the absence of the governor offer a reward. Hager v. Sidebottom, 130 Ky. 687, 113 SW 870.

[91] Gibbs v. U. S., 14 Ct. Cl. 544; Hungerford v. Moore, 65 Ala. 232; Drew v. Ricks, 17 Ala. 25; Crawford County v. Spenney, 21 Ill. 288; Anderson v. Pierce County, 40 Nebr. 481, 58 NW 955.

[a] **Discretion of official.**—(1) Governor, offering reward for apprehension of an offender under statute, must use discretion in determining whether a reward shall be offered, the amount thereof, and also determine to what jail the offender shall be delivered. Hager v. Sidebottom, 130 Ky. 687, 113 SW 870. (2) Prosecuting attorney, pursuant to authority so conferred, may within his discretion offer rewards for the apprehension of persons charged with crime. State v. Kanawha County Ct., 84 W. Va. 619, 100 SE 408.

[b] **Additional conditions may be imposed by governor** of state to those mentioned in statute authorizing offer of reward. Caryl v. State, 135 Wash. 1, 236 P 792.

[c] **An act creating office of state commissioner of prohibition** does not repeal law authorizing prosecuting attorney to offer rewards for violations of prohibition laws. State v. Greenbrier County Ct., 93 W. Va. 481, 117 SE 135.

rest of particular offenders, the proclamation of the governor offering such sum or any other can have no legal effect to bind the state aside from, or independent of, the statute,[92] but the legislature may authorize a greater reward which will be regarded as in full payment and not additional to the statutory sum unless the contrary intent is apparent.[93]

[§ 11] **4. Municipal Corporation.** Under an express grant of power, a municipality may offer an award,[94] the extent of its power[95] or of officials acting in the exercise thereof[96] depending upon the construction of the statute. In the absence of express authorization, however, it is generally held that municipal corporations are not empowered to offer rewards for the arrest or conviction of offenders against the criminal law of the state,[97] although it has been held that a board being charged with the management and control of county funds has the authority to offer a reward for the recovery of property stolen from the county.[98] On the other hand some authorities have held the power of municipalities to offer rewards for the detection or punishment of crime to be implied[99] under the general rule that powers necessary to effectuate powers express-

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Construction of statutory reward see infra § 20.

92. Jones v. Gibbs, 51 Miss. 401.

93. Jones v. Gibbs, supra.

94. See cases infra this note; and notes 95, 96.

[a] **State might empower or make it the duty** of a county to offer rewards. Felker v. Elk County, 70 Kan. 96, 78 P 167, 3 AnnCas 156.

95. Ill.—Crawford County v. Spenney, 21 Ill. 288.

Mass.—Day v. Otis, 8 Allen 477.

Mich.—Loveland v. Detroit, 41 Mich. 367, 1 NW 952.

Mo.—Cummings v. Clinton County, 181 Mo. 162, 79 SW 1127.

Nebr.—Anderson v. Pierce County, 40 Nebr. 481, 58 NW 955.

N. H.—Janvrin v. Exeter, 48 N. H. 83, 2 AmR 185.

N. J.—Union County v. Hopkins, 95 N. J. Eq. 444, 125 A 365.

N. Y.—Peo. v. Brower, 111 App. Div. 915, 97 NYS 349.

[a] **When rewards for those charged with crime** are authorized by statute, a town has no power to offer a reward for one not charged with a crime by complaint or indictment. Day v. Otis, 8 Allen (Mass.) 477.

[b] **Adoption of offer of private person.**—A county is liable under the statute when the authorities adopt or indorse an offer made by private persons. Cummings v. Clinton County, 181 Mo. 162, 79 SW 1127.

[c] **To actions on rewards offered by a municipal corporation** it is necessarily a condition precedent to the maintenance thereof that the authority to offer it comes within the statute from which such authority is derived. Abel v. Pembroke, 61 N. H. 357.

96. Gibbs v. U. S., 14 Ct. Cl. 544; Hungerford v. Moore, 65 Ala. 232; Mudd v. Woodside, 136 Ky. 296, 124 SW 321; State v. Greenbrier County Ct., 93 W. Va. 481, 117 SE 135.

[a] **Authority to apply funds.**—Mudd v. Woodside, 136 Ky. 296, 124 SW 321; Hagan v. Black, 159 Tenn. 290, 17 SW (2d) 908; State v. Greenbrier County Ct., 93 W. Va. 481, 117 SE 135.

[b] **Qualifications as to value.**—When a statute authorizes a county board to offer rewards for the arrest or conviction of persons stealing any horse, etc., or neat cattle, or any other property exceeding fifty dollars in value, a board has the power to offer a reward when the thing stolen was a horse worth less than fifty dollars, since the qualification as to value was not intended to apply to the property enumerated. Butler v. McLean County, 32 Ill. A. 397.

[c] **The proper municipal officers** must make the offer, when it is made by a municipality empowered to make it. Peo. v. Holly, 119 Mich. 637, 78 NW 665, 75 AmSR 435, 44 LRA 677.

[d] **Municipal officers and boards held authorized.**—(1) County board. Butler v. McLean County, 32 Ill. A. 397. (2) County judge. Cummings v. Clinton County, 181 Mo. 162, 79 SW 1127. (3) County prosecuting attorney. State v. Kanawha County Ct., 84 W. Va. 619, 100 SE 408.

[e] **Officers and boards held not authorized.**—(1) County courts. Hagan v. Black, 159 Tenn. 290, 17 SW (2d) 908. (2) Common council, independently of police commission. Loveland v. Detroit, 41 Mich. 367, 1 NW 952. (3) Selectmen. Brown v. Bradlee, 156 Mass. 28, 30 NE 85, 32 AmSR 430, 15 LRA 509; Day v. Otis, 8 Allen (Mass.) 477.

97. Conn.—Crofut v. Danbury, 65 Conn. 294, 32 A 365.

D. C.—Baker v. Washington, 7 D. C. 134.

Fla.—Murphy v. Jacksonville, 18 Fla. 318, 43 AmR 323.

Ga.—Barrett v. Atlanta, 145 Ga. 678, 89 SE 781, 782 [cit Cyc].

Ind.—Grant County v. Bradford, 72 Ind. 455, 37 AmR 174.

Iowa.—Hanger v. Des Moines, 52 Iowa 193, 2 NW 1105, 35 AmR 266; Hawk v. Marion County, 48 Iowa 472.

Kan.—Felker v. Elk County, 70 Kan. 96, 78 P 167.

Ky.—Patton v. Stephens, 14 Bush 324.

Me.—Gale v. South Berwick, 51 Me. 174.

N. H.—Abel v. Pembroke, 61 N. H. 357.

N. J.—Union County v. Hopkins, 95 N. J. Eq. 444, 123 A 365.

Or.—Mountain v. Multnomah County, 16 Or. 279, 18 P 464.

Tenn.—Hagan v. Black, 159 Tenn. 290, 17 SW (2d) 908.

Va.—Winchester v. Redmond, 93 Va. 711, 25 SE 1001, 57 AmSR 822.

Wis.—Butler v. Milwaukee, 15 Wis. 493.

Ont.—Cornwall v. West Missouri Tp., 25 U. C. C. P. 9.

[a] **A city is not authorized** to offer a reward for the arrest and conviction of an assassin. Baker v. Washington, 7 D. C. 134.

[b] **Board of county commissioners.**—(1) A county cannot be bound by an offer of reward by a board of county commissioners or supervisors. Huthsing v. Bousquet, 7 Fed. 833, 2 McCrary 152; Hanger v. Des Moines, 52 Iowa 193, 2 NW 1105, 35 AmR 266; Hawk v. Marion County, 48 Iowa 472; Felker v. Elk County, 70 Kan. 96, 78 P 167; 3 AnnCas 156; Stamp v. Cass County, 47 Mich. 330, 11 NW 183; Peo. v. Brower, 111 App. Div. 915, 97 NYS 349. (2) The law confers no power and enjoins no duty upon the board of commissioners of a county to aid in the arrest, prosecution, or conviction of a person charged with the commission of crime, either by an offer of reward, or by the employment of detective or professional skill. Grant County v. Bradford, 72 Ind. 455. (3) Resolution of the county commissioners offering a reward for the finding and identification of a missing man is in excess of legal power conferred upon them as commissioners, and does not authorize a contract between the county and a third person. Scheiber v. Von Arx, 87 Minn. 298, 92 NW 3.

[c] **A sheriff** has no power to bind the county by the offer of a reward for the capture of an escaped criminal. Crawford County v. Spenney, 21 Ill. 288; Bemis v. Rice County, 23 Minn. 73.

[d] **Statutes authorizing counties to compensate officers** for ex officio services do not confer power to enact resolution offering bounty to officers for conviction of criminals. Hagan v. Black, 159 Tenn. 290, 17 SW (2d) 908.

98. Hawk v. Marion County, 48 Iowa 472.

99. Luchini v. Police Jury, 126 La. 972, 53 S 68, 21 AnnCas 59; Carnes v. Red River Parish Police Jury, 110 La. 1011, 35 S 267; Crawshaw v. Roxbury, 7 Gray (Mass.) 374; Freeman v. Boston, 5 Metc. (Mass.) 56; Peo. v. Holly, 119 Mich. 637, 78 NW 665, 76 AmSR 435, 44 LRA 677.

[a] **Rewards for the detection or conviction** of liquor law violators may be offered by a municipal corporation. Luchini v. Police Jury, 126 La. 972, 53 S 68, 21 AnnCas 59; Carnes v. Red River Parish Police Jury, 110 La. 1011, 35 S 267.

[b] **Boards and officers held to have implied power to make offer.**—(1) Burgesses of town. York v. Forscht, 23 Pa. 391. (2) County boards. Butler v. McLean County, 32 Ill. A. 397. (3) Police jury. Luchini v. Police Jury, 126 La. 972, 53 S 68, 21 AnnCas 59.

[c] **A school board has no authority** to offer a reward for the detection and punishment of crime, it having no statutory authority, and its objects having nothing to do with rewards. Luchini v. Police Jury, 126 La. 972, 53 S 68, 21 AnnCas 59.

ly granted will be implied;[1] as for example, from the power to provide for the general welfare;[2] although as to this there is contrary authority;[3] or from the power to provide for the enforcement of its police regulations.[4] Further, the power may be implied on the theory that a municipality is a department of the state and the municipal legislators part of its public police.[5]

[§ 12] **5. Personal Liability of Officers.** When persons who are public officers publish a reward which they are not authorized to offer as such, or which is in excess of their authority, they are not as a general rule personally liable thereunder,[6] but may be so when the true construction of the offer authorizes such inference.[7]

[§ 13] **C. Manner of Making Offer.** In the absence of express statutory requirement,[8] the offer may be made orally,[9] the contract not being one required to be in writing by the statute of frauds,[10] but it may be made otherwise.[11] An offer of a reward may be by private contract with a particular person,[12] or it may be by any advertisement or other statement publicly proclaimed,[13] or may be published by being spread upon the record of the proper court or tribunal authorized to make the offer,[14] by proclamation,[15] newspaper publication,[16] handbills,[17] circulars,[18] postal cards,[19] or telegrams.[20] An offer of a reward may be made by statute[21] or ordinance.[22]

Renewal of offer. The silence of the offerer might, under some circumstances, amount to a renewal of an offer.[23]

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[1] See cases supra note 99; infra notes 2-4.

Implied powers of municipal corporations generally see Municipal Corporations § 190.

[2] Peo. v. Holly, 119 Mich. 637, 78 NW 665, 75 AmSR 435, 44 LRA 677.

[a] **Rewards for incendiaries.**—Under the welfare clause, a municipal corporation is authorized to offer a reward for the detection and conviction of incendiaries should they destroy property within the city limits. Crawshaw v. Roxbury, 7 Gray (Mass.) 374; Peo. v. Holly, 119 Mich. 637, 78 NW 665, 75 AmSR 435, 44 LRA 677.

[3] Barrett v. Atlanta, 145 Ga. 678, 89 SE 781.

[4] Luchini v. Police Jury, 126 La. 972, 53 S 68, 21 AnnCas 59; Carnes v. Red River Parish Police Jury, 110 La. 1011, 35 S 267.

[a] **Although the prosecution is in the name of the state,** if it includes a violation of an ordinance of the police jury, such body has the power to offer a reward, even though it has no power to provide a system for denouncing violations of the state criminal law. Luchini v. Police Jury, 126 La. 972, 53 S 68, 21 AnnCas 59.

[b] **Police juries may offer rewards as a means** of accomplishing the enforcement of their regulations. For the power of a police jury is not confined to the adoption of regulations to the exclusion of the power of carrying them out. Carnes v. Red River Parish Police Jury, 110 La. 1011, 35 S 267.

[5] York v. Forscht, 23 Pa. 391.

[a] **Thus it is the state that makes the offer** through one of its departments. York v. Forscht, 23 Pa. 391.

[6] Huthsing v. Bousquet, 7 Fed. 833, 2 McCrary 152 [aff 17 Fed. 54, 3 McCrary 569]; Scheiber v. Von Arx, 87 Minn. 298, 92 NW 3; Belknap v. Reinhart, 2 Wend. (N. Y.) 375, 20 AmD 621; Hite v. Goodman, 21 N. C. 364.

[7] King v. Lewis, 32 Ga. A. 110, 122 SE 633; Murray v. Kennedy, 15 La. Ann. 385, 77 AmD 189; Brown v. Bradlee, 156 Mass. 28, 30 NE 85, 32 AmSR 430, 15 LRA 509; Timken v. Tallmadge, 54 N. J. L. 117, 22 A 996.

[a] **An offer by B, R, and S, as "selectmen of Milton,"** is a personal offer of the persons so signing it, especially if they do not in their official capacity have authority to bind the town of which they were selectmen. Brown v. Bradlee, 156 Mass. 28, 30 NE 85, 32 AmSR 430, 15 LRA 509.

[b] **When the mayor of a city** in New Jersey offers a reward for the arrest of a fugitive defaulting official and he is wholly without authority as mayor to offer rewards, he is personally liable on such offer, since in that state municipal officers who exceed their authority are liable in the same manner as agents who do so. Timken v. Tallmadge, 54 N. J. L. 117, 22 A 996.

[c] **Where a United States marshal** offers a reward for the capture of a fugitive, adding after his name, the words, "U. S. Marshal," he is personally liable. Murray v. Kennedy, 15 La. Ann. 385, 77 AmD 189.

[d] **Reward was official act** of mayor and aldermen, where it purported to be such, even though signed by the city clerk. Freeman v. Boston, 5 Metc. (Mass.) 56.

[8] See statutory provisions.

[a] **Authorization by telephone to sign.**—When a county judge authorizes another by telephone to sign his name to the offer, that is sufficient under a statute requiring the offer to be in writing. Cummings v. Clinton County, 181 Mo. 162, 79 SW 1127.

[9] Wilson v. McClure, 50 Ill. 366; Hayden v. Souger, 56 Ind. 42, 26 AmR 1; Wilmoth v. Hensel, 151 Pa. 200, 25 A 86, 31 AmSR 738; Patton v. Hassinger, 69 Pa. 311; Reif v. Paige, 55 Wis. 496, 13 NW 473, 42 AmR 731.

[a] **Made at a public gathering.**—Wilson v. McClure, 50 Ill. 366.

[b] **Made by one standing in a crowd** and shouting out the offer to those present. Reif v. Paige, 55 Wis. 496, 13 NW 473, 42 AmR 731.

[c] **Made in a political speech.**—Wilmoth v. Hensel, 151 Pa. 200, 25 A 86, 31 AmSR 738.

[10] Zwolanek v. Baker Mfg. Co., 150 Wis. 517, 137 NW 769, 44 LRANS 1214, AnnCas1914A 793; Williams v. Byrnes, 1 Moore P. C. N. S. 154, 15 Reprint 660.

[a] **Reason for rule.**—Until the offer made is accepted by performance there is no contract, executory or otherwise. When the agreement comes into existence the only remaining obligation is that of the offer to pay what is due under it. Zwolanek v. Baker Mfg. Co., 150 Wis. 517, 137 NW 769, 44 LRANS 1214, AnnCas1914A 793.

[11] Murray v. Kennedy, 15 La. Ann. 385, 77 AmD 189; Janvrin v. Exeter, 48 N. H. 83, 2 AmR 185; Zwolanek v. Baker Mfg. Co., 150 Wis. 517, 137 NW 769, 44 LRANS 1214, AnnCas1914A 793; Kinn v. Mineral Point First Nat. Bank, 118 Wis. 537, 95 NW 969, 99 AmSR 1012.

[12] Franklin v. Heiser, 9 F. Cas. No. 5,054, 6 Blatchf. 426.

[13] Ala.—Morrell v. Quarles, 35 Ala. 544.

Ind.—Harson v. Pike, 16 Ind. 140.

Mass.—Besse v. Dyer, 9 Allen 151, 85 AmD 747.

Mo.—Anderson v. Public Schools, 122 Mo. 61, 27 SW 610, 26 LRA 707.

N. J.—Furman v. Parke, 21 N. J. L. 310.

N. Y.—Pierson v. Morch, 82 N. Y. 503.

Pa.—Cummings v. Gann, 52 Pa. 484.

Wis.—Reif v. Paige, 55 Wis. 496, 13 NW 473, 42 AmR 731.

[a] **Written contract within statute of limitations.**—(1) An advertisement offering a reward, upon its acceptance was held to be a written contract upon which the statute of limitations would not run for four years. Ryer v. Stockwell, 14 Cal. 134, 73 AmD 634. (2) But a contrary rule, holding that such a contract was not in writing under the statute of limitations, was adopted in Cunningham v. Fiske, 13 N. M. 331, 83 P 789.

[14] Smith v. Vernon County, 188 Mo. 501, 87 SW 949, 107 AmSR 324, 70 LRA 59.

[15] Auditor v. Ballard, 9 Bush (Ky.) 572, 15 AmR 728.

[a] **No publication other than entry** upon the executive journals is necessary for a reward proclaimed and properly signed by an authorized officer. Auditor v. Ballard, 9 Bush (Ky.) 572, 15 AmR 728.

[16] Ryer v. Stockwell, 14 Cal. 134, 73 AmD 634; Symmes v. Frazier, 6 Mass. 344, 4 AmD 142; Pierson v. Morch, 82 N. Y. 503.

[17] Central R., etc., Co. v. Cheatham, 85 Ala. 292, 4 S 828, 7 AmSR 48; Wilmoth v. Hensel, 151 Pa. 200, 25 A 86, 31 AmSR 738; Tarner v. Walker, L. R. 2 Q. B. 301, 8 B. & S. 314 [aff L. R. 1 Q. B. 641]; Thatcher v. England, 3 C. B. 254, 54 ECL 254, 136 Reprint 102.

[18] Central R., etc., Co. v. Cheatham, 85 Ala. 292, 4 S 828, 7 AmSR 48; Madison First Nat. Bank v. Hart, 55 Ill. 62.

[19] Swanton v. Ost, 74 Ill. A. 281; State v. Woodruff, 47 Kan. 151, 27 P 842, 27 AmSR 285.

[20] Cummings v. Gann, 52 Pa. 484.

[21] See cases supra § 10; and infra §§ 20, 41.

[22] See cases supra § 11.

[§ 14] **D. To Whom Offer May Be Made.** The offer may be directed to a particular person[24] or class of persons,[25] or to the world at large, that is, to any and all persons complying with the terms of the offer.[26]

[§ 15] **E. Revocation—1. In General.** Since an unaccepted offer confers no contractual rights[27] the offer may be revoked at any time before its acceptance by performance.[28] Personal notice of the revocation is not required,[29] yet an offer can only be revoked either in the manner in which it was made[30] or in some other manner that will give the revocation the same publicity as the offer.[31] Hence a subsequent offer, in different terms from the first, and made in another place, will not revoke the one made previously.[32] But the authorities are not in accord as to whether the discontinuance of an advertisement offering a reward will of itself revoke an offer;[33] however, such an act does prove that those who made it no longer hold it forth conspicuously as a continuing offer.[34]

[§ 16] **2. After Performance or Part Performance.** The offer cannot be revoked so as to deprive a person, who acted on the faith of it, of any compensation earned by performance[35] or part performance[36] of its conditions.

[§ 17] **F. Lapse of Offer.** Generally it is held that an offer of reward not limited in its duration by its own terms is not to be understood as intended to be perpetual[37] but, as in the case of other contracts,[38] it must be considered as having been withdrawn after a reasonable time from its date.[39] What period constitutes a reasonable time necessarily depends largely upon the circumstances under which the offer was made.[40] But it has been held

[23] Neal v. Evans, 6 Ky. Op. 418.

[a] **Where the offerer did not mention the withdrawal** of his offer to one he met engaged in searching for the offerer's lost mule, it amounted to a renewal of the offer of reward made on Sunday, which might not of itself have been enforceable. Neal v. Evans, 6 Ky. Op. 418.

[24] See cases infra this note.

[a] **Applications of rule.**—Franklin v. Heiser, 9 F. Cas. No. 5,054, 6 Blatchf. 426; Campbell v. Mercer, 108 Ga. 103, 33 SE 871; Bronnenberg v. Coburn, 110 Ind. 169, 11 NE 29.

[25] See cases infra this note.

[a] **Particular classes.**—(1) Employees. Zwolanek v. Baker Mfg. Co., 150 Wis. 517, 137 NW 769, 44 LRA NS 1214, AnnCas1914A 793. (2) Bank officers or police detectives. Madison First Nat. Bank v. Hart, 55 Ill. 62. (3) Fire companies. In re Hempstead F. Dept., 66 Misc. 381, 121 NYS 369; Cutting v. Taylor, 3 S. D. 11, 51 NW 949, 15 LRA 691. (4) Architects. Audsley v. New York, 74 Fed. 274, 20 CCA 426; Walsh v. St. Louis Exposition, etc., Assoc., 16 Mo. A. 502 [aff 90 Mo. 459, 2 SW 842]; Cope v. Hastings, 183 Pa. 300, 38 A 717.

[26] Williams v. Carwardine, 4 B. & Ad. 621, 24 ECL 274, 110 Reprint 590, 5 C. & P. 566, 24 ECL 711, 172 Reprint 1101, 6 ERC 133.

[a] **Applications of rule.**—Shuey v. U. S., 92 U. S. 73, 23 L. ed. 697; Central R., etc., Co. v. Cheatham, 85 Ala. 292, 4 S 828, 7 AmSR 48; Morrell v. Quarles, 35 Ala. 544; Ryer v. Stockwell, 14 Cal. 134, 73 AmD 634; Bull v. Talcot, 2 Root (Conn.) 119, 1 AmD 62; Madison First Nat. Bank v. Hart, 55 Ill. 62; Vigo Agricultural Soc. v. Brumfield, 102 Ind. 151, 52 AmR 657; Hayden v. Souger, 56 Ind. 42, 26 AmR 1; Harson v. Pike, 16 Ind. 140; Tarbell v. Stevens, 7 Iowa 163; Besse v. Dyer, 9 Allen (Mass.) 151, 85 AmD 747; Freeman v. Boston, 5 Metc. (Mass.) 56; Medina Union Bank v. Shea, 57 Minn. 180; Hoggard v. Dickerson, 180 Mo. A. 70, 165 SW 1135; Janvrin v. Exeter, 48 N. H. 83, 2 AmR 185; Morse v. Bellows, 7 N. H. 549, 28 AmD 372; Pierson v. Morch, 82 N. Y. 503; Butler County v. Liebold, 107 Pa. 407; Cummings v. Gann, 52 Pa. 484; Holt v. Wood, 14 Pa. Co. 499; De la Rosa v. Philippine Island Bank, 51 Philippine 926; Kasling v. Morris, 71 Tex. 584, 9 SW 739, 10 AmSR 797; Kinn v. Mineral Point First Nat. Bank, 118 Wis. 537, 95 NW 969, 99 AmSR 1012; Reif v. Paige, 55 Wis. 496, 13 NW 473, 42 AmR 731; Bhugwandass v. Netherlands India Sea, etc., Ins. Co., L. R. 14 App. Cas. 83.

[b] **Where manufacturers of a medicine** advertised that they would pay a certain sum of money to anyone who contracted a named disease after having used the medicine in a specified manner, the contracting of the disease in the manner described imposed a binding obligation upon the advertisers and created a contract between them and plaintiff. Carlill v. Carbolic Smoke Ball Co., [1893] 1 Q. B. 256.

[27] **Necessity of acceptance** see infra § 25; Contracts § 68.

[28] U. S.—Shuey v. U. S., 92 U. S. 73, 23 L. ed. 697.

Cal.—Wilson v. Stump, 103 Cal. 255, 37 P 151, 42 AmSR 111; Ryer v. Stockwell, 14 Cal. 134, 73 AmD 634; Berthiaume v. Doe, 22 Cal. A. 78, 133 P 515.

Conn.—Crocker v. New London, etc., R. Co., 24 Conn. 249.

Ga.—Biggers v. Owen, 79 Ga. 658, 5 SE 193.

Ind.—Harson v. Pike, 16 Ind. 140.

Me.—Mitchell v. Abbott, 86 Me. 338, 29 A 1118, 41 AmSR 559, 25 LRA 503.

Mass.—Loring v. Boston, 7 Metc. 409; Freeman v. Boston, 5 Metc. 56.

Mo.—Hoggard v. Dickerson, 180 Mo. A. 70, 72, 165 SW 1135 [cit Cyc].

N. H.—Janvrin v. Exeter, 48 N. H. 83, 2 AmR 185.

N. Y.—Fitch v. Snedaker, 38 N. Y. 248, 97 AmD 791; Jones v. Phœnix Bank, 8 N. Y. 228.

Oh.—Gilmore v. Lewis, 12 Oh. 281.

Pa.—Cummings v. Gann, 52 Pa. 484.

[29] Shuey v. U. S., 92 U. S. 73, 23 L. ed. 697; Lauve v. Balfour, 1 Tex. A. Civ. Cas. § 726.

[30] Sullivan v. Phillips, 178 Ind. 164, 98 NE 868, AnnCas1915B 670.

[a] **An offer may be withdrawn** in the same way it was made prior to its being acted upon. Shuey v. U. S., 92 U. S. 73, 23 L. ed. 697; Hoggard v. Dickerson, 180 Mo. A. 70, 165 SW 1135.

[31] Sullivan v. Phillips, 178 Ind. 164, 98 NE 868, AnnCas1915B 670.

[32] Hoggard v. Dickerson, 180 Mo. A. 70, 165 SW 1135.

[33] See cases infra this note.

[a] **Discontinuance not in itself revocation.**—Loring v. Boston, 7 Metc. (Mass.) 409.

[b] **Discontinuance tantamount to express revocation.**—Lauve v. Balfour, 1 Tex. A. Civ. Cas. § 726.

[34] Loring v. Boston, 7 Metc. (Mass.) 409.

[35] Umatilla County v. Estes, 105 Or. 248, 208 P 761; Zwolanek v. Baker Mfg. Co., 150 Wis. 517, 137 SW 769, 44 LRANS 1214, AnnCas1914A 793.

Effect of performance see infra § 70.

[36] Bronnenberg v. Coburn, 110 Ind. 169, 11 NE 29; Zwolanek v. Baker Mfg. Co., 150 Wis. 517, 137 NW 769, 44 LRANS 1214, AnnCas1914A 793.

[a] **The withdrawal of an offer** of reward for the detection, arrest and conviction of an offender after his discovery and arrest, but before conviction, does not mean that the claimant is entitled to nothing, even though he consents to the withdrawal of the full reward. Bronnenberg v. Coburn, 110 Ind. 169, 11 NE 29.

Where complete performance prevented see infra § 65.

[37] Loring v. Boston, 7 Metc. (Mass.) 409.

[38] See Contracts § 111.

[39] Loring v. Boston, 7 Metc. (Mass.) 409.

[a] **Revocation is conclusively presumed** to have been made where the offer is not accepted within a reasonable time. Mitchell v. Abbott, 86 Me. 338, 29 A 1118, 41 AmSR 559, 25 LRA 503.

Time for performance see infra §§ 37–38.

[40] Mitchell v. Abbott, 86 Me. 338, 29 A 1118, 41 AmSR 559, 25 LRA 503.

[a] **Periods held to be more than a reasonable time.**—(1) After twelve years. Mitchell v. Abbott, 86 Me. 338, 29 A 1118, 41 AmSR 559, 25 LRA 503. (2) After ten years. Shaub v. Lancaster, 156 Pa. 362, 26 A 1067, 21 LRA 691; (3) After three years. Loring v. Boston, 7 Metc. (Mass.) 409. (4) Ten months after discontinuance of advertisement. Lauve v. Balfour, 1 Tex. A. Civ. Cas. § 726.

[b] **An offer is presumed to remain open** during the fifth day after it was made, where it is not limited in time.

that an offer of reward for discovery and information of perpetrators of a past offense is not barred by lapse of time[41] but continues until the statute of limitations shall have run against the crime.[42]

[§ 18] **G. Construction of Offer—1. Applicability of General Rules.** The general rules governing the interpretation or construction of contracts[43] apply to rewards.[44] As the contract depends wholly upon the offer and its acceptance by performance,[45] its legal import and effect must be determined by the terms of the offer[46] fairly,[47] liberally,[48] and reasonably construed[49] according to the intention of the offerer,[50] as manifested in the offer itself,[51] in the light of the surrounding circumstances.[52] Due regard must be given to the meaning of the language[53] but the offer should not be literally construed[54] to the exclusion of the spirit,[55] as for example, where the offer is of a reward for "the arrest and conviction" of an offender.[56] The construction that tends to validate an offer will prevail over one tending to destroy it.[57]

[§ 19] **2. Past or Future Offenses.** Whether a reward for the arrest and conviction of a criminal applies to past or future offenses or to both is a question dependent upon the construction of the offer.[58] Where the terms of the offer are general, the offer may apply equally to offenses committed either before or after the date of the offer.[59]

[§ 20] **3. Statutory Rewards.** Statutes offering rewards are ordinarily liberally construed[60] so as to

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Wilson v. Stump, 103 Cal. 255, 37 P 151, 42 AmSR 111.

[41] In re Kelly, 39 Conn. 159.

[42] In re Kelly, supra.

Statute of limitations after acceptance see infra § 35 note 84 [b].

[43] **Construction of contracts generally** see Contracts §§ 481-520.

[44] Ala.—Central R., etc., Co. v. Cheatham, 85 Ala. 292, 4 S 828, 7 AmSR 48.

Mass.—Freeman v. Boston, 5 Metc. 56.

Mo.—Hoggard v. Dickerson, 180 Mo. A. 70, 72, 165 SW 1135 [cit Cyc].

N. C.—Washburn v. Humphreys, 35 N. C. 88.

Or.—MacFarlane v. Bloch, 59 Or. 1, 115 P 1056, AnnCas1913B 1275.

Tenn.—Stair v. Heska Amone Cong., 128 Tenn. 190, 159 SW 840.

Tex.—Henderson v. U. S. Fidelity, etc., Co., (Commn. A.) 298 SW 404 [rev (Civ. A.) 293 SW 339]; Tobin v. McComb, (Civ. A.) 156 SW 237.

[a] **The advertisement of an official reward** offered by the mayor and aldermen and signed by the city clerk is to be taken, together with the note authorizing it, when it is construed. Freeman v. Boston, 5 Metc. (Mass.) 56.

[45] See supra § 2.

[46] Commercial Bank v. Pleasants, 6 Whart. (Pa.) 375. And see notes infra this section.

[47] Salbadore v. Crescent Mut. Ins. Co., 22 La. Ann. 338; Commercial Bank v. Pleasants, 6 Whart. (Pa.) 375.

[48] Union County v. Hopkins, 95 N. J. Eq. 444, 123 A 365.

[49] Hoggard v. Dickerson, 180 Mo. A. 70, 165 SW 1135; Commercial Bank v. Pleasants, 6 Whart. (Pa.) 375.

[a] **The more reasonable** of two constructions should be given to the meaning of the terms of an offer of reward. Washburn v. Humphreys, 35 N. C. 88.

[50] Freeman v. Boston, 5 Metc. (Mass.) 56, 57 (per Shaw, C. J.); Henderson v. U. S. Fidelity, etc., Co., (Tex. Commn. A.) 298 SW 404 [rev (Civ. A.) 293 SW 339].

[51] Anderson v. St. Louis Public Schools, 122 Mo. 61, 27 SW 610, 26 LRA 707; Henderson v. U. S. Fidelity, etc., Co., (Tex. Commn. A.) 298 SW 404 [rev (Civ. A.) 293 SW 339].

[a] **Where the mere reading of the offer** makes its nature plain and unmistakable, this meaning should be adopted. Juniata County v. McDonald, 122 Pa. 115, 15 A 696.

[b] **Any secret intention** of the offerer will not be let in to show an intent different from that expressed. Sullivan v. Phillips, 178 Ind. 164, 98 NE 868, AnnCas1915B 670.

[52] Umatilla County v. Estes, 105 Or. 248, 208 P 761; Commercial Bank v. Pleasants, 6 Whart. (Pa.) 375.

[53] See cases infra this note.

[a] **Language of particular offers construed.**—(1) Five thousand dollars reward for an arrest and conviction or information leading thereto is not in the alternative for two things, or ten thousand dollars, but for one thing and only five thousand dollars. Fargo v. Arthur, 43 HowPr (N. Y.) 193. (2) A reward for the arrest and conviction of "any one cutting trees" does not mean each person, where the three persons were cutting the same tree. Boyce v. Goodwin, 158 Ark. 475, 250 SW 523. (3) Where a slave was stolen and a reward of "one hundred dollars for apprehension of both slave and thief, or fifty dollars for the slave out of the state, twenty five for apprehension of slave within state," it means that the one hundred dollars was offered only for the arrest of the thief and slave if taken without the state. Washburn v. Humphreys, 35 N. C. 88. (4) A reward for the return of a dog comes within the Larceny Act imposing a penalty for advertisement of a reward for the return of any property whatsoever and the use in such advertisement of any words purporting that no questions will be asked. Mirams v. Our Dogs Pub. Co., [1901] 2 K. B. 564.

[b] **Particular words construed.**—(1) "Lost." Commercial Bank v. Pleasants, 6 Whart. (Pa.) 375. (2) "Recover." Commercial Bank v. Pleasants, supra. (3) "Bank officers." Henderson v. U. S. Fidelity, etc., Co., (Tex. Commn. A.) 298 SW 404 [reh den (Commn. A.) 10 SW (2d) 534]. (4) "Apprehension" and "arrest" as interchangeable. Cummings v. Clinton County, 181 Mo. 162, 79 SW 1127. (5) "Undertaking to rob or burglarize." Henderson v. U. S. Fidelity, etc., Co., (Tex. Commn. A.) 298 SW 404 [reh den (Commn. A.) 10 SW (2d) 534]. (6) Abbreviation of word "superintendent" is immaterial. Central R., etc., Co. v. Cheatham, 85 Ala. 292, 4 S 828, 7 AmSR 48.

[c] **An essential difference** exists between an offer "for detection, apprehension and conviction" and an offer "for detection and apprehension of criminals payable after conviction." Union County v. Hopkins, 95 N. J. Eq. 444, 123 A 365.

[54] Henderson v. U. S. Fidelity, etc., Co., (Tex. Commn. A.) 298 SW 404 [rev (Civ. A.) 293 SW 339].

[a] **For the purpose of showing compliance** by performance of the terms of the contract it is not to be literally construed. Chambers v. Ogle, 117 Ark. 242, 174 SW 532.

[55] Stair v. Heska Amone Cong., 128 Tenn. 190, 159 SW 840; Henderson v. U. S. Fidelity, etc., Co., (Tex. Commn. A.) 298 SW 404 [rev (Civ. A.) 293 SW 339].

[56] Chambers v. Ogle, 117 Ark. 242, 174 SW 532; Haskell v. Davidson, 91 Me. 488, 40 A 330, 64 AmSR 254, 42 LRA 155.

[a] **Reward for the arrest and conviction of an unknown offender** should not be taken literally. Kinn v. Mineral Point First Nat. Bank, 118 Wis. 537, 95 NW 969, 99 AmSR 1012.

[b] **"$500 reward** will be paid to any parties who will secure the arrest and conviction of any person who has injured persons or property by throwing stones or other missiles at the trains of this company," was construed not to apply to the case of a missile thrown in the course of a fight between an employee or passenger and a stranger. Chicago, etc., R. Co. v. Sebring, 19 Ill. A. 222.

Arrest and conviction see infra §§ 54-57.

[57] Hoggard v. Dickerson, 180 Mo. A. 70, 165 SW 1135.

[58] Salbadore v. Crescent Mut. Ins. Co., 22 La. Ann. 338; Abel v. Pembroke, 61 N. H. 357.

[a] **Where an advertisement recited** that sundry houses had been set on fire and offered the reward for the conviction of any person setting fire to buildings, it applied only to offenses previously committed. Freeman v. Boston, 5 Metc. (Mass.) 56.

[b] **A reward offered "for the arrest with proof to convict** of any person or persons for the malicious obstructing of the tracks" is applicable to both past and future offenses. Central R., etc., Co. v. Cheatham, 85 Ala. 292, 4 S 828, 7 AmSR 48.

[59] Central R., etc., Co. v. Cheatham, 85 Ala. 292, 4 S 828, 7 AmSR 48.

[60] In re Kelly, 39 Conn. 159; Harrison County v. Hurst, 110 Miss. 716, 70 S 889; Union County v. Hopkins, 95 N. J. Eq. 444, 123 A 365; Com. v. Sherk, 35 Pa. Co. 582.

[a] **A statute authorizing a county to offer a reward** for the apprehension of criminals is to be liberally construed. Union County v. Hopkins, 95 N. J. Eq. 444, 123 A 365.

[b] **Statute authorizing payment of a reward** for the arrest of fleeing murderer must be liberally construed. Ex p. Austin, 129 Miss. 869, 93 S 369; Harrison County v. Hurst, 110 Miss.

effectuate their purpose.[61] However, in a few instances a strict construction has been applied.[62] Unless a contrary intent is apparent, a statute offering a reward will not be construed to include a statutory offense subsequently created,[63] nor will an award offered by a state legislature be construed to include an offense under a statute of the United States.[64] Where an injury is inflicted in one county and death occurs in another, the reward is payable by the county where the fatal injury was inflicted under a statute providing for the payment of a reward, by the county in which the homicide occurred, for the arrest of one who has killed another and is fleeing or attempting to flee.[65]

IV. LEGALITY[66]

[§ 21] **A. In General.** A contract for a reward, if illegal, is void,[67] its legality being tested by the same rules which govern other contracts.[68] The illegality may consist in the agreement involving the commission of a crime,[69] for example, murder,[70] or bribery,[71] or it may violate a statute by the inclusion in the offer of forbidden terms.[72] It is illegal if based upon an unlawful lottery transaction[73] and is void and unenforceable if it contemplates or involves an illegal arrest.[74] A reward offered by a candidate to electors for their votes is illegal,[75] as also is a candidate's promise, under certain circumstances, to return his official salary back to the county if he is elected.[76] Contracts for rewards are invalid when they are contrary to public policy.[77] Instances of such invalid agreements are marriage brokage contracts,[78] and rewards for testimony favorable to an offender.[79] But offers of reward for the conviction of persons for offenses thereafter committed are not contrary to public policy,[80] neither are contracts for the return of stolen property,[81] provided there is no stipulation to refrain from prosecuting the thief or to compound a felony.[82]

Contempt of court. Offers of rewards involving matters which were then being litigated have been held to be in contempt of court,[83] particularly where such offers were obviously made in bad faith.[84]

[§ 22] **B. Prizes and Premiums.** When statutes prohibit the offering of premiums or rewards for certain contests or exhibitions,[85] such rewards cannot of course be recovered.[86] But in the absence of statutory prohibition[87] the offer of a prize or premium, for example to the owner of a horse winning a race,[88] made in good faith and not as a cover for betting,[89] and payable by the person or association making the offer,[90] is not unenforceable as a gambling or wagering transaction[91] and is not against public policy.[92] Offers of premiums, by way of profit sharing in one's business, to employees[93] or to customers for exclusive patronage,[94] are enforceable[95] and not in restraint of trade or against public policy.[96]

716, 70 S 889; Ex p. Webb, 96 Miss. 8, 49 S 567; Newton County v. Doolittle, 72 Miss. 929, 18 S 451.

[c] **Where one apprehends two joint horse thieves,** who are tried and convicted severally, he is entitled to the statutory reward for each thief. Com. v. Sherk, 18 Pa. Dist. 714.

61. Com. v. Heist, 21 Pa. Dist. 985; Com. v. Sherk, 18 Pa. Dist. 714. But see Pennsylvania cases infra note 62 [a].

62. State v. Ost, 129 Minn. 520, 152 NW 866.

[a] **A reward for the arrest and conviction of a horse thief** does not include a mule thief. State v. Ost, 129 Minn. 520, 152 NW 866; Com. v. Davidson, 4 Pa. Dist. 172; Com. v. Evans, 10 Phila. (Pa.) 215.

63. Com. v. Smith, 16 Pa. Dist. 755, 33 Pa. Co. 367.

[a] **Illustration.**—A statutory reward for the apprehension of persons stealing horses, does not include a case of larceny by bailee, a crime unknown at the time of the enactment of the statute as to awards. Com. v. Smith, 16 Pa. Dist. 755, 33 Pa. Co. 367.

64. Sias v. Hallock, 14 Nev. 332 (where a reward payable by statute for the arrest of those who rob or attempt to rob was held to apply to a violation of the state law, but not to a robbery of the mail which is an offense against the United States).

65. Newton County v. Wells, 67 Miss. 151, 6 S 614.

66. Legality of contracts generally see Contracts §§ 339–480.

67. Boehmer v. Foval, 55 Ill. A. 71.

[a] **Where the entire consideration** or a part thereof is illegal the whole contract is void. Boehmer v. Foval, 55 Ill. A. 71.

68. See Contracts § 339.

69. Hoggard v. Dickerson, 180 Mo. A. 70, 165 SW 1135.

70. Hoggard v. Dickerson, supra.

71. Stotesbury v. Smith, 2 Burr. 924, 97 Reprint 635.

72. Mirams v. Our Dogs Pub. Co., [1901] 2 K. B. 564.

[a] **"No questions will be asked"** used in an offer in violation of statute. Mirams v. Our Dogs Pub. Co., [1901] 2 K. B. 564.

73. Dieckhoff v. Fox, 56 Minn. 438, 57 NW 930.

74. Marking v. Needy, 8 Bush (Ky.) 22; Moore v. Peace, 97 SW 762, 30 KyL 193; Morris v. Kasling, 79 Tex. 141, 15 SW 226, 11 LRA 398.

75. State v. Dustin, 5 Or. 375, 20 AmR 746; State v. Purdy, 36 Wis. 213, 17 AmR 485.

76. State v. Dustin, 5 Or. 375, 20 AmR 746; State v. Purdy, 36 Wis. 213, 17 AmR 485.

77. Marking v. Needy, 8 Bush (Ky.) 22; Moore v. Peace, 97 SW 762, 30 KyL 193; Morris v. Kasling, 79 Tex. 141, 15 SW 226, 11 LRA 398.

Offer to police or other officer see infra §§ 30–33.

78. Crawford v. Russell, 62 Barb. (N. Y.) 92; Keat v. Allen, 2 Vern. Ch. 588, 23 Reprint 983.

Marriage brokage contract see Contracts § 405.

79. Boehmer v. Foval, 55 Ill. A. 71.

80. Wilmoth v. Hensel, 151 Pa. 200, 25 A 86, 31 AmSR 738.

81. Schirm v. Weiman, 103 Md. 541, 63 A 1056, 115 AmSR 373, 7 LRA NS 175, 7 AnnCas 1008.

82. Schirm v. Wieman, supra.

83. Butler v. Butler, 13 P. D. 73; Brodribb v. Brodribb, 11 P. D. 66.

84. Butler v. Butler, supra.

85. See statutory provisions.

86. Bronson Agricultural, etc., Assoc. v. Ramsdell, 24 Mich. 441.

87. Delier v. Plymouth Agricultural Soc., 57 Iowa 481, 10 NW 872. And see statutory provisions.

88. Cal.—Hankins v. Ottinger, 115 Cal. 454, 47 P 254, 40 LRA 76.

Iowa.—Delier v. Plymouth Agricultural Soc., 57 Iowa 481, 10 NW 872.

N. Y.—Peo. v. Fallon, 152 N. Y. 12, 46 NE 296, 57 AmSR 492, 37 LRA 227.

Wis.—Porter v. Day, 71 Wis. 296, 37 NW 259.

Alta.—Sporle v. Edmonton Exhibition Assoc., Ltd., 7 Alta. L. 383.

89. Porter v. Day, 71 Wis. 296, 37 NW 259.

90. Peo. v. Fallon, 152 N. Y. 12, 46 NE 296, 57 AmSR 492, 37 LRA 227.

91. Hankins v. Ottinger, 115 Cal. 454, 47 P 254, 40 LRA 76; Porter v. Day, 71 Wis. 296, 37 NW 259. See Gaming § 267.

92. Delier v. Plymouth Agricultural Soc., 57 Iowa 481, 10 NW 872.

93. Zwolanek v. Baker Mfg. Co., 150 Wis. 517, 137 NW 769, 44 LRANS 1214, AnnCas1914A 793.

94. Corn Products Refining Co. v. Roser-Runkle Co., 10 OhNPNS 596.

95. Corn Products Refining Co. v. Roser-Runkle Co., supra; Zwolanek v. Baker Mfg. Co., 150 Wis. 517, 137 NW 769, 44 LRANS 1214, AnnCas1914A 793.

96. Corn Products Refining Co. v. Roser-Runkle Co., supra.

V. CONSIDERATION

[§ 23] **A. Necessity.** As in the case of other contracts,[97] a consideration is necessary to support the contract for a reward,[98] without it the contract is unenforceable.[99]

[§ 24] **B. What Constitutes Valid Consideration.** The consideration which supports the promise of a reward is not benefit to the promisor,[1] it is rather the trouble,[2] inconvenience or detriment[3] to the promisee by reason of the fact that upon the faith of the promise he has done some act.[4] Hence, the performance of the terms of an offer constitute a good and sufficient consideration for the contract upon which to base the recovery by claimant,[5] but performance of services which one is otherwise bound to do does not operate as such a consideration.[6]

VI. ACCEPTANCE; WHO MAY CLAIM REWARD

[§ 25] **A. Necessity and Nature of Acceptance.** It is a general rule of contracts that before an offer can become a binding promise and result in a contract it must be accepted.[7] Hence, an acceptance of the offer,[8] including its terms and conditions,[9] is necessary to constitute a contract for a reward. Acting upon the offer and complying with its terms and conditions will operate as an acceptance;[10] however, the compliance must be voluntary.[11]

[§ 26] **B. Notice of Acceptance.**[12] It is not necessary that the person performing the services for which a reward is offered generally should give notice that he accepts the offer,[13] for in such case the party making the offer impliedly dispenses with actual notice[14] and the doing of the act completes the contract.[15]

[§ 27] **C. Time of Acceptance.**[16] Acceptance of an offer of reward by performing or commencing to perform the service requested must be within a reasonable time, unless the time is limited in the offer itself.[17]

[§ 28] **D. Who May Accept or Claim Reward—1. In General.** The general rule is that when a reward is offered to the public, as most rewards are,[18] it may be accepted by anyone who, under its terms and conditions, performs the services required,[19] as for

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97. See Contracts § 145.

98. Wilmoth v. Hensel, 151 Pa. 200, 25 A 86, 31 AmSR 738.

99. Stilk v. Myrick, 2 Campb. 317, 170 Reprint 1168; Harris v. Watson, Peake N. P. 102, 170 Reprint 94.

1. Furman v. Parke, 21 N. J. L. 310.

[a] **But there is a benefit or advantage to the offerer** of an advertisement of a reward for anyone using a certain medicine as directed and thereafter contracting a particular disease. It is the instilling of confidence in the remedy in the public which is enough to constitute a consideration. Carlill v. Carbolic Smoke Ball Co., [1893] 1 Q. B. 256.

2. Ryer v. Stockwell, 14 Cal. 134, 73 AmD 634.

3. Carlill v. Carbolic Smoke Ball Co., [1893] 1 Q. B. 256.

4. Bronnenberg v. Coburn, 110 Ind. 169, 11 NE 29; Train v. Gold, 5 Pick. (Mass.) 380; Furman v. Parke, 21 N. J. L. 310.

5. Morrell v. Quarles, 35 Ala. 544; Ryer v. Stockwell, 14 Cal. 134, 73 AmD 634; Berthiaume v. Doe, 22 Cal. A. 78, 133 P 515; Mitchell v. Abbott, 86 Me. 338, 29 A 1118, 41 AmSR 559, 25 LRA 503; Freeman v. Boston, 5 Metc. (Mass.) 56.

6. Smith v. Whilden, 10 Pa. 39, 49 AmD 572; Smith v. Lancaster County, 29 Pa. Dist. 902; Stilk v. Myrick, 2 Campb. 317, 170 Reprint 1168; Harris v. Carter, 3 E. & B. 559, 77 ECL 559, 118 Reprint 1251; Harris v. Watson, Peake N. P. 102, 170 Reprint 94.

Agents, employees, and public officers see infra § 29 et seq.

7. See Contracts § 68.

8. Ill.—Van Vlissingen v. Manning, 105 Ill. A. 255.

Kan.—Taft v. Hyatt, 105 Kan. 35, 180 P 213, 181 P 561.

N. Y.—Fitch v. Snedaker, 38 N. Y. 248, 97 AmD 791, 7 Transcr. A. 228; Hart v. Hopwood, 89 Misc. 414, 151 NYS 871.

Pa.—Smith v. Lancaster County, 29 Pa. Dist. 902.

Tenn.—Stamper v. Temple, 6 Humphr. 113, 44 AmD 296.

[a] **The consent is vital** even though the motive for it may be immaterial. Fitch v. Snedaker, 38 N. Y. 248, 97 AmD 791.

[b] **Prior to acceptance of, or performance of the services** specified therein, an offer of reward is not a contract. Williams v. West Chicago St. R. Co., 191 Ill. 610, 61 NE 456, 85 AmSR 278; Harson v. Pike, 16 Ind. 140; Cummings v. Gann, 52 Pa. 484.

9. Smith v. Lancaster County, 29 Pa. Dist. 902.

10. Elkins v. Wyandotte County, 86 Kan. 305, 120 P 542, 46 LRANS 662; Pierson v. Morch, 82 N. Y. 503; Sheldon v. George, 132 App. Div. 470, 116 NYS 969; Patton v. Hassinger, 69 Pa. 311.

[a] **Compliance with an offer,** especially if no notice of acceptance is required, is the most significant evidence of its acceptance. Patton v. Hassinger, 69 Pa. 311.

Effect of performance see infra § 70.

11. Sheldon v. George, 132 App. Div. 470, 116 NYS 969.

[a] **Where compliance with an offer** of reward for the return of property was made to avoid legal proceedings there was no acceptance and no contract. Sheldon v. George, 132 App. Div. 470, 116 NYS 969.

12. Performance without knowledge of offer see infra §§ 66–69.

13. Wilson v. McClure, 50 Ill. 366; Hayden v. Souger, 56 Ind. 42, 26 AmR 1; Harson v. Pike, 16 Ind. 140; Patton v. Hassinger, 69 Pa. 311; Zwolanek v. Baker Mfg. Co., 150 Wis. 517, 137 NW 769, 44 LRANS 1214, AnnCas1914A 793; Reif v. Paige, 55 Wis. 496, 13 NW 473, 42 AmR 731. See Sullivan v. Phillips, 178 Ind. 164, 98 NE 868, AnnCas1915B 670 (recognizing rule).

14. Madison First Nat. Bank v. Hart, 55 Ill. 62; Sullivan v. Phillips, 178 Ind. 164, 98 NE 868, AnnCas1915B 670; Zwolanek v. Baker Mfg. Co., 150 Wis. 517, 137 NW 769, 44 LRANS 1214, AnnCas1914A 793.

[a] **Notification of acceptance being for the benefit** of the person who makes the offer, he may dispense with it if he thinks it desirable to do so. Carlill v. Carbolic Smoke Ball Co., [1893] 1 Q. B. 256.

15. Madison First Nat. Bank v. Hart, 55 Ill. 62; Sullivan v. Phillips, 178 Ind. 164, 98 NE 868, AnnCas1915B 670; Zwolanek v. Baker Mfg. Co., 150 Wis. 517, 137 NW 769, 44 LRANS 1214, AnnCas1914A 793.

[a] **Rescue of body.**—"I will give $5,000 to any person who will bring the body of my wife out of that building, dead or alive." A person who relying on that offer rescued the body of the wife of the offerer from the burning building was held to be entitled to recover the reward. Reif v. Paige, 55 Wis. 496, 13 NW 473, 42 AmR 731.

Effect of performance see infra § 70.

16. Time of performance see infra §§ 37, 38.

17. Mitchell v. Abbott, 86 Me. 338, 29 A 1118, 41 AmSR 449, 25 LRA 503; Loring v. Boston, 7 Metc. (Mass.) 409.

Lapse of offer see supra § 17.

18. Butler County v. Leibold, 107 Pa. 407.

19. Ga.—Campbell v. Mercer, 108 Ga. 103, 33 SE 871.

Kan.—Elkins v. Wyandotte County, 86 Kan. 305, 120 P 542, 46 LRANS 662.

Or.—Umatilla County v. Estes, 105 Or. 248, 208 P 761.

Pa.—Butler County v. Leibold, 107 Pa. 407.

Wis.—Zwolanek v. Baker Mfg. Co., 150 Wis. 517, 137 NW 769, 44 LRANS 1214, AnnCas1914A 793.

example the recovery of property,[20] the apprehension of an offender,[21] or any other act.[22] Hence he who performs such required service may claim the reward[23] unless he has estopped himself[24] or is guilty of bad faith.[25] Likewise when limited to a particular person or group of persons the offer may[26] and must be accepted by such person or group to which it is directed.[27] However, if the services of one outside the designated group are accepted by the offerer he may be liable to such person.[28]

[§ 29] **2. Agents, Employees, Etc.** To the general rule, that when a reward is offered to the public it may be claimed by anyone doing the required act,[29] is the exception[30] of agents or officers,[31] employees,[32] and other persons[33] whose duty it already is to do that for the doing of which the reward is offered. However, it is held that the mere fact that one is an employee of the offerer does not preclude him from claiming the reward,[34] particularly where such reward is directed to employees.[35]

[§ 30] **3. Police and Other Officers—a. Within Scope of Official Duty—(1) In General.** From an early day it has been established[36] and it continues to be the rule that a promise by a private individual[37] to reward a public officer for doing what it is his duty to do is not only void for want of consideration[38] but also because it is contrary to public policy[39]

Agents, employees, etc. see infra § 29.

Police and other officers see infra §§ 30-33.

20. Besse v. Dyer, 9 Allen (Mass.) 151, 85 AmD 747; Wentworth v. Day, 3 Metc. (Mass.) 352, 37 AmD 145; Pierson v. Morch, 82 N. Y. 503; Cummings v. Gann, 52 Pa. 484; Thatcher v. England, 3 C. B. 254, 54 ECL 254, 136 Reprint 102.

[a] **Owner of stolen property.**—A statute gave a reward to "whoever shall pursue and apprehend any person who shall have stolen any mare," etc. Since the statute makes no distinction between the owner of a stolen horse and any other person, the owner is entitled to such reward. Butler County v. Leibold, 107 Pa. 407.

21. Ala.—Morrell v. Quarles, 35 Ala. 544.

Cal.—Ryer v. Stockwell, 14 Cal. 134, 73 AmD 634.

Ill.—Montgomery County v. Robinson, 85 Ill. 174; Madison First Nat. Bank v. Hart, 55 Ill. 62.

Ind.—Hayden v. Souger, 56 Ind. 42, 26 AmR 1.

Kan.—Elkins v. Wyandotte County, 86 Kan. 305, 120 P 542, 46 LRANS 662.

Mass.—Besse v. Dyer, 9 Allen 151, 85 AmD 747; Loring v. Boston, 7 Metc. 409.

N. H.—Janvrin v. Exeter, 48 N. H. 83, 2 AmR 185.

Or.—Umatilla County v. Estes, 105 Or. 248, 208 P 761.

Eng.—Tarner v. Walker, L. R. 2 Q. B. 301; Bent v. Wakefield, etc., Union Bank, 4 C. P. D. 1; Williams v. Carwardine, 4 B. & Ad. 621, 24 ECL 274, 110 Reprint 590, 5 C. & P. 566, 24 ECL 711, 172 Reprint 1101, 6 ERC 133; Thatcher v. England, 3 C. B. 254, 54 ECL 254, 136 Reprint 102.

22. McClure v. Wilson, 43 Ill. 356; Harson v. Pike, 16 Ind. 140; Reif v. Paige, 55 Wis. 496, 13 NW 473, 42 AmR 731; Carlill v. Carbolic Smoke Ball Co., [1892] 2 Q. B. 484 [aff [1893] 1 Q. B. 256].

23. Bull v. Talcot, 2 Root (Conn.) 119, 1 AmD 62; Hoggard v. Dickerson, 180 Mo. A. 70, 72, 165 SW 1135; Com. v. Heist, 21 Pa. Dist. 985; Elkins v. Wyandotte County, 86 Kan. 305, 120 P 542, 46 LRANS 662.

Effect of performance see infra § 70.

24. Witty v. Southern Pac. Co., 76 Fed. 217.

25. Peoples Trust Co. v. Davis, 5 Pa. Dist. & Co. 459.

26. Campbell v. Mercer, 108 Ga. 103, 33 SE 871; Zwolanek v. Baker Mfg. Co., 150 Wis. 517, 137 SW 769, 44 LRANS 1214, AnnCas1914A 793.

27. Madison First Nat. Bank v. Hart, 55 Ill. 62.

28. Madison First Nat. Bank v. Hart, supra.

29. See supra § 28.

30. In re Waggoner, 47 S. D. 401, 199 NW 244.

31. Stacy v. State Bank, 5 Ill. 91.

[a] **A director in a bank** cannot claim a reward offered for the detection of the person who had robbed the bank and for the recovery of the money stolen. Stacy v. State Bank, 5 Ill. 91.

32. Van Horn v. Ricks Water Co., 115 Cal. 448, 47 P 361; Pruitt v. Miller, 3 Ind. 16; Forsythe v. Murnane, 113 Minn. 181, 129 NW 134. See Bagnall v. Barnard, 59 Hun 151, 13 NYS 199 (holding claimant not an employee).

33. Spinney v. U. S., 32 Ct. Cl. 397; In re Waggoner, 47 S. D. 401, 199 NW 244.

[a] **It is the duty of a postmaster** to assist in capturing the thief when his office has been robbed and therefore he cannot claim a general reward offered to all persons for the arrest of post-office burglars. Spinney v. U. S., 32 Ct. Cl. 397.

[b] **A private watchman** employed by a railway company may claim a reward offered by a bank for the arrest of a defaulter. Minneapolis Bank v. Griffin, 66 Ill. A. 577 [aff 168 Ill. 314, 48 NE 154].

Police and other officers see infra §§ 30-33.

34. Chicago, etc., R. Co. v. Sebring, 16 Ill. A. 181, 19 Ill. A. 222.

[a] **A railroad employee may claim** a reward offered to the public for the arrest of persons injuring the property of the railroad. Chicago, etc., R. Co. v. Sebring, 16 Ill. A. 181, 19 Ill. A. 222.

35. Henderson v. U. S. Fidelity, etc., Co., (Tex. Commn. A.) 298 SW 404.

36. Bridge v. Cage, Cro. Jac. 103, 79 Reprint 89.

[a] **"If once it should be allowed** That such Promises [to an officer to pay more for his services than the law allows] could maintain an Action, the People would quickly be given to understand how kindly they would be taken, and happy would that Man be who could have his Business well done without them." 1 Hawkins P. C. c 68 § 4.

[b] **"It would open a door to profligacy, chicanery, and corruption,** if the officers appointed to carry out the criminal law were permitted to stipulate by private contract; it would open a door to the escape of offenders by culpable supineness and indifference on the part of those officers, and compel the injured persons to take upon themselves the burden of public prosecutions." Smith v. Whildin, 10 Pa. 39, 40, 49 AmD 572; Smith v. Lancaster County, 29 Pa. Dist. 902.

[c] **A species of quasi-extortion,** and partaking of the character of a bribe. Stotesbury v. Smith, 2 Burr. 924, 97 Reprint 635; Bridge v. Cage, Cro. Jac. 103, 79 Reprint 89; Badow v. Salter, W. Jones 65, 82 Reprint 34.

37. Taft v. Hyatt, 105 Kan. 35, 180 P 213, 181 P 561; Gray v. Martino, 91 N. J. L. 462, 103 A 24.

Statutory rewards see infra § 31.

38. Hanmer v. Wells, 174 App. Div. 724, 160 NYS 651. See Contracts § 208.

39. U. S.—Union Pac. R. Co. v. Belek, 211 Fed. 699.

Ala.—Morrell v. Quarles, 35 Ala. 544.

Ark.—St. Louis, etc., R. Co. v. Grafton, 51 Ark. 504, 11 SW 702, 14 AmSR 66.

Ill.—Neustadt v. Hall, 58 Ill. 172.

Kan.—Williamson v. Labette County, 122 Kan. 349, 252 P 466.

Ky.—Mason v. Manning, 150 Ky. 805, 150 SW 1020, 43 LRANS 131; Marking v. Needy, 8 Bush 22; Trundle v. Riley, 17 B. Mon. 396; Mitchell v. Vance, 5 T. B. Mon. 528, 17 AmD 96.

Mass.—Pool v. Boston, 5 Cush. 219.

Mich.—Foley v. Platt, 105 Mich. 635, 63 NW 520.

Minn.—Day v. Putnam Ins. Co., 16 Minn. 408; Warner v. Grace, 14 Minn. 487.

Miss.—Odineal v. Barry, 24 Miss. 9.

Mo.—Kick v. Merry, 23 Mo. 72, 66 AmD 658.

N. J.—Gray v. Martino, 91 N. J. L. 462, 103 A 24.

N. Y.—Hanmer v. Wells, 174 App. Div. 724, 160 NYS 651; Deuhert v. Schwend, 13 NYSt 712; Weaver v. Whitney, Hopk. 13; City Bank v. Bangs, 2 Edw. 95.

Oh.—Somerset Bank v. Edmund, 76 Oh. St. 396, 81 NW 641, 11 LRANS 1170; Gilmore v. Lewis, 12 Oh. 281.

Okl.—Beck v. Sulser, 48 Okl. 187, 150 P 107; Oklahoma R. Co. v. Morris, 48 Okl. 8, 148 P 1032.

Pa.—Shields v. Latrobe-Connellsville Coal, etc., Co., 239 Pa. 233, 86 A 784; McCandless v. Allegheny Besse-

and illegal.[40] Accordingly, no sheriff,[41] deputy or under sheriff,[42] constable[43] jailer,[44] policeman,[45] peace officer,[46] or other official[47] is entitled to a reward for the performance of services when the services are within the scope or line of his official duties,[48] and his compensation therefor is fixed by

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mer Steel Co., 152 Pa. 139, 25 A 579; Barry v. Gvoic, 8 Pa. Dist. & Co. 544.

Tenn.—Stair v. Heska Amone Cong., 128 Tenn. 190, 159 SW 840; Stamper v. Temple, 6 Humphr. 113, 44 AmD 296.

Tex.—Ellis v. Stone, 4 Tex. Civ. A. 157, 23 SW 405.

Va.—Buek v. Nance, 112 Va. 28, 70 SE 515, AnnCas1912C 1293.

Wis.—Ring v. Devlin, 68 Wis. 384, 32 NW 121.

[a] **Against the policy of the law.**—St. Louis, etc., R. Co. v. Grafton, 51 Ark. 504, 11 SW 702, 14 AmSR 66; Williamson v. Labette County, 122 Kan. 349, 252 P 466; Taft v. Hyatt, 105 Kan. 35, 180 P 213, 181 P 561; Marking v. Needy, 8 Bush (Ky.) 22; Pool v. Boston, 5 Cush. (Mass.) 219; Day v. Putnam Ins. Co., 16 Minn. 408; Warner v. Grace, 14 Minn. 487; Kick v. Merry, 23 Mo. 72, 66 AmD 658; Gilmore v. Lewis, 12 Oh. 281; Stamper v. Temple, 6 Humphr. (Tenn.) 113, 44 AmD 296.

[b] **Against sound morals.**—Somerset Bank v. Edmund, 76 Oh. St. 396, 81 NW 641, 11 LRANS 1170.

40. Maggi v. Cassiday, 190 Iowa 933, 181 NW 27; Tyler County Ct. v. Long, 72 W. Va. 8, 77 SE 328, AnnCas 1915B 808.

41. Ill.—Hogan v. Stophlet, 179 Ill. 150, 53 NE 604, 44 LRA 809.

Iowa.—Maggi v. Cassiday, 190 Iowa 933, 187 NW 27.

Nebr.—Ward v. Adams, 95 Nebr. 781, 146 NW 950.

N. Y.—Rogers v. McCoach, 66 Misc. 85, 120 NYS 686.

Pa.—Shields v. Latrobe-Connellsville Coal, etc., Co., 239 Pa. 233, 86 A 784.

W. Va.—Tyler County Ct. v. Long, 72 W. Va. 8, 77 SE 328, AnnCas1915B 808.

42. See cases infra this note.

[a] **Under sheriff.**—Williamson v. Labette County, 122 Kan. 349, 252 P 466.

[b] **Deputy sheriff.**—Witty v. Southern Pac. R. Co., 76 Fed. 217; Thacker v. Smith, 103 Kan. 641, 175 P 983; Benton v. Kentucky Bankers' Assoc., 211 Ky. 554, 277 SW 858; Mason v. Manning, 150 Ky. 805, 150 SW 1020, 43 LRANS 131; Cornwell v. St. Louis Transit Co., 100 Mo. A. 258, 73 SW 305.

[c] **Special deputy.**—Miller v. Hogeboom, 56 Nebr. 434, 76 NW 888.

43. Ind.—Hayden v. Souger, 56 Ind. 42, 26 AmR 1.

Miss.—Ex p. Gore, 57 Miss. 251.

N. Y.—Rogers v. McCoach, 66 Misc. 85, 120 NYS 686; Hatch v. Mann, 15 Wend. 44 [rev 9 Wend. 262].

Oh.—Somerset Bank v. Edmund, 76 Oh. St. 396, 81 NE 641, 11 LRANS 1170, 10 AnnCas 726.

Pa.—Smith v. Lancaster County, 29 Pa. Dist. 902; Barry v. Gvoic, 8 Pa. Dist. & Co. 544; Com. v. Harshman, 7 Pa. Dist. 741, 20 Pa. Co. 666.

[a] **Constable within his jurisdiction.**—Somerset Bank v. Edmund, 76 Oh. St. 396, 81 NE 641, 11 LRANS 1170, 10 AnnCas 726; Beck v. Sulser, 48 Okl. 187, 150 P 107.

[b] **Official duty.**—A constable who, within his jurisdiction, arrests a person who has committed a felony, will, in making the arrest, be presumed and held to act in his official capacity, whether such arrest be made by him under or without a warrant; and the law will not permit him to claim that an arrest made, pursuant to official duty, was made by him in his individual capacity as a private citizen so as to enable him to claim an offered award. Somerset Bank v. Edmund, 76 Oh. St. 396, 81 NE 641, 11 LRANS 1170, 10 AnnCas 726.

44. Buek v. Nance, 112 Va. 28, 70 SE 515, AnnCas1912C 1293.

45. U. S.—Union Pac. R. Co. v. Belek, 211 Fed. 699.

Ill.—Kincaid Trust, etc., Bank v. Hawkins, 234 Ill. A. 64.

Kan.—Taft v. Hyatt, 105 Kan. 35, 180 P 213, 181 P 561.

Mo.—Kick v. Merry, 23 Mo. 72, 66 AmD 658.

N. Y.—Hanmer v. Wells Fargo & Co. Express, 174 App. Div. 724, 160 NYS 651; Rogers v. McCoach, 66 Misc. 85, 120 NYS 686.

Okl.—Oklahoma R. Co. v. Morris, 48 Okl. 8, 148 P 1032.

[a] **Chief of police.**—Williamson v. Labette County, 122 Kan. 349, 252 P 466; Taft v. Hyatt, 105 Kan. 35, 180 P 213, 181 P 561.

[b] **Special police officer.**—Gray v. Martino, 91 N. J. L. 462, 103 A 24.

[c] **Detective.**—Atwood v. Armstrong, 102 App. Div. 601, 92 NYS 596.

46. Kincaid Trust, etc., Bank v. Hawkins, 234 Ill. A. 64; Benton v. Kentucky Bankers' Assoc., 211 Ky. 554, 277 SW 858; Oklahoma R. Co. v. Morris, 48 Okl. 8, 148 P 1032; Kinn v. Mineral Point First Nat. Bank, 118 Wis. 537, 95 NW 969, 99 AmSR 1012.

47. See cases infra this note.

[a] **Other persons held not entitled to reward:** (1) A man acting as one of the posse comitatus, called out by the sheriff to protect property during a strike, cannot claim a reward offered for the arrest of persons interfering with such property. St. Louis, etc., R. Co. v. Grafton, 51 Ark. 504, 11 SW 702, 14 AmSR 66. (2) A keeper of a county asylum cannot change his status to that of a private person so as to be able to claim a reward for returning one of the lawfully committed inmates of his institution to another insane asylum from which he had escaped. Ring v. Devlin, 68 Wis. 384, 32 NW 121. (3) Agent of officer. If a police officer communicates information as to the guilt of a suspected offender to a person who induces the criminal to confess and his conviction is secured in consequence of the confession such person cannot recover the reward. Dunham v. Stockbridge, 133 Mass. 233. (4) County attorney. In re Waggoner, 47 S. D. 401, 199 NW 244. (5) A watchman. Ensminger v. Horn, 70 Ill. A. 605; Pool v. Boston, 5 Cush. (Mass.) 219.

48. U. S.—U. S. v. Matthews, 173 U. S. 381, 19 SCt 413, 43 L. ed. 738; Union Pac. R. Co. v. Belek, 211 Fed. 699.

Ala.—Morrell v. Quarles, 35 Ala. 544.

Ark.—Chambers v. Ogle, 117 Ark. 242, 174 SW 532; St. Louis, etc., R. Co. v. Grafton, 51 Ark. 504, 11 SW 702, 14 AmSR 66.

Cal.—Lees v. Colgan, 120 Cal. 262, 52 P 502, 40 LRA 355.

Conn.—In re Russell, 51 Conn. 577, 50 AmR 55.

Ill.—Hogan v. Stophlet, 179 Ill. 150, 53 NE 604, 44 LRA 809; Kincaid Trust, etc., Bank v. Hawkins, 234 Ill. A. 64; Mahoney v. Whyte, 49 Ill. A. 97.

Ind.—Hayden v. Souger, 56 Ind. 42, 26 AmR 1.

Iowa.—Maggi v. Cassiday, 190 Iowa 933, 181 NW 27; Means v. Hendershott, 24 Iowa 78.

Kan.—Williamson v. Labette County, 122 Kan. 349, 252 P 466; Taft v. Hyatt, 105 Kan. 35, 180 P 213, 181 P 561; Thacker v. Smith, 103 Kan. 641, 175 P 983; Smith v. Fenner, 102 Kan. 830, 172 P 514, LRA1918E 348; Elkins v. Wyandotte County, 91 Kan. 518, 520, 139 P 578, 51 LRANS 638, AnnCas 1915D 257 [cit Cyc].

Ky.—Collier v. Green, 205 Ky. 361, 265 SW 812; Marking v. Needy, 8 Bush 22; Smitha v. Gentry, 45 SW 515, 20 KyL 171, 42 LRA 302; Riley v. Grace, 33 SW 207, 17 KyL 1007.

Mass.—Davies v. Burns, 5 Allen 349; Pool v. Boston, 5 Cush. 219.

Minn.—Day v. Putnam Ins. Co., 16 Minn. 408; Warner v. Grace, 14 Minn. 487.

Miss.—Ex p. Gore, 57 Miss. 251.

Mo.—Kick v. Merry, 23 Mo. 72, 66 AmD 658; Davis v. Millsap, 159 Mo. A. 167, 169, 140 SW 751 [cit Cyc]; Thornton v. Missouri Pac. R. Co., 42 Mo. A. 58.

Nebr.—Ward v. Adams, 95 Nebr. 781, 146 NW 950; Miller v. Hogeboom, 56 Nebr. 434, 76 NW 888.

N. Y.—Hanmer v. Wells, 174 App. Div. 724, 160 NYS 651; Atwood v. Armstrong, 102 App. Div. 601; 92 NYS 596; Rogers v. McCoach, 66 Misc. 85, 120 NYS 686; Hatch v. Mann, 15 Wend. 44; City Bank v. Bangs, 2 Edw. 95.

N. C.—Malpass v. Caldwell, 70 N. C. 130.

Oh.—Somerset Bank v. Edmund, 76 Oh. 396, 81 NE 641, 11 LRANS 1170; Gilmore v. Lewis, 12 Oh. 281; Brown v. Sandusky County, 24 Oh. Cir. Ct. 481.

Okl.—Oklahoma R. Co. v. Morris, 48 Okl. 8, 148 P 1032 [quot Cyc].

Pa.—Butler County v. Leibold, 107 Pa. 407; Smith v. Whildin, 10 Pa. 39, 49 AmD 572; Barry v. Gvoic, 8 Pa. Dist. & Co. 544; Smith v. Lancaster County, 29 Pa. Dist. 902; Com. v. Harshman, 7 Pa. Dist. 741, 20 Pa. Co. 666; Com. v. Koffroth, 30 Pa. Co. 45. But see Peoples Trust Co. v. Davis, 5 Pa. Dist. & Co. 431 (holding officers performing services in line of duty are entitled to a reduced award).

Tenn.—Stamper v. Temple, 6 Humphr. 113, 44 AmD 296.

Tex.—Southwestern Tel., etc., Co. v. Priest, 31 Tex. Civ. A. 345, 72 SW 241.

Vt.—Brown v. Godfrey, 33 Vt. 120.

Wis.—Kinn v. Mineral Point First Nat. Bank, 118 Wis. 537, 95 NW 969, 99 AmSR 1012; Ring v. Devlin, 68 Wis. 384, 32 NW 121.

Eng.—Thatcher v. England, 6 C. B. 263, 54 ECL 254, 136 Reprint 102.

[a] **The making of extraordinary efforts** and the incurring of expense not covered by legal fees will not entitle an officer to recover a reward

law.[49] It makes no difference that the service is rendered at a time when the officer is not on duty,[50] or that the arrest is made without a warrant[51] when there are reasonable grounds for believing the offender guilty,[52] or that the crime for which the arrest is made was committed in another county of the state,[53] or in another state.[54] However, where arrests are made without warrants, or for crimes in another state, some courts apply a different rule[55] on the theory that such services are without the scope and line of the officer's duty.[56]

[§ 31] **(2) Statutory Award.** Some cases make a distinction between the right of an officer to take a reward from a private individual for the performance of his official duty and his right to such a reward when offered by statute,[57] holding that in the latter case he is entitled to it[58] where the statute is sufficiently liberal and generic to comprehend the services of officers,[59] or where the statute limits the reward to officers alone.[60] But other authorities hold that unless expressly as provided in the statute[61] an officer is not entitled even to a statutory reward.[62]

[§ 32] **b. Without Scope of Official Duty.** When an officer performs the services for which a reward is offered by acts outside the scope and line of duty, there is no rule of public policy which forbids his claiming the reward,[63] hence he is entitled to it.[64] Therefore, as they are without the scope of his duty he may ordinarily claim a reward for acts done outside of his territorial jurisdiction,[65] such as those

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for making an arrest which it was his legal duty to make. Hogan v. Stophlet, 179 Ill. 150, 53 NE 604, 44 LRA 809.

[49] Williamson v. Labette County, 122 Kan. 349, 252 P 466; Smith v. Fenner, 102 Kan. 830, 172 P 514; Somerset Bank v. Edmund, 76 Oh. St. 396, 81 NE 396, 11 LRANS 1170, 10 AnnCas 726; Beck v. Sulser, 48 Okl. 187, 150 P 107; Tyler County Ct. v. Long, 72 W. Va. 8, 77 SE 328, AnnCas1915B 808.

[50] In re Russell, 51 Conn. 577, 50 AmR 55; Oklahoma R. Co. v. Morris, 48 Okl. 8, 148 P 1032.

[51] Taft v. Hyatt, 105 Kan. 35, 180 P 213. 181 P 561; Benton v. Kentucky Bankers' Assoc., 211 Ky. 554, 277 SW 858.

[52] Taft v. Hyatt, 105 Kan. 35, 180 P 213, 181 P 561.

[53] Lees v. Colgan, 120 Cal. 262, 52 P 502, 40 LRA 355; Benton v. Kentucky Bankers' Assoc., 211 Ky. 554, 277 SW 858; Warner v. Grace, 14 Minn. 487.

[54] Kincaid Trust, etc., Bank v. Hawkins, 234 Ill. A. 64; Rogers v. McCoach, 66 Misc. 85, 120 NYS 686.

[a] **A sheriff in a sister state,** arresting a fugitive from justice under a warrant and pursuant to a notice from a sheriff in this state, describing such fugitive and indicating the place where he may be found, acts strictly within the line of his duty as an officer, and is entitled only to such reward or compensation as is allowed him by law, and cannot recover from county commissioners a general reward offered for the apprehension of such fugitive under statute. Hogan v. Stophlet, 179 Ill. 150, 5 NE 604, 44 LRA 809.

[55] Barry v. Gvoic, 8 Pa. Dist. & Co. 544.

[56] Barry v. Gvoic, supra.

Without scope of official duty see infra § 32.

[57] Barry v. Gvoic, 8 Pa. Dist. & Co. 544.

[a] **Offer by public authority,** under statute. U. S. v. Mathews, 173 U. S. 381, 19 SCt 413, 43 L. ed. 738.

[58] U. S. v. Mathews, supra; Com. v. O'Brien, 22 Pa. Dist. 1045, 41 Pa. Co. 255; Com. v. Heist, 21 Pa. Dist. 985; Com. v. McCleary, 30 Pa. Co. 263; Com. v. Matthews, 29 Pa. Co. 498; McCain's Pet., 4 Pa. Co. 9.

[a] **A deputy United States marshal,** who had complied with all the conditions of the offer and of the statute, is entitled to receive the amount of the reward offered. U. S. v. Mathews, 173 U. S. 381, 19 SCt 413, 43 L. ed. 738.

[59] U. S. v. Mathews, supra; Gray v. Martino, 91 N. J. L. 462, 103 A 24; Com. v. O'Brien, 22 Pa. Dist. 1045, 41 Pa. Co. 255.

[60] Hutchins v. Granville County, 193 N. C. 659, 137 SE 711; Porterfield v. State, 92 Tenn. 289, 21 SW 519.

[a] **Law requiring payment of fees** to officers for arrests of prohibition law violators is constitutional. Hutchins v. Granville County, 193 N. C. 659, 137 SE 711.

[61] See statutory provisions, and supra note 60.

[62] Lees v. Colgan, 120 Cal. 262, 52 P 502, 40 LRA 355; Pool v. Boston, 5 Cush. (Mass.) 219; Ex p. Gore, 57 Miss. 251; Com. v. Koffroth, 30 Pa. Co. 45; Com. v. Miller, 25 Pa. Co. 491.

[a] **Deputy game protectors** are not entitled to the reward payable to constables for securing a conviction for violation of the game laws. Alms v. Indiana County, 45 Pa. Super. 137.

[b] **A peace officer is not entitled to reward offered to "persons"** securing conviction for liquor violations when he is allowed a fee for such conviction. Martin Fiscal Ct. v. Runyon, 222 Ky. 260, 300 SW 629.

[63] Harris v. More, 70 Cal. 502, 11 P 780; Montgomery County v. Johnson, 126 Kan. 36, 266 P 749; Smith v. Fenner, 102 Kan. 830, 172 P 514, LRA 1918E 348; Gallagher v. Garrett, 144 Md. 241, 124 A 898.

[64] U. S.—Union Pac. R. Co. v. Belek, 211 Fed. 699.

Ala.—Morrell v. Quarles, 35 Ala. 544.

Ark.—Chambers v. Ogle, 117 Ark. 242, 174 SW 532.

Ind.—Bronnenberg v. Coburn, 110 Ind. 169, 11 NE 29; Hayden v. Souger, 56 Ind. 42, 26 AmR 1.

Ind. T.—Curran v. Collier, 7 Ind. T. 148, 104 SW 572.

Iowa.—Maggi v. Cassiday, 190 Iowa 933, 181 NW 27.

Kan.—Montgomery County v. Johnson, 126 Kan. 36, 266 P 749; Elkins v. Wyandotte County, 91 Kan. 518, 138 P 578, 51 LRANS 638, AnnCas1915D 257; Marsh v. Wells, 88 Kan. 538, 541, 129 P 168, 43 LRANS 133 [cit Cyc].

Ky.—Benton v. Kentucky Bankers' Assoc., 211 Ky. 554, 277 SW 858; Collier v. Green, 205 Ky. 361, 265 SW 812.

La.—Pilie v. New Orleans, 19 La. Ann. 274; Murphy v. New Orleans, 11 La. Ann. 323.

Mass.—Hartley v. Granville, 216 Mass. 38, 102 NE 942, 48 LRANS 392, AnnCas1915A 725.

Minn.—Bystrom v. Rohlen, 134 Minn. 67, 158 NW 796; Burkee v. Matson, 114 Minn. 233, 237, 130 NW 1025, 34 LRANS 924 [cit Cyc]; Forsythe v. Murnane, 113 Minn. 181, 129 NW 134.

Mo.—Smith v. Vernon County, 188 Mo. 501, 87 SW 949, 107 AmSR 324, 70 LRA 59; Davis v. Millsap, 159 Mo. A. 167, 140 SW 751; Cornwell v. St. Louis Transit Co., 100 Mo. A. 258, 73 SW 305.

N. Y.—Gregg v. Pierce, 53 Barb. 387.

Okl.—Miners' Wholesale Grocery Co. v. Jennings, 98 Okl. 32, 224 P 192.

Pa.—Com. v. Harshman, 7 Pa. Dist. 741, 20 Pa. Co. 666; In re Swartz, 30 Pa. Co. 141; McCain's Pet., 4 Pa. Co. 9.

Tex.—Kasling v. Morris, 71 Tex. 584, 9 SW 739, 10 AmSR 797; Tobin v. McComb, (Civ. A.) 156 SW 237.

Vt.—Russell v. Stewart, 44 Vt. 170; Davis v. Munson, 43 Vt. 676, 5 AmR 315; Brown v. Godfrey, 33 Vt. 120.

Wis.—Kinn v. Mineral Point First Nat. Bank, 118 Wis. 537, 95 NW 969, 99 AmSR 1012.

[a] **A constable doing detective work** in reliance upon an offer of reward may recover, such work not being within the scope of his ordinary duties. Hartley v. Granville, 216 Mass. 38, 102 NE 942, 48 LRANS 392, AnnCas1915A 725.

[b] **If an officer renders extraordinary services** beyond or outside the limit of his ordinary official duty and for which a reward has been offered, he becomes entitled to the reward. Hogan v. Stophlet, 179 Ill. 150, 53 NE 604, 44 LRA 809; Bronnenberg v. Coburn, 110 Ind. 169, 11 NE 29; Davis v. Millsap, 159 Mo. A. 167, 140 SW 751; Cornwell v. St. Louis Transit Co., 100 Mo. A. 258, 73 SW 305; Gregg v. Pierce, 53 Barb. (N. Y.) 387; Rogers v. McCoach, 66 Misc. 85, 120 NYS 686; Reif v. Paige, 55 Wis. 496, 13 NW 473, 42 AmR 731.

[c] **A fireman** does not contract to risk his life in rescuing a person from a burning building in the fire department's service, and is therefore entitled to the reward offered for such rescue. Reif v. Paige, 55 Wis. 496, 13 NW 473, 42 AmR 731.

[65] Maggi v. Cassiday, 190 Iowa 933, 181 NW 27; Benton v. Kentucky Bankers' Assoc., 211 Ky. 554, 277 SW 858; Gallagher v. Garrett, 144 Md. 241, 124 A 898; Brown v. Godfrey, 33 Vt. 120.

[a] **"An officer has no authority, and is not bound,** to search for offenders outside of the line of his jurisdiction, and if he should go in pursuit of an offender beyond or with-

performed in another state,[66] county,[67] or outside of his city;[68] or for the arrest of fugitives from another state.[69] Arrests without a warrant[70] when the officer's authority is limited to the execution of a warrant[71] are also without the scope of his duty[72] and he may claim rewards for them.[73] "Non pay" officers, who are under no obligation to investigate criminal offenses,[74] are not precluded from claiming rewards.[75] If the reward is offered by a surety on a bail bond for the delivery of the principal, it may be claimed by an officer.[76]

[§ 33] **c. Person Ceasing To Be Officer.** When an officer has ceased to be such, he may become entitled to the reward by services thereafter rendered.[77]

[§ 34] **4. Particeps Criminis.** The maxim that no man shall profit by his own wrong applies to those claiming rewards.[78] Hence one is not entitled to a reward who aids or abets in the commission of a crime,[79] or in its concealment,[80] or who performs the services through collusion with an offender.[81] Similarly, one purchasing property, with reasonable grounds for believing that it belonged to the offerer, and had been stolen is not entitled to the reward offered for its return.[82]

[§ 35] **E. Effect of Acceptance.** While a mere offer not assented to does not constitute a contract,[83] an acceptance of the terms of an offer of reward by any person who complies therewith by performing the service creates a complete and valid contract.[84]

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out his jurisdiction, his services, while thus without his jurisdiction, would be those of a private person . . . and for the payment of such services he would be allowed to stipulate by contract like any private person." Brown v. Godfrey, 33 Vt. 120.

[66] Chambers v. Ogle, 117 Ark. 242, 174 SW 532; Davis v. Millsap, 159 Mo. A. 167, 140 SW 751; Miners' Wholesale Grocery Co. v. Jennings, 98 Okl. 32, 224 P 192.

[67] Marsh v. Wells, 88 Kan. 538, 129 P 168, 43 LRANS 133; Benton v. Kentucky Bankers' Assoc., 211 Ky. 554, 277 SW 858.

[a] **If the crime was committed and the trial held in another county** than that in which the deputy sheriff was an officer, an agreement to compensate him for procuring evidence leading to the conviction of the offender is not contrary to public policy. Harris v. More, 70 Cal. 502, 11 P 780.

[68] Benton v. Kentucky Bankers' Assoc., 211 Ky. 554, 277 SW 858; Bystrom v. Rohlen, 134 Minn. 67, 158 NW 796; Burkee v. Matson, 114 Minn. 233, 130 NW 1025, 34 LRANS 924.

[69] Ala.—Morrell v. Quarles, 35 Ala. 544.

Ark.—Chambers v. Ogle, 117 Ark. 242, 174 SW 532.

Kan.—Montgomery County v. Johnson, 126 Kan. 36, 266 P 749.

Ky.—Collier v. Green, 205 Ky. 361, 265 SW 812.

Mo.—Smith v. Vérnon County, 188 Mo. 501, 87 SW 949, 107 AmSR 324, 70 LRA 59.

But see supra § 30 note 54 for contrary rule.

[a] **An officer not required by statute** to arrest fugitives from sister states may arrest a fugitive and recover a reward. Chambers v. Ogle, 117 Ark. 242, 174 SW 532.

[70] Union Pac. R. Co. v. Belek, 211 Fed. 699.

[a] **Arrests outside jurisdiction without a warrant** do not preclude the recovery of an offered reward. Maggi v. Cassiday, 190 Iowa 933, 181 NW 27; Marsh v. Wells, 88 Kan. 538, 129 P 168, 43 LRANS 133; Bystrom v. Rohlen, 134 Minn. 67, 158 NW 796.

[71] Union Pac. R. Co. v. Belek, 211 Fed. 699.

[72] Union Pac. R. Co. v. Belek, supra.

[73] U. S.—Union Pac. R. Co. v. Belek, supra.

Kan.—Marsh v. Wells, 88 Kan. 538, 129 P 168, 43 LRANS 133.

Minn.—Bystrom v. Rohlen, 134 Minn. 67, 158 NW 796.

Pa.—White's Pet., 15 Pa. Dist. 730.

Tex.—Tobin v. McComb, (Civ. A.) 156 SW 237.

[a] **A special constable, holding a warrant** directed simply to any constable of the county, and who, relying upon an offer of reward, makes the arrest, has been held to be entitled to the reward. Hayden v. Souger, 56 Ind. 42, 26 AmR 1.

[b] **Where there was no proof as** to nature of a marshal's information, even though before making arrest he said that he was "about to arrest train robbers," he is not precluded from earning a reward on the ground that the arrest was part of his duty. Union Pac. R. Co. v. Belek, 211 Fed. 699.

[74] Elkins v. Wyandotte County, 91 Kan. 518, 138 P 578, 51 LRANS 638, AnnCas1915D 257 [reh den 92 Kan. 299, 140 P 896, 51 LRANS 639].

[75] Montgomery County v. Johnson, 126 Kan. 36, 226 P 749; Smith v. Fenner, 102 Kan. 830, 172 P 514, LRA 1918E 348; Elkins v. Wyandotte County, 91 Kan. 518, 138 P 578, 51 LRANS 638, AnnCas1915D 257 [reh den 92 Kan. 299, 140 P 896, 51 LRANS 639].

[76] Curran v. Collier, 7 Ind. T. 148, 104 SW 572.

[a] **Reason for rule.**—Such a reward is offered solely for the surety's benefit to save him harmless on the bond and neither public policy nor positive law prevents a policeman from receiving it. Curran v. Collier, 7 Ind. T. 148, 104 SW 572.

[77] Cornwell v. St. Louis Transit Co., 100 Mo. A. 258, 73 SW 305.

[a] **Where an offer of reward is renewed** to one who had been a deputy sheriff and the offer is acted upon, it becomes a contract which is executed upon rendition of the services for which the reward is offered, and a substantial performance of the conditions of the reward entitles the claimant to the recompense proffered. Cornwell v. St. Louis Transit Co., 100 Mo. A. 258, 73 SW 305.

[78] Clinton County v. Davis, 162 Ind. 60, 69 NE 680, 64 LRA 780, 1 AnnCas 282.

[79] Clinton County v. Davis, supra; Hassan v. Doe, 38 Me. 45; Jenkins v. Kelren, 12 Gray (Mass.) 330, 74 AmD 596.

[a] **Illegal vote buying to claim a reward.**—Clinton County v. Davis, 162 Ind. 60, 69 NE 680, 64 LRA 780, 1 AnnCas 282; Wilmoth v. Hensel, 151 Pa. 200, 25 A 86, 31 AmSR 738.

[80] Clinton County v. Davis, 162 Ind. 60, 69 NE 680, 64 LRA 780, 1 Ann Cas 282; Jenkins v. Kelren, 12 Gray (Mass.) 330, 74 AmD 596; Bledsoe v. Jackson, 4 Sneed (Tenn.) 429.

[a] **The person who had concealed a fugitive murderer** and agreed to share with him the reward offered for his arrest cannot recover it. Bledsoe v. Jackson, 4 Sneed (Tenn.) 429.

[81] Greenwade v. Com., 5 Ky. Op. 647; State v. Dinkins, 77 Miss. 874, 27 S 832.

[a] **One who colludes with an escaped criminal,** inducing him to allow himself to be delivered up for trial, promising that a part of the reward offered for him, when collected, should be used in his defense, is not entitled to the reward. State v. Dinkins, 77 Miss. 874, 27 S 832.

[82] Sheldon v. George, 132 App. Div. 470, 116 NYS 969.

[83] See supra § 25.

[84] Ala.—Morrell v. Quarles, 35 Ala. 544.

Ind.—Harson v. Pike, 16 Ind. 1.

Kan.—Taft v. Hyatt, 105 Kan. 35, 180 P 213, 181 P 561; Elkins v. Wyandotte County, 86 Kan. 305, 120 P 542, 46 LRANS 662.

Mich.—Genesee County v. Pailthorpe, 246 Mich. 356, 224 NW 418.

N. J.—Furman v. Parke, 21 N. J. L. 310.

N. Y.—Pierson v. Morch, 82 N. Y. 503.

Or.—Umatilla County v. Estes, 104 Or. 248, 208 P 761; MacFarlane v. Bloch, 59 Or. 1, 115 P 1056, AnnCas 1913B 1275.

Pa.—Cummings v. Gann, 52 Pa. 484.

Tex.—Henderson v. U. S. Fidelity, etc., Co., (Commn. A.) 298 SW 404.

Wis.—Zwolanek v. Baker Mfg. Co., 150 Wis. 517, 522, 137 NW 769, 44 LRANS 1214, AnnCas1914A 793 [quot Cyc]; Reif v. Paige, 55 Wis. 496, 13 NW 473, 42 AmR 731.

[a] **"Although the offer is made to the world, the contract is made with that limited portion** of the public who come forward and perform the condition on the faith of the advertisement." Carlill v. Carbolic Smoke Ball Co., [1893] 1 Q. B. 266, 268 (per Borden, L. J.).

[b] **The statute of limitations,** after the acceptance of the offer of a reward for an arrest and conviction, which is the accrual of the cause of action, does not begin to run until after conviction. Ryer v. Stockwell, 14 Cal. 134, 73 AmD 634.

Acceptance by performance see infra § 70.

VII. PERFORMANCE

[§ 36] **A. Necessity.** To make the offer a binding and enforceable contract, the act must be done or the services rendered in accordance with the terms of the offer, before it lapses or is revoked.[85]

[§ 37] **B. Time of Performance—1. In General.** Although the offer may not designate any time within which the services are to be rendered, it must be accepted by such performance within a reasonable time according to the nature of the subject matter.[86]

[§ 38] **2. Commencement Prior to Offer.** While acts done or information given prior to an offer of reward cannot constitute performance,[87] yet a performance begun before the offer is made does entitle the party to the reward when it is completed afterward.[88]

[§ 39] **C. What Constitutes Performance—1. In General.** The person making the offer having the right to prescribe the conditions under which he will be liable,[89] the reward can be claimed only by him who, according to the true construction of the offer, has complied with these conditions,[90] and who was the efficient[91] and moving cause of the performance of the services.[92] The fact that the offerer renders assistance to the claimant in earning the reward does not preclude its recovery.[93] Performance may be by the agent of the claimant.[94]

Determination of sufficiency by offerer. Where an offerer, having the right to attach any conditions he sees fit,[95] provides that he,[96] or other persons,[97] shall be the final judge of disputes arising over the reward, their decision, in the absence of fraud, is conclusive.

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[85] Cal.—Wilson v. Stump, 103 Cal. 255, 37 P 151, 42 AmSR 111.

Conn.—Bull v. Talcot, 2 Root 119, 1 AmD 62.

Ind.—Vigo Agricultural Soc. v. Brumfiel, 102 Ind. 146, 1 NE 382, 52 AmSR 657.

Kan.—Smith v. Fenner, 102 Kan. 830, 172 P 514, LRA1918E 348.

Me.—Haskell v. Davidson, 91 Me. 488, 40 A 330, 64 AmSR 254, 42 LRA 155.

Mass.—Freeman v. Boston, 5 Metc. 56, 57.

N. J.—Union County v. Hopkins, 95 N. J. Eq. 444, 123 A 365.

Pa.—Smith v. Lancaster County, 29 Pa. Dist. 902.

Wis.—Zwolanek v. Baker, 150 Wis. 517, 137 NW 769, 44 LRANS 1214, AnnCas1914A 793.

Performance as acceptance see infra § 70.

[86] Mitchell v. Abbott, 86 Me. 338, 29 A 1118, 41 AmSR 559, 25 LRA 503; Loring v. Boston, 7 Metc. (Mass.) 409; Schaub v. Lancaster, 156 Pa. 362, 26 A 1067, 21 LRA 691.

[a] **Statutory limitation of prosecution.**—(1) "The offer [for detection and conviction] . . . is not limited in its terms as to time, but the statute of limitations, which is applicable to the crime in question, necessarily restricts the offer to the period within which the delinquent must be informed against and prosecuted. . . . So long as the statute of limitations continued to run against the offender, so long would this offer of reward continue good. As soon as the statute becomes a bar to the prosecution, all liability to pay the reward of course ceases, for the conviction of the offender is an event necessarily antecedent to the payment of the reward." In re Kelly, 39 Conn. 159, 163. (2) Claimant making arrest ten years after the offer of reward is entitled to recover it where prosecution was not barred by statute. Drummond v. U. S., 35 Ct. Cl. 356.

Lapse of offer see supra § 17.

Within what time offer must be accepted see supra § 27.

[87] Union County v. Hopkins, 95 N. J. Eq. 444, 123 A 365.

[a] **Where plaintiff not only did not know** of reward, but reward was not in fact offered at the time he performed services, he cannot recover it. Smith v. Lancaster County, 29 Pa. Dist. 902.

[88] Hoggard v. Dickerson, 180 Mo. A. 70, 72, 165 SW 1135 [cit Cyc]; Neville v. Kelly, 12 C. B. N. S. 740, 104 ECL 740, 142 Reprint 1333.

Necessity of knowledge of offer see infra §§ 66–69.

Revocation after part performance see supra § 16.

[89] **Right of offerer to prescribe conditions** see supra § 5.

[90] Cal.—Wilson v. Stump, 103 Cal. 255, 37 P 151, 42 AmSR 111.

Conn.—Gardner v. Hartford, 14 Conn. 195; Bull v. Talcot, 2 Root 119, 1 AmD 62.

Ill.—Chicago, etc., R. Co. v. Sebring, 19 Ill. A. 222.

Me.—Haskell v. Davidson, 91 Me. 490, 40 A 330, 64 AmSR 254, 42 LRA 155.

Mass.—Kaplan v. Suher, 254 Mass. 180, 150 NE 9, 42 ALR 1142; Besse v. Dyer, 9 Allen 151, 85 AmD 747.

Mich.—Peterson v. Mark, 134 Mich. 594, 96 NW 926.

N. Y.—Jones v. Phœnix Bank, 8 N. Y. 228; Peo. v. Brower, 111 App. Div. 915, 97 NYS 349; In re Hempstead Fire Dept., 66 Misc. 381, 121 NYS 359.

Or.—MacFarlane v. Bloch, 59 Or. 1, 115 P 1056, AnnCas1913B 1275.

Pa.—Com. v. Turner, 17 Pa. Dist. 794, 34 Pa. Co. 358; Com. v. Edwards, 10 Phila. 215.

Tex.—Tobin v. McComb, (Civ. A.) 156 SW 237; Southwestern Tel., etc., Co. v. Priest, 31 Tex. Cr. 345, 72 SW 241.

Wash.—Davidson v. Times Printing Co., 63 Wash. 577, 116 P 18, 34 LRA NS 1164.

Wis.—Reif v. Paige, 55 Wis. 496, 13 NW 473, 42 AmSR 731.

Alta.—Sporle v. Edmonton Exhibition Assoc., Ltd., 7 Alta. L. 383.

[a] **Unless and until there has been essentially a complete performance** of all the material terms and conditions specified in the offer, there is no completed contract, and no one is entitled to payment of the reward. Union County v. Hopkins, 93 N. J. Eq. 444, 123 A 365.

[b] **Unfair dealing by collusion** on the part of a contender for a prize will justify the offerer in rejecting his claim. Davidson v. Times Printing Co., 63 Wash. 577, 116 P 18, 34 LRANS 1164.

[c] **Return of lost boy.**—In an action to recover a reward offered for the delivery of a lost boy where the defense was that the boy was not lost when found by plaintiff but was on his way home, evidence that the boy was several miles from his home and was going in the opposite direction from it, when plaintiff took possession of him, was held to warrant the inference that the boy was lost. Peterson v. Mark, 134 Mich. 594, 96 NW 926.

Construction of offer see supra §§ 18–20.

[91] Stair v. Heska Amone Cong., 128 Tenn. 190, 159 SW 840.

[a] **Where a policeman was the efficient cause** of an arrest, and he was voluntarily paid the reward after notice that a private citizen claimed it, the rights of such citizen are not enlarged, nor is he entitled to claim a reward even though public policy precludes police officers from receiving rewards for arrests. Stair v. Heska Amone Cong., 128 Tenn. 190, 159 SW 840.

[b] **The completed contract** is with those persons only who have essentially caused, or participated in causing, the specified result. Union County v. Hopkins, 93 N. J. Eq. 444, 123 A 365.

[92] Rogers v. McCoach, 66 Misc. 85, 120 NYS 686; Rinehart v. Lancaster, 18 WklyNC (Pa.) 364; Tobin v. McComb, (Tex. Civ. A.) 156 SW 237.

[93] Bagnall v. Barnard, 59 Hun 151, 13 NYS 151.

[a] **Aiding the finder.**—Where defendant offered a reward for the recovery of the body of his son who had been drowned, the fact that he supplied plaintiff with a diving suit and a man to work the apparatus does not disentitle plaintiff to the reward. Bagnall v. Barnard, 59 Hun 151, 13 NYS 199.

[94] Shuey v. U. S., 92 U. S. 73, 76, 23 L. ed. 697; Montgomery County v. Robinson, 85 Ill. 174; Heather v. Thompson, 78 SW 194, 25 KyL 1554.

[a] **An agent contracting to arrest a fugitive** for the person who has located him, cannot repudiate the contract on the ground that the amount of the reward for the fugitive was withheld from him. Heather v. Thompson, 78 SW 194, 25 KyL 1554.

Waiver. As in the case of any other contract[98] nonperformance of certain terms of the offer may be excused by waiver[99] after which the offerer cannot defeat recovery on the ground that such terms were not complied with.[1]

[§ 40] **2. Substantial Performance.** Generally substantial compliance with the terms of the offer is sufficient,[2] literal performance not being necessary.[3] However, at least a substantial compliance with the conditions of the offer must be shown to authorize a recovery.[4]

[§ 41] **3. Earning Statutory Reward.** Where a reward is offered by statute, the question of whether a claimant is entitled thereto must be determined by a construction of the terms of the particular statute involved,[5] he being entitled to the reward upon fulfilment of the conditions imposed by the statute[6] and not otherwise,[7] although substantial performance has been held sufficient[8] and he is not required to go further than such conditions.[9]

Allowance of claim. Claims for statutory rewards are sometimes allowed only when boards of supervisors directly allow them.[10] A statute authorizing the payment of a reward, upon allowance by the board of supervisors and the circuit court, does not require the county to be made a party to the proceeding in the circuit court; the county being required to act for itself when the claim is presented to the board of supervisors after allowance by the court.[11] A claim for a reward stands allowed by the board of supervisors, as the statute requires, either when the board directly allows it or when its action disallowing it is reversed by the circuit court on appeal.[12]

[§ 42] **4. Particular Services and Conditions—a. Information—(1) In General.** Where the reward is offered for information[13] leading to an arrest and conviction, or return of property, or for other purposes, that person is entitled to it who just gives the information[14] which is the effective[15] or proxi-

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95. **Right of offerer to prescribe conditions** see supra § 5.

96. Davidson v. Times Printing Co., 63 Wash. 577, 116 P 18, 34 LRA NS 1164.

97. Smith v. American Auto Assoc., 69 Misc. 60, 125 NYS 804.

98. See Contracts § 788.

99. Union Pac. R. Co. v. Belek, 211 Fed. 699; Miners' Wholesale Grocery Co. v. Jennings, 98 Okl. 32, 224 P 192.

[a] **Interpleader may constitute a waiver** of substantial conditions of an offer of reward. Union Pac. R. Co. v. Belek, 211 Fed. 699.

1. Miners' Wholesale Grocery Co. v. Jennings, 98 Okl. 32, 224 P 192.

2. U. S.—Franklin v. Heiser, 9 F. Cas. No. 5,054, 6 Blatchf. 426.

Del.—Gilkey v. Bailey, 2 Del. 359.

Ill.—Williams v. West Chicago St. R. Co., 191 Ill. 610, 61 NE 456, 85 AmSR 278.

Kan.—Elkins v. Wyandotte County, 86 Kan. 305, 120 P 542, 46 LRANS 662.

Ky.—Louisville, etc., R. Co. v. Goodnight, 10 Bush 552, 19 AmR 80.

La.—Salbadore v. Crescent Mut. Ins. Co., 22 La. Ann. 338.

Me.—Haskell v. Davidson, 91 Me. 488, 40 A 330, 64 AmSR 254, 42 LRA 155.

Mass.—Besse v. Dyer, 9 Allen 151, 85 AmD 747.

Mich.—Bloomfield v. Maloney, 176 Mich. 548, 142 NW 785, AnnCas1915B 662.

N. Y.—Fitch v. Snedaker, 38 N. Y. 248, 97 AmD 791; Brennan v. Haff, 1 Hilt. 151.

Or.—Umatilla County v. Estes, 104 Or. 248, 208 P 761.

Wash.—Hall v. State, 102 Wash. 519, 173 P 429.

Wis.—Zwolanek v. Baker Mfg. Co., 150 Wis. 517, 137 NW 769, 44 LRANS 1214, AnnCas1914A 793.

Eng.—Smith v. Moore, 1 C. B. 438, 50 ECL 438, 135 Reprint 610.

3. Haskell v. Davidson, 91 Me. 488, 40 A 330, 64 AmSR 254, 42 LRA 155; Besse v. Dyer, 9 Allen (Mass.) 151, 85 AmD 747; Bloomfield v. Maloney, 176 Mich. 548, 142 NW 785, AnnCas1915B 662.

4. U. S.—Shuey v. U. S., 92 U. S. 73, 23 L. ed. 697.

Ark.—Boyce v. Goodwin, 158 Ark. 475, 250 SW 523; Chambers v. Ogle, 117 Ark. 242, 174 SW 532; Amis v. Conner, 43 Ark. 337.

Cal.—Burke v. Wells, 50 Cal. 218.

Conn.—Gardner v. Hartford, 14 Conn. 195.

Ill.—Williams v. West Chicago, etc., R. Co., 191 Ill. 610, 61 NE 456, 85 AmSR 278; Chicago, etc., R. Co. v. Sebring, 19 Ill. A. 222.

Me.—Haskell v. Davidson, 91 Me. 488, 40 A 330, 64 AmSR 254, 42 LRA 155.

Mass.—Besse v. Dyer, 9 Allen 151, 85 AmD 747.

Mich.—Peterson v. Mark, 134 Mich. 594, 96 NW 926.

Mo.—Smith v. Vernon County, 188 Mo. 501, 87 SW 949, 107 AmSR 324, 70 LRA 59; Ralls County v. Stephens, 104 Mo. A. 115, 78 SW 291; Lovejoy v. Atchison, etc., R. Co., 53 Mo. A. 386.

N. Y.—Jones v. Phœnix Bank, 8 N. Y. 228.

Pa.—Com. v. Edwards, 10 Phila. 215.

Tex.—Tobin v. McComb, (Civ. A.) 156 SW 237; Southwestern Tel., etc., Co. v. Priest, 31 Tex. Civ. A. 345, 72 SW 241.

Wash.—Davidson v. Times Printing Co., 63 Wash. 577, 580, 116 P 18, 34 LRANS 1164 [cit Cyc].

Wis.—Zwolanek v. Baker Mfg. Co., 150 Wis. 517, 137 NW 769, 44 LRA NS 1214, AnnCas1914A 793.

5. See cases infra this note and notes 6–9.

6. Drew v. Ricks, 17 Ala. 25.

Construction of statutory offers see supra § 20.

7. Itawamba County v. Candler, 62 Miss. 193; Anderson v. Pierce County, 40 Nebr. 481, 58 NW 955.

8. Smith v. State, 38 Nev. 477, 151 P 512, LRA1916A 1276.

9. Drew v. Ricks, 17 Ala. 25.

[a] **Illustration.**—Under a statute providing that runaway slaves may be apprehended by any person and carried before the next justice of the peace who shall either commit them to jail or send them to the owner if known and that the owner shall pay to the person apprehending them a stated sum, the person apprehending a slave is entitled to the reward although he refuses to take him to jail when he is ordered by the justice to be committed. Drew v. Ricks, 17 Ala. 25.

10. See statutory provisions.

11. Ex p. Webb, 96 Miss. 8, 49 S 567 [overr Warren County v. Lanier, 87 Miss. 606, 40 S 429].

12. Ex p. Webb, 96 Miss. 8, 49 S 567 [overr Tate County v. Moore, 87 Miss. 245, 39 S 781].

13. See cases infra this note.

[a] **"Information"** means the communication of material facts for the first time. Lancaster v. Walsh, 4 M. & W. 16, 150 Reprint 16.

[b] **A mere suspicion,** though helpful as a clue or suggestion, is not "information." Kincaid Trust, etc., Bank v. Hawkins, 234 Ill. A. 64; Tobin v. McComb, (Tex. Civ. A.) 156 SW 237; Fallick v. Barber, 1 M. & S. 108, 105 Reprint 41. And see notes infra this section.

14. Higgins v. Lessig, 49 Ill. A. 459; Thatcher v. England, 3 C. B. 254, 54 ECL 254, 136 Reprint 102; Smith v. Moore, 1 C. B. 348, 50 ECL 438, 135 Reprint 610; Lancaster v. Walsh, 4 M. & W. 16, 150 Reprint 16.

15. U. S.—Shuey v. U. S., 92 U. S. 73, 76, 23 L. ed. 697.

Ill.—Kincaid Trust, etc., Bank v. Hawkins, 234 Ill. A. 64; Williams v. West Chicago R. Co., 94 Ill. A. 385 [aff 191 Ill. 610, 61 NE 456, 85 AmSR 278].

Mich.—Bloomfield v. Maloney, 176 Mich. 548, 142 NW 785, AnnCas1915B 662.

N. J.—Union County v. Hopkins, 95 N. J. Eq. 444, 123 A 365.

N. Y.—Atwood v. Armstrong, 102 App. Div. 601, 92 NYS 596; Rogers v. McCoach, 66 Misc. 85, 120 NYS 686.

mate[16] means of securing the desired arrest[17] and conviction[18] or recovery of property,[19] even though he does nothing else except divulge such information,[20] and the physical capture is made by others.[21] However, the information furnished by a person under such an offer of reward must be timely;[22] for example, it comes too late when given after the criminal has surrendered[23] or has been arrested,[24] or when the information was already known when the informant gave it.[25] The information must also be adequate;[26] it will be inadequate when not leading to the desired result,[27] such as the recovery of property,[28] or an arrest[29] and conviction,[30] or when insufficient upon which to found a complaint.[31]

[§ 43] **(2) Furnishing Part of Information.** An informer furnishing part of the information is entitled to a reward for an arrest and conviction,[32] or to participation therein,[33] where his information proximately[34] contributes to,[35] or is necessary to a conviction.[36] But giving information of the identity of offenders does not of itself entitle the informer to such a reward.[37]

[§ 44] **(3) Informant as Prosecutor or Witness.** The informant need not act as prosecutor to entitle him to the reward.[38] Nor is it necessary that he should be a witness at the trial of the offender.[39]

[§ 45] **(4) Conviction Unnecessary.** When the reward offered is for the detection or discovery of an offender his conviction is not necessary;[40] it being sufficient if there is a discovery[41] or an arrest.[42]

[§ 46] **(5) To Whom Given.** The information may be given either to the offerer,[43] his agent,[44] or to

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Or.—Umatilla County v. Estes, 104 Or. 248, 208 P 761.

Eng.—Tarner v. Walker, L. R. 2 Q. B. 301; Thatcher v. England, 3 C. B. 254, 54 ECL 254, 136 Reprint 102.

[16] Genesee County v. Pailthorpe, 246 Mich. 356, 224 NW 418; Bloomfield v. Maloney, 176 Mich. 548, 142 NW 785, AnnCas1915B 662.

[17] Kincaid Trust, etc., Bank v. Hawkins, 234 Ill. A. 64; Genesee County v. Pailthorpe, 246 Mich. 356, 224 NW 418; Tarner v. Walker, L. R. 2 Q. B. 301.

[18] Kincaid Trust, etc., Bank v. Hawkins, 234 Ill. A. 64; Genesee County v. Pailthorpe, 246 Mich. 356, 224 NW 418; Williams v. Carwardine, 4 B. & Ad. 621, 24 ECL 274, 110 Reprint 590, 5 C. & P. 566, 24 ECL 711, 172 Reprint 1101, 6 ERC 133.

[a] **Information alone does not entitle one to a reward** for an apprehension and conviction unless the information leads to an arrest and conviction. Shuey v. U. S., 92 U. S. 73, 23 L. ed. 697; Williams v. West Chicago R. Co., 191 Ill. 610, 61 NE 456, 85 AmSR 278; Hogan v. Stophlet, 179 Ill. 150, 53 NE 604, 44 LRA 809; Kincaid Trust, etc., Bank v. Hawkins, 234 Ill. A. 64; Swanton v. Ost, 74 Ill. A. 281; Everman v. Hyman, 26 Ind. A. 165, 28 NE 1022, 84 AmSR 284.

[19] Higgins v. Lessig, 49 Ill. A. 459; Thatcher v. England, 3 C. B. 254, 54 ECL 254, 136 Reprint 102.

[a] **Production of letter.**—If a person proclaims that he is desirous of obtaining an alleged letter, and will pay a reward for its production to him, one who, in consideration of such proclamation and offer, produces the letter and claims the reward is entitled to a judgment therefor. Wilson v. Stump, 103 Cal. 255, 67 P 151, 42 AmSR 111.

[20] Kaplan v. Suker, 254 Mass. 180, 150 NE 9, 42 ALR 1142.

[21] Shuey v. U. S., 92 U. S. 73, 23 L. ed. 697; Umatilla County v. Estes, 104 Or. 248, 208 P 761; Choice v. Dallas, (Tex. Civ. A.) 210 SW 753.

[22] Higgins v. Lessig, 49 Ill. A. 459; Bent v. Wakefield Bank, 4 C. P. D. 1.

[23] Bent v. Wakefield Bank, supra.

[a] **Where information was not acted upon in time** to make arrest before surrender of offender to another, the informant is not entitled to the reward. Taft v. Hyatt, 105 Kan. 35, 180 P 213, 181 P 561.

[24] Fitch v. Snedaker, 38 N. Y. 248, 97 AmD 791; Rogers v. McCoach, 66 Misc. 85, 120 NYS 686.

[a] **Those extracting a confession** out of accused are not entitled to share in reward even though a conviction would not be had otherwise, because the information was given after the arrest. Rogers v. McCoach, 66 Misc. 85, 120 NYS 686.

[b] **Where the reward was for information leading to the recovery** of certain stolen property and the apprehension of the thief, plaintiff who had arrested the thief before the offer was made but gave defendant information leading to the recovery of the property afterward is entitled to the reward. Neville v. Kelly, 12 C. B. N. S. 740, 104 ECL 740, 142 Reprint 1333.

[25] Higgins v. Lessig, 49 Ill. A. 459.

[26] Kincaid Trust, etc., Bank v. Hawkins, 234 Ill. A. 64; Howland v. Lounds, 51 N. Y. 604, 10 AmR 654; Tobin v. McComb, (Tex. Civ. A.) 156 SW 237; Smith v. Moore, 1 C. B. 438, 50 ECL 438, 135 Reprint 610.

[a] **A reward having been offered for information** leading to the discovery of a thief, A told B that C knew something of the theft and if given refreshment might be induced to confess. This was accordingly done and C confessed and was convicted. A was held to be entitled to the reward. Smith v. Moore, 1 C. B. 438, 50 ECL 438, 135 Reprint 610.

[b] **Question for jury.**—A watchmaker to whom a stolen watch had been brought by a receiver informed the person robbed of this fact who was thereby enabled to discover from the receiver where the thieves could be found and they were arrested and convicted. It was left to the jury to say whether this information entitled the watchmaker to recover a reward offered for information leading to the apprehension and conviction of the thieves. Tarner v. Walker, L. R. 2 Q. B. 301.

[27] Atwood v. Armstrong, 102 App. Div. 601, 92 NYS 596.

[28] Holland v. Lounds, 51 N. Y. 604, 10 AmR 654.

[29] Kincaid Trust, etc., Bank v. Hawkins, 234 Ill. A. 64; Atwood v. Armstrong, 102 App. Div. 601, 92 NYS 596.

[a] **Where one informed a bank** offering a reward for the arrest of its absconding teller that he was at a certain hotel, an officer ascertained that he had left, and another informed the police that the defaulter was at his hotel and he was there arrested, the first informer was entitled to no part of the reward. Atwood v. Armstrong, 102 App. Div. 601, 92 NYS 596.

[30] Kincaid Trust, etc., Bank v. Hawkins, 234 Ill. A. 64.

[31] Kincaid Trust, etc., Bank v. Hawkins, supra.

[32] In re Kelly, 39 Conn. 159; Genesee County v. Pailthorpe, 246 Mich. 356, 224 NW 418.

[33] Benton v. Kentucky Bankers' Assoc., 211 Ky. 554, 277 SW 858; Genesee County v. Pailthorpe, 246 Mich. 356, 224 NW 418. See infra §§ 71-73.

[34] Genesee County v. Pailthorpe, 246 Mich. 356, 224 NW 418.

[35] Benton v. Kentucky Bankers' Assoc., 211 Ky. 554, 277 SW 858; Genesee County v. Pailthorpe, 246 Mich. 356, 224 NW 418.

[36] In re Kelly, 39 Conn. 159.

[37] Kincaid Trust, etc., Bank v. Hawkins, 234 Ill. A. 64.

[38] U. S. v. 100 Barrels Distilled Spirits, 27 F. Cas. No. 15,946, 1 Lowell 244.

[39] U. S. v. 100 Barrels Distilled Spirits, supra; Besse v. Dyer, 9 Allen (Mass.) 151, 85 AmD 747.

[40] Cunningham v. Fiske, 13 N. M. 331, 83 P 789; Brennan v. Haff, 1 Hilt. (N. Y.) 151.

[a] **Even against evidence of a failure to convict** the plaintiff may prove the parties he asserted to be the murderers were such, where the offer was for the discovery of certain murderers, since the failure of conviction might result from causes entirely independent of the fact that the actual murderers were discovered and tried. The cause of action therefore accrued when the murderers were discovered. Cunningham v. Fiske, 13 N. M. 331, 83 P 789.

Arrest and conviction see infra §§ 54-57.

[41] Cunningham v. Fiske, 13 N. M. 331, 83 P 789.

[42] Brennan v. Haff, 1 Hilt. (N. Y.) 151.

[43] Union County v. Hopkins, 95 N. J. Eq. 444, 123 A 365; Lockhart v. Barnard, 14 M. & W. 674, 153 Reprint 646.

[44] Lockhart v. Barnard, supra.

a person in authority.[45] But the giving of information by one claimant to another is not sufficient.[46]

[§ 47] **(6) Motive of Informant.** The motive of the claimant in supplying the requisite information is immaterial to his recovery of the reward,[47] with the qualification that the giving must be voluntary.[48] The informant's motive may, however, reduce the amount of his share in a reward.[49]

[§ 48] **b. Arrest—(1) In General.** Where a reward is offered for the apprehension[50] or arrest[51] of a criminal, that person is generally held entitled to the reward who furnishes information leading directly to the arrest[52] or causes the arrest to be made by an officer,[53] or by his own agent,[54] or other person;[55] a personal arrest by claimant not being necessary.[56] But the doctrine of some cases is that the giving of information which leads to an arrest actually made by others is not a performance of an offer of a reward for an arrest;[57] under this doctrine the reward belongs to those who assume the personal danger and responsibility[58] either by actually making the arrest,[59] or causing it to be made by another.[60] One who merely accompanies the real captor is not entitled to any part of the reward,[61] unless such captor be disqualified to claim it,[62] in which case those who most effectively aided in causing the arrest may recover it.[63]

[§ 49] **(2) Person Arrested.** The arrest must be of such person as is described in the offer.[64] This rule has been applied to rewards for fugitives from justice,[65] murderers fleeing or attempting to flee,[66] horse thieves,[67] and to other persons.[68]

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[45] Union County v. Hopkins, 95 N. J. Eq. 444, 123 A 365; Lancaster v. Walsh, 4 M. & W. 16, 150 Reprint 16; Lockhart v. Barnard, 14 M. & W. 674, 153 Reprint 646.

[46] Union County v. Hopkins, 95 N. J. Eq. 444, 123 A 365.

[47] Williams v. Carwardine, 4 B. & Ad. 621, 24 ECL 274, 110 Reprint 590, 5 C. & P. 566, 24 ECL 711, 172 Reprint 1101, 6 ERC 133.

[48] Vitty v. Eley, 51 App. Div. 44, 64 NYS 397.

[a] **The contractual element would be destroyed** if the information were cork-screwed out of a claimant by threats of prosecution. Vitty v. Eley, 51 App. Div. 44, 64 NYS 397.

[49] Gallagher v. Garrett, 144 Md. 241, 124 A 898.

[50] Cummings v. Clinton County, 181 Mo. 162, 79 SW 1127; Gilmore v. Lewis, 12 Oh. 281; Com. v. Turner, 17 Pa. Dist. 794, 34 Pa. Co. 358.

[a] **Detention of criminal in response to request by telephone** does not entitle one to reward under a statute giving a reward for apprehension. Com. v. Turner, 17 Pa. Dist. 794, 34 Pa. Co. 358.

[51] Newton County v. Doolittle, 72 Miss. 929, 18 S 451; Hoggard v. Dickerson, 180 Mo. A. 70, 165 SW 1135.

[a] **Retaking a culprit in an attempted escape** from an arrest is not a second arrest within the meaning of an offer of reward, where there was an immediate and continuous pursuit. Stair v. Heska Amone Cong., 128 Tenn. 190, 159 SW 840.

[b] **Safe delivery** to the proper persons or place for holding him for trial is implied in a reward offered for the arrest or capture of a fugitive. Hoggard v. Dickerson, 180 Mo. A. 70, 165 SW 1135.

[52] Crawshaw v. Roxbury, 7 Gray (Mass.) 374; Umatilla County v. Estes, 104 Or. 248, 208 P 761.

[53] Montgomery County v. Robinson, 85 Ill. 174; Swanton v. Ost, 74 Ill. A. 281; Elkins v. Wyandotte County, 91 Kan. 518, 138 P 578, 51 LRANS 638, AnnCas1915D 257; Heather v. Thompson, 78 SW 194, 25 KyL 1554; Ralls County v. Stephens, 104 Mo. A. 115, 78 SW 291.

[54] Montgomery County v. Robinson, 85 Ill. 174; Heather v. Thompson. 78 SW 194, 25 KyL 1554; Goldsborough v. Cradie, 28 Md. 477.

[a] **Although having the power to make an arrest** himself, if an officer omits to exercise it and allows another officer to arrest the offender he may still be entitled to the reward. Elkins v. Wyandotte County, 91 Kan. 518, 138 P 578, 51 LRANS 638, Ann Cas1915D 257.

[b] **One is entitled to a reward when the person making the pursuit** and capture is his agent, and the concealment by the principal of the fact a reward had been offered gives the agent no claim thereto. Montgomery County v. Robinson, 85 Ill. 174.

[55] Cummings v. Clinton County, 181 Mo. 162, 79 SW 1127.

[56] Haskell v. Davidson, 91 Me. 488, 40 A 330, 64 AmSR 254, 42 LRA 155; Forsythe v. Murnane, 113 Minn. 181, 129 NW 134; Kinn v. Mineral Point First Nat. Bank, 118 Wis. 537, 95 NW 969, 99 AmSR 1012.

[a] **Where a statute provides** (1) an award to "whosoever shall pursue and apprehend any person," the right to the award is not limited to the person who actually takes the offender into custody. Com. v. Heist, 21 Pa. Dist. 985. (2) And the reward may be divided between one causing the detention of a criminal and the one arresting him. Com. v. Heist, supra.

[57] McClaughry v. King, 147 Fed. 463, 79 CCA 91, 7 LRANS 216, 8 Ann Cas 856; Minnesota, etc., Cattle Co. v. Atchison, etc., R. Co., 147 Fed. 463, 77 CCA 607 [aff 210 U. S. 1, 28 SCt 607, 52 L. ed. 931]; Ste. Marie v. U. S., 9 Ct. Cl. 415; Everman v. Hyman, 26 Ind. A. 165, 28 NE 1022, 84 AmSR 284; Sias v. Hallock, 14 Nev. 332; Juniata County v. McDonald, 122 Pa. 115, 15 A 696; Com. v. Sandoe, 18 Pa. Dist. 433; Com. v. Taylor, 17 Pa. Dist. 10; Walker's Case, 23 Pa. Co. 305.

[a] **One informing officer of location of a thief** is not entitled to a reward for his capture. Everman v. Hyman, 26 Ind. A. 165, 28 NE 1022, 84 AmSR 284.

[b] **Two rewards for different services** were offered, one for the apprehension of a fugitive and the other for information that would conduce to his arrest. The former reward contemplated the actual capture of the fugitive and was not earned by the giving of information which led to his arrest by a foreign government. Shuey v. U. S., 92 U. S. 73, 23 L. ed. 697.

[58] Union Pac. R. Co. v. Belek, 211 Fed. 699; Minnesota, etc., Cattle Co. v. Atchison, etc., R. Co., 147 Fed. 463, 77 CCA 607 [aff 210 U. S. 1, 28 SCt 607, 52 L. ed. 931]; McClaughry v. King, 147 Fed. 463, 79 CCA 91, 7 LRANS 216, 8 AnnCas 856; Stair v. Heska Amone Cong., 128 Tenn. 190, 159 SW 840.

[59] Union Pac. R. Co. v. Belek, 211 Fed. 699; McClaughry v. King, 147 Fed. 463, 74 CCA 91, 7 LRANS 216, 8 AnnCas 856; Minnesota, etc., Cattle Co. v. Atchison, etc., R. Co., 147 Fed. 463, 77 CCA 607 [aff 210 U. S. 1, 28 SCt 607, 52 L. ed. 931]; Com. v. Sandoe, 18 Pa. Dist. 433; Com. v. Taylor, 17 Pa. Dist. 10; Walker's Application, 9 Pa. Dist. 121; Com. v. Anderson, 5 Kulp (Pa.) 302; Com. v. Fisher, 5 YorkLegRec (Pa.) 103; Stair v. Heska Amone Cong., 128 Tenn. 190, 159 SW 840.

[60] Union Pac. R. Co. v. Belek, 211 Fed. 699; Minnesota, etc., Cattle Co. v. Atchison, etc., R. Co., 147 Fed. 463, 77 CCA 607 [aff 210 U. S. 1, 28 SCt 607, 52 L. ed. 931]; McClaughry v. King, 135 Fed. 195 [aff 147 Fed. 463, 79 CCA 91, 7 LRANS 216, 8 AnnCas 856].

[61] Stroud v. Garrison, 24 Ark. 53; Johnson v. Com., 76 SW 832, 25 KyL 986.

[62] Union Pac. R. Co. v. Belek, 211 Fed. 699.

[63] Union Pac. R. Co. v. Belek, supra.

[64] Amis v. Conner, 43 Ark. 337; State v. Auditor, 61 Mo. 263; Com. v. Edwards, 10 Phila. (Pa.) 215.

[a] **A reward offered for the arrest of two persons** is not earned by the arrest of one of them. Blain v. Pacific Express Co., 69 Tex. 74, 6 SW 679.

[65] State v. Auditor, 61 Mo. 263.

[a] **Fugitives from justice.**—"It does not follow that the arrest of the persons advertised as fugitives would authorize the payment of the reward offered, if it appeared that at the time of their arrest they were not in fact fugitives from justice, but living openly and notoriously at their usual places of abode, without any concealment, and accessible by the officers of the law at all times. . . . The reward is offered to secure fugitives from justice, and not to secure the delivery of a person not a fugitive." State v. Auditor, 61 Mo. 263, 269.

[66] Ex p. Austin, 129 Miss. 869, 93 S 369; Harrison County v. McCaleb, 110 Miss. 733, 70 S 899; Wilkinson County v. Jones, (Miss.) 52 S 453; Newton County v. Doolittle, 72 Miss. 929, 18 S 451; Monroe County v. Bell, (Miss.) 18 S 121.

[a] **Person fleeing arrest for homicide.**—(1) A statute providing an

[§ 50] **(3) Legality of Arrest.** The arrest must be legal.[69] Hence, those illegally arresting a person who is entitled to his liberty[70] or one against whom there exists no reasonable grounds of suspicion[71] cannot recover a reward offered for his capture[72] for the reason that an agreement for such an arrest is contrary to public policy[73] and unenforceable.[74]

[§ 51] **(4) To Convict Not Necessary.** Under statutes authorizing the offering of a reward for the arrest and apprehension,[75] or the detection and apprehension[76] of an offender a person claiming the reward has no duty resting upon him of convicting the person arrested[77] although the reward cannot be paid until after conviction[78] and the offer of the reward purports to be for such arrest and conviction.[79]

[§ 52] **(5) Voluntary Surrender.** If the offender voluntarily surrenders himself[80] or is on the way to surrender[81] the reward is not earned by his captors,[82] or those arranging for his arrest.[83] But those taking the accused into custody are entitled to the reward, where, without fraud or collusion, they persuade him to surrender,[84] or where, because of injuries, the fugitive abandons the idea of escape and asks to be returned.[85]

[§ 53] **c. Arrest and Delivery.** When the reward is offered for the capture or arrest of an offender and his delivery, claimant must show both a capture and a delivery by him.[86] The delivery may be to an agent,[87] to an officer in another state[88] or, indeed, to an officer present at the time of the arrest.[89] But delivery is excused if, after capture, it is prevented by lawful authority,[90] or by the death of the person arrested.[91]

[§ 54] **d. Arrest and Conviction—(1) In General.** The rule is well settled[92] that when the reward is offered for the arrest and conviction of an offender

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award to one arresting anyone killing another who is fleeing or attempting to flee applies to the arrest of one who has concealed himself to avoid arrest. Ex p. Austin, 129 Miss. 869, 93 S 369. (2) The arrest must be made while the murderer is fleeing or attempting to flee, under the express terms of the statute. Wilkinson County v. Jones, (Miss.) 52 S 453. Harrison County v. McCaleb, 110 Miss. 733, 70 S 899; Monroe County v. Bell, (Miss.) 18 S 121. (3) Such a statute does not apply to one accused of murder who has returned, after fleeing to another state, to the county where the killing occurred for the purpose of standing trial and was going about openly although he had not actually surrendered himself to the proper authorities. Sunflower County v. Wright, 111 Miss. 790, 72 S 226. (4) It is not necessary that the victim of a mortal wound shall be actually dead before the arrest of the person inflicting the wound. Martin v. Copiah County, 71 Miss. 407, 15 S 73. (5) Where an arrest has been made by one citizen and the prisoner escaping from him is arrested by another who delivers him to the custody of the proper officer, such other is entitled to the reward named in the statute. Wilson v. Wallace, 64 Miss. 13, 8 S 128. (6) A reward cannot be claimed for the arrest of one after he had been arrested for the offense with which he was charged and tried and discharged by a justice of the peace of the county. Itawamba County v. Candler, 62 Miss. 193. (7) Where one who wounded another, while his victim was still alive, was arrested, and tried for assault with intent to kill, and discharged, but on his victim's subsequently dying, he fled, the one arresting him was entitled to the reward. Newton County v. Doolittle, 72 Miss. 929, 18 S 451.

67. State v. Ost, 129 Minn. 520, 152 NW 866.

68. See cases infra this note.

[a] **If the reward is offered for the apprehension of runaway slaves** it cannot be recovered by one who apprehended the negroes when they were returning to their owner. Goldsborough v. Cradie, 28 Md. 477.

[b] **Guilty persons.**—If the reward is offered for the arrest of the persons who committed a burglary the claimant must show that the persons whose arrest he caused but who escaped from jail were the guilty parties. Annis v. Conner, 43 Ark. 337.

69. Marking v. Needy, 8 Bush (Ky.) 22.

[a] **Where stolen money was under the control of accused** in an unknown place, it is immaterial that it was not in his physical possession, to render arrest by claimants to reward a legal one under the statute. Henderson v. U. S. Fidelity, etc., Co., (Tex. Commn. A.) 10 SW (2d) 534.

70. Marking v. Needy, 8 Bush (Ky.) 22; Morris v. Kasling, 79 Tex. 141, 15 SW 226, 11 LRA 398.

71. Marking v. Needy, 8 Bush (Ky.) 22.

72. Moore v. Peace, 97 SW 762, 30 KyL 193; Marking v. Needy, 8 Bush (Ky.) 22; Morris v. Kasling, 79 Tex. 141, 15 SW 226, 11 LRA 398; Henderson v. U. S. Fidelity, etc., Co., (Tex. Commn. A.) 298 SW 404 [rev (Civ. A.) 293 SW 339].

73. Marking v. Needy, 8 Bush (Ky.) 22; Morris v. Kasling, 79 Tex. 141, 15 SW 226, 11 LRA 398.

74. Marking v. Needy, 8 Bush (Ky.) 22.

75. Smith v. Vernon County, 188 Mo. 501, 87 SW 949, 107 AmSR 324, 70 LRA 59.

76. Union County v. Hopkins, 95 N. J. Eq. 444, 123 A 365.

77. Smith v. Vernon County, 188 Mo. 501, 87 SW 949, 107 AmSR 324, 70 LRA 59; Union County v. Hopkins, 95 N. J. Eq. 444, 123 A 365.

78. Smith v. Vernon County, 188 Mo. 501, 87 SW 949, 107 AmSR 324, 70 LRA 59; Anderson v. Pierce County, 40 Nebr. 481, 58 NW 955; Union County v. Hopkins, 95 N. J. Eq. 444, 123 A 365.

79. Smith v. Vernon County, 188 Mo. 501, 87 SW 949, 107 AmSR 324, 70 LRA 59; Union County v. Hopkins, 95 N. J. Eq. 444, 123 A 365. And see supra § 45.

80. Currie v. Swindall, 33 N. C. 361; Bent v. Wakefield Bank, 4 C. P. D. 1.

81. Sunflower County v. Wright, 111 Miss. 790, 72 S 226; Oktibbeha County v. Cottrell, 70 Miss. 117, 12 S 156.

82. Sunflower County v. Wright, 111 Miss. 790, 72 S 226; Oktibbeha County v. Cottrell, 70 Miss. 117, 12 S 156; Currie v. Swindall, 33 N. C. 361; Bent v. Wakefield Bank, 4 C. P. D. 1.

[a] **Parties assisting in surrender to protect accused from violence** without knowledge of reward are not entitled thereto. Taft v. Hyatt, 105 Kan. 35, 180 P 213, 181 P 561.

83. Taft v. Hyatt, supra.

84. Hogg v. Com., 11 Ky. Op. 370.

85. Mudd v. Woodside, 136 Ky. 296, 124 SW 321.

86. Ky.—Nall v. Proctor, 3 Metc. 447.

Md.—Goldsborough v. Cradie, 28 Md. 477.

Miss.—Gould v. Chickasaw County, 85 Miss. 123, 37 S 710.

N. C.—Currie v. Swindall, 33 N. C. 361.

Pa.—Juniata County v. McDonald, 122 Pa. 115, 15 A 696.

S. C.—Clanton v. Young, 45 S. C. L. 546.

Tex.—Adair v. Cooper, 25 Tex. 548.

[a] **Delivery to wrong jail,** where proper one was specified in offer, does not defeat right to a reward for the arrest and delivery of a fugitive. Collier v. Green, 205 Ky. 361, 265 SW 812; Stephens v. Brooks, 2 Bush (Ky.) 137.

87. Hewitt v. Lamb, 130 Ga. 709, 61 SE 716, 14 AnnCas 800.

[a] **Where A offered a reward for the arrest of B** and his delivery to a sheriff in Georgia, and C, with the assistance of others, arrested B in California and delivered him to the agent of the state of Georgia, who brought him to Georgia and delivered him to the sheriff, C having made the arrest in California was held to be entitled to the reward. Hewitt v. Lamb, 130 Ga. 709, 61 SE 716.

88. Harrison County v. Hurst, 110 Miss. 716, 70 S 889.

89. Harrison County v. Hurst, supra.

90. Stone v. Dysert, 20 Kan. 123; Stephens v. Brooks, 2 Bush (Ky.) 137.

91. Mosley v. Stone, 108 Ky. 492, 56 SW 965, 22 KyL 173.

92. Caryl v. State, 135 Wash. 1, 236 P 792.

the terms are construed copulatively[93] and the claimant must show that he caused both the arrest and the subsequent conviction,[94] as both are conditions precedent to his recovery.[95] Moreover, such an offer must be enforced as an entirety, or not at all,[96] and the reward cannot be apportioned between what is due for the arrest and what due for the conviction.[97] However, the reward may be recovered if a conviction is prevented by the offerer[98] or by lawful authority,[99] but the failure of prosecuting officers to charge accused with the crime named in the offer does not entitle a claimant to such reward.[1] Likewise, if the offenders are killed resisting arrest, a reward for their arrest and conviction is recoverable,[2] but on the other hand, if a conviction is prevented by the suicide of the offender, the reward cannot be recovered.[3]

Furnishing information. The authorities are not in accord on the performance required of the claimant to a reward for an arrest and conviction.[4] One line of decisions reasons that since such an offer is not to be literally construed,[5] there is a substantial compliance[6] by one who gives, to the proper person interested,[7] information which leads to the arrest and subsequent conviction of the offender,[8] although he neither makes the arrest himself[9] nor testifies at the trial.[10] Other cases follow a contrary rule, to the effect that the mere furnishing of information leading to an arrest and conviction does not entitle one to a reward,[11] claimant having to show that the arrest was made by him[12] or by another under his direction,[13] and he must also show some active agency in procuring the conviction.[14]

[§ 55] **(2) What Is "Conviction"—(a) In Gen-**

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[93] Caryl v. State, supra.

[94] Ala.—Central R., etc., Co. v. Cheatham, 85 Ala. 292, 4 S 828, 7 Am SR 48.

Cal.—Ryer v. Stockwell, 14 Cal. 134, 73 AmD 634.

Ill.—Williams v. West Chicago St. R. Co., 191 Ill. 610, 61 NE 456, 85 AmSR 278.

Mo.—Lovejoy v. Atchison, etc., R. Co., 53 Mo. A. 386.

N. J.—Furman v. Parke, 21 N. J. L. 310.

N. Y.—Fitch v. Snedaker, 38 N. Y. 248, 97 AmD 791; Rogers v. McCoach, 66 Misc. 85, 120 NYS 686.

Pa.—Rinehart v. Lancaster, 3 Pa. Cas. 210, 6 A 91; Ringler v. Bushong, 43 Pa. Co. 138.

Wash.—Caryl v. State, 135 Wash. 1, 236 P 792.

Ont.—Fortier v. Wilson, 11 U. C. C. P., 495.

[a] **Plaintiff must have been principally instrumental** in securing the arrest and conviction. Rinehart v. Lancaster, 18 WklyNC (Pa.) 364.

[b] **Conviction of precise offense.**—(1) Conviction for murder of person other than one named in reward does not entitle party to reward. Caryl v. State, 135 Wash. 1, 236 P 792. (2) Where the reward was for the detection and conviction of any person who may be guilty of feloniously setting fire to a building and the evidence shows that a person was convicted of setting fire to a building, but the court could not infer that it was feloniously done, a recovery of such reward was not allowed. Mead v. Boston, 3 Cush. (Mass.) 404. (3) A reward for the detection and conviction of persons who "set fire to any building destroyed" is not earned by the detection and conviction of a person who set fire to a building where the fire went out before any very substantial damage was done, since the injury did not amount to a destruction within the meaning of the offer. Gardner v. Hartford, 14 Conn. 195. (4) The offer of a reward by a telephone company for the conviction of persons tearing down or cutting wire or obstructing the transmission of messages does not apply to the cutting of a dead wire, since that does not interfere with messages. Southwestern Tel., etc., Co. v. Priest, 31 Tex. Civ. A. 345, 72 SW 241.

[95] Williams v. West Chicago St. R. Co., 191 Ill. 610, 61 NE 456, 85 Am SR 278; Lovejoy v. Atchison, etc., R. Co., 53 Mo. A. 386; Fitch v. Snedaker, 38 N. Y. 248, 97 AmD 791; Fortier v. Wilson, 11 U. C. C. P. (Ont.) 495.

[96] Williams v. West Chicago St. R. Co., 191 Ill. 610, 61 NE 456, 85 Am SR 278; Hogan v. Stophlet, 179 Ill. 150, 153, 53 NE 604, 44 LRA 809.

[97] Van Horn v. Ricks Water Co., 115 Cal. 448, 47 P 361; Williams v. West Chicago R. Co., 191 Ill. 610, 61 NE 456, 85 AmSR 278; Hogan v. Stophlet, 179 Ill. 150, 53 NE 604, 44 LRA 809.

[98] Louisville, etc., R. Co. v. Goodnight, 10 Bush (Ky.) 552, 19 AmR 80; Caryl v. State, 135 Wash. 1, 236 P 792.

[99] Williams v. U. S., 12 Ct. Cl. 192; Caryl v. State, 135 Wash. 1, 236 P 792.

[a] **Suspension of judgment,** after verdict of guilty, or motion of district attorney. Williams v. U. S., 12 Ct. Cl. 192.

[1] Caryl v. State, 135 Wash. 1, 236 P 792.

[2] Smith v. State, 38 Nev. 477, 151 P 512, LRA1916A 1276.

[3] Caryl v. State, 135 Wash. 1, 236 P 792; Fortier v. Wilson, 11 U. C. C. P. (Ont.) 495.

[4] Chambers v. Ogle, 117 Ark. 242, 174 SW 532.

[5] **Construction of offer** see supra §§ 18-20.

[6] Elkins v. Wyandotte County, 86 Kan. 305, 120 P 542, 46 LRANS 662; Besse v. Dyer, 9 Allen (Mass.) 151, 85 AmD 747; Kinn v. First Nat. Bank, 118 Wis. 537, 95 NW 969, 99 AmSR 1012.

[7] Haskell v. Davidson, 91 Me. 488, 40 A 330, 64 AmSR 254, 42 LRA 155.

[8] Kan.—Elkins v. Wyandotte County, 86 Kan. 305, 310, 120 P 542, 46 LRANS 662 [cit Cyc].

Me.—Haskell v. Davidson, 91 Me. 488, 40 A 330, 64 AmSR 254, 42 LRA 155.

Mass.—Crawshaw v. Roxbury, 7 Gray 374; Besse v. Dyer, 9 Allen 151, 85 AmD 747.

Mich.—Bloomfield v. Maloney, 176 Mich. 548, 142 NW 785, AnnCas1915B 662.

Mo.—Smith v. Vernon County, 188 Mo. 501, 87 SW 949, 107 AmSR 324, 70 LRA 59.

Tex.—Choice v. Dallas, (Civ. A.) 210 SW 753; Tobin v. McComb, (Civ. A.) 156 SW 237.

Wis.—Kinn v. Mineral Point First Nat. Bank, 118 Wis. 537, 95 NW 969.

[a] **The service contemplated** is the obtaining and giving to some proper person interested sufficient information in relation to the perpetrator of the crime and his whereabouts as to authorize and secure the arrest of the offender, and subsequently to procure his conviction by a court of competent jurisdiction. Haskell v. Davidson, 91 Me. 488, 40 A 330, 64 AmSR 254, 42 LRA 155.

[b] **The information must have been given before the apprehension** to entitle the informer to the reward, even though such information brought about the conviction. Fitch v. Snedaker, 38 N. Y. 248, 97 AmD 791; Rogers v. McCoach, 66 Misc. 85, 120 NYS 686.

[9] Kan.—Elkins v. Wyandotte County, 91 Kan. 518, 138 P 578, 51 LRANS 638, AnnCas1915D 257 [reh den 92 Kan. 299, 140 P 896, 51 LRANS 639].

Mass.—Crawshaw v. Roxbury, 7 Gray 374.

Pa.—Berks County v. Stroble, 11 Pa. Dist. & Co. 327.

Tex.—Choice v. Dallas, (Civ. A.) 210 SW 753.

Wis.—Kinn v. First Nat. Bank, 118 Wis. 537, 95 NW 969, 99 AmSR 1012.

[10] Crawshaw v. Roxbury, 7 Gray (Mass.) 374; Smith v. Vernon County, 188 Mo. 501, 87 SW 949, 107 AmSR 324, 70 LRA 59.

[11] Chambers v. Ogle, 117 Ark. 242, 174 SW 532; Williams v. Chicago St. R. Co., 119 Ill. 610, 61 NE 456, 85 Am SR 278; Lovejoy v. Atchison, etc., R. Co., 53 Mo. A. 386; Berks County v. Stroble, 11 Pa. Dist. & Co., 327; Ringler v. Bushong, 43 Pa. Co. 138.

[a] **Identifying parties already under arrest,** not having done anything toward their capture or conviction, would not entitle one to the reward. Williams v. West Chicago St. R. Co., 191 Ill. 610, 61 NE 456, 85 Am SR 278.

[12] Central R., etc., Co. v. Cheatham, 85 Ala. 292, 4 S 828, 7 AmSR 48; Williams v. West Chicago St. R. Co., 191 Ill. 610, 61 NE 456, 85 AmSR 278; Lovejoy v. Atchison, etc., R. Co., 53 Mo. A. 386; Berks County v. Stroble, 11 Pa. Dist. & Co. 327; Ringler v. Bushong, 43 Pa. Co. 138.

[13] Ringler v. Bushong, supra.

[14] Central R., etc., Co. v. Cheatham, 85 Ala. 292, 4 S 828; Lovejoy v. Atchison, etc., R. Co., 53 Mo. A. 386.

[a] **Claimant must furnish proof to convict.**—Central R., etc., Co. v. Cheatham, 85 Ala. 292, 4 S 828, 7 AmSR 48.

eral. The word "conviction" in the offer is to be taken in its popular sense[15] and it includes a plea[16] or verdict of guilty,[17] even though not followed by a sentence.[18] If an appeal from the judgment be taken, the reward is not earned until final conviction.[19]

[§ 56] **(b) Secured by Other Evidence.** The communication of suspicions as to the guilt of a person whose arrest and conviction are secured by other evidence is not a compliance with the terms of the offer.[20]

[§ 57] **(3) Claiming and Receiving Witness' Fees.** It does not prejudice one in his claim for a reward for the arrest and conviction of the one testified against, that he claims[21] and receives witness' fees for attendance at the trial.[22]

[§ 58] **e. Recovery of Stolen Property—(1) In General.** To be entitled to a reward for the recovery of stolen property the claimant must of course show that he was instrumental in bringing about such recovery.[23] Hence, the one imparting to the proper person knowledge of the facts which leads to the discovery of the things stolen, with a view of obtaining the promised reward,[24] is entitled to it.[25] But he who is merely the conduit through which the recovery is passed,[26] and simply makes the actual seizure in consequence of such information, is not so entitled.[27]

[§ 59] **(2) When Apprehension of Thief Is Required.** If the reward is offered for the apprehension of the thief and the recovery of the stolen property both conditions must be performed in order to make the offerer liable.[28]

[§ 60] **(3) When Detection of Thief Is Required.** One who gives the owners of stolen property, who have offered a reward for its recovery and detection of the thief, information by which, with reasonable diligence on their part, they are enabled to recover the property and detect the thief, is entitled to the reward.[29]

[§ 61] **f. Return of Lost Property—(1) In General.** Independently of statutory provisions requiring a reward to the finder of lost goods,[30] he is not entitled to a reward for restoring it to the owner if none has been offered;[31] although he may be entitled to compensation for his expense in preserving the property.[32] But he is entitled to a reward if one has been offered,[33] provided the return is voluntary,[34]

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15. Williams v. U. S., 12 Ct. Cl. 192; Wilmoth v. Hensel, 151 Pa. 200, 25 A 86, 31 AmSR 738.

[a] **But the judgment of a juvenile court,** committing a child to a training school for delinquency, is not a conviction under an offer of reward. McCrary v. Nashville, etc., R. Co., 37 Ga. A. 670, 141 SE 416.

16. Haskell v. Davidson, 91 Me. 488, 40 A 330, 64 AmSR 254, 42 LRA 155; Wilmoth v. Hensel, 151 Pa. 200, 25 A 86, 31 AmSR 738.

17. Williams v. U. S., 12 Ct. Cl. 192; Wilmoth v. Hensel, 151 Pa. 200, 25 A 86, 31 AmSR 738.

18. Williams v. U. S., 12 Ct. Cl. 192; Stone v. Wickliffe, 106 Ky. 252, 50 SW 44, 20 KyL 1806; Wilmoth v. Hensel, 151 Pa. 200, 25 A 86, 31 AmSR 738.

[a] **An order arresting judgment and discharging the prisoner** does not set aside a verdict of guilty in a criminal case; and such verdict is nevertheless a conviction, within the meaning of a contract to pay a reward for the conviction of the person guilty of the offense in question. Buckley v. Schwartz, 83 Wis. 304, 53 NW 511.

19. Stone v. Wickliffe, 106 Ky. 252, 50 SW 44, 20 KyL 1806; Scott v. American Express Co., (Mo. A.) 233 SW 492.

[a] **Where convicted defendant died pending his appeal** from judgment of conviction there was no liability on the offerer of the reward, since the contract contemplated a final conviction. Scott v. American Express Co., (Mo. A.) 233 SW 492.

20. Burke v. Wells, 50 Cal. 218; Williams v. West Chicago St. R. Co., 191 Ill. 610, 61 NE 456, 85 AmSR 278; Austin v. Milwaukee County, 24 Wis. 278.

21. Smith v. Vernon County, 188 Mo. 501, 87 SW 949, 107 AmSR 324, 70 LRA 59.

22. Smith v. Vernon County, supra.

23. Brague v. Lord, 67 N. Y. 495. 2 AbbNCas 1.

[a] **A servant whose information to a mistress was the first cause** of suspicion is not entitled to any part of a reward offered for the restoration of stolen property, where such information was not given with the intention of inducing the mistress to act, or of becoming a party to any ensuing proceedings. City Bank v. Bangs, 2 Edw. (N. Y.) 95.

[b] **Putting the owner in possession** of the horse, for the return of which the offer was made, is not necessary to maintain an action for a reward "for the return of a stolen horse." Plaintiff was only required to find and offer to return the animal. Everman v. Hyman, 26 Ind. A. 165, 28 NE 1022, 84 AmSR 284.

24. **To whom information must be given** see supra § 46.

Reliance on offer see infra § 69.

25. Atwood v. Armstrong, 102 App. Div. 601, 92 NYS 596; City Bank v. Bangs, 2 Edw. (N. Y.) 95.

[a] **The criterion in such a case is:** Who acquired and imparted the knowledge necessary to the discovery, with the intent and purpose of bringing about a restoration of the property, taking the risks of failure and acting with a view to the benefits if successful. City Bank v. Bangs, 2 Edw. (N. Y.) 95.

26. City Bank v. Bangs, supra.

27. Atwood v. Armstrong, 102 App. Div. 601, 92 NYS 596; City Bank v. Bangs, 2 Edw. (N. Y.) 95.

28. Jones v. Phœnix Bank, 8 N. Y. 228.

[a] **Neither the apprehension of the forger nor the recovery** of the money, or any part of it, alone, comes within the terms of an offer of reward for the apprehension of a forger and the recovery of the money or a proportionate part thereof. Jones v. Phœnix Bank, 8 N. Y. 228.

29. Besse v. Dyer, 9 Allen (Mass.) 151, 85 AmD 747.

30. See Finding Lost Goods § 14.

31. Cal.—Berthiaume v. Doe, 22 Cal. A. 78, 133 P 513.

Iowa.—Dougherty v. Posegate, 3 Iowa 88.

Mass.—Wentworth v. Day, 3 Metc. 352, 37 AmD 145.

N. Y.—Amory v. Flyn, 10 Johns. 102, 6 AmD 316.

Or.—Watts v. Ward, 1 Or. 86, 62 AmD 299.

[a] **The finder of a public document, paper, or record,** or one into whose hands such an instrument comes by finding or otherwise, gains no such property in the same as to authorize him to estimate what the value of the document may be to him, to whom it may belong, or who may have an interest therein, and to withhold the same from the rightful owner or lawful custodian until the sum estimated or demanded for the picking up and keeping shall be paid. De la O v. Acoma, 1 N. M. 226.

[b] **The Roman law** denied to the finder of lost property a reward for finding it. 2 Kent Comm. p 356 [cit Dig. 47, 2, 44, §§ 4-10].

32. See Finding Lost Goods § 14.

33. Berthiaume v. Doe, 22 Cal. A. 78, 133 P 515; Wentworth v. Day, 3 Metc. (Mass.) 352, 37 AmD 145; Pierson v. Morch, 82 N. Y. 503; Cummings v. Gann, 52 Pa. 484.

[a] **Insisting upon the identification** of the property before restoring it does not waive the right to claim the reward. Wood v. Pierson, 45 Mich. 313, 7 NW 888.

[b] **Refusal of agent to disclose name of finder.**—The reward cannot be recovered back because the agent or lawyer who returned the property refused to disclose the name of the finder and made threats. Grady v. Crook, 2 AbbNCas 53 [aff 72 N. Y. 612].

34. Sheldon v. George, 132 App. Div. 470, 116 NYS 969.

Lien of finder see infra § 63.

and within the terms of the offer.[35] However, a distinction is made between lost and mislaid property,[36] it being held that a reward for the return of lost property is not earned by one who finds it where it has been deposited.[37]

[§ 62] **(2) Return of Part of Property.** If only part of the lost property is restored to the loser, the finder is so entitled to a proportionate part of the reward.[38]

[§ 63] **(3) Lien of Finder.** If the reward offered is definite and certain, the finder has a lien on the property[39] to the amount of the reward[40] until it is paid.[41] But if the offer is indefinite,[42] such as that of a "liberal reward,"[43] the finder has no lien.[44]

[§ 64] **D. Part Performance[45]—1. In General.** Where the offer of a reward is entire,[46] the general rule may be stated to be that the person who performs only part of the service or services requested is not entitled to any of the reward,[47] since an entire contract is not apportionable[48] and also because such part performance is not a compliance with the terms of the offer.[49] But this rule has been held not to apply to offers of rewards for the recovery of lost goods or property.[50]

[§ 65] **2. Where Complete Performance Prevented.**[51] When the claimant has performed part of the service and is prevented by the offerer,[52] or by those for whose acts he is responsible,[53] or by proper legal authorities,[54] from completing the work, he is entitled to the whole reward,[55] or at least to compensation on a quantum meruit.[56]

[§ 66] **E. Performance without Knowledge of Offer—1. In General.** Upon the proposition of the right of one to recover a reward for services performed without knowledge of the offer, there exists a hopeless conflict of authority.[57] By some courts it is held that a previous knowledge of the offer is not necessary to a recovery,[58] while in what seems to be a majority of the jurisdictions, the rule is that such knowledge is a prerequisite.[59]

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[35] Simpson v. Twenty-Eighth St. Co., 92 Misc. 399, 156 NYS 87; Commercial Bank v. Pleasants, 6 Whart. (Pa.) 375.

[a] **Where the property was not lost or was not recovered** within the terms of the advertised offer, the reward cannot be said to be earned. Commercial Bank v. Pleasants, 6 Whart. (Pa.) 375.

[b] **One merely giving information** that leads to the recovery of property by criminal proceeding does not comply with an offer of reward for "return of property, no questions asked." Simpson v. Twenty-Eighth St. Co., 92 Misc. 399, 156 NYS 87.

[36] McAvoy v. Medina, 11 Allen (Mass.) 548, 87 AmD 733; Sovern v. Yoran, 16 Or. 269, 20 P 100, 8 AmSR 293; Huthmacher v. Harris, 38 Pa. 491, 80 AmD 502.

[37] Kincaid v. Eaton, 98 Mass. 139, 93 AmD 142; Commercial Bank v. Pleasants, 6 Whart. (Pa.) 375.

[38] Hawk v. Marion County, 48 Iowa 472; Deslondes v. Wilson, 5 La. 397, 25 AmD 187; Symmes v. Frazier, 6 Mass. 344, 4 AmD 142.

[a] **It is consistent with honesty and fair dealing,** and not inconsistent with any principle of law to allow a pro rata share of the reward offered to the finder of part of the lost property. Symmes v. Frazier, 6 Mass. 344, 4 AmD 142.

[39] Ind.—Everman v. Hyman, 3 Ind. A. 459, 29 NE 1140.

Md.—Wilson v. Guyton, 8 Gill 213.

Mass.—Preston v. Neale, 12 Gray 222; Wentworth v. Day, 3 Metc. 352, 37 AmD 145.

Mich.—Wood v. Pierson, 45 Mich. 313, 7 NW 888.

Or.—MacFarlane v. Bloch, 59 Or. 1, 115 P 1056, AnnCas1913B 1275.

Pa.—Cummings v. Gann, 52 Pa. 484.

[40] Preston v. Neale, 12 Gray (Mass.) 222; Wood v. Pierson, 45 Mich. 313, 7 NW 888; MacFarlane v. Bloch, 59 Or. 1, 115 P 1056, AnnCas 1913B 1275.

[41] Ind.—Everman v. Hyman, 3 Ind. A. 459, 29 NE 1140.

Md.—Wilson v. Guyton, 8 Gill 213.

Mass.—Wentworth v. Day, 3 Metc. 352, 37 AmD 145.

Mich.—Wood v. Pierson, 45 Mich. 313, 7 NW 888.

Or.—MacFarlane v. Bloch, 59 Or. 1, 115 P 1056, AnnCas1913B 1275.

Pa.—Cummings v. Gann, 52 Pa. 484.

[42] Wilson v. Guyton, 8 Gill (Md.) 213.

[a] **Where no reward is offered,** the finder of lost property is not entitled to a lien. Hendler v. Perkins, 4 Pa. Super. 344.

[43] Wilson v. Guyton, 8 Gill (Md.) 213.

[a] **Who would be the judge** of the liberality of the reward? The owner does not by his offer design to make the recoverer the exclusive judge, and it is as unreasonable and unjust that the offerer should be the exclusive judge. In the event of a disagreement between them the amount would have to be ascertained by a judicial tribunal, involving the delays incident to litigation, and it would be a gross perversion of the intention of the owner that he be deprived of possession of his property until the delays of litigation were exhausted. Wilson v. Guyton, 8 Gill (Md.) 213.

[44] Wilson v. Guyton, supra. But see Baker v. Hoag, 7 Barb. (N. Y.) 113 (holding that a promise "to see the finder paid" might entitle the finder to receive his compensation before he parted with possession of the property).

[45] **Part performance before offer made** see supra § 38.

[46] **Entire and severable or divisible contracts** see Contracts § 525.

[47] Williams v. West Chicago St. R. Co., 191 Ill. 610, 61 NE 456, 85 AmSR 278; Jones v. Phœnix Bank, 8 N. Y. 228. See Contracts § 787.

[a] **Arrest and conviction of one of several murderers.**—Where a reward is offered for the arrest and conviction of any one implicated in the murder of several persons, performance is not sufficient where one is arrested and convicted who was implicated in the murder of but one of the persons mentioned in the offer. Furman v. Parke, 21 N. J. L. 310.

[48] Van Horn v. Ricks Water Co., 115 Cal. 448, 47 P 361; Williams v. West Chicago St. R. Co., 191 Ill. 610, 61 NE 456; Hogan v. Stophlet, 179 Ill. 150, 53 NE 604, 44 LRA 809; Blain v. Pacific Express Co., 69 Tex. 74, 6 SW 679.

[a] **Insufficiency of part performance.**—If the promise is to pay so much money for the arrest of two persons, it is an entire proposition which, when acted upon by any person, would constitute a contract single in its nature, and not subject to apportionment under rules recognized wherever the common law is in force. Blain v. Pacific Express Co., 69 Tex. 74, 6 SW 679.

[49] Furman v. Parke, 21 N. J. L. 310; Jones v. Phœnix Bank, 8 N. Y. 228.

[50] **Return of part of property** see supra § 62.

[51] **Conviction prevented** see supra § 54 notes 98–3.

Delivery prevented see supra § 53 notes 90, 91.

[52] Blain v. Pacific Express Co., 69 Tex. 74, 6 SW 679; Zwolanek v. Baker Mfg. Co., 150 Wis. 517, 137 NW 769, 44 LRANS 1214, AnnCas1914A 793.

[53] Louisville, etc., R. Co. v. Goodnight, 10 Bush (Ky.) 552, 19 AmR 80; Zwolanek v. Baker Mfg. Co., 150 Wis. 517, 522, 137 NW 769, 44 LRANS 1214, AnnCas1914A 793 [cit Cyc].

[a] **Where attorneys of offerer** by solicitation caused indictments to be dismissed against offenders in order to use them as witnesses, the plaintiff who captured them is entitled to the reward for their capture and conviction. Louisville, etc., R. Co. v. Goodnight, 10 Bush (Ky.) 522, 19 AmR 80.

[54] Stone v. Dysert, 20 Kan. 123.

[55] Stone v. Dysert, supra; Louisville, etc., R. Co. v. Goodnight, 10 Bush (Ky.) 552, 19 AmR 80; Zwolanek v. Baker Mfg. Co., 150 Wis. 517, 137 NW 769, 44 LRANS 1214, AnnCas 1914A 793.

[56] Blain v. Pacific Express Co., 69 Tex. 74, 6 SW 679; Zwolanek v. Baker Mfg. Co., 150 Wis. 517, 137 NW 769, 44 LRANS 1214, AnnCas1914A 793.

[57] Smith v. Vernon County, 188 Mo. 501, 87 SW 949, 107 AmSR 324, 70 LRA 59.

[a] **Decisions on both sides base the rule on the same case,** that of Williams v. Carwardine, 4 B. & Ad. 621, 24 ECL 274, 110 Reprint 590, 5 C. & P. 566, 24 ECL 711, 172 Reprint 1101, although their interpretations are opposed to each other. Oldfield v. Reading, 18 Pa. Dist. 833.

[b] **The weight of authority** is claimed by proponents of each rule. (1) The weight of authority is that knowledge of the offer is not essential. Drummond v. U. S., 35 Ct. Cl. 356; Oldfield v. Reading, 18 Pa. Dist. 833. (2) The weight of authority supports the view that knowledge is necessary.

Statutory rewards are the subject of a further distinction from private rewards, it being suggested[60] and held that knowledge of a statutory reward is not necessary[61] for the reason that a legal right is given without the aid of contract.[62]

[§ 67] **2. Rule That Knowledge Is Not Necessary.** The rule applied in some jurisdictions is that the person performing the services is entitled to the reward, although he did not know of the offer at the time.[63]

[§ 68] **3. Rule That Knowledge Is Necessary.** Adhering to the contractual basis of the offer of a reward and its acceptance,[64] this rule requires a knowledge of the offer by the person rendering the service in order to entitle him to a reward,[65] arguing that without such knowledge there can be no meeting of the minds,[66] hence no contract.[67] However, where performance is completed after acquiring knowledge of the offer, although begun in ignorance thereof, those performing the services may recover the reward.[68]

[§ 69] **4. Reliance on Offer.** The authorities are also in conflict on the question of the necessity of a reliance on the reward by the one performing the services.[69] Obviously if the reward is to be relied upon knowledge of it is necessary.[70] One theory is that the motives actuating the performance are immaterial[71] and cannot be inquired into,[72] while on the other hand it is held that the services must be

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Arkansas Bankers' Assoc. v. Ligon, 174 Ark. 234, 295 SW 4, 53 ALR 534.

[58] See infra § 67.

[59] See infra § 68.

[60] Drummond v. U. S., 35 Ct. Cl. 356; Sullivan v. Phillips, 178 Ind. 164, 98 NE 868, AnnCas1915B 670; Clinton County v. Davis, 162 Ind. 60, 69 NE 680, 64 LRA 780, 1 AnnCas 282; Smith v. Vernon County, 188 Mo. 501, 87 SW 949, 107 AmSR 324, 70 LRA 59; Broadnax v. Ledbetter, 100 Tex. 375, 99 SW 1111, 9 LRANS 1057.

[61] Smith v. State, 38 Nev. 477, 151 P 512, LRA1916A 1276; Choice v. Dallas, (Tex. Civ. A.) 210 SW 753.

[62] Smith v. State, 38 Nev. 477, 151 P 512, LRA1916A 1276; Broadnax v. Ledbetter, 100 Tex. 375, 99 SW 1111, 9 LRANS 1057; Choice v. Dallas, (Tex. Civ. A.) 210 SW 753.

[63] U. S.—Drummond v. U. S., 35 Ct. Cl. 356.

Del.—Eagle v. Smith, 9 Del. 293.

Ind.—Sullivan v. Phillips, 178 Ind. 164, 98 NE 868, AnnCas1915B 670; Monroe County v. Wood, 39 Ind. 345; Dawkins v. Sappington, 26 Ind. 199; Everman v. Hyman, 26 Ind. A. 165, 28 NE 1022, 84 AmSR 284.

Ky.—Auditor v. Ballard, 9 Bush 572, 15 AmR 728 [overr Lee v. Flemingsburg, 7 Dana 28].

Mass.—Crawshaw v. Roxbury, 7 Gray 374.

Vt.—Russell v. Stewart, 44 Vt. 170.

Eng.—Gibbons v. Proctor, 64 L. T. Rep. N. S. 594.

[a] **Reason for rule.**—As it is unnecessary that the one performing the services be induced to do so by the reward, on a parity of reasoning there is no more necessity that he should have even known it was offered before he did it. Eagle v. Smith, 9 Del. 293.

[b] **A leading case** on this theory is Auditor v. Ballard, 9 Bush (Ky.) 572, 575, 15 AmR 728, where the appellee was refused a reward because he did not know, when arresting and delivering a fugitive, that it had been offered. The court declared: "If the offer was made in good faith, why should the state inquire whether appellee knew that it had been made. Would the benefit to the state be diminished by a discovery of the fact that the appellee, instead of acting from mercenary motives, had been actuated solely by a desire to prevent the escape of a fugitive and to bring a felon to trial."

[64] See supra § 2; and infra notes 65–67.

[65] Ala.—Morrell v. Quarles, 35 Ala. 544.

Ark.—Arkansas Bankers' Assoc. v. Ligon, 174 Ark. 234, 295 SW 4, 53 ALR 534.

Cal.—Wilson v. Stump, 103 Cal. 255, 37 P 151, 42 AmSR 111; Hewitt v. Anderson, 56 Cal. 476, 38 AmR 65.

Conn.—Marvin v. Treat, 37 Conn. 96, 9 AmR 307.

Ill.—Williams v. West Chicago St. R. Co., 191 Ill. 610, 61 NE 456, 85 AmSR 278; Kincaid Trust, etc., Bank v. Hawkins, 234 Ill. A. 64; Police Pension Fund v. Railway Ticket Protective Bureau, 175 Ill. A. 464; Van Vlissingen v. Manning, 105 Ill. A. 255; Ensminger v. Horn, 70 Ill. A. 605; Chicago, etc., R. Co. v. Sebring, 16 Ill. A. 181.

Kan.—Taft v. Hyatt, 105 Kan. 35, 180 P 213, 181 P 561.

Mich.—Genesee County v. Pailthorpe, 246 Mich. 356, 224 NW 418.

Minn.—Forsythe v. Murnane, 113 Minn. 181, 129 NW 134.

Miss.—Fidelity, etc., Co. v. Messer, 112 Miss. 267, 72 S 1004.

Mo.—Smith v. Vernon County, 188 Mo. 501, 87 SW 949, 107 AmSR 324, 70 LRA 59; Hoggard v. Dickerson, 180 Mo. A. 70, 165 SW 1135; Stone v. St. Louis Union Trust Co., 150 Mo. A. 331, 333, 130 SW 825 [quot Cyc]; Sanderson v. Lane, 43 Mo. A. 158.

N. Y.—Howland v. Lounds, 51 N. Y. 604, 10 AmR 654; Fitch v. Snedaker, 38 N. Y. 248, 97 AmD 791; Sheldon v. George, 132 App. Div. 470, 116 NYS 969; Vitty v. Eley, 51 App. Div. 46, 64 NYS 397; Rubenstein v. Frost, 116 NYS 681; City Bank v. Bangs, 2 Edw. 95.

N. D.—Couch v. State, 14 N. D. 361, 103 NW 942.

Pa.—Smith v. Lancaster County, 29 Pa. Dist. 902. Contra Oldfield v. Reading, 18 Pa. Dist. 833 (holding that weight of authority is that previous knowledge is not necessary).

Tenn.—Stamper v. Temple, 6 Humphr. 113, 14 AmD 296.

Tex.—Broadnax v. Ledbetter, 100 Tex. 375, 99 SW 1111, 9 LRANS 1057; Choice v. Dallas, (Civ. A.) 210 SW 753; Tobin v. McComb, (Civ. A.) 156 SW 237.

Wis.—Reif v. Paige, 55 Wis. 496, 13 NW 473, 42 AmR 731.

[a] **"The liability must be created,** if at all, by contract. One may do such things as are specified in the offer, but, in so doing, does not act in performance of it, and therefore does not accept it, when he is ignorant of its being made. There is no such mutual agreement of minds as is essential to a contract." Broadnax v. Ledbetter, 100 Tex. 375, 377, 99 SW 1111, 9 LRANS 1057.

[b] **Where reward is for the return** of lost property, it is immaterial that the property be found before the finder knows of the reward, the reward being for the return, not the finding. MacFarlane v. Bloch, 59 Or. 1, 115 P 1056, AnnCas1913B 1275; Hosier v. Northampton Horse Ins. Co., 21 Pa. Dist. 1001.

[66] Taft v. Hyatt, 105 Kan. 35, 180 P 213, 181 P 561; Smith v. Vernon County, 188 Mo. 501, 87 SW 949, 107 AmSR 324, 70 LRA 59; Broadnax v. Ledbetter, 100 Tex. 375, 99 SW 1111, 9 LRANS 1057.

[67] Smith v. Vernon County, 188 Mo. 501, 87 SW 949, 107 AmSR 324, 70 LRA 59; Broadnax v. Ledbetter, 100 Tex. 375, 99 SW 1111, 9 LRANS 1057.

[a] **Without a meeting of the minds it is impossible** to see how a reward can be brought into the classification of a contract; an aggregatio mentium cannot exist without the acceptance of an offer, express or implied, or from a fiction of law. Smith v. Vernon County, 188 Mo. 501, 87 SW 949, 107 AmSR 324, 70 LRA 59.

[b] **No implication of a contractual relation** arises unless the person performing the services knew of the offer at the time. Kincaid Trust, etc., Bank v. Hawkins, 234 Ill. A. 64.

[68] Genesee County v. Pailthorpe, 246 Mich. 356, 224 NW 418; Hoggard v. Dickerson, 180 Mo. A. 70, 165 SW 1135.

Performance prior to offer see supra § 38.

[69] See infra notes 71–75.

[70] **Rule that knowledge is necessary** see supra § 68.

[71] Williams v. Carwardine, 4 B. & Ad. 621, 24 ECL 274, 110 Reprint 590, 5 C. & P. 566, 24 ECL 711, 172 Reprint 1101, 6 ERC 133.

[a] **Although induced by other motives** than the reward, namely, to ease her conscience, plaintiff was held entitled to the reward as having performed the required services. The question of her knowledge of the offer is not entered into. Williams v. Carwardine, 4 B. & Ad. 621, 24 ECL 274, 110 Reprint 590, 5 C. & P. 566, 24 ECL 711, 172 Reprint 1101, 6 ERC 133.

[72] Williams v. Carwardine, supra.

given voluntarily[73] with a view to obtaining the reward.[74] Hence one performing the required services with knowledge of the offer of reward but without any intention of claiming it cannot recover.[75]

[§ 70] **F. Effect of Performance.** If an offer is acted upon before its expiration[76] or revocation,[77] the offer and the acceptance by performance become a valid contract,[78] based upon a sufficient consideration,[79] upon which an action will lie to recover the amount of reward offered.[80]

VIII. PAYMENT AND APPORTIONMENT

[§ 71] **A. In General.** A reward is to be paid to the person or persons who perform, at least substantially, the services required.[81] But where the persons performing the services are disqualified to claim the reward,[82] others whose services proximately contributed to such performance may receive it.[83] Rewards are apportionable among several claimants who participated in the performance of the required services under certain circumstances.[84] However, there can be no apportionment to one whose participation was of no great consequence,[85] and no difficulty of apportionment will justify an order redistributing the reward among its donors who do not claim it.[86]

[§ 72] **B. When Claimants Acting in Concert.** If two or more claimants of a reward have performed the services required by concerted action, they are entitled to an equitable[87] distribution among themselves,[88] in proportion to the relative value of their

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73. Sheldon v. George, 132 App. Div. 470, 116 NYS 969.

74. Ark.—Arkansas Bankers' Assoc. v. Ligon, 174 Ark. 234, 295 SW 4, 53 ALR 534.

Cal.—Hewitt v. Anderson, 56 Cal. 476, 38 AmR 65; Burke v. Wells, 50 Cal. 218.

Ill.—Kincaid Trust, etc., Bank v. Hawkins, 234 Ill. A. 64; Chicago, etc., R. Co. v. Sebring, 16 Ill. A. 181.

Kan.—Taft v. Hyatt, 105 Kan. 35, 180 P 213, 181 P 561 [cit Cyc].

Mich.—Genesee County v. Pailthorpe, 246 Mich. 356, 224 NW 418.

Mo.—Smith v. Vernon County, 188 Mo. 501, 87 SW 949, 107 AmSR 324, 70 LRA 59; Hoggard v. Dickerson, 180 Mo. A. 70, 165 SW 1135.

N. Y.—Howland v. Lounds, 51 N. Y. 604, 10 AmR 654; Vitty v. Eley, 51 App. Div. 44, 64 NYS 397.

Tex.—Broadnax v. Ledbetter, 100 Tex. 375, 99 SW 1111, 9 LRANS 1057; Choice v. Dallas, (Civ. A.) 210 SW 753.

75. Arkansas Bankers' Assoc. v. Ligon, 174 Ark. 234, 295 SW 4, 53 ALR 534; Hewitt v. Anderson, 56 Cal. 476, 38 AmR 65; Smith v. Vernon County, 188 Mo. 501, 87 SW 949, 107 AmSR 324, 70 LRA 59; Hoggard v. Dickerson, 180 Mo. A. 70, 72, 165 SW 1135 [cit Cyc]; Sheldon v. George, 132 App. Div. 470, 116 NYS 969.

[a] **When a statutory reward** directed payment to be made to the person "who shall in consequence of such offer apprehend any person . . . charged with a capital or high crime," it was held that under the plain language of the statute there could be no recovery for what was not done in consequence of the offer. Abel v. Pembroke, 61 N. H. 357.

76. **Expiration by lapse of time** see supra § 17.

77. **Revocation** see supra §§ 15, 16.

78. Ala.—Central R., etc., Co. v. Cheatham, 85 Ala. 292, 40 S 828, 7 AmSR 48.

Cal.—Ryer v. Stockwell, 14 Cal. 134, 73 AmD 634; Berthiaume v. Doe, 22 Cal. A. 78, 133 P 515.

Ill.—Von Vlissingen v. Manning, 105 Ill. A. 255.

Ind.—Vigo Agricultural Soc. v. Brumfiel, 102 Ind. 146, 1 NE 382, 52 AmR 657; Harson v. Pike, 16 Ind. 140.

Me.—Mitchell v. Abbott, 86 Me. 338, 29 A 1118, 41 AmSR 559, 25 LRA 503.

N. J.—Furman v. Parke, 21 N. J. L. 310.

N. Y.—Pierson v. Morch, 82 N. Y. 503.

Or.—Umatilla County v. Estes, 105 Or. 248, 208 P 761.

Pa.—Cummings v. Gann, 52 Pa. 484, 490. See Oldfield v. Reading, 18 Pa. Dist. 833.

Philippine.—De la Rosa v. Philippine Islands Bank, 51 Philippine 926.

Tex.—Kasling v. Morris, 71 Tex. 584, 9 SW 739, 10 AmSR 797.

Wis.—Zwolanek v. Baker Mfg. Co., 150 Wis. 517, 137 NW 769, 44 LRANS 1214, AnnCas1914A 793; Reif v. Paige, 55 Wis. 496, 13 NW 473, 42 AmR 731.

[a] **It is elementary** that where a party publishes an offer to the world, and before it is withdrawn another acts upon it, the party making the offer is bound to perform his promise. Vigo Agricultural Soc. v. Brumfiel, 102 Ind. 146, 1 NE 382, 52 AmR 657.

[b] **If plaintiff accepted and performed** in reliance on the offer before it was revoked a valid contract was thereby consummated. Wilson v. Stump, 103 Cal. 255, 37 P 151, 42 AmSR 111.

[c] **There is no consideration for one's agreement to take less** than the amount offered for the best exhibit at a fair, where the exhibitor has become entitled to the sum originally offered. Murray v. Walker, 83 Iowa 202, 48 NW 1075.

79. **Consideration** see supra §§ 23, 24.

80. **Actions** see infra § 74 et seq.

81. **Effect of performance** see supra § 70.

Substantial performance see supra § 40.

82. **Who may claim reward** see supra §§ 28–34.

83. Union Pac. R. Co. v. Belek, 211 Fed. 699.

[a] **Where the offerer waives substantial performance** as by interpleader, it admits that some one of the defendants is entitled to the reward, and, if the officers making the actual arrest are disqualified, other persons proximately aiding in the accomplishment of the required service will receive it. Union Pac. R. Co. v. Belek, 211 Fed. 699.

84. See infra §§ 72, 73.

85. Benton v. Kentucky Bankers' Assoc., 211 Ky. 554, 277 SW 858.

86. Maggi v. Cassiday, 190 Iowa 933, 181 NW 27.

[a] **When the offerer interpleads,** the reward cannot be returned to it. Union Pac. R. Co. v. Belek, 211 Fed. 699.

87. Iowa.—Maggi v. Cassiday, 190 Iowa 933, 181 NW 27.

Mich.—Bloomfield v. Maloney, 176 Mich. 548, 142 NW 785, AnnCas1915B 662.

Minn.—Forsythe v. Murnane, 113 Minn. 181, 129 NW 134.

Oh.—Rea v. Smith, 2 Handy 193, 12 Oh. Dec. (Reprint) 398.

Or.—Umatilla County v. Estes, 105 Or. 248, 208 P 761.

88. Ark.—Chambers v. Ogle, 117 Ark. 242, 174 SW 532.

Iowa.—Maggi v. Cassiday, 190 Iowa 933, 181 NW 27.

Ky.—Tomlinson v. Phœnix, 8 Ky. Op. 547.

Md.—Goldsborough v. Cradie, 28 Md. 477.

Mich.—Genesee County v. Pailthorpe, 246 Mich. 356, 224 NW 418; Bloomfield v. Maloney, 176 Mich. 548, 142 NW 785, AnnCas1915B 662.

Nebr.—Elkhorn Valley Lodge No. 57, I. O. O. F. v. Hudson, 59 Nebr. 672, 81 NW 859.

N. H.—Janvrin v. Exeter, 48 N. H. 83, 2 AmR 185.

N. Y.—Fargo v. Arthur, 43 HowPr 193.

Oh.—Rea v. Smith, 2 Handy 193, 12 Oh. Dec. (Reprint) 398.

Or.—Umatilla County v. Estes, 105 Or. 248, 208 P 761.

Pa.—Peoples Trust Co. v. Davis, 5 Pa. Dist. & Co. 431; Oldfield v. Reading, 18 Pa. Dist. 833; Com. v. Heist, 39 Pa. Co. 392.

Wis.—Kinn v. Mineral Point First Nat. Bank, 118 Wis. 537, 95 NW 969, 99 AmSR 1012.

[a] **Trainman,** the first to furnish information, who assisted officers in the arrest and was ready to testify at the trial is entitled to participate in the reward. Benton v. Kentucky Bankers' Assoc., 211 Ky. 554, 277 SW 858.

[b] **Concert a question of fact.**—Where several persons searched for a dead body for the recovery of which

services.[89] However, there seems to be no arbitrary rule as to the carrying out of such distribution.[90] Where they join in claiming a reward it need not be shown that each did all of the work,[91] it being sufficient that each performed an essential part[92] and that through their joint efforts the terms and conditions of the offer were satisfied.[93]

[§ 73] **C. When Claimants Not Acting in Concert.** It is generally held that if the service demanded is done by several persons not acting in concert one with another he alone is entitled to the reward who first complied with the offer.[94] However, there is a line of cases allowing an equitable[95] apportionment among several claimants not acting in concert[96] or even acting unknown to each other[97] where, but for the acts of each of the independent parties, the required services would not have been performed.[98]

IX. ACTIONS

[§ 74] **A. Right of Action.** A right of action to recover a reward accrues to plaintiff upon his doing the act or performing the service for which the reward was offered.[99] But any conditions precedent to the right to maintain the action must, of course, be complied with.[1] Where the offering of rewards for certain purposes and the payment of them is intrusted by statute to the discretion of the governor of the state, no action will lie against the state for a reward which the governor has refused to pay.[2] Claims for services to a county under a reward offered therefor by its board of supervisors have been held to be within the exclusive jurisdiction of such board,[3] its disposition not being subject to review upon the facts;[4] and no action will lie against the county therefor after the board has considered and rejected them.[5]

[§ 75] **B. Form of Action.** The ordinary form of

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a reward had been offered, and it was found by one, the question whether he acted independently or jointly with the other searchers is a question of fact. Elkhorn Valley Lodge No. 57 I. O. O. F. v. Hudson, 59 Nebr. 672, 81 NW 859.

[c] **Not partners.**—The mere fact that two or more persons act together in making an arrest does not make them partners so as to authorize one to make an agreement with a stranger concerning the division of the reward which will bind the others. Hart v. Green, 16 Colo. A. 70, 65 P 344.

89. Bloomfield v. Maloney, 176 Mich. 548, 142 NW 785, AnnCas1915B 662; Fargo v. Arthur, 43 HowPr (N. Y.) 193; Umatilla County v. Estes, 105 Or. 248, 208 P 761; Peoples Trust Co. v. Davis, 5 Pa. Dist. & Co. 431.

[a] **Where the information is supplied by several** and is not a repetition of the same facts, but information of independent facts, the whole combining to satisfy the terms and conditions of the offer, the distribution among the claimants should be based on the relative value of their acts. Genesee County v. Pailthorpe, 246 Mich. 356, 224 NW 418; Bloomfield v. Maloney, 176 Mich. 548, 142 NW 785, AnnCas1915B 662; Fargo v. Arthur, 43 HowPr (N. Y.) 193; Thatcher v. England, 3 C. B. 254, 54 ECL 254, 136 Reprint 102.

90. Bloomfield v. Maloney, 176 Mich. 548, 142 NW 785, AnnCas1915B 662.

[a] **Equal distribution** of the reward is sometimes made to those acting in concert. Union Pac. R. Co. v. Belek, 211 Fed. 699; Maggi v. Cassiday, 190 Iowa 933, 181 NW 27; Tomlinson v. Phœnix, 8 Ky. Op. 547.

91. Goldsborough v. Cradie, 28 Md. 477.

[a] **Simultaneous action** between those acting in concert is unnecessary, neither must they all have been originally concerned in the performance of the services. Goldsborough v. Cradie, 28 Md. 477.

92. Maggi v. Cassiday, 190 Iowa 933, 181 NW 27; Genesee County v. Pailthorpe, 246 Mich. 356, 224 NW 418; Oldfield v. Reading, 18 Pa. Dist. 833.

93. Maggi v. Cassiday, 190 Iowa 933, 181 NW 27; Oldfield v. Reading, 18 Pa. Dist. 833.

94. Ark.—Stroud v. Garrison, 24 Ark. 53.

Nebr.—Elkhorn Valley Lodge No. 57, I. O. O. F. v. Hudson, 59 Nebr. 672, 81 NW 859.

N. H.—Janvrin v. Exeter, 48 N. H. 83, 2 AmR 185.

Tenn.—Stair v. Heska Amone Cong., 128 Tenn. 190, 159 SW 840.

Wash.—Hall v. State, 102 Wash. 519, 173 P 429.

Eng.—Thatcher v. England, 3 C. B. 254, 54 ECL 254, 136 Reprint 102.

[a] **No sufficient concert** of action exists, where a prisoner escaping from an officer surrenders to a citizen during the pursuit, to entitle the citizen to a portion of the reward. Stair v. Heska Amone Cong., 128 Tenn. 190, 159 SW 840.

[b] **That it is difficult to determine,** in some cases, whether persons are in concert or not does not affect the rule. Elkhorn Valley Lodge No. 57, I. O. O. F. v. Hudson, 59 Nebr. 672, 81 NW 859; Janvrin v. Exeter, 48 N. H. 83, 2 AmR 185.

[c] **All of those independently pursuing robbers,** in an effort to secure a reward, without any agreement of concerted action, are not entitled to participate in the reward on the capture effectuated by some of them. Cotton v. Downs, 168 Ark. 736, 271 SW 340.

What constitutes compliance see supra § 39.

95. Cotton v. Downs, 168 Ark. 736, 271 SW 340; Umatilla County v. Estes, 105 Or. 248, 208 P 761.

96. Cotton v. Downs, 168 Ark. 736, 271 SW 340; Bloomfield v. Maloney, 176 Mich. 548, 142 NW 785, AnnCas 1915B 662; Umatilla County v. Estes, 105 Or. 248, 208 P 761; Tobin v. McComb, (Tex. Civ. A.) 156 SW 237, 240 [cit Cyc].

[a] **Although not actively in concert** with those actually capturing the persons for whose apprehension the reward is offered, one who furnishes information leading to their capture is entitled to an equitable portion of the reward. Umatilla County v. Estes, 105 Or. 248, 208 P 761.

[b] **Where an independent party drove robbers** into the hands of another party in attempting to effect their capture, it being clear that but for his pursuit they would not have been captured in that place and manner, he is entitled to share in the reward. Cotton v. Downs, 168 Ark. 736, 271 SW 340.

[c] **Parties acting independently cannot complain** of court's action in interpleader suit in dividing the reward among them where there was no concert of action, and no claimant alone met the terms of the offer and accomplished its purpose. Rochelle v. Pacific Exp. Co., 56 Tex. A. 142, 120 SW 543.

97. Cotton v. Downs, 168 Ark. 736, 271 SW 340; Tobin v. McComb, (Tex. Civ. A.) 156 SW 237.

98. Cotton v. Downs, 168 Ark. 736, 271 SW 340; Bloomfield v. Maloney, 176 Mich. 548, 142 NW 785, AnnCas 1915B 662.

[a] **One need not perform the whole service alone** to be entitled to a part of the reward. Tobin v. McComb, (Tex. Civ. A.) 156 SW 237.

99. Morrell v. Quarles, 35 Ala. 544; Ryer v. Stockwell, 14 Cal. 134, 73 AmD 634; Pierson v. Morch, 82 N. Y. 503; Reif v. Paige, 55 Wis. 496, 13 NW 473, 42 AmR 731.

[a] **Assignment after action commenced** does not operate to defeat the action. Goldsborough v. Cradie, 28 Md. 477.

Determination by offerer of sufficiency of performance see supra § 39 notes 95–1.

1. Necessity of performance see supra § 36. And see Actions § 72; Contracts § 791.

2. State v. Dinkins, 77 Miss. 874, 27 S 832.

3. Stamp v. Cass County, 47 Mich. 330, 11 NW 183.

Allowance of reward fixed by statute see supra § 41 notes 10–12.

4. Stamp v. Cass County, 47 Mich. 330, 11 NW 183.

5. Stamp v. Cass County, supra.

[a] **One who claims all of a re-**

action for the recovery of a reward is assumpsit,[6] but debt may also lie.[7]

[§ 76] **C. Where There Are Several Claimants—1. Parties.**[8] If the services by which the reward was earned were performed by two or more persons they should sue jointly;[9] however, it has been held that the failure to join a police officer as a party plaintiff furnishes no ground for objection.[10]

Intervention.[11] Persons with the necessary interest may intervene in actions for rewards.[12]

[§ 77] **2. Interpleader.** When the reward is claimed by different persons, the offerer may file a bill of interpleader.[13] Similar proceedings are sometimes adopted.[14]

[§ 78] **3. Recovery by One from Another.** Although there is authority to the contrary,[15] it has been said to be the better rule[16] that the person really entitled to a reward may recover it from one to whom it was erroneously paid.[17] And the fact that one claimant sued for the reward and recovered a judgment does not affect the right of another claimant.[18]

[§ 79] **D. Pleading—1. Declaration, Complaint, or Petition.** In accordance with the general rules of pleadings[19] the declaration, complaint, or petition must allege every material fact which constitutes plaintiff's cause of action,[20] including the performance by plaintiff of conditions precedent to his right of action,[21] but it need not negative matters of defense.[22] It must sufficiently allege, inter alia, the contract[23] based upon the offer of defendant,[24] which was accepted by plaintiff,[25] who complied with the terms and conditions by performing the services requested.[26]

[§ 80] **2. Plea or Answer.** The rules governing

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ward and submits the matter to a board of supervisors, who give him only a part, cannot further litigate the question. Prentiss v. Farnham, 22 Barb. (N. Y.) 519.

[6] Ill.—Madison First Nat. Bank v. Hart, 55 Ill. 62.

Mass.—Symmes v. Frazier, 6 Mass. 344, 4 AmD 142.

N. J.—Furman v. Parke, 21 N. J. L. 310.

N. Y.—Fitch v. Snedaker, 38 N. Y. 248, 97 AmD 791.

Eng.—Williams v. Carwardine, 4 B. & Ad. 621, 24 ECL 274, 110 Reprint 590, 5 C. & P. 566, 24 ECL 711, 172 Reprint 1101, 6 ERC 133; Lancaster v. Walsh, 4 M. & W. 16, 150 Reprint 16.

Assumpsit generally see Assumpsit, Action of 5 C. J. p 1378.

[7] Furman v. Parke, 21 N. J. L. 310.

[a] **Debt is a concurrent remedy** with indebitatus assumpsit, although assumpsit is the most usual and convenient form of action for the recovery of a reward. Furman v. Parke, 21 N. J. L. 310.

[8] **Parties generally** see Parties 47 C. J. p 1.

[9] Goldsborough v. Cradie, 28 Md. 477; Janvrin v. Exeter, 48 N. H. 83, 2 AmR 185; Williams v. Carwardine, 4 B. & Ad. 621, 24 ECL 274, 110 Reprint 590, 5 C. & P. 566, 24 ECL 711, 172 Reprint 1101, 6 ERC 133.

[10] Jenkins v. Kelren, 12 Gray (Mass.) 330, 74 AmD 596.

[11] **Intervention generally** see Parties §§ 185-226.

[12] Burke v. Wells, 50 Cal. 218; Ward v. Keystone Land, etc., Co., (Tex. Civ. A.) 38 SW 532.

[13] See Interpleader § 25 text and notes 93, 94.

Waiver of substantial conditions by interpleader see supra § 39 note 99 [a].

[14] See cases infra this note.

[a] **Action in the nature of a bill of interpleader.**—Warner v. Grace, 14 Minn. 487.

[b] **Bill in equity to secure proper distribution** among claimants. Peoples Trust Co. v. Davis, 5 Pa. Dist. & Co. 431.

[15] Sergeant v. Stryker, 16 N. J. L. 464, 32 AmD 404.

[a] **An action will not lie** for the recovery of a reward by the person entitled thereto against the person to whom it was paid through mistake or misrepresentation, for the reason that no privity is shown to exist between the parties in relation to the money sought to be recovered. Sergeant v. Stryker, 16 N. J. L. 464, 32 AmD 404.

[16] Claxton v. Kay, 101 Ark. 350, 142 SW 517, AnnCas1913E 972.

[17] Claxton v. Kay, supra; Dawson v. Gurley, 22 Ark. 381; Stephens v. Brooks, 2 Bush (Ky.) 137; Williams v. Thweatt, 46 S. C. L. 478.

[a] **The rule is particularly applicable** where the reward is offered by a public agency, for in such a case it is in effect held for the person entitled thereto and if one without right receives it he will be liable to an action as for money had and received for the use of him actually entitled thereto. Claxton v. Kay, 101 Ark. 350, 142 SW 517, AnnCas1913E 972.

[18] Swanton v. Ost, 74 Ill. A. 281.

[a] **A court order allowing a reward to another** will not preclude one who was not a party to the proceedings before the court from himself claiming it. Claxton v. Kay, 101 Ark. 350, 142 SW 517, AnnCas1913E 972.

[19] **Pleading generally** see Pleading 49 C. J. p 1.

[20] See cases infra this note.

[a] **Allegations held sufficient.**—Wilson v. Stump, 103 Cal. 255, 37 P 151, 42 AmSR 111; McLeod v. Meade, 77 Cal. 87, 19 P 189; Bronnenberg v. Coburn, 110 Ind. 169, 11 NE 29; Hayden v. Souger, 56 Ind. 42, 26 AmR 1.

[b] **Allegations held insufficient.**—McCrary v. Nashville, etc., R. Co., 37 Ga. A. 670, 141 SE 416; Codding v. Mansfield, 7 Gray (Mass.) 272; Furman v. Parke, 21 N. J. L. 310; Southwestern Land Co. v. McCallam, 41 Okl. 657, 136 P 1093.

[21] See cases infra this note.

[a] **Performance of conditions precedent held sufficiently pleaded.**—Reif v. Paige, 55 Wis. 496, 13 NW 473, 42 AmR 731.

[b] **Where reward is to be awarded by a jury** selected under the terms of the offer, the petition must state that the reward has been awarded as so provided, or that such award was prevented by the fault of defendant. Southwestern Land Co. v. McCallam, 41 Okl. 657, 136 P 1093.

[22] See Pleading § 165; and cases infra this note.

[a] **Some of claimants need not plead** that others, who are police officers, are not for that reason entitled to share with them in reward. Union Pac. R. Co. v. Belek, 211 Fed. 699.

[b] **Negativing revocation of offer.**—If a complaint alleges an offer of a reward, and that within five days thereafter in reliance thereon plaintiff performed the services requested, it need not aver that such offer had not been revoked or withdrawn. Wilson v. Stump, 103 Cal. 255, 37 P 151, 42 AmSR 111.

[23] See Contracts 13 C. J. p 829; and supra § 2.

[24] Hayden v. Souger, 56 Ind. 42, 26 AmR 1.

[a] **Petition is properly dismissed on general demurrer** where plaintiff sues one railroad for a reward offered by another distinct corporation, stipulating that the latter would pay the reward for persons tampering with its tracks. McCrary v. Western, etc., R. Co., 35 Ga. A. 641, 134 SE 347.

[25] See cases infra note 26.

[26] Reif v. Paige, 55 Wis. 496, 13 NW 473, 42 AmR 731.

[a] **That plaintiff was instrumental** in the conviction must be alleged; it is not enough to merely allege that the prisoner was arrested upon his complaint, indicted, convicted, sentenced, and executed, where the reward was for the apprehension and conviction. Furman v. Parke, 21 N. J. L. 310.

[b] **That the information resulted in conviction** must be alleged in an action to recover a reward "for information resulting in the conviction" of anyone tampering with the offerer's railroad property, unless there be something to render the allegation of conviction unnecessary in a particular case. McCrary v. Nashville, etc., R. Co., 37 Ga. A. 670, 141 SE 416.

[c] **Averment that defendant caused commitment** of child to training school to escape liability for reward does not relieve plaintiff from alleging conviction to recover reward. McCrary v. Nashville, etc., R. Co., 37 Ga. A. 670, 141 SE 416.

[d] **Certainty.**—Where the reward was offered "to any person who will give information . . . that will lead to the detection and conviction

pleadings of defendants in actions on contracts for rewards are those applicable to civil actions generally,[27] subject to the restrictions imposed by the particular form of action employed.[28] Thus special defenses may be set up when proper[29] and must be specially pleaded to be available.[30]

[§ 81] **3. Issues, Proof, and Variance.** The general rules that relate to such questions in other civil actions[31] govern matters of the issues,[32] proof,[33] and variance.[34]

[§ 82] **E. Evidence—1. Presumptions[35] and Burden of Proof.** In accordance with the general rule that the burden of proof rests on the party having the affirmative of the issue[36] the burden is on plaintiff to prove clearly all of the material elements of his cause of action for the recovery of a reward.[37] Although it is not necessary to prove that an official of a corporation who offered a reward had been authorized to do so by a resolution of the board of directors,[38] yet claimant has the burden of proving the authority of a superintendent to admit the liability of his corporation for a reward.[39] The presumption is that the act was an official transaction, where a circular having been sent by mail to plaintiff suing to recover a reward, in response to a letter directed to the superintendent, is in an official envelope and addressed in the handwriting of his secretary.[40] Where a resolution was adopted in good faith at a regular meeting of the board, and, after being signed by the commissioners individually, was attested by the county auditor, and in that form published in a newspaper, the authorized inference to be drawn from such published resolution is that the board intended in its official capacity to create a public liability.[41]

[§ 83] **2. Admissibility.** As the general rules governing the admissibility of evidence in actions on contracts[42] apply to actions for rewards,[43] evidence is admissible to prove the offer,[44] the authority of

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of the person who set fire to" a certain house. The declaration alleged that plaintiff arrested one P as the incendiary of the house and gave information thereof whereupon such proceedings were had that the prisoner was convicted. This was adjudged insufficient because "for aught the declaration states, P may have been detected before plaintiff arrested him, or afterwards, on information derived wholly from other persons." Codding v. Mansfield, 7 Gray (Mass.) 272.

[27] See Pleading §§ 197–379.

[28] See Assumpsit, Action of §§ 64–71; Debt §§ 30–40.

[a] **Unless a plea of non est factum** is filed as required by statute, a corporation, alleged to have offered a reward through persons assuming to act as its officials, cannot deny their authority thus to bind it. Blain v. Pacific Express Co., 69 Tex. 74, 6 SW 679.

[29] See case infra this note and note 30.

[a] **Setting up special defense.**—Where a telephone company offered a reward for the conviction of any person guilty of cutting, pulling, tearing down, or misplacing its wires, posts, etc., or unlawfully obstructing the transmission of messages in violation of statute, the company had the right, in an action against it to recover the reward because of the conviction of one for cutting a wire, to plead as a special defense the fact that the wire cut was a dead one, and did not come within the offer and that plaintiff had personal notice that the reward did not apply to such wires. Southwestern Tel., etc., Co. v. Priest, 31 Tex. Civ. A. 345, 72 SW 241.

[30] Hoggard v. Dickerson, 180 Mo. A. 70, 165 SW 1135.

[a] **Revocation** before acceptance of offer is a matter of defense and must be pleaded. Hoggard v. Dickerson, 180 Mo. A. 70, 165 SW 1135.

[31] See Pleading §§ 1144–1211.

[32] See Arkansas Bankers' Assoc. v. Ligon, 174 Ark. 234, 295 SW 4, 53 ALR 534.

[a] **Issue of whether plaintiff was actuated by the reward** when procuring burglar's arrest is raised by general denial and plaintiff's undisputed testimony. Arkansas Bankers' Assoc. v. Ligon, 174 Ark. 234, 295 SW 4, 53 ALR 534.

[33] See cases infra this note.

[a] **No failure of proof.**—Where, in an action to recover a reward for the prosecution of vote sellers at an election, defendant pleaded an unlawful contract between plaintiff and one of the bribers to pay the latter for information, merely to link plaintiff with the alleged unlawful transaction, and not as the basis of a cause of action, the fact that the answer charged that the contract was entered into between plaintiff and B and T, and the proof showed that the contract was merely between plaintiff and B, constituted a mere variance, and not a failure of proof. Mount v. Montgomery County, 168 Ind. 661, 80 NE 629, 14 LRANS 483.

[b] **Proof of guilt.**—When the reward was offered for the arrest of the persons who committed a burglary, and plaintiff caused the arrest of certain persons who escaped from jail before trial, he could not recover the reward without proving that these persons were guilty. Amis v. Conner, 43 Ark. 337.

[34] In re Kelly, 39 Conn. 159; Mount v. Montgomery County, 168 Ind. 661, 80 NE 629, 14 LRANS 483; Stone v. Wickliffe, 106 Ky. 252, 50 SW 44, 20 KyL 1806; Morris v. Kasling, 79 Tex. 141, 15 SW 226, 11 LRA 398.

[a] **Illustration.**—A reward offered for the apprehension and conviction of such person as may have been implicated in the murder of four named individuals is not recoverable, upon an allegation that plaintiff had caused a certain party to be convicted of the murder of one of the individuals, it not being alleged that he was concerned in the murder of the other three. Furman v. Parke, 21 N. J. L. 310.

[35] **Presumption as to lapse of offer** see § 17 note 39.

Presumptions generally see Evidence §§ 13–25.

[36] **Burden of proof generally** see Evidence §§ 25–89.

[37] Amis v. Conner, 43 Ark. 337; Higgins v. Lessig, 49 Ill. A. 459; Howland v. Lounds, 51 N. Y. 604, 10 AmR 654; In re Heffelfinger, 20 Pa. Dist. 1054; Com. v. Sandoe, 18 Pa. Dist. 433; Com. v. Smith, 15 Pa. Dist. 473.

[a] **Every interpleading claimant** has the burden of proof as to his own claim. Union County v. Hopkins, 95 N. J. Eq. 444, 123 A 365.

[b] **Claimant of premium** offered for best six building plans has the burden of showing that his were among the best six plans submitted. Audsley v. New York, 74 Fed. 275, 20 CCA 426.

[38] Central R., etc., Co. v. Cheatham, 85 Ala. 292, 4 S 828, 7 AmSR 48.

[a] **Authority of agent.**—A handbill headed with the names of two railroad companies offering a reward "for the arrest, with proof to convict, any person or persons for the maliciously obstructing of the tracks of these companies" signed T. D. K. Superintendent, is on its face the act of the corporation acting through its agent, and it is not necessary to show that the superintendent had express authority conferred upon him by a resolution of the board of directors. Central R., etc., Co. v. Cheatham, 85 Ala. 292, 4 S 828, 7 AmSR 48.

[39] Blain v. Pacific Express Co., 69 Tex. 74, 6 SW 679.

[40] Central R., etc., Co. v. Cheatham, 85 Ala. 292, 4 S 828, 7 AmSR 48.

[41] Scheiber v. Von Arx, 87 Minn. 298, 92 NW 3.

[42] See Contracts §§ 960–975; Evidence 22 C. J. p 89 et seq.

[43] See cases infra this note and notes 44–48.

[a] **Parol testimony** cannot be admitted to explain or interpret a resolution of a board of underwriters of city, offering a reward to be paid by the insurance companies for the apprehension of, with sufficient evidence to convict, any person guilty of the crime of arson. Salbadore v. Crescent Mut. Ins. Co., 22 La. Ann. 338.

[44] McPeek v. Western Union Tel. Co., 107 Iowa 356, 78 NW 63, 70 Am SR 205, 43 LRA 214.

[a] **To prove the offer** of a reward for the arrest of a person, a copy of the governor's proclamation duly certified by the secretary of

the offerer to make it,[45] a ratification of the offer,[46] and all of the acts of plaintiff by which he earned the reward.[47] However, evidence declared by statute to be inadmissible cannot be used to prove the performance of the services required.[48]

[§ 84] **3. Weight and Sufficiency.** The general rules relating to weight and sufficiency of evidence[49] apply.[50] If the reward was offered for the arrest and conviction of the person who committed a certain crime, the record of the conviction of a person for that crime is prima facie evidence of his guilt and it need not be otherwise proved.[51] An official certificate of the governor to a reward offered for the apprehension of an offender is only prima facie valid, and may be shown to be invalid by proof that would invalidate other official certificates purporting to be acts of the officers whose names they bear.[52]

[§ 85] **F. Trial.** Directing a verdict,[53] dismissal of the proceeding,[54] questions for the court and jury[55] giving and refusing of instructions,[56] the ver-

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state, with whom the original is deposited, is admissible. McPeek v. Western Union Tel. Co., 107 Iowa 356, 78 NW 63, 70 AmSR 205, 43 LRA 214.

45. Central R., etc., Co. v. Cheatham, 85 Ala. 292, 4 S 828, 7 AmSR 48.

[a] **That circular was received** in an official envelope of the company by one who had written to the superintendent is admissible to prove that the superintendent acted officially. Central R., etc., Co. v. Cheatham, 85 Ala. 292, 4 S 828, 7 AmSR 48.

46. Central R., etc., Co. v. Cheatham, supra.

47. Simonds v. Clapp, 16 N. H. 222; Brague v. Lord, 2 AbbNCas (N. Y.) 1; Rollins v. Clement, 25 S. C. 601.

[a] **A record of the conviction** of a person for shooting another, and the trial of his guilt, are admissible in evidence against one who has offered a reward for the arrest and conviction, for the purpose of showing that the person convicted was guilty, and that the reward had been earned by plaintiff who caused the arrest and conviction. Brown v. Bradlee, 156 Mass. 28, 30 NE 85, 32 AmSR 430, 15 LRA 509.

48. Kozler v. New York Tel. Co., 93 N. J. L. 279, 108 A 375.

[a] **Evidence of the conviction of a juvenile offender** is not admissible in an action for a reward for information leading to an arrest and conviction where a statute prohibits the admission in evidence of either the record or the fact of conviction of a juvenile in any civil or criminal proceeding. Kozler v. New York Tel. Co., 93 N. J. L. 279, 108 A 375.

49. See Evidence §§ 1730-1807.

50. See cases infra this note.

[a] **Evidence held sufficient** to show: (1) The contract. Smith v. Fenner, 102 Kan. 830, 172 P 514, LRA 1918E 348. (2) An arrest on information supplied by several. Bloomfield v. Maloney, 176 Mich. 548, 142 NW 785, AnnCas1915B 662. (3) Substantial compliance with offer. Marsh v. Wells, 88 Kan. 538, 129 P 168, 43 LRANS 133. (4) Recovery authorized. Kincaid Trust, etc., Bank v. Hawkins, 234 Ill. A. 64. (5) Plaintiff entitled to part of reward for information furnished. Genesee County v. Pailthorpe, 246 Mich. 356, 224 NW 418.

[b] **Evidence held sufficient to support verdict.**—Campbell v. Mercier, 108 Ga. 103, 33 SE 871; Smith v. Fenner, 102 Kan. 830, 172 P 514, LRA1918E 348.

[c] **Evidence sufficient to go to jury** on question of agent's authority to offer reward: Cornwell v. St. Louis Transit Co., 106 Mo. A. 135, 80 SW 744.

[d] **Evidence held sufficient to sustain finding** that: (1) Offer was ratified by company. Arkansas Southwestern R. Co. v. Dickinson, 78 Ark. 483, 95 SW 802, 115 AmSR 54. (2) Plaintiff had earned reward. Smith v. Fenner, 102 Kan. 830, 172 P 514, LRA1918E 348. (3) The reward was not conditioned on the murderer being brought in dead. Hoggard v. Dickerson, 180 Mo. A. 70, 165 SW 1135. (4) That party attempting and officers actually making arrest were entitled to share equally. Montgomery County v. Johnson, 126 Kan. 36, 266 P 749.

[e] **Evidence held to warrant conclusion** that plaintiff had knowledge of the reward, although apparently he could not read. Vitty v. Eley, 51 App. Div. 44, 46, 64 NYS 397.

[f] **Evidence held insufficient:** (1) To show fraud and collusion. Statesman Pub. Co. v. Foltin, 87 Or. 65, 167 P 782. (2) That arrested person was a "fleeing homicide" within statute. Brasfield v. State, 143 Miss. 769, 109 S 736. (3) To prove guilt of prisoner who committed suicide beyond a reasonable doubt so it could be said a jury would have convicted him. Caryl v. State, 135 Wash. 1, 236 P 792.

51. Ark.—Arkansas Southwestern R. Co. v. Dickinson, 78 Ark. 483, 95 SW 802, 115 AmSR 54.

Cal.—Burke v. Wells, 34 Cal. 60.

Mass.—Brown v. Bradlee, 156 Mass. 28, 30 NE 85, 32 AmSR 430, 15 LRA 509; Mead v. Boston, 3 Cush. 404.

N. Y.—Brennan v. Haff, 1 Hilt. 151.

Pa.—York v. Forscht, 23 Pa. 391.

52. Hager v. Sidebottom, 130 Ky. 687, 113 SW 870.

53. See cases infra this note.

[a] **Direction of verdict held proper.**—Hart v. Green, 16 Colo. A. 70, 65 P 344.

[b] **Refusal to direct verdict held proper.**—Curran v. Collier, 7 Ind. T. 148, 104 SW 572.

[c] **Direction of verdict held improper.**—Huckins v. East Saginaw Second Nat. Bank, 47 Mich. 92, 10 NW 122.

Direction of verdict generally see Trial [38 Cyc 1563-1593].

54. Johnson v. Com., 76 SW 832, 25 KyL 986.

[a] **Dismissal held erroneous.**—Johnson v. Com., 76 SW 832, 25 KyL 986.

Generally see Dismissal and Nonsuit 18 C. J. p 1142.

55. See cases infra this note.

[a] **The legal effect** of a contract of reward is for the court. Boehmer v. Foval, 55 Ill. A. 71.

[b] **Questions of fact for jury:** (1) Whether a reward was offered. Miller v. Hogeboom, 56 Nebr. 434, 76 NW 888. (2) Whether the offer was induced by fraud. Campbell v. Mercer, 108 Ga. 103, 33 SE 871. (3) Whether one was induced by reward. Tobin v. McComb, (Tex. Civ. A.) 156 SW 237. (4) Whether one acted independently or in concert with others. Elkhorn Valley Lodge No. 57 I. O. O. F. v. Hudson, 59 Nebr. 672, 81 NW 859. (5) Whether plaintiff was first to give information. Lancaster v. Walsh, 4 M. & W. 16, 150 Reprint 16. (6) Whether information actually led to the apprehension. Tarner v. Walker, L. R. 1 Q. B. 641 [aff L. R. 2 Q. B. 301]. (7) Whether prize jury award had been made according to conditions of offer. Southwestern Land Co. v. McCallam, 41 Okl. 657, 136 P 1093. (8) Whether those arresting supposed robber had reasonable grounds to believe property had been stolen, rendering arrest legal. Henderson v. U. S. Fidelity, etc., Co., (Tex. Commn. A.) 10 SW (2d) 534. (9) Where chairman of political committee offered reward for conviction of any violator of election laws as chairman, and later in speech said he had one thousand dollars to pay for such conviction, whether offer was made personally, or in his representative capacity, is for jury to decide. Wilmoth v. Hensel, 151 Pa. 200, 25 A 1082, 17 LRA 536.

Province of court and jury see Trial [38 Cyc 1511-1530].

56. See cases infra this note.

[a] **Instructions held erroneous or properly refused:** (1) In general. Hart v. Green, 16 Colo. A. 70, 65 P 344; Biggers v. Owen, 79 Ga. 658, 5 SE 193; Bronnenberg v. Coburn, 110 Ind. 169, 11 NE 29; Everman v. Heyman, 26 Ind. A. 165, 28 NE 1022, 84 AmSR 284; Dunham v. Stockbridge, 133 Mass. 233; Huckins v. East Saginaw Second Nat. Bank, 47 Mich. 92, 10 NW 122; Hugill v. Kinney, 9 Or. 250, 42 AmR 801. (2) Where more than one of the parties claims to be the sole moving cause of an arrest and conviction and there is some evidence to support their claims, it is error to charge that none of the parties is alone entitled to recover the whole reward. Tobin v. McComb, (Tex. Civ. A.) 156 SW 237.

[b] **Instructions held not erroneous or improperly refused:** (1) In general. Dunham v. Stockbridge, 133 Mass. 233; Kirk v. Smith, 48 Mont. 489, 138 P 1088; Southwestern Land Co. v. McCallam, 41 Okl. 657, 136 P 1093. (2) Where other instruction was not requested. Cornwell v. St. Louis Transit Co., 106 Mo. A. 135, 80 SW 744; Kirk v. Smith, 48 Mont. 489, 138 P 1088. (3) Harmless error in instruction. Hayden v. Souger, 56 Ind. 42, 26 AmR 1. (4) Instruction held not inconsistent with claim of plaintiffs. Tobin v. McComb, (Tex. Civ. A.) 156 SW 237. (5) An instruction that, to sustain a defense of settlement of defendant's liability for a reward, the jury must find that the sum received was accepted in full settlement of all plaintiff's claims for the reward, was not objectionable as applying to claims for rewards that might be offered by others than defendant. Hoggard v. Dickerson, 180 Mo. A. 70, 165 SW 1135.

dict and findings,[57] and costs[58] are governed by the usual rules applicable to civil actions.

[§ 86] **G. Review.** Appellate proceedings in an action for a reward are governed by the rules which apply in civil cases,[59] for example, the usual presumptions will be indulged[60] and a judgment will not be disturbed for error which is not prejudicial.[61]

X. MANDAMUS

[§ 87] Mandamus may lie in a proper case[62] to compel a public officer to pay a statutory reward which has been earned.[63]

***REX.** The king.[1]

REX AD JUSTITIAM FACIENDAM NON COGITUR.[2]

REX DATUR PROPTER REGNUM; NON REGNUM PROPTER REGEM.[3]

REX DEBET ESSE SUB LEGE; QUIA LEX FACIT REGEM.[4]

REX EST CAPUT ET SALUS REIPUBLICÆ.[5]

REX EST LEGALIS ET POLITICUS.[6]

REX EST LEX VIVENS.[7]

REX EST MAJOR SINGULIS, MINOR UNIVERSIS.[8]

REX EST PATER PATRIÆ.[9]

REX EST PERSONA MIXTA, MEDICUS REGNI; PATER PATRIÆ; ET SPONSUS REGNI.[10]

REX EST PERSONA SACRA ET MIXTA CUM SACERDOTE.[11]

REX EST QUI METUIT, ET QUI CUPIT NIHIL.[12]

REX HOC SOLUM NON POTEST FACERE QUOD NON POTEST INJUSTE AGERE.[13]

REX IN REGNO SUO NON HABET PAREM.[14]

REX LEGE CADERE NON POTEST.[15]

REX LEGI SUBJECTUS EST.[16]

Instructions generally see Trial [38 Cyc 1594 et seq].

57. See cases infra this note.

[a] **Findings held not materially inconsistent.**—Smith v. Fenner, 102 Kan. 830, 172 P 514, LRA1918E 348.

[b] **Notwithstanding testimony** of those capturing robber, that they would have made capture regardless of reward, court may infer that the reward was an inducement. U. S. Fidelity, etc., Co. v. Henderson, (Tex. Commn. A.) 298 SW 404 [reh den (Commn. A.) 10 SW (2d) 535].

Generally see Trial [38 Cyc 1868].

58. Kinn v. First Nat. Bank, 118 Wis. 537, 95 NW 969, 99 AmSR 1012.

[a] **Costs will not be paid out of the reward** which was deposited in court to be apportioned among the claimants, as the whole of the reward so deposited became the property of the claimants. Kinn v. First Nat. Bank, 118 Wis. 537, 95 NW 969, 99 AmSR 1012.

Costs generally see Costs 15 C. J. p 1.

59. See cases infra this note; and notes 60, 61.

[a] **If the verdict of the jury** is not against the clear weight of the evidence it will not be overturned on appeal. Campbell v. Mercer, 108 Ga. 103, 33 SE 871; Elkhorn Valley Lodge No. 57 I. O. O. F. v. Hudson, 59 Nebr. 672, 81 NW 859.

[b] **The findings of fact of the appellate court** are binding on the supreme court; their correctness is not considered on appeal. Hogan v. Stophlet, 179 Ill. 150, 53 NE 604, 44 LRA 809.

[c] **Prejudicial instructions** are ground for reversal. Biggers v. Owen, 79 Ga. 658, 5 SE 193; Dunham v. Stockbridge, 133 Mass. 233; Hugill v. Kinney, 9 Or. 250, 42 AmR 801.

Generally see Appeal and Error, 3 C. J. p 256.

60. See cases infra this note.

[a] **Presumptions:** (1) Presumptions are indulged in support of the judgment, not against it. Means v. Hendershott, 24 Iowa 78. (2) Where the record shows that a paper was placed in evidence, it is presumed that its contents were made known to the jury on the trial. Arkansas Southwestern R. Co. v. Dickinson, 78 Ark. 483, 93 SW 802, 115 AmSR 54.

Presumptions on review generally see Appeal and Error §§ 2662-2752.

61. Bronnenberg v. Coburn, 110 Ind. 169, 11 NE 29; Hayden v. Souger, 56 Ind. 42, 26 AmR 1; Cornwell v. St. Louis Transit Co., 106 Mo. A. 135, 80 SW 744.

Harmless or prejudicial error see Appeal and Error §§ 2878-3055.

62. See Mandamus 38 C. J. p 526.

63. See cases infra this note.

[a] **Mandamus to compel:** (1) State auditor to pay reward. Hager v. Sidebottom, 130 Ky. 687, 113 SW 870; Stone v. Wycliffe, 106 Ky. 252, 50 SW 44, 20 KyL 1806. (2) State controller to draw warrant for reward. Lees v. Colgan, 120 Cal. 262, 52 P 502, 40 LRA 355. (3) Warden to pay reward for capture and return of escaped convict. Mudd v. Woodside, 136 Ky. 296, 124 SW 321.

1. Black L. D.

2. A maxim meaning "The king cannot be forced to do justice." Morgan Leg. Max. [cit Halkerstone Max.].

3. A maxim meaning "A king is given for the sake of the kingdom; not the kingdom for a king." Morgan Leg. Max.

4. A maxim meaning "The king should be subject to the law; for the law makes the king." Peloubet Leg. Max. [cit 1 Blackstone Comm. 239].

5. A maxim meaning "The king is the guardian and head of the commonwealth." Peloubet Leg. Max. [cit Beverley's Case, 4 Coke 123b, 124, 76 Reprint 1118].

6. A maxim meaning "The king is both a legal and political person." Black L. D.

7. A maxim meaning "The king is the living law." Morgan Leg. Max. [cit Jenkins Cent. 17].

8. A maxim meaning "The king is greater than any single person, less than all." Black L. D.

9. A maxim meaning "The king is the father of his country." Morgan Leg. Max. [cit Halkerstone Max. 162].

10. A maxim meaning "The king is a mixed person; the physician of the state, the father of the country, and the husband of the kingdom." Peloubet Leg. Max. [cit Magdalen College Case, 11 Coke 66b, 70b].

11. A maxim meaning "The king is a sacred person, and mixed with the priesthood." Peloubet Leg. Max. [cit 5 Coke 28b, 77 Reprint 33].

12. A maxim meaning "He is truly a king who fears nothing, and who desires nothing." Morgan Leg. Max. [cit Riley Max. 401].

13. A maxim meaning "The king can do everything but an injustice." Black L. D. [cit Magdalen College Case, 11 Coke 66b, 72a].

14. A maxim meaning "The king has no equal in his own kingdom." Peloubet Leg. Max. [cit Wharton Leg. Max. 899].

15. A maxim meaning "The king can not legally cease." Morgan Leg. Max. [cit Halkerstone Max. 163].

16. A maxim meaning "The king is

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*By Wm. Howard Buchanan (Rex—Ridgling inclusive).

REX NIHIL ALIUD EST QUAM LEX AGENS.[17]

REX NIL DAT NISI PER RECORDUM.[18]

REX NIL POTEST JUBERE NISI PER CURIAM LEGITIME CONSTITUAM.[19]

REX NON DEBET ESSE SUB HOMINE, SED SUB DEO ET SUB LEGE, QUIA LEX FACIT REGEM.[20]

REX NON DEBET JUDICARE SED SECUNDUM LEGEM.[21]

REX NON EST UBI VOLUNTAS DOMINATUR.[22]

REX NON POTEST FALLERE NEC FALLI.[23]

REX NON POTEST INVITUM CIVEM REGNO REPELLERE.[24]

REX NON POTEST MALUM VEL INJURIAM FACERE.[25]

REX NON POTEST PECCARE.[26]

REX NON POTEST SUBDITIUM ONERARE IMPOSITIONIBUS.[27]

REX NUNQUAM INFRA ÆTATEM EST.[28]

REX NUNQUAM MORITUR.[29]

REX PRÆSUMITUR IN SCRINIO PECTORIS SUI HABERE OMNIA JURA.[30]

REX PROSEQUI IN JUDICIS POTEST IN QUA CURIA SIBI VISUM FUERIT.[31]

REX QUOD INJUSTUM EST FACERE NON POTEST.[32]

REX SEMPER PRÆSUMITUR ATTENDERE ARDUA REGNI PRO BONO PUBLICO OMNIUM.[33]

REX SUMMUS DOMINUS SUPRA OMNES.[34]

REX TUETUR LEGEM, ET LEX TUETUR JUS.[35]

RHEOSTAT. Any contrivance for regulating a current[36] by means of (usually) variable resistances.[37]

RHEUMATIC FEVER.[38] Acute articular rheumatism.[39]

RHEUMATISM. A generic term that is applied to almost every ache and pain not otherwise accounted for.[40] An acute[41] general disease,[42] variable and shifting in character, attacking the joints, with a marked tendency to involve the heart;[43] a constitutional disease, which may be acute, subacute, or chronic,[44] manifesting itself in a variety of morbid states, and characterized chiefly by pains of various types;[45] the disease specifically known as acute articular rheumatism,[46] including subacute and chronic forms apparently of the same causation.[47]

RHEUMATOID ARTHRITIS.[48] A rheumatic inflammation of the joints.[49]

RHINOSCOPE. An instrument for the exploration of the nasal cavities.[50]

RHOMBOID. A geometrical term applied to an oblong figure, the longer sides of which are horizontal and .parallel[51] and the shorter sides oblique and

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subject to the law." In re Massey, 45 Fed. 629, 637.

[17] A maxim meaning, "The king is nothing else than law in action." Morgan Leg. Max. [cit Halkerstone Max. 163].

[18] A maxim meaning "The king gives nothing except by record." Morgan Leg. Max. [cit Halkerstone Max. 163].

[19] A maxim meaning "The king can order nothing except through his regularly constituted parliament." Morgan Leg. Max. [cit Halkerstone Max. 163].

[20] A maxim meaning "The king ought to be under no man but under God and the law, because the law makes a king." Black L. D. [cit Broom Leg. Max. 47].

[21] A maxim meaning "The king ought to govern only according to law." Peloubet Leg. Max. [cit Jenkins Cent. 9].

[22] A maxim meaning "He is not a king who is ruled by his own will." Morgan Leg. Max. [cit Halkerstone Max. 163].

[23] A maxim meaning "The king cannot deceive, nor be deceived." Peloubet Leg. Max. [cit Jenkins Cent. 48].

[24] A maxim meaning "The king can not expel a subject against his own will from the kingdom." Morgan Leg. Max. [cit Halkerstone Max. 164].

[25] A maxim meaning "The king can not do evil or injustice." Morgan Leg. Max. [cit Halkerstone Max. 164].

[26] A maxim meaning "The king cannot do wrong." Black L. D. [cit 2 Rolle 304].

[a] **Maxim does not find a place** in the jurisprudence of this country. Mills v. Stewart, 76 Mont. 429, 247 P 332, 333, 47 ALR 424. See also Langford v. U. S., 101 U. S. 341, 343, 25 L. ed. 1010.

[27] A maxim meaning "The king may not oppressively levy taxes upon a subject." Morgan Leg. Max [cit Halkerstone Max. 164].

[28] A maxim meaning "The king is never an infant." Morgan Leg. Max. [cit Halkerstone Max. 164].

[29] A maxim meaning "The king never dies." Black L. D. [cit Broom Max. 50; Branch Max. (5th ed.) 197].

[30] A maxim meaning "The king is presumed to have all the law in the recesses of his heart." Morgan Leg. Max. [cit Halkerstone Max. 164].

[31] A maxim meaning "The king can proceed to judgment in whatever court he pleases." Peloubet Leg. Max. [cit Wharton Leg. Max. 900].

[32] A maxim meaning "The king cannot do what is unjust." Peloubet Leg. Max. [cit Jenkins Cent. 9].

[33] A maxim meaning "The king is always presumed to attend to the business of the realm for the public good of all." Morgan Leg. Max. [cit Sadler's Case, 4 Coke 54b, 56, 76 Reprint 1012].

[34] A maxim meaning "The king is the great lord over all." Peloubet Leg. Max. [cit 2 Inst. 501].

[35] A maxim meaning "The king protects the law, and the law protects the right." Peloubet Leg. Max. [cit Coke Litt. 130a].

[36] **"Current"** 17 C. J. p 408.

[37] Webster New Int. D. See generally Electricity 20 C. J. p 303.

[a] **"An attachment known as the 'rheostat'** was located on the turntable, and was a device by means of which the current of electricity necessary to turn the table was turned off or on." Ft. Worth, etc., R. Co. v. Miller, (Tex. Civ. A.) 201 SW 1049.

[38] See Acute 1 C. J. p 1189 text and note 57 [a].

[39] Century D. [quot Holmes v. Continental Casualty Co., 102 Me. 287, 288, 65 A 385].

"Rheumatism" post.

[40] Bailey v. Fraternal Reserve L. Assoc., 202 Ill. A. 430, 435.

[41] **"Acute"** 1 C. J. p 1189.

[42] **"Disease"** 18 C. J. p 1139.

[43] Robinson v. State, 212 Ala. 459, 102 S 693, 695 [quot Cyc]; Blackman v. U. S. Casualty Co., 117 Tenn. 578, 593, 103 SW 784 (where it was said to be characterized by local fever, inflammation, swelling, aching pains, and acid sweats, distressing, debilitating, and frequently prostrating).

[44] **"Chronic"** 11 C. J. p 761.

[45] Webster D. [quot Robinson v. State, 212 Ala. 459, 102 S 693, 695].

[46] Century D. [quot Holmes v. Continental Casualty Co., 102 Me. 287, 288, 65 A 385].

"Acute articular rheumatism" see Acute 1 C. J. p 1189 text and note 57 [a].

"Rheumatic fever" ante.

[47] Century D. [quot Holmes v. Continental Casualty Co., 102 Me. 287. 289, 65 A 385].

[48] See Rheumatism ante.

[49] Moennich v. Chicago, 147 Ill. A. 553, 557.

[50] Atchison, etc., R. Co. v. Palmore, 68 Kan. 545, 550, 75 P 509, 64 LRA 90.

[51] **"Parallel"** 46 C. J. p 1176.

parallel, giving two obtuse angles and two acute angles;[52] an oblique-angled parallelogram.[53]

RHUMKORF COIL.[54] A coil constructed on the following principle: Around a central core of soft iron is wound a certain number of turns of copper wire, each turn being insulated by a layer of paper or some other insulating material; then on top of this coarser wire is wound in the same direction a large number of layers of very thin wire, each one likewise insulated by a layer of paper or other insulating material, and the fine wires connect with the two poles on top, and the coarser wires connect with the lower, with the commutator running from one pole to the other. This box is filled with what is called "condenser," which is a series or number of plates of tin foil such as we find wound around tobacco.[55]

RIBBED VELVETS.[56]

RIBBON. A strip of fine stuff as silk, satin, or velvet, having two selvages.[57]

"Ribbons," without any qualification, has been held to include velvet ribbons as well as ribbons manufactured wholly of silk.[58]

RIBS. As used among dealers in meats the term has no definite or specific meaning.[59]

In mining, the columns or partitions left in the coal vein to support the roof.[60]

RIB SIDE. A mining term applied to the sides of an entry or room in the mine.[61]

RICE. The grain[62] or seeds[63] of rice.[64]

Phrases: "Brown rice,"[65] "uncleaned rice,"[66] and "white rice."[67]

As an adjective, as in the phrases "rice anthracite coal,"[68] "rice beer,"[69] "rice bran,"[70] and "rice seed."[71]

RICH. A relative term, variously defined as meaning[72] abounding in desirable or effective qualities or elements;[73] fertile;[74] fruitful;[75] of superior quality;[76] producing or yielding abundantly;[77] productive or fertile;[78] yielding large returns.[79] It is the opposite of poor.[80]

Phrases: "Dying rich,"[81] and "rich soil."[82]

RIDE.[83] To be carried on a horse or other animal or in any kind of vehicle or carriage;[84] to be carried or travel on horseback;[85] also, to control and manage;[86] to manage or control while seated on;[87] to sit on and control so as to be carried.[88]

In accident insurance policies "riding" is the equivalent of "traveling."[89]

Phrases: "Ride or drive,"[90] also "riding and driving races,"[91] "riding as a passenger in or upon a public conveyance,"[92] "riding at his own risk,"[93]

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52. Moennich v. Chicago, 147 Ill. A. 553, 557 [cit International Encyc.].

"Angle" 2 C. J. p 1346.

53. Moennich v. Chicago, 147 Ill. A. 553, 557 [cit International Encyc.].

54. See generally Electricity 20 C. J. p 303.

55. Robertson v. Oelschlaeger, 137 U. S. 436, 442, 443, 11 SCt 148, 150, 34 L. ed. 744 (where it was said "that [it] is used in schools and universities, and also by physicians. . . . It is also used to explode mines at times . . . [and] dynamite cartridges. . . . It has no practical use in telegraphing. Its main use is for illustrating the laws of electrical induction").

"Insulation" 32 C. J. p 948.

56. See Cords 13 C. J. p 1236 text and note 25.

57. Century D.

58. Lane v. Russell, 14 F. Cas. No. 8,053, 4 Cliff. 122, 126. But see Chapon v. Smythe, 5 F. Cas. No. 2,611, 11 Blatchf. 120.

59. Borum v. Swift, 125 Ga. 198, 201, 53 SE 608.

60. Reddon v. Union Pac. R. Co., 5 Utah 344, 349, 15 P 262.

61. Muren Coal, etc., Co. v. Howell, 119 Ill. A. 209, 211.

62. **"Grain"** 28 C. J. p 757.

63. **"Seed"** [35 Cyc 1370].

64. Webster New Int. D.

[a] **Mochi or canned boiled rice** and so-called wafers consisting of rice and barley have been held not to be rice. Hoyt v. U. S., 12 Cust. A. 47.

65. U. S. v. Brandenstein, 8 Cust. A. 435, 436.

66. U. S. v. Brandenstein, supra.

67. U. S. v. Brandenstein, supra.

68. See Mines and Minerals § 91.

69. See Beer 7 C. J. p 1025 text and note 56.

70. U. S. v. Brandenstein, 8 Cust. A. 435, 436.

"Bran" 9 C. J. p 318.

71. U. S. v. Brandenstein, 8 Cust. A. 435, 436.

72. Leppelman's Succ., 30 La. Ann. 468, 471. See also Descent and Distribution § 95.

73. Century D. [quot Boltz v. O'Conner, 45 Ind. A. 178, 90 NE 496, 498].

74. Century D. [quot Boltz v. O'Conner, supra].

75. Century D.; Webster D. [both quot Boltz v. O'Conner, supra].

76. Century D. [quot Boltz v. O'Conner, supra].

77. Century D. [quot Boltz v. O'Conner, supra].

78. Webster D. [quot Boltz v. O'Conner, supra].

79. Webster D. [quot Boltz v. O'Conner, supra].

80. Webster D. [quot Boltz v. O'Conner, supra].

"Poor" 49 C. J. p 1080.

81. See Descent and Distribution § 95 (as affecting "marital portion").

82. Boltz v. O'Conner, 45 Ind. A. 178, 90 NE 496, 498.

83. **Persons riding generally** see Carriers § 1033 et seq; Motor Vehicles §§ 774–777, 802–811, 826, 827; Negligence §§ 278, 290, 566–572, 585–594; Railroads §§ 1821, 1835, 2176, 2300–2311; Street Railroads [36 Cyc 1467].

Riding in:
Conveyance not provided for passengers see Accident Insurance § 151; Carriers § 1512.
Dangerous or improper place see Carriers §§ 1386, 1511–1514.

Riding on:
Locomotive see Accident Insurance § 94.
Platform of conveyance see Accident Insurance §§ 95, 152; Carriers §§ 1513, 1514.
Steps of moving conveyance see Accident Insurance § 152; Carriers §§ 1513–1514.

Riding with incompetent driver see Negligence § 572.

84. Webster D. [quot Citizens' R. Co. v. Ford, 93 Tex. 110, 113, 53 SW 575, 46 LRA 457].

"Drive" equivalent see Drive 19 C. J. p 764 text and note 99 [a].

85. Webster D. [quot Citizens' R. Co. v. Ford, 93 Tex. 110, 113, 53 SW 575, 46 LRA 457].

86. Silverstein v. Commercial Casualty Ins. Co., 237 N. Y. 391, 393, 143 NE 231.

[a] **As transitive verb** "to ride" imports the idea of control or management. Silverstein v. Commercial Casualty Ins. Co., 237 N. Y. 391, 393, 143 NE 231.

87. Silverstein v. Commercial Casualty Ins. Co., supra.

88. Silverstein v. Commercial Casualty Ins. Co., supra.

89. Powis v. Ontario Acc. Ins. Co., 1 Ont. L. 54.

90. State v. Smith, 29 R. I. 245, 248, 72 A 710; State v. Thurston, 28 R. I. 265, 268, 66 A 580.

91. Swanbrough v. United Commercial Travelers, 66 Colo. 384, 181 P 204, 206, 6 LRA 485.

92. Boyd v. Royal Indemn. Co., 120 Oh. St. 515, 166 NE 580, 581.

93. Tompkins v. Boston El. R. Co., 201 Mass. 114, 87 NE 488, 489, 131 Am SR 392, 20 LRANS 1063.

"riding in or upon,"[94] "riding upon,"[95] "while riding a motorcycle,"[96] "while riding as a passenger . . . in a passenger elevator,"[97] "while riding as a passenger in a public conveyance,"[98] and "while riding on the platform or steps of any railway car."[99]

RIDER.[1] A new and unrelated enactment or provision attached to appropriation bills in the legislature.[2]

RIDGLING. A male of any beast half-gelt;[3] an animal[4] half castrated;[5] a stallion only one of whose testicles come down into the scrotum.[6]

***RIFLE.** As a noun, a rifle has a well defined meaning;[7] a firearm, of whatever size, having upon the surface of its bore spiral grooves, called rifling, to impart rotary motion to the projectile, insuring greater accuracy of fire.[8]

Flobert rifle. A smooth bore rifle, no longer manufactured, which formerly was commonly used in shooting galleries and for target practice of that kind.[9]

Target rifle. A low power twenty-two caliber rifle;[10] such as shoots twenty-two caliber short cartridges.[11]

†RIGGING. When applied to the handling of heavy loads, whether of timber, metal, stone, or other similar material, the tackle, lines, and fastenings with which the task is accomplished, without regard to the material, whether metal or vegetable, from which they are fabricated.[12]

RIGGING THE MARKET. Going into the market pretending to buy shares by a person who is put forward to buy them, who is not really buying them, but only pretending to buy them, in order that they may be quoted in the public papers as bearing a premium, which premium is never paid.[13]

RIGHT.[14] [§ 1] **A. As Noun—1. In General.** A word of broad signification, variously defined[15] and having a wide scope of meaning in its many applications.[16]

In law, that which the law directs, a liberty of doing or possessing something consistent with law;[17] that which is directed by law for one's protection and advantage is said to be one's right.[18]

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[94] Wallace v. Employers' Liability Assur. Corp., 26 Ont. L. 10, 2 DomLR 854, 857, AnnCas1913A 838.

[95] Christ v. Chicago, etc., R. Co., 176 Minn. 592, 224 NW 247.

[96] Silverstein v. Commercial Casualty Ins. Co., 237 N. Y. 391, 393, 143 NE 231.

[97] London Guarantee, etc., Co. v. Ladd, 299 Fed. 562, 564.

[98] Powis v. Ontario Acc. Ins. Co., 1 Ont. L. 54.

[99] Standard L., etc., Ins. Co. v. Thornton, 100 Fed. 582, 588, 40 CCA 564, 49 LRA 116.

[1] **Attached to policy** see Fire Insurance §§ 49, 72; Insurance §§ 222, 270.

[2] Com. v. Barnett, 199 Pa. 161, 172, 48 A 976.

[3] Douglass v. Moses, 89 Iowa 40, 41, 56 NW 271, 48 AmSR 353; Webster D. [quot Brisco v. State, 4 Tex. A. 219, 221, 30 AmR 162].

"Gelding" distinguished see 28 C. J. p 607 text and note 44 [a].

"Gelt" 28 C. J. p 608.

[4] See Animals 3 C. J. p 1; Horse 30 C. J. p 458.

[5] Webster D. [quot Briscoe v. State, 4 Tex. A. 219, 221, 30 AmR 162].

[6] Union Inv. Co. v. Rosenzweig, 79 Wash. 112, 114, 139 P 874.

[a] **"Stallion" distinguished.**—State v. McDonald, 10 Mont. 21, 22, 24 P 628, 24 AmSR 25.

[7] Johnson v. Hazelhurst Hardware Co., 113 Miss. 428, 74 S 294.

[8] Webster New Int. D.

[a] **Included in definition of "gun."**—Henderson v. State, 75 Fla. 464, 467, 78 S 427.

[b] **Held not "pistol" or "revolver."**—Taylor v. Seil, 120 Wis. 32, 35, 97 NW 498.

[9] Johnson v. Hazelhurst Hardware Co., 113 Miss. 428, 433, 434, 74 S 294.

[10] Johnson v. Hazelhurst Hardware Co., supra.

[11] Johnson v. Hazelhurst Hardware Co., supra.

[12] McCollin v. James Black Masonry, etc., Co., 247 Mo. 174, 151 SW 973, 975.

[13] Rubery v. Grant, L. R. 13 Eq. 443, 447, 42 L. J. Ch. 19, 26 L. T. Rep. N. S. 538.

[14] **Cross references:**
Absolute right see Absolute 1 C. J. p 31 text and note 33 [e].
Acquired right see Acquired 1 C. J. p 909 text and note 38 [d].
"Bill of rights" 7 C. J. p 1181; Constitutional Law § 444.
"Civil rights" 11 C. J. p 799.
"Color of right" 11 C. J. p 1227.
"Common right" 12 C. J. p 206.
"Constitutional right" 12 C. J. p 1294.
Constitutional rights see Constitutional Law 12 C. J. p 653.
Contingent right see Contingent 13 C. J. p 117 text and note 46.
Copyright see Copyright and Literary Property 13 C. J. p 936.
Dower right see Dower §§ 105–200, 204–206.
"Exclusion right" see Exclusion 23 C. J. p 275.
Exemption right see Exemptions 25 C. J. p 1; Homesteads 29 C. J. p 770.
"Existing right" see Exist 25 C. J. p 168.
Incorporeal right see Incorporeal 31 C. J. p 408.
"Legal right" see Legal § 12.
"Litigious right" see Litigious 38 C. J. p 69.
Marital rights see Marital 38 C. J. p 491.
Mining rights see Mines and Minerals § 74.
Natural right see Natural § 13.
Patent rights see Patents § 1.
"Perfect right" see Perfect 48 C. J. p 810.
Personal rights see Personal § 15.
Political rights see Political § 18.
"Preferential right" see Preferential 49 C. J. p 1323.
"Primary right" see Primary 49 C. J. p 1348.
Private rights see Private § 23.
Property rights see Property § 50.
Proprietary rights see Proprietary 50 C. J. p 790 text and note 19.
"Prospective right" see Prospective 50 C. J. p 798.
Public land rights see Public Lands 50 C. J. p 872.
Public right see Public § 72.
Real rights see Real 52 C. J. p 1156 text and note 75.
Religious rights see Religious Societies ante.
Right as property see Property §§ 3, 8, 9.
Right of:
  Action see Actions §§ 46–71.
  Common see Common Lands § 1.
  Drainage see Drains § 1; Easements 19 C. J. p 856; Waters [40 Cyc 542].
  Preëmption see Public Lands § 87.
  Privacy see Right of Privacy post.
  Property see Property § 3. See also Detinue 18 C. J. p 987; Replevin ante p 404; Trover and Conversion [38 Cyc 1997].
  Quarantine see Executors and Administrators §§ 764–770.
  Recaption see Recaption 52 C. J. p 1190; Recapture 52 C. J. p 1190.
  Redemption see Chattel Mortgages § 577; Executions § 722; Judicial Sales §§ 103–105; Redemption 53 C. J. p 664.
  Search see Arrest §§ 74, 76; Intoxicating Liquors §§ 360–398; Searches and Seizures [35 Cyc 1263]; War [40 Cyc 298].
  Stockholder see Corporations §§ 1264–1798.
  Subrogation [37 Cyc 361].
  Succession see Descent and Distribution 18 C. J. p 795.
  Suffrage see Elections §§ 13–23.
  Way see Right of Way post.
Right to:
  Bear arms see Arms 5 C. J. p 287; Bear 7 C. J. p 1018 text and note 76 [a].
  Counsel see Criminal Law § 2076.
  Jury trial see Criminal Law § 641; Juries §§ 12–175, 398.
  Open and close see Criminal Law §§ 2083–2085; Executions § 529; Trial [38 Cyc 1300].
  Subscribe for stock see Corporations §§ 752–1032.
  Take for public use see Eminent Domain 20 C. J. p 501.
Vested right see Constitutional Law §§ 485–592.
Water rights see Waters [40 Cyc 636, 640–650, 658, 660–663, 666–668, 671, 674–680, 701–709, 713–738, 764, 780–782, 814–816, 829–835, 841, 844].
Writ of right see Real Actions §§ 2–25.

[15] Waddell v. Ravalli County School Dist. No. 3, 79 Mont. 432, 257 P 278, 280.

[16] Gould v. Eagle Creek School

*By Carlos M. Sandoval (Rifle).

† By Wm. Howard Buchanan (Rigging—Right of Post Liminii inclusive).

[§ 2] **2. As Consequence or Relation.** A right has been said to be the legal consequence that attends[19] or applies[20] to certain facts, such as some advantage,[21] concern,[22] or benefit;[23] a relation of a person or persons to some thing or person.[24] A right, in a legal sense, exists when, in consequence of given facts, the law declares that one person is entitled to enforce against another a claim, or to resist the enforcement of a claim urged by another.[25]

[§ 3] **3. Something Belonging to or Claimable—a. In General.** The term may be employed to designate that to which one has a just claim,[26] power, privilege, or the like, vested in one by law or by authority, social custom, or the like.[27] Accordingly it has been variously defined as meaning a claim;[28] a just claim;[29] a just claim, or that to which one has a just claim;[30] a legal claim;[31] a well founded claim;[32] a well founded or acknowledged claim;[33] something with which the law invests one person and with respect to which, for his benefit, another, or perhaps all others, are required by the law to do or perform acts or to forbear or sustain from acts;[34] that which a man is entitled to have, or to do, or to receive from others, within the limits prescribed by law;[35] that which justly belongs to one;[36] that which may be lawfully claimed of any other person;[37] that which one has a legal claim to do;[38] that which one has a legal or social claim to do or to exact;[39] whatever one may lawfully claim;[40] also, as meaning any power or privilege vested in a person by law, whether to act or demand action or forbearance at the hands of another;[41] authority;[42] capacity or privilege the enjoyment of which is secured to a person by law;[43] capacity residing in one man of controlling, with the assent and assistance of the state, the action of others;[44] capacity or power of exacting from another or others, acts or forbearances;[45] liberty of doing or possessing something consistent with the law;[46] power,[47] or legal power;[48] power, prerogative, and privilege, and especially when applied to corporations;[49] prerogative;[50] privilege;[51]

Dist., 7 Minn. 203. See also infra §§ 2–13.

17. Imperial D. [quot Winnipeg v. Barrett, 5 Cartwr. Cas. (Can.) 32, 90].

18. International R. Co. v. Rann, 224 N. Y. 83, 87, 120 NE 153.

19. The Common L. p 214 [quot U. S. Fidelity, etc., Co. v. Borough Bank, 161 App. Div. 479, 146 NYS 870, 876; White v. Multnomah County, 13 Or. 317, 323, 10 P 484, 57 AmR 20].

20. Mikkelson v. Pacific SS. Co., 46 F. (2d) 124, 125.

[a] **Right is sometimes presumed from circumstances,** where the origin and fountain cannot be found. Tinkham v. Arnold, 3 Me. 120, 125.

21. Bouvier L. D. [quot State v. Lyon, 63 Okl. 285, 165 P 419, 420].

22. Bouvier L. D. [quot State v. Lyon, supra].

"Advantage" 2 C. J. p 34.

23. Bouvier L. D. [quot State v. Lyon, 63 Okl. 285, 165 P 419, 420].

"Benefit" 7 C. J. p 1135.

24. North Branch Pass. R. Co. v. City Pass. R. Co., 38 Pa. 361, 367.

[a] **It cannot arise or exist in advance** of the persons or things related, and of which it expresses the relation. North Branch Pass. R. Co. v. City Pass. R. Co., 38 Pa. 361, 367.

25. Mellinger v. Houston, 68 Tex. 37, 45, 3 SW 249. See also infra § 3.

26. Webster New Int. D.

27. Webster New Int. D.

28. Webster New Int. D. [quot Ex p. Bailey, 20 Okl. 497, 501, 94 P 553].

"Claim" 11 C. J. p 816.

29. Webster D. [quot Monmouth v. Plimpton, 77 Me. 556, 560, 1 A 693].

30. Imperial D. [quot Winnipeg v. Barrett, 5 Cartwr. Cas. (Can.) 32, 90].

"Just claim" see Just 35 C. J. p 433 text and note 71.

31. Webster D. [quot Hathorn v. Robinson, 98 Me. 334, 56 A 1057, 1059].

"Legal claim" see Legal § 3.

32. Bouvier L. D. [quot Northern Pac. R. Co. v. Amacker, 53 Fed. 48, 56; Union Nat. Bank v. Byram, 131 Ill. 92, 100, 22 NE 842; Smart v. Morrison, 15 Ill. A. 226, 229; State v. Lyon, 63 Okl. 285, 165 P 419, 420]; Mellinger v. Houston, 68 Tex. 37, 45, 3 SW 249.

"Well-founded" see Well [40 Cyc 889 text and note 8].

33. Bouvier L. D. [quot Chelentis v. Luckenbach SS. Co., 247 U. S. 372, 38 SCt 501, 504, 62 L. ed. 1171]; Christensen v. Morse Dry Dock, etc., Co., 216 App. Div. 274, 214 NYS 732, 743; Colonna Shipyard, Inc. v. Bland, 150 Va. 349, 143 SE 729, 730, 59 ALR 497.

[a] **One has right,** when the law authorizes him, to exact from another an act or forbearance. Peo. v. Ulster County, 65 N. Y. 300, 308.

34. Cooley Torts p 23 [quot Galveston, etc., R. Co. v. Hennegan, 33 Tex. Civ. A. 314, 317, 76 SW 452].

35. Waddell v. Ravalli County School Dist. No. 3, 79 Mont. 432, 257 P 278, 280; Atchison, etc., R. Co. v. Baty, 6 Nebr. 37, 40, 29 AmR 356.

36. Webster New Int. D. [quot Ex p. Bailey, 20 Okl. 497, 501, 94 P 553]; Webster D. [quot Carney v. Kain, 40 W. Va. 758, 781, 23 SE 650].

37. Imperial D. [quot Winnipeg v. Barrett, 5 Cartwr. Cas. (Can.) 32, 90].

38. U. S. v. Patrick, 54 Fed. 338, 348.

[a] **Right to do an act** is the possession of the highest authority. Smith v. Floyd, 140 N. Y. 337, 340, 35 NE 606.

39. Webster New Int. D. [quot State v. Barr, 8 OhS&CP 541, 546, 5 OhNP 435; Ex p. Bailey, 20 Okl. 497, 501, 94 P 553].

40. Coty v. Prestonettes, Inc., 285 Fed. 501, 504.

41. Webster New Int. D. [quot Waddell v. Ravalli County School Dist. No. 3, 79 Mont. 432, 257 P 278, 280].

42. Webster New Int. D. [quot Ex p. Bailey, 20 Okl. 497, 501, 94 P 553]; U. S. v. Patrick, 54 Fed. 338, 348.

"Authority" 6 C. J. p 864.

43. Webster New Int. D. [quot Waddell v. Ravalli County School Dist. No. 3, 79 Mont. 432, 257 P 278, 281].

44. State v. Barr, 8 OhS&CP 541, 546, 5 OhNP 435.

45. Peo. v. Ulster County, 65 N. Y. 300, 308.

46. Imperial D. [quot Winnipeg v. Barrett, 5 Cartwr. Cas. (Can.) 32, 90]; Wharton L. Lex. [quot Winnipeg v. Barrett, 5 Cartwr. Cas. (Can.) 32, 91].

"Liberty" 37 C. J. p 159.

47. Anderson L. D. [quot State v. Barr, 8 OhS&CP 541, 546, 5 OhNP 435]; Walker D. [quot Barber Asphalt Pav. Co. v. Field, 134 Mo. A. 663, 668, 111 SW 907; Peo. v. Dikeman, 7 HowPr (N. Y.) 124, 130]; Smith v. Cornell Univ., 21 Misc. 220, 225, 45 NYS 640; Shaw v. Proffitt, 57 Or. 192, 201, 109 P 584, 110 P 1092, AnnCas1913A 63.

"Power" 49 C. J. p 1241.

48. Webster New Int. D. [quot Ex p. Bailey, 20 Okl. 497, 501, 94 P 553]; U. S. v. Patrick, 54 Fed. 338, 348.

49. Barber Asphalt Pav. Co. v. Field, 134 Mo. A. 663, 667, 111 SW 907; Peo. v. Dikeman, 7 HowPr (N. Y.) 124, 130; State v. Barr, 8 OhS&CP 541, 546, 5 OhNP 435.

50. Anderson L. D. [quot State v. Barr, supra]; Walker D. [quot Barber Asphalt Pav. Co. v. Field, 134 Mo. A. 663, 668, 111 SW 907; Peo. v. Dikeman, 7 HowPr (N. Y.) 124, 130]; Smith v. Cornell Univ., 21 Misc. 220, 225, 45 NYS 640; Shaw v. Proffit, 57 Or. 192, 201, 109 P 584, 110 P 1092, AnnCas1913A 63.

"Prerogative" 49 C. J. p 1332.

51. Anderson L. D. [quot State v. Barr, 8 OhS&CP 541, 546, 5 OhNP 435]; Walker D. [quot Barber Asphalt Pav. Co. v. Field, 134 Mo. A. 663, 668, 111 SW 907; Peo. v. Dikeman, 7 HowPr (N. Y.) 124, 130]; Smith v. Cornell Univ., 21 Misc. 220, 225, 45 NYS 640; McCann v. Burns, 73 Or. 167, 136 P 659, 660, 143 P 916, 1099; Shaw v. Proffitt, 57 Or. 192, 201, 109 P 584, 110 P 1092, AnnCas1913A 63.

"Privilege" 50 C. J. p 400.

and also as meaning immunity;[52] immunity granted by authority.[53] As an enforceable legal right, it means that which one has a legal right to do.[54]

Individual right is that which a person is entitled to have or to receive from others or to do under protection of the law.[55]

In statute relating to waiver of right, the term has been construed to mean a tangible legal right, one resting on contract or in tort, which would be recognized and enforced by law.[56]

"Rights," in the plural, is said to be generic, common, embracing whatever may be lawfully claimed.[57]

[§ 4] **b. In Respect of Property.** With respect to property the term may be employed as designating a claim or title to, or interest in, anything whatsoever that is enforceable by law,[58] or that which one has a claim to possess or own;[59] an enforceable[60] claim or title to any subject matter whatever;[61] an interest;[62] that interest which a person actually has in any subject of property, entitling him to hold or convey it at pleasure;[63] the interest or share which anyone has in a piece of property;[64] ownership;[65] property;[66] that which one person ought to have or receive from another, it being withheld from him, or not in his possession;[67] title,[68] lawful title or claim,[69] or legal title.[70] It is most frequently applied to property in its restricted sense,[71] and has been held to include something more than the mere right of property,[72] embracing the possession of the full and complete title, and of all remedies relating thereto,[73] and such rights as spring out of its lawful management, or as are incident to its ownership and the power of disposition,[74] as the right to the free use, enjoyment, and disposal of it.[75]

In Spanish law, a right was either in the thing or to the thing.[76]

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[52] Walker D. [quot Barber Asphalt Pav. Co. v. Field, 134 Mo. A. 663, 668, 111 SW 907; Peo. v. Dikeman, 7 HowPr (N. Y.) 124, 130]; Shaw v. Proffitt, 57 Or. 192, 201, 109 P 584, 110 P 1092, AnnCas1913A 63.

"Immunity" 31 C. J. p 252.

[53] U. S. v. Patrick, 54 Fed. 338, 348.

[54] Shaw v. Proffitt, 57 Or. 192, 201, 109 P 584, 110 P 1092, AnnCas 1913A 63.

[55] State v. Austin, 114 N. C. 855, 862, 19 SE 919, 41 AmSR 817, 25 LRA 283.

"Individual" 31 C. J. p 885.

[56] Pittsburgh, etc., R. Co. v. Cox, 55 Oh. St. 497, 511, 45 NE 641, 35 LRA 507.

[57] U. S. Fidelity, etc., Co. v. Borough Bank, 161 App. Div. 479, 146 NYS 870, 876; Lomas v. State, 3 Heisk. (Tenn.) 287, 306.

[a] **Classifications.**—(1) Rights are of three kinds: Rights jus proprietatis, jus possessionis, and jus vagum, or an imperfect right. Settlements may be ranked among the latter species. It is a right to preemption; a claim to favor. Smith v. Brown, 1 Yeates (Pa.) 513, 516. "Jus possessionis" see Jus 36 C. J. p 429 text and note 69 [bf]. "Jus proprietatis" see Jus 35 C. J. p 429 text and note 69 [bn]. (2) All rights which appertain to man are of one or the other of two classes, that is to say, first, natural rights; or second, acquired rights. Borden v. State, 11 Ark. 519, 527, 54 AmD 217. "Acquired rights" see Acquire 1 C. J. p 909 text and note 38 [d]. "Natural rights" see Natural § 13. (3) Rights which pertain to persons, other than such as are termed natural rights, are essentially the creatures of municipal law, written or unwritten. Mellinger v. Houston, 68 Tex. 37, 45, 3 SW 249. (4) "There are two classes of rights which the law accords to persons generally. These may be termed (1) substantive, and (2) remedial. The former includes those rights which one enjoys under the legal system prior to the disturbance of normal relations; the latter includes those rights by which a person may resort to the machinery of justice, either to secure amends for a disturbance of his substantive rights or to prevent a threatened disturbance." Massachusetts Bonding etc., Co. v. Novotny, 200 Iowa 227, 202 NW 588, 591. (5) Rights are not classified or distinguished as public and private. No authority makes any such classification. Dubuque v. Illinois Cent. R. Co., 39 Iowa 56, 64.

[b] **Wrongs ripening into rights.**—By a long series of years, wrongs may ripen into rights. Tinkham v. Arnold, 3 Me. 120, 125.

"Obligations" distinguished see Contracts § 552.

"Remedies" distinguished see Actions § 37 text and notes 30, 31.

[58] Bailey v. Miller, 45 Ind. A. 475, 91 NE 24, 25.

[59] Webster D. [quot Carney v. Kain, 40 W. Va. 758, 781, 23 SE 650]; Webster New Int. D. [quot Ex p. Bailey, 20 Okl. 497, 501, 94 P 553].

[60] **"Enforceable"** 20 C. J. p 1256.

[61] Anderson L. D. [quot Carney v. Kain, 40 W. Va. 758, 781, 23 SE 650]; Hathorn v. Robinson, 98 Me. 334, 56 A 1057, 1059; Smith v. Cornell Univ., 21 Misc. 220, 225, 45 NYS 640.

[62] Bouvier L. D. [quot State v. Lyon, 63 Okl. 285, 165 P 419, 420]; Walker D. [quot Barber Asphalt Pav. Co. v. Field, 134 Mo. A. 663, 668, 111 SW 907; Peo. v. Dikeman, 7 HowPr (N. Y.) 124, 130]; Webster New Int. D. [quot Ex p. Bailey, 20 Okl. 497, 501, 94 P 553]; Shaw v. Proffitt, 57 Or. 192, 201, 109 P 584, 110 P 1092, AnnCas 1913A 63.

"Interest" 33 C. J. p 261.

[63] Haskins v. Ryan, 71 N. J. Eq. 575, 579, 64 A 436.

[64] Webster New Int. D. (quot Ex p. Bailey, 20 Okl. 497, 501, 94 P 553].

[a] **Similar definition.**—"A right in any subject of property is the interest that a person actually has in that property." Stratton v. Buller, 268 Fed. 823, 824 [cit Cyc].

[b] **"Right doth include the estate in esse** in conveyances." Coke Littleton p 345a [quot Hoge v. Hollister, 2 Tenn. Ch. 606, 609]. And see Ammidown v. Granite Bank, 8 Allen (Mass.) 285, 290.

[65] Webster D. [quot Hathorn v. Robinson, 98 Me. 334, 56 A 1057, 1059; Monmouth v. Plimpton, 77 Me. 556, 560, 1 A 693; Ex p. Bailey, 20 Okl. 497, 501, 94 P 553].

"Ownership" see Property § 53.

[66] Walker D. [quot Barber Asphalt Pav. Co. v. Field, 134 Mo. A. 663, 668, 111 SW 907; Peo. v. Dikeman, 7 HowPr (N. Y.) 124, 130]; Webster D. [quot Hathorn v. Robinson, 98 Me. 334, 56 A 1057, 1059]; Shaw v. Proffitt, 57 Or. 192, 201, 109 P 584, 110 P 1092, AnnCas1913A 63.

Property as right see Property § 3.

[67] Black L. D. [quot U. S. Fidelity, etc., Co. v. Borough Bank, 161 App. Div. 479, 146 NYS 870, 876].

[a] **"In this sense 'right' has the force of 'claim,'** and is properly expressed by the Latin 'jus.'" Black L. D. [quot U. S. Fidelity, etc., Co. v. Borough Bank, 161 App. Div. 479, 146 NYS 870, 876].

"Jus" 35 C. J. p 428.

[68] Webster New Int. D. [quot Ex p. Bailey, 20 Okl. 497, 501, 94 P 553]; Hale v. Grow, 88 W. Va. 173, 106 SE 409, 412.

[a] **Often included in "title,"** which is the more general word. Ammidown v. Granite Bank, 8 Allen (Mass.) 285, 290 [cit Coke Littleton p 345b]. See also Property § 59 text and note 6.

"Title" see Property § 57.

[69] Browne L. D. [quot Winnipeg v. Barrett, 5 Cartwr. Cas. (Can.) 32, 91].

"Lawful title" see Lawful 36 C. J. p 968 text and note 45.

[70] Webster D. [quot Monmouth v. Plimpton, 77 Me. 556, 560, 1 A 693].

"Legal title" see Legal § 14.

[71] Barber Asphalt Pav. Co. v. Field, 134 Mo. A. 663, 667, 111 SW 907; Peo. v. Dikeman, 7 HowPr (N. Y.) 124, 130; Shaw v. Proffitt, 57 Or. 192, 201, 109 P 584, 110 P 1092, AnnCas 1913A 63.

[72] Springer v. Berry, 47 Me. 330, 337.

[73] Bailey v. Miller, 45 Ind. A. 475, 91 NE 24, 25.

[74] Springer v. Berry, 47 Me. 330, 337.

[75] Bailey v. Miller, 45 Ind. A. 475, 91 NE 24, 25. See Ammidown v. Granite Bank, 8 Allen (Mass.) 285, 290 [cit 1 Blackstone Comm. p 138].

"Free use" see Free 27 C. J. p 891 text and note 3.

[76] Sullivan v. Richardson, 33 Fla. 1, 116, 14 S 692.

[§ 5] 4. **Right of Entry.**[77] Right to possession.[78]

Phrase: "Enforcement of any . . . right of entry."[79]

[§ 6] 5. **Right of Navigation.**[80] A right of way[81] exercised for the purpose of trade[82] and commerce[83] which may be enjoyed in the sea, in public, and in private waters;[84] the right to pass by water.[85]

[§ 7] 6. **Right of Property.**[86] That sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.[87] It consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land;[88] the right to acquire, possess and enjoy property in any way consistent with the equal rights of others and the just exactions and demands of the state;[89] a perfect and exclusive right.[90]

[§ 8] 7. **Right in Rem.**[91] A right which avails against all persons whomsoever;[92] that which avails against persons generally.[93]

[§ 9] 8. **Right in Personam.**[94] A right which avails exclusively against certain or determinate persons.[95]

[§ 10] 9. **Right To Reserve.**[96] As used in the sense that obtains in baseball nomenclature, the term is intended to signify an option.[97]

[§ 11] 10. **Other Phrases.** Among many phrases in which the word "right" as a noun has been used are: "Accrued right or title,"[98] "accruing right,"[99] "all right,"[1] "all right and title,"[2] "all right, title and interest,"[3] "all the right and claim,"[4] "all the right, title and interest,"[5] "any pretended right or title,"[6] "any property, right, title, or interest,"[7] "any right acquired or accrued under any enactment thereby repealed,"[8] "by right, devise or bequest,"[9] "by right of representation,"[10] "claiming right thereto,"[11] "claim of right,"[12] "claims of a 'right under an authority exercised under the United States,'"[13] "color of right,"[14] "common right,"[15] "constitutional right,"[16] "contract, obligation, or right, or lien,"[17]

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77. **"Entry"** 20 C. J. p 1274.

Right of entry:
In general see Forcible Entry and Detainer 26 C. J. p 797; Landlord and Tenant 35 C. J. p 937.
Affecting:
  Adverse possession see Adverse Possession §§ 113–129.
  Contributory negligence see Negligence § 819.
As chose in action see Property § 42 text and note 62.
As estate see Estates § 1 text and note 48.
Upon disseizin see Husband and Wife § 694.

78. Cecil v. Clarke, 44 W. Va. 659, 666, 30 SE 216.

[a] **"Right of action" synonymous.**—Guion v. Anderson, 8 Humphr. (Tenn.) 298, 307. "Right of action" see Actions § 40.

79. Granger v. Luther, 42 S. D. 636, 176 NW 1019, 1031.

80. **"Navigation"** 45 C. J. p 576. See also Navigable Waters §§ 50–134.

81. **"Right of way"** post.

82. **"Trade"** [38 Cyc 670].

83. **"Commerce"** see Commerce § 1.

84. McNeil v. Jones, 26 N. S. 299, 303.

85. Queddy River Driving Boom Co. v. Davidson, 3 Cartwr. Cas. (Can.) 243, 262.

86. See generally Property 50 C. J. p 725.

87. 2 Blackstone Comm. c 1 p 2 [quot Bruch v. Carter, 32 N. J. L. 554, 562].

88. 1 Blackstone Comm. c 1 p 138 [quot Hutchinson v. Schimmelfeder, 40 Pa. 396, 398, 80 AmD 582]; Evans v. Reading Chemical Fertilizer Co., 160 Pa. 209, 218, 28 A 702. To same effect Bruch v. Carter, 32 N. J. L. 554, 562; Toledo Bank v. Toledo, 1 Oh. St. 622, 662; Block v. Schwartz, 27 Utah 387, 76 P 22, 25, 101 AmSR 971, 65 LRA 308, 1 AnnCas 550.

[a] **Similar definition.**—A right which "consists in the free use, enjoyment, and disposition of all a person's acquisitions without any control or diminution save only by the law of the land." Roderigas v. East River Sav. Inst., 48 HowPr (N. Y.) 166, 174; Matter of Jacobs, 2 N. Y. Cr. 539, 543 [both cases cit 1 Blackstone Comm. c 1 p 138].

[b] **Right of property in article** involves the power to sell and dispose of such article as well as to use and enjoy it. Bartemeyer v. Iowa, 18 Wall. (U. S.) 129, 137, 21 L. ed. 929.

[c] **"Exclusive right of using and transferring property,"** says Chancellor Kent, "follows as a natural consequence from the perception and admission of the right itself." Roderigas v. East River Sav. Inst., 48 How Pr (N. Y.) 166, 174.

[d] **Contingent interest construed as right of property.**—Nash v. Nash, 12 Allen (Mass.) 345, 348.

[e] **Debts included.**—Bowen v. Delaware, etc., R. Co., 153 N. Y. 476, 47 NE 907, 60 AmSR 667.

[f] **Right represented by ticket to public place of amusement** is a right of property. Ex p. Quarg, 149 Cal. 79, 81, 84 P 766, 767, 117 AmSR 115, 5 LRANS 183, 9 AnnCas 747.

89. Bertholf v. O'Reilly, 74 N. Y. 509, 515, 30 AmR 323 [quot Ives v. South Buffalo R. Co., 201 N. Y. 271, 94 NE 431, 34 LRANS 162, AnnCas 1912B 156].

90. Lohrstorfer v. Lohrstorfer, 140 Mich. 551, 560, 104 NW 142, 70 LRA 621.

91. **Cross references:**
Action or proceeding in rem see Actions § 171.
"In rem" see In § 7 text and note 87.
"Jus in re" see Jus 35 C. J. p 429 text and note 69 [an].

92. Wabash, etc., R. Co. v. Shacklet, 105 Ill. 364, 379, 44 AmR 791.

"Right in personam" distinguished see infra § 14.

93. Hook v. Hoffman, 16 Ariz. 540, 554, 147 P 722.

94. **Cross references:**
Action or proceeding in personam see Actions § 171.
"In personam" see In § 7 text and note 87.
"Jus in personam" see Jus 35 C. J. p 429 text and note 69 [am].

95. Hook v. Hoffman, 16 Ariz. 540, 554, 147 P 722.

[a] **"Right in rem" distinguished.**—Hook v. Hoffman, 16 Ariz. 540, 554, 147 P 722.

96. **Cross references:**
Injunction to restrain violation of reserve clause see Injunctions § 313.
Reserve clause as:
  Affecting mutuality of contract see Contracts § 188 text and note 73.
  Violation of Federal Anti-Trust Act see Monopolies § 171 text and note 62.

"Reserve" ante.

97. Metropolitan Exhibition Co. v. Ewing, 42 Fed. 198, 202, 7 LRA 381.

"Option" 46 C. J. p 1122.

98. See Accrue 1 C. J. p 733 note 24 [h].

99. See Accrue 1 C. J. p 734 note 29 [c].

1. See All § 3 text and note 86.

2. See All § 3 text and note 87.

3. United Sugar Co. v. Guaranty Trust Co., 254 Mass. 292, 150 NE 95.

4. Richardson v. Cambridge, 2 Allen (Mass.) 118, 121, 79 AmD 767.

5. See All § 3 text and note 88; Interest 33 C. J. p 263 text and note 76.

6. See Pretend 49 C. J. p 1341 text and note 4.

7. See Property § 5 text and note 86.

8. In re Chaffers, 15 Q. B. D. 467, 470.

"Enactment" 20 C. J. p 1247.

9. See By 9 C. J. p 1111 text and note 97.

10. See By 9 C. J. p 1111 text and note 98.

"Representation" ante.

11. See Claim 11 C. J. p 825 text and note 89.

12. See Claim 11 C. J. p 823 text and note 62.

13. See Claim 11 C. J. p 823 text and note 59.

14. **"Color of right"** see 11 C. J. p 1227.

15. See Common Right 12 C. J. p 206.

16. See Constitutional Right 12 C. J. p 1294.

17. Gould v. Eagle Creek School Dist., 7 Minn. 203.

“creating a right,”[18] “entitled in his own right,”[19] “exclusive right,”[20] “exclusive right to sell,”[21] “exclusive right to supply ale,”[22] “exclusive right to vend,”[23] “exercised the right,”[24] “exercising the right of suffrage,”[25] “existing right,”[26] “free and undisturbed right to the use,”[27] “free right of passage,”[28] “good right,”[29] “good right to convey,”[30] “holder in his own right,”[31] “impairing the right to private property,”[32] “legal right,”[33] “life right,”[34] “litigious right,”[35] “local right,”[36] “my own right heir, or right heirs,”[37] “other estate, interest, right, or possibility,”[38] “perfect right,”[39] “persons claiming the right to purchase,”[40] “preferential right,”[41] “pretended right or title,”[42] “primary right,”[43] “prior right,”[44] “private right,”[45] “property right,”[46] “property, right, or custody,”[47] “property right to be ‘owned in the future,’ ”[48] “prospective right,”[49] “public right,”[50] “public right of travel,”[51] “question of right or titles,”[52] “quit my right,”[53] “real right,”[54] “reserved a right,”[55] “right accrued,”[56] “right already existing or accrued,”[57] “right and interest,”[58] “right and interest by descent,”[59] “right and justice,”[60] “right and power,”[61] “right and privilege,”[62] “right and proper,”[63] “right arising out of an obligation,”[64] “right cognizable in a court of equity,”[65] “right, debt or duty,”[66] “right existing or accrued,”[67] “right, franchise, or privilege,”[68] “right hereby secured,”[69] “right in a contract,”[70] “right in a highway,”[71] “right in being,”[72] “right in real property,”[73] right “lawfully accrued or established,”[74] “right of access to adjoining park,”[75] “right of a common-law remedy,”[76] “right of alienation,”[77] “right of appeal,”[78] “right of appellant,”[79] “right of challenge,”[80] “right of conquest,”[81] “right of counsel

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“Contract” see Contracts § 1.

“Lien” see Liens §§ 1–8.

“Obligation” 46 C. J. p 845.

18. State v. Barr, 8 OhS&CP 541, 546, 5 OhNP 435.

19. See Entitle 20 C. J. p 1272 text and note 88.

20. See Exclusive 23 C. J. p 275 text and note 67.

21. See Exclusive 23 C. J. p 274 note 40 [a] (“exclusive agency” distinguished).

22. See Exclusive 23 C. J. p 275 text and note 71.

23. See Exclusive 23 C. J. p 275 text and note 72.

24. See Exercise 25 C. J. p 165 note 4 [g].

25. See Exercise 25 C. J. p 165 note 6 [g].

26. See Exist 25 C. J. p 168 text and note 75.

27. See Free 27 C. J. p 894 text and note 36.

28. See Free 27 C. J. p 894 text and note 94.

29. See Good 28 C. J. p 719 text and note 31.

30. See Good 28 C. J. p 719 note 31 [a].

31. See Holder 29 C. J. p 760 text and note 28.

32. See Impair 31 C. J. p 253 text and note 77.

“Private property” see Property § 17.

33. See Legal § 12.

34. See Life 37 C. J. p 348 text and note 42.

35. See Litigious 38 C. J. p 69 text and note 69.

36. See Common Right 12 C. J. p 206 note 28 [c] (distinguishing “common right”).

37. See My 45 C. J. p 362 text and note 95.

38. In re Devon, [1896] 2 Ch. 562, 568.

“Estate” see Estates § 1.

“Interest” 33 C. J. p 261.

“Possibility” 49 C. J. p 1117.

39. See Perfect 48 C. J. p 810 text and notes 30–32.

40. Nations v. Miller, (Tex.) 146 SW 261, 264.

“Purchase” 51 C. J. p 93.

41. See Preferential 49 C. J. p 1323 text and notes 60–61.

42. See Pretended Right or Title 49 C. J. p 1342.

43. See Primary 49 C. J. p 1348 text and note 69.

44. See Prior 50 C. J. p 324 text and note 20.

45. See Private § 23.

46. See Property § 5 text and note 50.

47. See Property § 5 text and note 51.

48. See Property § 5 text and note 53.

49. **“Prospective right”** see Prospective 50 C. J. p 798 text and notes 4, 5.

50. See Public § 72.

51. See Public § 72 note 3 [b].

52. See Question 51 C. J. p 122 text and note 68.

53. See Quit 51 C. J. p 299 text and note 11.

54. See Real § 1 text and note 74.

55. Morgan’s Case, 14 Ct. Cl. 319, 328.

“Reserve” ante.

56. State v. Atchison, etc., R. Co., 99 Kan. 831, 163 P 157, 160; In re Coal Mines Control Agreement, [1923] 1 Ch. 586.

“Accrue” 1 C. J. p 732.

57. Murphy v. Utter, 186 U. S. 95, 22 SCt 776, 782, 46 L. ed. 1070.

58. Cromartie v. Everglade Lumber Co., (Fla.) 129 S 767, 768; U. S. Fidelity, etc., Co. v. Borough Bank, 161 App. Div. 479, 146 NYS 870, 876.

59. Wright v. Holmes, 100 Me. 508, 512, 62 A 507, 3 LRANS 769.

“Descent” see Descent and Distribution § 1.

60. Ex p. Willcocks, 7 Cow. (N. Y.) 402, 408, 17 AmD 525.

“Justice” 35 C. J. p 434.

61. Smith v. Hightstown, 71 N. J. L. 536, 60 A 393, 394.

“Power” 49 C. J. p 1241.

62. Smith v. Floyd, 140 N. Y. 337, 341, 35 NE 606.

“Privilege” 50 C. J. p 400.

63. Hunt v. Thompson, 19 Wyo. 523, 532, 120 P 181, 122 P 624.

“Proper” 50 C. J. p 721.

64. Belden v. Farmers’, etc., Bank, 16 Cal. A. 452, 459, 118 P 449.

“Obligation” 46 C. J. p 846.

65. In re Ungaro, 88 N. J. Eq. 25, 102 A 244, 246.

66. Corey v. Morrill, 71 Vt. 51, 59, 42 A 976, 978; Green v. Adams, 59 Vt. 602, 608, 10 A 742, 59 AmR 761; Fairbanks v. Benjamin, 50 Vt. 99, 102; Beach v. Boynton, 26 Vt. 725, 735; Brooks v. Clayes, 10 Vt. 37, 54.

“Debt” 17 C. J. p 1371.

“Duty” 19 C. J. p 841.

67. Sehl v. Syracuse, 81 App. Div. 543, 546, 81 NYS 482.

68. British Columbia Electric R. Co. v. Stewart, [1913] A. C. 816.

“Franchise” see Franchises § 1.

69. Coleman v. Allen, 5 Mo. A. 127, 135.

70. Booth v. Burgess, 72 N. J. Eq. 181, 188, 65 A 226. See generally Contracts 13 C. J. p 214.

71. La Crosse v. Cameron, 80 Fed. 264, 276, 25 CCA 399.

“Highway” see Highways § 1.

72. Godwin v. Banks, 87 Md. 425, 441, 40 A 268.

“In being” see In § 8.

73. Chrisman v. Southern California Edison Co., 83 Cal. A. 249, 256 P 618, 622.

“Real property” see Property § 19.

74. Peo. v. Cohocton Stone Road, 25 Hun (N. Y.) 13, 17.

75. Goetz v. Knoxville Power, etc., Co., 154 Tenn. 545, 290 SW 409, 414.

76. Colonna Shipyard, Inc. v. Bland, 150 Va. 349, 143 SE 729, 731, 59 ALR 497.

“Common-law remedies” see Common Law § 23.

77. Manierre v. Welling, 32 R. I. 104, 140, 78 A 507, AnnCas1912C 1311.

“Alienation” 2 C. J. p 1035.

78. Johnson v. U. S., 6 Utah 403, 406, 24 P 256, 677. See generally Appeal and Error §§ 1, 464–579.

[a] **Defined** as “a privilege, that is, a prerogative to take an appeal.” McCann v. Burns, 73 Or. 167, 170, 136 P 659, 143 P 916, 1099.

Constitutional guaranty see Constitutional Law § 1112.

79. Snipes v. Davis, 131 S. C. 298, 127 SE 447, 452.

80. Tierney v. U. S., 280 Fed. 322, 324.

“Challenge” 11 C. J. p 226.

81. Caldwell v. State, 1 Stew. & P. (Ala.) 327, 408.

“Conquest” 12 C. J. p 509.

acting for the Attorney-General,"[82] "right of defense,"[83] "right of dower,"[84] "right of election,"[85] "right of free passage,"[86] "right of lien,"[87] "right of occupation,"[88] "right of office,"[89] "right of personal security,"[90] "right of possession,"[91] "right of preëmption,"[92] "right of priority,"[93] "right of privacy,"[94] "right of reply,"[95] "right of rescission,"[96] "right of retainer,"[97] "right of succession,"[98] "right of suit,"[99] "right of way,"[1] "right or estate in the lands,"[2] "right or privilege,"[3] "right or title,"[4] "right, property and interest,"[5] "right secured,"[6] "right, title and interest,"[7] "right, title, use, and occupation,"[8] "right to a free market,"[9] "right to all oil, coal, and other minerals,"[10] "right to be,"[11] "right to bear arms,"[12] "right to bear arms for the defense of himself,"[13] "right to be heard,"[14] "right to be let alone,"[15] "right to compensation,"[16] "right to contract,"[17] "right to infer,"[18] "right to possession,"[19] "right to real property,"[20] "right to receive,"[21] "right to redeem,"[22] "right to remain in,"[23] "right to sell,"[24] "right to subscribe to stock,"[25] "right to the proceeds,"[26] "right to use a mine,"[27] "right to use the timber,"[28] "right to work minerals,"[29] "same right,"[30] "sovereign right,"[31] "subject to easement or right,"[32] "substantial right,"[33] "substantive right,"[34] "the right, title, and interest of any defendant there-

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82. Reg. v. Le Blanc, 6 CanCrCas 348, 349.

83. Aldrich v. Wright, 53 N. H. 398, 400, 16 AmR 339 ("right to do whatever apparently is reasonably necessary to be done in defense"). See also Defense or Defence 18 C. J. p 463; Self-Defense [35 Cyc 1373].

84. Woodford v. Woodford, 44 N. J. Eq. 79, 80, 14 A 273. See generally Dower 19 C. J. p 448.

85. Catlin v. Catlin, 60 Md. 573, 577.

"Election" 19 C. J. p 1257.

86. Castle v. Bell Tel. Co., 49 App. Div. 437, 440, 63 NYS 482.

87. Wood's App., 30 Pa. 274, 277 ("A phrase which expresses the liability of certain property for a certain legal duty, or a right to resort to it in order to enforce the duty"). See generally Liens 37 C. J. p 303.

88. Caldwell v. State, 1 Stew. & P. (Ala.) 327, 407.

"Occupation" 46 C. J. p 895.

89. See Color of Office 11 C. J. p 1225 note 13 [b] ("right of office" distinguished from "color of office").

90. See Constitutional Law § 449 text and note 36.

91. See Possession 49 C. J. p 1099 text and note 43.

92. See Public Lands § 87.

93. U. S. v. Preston, 27 F. Cas. No. 16,087, 4 Wash. C. C. 446, 451 ("a preference of payment before the other creditors of the insolvent").

Priorities in distribution of insolvent estate see Insolvency §§ 190–200.

"Priority" 50 C. J. p 325 and cross references there listed.

94. See Right of Privacy post.

95. Rex v. Martin, 9 Ont. L. 218, 226, 9 CanCrCas 371, 4 AnnCas 912, 2 BRC 336.

"Reply" ante.

96. Isner v. Nydegger, 63 W. Va. 677, 682, 60 SE 793.

"Rescission" ante.

97. Chase Nat. Bank v. Sayles, 30 F. (2d) 178, 183. See also Executors and Administrators § 1193 et seq.

98. In re Stebbins, 52 Misc. 438, 103 NYS 563, 566. See generally Descent and Distribution 18 C. J. p 795.

99. Jacobsen v. Jacobsen, 11 Or. 454, 455, 5 P 567 ("a present right to resort to the courts for redress").

"Right of action" see Actions § 40.

"Suit" see Actions § 42.

1. See Right of Way post.

2. Howell v. Hill, 94 Miss. 566, 48 S 177.

"Estate" see Estates § 1.

3. Felix v. U. S., 186 Fed. 685, 689, 108 CCA 503; U. S. v. Ringeling, 8 Mont. 353, 357, 26 P 643.

"Privilege" 50 C. J. p 400.

4. Peo. v. Kings County Dev. Co., 177 Cal. 529, 171 P 102, 104; Peo. v. Banning Co., 167 Cal. 643, 140 P 587.

"Title" see Property § 57.

5. Wallace v. Taliaferro, 2 Call (6 Va.) 447, 481.

6. Kellom v. Easley, 14 F. Cas. No. 7,668, 1 Dill. 281, 286; Camp v. Smith, 2 Minn. 155, 168.

7. See Deeds § 265 text and note 72, § 302; Interest 33 C. J. p 265 note 49.

8. Moss Point Lumber Co. v. Harrison County, 89 Miss. 448, 557, 42 S 290, 873.

"Use and occupation" see Occupation 46 C. J. p 896 text and note 95.

9. Booth v. Burgess, 72 N. J. Eq. 181, 188, 65 A 226 ("right of every dealer, in the full enjoyment of his right to contract, to have all other possible dealers with him left free to deal or not as they may voluntarily elect").

"Market" 38 C. J. p 1258.

10. Hale v. Grow, 88 W. Va. 173, 106 SE 409, 412.

"Coal" 11 C. J. p 934.

"Mineral" see Mines and Minerals §§ 9–12.

"Oil" 46 C. J. p 1087.

11. "Exist" compared see Exist 25 C. J. p 167 note 54 [b].

12. See Bear 7 C. J. p 1018 note 76 [a].

13. Peo. v. Zerillo, 219 Mich. 635, 189 NW 927, 928.

"Arms" 5 C. J. p 287.

14. Ex p. Dawes, (Okl. Cr.) 239 P 689, 692; Hosmer v. State, 24 Okl. Cr. 312, 218 P 164, 168.

15. Henry v. Cherry, 30 R. I. 13, 21, 73 A 97, 136 AmSR 928, 24 LRA NS 991, 18 AnnCas 1006. See also Right of Privacy post.

16. Steel, etc., Mongers v. Bonnite Insulator Co., 90 N. J. Eq. 200, 106 A 380, 381.

"Compensation" 12 C. J. p 229.

17. Mathewson v. Mathewson, 79 Conn. 23, 25, 63 A 285, 5 LRANS 611, 6 AnnCas 1027. See also Constitutional Law § 444 et seq.

18. State v. Blake, 208 Iowa 995, 221 NW 569, 570.

"Infer" 31 C. J. p 1181.

19. Cahill v. Pine Creek Oil Co., 38 Okl. 568, 134 P 64, 65.

[a] **"Right of possession" distinguished.**—Cahill v. Pine Creek Oil Co., 38 Okl. 568, 134 P 64, 65. See also Property § 56.

20. Imperial Water Co. No. 1 v. Wores, 29 Cal. A. 253, 155 P 124, 126.

"Real property" see Property §§ 19–31.

21. Union Trust Co. v. Heiner, 26 F. (2d) 391.

"Receive" 52 C. J. p 1191.

22. Case v. Cherokee Lanyon Spelter Co., 62 Kan. 69, 72, 61 P 406. See also Redeem ante; Redemption ante.

[a] **"Opportunity to redeem" not synonymous.**—Case v. Cherokee Lanyon Spelter Co., 62 Kan. 69, 72, 61 P 406.

23. Farquaharson v. Farquaharson, (Pr. Edw. Isl.) 6 DomLR 818, 819, 11 EastLR 201.

"Remain" ante.

24. Mabie v. Whittaker, 10 Wash. 656, 663, 39 P 172.

"Sell" [35 Cyc 1374].

25. In re Davison, 134 Misc. 769, 236 NYS 437, 443.

Subscriptions to capital stock see Corporations §§ 752–1032.

26. Woodruff's Case, 7 Ct. Cl. 605, 613.

"Proceeds" 50 C. J. p 427.

27. O'Donnell v. Luskin, 12 Montg. Co. (Pa.) 109, 110.

"Mine" see Mines and Minerals §§ 1–8.

28. Paxton Lumber Co. v. Panther Coal Co., 83 W. Va. 341, 98 SE 563, 565.

"Timber" see Logs and Logging § 2.

29. Inland Revenue Comrs. v. Joicey, [1913] 2 K. B. 580. See generally Mines and Minerals 40 C. J. p 717.

30. See Same [35 Cyc 790 text and note 6].

31. See Sovereign [36 Cyc 516].

32. See Subject [37 Cyc 341 text and note 61].

33. See Appeal and Error § 265.

34. Dexter v. Edmands, 89 Fed. 467, 468.

"Remedy" distinguished see Remedy ante.

in,"[35] "under claim of right,"[36] "vested right,"[37] "water right,"[38] and "court of right."[39] Also among many phrases in which the plural "rights" as a noun has been used are: "Absolute rights of individuals,"[40] "acquired rights,"[41] "all other rights and privileges appertaining to the copyright,"[42] "all property and rights of every kind and nature belonging to and vested in such incorporated city,"[43] "all rights,"[44] "all rights and liabilities existing, acquired, or incurred,"[45] "all rights and liabilities existing, acquired, or incurred at the time this act takes effect are hereby saved,"[46] "all rights of the parties,"[47] "all the real and personal estate[48] rights, property, credits,[49] and effects[50] whether vested or contingent,"[51] "all the rights and privileges,"[52] "all the rights and property,"[53] "any interests and rights,"[54] "civil rights,"[55] "contingent rights,"[56] "determined rights,"[57] "exclusive rights and privileges,"[58] "existing or accruing rights are preserved,"[59] "existing rights of others,"[60] "franchises, rights, and privileges,"[61] "goods, chattels, rights, and credits of the deceased,"[62] "his rights under said contract,"[63] "incorporeal rights,"[64] "marital rights,"[65] "marital rights, duties, or obligations,"[66] "material rights,"[67] "merger of rights,"[68] "mining rights,"[69] "money, rights or credits,"[70] "mutual assumption of marital rights, duties, or obligations,"[71] "natural rights,"[72] "patent rights,"[73] "personal rights,"[74] "political rights,"[75] "property and civil rights,"[76] "property and civil rights . . . within the province,"[77] "property and rights of the city,"[78] "property, contracts, and rights of action,"[79] "property rights,"[80] "property rights or interests,"[81] "proprietary rights,"[82] "real rights,"[83] "rights acquired by marriage,"[84] "rights and benefits,"[85] "rights and claims,"[86] "rights and credits,"[87] "rights and credits of assignor,"[88] "rights and effects,"[89] "rights and franchises,"[90] "rights and liabilities,"[91] "rights and liberty,"[92] "rights and privileges,"[93] "rights and privileges" [as a corporation],[94] "rights and privileges as to party wall,"[95] "rights and property,"[96] "rights as such, of any corporation now existing,"[97] "rights, defenses, or limitations lawfully accrued or established,"[98] "rights in ports and shores,"[99] "rights of another,"[1] "rights of shareholder,"[2] "rights or privileges secured to any citizen of the state,"[3] "rights, privileges and immunities,"[4] "rights, remedies, and liabilities,"[5] "rights retained by the people,"[6] "rights [which husband] has by law,"[7] "terms and conditions, rights and privileges,"[8] "where the rights in future might be bound,"[9] and "with all the rights and privileges."[10]

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[35] Tucker v. Denico, 27 R. I. 239, 245, 61 A 642; Mitchell v. Campbell, 48 R. I. 120, 136 A 249, 250.

[36] See Claim 11 C. J. p 824 text and note 77.

[37] See Vested Right [40 Cyc 199].

[38] See Water Right [40 Cyc 540].

[39] See Real Actions §§ 2–25.

[40] See Absolute 1 C. J. p 361 note 33 [c].

[41] See Acquire 1 C. J. p 909 note 38 [d].

[42] See All § 9 text and note 97.

[43] Barber Asphalt Paving Co. v. Field, 134 Mo. A. 663, 667, 111 SW 907.

[44] Atlantic, etc., R. Co. v. Allen, 15 Fla. 637, 658.

[45] Peo. v. Driessen, 178 Mich. 118, 144 NW 526, 528.

[46] See Liability 36 C. J. p 1052 text and note 98.

[47] See All § 3 text and note 90.

[48] **"Personal estate"** see Personal § 7.

[49] **"Credits"** 15 C. J. p 1348.

[50] **"Effects"** 19 C. J. p 1017.

[51] McGregor v. Campbell, 19 Man. 38, 44, 11 WestLR 153.

"Contingent" 13 C. J. p 114.

"Vested" [40 Cyc 197].

[52] See All § 3 text and note 89.

[53] Smith v. Hightstown Borough, 71 N. J. L. 276, 279, 57 A 901.

[54] See Interest 33 C. J. p 263 text and note 81.

[55] See Civil Rights 11 C. J. p 799.

[56] See Contingent 13 C. J. p 117 text and note 46.

[57] See Determine 18 C. J. p 985 note 33 [a].

[58] See Exclusive 23 C. J. p 275 text and note 68.

[59] See Exist 25 C. J. p 168 text and note 72.

[60] See Exist 25 C. J. p 168 text and note 76.

[61] Adams v. Yazoo, etc., R. Co., 77 Miss. 194, 258, 24 S 200, 317, 28 S 956, 60 LRA 33.

[62] Newport Prob. Ct. v. Hazard, 13 R. I. 3, 9.

[63] Cohrt v. Kock, 56 Iowa 658, 660, 10 NW 230.

[64] See Incorporeal 31 C. J. p 408.

[65] See Marital 38 C. J. p 1191.

[66] See Obligation § 4 text and note 4.

[67] See Material 39 C. J. p 1388 text and note 10.

[68] See Merger 40 C. J. p 650 text and notes 23–29.

[69] See Mines and Minerals § 74.

[70] Sargeant v. Leland, 2 Vt. 277, 280.

"Money" 40 C. J. p 1489.

[71] See Mutual 44 C. J. p 1501 text and note 25.

[72] See Natural § 13.

[73] See Patents § 1.

[74] See Personal § 15.

[75] See Political § 18.

[76] See Property § 5 text and note 95.

[77] See Property § 5 text and note 96.

[78] International R. Co. v. Rann, 224 N. Y. 83, 88, 120 NE 153.

[79] See Property § 5 text and note 6.

[80] See Property § 5 text and note 50.

[81] See Property § 5 text and note 52.

[82] See Proprietary 50 C. J. p 790 text and note 19.

[83] See Real 52 C. J. p 1156 text and note 75.

[84] Hamilton v. McNeill, 150 Iowa 470, 129 NW 480, 481, AnnCas1912D 604.

"Marriage" see Marriage § 1.

[85] Jennings v. Reed, 75 N. J. Eq. 530, 72 A 939, 940.

[86] De Ford v. Johnson, 251 Mo. 244, 158 SW 29, 31, 46 LRANS 1083.

[87] See Credit 15 C. J. p 1350 note 87 [a].

[88] Runner v. Dwiggins, 147 Ind. 238, 239, 46 NE 580, 36 LRA 645.

"Assignor" see Assignments § 3.

[89] Union Nat. Bank v. Byram, 131 Ill. 92, 100, 22 NE 842.

[90] State v. Twin Falls Canal Co., 21 Ida. 410, 121 P 1039, 1040, LRA 1916F 236; Alexandria, etc., R. Co. v. Alexandria, etc., R. Co., 75 Va. 780, 789, 40 AmR 743.

[91] Means v. Harrison, 114 Ill. 248, 251, 2 NE 64.

[92] Caldwell v. State, 1 Stew. & P. (Ala.) 327, 441.

[93] See Privilege § 2 text and note 1.

[94] International, etc., R. Co. v. State, 75 Tex. 356, 373, 12 SW 685.

[95] Roche v. Allan, 23 Ont. L. 300, 307, 2 OntWN 787, 913, 18 OntWR 749.

Party Walls § 1.

[96] Smith v. Hightstown, 71 N. J. L. 276, 57 A 901, 903.

[97] St. Joseph F. & M. Ins. Co. v. Houch, 63 Mo. 112, 118.

[98] Donovan v. Flynn, 219 App. Div. 471, 220 NYS 44, 48.

[99] Wilson v. Welch, 12 Or. 353, 359, 7 P 341. See generally Navigable Waters 45 C. J. p 398.

[a] **According to Hale** they are of three kinds. First, the jus privatum, or right of property or franchise; second, jus publicum, or public right of passage and navigation; and third, the jus regium, or governmental right. Wilson v. Welch, 12 Or. 353, 359, 7 P 341.

"Port" 49 C. J. p 1084.

"Shore" [36 Cyc 432].

[1] Wood v. Michigan Air-Line R. Co., 81 Mich. 358, 362, 45 NW 980.

[2] Union Nat. Bank v. Byram, 131 Ill. 92, 100, 22 NE 842 (they are "rights of a contract, or in technical language, choses in action). See generally Corporations §§ 1264–1798.

[3] Hennepin County v. Jones, 18 Minn. 199.

"Citizen" see Citizens § 1.

"State" see States [36 Cyc 826].

[§ 12] **11. Other Terms Compared.** "Right" is, or may be employed as, the correlative of "duty,"[11] "obligation,"[12] "remedy,"[13] or "wrong."[14] "Right" has been compared with and, in the connection in which used, has been distinguished from "cause of action,"[15] "indulgence,"[16] "law,"[17] "obligation,"[18] "privilege,"[19] "remedy,"[20] "status,"[21] and "title."[22] On the other hand "right" has been compared with certain other terms and held to be equivalent to or synonymous with them in the particular connection in which employed, such as "all right,"[23] "debt or duty,"[24] "deed,"[25] "duty,"[26] "estate,"[27] "liberty,"[28] "obligation,"[29] "ownership,"[30] "power,"[31] "privilege,"[32] and "title."[33]

[§ 13] **B. As Adjective.** Fit; suitable; proper; correct;[34] also, opposed to "left."[35]

Phrases: "My own right heirs,"[36] "my right heirs,"[37] "right heirs,"[38] "right heirs and distributees,"[39] "right heirs at law,"[40] and "right heirs by blood;"[41] also "right bank."[42]

RIGHT AND WRONG TEST.[43]

RIGHT AWAY. At once;[44] within a reasonable time, in view of the particular facts.[45]

RIGHTFUL. Lawful;[46] legitimate.[47]

Phrases: "Rightful possession,"[48] and "rightful subjects of legislation."[49]

RIGHT IN ACTION.[50]

RIGHT OF ACTION.[51]

RIGHT OF COMMON.[52]

RIGHT OF CONSCIENCE.[53]

RIGHT OF DOWER.[54]

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4. Phœnix F. & M. Ins. Co. v. Tennessee, 161 U. S. 174, 16 SCt 471, 40 L. ed. 660; Grand Canyon R. Co. v. Treat, 12 Ariz. 69, 79, 95 P 187; Atlanta, etc., Air-Line R. Co. v. State, 63 Ga. 483, 484; State v. Ashman, 123 Tenn. 654, 135 SW 325, 326; Nashville, etc., Turnp. Co. v. Davidson County, 106 Tenn. 258, 262, 61 SW 68; Lonas v. State, 3 Heisk. (Tenn.) 287, 306.

"Immunity" 31 C. J. p 252.

"Privilege" 50 C. J. p 400.

5. Curry v. Bacharach Quality Shops, 271 Pa. 364, 117 A 435, 438; Curry v. Bacharach Quality Shops, (Pa.) 114 A 818, 821, 271 Pa. 364, 117 A 435.

"Liability" 36 C. J. p 1050.

"Remedy" see Actions § 91.

6. Ex p. Powell, 70 Fla. 363, 70 S 392, 397.

"People" 48 C. J. p 805.

7. Heald v. Kilgore, (N. H.) 149 A 866, 868. See also Husband and Wife §§ 4–177.

8. See Privilege § 2 text and note 8.

9. Cully v. Ferdais, 30 Can. S. C. 330; Raphael v. Maclaren, 27 Can. S. C. 319, 325; Stevenson v. Montreal, 27 Can. S. C. 187, 191; O'Dell v. Gregory, 24 Can. S. C. 661, 663; Rodier v. Lapierre, 21 Can. S. C. 69, 71.

10. Memphis v. Phœnix F. & M. Ins. Co., 91 Tenn. 566, 569, 19 SW 1044.

11. Lake Shore, etc., R. Co. v. Kurtz, 10 Ind. A. 60, 35 NE 201, 37 NE 303, 304; Bouvier L. D. [quot Winnipeg v. Barrett, 5 Cartwr. Cas. (Can.) 32, 91].

12. See Obligation § 3 text and note 66.

13. See Actions §§ 93–99.

14. See Actions §§ 93–99.

15. Smart v. Morrison, 15 Ill. A. 226, 229.

16. Brown v. Meady, 10 Me. 391, 395, 25 AmD 248.

17. State v. Worden, 46 Conn. 349, 364, 33 AmR 27.

18. See Obligation § 3 text and notes 67–69.

19. See Privilege § 1 note 57 [a], 2. Compare supra § 3.

20. See Remedy ante.

21. Calhoun v. Bryant, 28 S. D. 266, 276, 133 NW 266.

22. See Property § 59 text and note 6. Compare supra § 4.

23. Monmouth v. Plimpton, 77 Me. 556, 560, 1 A 693.

24. Beach v. Boynton, 26 Vt. 725, 736; Brooks v. Clayes, 10 Vt. 37, 54.

25. Rowton v. Rowton, 1 Hen. & M. (11 Va.) 92, 98.

26. Doyle v. Missouri, etc., R. Co., (Mo. A.) 185 SW 1175.

27. Northern Pac. R. Co. v. Amacker, 53 Fed. 48, 56 ("at least in wills").

28. See Liberty 37 C. J. p 159 text and note 61; and supra § 3.

29. See Obligation § 3 text and note 65.

30. Hathorn v. Robinson, 98 Me. 334, 56 A 1057, 1059.

31. See Power 49 C. J. p 1242 text and note 18. See also supra § 3.

32. Smith v. Cornell Univ., 21 Misc. 220, 222, 45 NYS 640. See also supra § 3.

33. Monmouth v. Plimpton, 77 Me. 556, 560, 1 A 693. See also supra § 4.

34. Webster New Int. D.

"Correct" 14A C. J. p 1426.

"Fit" 26 C. J. p 646.

"Proper" 50 C. J. p 721.

"Suitable" [37 Cyc 525].

[a] **Archbishop Whately** says: "That which is conformable to the supreme will is absolutely right, and is called right simply, without any reference to a special end. The opposite to right is wrong." This announces a standard but gives no practical aid. Allen v. Ferguson, 18 Wall. (U. S.) 1, 4, 21 L. ed. 854.

35. Webster New Int. D.

36. See My C. J. p 362 text and note 96. See also Wills [40 Cyc 1461 text and note 21].

37. See My 45 C. J. p 362 text and note 3.

38. See Heir § 44.

39. In re Tatham, 250 Pa. 269, 278, 95 A 520, AnnCas1917A 855.

"Distributee" 18 C. J. p 1291.

40. State Street Trust Co. v. Sampson, 228 Mass. 411, 412, 117 NE 832.

"Heir at law" see Heir § 24.

41. Harison v. Jones, 82 Ga. 599, 603, 9 SE 527.

"Heirs by blood" see Heir § 23 text and note 10.

42. Borkenhagen v. Vianden, 82 Wis. 206, 208, 52 NW 260 ("the east bank—or the bank lying to the right of an object passing down stream").

43. See Criminal Law § 75; Homicide § 13.

44. Webster New Int. D.

45. Lorimer v. Boylan, 98 Mich. 18, 22, 56 NW 1043.

46. Terr. v. O'Conner, 5 Dak. 397, 41 NW 746, 749, 3 LRA 355; Maynard v. Hill, 2 Wash. T. 321, 326, 5 P 717.

"Lawful" 36 C. J. p 967.

47. Baca v. Parez, 8 N. M. 187, 200, 42 P 162.

"Legitimate" 36 C. J. p 988.

48. Sims v. State, 36 Tex. Cr. 154, 36 SW 256.

[a] **"Legal possession" distinguished.**—Sims v. State, 36 Tex. Cr. 154, 36 SW 256.

"Legal possession" see Legal § 15 text and note 80.

"Possession" 49 C. J. p 1072.

49. Leatherwood v. Hill, 10 Ariz. 243, 89 P 521, 522; Bennett v. Nichols, 9 Ariz. 138, 80 P 392, 393; McRae v. Cochise County, 5 Ariz. 26, 44 P 299, 301; Terr. v. O'Connor, 5 Dak. 397, 403, 41 NW 746, 749, 3 LRA 355; Maynard v. Hill, 2 Wash. T. 321, 326, 5 P 717.

50. See Actions § 40 note 36 [c].

51. See Actions § 40.

52. See Common Lands § 1 text and notes 13, 14.

53. See Conscience, Right of 12 C. J. p 512.

54. **Inchoate right of dower** see Dower §§ 105–200.

Right of widow before assignment of dower see Dower §§ 204–206.

RIGHT OF DRAINAGE.[55]

RIGHT OF EMINENT DOMAIN.[56]

RIGHT OF ENTRY.[57]

RIGHT OF NAVIGATION.[58]

RIGHT OF POST LIMINII.[59]

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[55] See Drains § 1 note 7 [d]; Jus 35 C. J. p 429 note 69 [i]. And see generally Easements 19 C. J. p 356; Waters [40 Cyc 542].

Right of drainage as hereditament see Property § 29 note 41 [b].

[56] See generally Eminent Domain 20 C. J. p 501.

[57] See Right § 5.

[58] See Right § 6.

[59] See Postliminy 49 C. J. p 1122.

RIGHT OF PRIVACY

By Francis J. Ludes

[Matters not in this Title, treated elsewhere in this Work, see Cross References infra this page]

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CROSS REFERENCES

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Freedom of speech and of the press see **Constitutional Law** §§ 467–481.
Libel and Slander 36 C. J. p 1134.
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Property rights:
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Property rights: Continued
  In: Continued
    Letters see **Copyright and Literary Property** §§ 18, 32.
    Photographs see **Copyright and Literary Property** § 30.
  Of author to use of his name see **Copyright and Literary Property** §§ 24, 25.
Right to privacy from overlooking windows see **Adjoining Landowners** § 80.
Searches and Seizures [35 Cyc 1263].

I. DEFINITION

[§ 1] The "right of privacy," as the term is employed with reference to the determination of whether a cause of action in damages exists for an unwarranted invasion of such right[1] or whether it may be protected by injunctive relief,[2] may be defined as the right of an individual to be let alone,[3] or to live a life of seclusion,[4] or to be free from unwarranted publicity,[5] or to live without unwarranted interference by the public about matters with which the public is not necessarily concerned.[6]

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[1] **Action for damages** see infra § 13.

[2] **Injunctive relief** see infra § 14.

[3] Brents v. Morgan, 221 Ky. 765, 299 SW 967; Rosenwasser v. Ogoglia, 172 App. Div. 107, 158 NYS 56 [quot Cooley Torts (3d ed) p 33].

[4] Pavesich v. New England L. Ins. Co., 122 Ga. 190, 50 SE 68, 106 AmSR 104, 69 LRA 101, 2 AnnCas 561.

[5] Brents v. Morgan, 221 Ky. 765, 299 SW 967.

[6] Brents v. Morgan, supra.

[a] **Similar definition.**—"The right of a person to be secure from invasion by the public into matters of a private nature." Pavesich v. New England L. Ins. Co., 122 Ga. 190, 50 SE 68, 71, 106 AmSR 104, 69 LRA 101, 2 AnnCas 561.

II. EXISTENCE, NATURE, AND EXTENT

[§ 2] **A. In General.** The authorities are in conflict as to the propriety of recognizing the existence of an individual's right of privacy as a distinct basis of a cause of action because of its infringement[7] apart from other rights, such as the right to liberty,[8] property,[9] or reputation.[10] While some decisions specifically recognize such a right,[11] by others, it is specifically denied.[12]

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[7] See cases infra notes 11, 12.

[8] **Right to:**
Freedom:
  From unreasonable or unlawful search or seizure see Searches and Seizures [35 Cyc 1263].
  Of speech and of press see Constitutional Law §§ 467-481.
Personal:
  Liberty see Constitutional Law §§ 445-448.
  Security see Constitutional Law § 449.

[9] **Easement of prospect or privacy** see Easements § 139.

Rights:
In:
  Lectures, sermons, and addresses see Copyright and Literary Property § 20.
  Letters see Copyright and Literary Property §§ 18, 32.
  Photographs see Copyright and Literary Property § 30.
Of author to use of his name see Copyright and Literary Property §§ 24, 25.
To privacy from overlooking windows see Adjoining Landowners § 80.

[10] **Libel and slander** see Libel and Slander 36 C. J. p 1134.

[11] Ga.—Pavesich v. New England L. Ins. Co., 122 Ga. 190, 50 SE 68, 106 AmSR 104, 69 LRA 101, 2 AnnCas 561.

Kan.—Kunz v. Allen, 102 Kan. 883, 172 P 532, LRA1918D 1151.

Ky.—Brents v. Morgan, 221 Ky. 765, 299 SW 967; Foster-Milburn Co. v. Chinn, 134 Ky. 424, 120 SW 364, 135 AmSR 417, 34 LRANS 1137.

La.—Itzkovitch v. Whitaker, 117 La. 708, 42 S 228, 116 AmSR 215; Schulman v. Whitaker, 117 La. 704, 42 S 227, 7 LRANS 274, 8 AnnCas 1174.

Mo.—Munden v. Harris, 153 Mo. A. 652, 134 SW 1076.

N. J.—Edison v. Edison Polyform, etc., Co., 73 N. J. Eq. 136, 67 A 392; Vanderbilt v. Mitchell, 72 N. J. Eq. 910, 67 A 97, 14 LRANS 304.

[a] **The absence of precedent,** even for all time, is not conclusive of the question as to the existence of the right. Pavesich v. New England L. Ins. Co., 122 Ga. 190, 50 SE 68, 106 AmSR 104, 69 LRA 101, 2 Ann Cas 561.

[b] **Failure of authorities to mention not conclusive.**—"While neither Sir William Blackstone nor any of the other writers on the principles of the common law have referred in terms to the right of privacy, the illustrations given by them as to what would be a violation of the absolute rights of individuals are not to be taken as exhaustive, but the language should be allowed to include any instance of a violation of such rights which is clearly within the true meaning and intent of the words used to declare the principle." Pavesich v. New England L. Ins. Co., 122 Ga. 190, 50 SE 68, 70, 106 AmSR 104, 69 LRA 101, 2 AnnCas 561.

[c] **Recognition of natural rights.**—(1) "It is one of those rights referred to by some law writers as 'absolute'—such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it." Pavesich v. New England L. Ins. Co., 122 Ga. 190, 194, 50 SE 68, 70, 106 AmSR 104, 69 LRA 101, 2 Ann Cas 561. (2) "The individual surrenders to society many rights and privileges which he would be free to exercise in a state of nature, in exchange for the benefits which he receives as a member of society. But he is not presumed to surrender all those rights, and the public has no more right, without his consent, to invade the domain of those rights which it is necessarily to be presumed he has reserved than he has to violate the valid regulations of the organized government under which he lives." Pavesich v. New England L. Ins. Co., supra.

[d] **Personal liberty.**—"The right of one to exhibit himself to the public at all proper times, in all proper places, and in all proper manner is embraced within the right of personal liberty. The right to withdraw from the public gaze at such times as a person may see fit, when his presence in public is not demanded by any rule of law, is also embraced within the right of personal liberty. Publicity in one instance, and privacy in the other, are each guarantied. If personal liberty embraces the right of publicity, it no less embraces the correlative right of privacy, and this is no new idea in Georgia law. . . . The right of privacy within certain limits is a right derived from natural law, recognized by the principles of municipal law, and guarantied to persons in this state both by the Constitutions of the United States and of the state of Georgia, in those provisions which declare that no person shall be deprived of liberty except by due process of law." Pavesich v. New England L. Ins. Co., 122 Ga. 190, 50 SE 68, 70, 106 AmSR 104, 69 LRA 101, 2 AnnCas 561.

[e] **"Personal security** includes the right to exist and the right to the enjoyment of life while existing, and is invaded not only by a deprivation of life, but also by a deprivation of those things which are necessary to the enjoyment of life according to the nature, temperament, and lawful desires of the individual." Pavesich v. New England L. Ins. Co., 122 Ga. 190, 50 SE 68, 106 AmSR 104, 69 LRA 101, 2 AnnCas 561.

[f] **Difficulty of delimitation not a bar to recognition.**—"It may be that there will arise many cases which lie near the border line which marks the right of privacy, on the one hand, and the right of another individual or of the public, on the other. But this is true in regard to numerous other rights which the law recognizes as resting in the individual. In regard to cases that may arise under the right of privacy, as in cases that arise under other rights where the line of demarkation is to be determined, the safeguard of the individual, on the one hand, and of the public, on the other, is the wisdom and integrity of the judiciary." Pavesich v. New England L. Ins. Co., 122 Ga. 190, 50 SE 68, 72, 106 AmSR 104, 69 LRA 101, 2 AnnCas 561.

[12] Roberson v. Rochester Folding-Box Co., 171 N. Y. 538, 64 NE 442, 89 AmSR 828, 59 LRA 478; Owen v. Partridge, 40 Misc. 415, 82 NYS 248; Henry v. Cherry, 30 R. I. 13, 73 A 97, 136 AmSR 928, 24 LRANS 991, 18 Ann Cas 1006; Hillman v. Star Pub. Co., 64 Wash. 691, 117 P 594, 35 LRANS 595. See Von Thodorovich v. Franz Josef Ben. Assoc., 154 Fed. 911 (where there is a dictum to the effect that equity will not relieve as to a breach of privacy even in the case of a private individual and much less in the case of one standing in the public eye like an emperor); Murray v. Gast Lith., etc., Co., 8 Misc. 36, 28 NYS 271 (denying parent damages and injunction in case of unauthorized publication of portrait of his infant daughter).

"The so-called 'right of privacy' has not as yet found an abiding place in our jurisprudence, and, as we view it, the doctrine cannot now be incorporated without doing violence to settled principles of law by which the profession and the public have long been guided." Roberson v. Rochester Folding-Box Co., 171 N. Y. 538, 556, 64 NE 442, 89 AmSR 828, 59 LRA 478 [quot Henry v. Cherry, 31 R. I. 13, 73 A 97, 109, 136 AmSR 928, 24 LRA NS 991].

[a] **Failure of authorities to mention held persuasive.**—"Mention of such a right is not to be found in Blackstone, Kent, or any other of the great commentators upon the law; nor, so far as the learning of counsel or the courts in this case have been able to discover, does its existence seem to have been asserted prior to about the year 1890, when it was presented with attractiveness, and no inconsiderable ability, in the Harvard Law Review (volume 4, p. 193) in an article entitled 'Rights of a Citizen to His Reputation.'" Roberson v. Rochester Folding-Box Co., 171 N. Y. 538, 64 NE 442, 443, 89 AmSR 828, 59 LRA 478.

[b] **Natural rights recognized only as guaranteed by the constitution.**—"Since . . . except when expressly limited, the General Assembly exercises all of the legislative powers of sovereignty possessed by the British Parliament, which is all-powerful, and since acts of that body are tested merely by the principles of the Constitution, and never by standard of transcendent rights alleged to have been reserved by the individual when he entered into society, there is no room in our constitutional theory for any transcendent right or instinct of nature except as guaranteed by that Constitution." Henry v. Cherry, 30 R. I. 13, 73 A 97, 104, 136 AmSR 928, 24 LRANS 991, 18 AnnCas 1006.

[c] **Difficulty of application.**—"If such a principle be incorporated into the body of the law through the instrumentality of a court of equity, the attempts to logically apply the principle will necessarily result not only in a vast amount of litigation, but in litigation bordering upon the absurd, for the right of privacy, once established as a legal doctrine, cannot be confined to the restraint of the publication of a likeness, but must necessarily embrace as well the publication of a word picture, a comment upon one's looks, conduct, domestic relations or habits. And, were the right of privacy once legally assert-

[§ 3] **B. Nature.** The right of privacy, assuming its existence,[13] has been held to be a purely personal right,[14] although there is authority to the effect that it is a property right,[15] at least where the right of an individual to privacy with reference to his own picture is involved.[16] Upon the theory that the right is purely personal, it has been held that it may be enforced only by the person whose right has been infringed,[17] that the individual right of privacy which any person has during life dies with the person,[18] and that any right of privacy which survives, is a right pertaining to the living only.[19] But while it has been held that a parent cannot enjoin an unauthorized publication of the portrait of an infant child,[20] relief has been granted to the parents of infants, where the right of privacy was invaded after the death of the children.[21]

[§ 4] **C. Extent—1. In General.** While the cases in which a right of privacy has been asserted are for the most part cases involving the use of the name[22] or picture[23] of an individual, the right has also been recognized with reference to a publication of his private affairs.[24] However, the right to privacy does not prohibit the communication of any

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ed, it would necessarily be held to include the same things if spoken instead of printed, for one, as well as the other, invades the right to be absolutely let alone. . . . I have gone only far enough to barely suggest the vast field of litigation which would necessarily be opened up should this court hold that privacy exists as a legal right enforceable in equity by injunction, and by damages where they seem necessary to give complete relief." Roberson v. Rochester Folding-Box Co., 171 N. Y. 538, 64 NE 442, 443, 89 AmSR 828, 59 LRA 478.

[d] **Right to freedom from assault distinguished.**—"Every exponent of the right of privacy cites as an authority in support of his contentions one sentence in Cooley on Torts, p. 29, where the learned author is discussing the right of personal immunity, and the sentence is as follows: 'The right to one's person may be said to be a right of complete immunity; to be let alone.' . . . The paragraph is given over entirely to a discussion of the doctrine of assault. The author is not, therefore, ushering in a new right of complete immunity. The right 'to be let alone' refers unmistakably to the right to be free from bodily injury, or from a reasonable fear of bodily injury, at the hands of a fellow being. . . . Apprehension of immediate physical harm is not an essential element of the right of privacy. But the incompatability between the principle of assault and that of the right of privacy is most strikingly brought out by the familiar rule that words alone can never constitute an assault. Cooley, Torts, 167. If words cannot constitute an assault, how, then, can writings; and, if writings cannot, how could the publication of a picture? It would seem reasonable to conclude that the principle of the right of privacy finds no support in the doctrine of assault." Henry v. Cherry, 31 R. I. 13, 73 A 97, 109, 136 AmSR 928, 24 LRANS 991, 18 AnnCas 1006.

[e] **In Michigan** the right of privacy was denied in an action brought by the widow of a lawyer to restrain the use of his picture and name as a label for a brand of cigars. Atkinson v. Doherty, 121 Mich. 372, 80 NW 285, 80 AmSR 507, 46 LRA 219. Compare Miller v. Gillespie, 196 Mich. 423, 163 NW 22 (where plaintiff brought an action to have the police records of his arrest surrendered, and although the court denied relief, did so without denying the jurisdiction of a court of equity to afford a remedy for a wrongful invasion of privacy).

[13] See supra § 2.

[14] Von Thodorovich v. Franz Josef Ben. Assoc., 154 Fed. 911; Schulman v. Whitaker, 117 La. 704, 42 S 227, 7 LRANS 274, 8 AnnCas 1174; Riddle v. MacFadden, 201 N. Y. 215, 94 NE 644; Roberson v. Rochester Folding-Box Co., 171 N. Y. 538, 64 NE 442, 89 AmSR 828, 59 LRA 478.

[a] **Rule applied.**—No appeal can be taken from a unanimous affirmance by the appellate division of a judgment in an action under the statute for the invasion of the right of privacy, unless allowed by Code Civ. Proc. § 191, such an action being one for personal injury. Riddle v. MacFadden, 201 N. Y. 215, 94 NE 644.

[15] Munden v. Harris, 153 Mo. A. 652, 134 SW 1076.

[16] Munden v. Harris, supra.

"It belongs to the same class of rights which forbids the reproduction of a private manuscript or painting, or the publication of private letters, of oral lectures delivered by a teacher to his class, or the revelation of the contents of a merchant's books by a clerk." Corliss v. E. W. Walker Co., 64 Fed. 280, 31 LRA 283.

[a] **Property right of material profit and value.**—One has the exclusive right to his picture on the score of its being a property right of material profit, and also a property right of value in that it is one of the modes of securing to a person the enjoyment of life and the exercise of liberty. Munden v. Harris, 153 Mo. A. 652, 134 SW 1076.

[b] **Representation of portrait.**—The right of a private individual to be protected in the representation of his portrait in any form is a property as well as a personal right. Corliss v. E. W. Walker Co., 64 Fed. 280, 31 LRA 283.

[17] Von Thodorovich v. Franz Josef Ben. Association, 154 Fed. 911; Murray v. Gast Lith., etc., Co., 8 Misc. 36, 28 NYS 271.

[a] **The right of the emperor of a foreign country** to restrain an association, doing business in the United States, from using his name and portrait, in advertising its business, because such use is offensive to him, is personal to him, and cannot be availed of in a suit in the federal court for such relief by the consul of such country residing in the United States. Von Thodorovich v. Franz Josef Ben. Assoc., 154 Fed. 911.

[18] Atkinson v. Doherty, 121 Mich. 372, 80 NW 285, 80 AmSR 507, 46 LRA 219; Schuyler v. Curtis, 147 N. Y. 434, 42 NE 22, 49 AmSR 671, 31 LRA 286.

[a] **Name and likeness of deceased person as label for brand of cigars.**—Equity will not restrain the use of the name and likeness of a deceased person as a label for a brand of cigars named after him, although offensive to the family of the deceased, so long as it does not amount to a libel. Atkinson v. Doherty, 121 Mich. 372, 80 NW 285, 80 AmSR 507, 46 LRA 219.

[19] Schuyler v. Curtis, 147 N. Y. 434, 42 NE 22, 49 AmSR 671, 31 LRA 286.

[a] **Any privilege of surviving relatives** of a deceased person to protect his memory exists for the benefit of the living to protect their feelings and to prevent a violation of their own rights in the character and memory of the deceased, and the mere fact that a person's feelings may be injured by the erection of a statue to a deceased relative is not ground for an injunction against its erection unless there is reasonable and plausible ground for the existence of this mental distress and injury. It must not be the creation of mere caprice, nor of pure fancy, nor the result of a supersensitive and morbid mental organization, dwelling with undue emphasis on the exclusive and sacred character of this right of privacy. Schuyler v. Curtis, 147 N. Y. 434, 42 NE 22, 49 AmSR 671, 31 LRA 286.

[20] Murray v. Gast Lith., etc., Co., 8 Misc. 36, 28 NYS 271.

[21] Bazemore v. Savannah Hospital, (Ga.) 155 SE 194, 196 [dist Murray v. Gast Lith., etc., Co., 8 Misc. 36, 28 NYS 271 (in which the parent sought to recover damages for the unauthorized publication of the portrait of his living infant child)]; Douglas v. Stokes, 149 Ky. 506, 149 SW 849, 42 LRANS 386, AnnCas1914B 374 (where plaintiff's wife gave birth to twin boy children, born together from the shoulders down to the end of their bodies, and after their death plaintiff employed defendant, a photographer, to photograph the corpse in its nude condition, it being agreed that defendant was to make twelve photographs for plaintiff and no more, but defendant made other photographs, on which he obtained a copyright, and the court held that defendant's misuse of the negative constituted a violation of plaintiff's right of privacy of the bodies of his dead children, for which defendant was liable in damages).

[22] See infra § 10.

[23] See infra § 8.

[24] Brents v. Morgan, 221 Ky. 765, 299 SW 967; Brex v. Smith, (N. J. Ch.) 146 A 34.

[a] **Submission of bank accounts of members of police department.**—A prosecutor may be enjoined from requiring submission to him of the bank accounts of all members of the police department, to assist him in making an investigation, as such action would work irreparable injury for which there is no adequate remedy at law. Brex v. Smith, (N. J. Ch.) 146 A 34.

matter, though in its nature private, when the publication is made under circumstances which would render it a privileged communication according to the rule of slander and libel,[25] and it has been said that there can be no redress for the invasion of privacy by oral publication.[26] In any event, the right of privacy must be recognized and enforced without curtailment of constitutional guarantees of freedom of speech and of the press.[27]

[§ 5] **2. Paramount Rights of Public—a. In General.** The right of privacy does not extend so far as to subvert those rights which spring from social conditions, including business relations,[28] or to prohibit the publication of matter which is of public or general interest.[29]

[§ 6] **b. Public Institutions or Public Enterprises.** An educational institution which is not only a corporation but a public institution has no right of privacy which will be conserved by injunction,[30] and an enterprise which is of public interest, and not a matter of business in which its rights might be interfered with, cannot claim any right of privacy.[31]

[§ 7] **c. Persons Accused or Convicted of Crime.**[32] Officers of the law have power to take and use photographs of persons confined in jail on criminal charges, for the purpose of identification,[33] and the use of such photographs cannot be enjoined,[34] unless the threatened use is wrongful or improper,[35] as the use of such photographs for the purpose of identification is not an invasion of the right of privacy.[36] On the other hand it has been held that the taking of a photograph of one who is merely suspected of crime may be enjoined if not necessary to identify him or to detect the crime,[37] and if a person is under arrest or within the court's jurisdiction, generally there is no necessity for the taking of a photograph before his trial and conviction,[38] but if a photograph is taken, the officer is not liable on his official bond.[39] In jurisdictions where the right of privacy is not recognized, the use of such photographs cannot be enjoined on this ground.[40]

After conviction. The relation to the public of one who has been convicted of crime is such as to forfeit whatever right of privacy he may be said

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25. Brents v. Morgan, 221 Ky. 765, 299 SW 967.

Privileged communications see Libel and Slander §§ 203-260.

26. Brents v. Morgan, 221 Ky. 765, 299 SW 967.

27. Pavesich v. New England L. Ins. Co., 122 Ga. 190, 50 SE 68, 80, 106 AmSR 104, 69 LRA 101, 2 AnnCas 561.

"What we have ruled cannot be in any sense construed as an abridgement of the liberty of speech and of the press as guarantied in the Constitution. Whether the reproduction of a likeness of another which is free from caricature can in any sense be declared to be an exercise of the right to publish one's sentiments, certain it is that one who merely for advertising purposes, and from mercenary motives, publishes the likeness of another without his consent, cannot be said, in so doing, to have exercised the right to publish his sentiments. . . . There is in the publication of one's picture for advertising purposes not the slightest semblance of an expression of an idea, a thought, or an opinion, within the meaning of the constitutional provision which guaranties to a person the right to publish his sentiments on any subject. Such conduct is not embraced within the liberty to print, but is a serious invasion of one's right of privacy, and may in many cases, according to the circumstances of the publication and the uses to which it is put, cause damages to flow which are irreparable in their nature. The knowledge that one's features and form are being used for such a purpose, and displayed in such places as such advertisements are often liable to be found, brings not only the person of an extremely sensitive nature, but even the individual of ordinary sensibility, to a realization that his liberty has been taken away from him; and, as long as the advertiser uses him for these purposes, he cannot be otherwise than conscious of the fact that he is for the time being under the control of another, that he is no longer free, and that he is in reality a slave, without hope of freedom, held to service by a merciless master; and if a man of true instincts, or even of ordinary sensibilities, no one can be more conscious of his enthrallment than he is." Pavesich v. New England L. Ins. Co., supra.

Freedom of speech and of press see Constitutional Law §§ 467-481.

28. Munden v. Harris, 153 Mo. A. 652, 134 SW 1076.

"By becoming a member of society one surrenders those natural rights which are incompatible with social conditions. In the nature of things, man in the social organization must be referred to and spoken of by others, and this may be done freely so long as it is free from slander." Munden v. Harris, supra.

29. Smith v. Suratt, 7 Alaska 416; Jones v. Herald Post Co., 230 Ky. 227, 18 SW (2d) 972.

"There are times, however, when one, whether willingly or not, becomes an actor in an occurrence of public or general interest. When this takes place, he emerges from his seclusion, and it is not an invasion of his right of privacy to publish his photograph with an account of such occurrence." Jones v. Herald Post Co., supra.

Publication of picture as violation of statute see infra § 9.

30. Vassar College v. Loose-Wiles Biscuit Co., 197 Fed. 982.

[a] **Rule applied.**—Defendant, a Missouri corporation, manufactured and sold a variety of candy called "Vassar Chocolates," which it advertised widely, employing the name "Vassar" together with a likeness of a young lady in scholastic garb and wearing a mortarboard hat, also using an imitation of the college pennant, a college yell, and imitation of the college seal, with the words "Vassar Chocolates" and "Always fresh" substituted for the words "Vassar College" and "Purity and Wisdom." It was held that Vassar College, as a public corporation, had no such property right in its name and insignia displayed by defendant in its advertisement as would entitle the college to restrain defendant's use thereof in his advertisements; the injury, if any, being psychological, rather than real. Vassar College v. Loose-Wiles Biscuit Co., 197 Fed. 982, 983.

31. Smith v. Suratt, 7 Alaska 416.

32. **Photographs or Bertillon measurements on arrest** see Arrest § 73.

33. Ark.—Mabry v. Kettering, 92 Ark. 81, 122 SW 115.

Ind.—State v. Clausmeier, 154 Ind. 599, 57 NE 541, 77 AmSR 511, 50 LRA 73.

Md.—Downs v. Swann, 111 Md. 53, 73 A 653, 134 AmSR 586, 23 LRANS 739.

N. J.—Bartletta v. McFeeley, (Ch.) 152 A 17.

Wash.—Hodgeman v. Olsen, 86 Wash. 615, 150 P 1122, LRA1916A 739.

[a] **Whether a person should be photographed,** fingerprinted, and measured is an administrative question to be determined by the police. Bartletta v. McFeeley, (N. J. Ch.) 152 A 17.

34. Mabry v. Kettering, 92 Ark. 81, 122 SW 115; Hodgeman v. Olsen, 86 Wash. 615, 150 P 1122, 1126, LRA 1916A 739.

"Whether in any case or on any state of facts the court would have the power to grant injunctive relief prohibiting the circulation of these pictures is a more difficult question, but one which we find it unnecessary to decide. It is clear that their distribution to duly constituted police officers and other penal institutions cannot be enjoined. That is one of the purposes of the keeping of such records. As we have seen in our discussion of the merits of the complaint, such distribution is justifiable as a reasonable police measure for the protection of society. The right of privacy, upon which the appellant insists, if it has any existence in this state, is not invaded by such distribution." Hodgeman v. Olsen, supra.

35. Mabry v. Kettering, 92 Ark. 81, 122 SW 115; Hodgeman v. Olsen, 86 Wash. 615, 150 P 1122, LRA1916A 739.

36. Mabry v. Kettering, 92 Ark. 81, 122 SW 115.

37. Itzkovitch v. Whitaker, 117 La. 708, 42 S 228, 116 AmSR 215; Schulman v. Whitaker, 117 La. 704, 42 S 227, 7 LRANS 274, 8 AnnCas 1174.

38. Itzkovitch v. Whitaker, 117 La. 708, 42 S 228, 116 AmSR 215; Schulman v. Whitaker, 117 La. 704, 42 S 227, 7 LRANS 274, 8 AnnCas 1174.

39. State v. Clausmeier, 154 Ind. 599, 57 NE 541, 77 AmSR 511, 50 LRA 73.

40. Owen v. Partridge, 40 Misc. 415, 82 NYS 248.

to have ever possessed,[41] and this is true, at least to the extent that the protection of society requires such forfeiture.[42]

Police record. An innocent person who has been arrested cannot have the police record destroyed, such record being true, and not exposing him to ridicule, obloquy, or disgrace, and not being a wrongful invasion of his right of privacy.[43]

[§ 8] **3. Pictures—a. In General.**[44] Some decisions have expressly denied the existence of a right of privacy allowing the prevention of the publication of an individual's portrait.[45] Where however the existence of a right of privacy is recognized,[46] a private individual has a right to be protected in the representation of his portrait in any form[47] and the use of a person's portrait or photograph without his consent and for the purpose of exploiting the publisher's business is a violation of the right of privacy.[48] A public character, however, cannot in the absence of a breach of contract or violation of confidence in securing the picture from which the publication is made enjoin its publication.[49]

[§ 9] **b. Statutory Provisions.** By express statutory provision one whose picture is used within the state for advertising purposes or for the purposes of trade without his written consent first obtained may maintain an equitable action to restrain such use and to recover damages by reason of such unlawful use.[50] The validity of such a statute has been sustained[51] and it gives to the person whose picture is sought to be used for such purposes an unlimited right to control of its use,[52] unless he is estopped from claiming the benefit of the statute.[53] An oral consent will not take the place of the written consent required by the statute.[54] In the case of an infant consent must be obtained from his parent[55] or guardian.[56] Such a statute, however, does not prohibit every use of the portrait or picture of a living person without his consent,[57] such as the publication of a person's photograph without his consent in a daily newspaper in connection with items of news not in any way libelous,[58] or in a motion picture film of current events.[59] In an action under the statute, it is immaterial whether the use of plaintiff's picture held him up to public ridicule or contempt.[60] Where defendant displayed a photograph of plaintiff to advertise photographs furnished in exchange for its trading stamps, it is immaterial whether the photographer had exhibited the photograph in defendant's shop,[61] or had made a contract with defendant whereby he was allowed to display the photographs.[62]

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[41] Hodgeman v. Olsen, 86 Wash. 615, 150 P 1122, LRA1916A 739.

[42] Hodgeman v. Olsen, supra.

[43] Miller v. Gillespie, 196 Mich. 423, 163 NW 22.

[44] **Persons accused or convicted of crime** see supra § 7.

[45] Roberson v. Rochester Folding-Box Co., 171 N. Y. 538, 64 NE 442, 89 AmSR 828, 59 LRA 478; Henry v. Cherry, 30 R. I. 13, 73 A 97, 136 AmSR 928, 24 LRANS 991, 18 AnnCas 1006; Hillman v. Star Pub. Co., 64 Wash. 691, 117 P 594, 35 LRANS 595. But see Marks v. Jaffa, 6 Misc. 290, 26 NYS 908 (where defendant devised the scheme of publishing in his newspaper a picture of two actors, with an invitation to the readers to vote, with a view to determining who was the more popular of the two, complainant declined to consent, yet a publication was made, when the bill was filed to restrain it, and an injunction was granted).

[a] **Illustration.**—The unauthorized publication of lithographic prints or copies of a photograph of a young woman as part of an advertisement of a legitimate manufactured article cannot be enjoined where there is no allegation that the picture is libelous in any respect, but the complaint alleges that the likeness is so good that it is easily recognized, and that it is used to attract attention to the advertisement, although the publication has caused great mental and physical distress to such woman, necessitating the employment and attendance of a physician. Roberson v. Rochester Folding-Box Co., 171 N. Y. 538, 64 NE 442, 89 AmSR 828, 59 LRA 478.

[46] See supra § 2.

[47] Corliss v. E. W. Walker Co., 64 Fed. 280, 31 LRA 283.

[48] Ga.—Pavesich v. New England L. Ins. Co., 122 Ga. 190, 50 SE 68, 106 AmSR 104, 69 LRA 101, 2 AnnCas 561.

Kan.—Kunz v. Allen, 102 Kan. 883, 172 P 532, LRA1918D 1151.

Ky.—Foster-Milburn Co. v. Chinn, 134 Ky. 424, 120 SW 364, 135 AmSR 417, 34 LRANS 1137.

Mo.—Munden v. Harris, 153 Mo. A. 652, 134 SW 1076.

N. J.—Edison v. Edison Polyform, etc., Co., 73 N. J. Eq. 136, 67 A 392.

[49] Corliss v. E. W. Walker Co., 64 Fed. 280, 31 LRA 283.

[a] **Reason for rule.**—"The distinction in the case of a picture or photograph lies, it seems to me, between public and private characters. A private individual should be protected against the publication of any portraiture of himself, but where an individual becomes a public character the case is different. A statesman, author, artist, or inventor, who asks for and desires public recognition, may be said to have surrendered this right to the public. When any one obtains a picture or photograph of such a person, and there is no breach of contract or violation of confidence in the method by which it was obtained, he has the right to reproduce it, whether in a newspaper, magazine, or book. It would be extending this right of protection too far to say that the general public can be prohibited from knowing the personal appearance of great public characters. Such characters, may be said, of their own volition, to have dedicated to the public the right of any fair portraiture of themselves." Corliss v. E. W. Walker Co., 64 Fed. 280, 282, 31 LRA 283.

[50] See statutory provisions; cases infra this note; and notes 51–62.

[a] **Construction.**—(1) Where the statute is, in part at least, penal, it should be construed accordingly. Binns v. Vitagraph Co., 210 N. Y. 51, 103 NE 1108, LRA1915C 839, AnnCas 1915B 1024; Humiston v. Universal Film Mfg. Co., 189 App. Div. 467, 178 NYS 752 (construction in favor of party charged with crime); Jeffries v. New York Evening Journal Pub. Co., 67 Misc. 570, 124 NYS 780. (2) The statute must be interpreted in the light of its history and the evil at which it was aimed. Colyer v. Richard K. Fox Pub. Co., 162 App. Div. 297, 146 NYS 999. (3) The primary object of the legislature in passing this statute was to prevent the use of a person's picture for advertising purposes or for the purposes of trade without having obtained his written consent. Humiston v. Universal Film Mfg. Co., supra.

[51] See cases infra this note.

[a] **Statutes sustained.**—(1) These statutes have been held not unconstitutional (Wyatt v. McCreery, 126 App. Div. 650, 111 NYS 86 [statute is valid so far as it requires one before using the picture of an infant to obtain the consent in writing of the parent or guardian]) (2) as depriving persons of liberty without due process of law (Rhodes v. Sperry-Hutchinson Co., 114 App. Div. 920 mem, 100 NYS 1140 mem, 120 App. Div. 467, 104 NYS 1102 [holding right of control in the person whose picture is sought to be used for purposes of trade or advertising is not limited by statute]).

[52] Binns v. Vitagraph Co., 210 N. Y. 51, 103 NE 1108, LRA1915C 839, AnnCas1915B 1024; Kunz v. Bosselman, 131 App. Div. 288, 115 NYS 650; Rhodes v. Sperry-Hutchinson Co., 114 App. Div. 920 mem, 100 NYS 1140 mem.

[a] **A picture within the meaning of such statute** is not necessarily a photograph of the living person but includes any representation of such person. Binns v. Vitagraph Co., 210 N. Y. 51, 103 NE 1108, LRA1915C 839, AnnCas1915B 1024 (liability may be incurred under such statute by the use of a picture of a person made up to represent another and described by name as being such other).

[b] **Changes in the pose.**—Under the statute, one whose picture had been used in designing a poster may enjoin the posting for advertising purposes, although slight changes were made by the artist in the pose. Loftus v. Greenwich Lith. Co., 192 App. Div. 251, 256, 182 NYS 428 ("If the wholesome provisions of the Civil Rights Law, upon which this action is based, can be thwarted by using a portrait or picture without consent, provided some such slight change in the pose is made by enlargement of the picture or otherwise, then the statute will be of little use and the purpose for which it was enacted will be defeated").

[c] **Use of name and picture in a feature film.**—A moving picture company which without authority uses the name and picture of a person as a feature and not as incidental to the film, and not designed to instruct or educate those who see it, but only to amuse them and to make money for the company, uses the portrait and name of the person for the purposes of trade within the meaning of such statute and subjects itself to the liabilities imposed thereby. Binns v. Vitagraph Co., 210 N. Y. 51, 103 NE 1108, LRA1915C 839, AnnCas1915B 1024.

[d] **Sale of cartoons containing a person's picture.**—A sale by defendant, for profit, of cartoons containing plaintiff's picture is a use for the purposes of trade and prohibited by statute. McNulty v. Press Pub. Co., 136 Misc. 833, 241 NYS 29.

[e] **Photographic representation of an actual court scene** including a picture of the plaintiff in connection with a story of a crime in which plaintiff was in no way involved is a use for the purposes of trade. Martin v. New Metropolitan Fiction, Inc., 248 NYS 359.

[§ 10] **4. Names[63]—a. In General.** While it has been held that where no question of trade or business purposes is involved,[64] nor any special injury to property, character, or reputation,[65] a person generally has no such exclusive right to the use of a name as will enable him to prevent its assumption or use by another, it has been held that equity will restrain its unauthorized use as part of a corporate title,[66] or in connection with its business or advertisements,[67] and will prevent the use of a pretended certificate of recommendation of a medicinal preparation,[68] although the person whose name is used is not a business competitor.[69]

[§ 11] **b. Statutory Provisions.** Statutes sometimes prohibit the use of a person's name for advertising purposes or for purposes of trade without his written consent first obtained.[70] Such statutes have been held constitutional.[71] If they are, in part at least, penal, they should be construed accordingly.[72] Such a statute does not extend to the name

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53. Wendell v. Conduit Mach. Co., 74 Misc. 201, 133 NYS 758 [dist Wyatt v. McCreery, 126 App. Div. 650, 111 NYS 86].

[a] **An employee posing for a portrait** to be used in his master's business cannot, on the termination of the employment, sue under the statute to restrain the further use of his portrait. Wendell v. Conduit Mach. Co., 74 Misc. 201, 133 NYS 758.

[b] **Reason for rule.**—"The statute was intended to prevent the unauthorized use of another's portrait for advertising purposes or purposes of trade, and made the written consent of the person whose portrait was used for such purposes evidence of that authority; but it never was meant that an employé could fraudulently, or by his culpable negligence amounting to constructive fraud, mislead his employer into expenditures to build up his trade and thereafter claim the intervention of a court of equity where such intervention would visit a material injury upon the employer." Wendell v. Conduit Mach. Co., 74 Misc. 201, 133 NYS 758, 759.

[c] **Where plaintiff is an infant** and has her pictures taken and in consideration of a reduced rate gives the photographer the right to sell, give away, or otherwise dispose of, copies for profit, she is not estopped from invoking the protection of the statute as to third persons procuring and using such pictures for advertising purposes, or purposes of trade. Wyatt v. McCreery, 126 App. Div. 650, 111 NYS 86 [foll Wyatt v. Wanamaker, 126 App. Div. 656, 111 NYS 90].

[d] **Contract of employment between moving picture actor and producer** has been held to prevent the actor from invoking the statute in order to prevent the films produced from being used in a different manner from that originally contemplated. Fairbanks v. Winik, 119 Misc. 809, 198 NYS 299 [rev on other grounds, 206 App. Div. 449, 201 NYS 487].

54. Almind v. Sea Beach R. Co., 157 App. Div. 230, 141 NYS 842.

55. Wyatt v. McCreery, 126 App. Div. 650, 111 NYS 86; Wyatt v. Wanamaker, 58 Misc. 429, 110 NYS 900 [aff 126 App. Div. 656, 111 NYS 90].

56. Wyatt v. McCreery, 126 App. Div. 650, 111 NYS 86; Wyatt v. Wanamaker, 58 Misc. 429, 110 NYS 900 [aff 126 App. Div. 656, 111 NYS 90].

[a] **Agreement with minor.**—The fact that a photographer has a right under an oral agreement with a minor, to sell copies of a photograph accompanied by the fact that he had sold them to a third person who delivered them to defendant is no defense, since the consent was oral, and since the consent of the minor's parent or guardian was not obtained, and defendant had not obtained such consent. Wyatt v. Wanamaker, 58 Misc. 429, 110 NYS 900 [aff 126 App. Div. 656, 111 NYS 90].

57. Binns v. Vitagraph Co., 210 N. Y. 51, 103 NE 1108, LRA1915C 839, AnnCas1915B 1024; Martin v. New Metropolitan Fiction, Inc., 248 NYS 359.

58. Binns v. Vitagraph Co., 210 N. Y. 51, 103 NE 1108, LRA1915C 839, AnnCas1915B 1024; Colyer v. Richard K. Fox Pub. Co., 162 App. Div. 297, 146 NYS 999; Jeffries v. New York Evening Journal Pub. Co., 67 Misc. 570, 124 NYS 780; Moser v. Press Pub. Co., 59 Misc. 78, 109 NYS 963.

[a] **Advertising purposes or purposes of trade.**—A person's picture is not used for "advertising purposes" or for "purposes of trade," within a statute prohibiting the use of any person's picture or portrait without his written consent for advertising purposes, or for purposes of trade, so as to warrant an injunction against such use unless it is used as part of an advertisement, nor is it used for the purposes of trade within the section when merely used for the dissemination of information, and not for commerce of traffic. Jeffries v. New York Evening Journal Pub. Co., 67 Misc. 570, 124 NYS 780 [quot Humiston v. Universal Film Mfg. Co., 189 App. Div. 467, 178 NYS 752].

[b] **Although paper contains advertisements,** the use of a person's portrait or picture is not a use for advertising or trade purposes. Colyer v. Richard K. Fox Pub. Co., 162 App. Div. 297, 146 NYS 999.

59. Humiston v. Universal Film Mfg. Co., 189 App. Div. 467, 474, 178 NYS 752.

"I am unable to see any practical difference between the presentation of these current events in a motion picture film and in a newspaper. . . . It matters not what may be the motive in the publishing of these films, whether instructive or whether to satisfy the morbid curiosity, any more than it matters what may be the motive in the publishing of actual news items in a newspaper." Humiston v. Universal Film Mfg. Co., supra.

[a] **Films of actual events.**—Although the publication of moving pictures is a trade, it is not such a "trade" as was within the contemplation of the legislature in the passage of the statute, and such statute does not prohibit the publication of a person's picture without his consent in a single set of films of actual events used at one time for distribution in different parts of the country before different audiences as a matter of current news. Humiston v. Universal Film Mfg. Co., 189 App. Div. 467, 178 NYS 752.

[b] **Bill boards in front of theater.**—The statute does not prohibit the use upon the bill boards in front of a theater of the pictures of persons appearing in motion pictures of actual events without their consent. Humiston v. Universal Film Mfg. Co., 189 App. Div. 467, 178 NYS 752.

60. Binns v. Vitagraph Co., 210 N. Y. 51, 103 NE 1108, LRA1915C 839, AnnCas1915B 1024.

61. Rhodes v. Sperry-Hutchinson Co., 114 App. Div. 920 mem, 100 NYS 1140 mem, 120 App. Div. 467, 104 NYS 1102.

62. Rhodes v. Sperry-Hutchinson Co., supra.

63. **Names generally** see Names 45 C. J. p 365.

Right of a public institution to prevent the use of its name see supra § 6.

64. **Right to use one's own or another's name for trade or business purposes** see Trade-Marks, Trade Names, and Unfair Competition [38 Cyc 807].

65. See Names § 18.

66. Edison v. Edison Polyform, etc., Co., 73 N. J. Eq. 136, 67 A 392.

Use as corporate name generally see Corporations § 376.

67. Edison v. Edison Polyform, etc., Co., 73 N. J. Eq. 136, 67 A 392.

68. Edison v. Edison Polyform, etc., Co., supra.

69. Edison v. Edison Polyform, etc., Co., supra.

70. See statutory provisions.

71. Rhodes v. Sperry-Hutchinson Co., 114 App. Div. 920 mem, 100 NYS 1140 mem, 120 App. Div. 467, 104 NYS 1102.

72. Binns v. Vitagraph Co., 210 N. Y. 51, 103 NE 1108, LRA1915C 839, of a copartnership.[73] Under such a statute the use of the name of an editor of a set of books in advertisements of an inferior edition, with which he has no connection, will be restrained.[74] The exhibition of motion pictures of a factory which displays the owner's name thereon gives no cause of action,[75] but if the motion picture manufacturer thereafter takes an interior arranged by himself purporting to be the interior of the factory, and uses such owner's name to describe the interior, such use would be within the purview of the statute.[76] If the person's name is used as a feature and not as incidental to a moving picture film, but for the purpose of making money for the company, such use is for the purposes of trade,[77] but the use of a person's name as the author of a story has been held not for the purposes of trade,[78] and the use of a person's name once in a novel is not within the statute.[79] The statute does not prohibit every use of the name of a living person without his consent,[80] such as the right to publish an author's true name in connection with the publication of books which he published under a nom de plume,[81] or the publication of a person's name in a daily newspaper in connection with items of news,[82] or in a motion picture film of current events,[83] or on the billboards in front of a theater of persons appearing in motion pictures of actual events.[84]

[§ 12] **D. Waiver or Forfeiture.** The right of privacy may be waived by the individual[85] or by any one authorized by him,[86] and this waiver may be either express[87] or implied.[88] The existence of the waiver carries with it the right to an invasion of privacy only to such an extent, however, as may be legitimately necessary and proper in dealing with the matter which has brought about the waiver.[89]

III. ACTIONS FOR DAMAGES

[§ 13] An unwarranted invasion of the right of privacy will sustain an action in tort,[90] and it is not necessary that special damages should have occurred from its violation in order to entitle the aggrieved party to recover,[91] and they need not be alleged[92] or proved.[93]

Defenses. The truth of the matter published does

AnnCas1915B 1024; Humiston v. Universal Film Mfg. Co., 189 App. Div. 467, 178 NYS 752; Merle v. Sociological Research Film Corp., 166 App. Div. 376, 152 NYS 829.

73. Rosenwasser v. Ogoglia, 172 App. Div. 107, 158 NYS 56.

74. Eliot v. Jones, 66 Misc. 95, 120 NYS 989 [aff 140 App. Div. 911 mem, 125 NYS 1119 mem].

75. Merle v. Sociological Research Film Corp., 166 App. Div. 376, 152 NYS 829, 832.

"To constitute a violation of the [statute], I think it must appear that the use of the plaintiff's picture or name is itself for the purpose of trade and not merely an incidental part of a photograph of an actual building, which cannot be presumed to add to the value of the photograph for trade or advertising, and even a use that may in a particular instance cause acute annoyance cannot give rise to an action under the statute unless it fairly falls within the terms of the statute." Merle v. Sociological Research Film Corp., supra.

76. Merle v. Sociological Research Film Corp., supra.

77. Binns v. Vitagraph Co., 210 N. Y. 51, 103 NE 1108, LRA1915C 839, AnnCas1915B 1024.

Use of picture for purposes of trade see supra § 9.

78. D'Altomonte v. New York Herald Co., 208 N. Y. 596, 102 NE 1101.

79. Damron v. Doubleday Doran and Co., Inc., 133 Misc. 302, 231 NYS 444 [aff 234 NYS 773 mem].

80. Binns v. Vitagraph Co., 210 N. Y. 51, 103 NE 1108, LRA1915C 839, AnnCas1915B 1024; Humiston v. Universal Film Mfg. Co., 189 App. Div. 467, 178 NYS 752.

81. Ellis v. Hurst, 70 Misc. 122, 128 NYS 144 [aff 145 App. Div. 918 mem, 130 NYS 1110 mem (aff 207 N. Y. 661 mem, 100 NE 1126 mem), and overr Ellis v. Hurst, 66 Misc. 235, 121 NYS 438, and dist Eliot v. Jones, 66 Misc. 95, 120 NYS 989 (aff 140 App. Div. 911 mem, 125 NYS 1119 mem)].

"The act was evidently designed to forbid the unauthorized and wanton appropriation or use of a person's name, picture, or portrait for trade or advertising purposes, where such use is wholly unrelated to the matters or things with which said name, picture, or portrait is associated, and it may perhaps also have been intended to forbid the unauthorized use of one's name, portrait, or picture when such use is asserted to be related to or connected with the things advertised or sold, but where such a relationship or connection is, in fact, unreal, unsubstantial, pretended, or false." Ellis v. Hurst, 70 Misc. 122, 128 NYS 144, 146.

Common-law right of author to use of name see Copyright and Literary Property § 24.

82. Binns v. Vitagraph Co., 210 N. Y. 51, 103 NE 1108, LRA1915C 839, AnnCas1915B 1024; Moser v. Press Pub. Co., 59 Misc. 78, 109 NYS 963.

83. Humiston v. Universal Film Mfg. Co., 189 App. Div. 467, 178 NYS 752.

84. Humiston v. Universal Film Mfg. Co., supra.

85. Pavesich v. New England L. Ins. Co., 122 Ga. 190, 50 SE 68, 106 AmSR 104, 69 LRA 101, 2 AnnCas 561; Brents v. Morgan, 221 Ky. 765, 299 SW 967; Munden v. Harris, 153 Mo. A. 652, 134 SW 1076.

[a] **Publication by the individual.**—The right of privacy ceases on the publication of the facts by the individual, or with his consent. Brents v. Morgan, 221 Ky. 765, 299 SW 967.

86. Pavesich v. New England L. Ins. Co., 122 Ga. 190, 50 SE 68, 106 AmSR 104, 69 LRA 101, 2 AnnCas 561.

87. Pavesich v. New England L. Ins. Co., supra; Munden v. Harris, 153 Mo. A. 652, 134 SW 1076.

88. Pavesich v. New England L. Ins. Co., 122 Ga. 190, 50 SE 68, 106 AmSR 104, 69 LRA 101, 2 AnnCas 561; Munden v. Harris, 153 Mo. A. 652, 134 SW 1076.

[a] **Consent may be shown** by acts which would be inconsistent with the claim of exclusive use, as if one should become a man engaged in public affairs, or who by a course of conduct, has excited public interest. Munden v. Harris, 153 Mo. A. 652, 134 SW 1076.

89. Pavesich v. New England L. Ins. Co., 122 Ga. 190, 50 SE 68, 106 AmSR 104, 69 LRA 101, 2 AnnCas 561.

[a] **Waiver by becoming a candidate for public office** does not extend into those matters and transactions of private life which are wholly foreign, and can throw no light whatever on the question as to his competency for the office, or the propriety of bestowing it on him. Pavesich v. New England L. Ins. Co., 122 Ga. 190, 50 SE 68, 106 AmSR 104, 69 LRA 101, 2 AnnCas 561.

90. Pavesich v. New England L. Ins. Co., supra; Brents v. Morgan, 221 Ky. 765, 299 SW 967; Munden v. Harris, 153 Mo. A. 642, 134 SW 1076.

[a] **Petition held sufficient.**—Pavesich v. New England L. Ins. Co., 122 Ga. 190, 50 SE 68, 106 AmSR 104, 69 LRA 101, 2 AnnCas 561; Brents v. Morgan, 221 Ky. 765, 299 SW 967.

91. Pavesich v. New England L. Ins. Co., 122 Ga. 190, 50 SE 68, 106 AmSR 104, 69 LRA 101, 2 AnnCas 561; Kunz v. Allen, 102 Kan. 883, 172 P 532, LRA1918D 1151; Brents v. Morgan, 221 Ky. 765, 299 SW 967; Foster-Milburn Co. v. Chinn, 134 Ky. 424, 120 SW 364, 135 AmSR 417, 34 LRANS 1137; Munden v. Harris, 153 Mo. A. 652, 134 SW 1076.

92. Foster-Milburn Co. v. Chinn, 134 Ky. 424, 120 SW 364, 135 AmSR 417, 34 LRANS 1137.

93. Pavesich v. New England L. Ins. Co., 122 Ga. 190, 50 SE 68, 106 AmSR 104, 69 LRA 101, 2 AnnCas 561; Kunz v. Allen, 102 Kan. 883, 172 P 532, LRA1918D 1151; Foster-Milburn Co. v. Chinn, 134 Ky. 424, 120 SW 364, 135 AmSR 417, 34 LRANS 1137; Munden v. Harris, 153 Mo. A. 652, 134 SW 1076.

Statutory provisions as to pictures and names see supra §§ 9, 11.

For **later cases, developments** and **changes** in the law see **Annotations,** same title and section numbe1.

not afford a defense,[94] nor does the absence of malice in the publisher.[95]

Damages.[96] Plaintiff is entitled to recover substantial damages,[97] although the only damages suffered by him resulted from mental anguish,[98] and the fact that the damages cannot be measured by a pecuniary standard is not a bar to his recovery.[99] Although not necessary to a recovery,[1] if there are special damages they may be stated and recovered,[2] and if the element of malice appears, as that term is known to the law, exemplary damages may be recovered.[3]

IV. INJUNCTIVE RELIEF

[§ 14] Where a person's right of privacy is invaded, he may enjoin such violation.[4] An action to enjoin the chief of police from taking a picture of plaintiff and exposing the same in the rogues' gallery is not an action to punish an infraction of the criminal laws.[5]

Evidence. General rules as to the admissibility[6] and weight and sufficiency of the evidence[7] apply.[8] Evidence of the custom of photographers to furnish photographs at special rates in return for the right to reproduce them and sell copies is not admissible in an action against one not connected with the photographer,[9] and evidence as to whether defendant had a contract with the photographer whereby defendant could display plaintiff's picture,[10] or as to whether the photographer had exhibited plaintiff's photograph in defendant's shop,[11] is inadmissible.

Damages.[12] In accordance with the general rule,[13] where an action is brought to enjoin an unlawful invasion of the right of privacy, a court of equity will retain jurisdiction so as to administer complete relief.[14] In an action to enjoin the invasion of the right of privacy all damages sustained by plaintiff are recoverable.[15] Some statutes authorize a recovery of exemplary damages for the unlawful use of a name or picture of a living person,[16] and a person recovering under such statute cannot thereafter obtain more damages by suing for libel.[17]

V. OFFENSE OF OPENING, READING, OR PUBLISHING LETTERS OR TELEGRAMS[18]

[§ 15] There are statutes in some jurisdictions making it a misdemeanor to willfully and without authority, open and read or cause to be opened and read a sealed letter or telegram or private paper, or a copy thereof, or to publish the same or any portion thereof.[19] An indictment for opening and reading or making public a letter addressed to another person must allege that it was a sealed letter,[20] or that it was published with knowledge that it had been opened and read without authority.[21] Communicating the contents of a letter to a single person, who has a legitimate interest in knowing what use was being made of information stolen from his office and who was not interested in giving general publicity to the facts in the letter, is not publishing it within the meaning of the statute.[22]

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[94] Brents v. Morgan, 221 Ky. 765, 299 SW 967.

[95] Brents v. Morgan, supra.

[96] **Generally** see Damages 17 C. J. p 699.

In action for injunction see infra § 14.

[97] Pavesich v. New England L. Ins. Co., 122 Ga. 190, 202, 50 SE 68, 106 AmSR 104, 69 LRA 101, 2 AnnCas 561; Brents v. Morgan, 221 Ky. 765, 299 SW 967.

"In an action for an invasion of such right the damages to be recovered are those for which the law authorizes a recovery in torts of that character; and if the law authorizes a recovery of damages for wounded feelings in other torts of a similar nature, such damages would be recoverable in an action for a violation of this right." Pavesich v. New England L. Ins. Co., supra.

[98] Brents v. Morgan, 221 Ky. 765, 299 SW 967.

[a] **Mortification and humiliation.**—For the publication of notice respecting plaintiff's indebtedness, plaintiff can recover reasonable compensation for mortification and humiliation. Brents v. Morgan, 221 Ky. 765, 299 SW 967.

[99] Brents v. Morgan, supra.

[1] See supra note 91.

[2] Munden v. Harris, 153 Mo. A. 652, 134 SW 1076.

[3] Munden v. Harris, supra.

[4] Munden v. Harris, supra; Brex v. Smith, (N. J. Ch.) 146 A 34; Binns v. Vitagraph Co., 210 N.Y. 51, 103 NE 1108, LRA1915C 839, AnnCas1915B 1024; Loftus v. Greenwich Lith. Co., 192 App. Div. 251, 182 NYS 428.

[a] **Complaint held sufficient.**—Bazemore v. Savannah Hospital (Ga.) 155 SE 195 [dist Murray v. Gast Lith. Co., 8 Misc. 36, 28 NYS 271]; Kunz v. Bosselman, 131 App. Div. 288, 115 NYS 650.

[5] Schulman v. Whitaker, 117 La. 704, 42 S 227, 7 LRANS 274, 8 AnnCas 1174.

[a] **Jurisdiction.**—A complaint to enjoin the chief of police from taking a picture of plaintiff and exposing the same in the rogues' gallery, relates to a personal right and is within the jurisdiction of the civil district court. Schulman v. Whitaker, 117 La. 704, 42 S 227, 7 LRANS 274, 8 AnnCas 1174.

[6] See Evidence § 89 et seq.

[7] See Evidence § 1730 et seq.

[8] See cases infra this note; and notes 9-11.

[a] **Evidence held insufficient** to support a finding that defendant produced the face of a woman of his own conception and did not attempt to reproduce a picture of plaintiff. Loftus v. Greenwich Lith. Co., 192 App. Div. 251, 182 NYS 428.

[9] Wyatt v. Wanamaker, 58 Misc. 429, 110 NYS 900 [aff 126 App. Div. 656, 111 NYS 90].

[10] Rhodes v. Sperry-Hutchinson Co., 114 App.Div. 920, 100 NYS 1140 [aff 104 NYS 1102].

[11] Rhodes v. Sperry-Hutchinson Co., supra.

[12] **Generally** see Damages 17 C. J. p 699.

In action at law see supra § 13.

Waiver of jury trial as to damages by invoking jurisdiction of equity see Juries § 119.

[13] See Equity § 117 et seq.

[14] See cases infra notes 15-17.

[15] Binns v. Vitagraph Co., 210 N. Y. 51, 103 NE 1108, LRA1915C, 839, AnnCas1915B 1024.

[a] **Compensatory damages under the statute** are limited to the humiliation, mortification, and mental distress which plaintiff may have suffered. Binns v. Vitagraph Co., 71 Misc. 203, 130 NYS 876.

[16] See statutory provisions.

[a] **Damages held not excessive.**—(1) Twelve thousand five hundred dollars. Binns v. Vitagraph Co., 147 App. Div. 783, 132 NYS 237 [reversing 71 Misc. 203, 130 NYS 876]. (2) One thousand dollars. Rhodes v. Sperry-Hutchinson Co., 114 App. Div. 920 mem, 100 NYS 1140 mem, 120 App. Div. 467, 104 NYS 1102.

[17] Binns v. Vitagraph Co., 210 N. Y. 51, 103 NE 1108, LRA1915C 839, AnnCas1915B 1024.

[18] **Offense against postal laws** see Post Office §§ 285-289.

[19] See statutory provisions.

[20] State v. Bagwell, 107 N. C. 859, 12 SE 254, 9 LRA 840.

[21] State v. Bagwell, supra.

[22] Peo. v. Burns, 178 App. Div. 845, 166 NYS 323, 36 NYCr 95 [aff 222 N Y. 621 mem, 118 NE 1072 mem].

***RIGHT OF PROPERTY.**[1]

RIGHT OF PROPERTY, TRIAL OF.[2]

RIGHT OF RECAPTION.[3]

RIGHT OF REDEMPTION.[4]

RIGHT OF SEARCH.[5]

RIGHT OF SUIT.[6]

RIGHT OF WAY.[7] [§ 1] **A. In General.** The term has a twofold signification;[8] it sometimes is used to describe a right belonging to a party, a right of passage over any tract;[9] a mere intangible right to cross;[10] a right of crossing;[11] and it is also used to describe that strip of land which railroad companies take upon which to construct their roadbed.[12]

As law of the road.[13] In regulations as to the use of highways, the right of way may mean the right of a vehicle to proceed uninterruptedly in a lawful manner in the direction in which it is moving in preference to another vehicle approaching from a different direction into its path.[14]

[§ 2] **B. As Easement To Pass or Cross.** In its restricted use and technical sense,[15] a right of way is a mere easement[16] on the lands of others;[17] a mere incorporeal right;[18] an easement;[19] an easement appurtenant to an estate owned by the person in whose favor the easement exists;[20] an easement of perpetual use;[21] a charge imposed upon one heritage for the use and advantage of a heritage belonging to another proprietor;[22] a charge or burden upon the land of one for the benefit of another;[23] an easement or incorporeal hereditament;[24] in common law, an easement, in the civil law, a servitude;[25] a mere servitude.[26] In this sense the term has been variously defined as a private way, which is an incorporeal hereditament of that class of easements, in which a particular person, or particular description of persons, have an interest and a right, although another person is the owner of the fee of the land, in which it is claimed;[27] a privilege which an individual or a particular description of individuals as the inhabitants of a certain village, or the owners or occupiers of a certain farm have of going over another's ground;[28] a privilege which one person, or particular description of persons, may have of passing over the land of another in some particular line;[29] a right not to be hindered, obstructed, or delayed by persons who reasonably can avoid hindering, obstructing, or delaying the one who has by law precedence in using the right of way;[30] a right of ingress and egress to and from the grantee's lands;[31] a right of passing over another man's ground;[32] a right of a person to travel over a particular tract of land without interference;[33] a right of travel over another's land;[34] a right to pass for all or for certain purposes, at all or at certain times, over and upon another man's land;[35] a right to pass over another's land more or less frequently, according to the nature of the use to be made of the easement;[36] a right to pass over the land of another;[37] a right to a way over the lands of another;[38] a right to use the passage over the lands of another;[39] a servitude of passage;[40] nothing more than a special and limited right of use.[41]

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[1] See Right § 11.

[2] See Attachment § 831 et seq; Executions §§ 506–508; Garnishment § 584 et seq; Replevin post; Trover and Conversion [38 Cyc 1997].

[3] See Recaption 52 C. J. p 1190; Recapture 52 C. J. p 1190.

Recaption of mortgaged property see Chattel Mortgages § 455 text and note 41 [a].

[4] See Chattel Mortgages § 577; Executions § 722; Judicial Sales §§ 103–105; Mortgages § 2067. See also Redemption 53 C. J. p 664.

[5] See Arrest §§ 74, 75; Intoxicating Liquors §§ 360–398; Searches and Seizures [35 Cyc 1263]; War [40 Cyc 298 et seq].

[6] See Right ante.

[7] **Right of way:**
- Easements §§ 3, 5, 7, 31, 71–98, 110, 114–135.
- Fixtures § 43 note 59 [c].
- Grant of, to railroad by:
  - Homesteader see Public Lands § 335.
  - United States see Public Lands §§ 411–438.
- Improvements § 2 note 14 [e].
- Indians § 80 (Indian lands).
- Injury to, or obstruction of see Case, Action on §§ 17, 42 note 83 [b]; Injunctions § 282; Justices of the Peace § 71.
- Interest in land see Interest 33 C. J. p 263 text and note 98 [m].
- Judicial Sales § 115.
- Mines and Minerals § 263.
- Of or for:
  - Bridges § 17.
  - Canals §§ 4–10.
  - Ditch see Waters [40 Cyc 718].
  - Drains § 160.
  - Improvement of river see Navigable Waters § 37 et seq.
  - Levees and Flood Control § 9 text and note 57.
  - Railroad:
    - In general see Railroads §§ 166 et seq, 193–199, 608.
    - Boundaries § 112.
    - Ejectment to recover see Ejectment § 19.
    - In accident policy see Accident Insurance § 154.
    - Injunction to prevent crossing see Injunctions § 528.
    - Mortgage of see Railroads §§ 668, 669.
    - New or additional use see Eminent Domain § 92.
    - Purchasers of railroad under foreclosure see Railroads § 800.
    - Railroads §§ 1271–1278.
  - Street Railroads [36 Cyc 1375 et seq.].
  - Telegraphs and Telephones [37 Cyc 1617, 1629].
- Of or for: Continued
  - Toll Roads [38 Cyc 377].
  - Water company see Waters [40 Cyc 780].
- Priorities between lien for right of way granted railroad and mortgage see Railroads § 716.
- Private way see Private § 33.
- Private right of way see Private § 24.
- Telegraph or telephone line along see Gas § 10.

[8] Central Trust Co. v. Wabash, etc., R. Co., 29 Fed. 546, 555; Atlanta, etc., R. Co. v. Coffee County, 152 Ga. 432, 110 SE 214, 215; Marion, etc., Tract. Co. v. Simmons, 180 Ind. 289, 102 NE 132, 133; Maysville, etc., R. Co. v. Ball, 108 Ky. 241, 56 SW 188, 191.

[9] Central Trust Co. v. Wabash, etc., R. Co., 29 Fed. 546, 555; Atlanta, etc., R. Co. v. Coffee County, 152 Ga. 432, 110 SE 214, 215; Maysville, etc., R. Co. v. Ball, 108 Ky. 241, 56 SW 188, 191.

[a] **"Way" synonymous.**—Cox v. Tipton, 18 Mo. A. 450, 455; Chollar-Potosi Min. Co. v. Kennedy, 3 Nev. 361, 373, 93 AmD 409.

[b] **"Road" distinguished.**—Chollar-Potosi Min. Co. v. Kennedy, 3 Nev. 361, 373, 93 AmD 409; Green v. Morris, etc., R. Co., 24 N. J. L. 486, 490.

[10] Marion, etc., Tract. Co. v. Simmons, 180 Ind. 289, 102 NE 132, 133.

[11] Marion, etc., Tract. Co. v. Simmons, supra.

[12] See Railroads § 193.

[13] **Right of way in use of highway:**
- In general see Highways §§ 413–420; Municipal Corporations § 3883.
- Ambulances see Motor Vehicles §§ 771–773; Municipal Corporations § 3883 text and note 33.
- At intersection of:
  - Railroads §§ 1734, 1735.
  - Streets see Motor Vehicles §§ 702–711, 713–725; Municipal Corporations §§ 3874 text and note 12, 3901–3903.
- Fire apparatus see Motor Vehicles §§ 765, 766; Municipal Corporations § 3883.
- Mail wagons see Municipal Corporations § 3883.
- Physician's vehicle see Municipal Corporations § 3883 text and note 34.
- Police see Municipal Corporations § 3883.
- Police vehicles see Motor Vehicles § 769.
- Public service water company see Waters [40 Cyc 780].
- Ships and other vehicles see Collision §§ 52–54, 158 et seq.

[14] Heidle v. Baldwin, 18 Oh. St. 375, 161 NE 44, 45, 58 ALR 1186, note; Kling v. George Ast Candy Co., (Oh. A.) 168 NE 761.

[15] See cases infra notes 16–41.

[16] Stockton Gas, etc., Co. v. San Joaquin County, 148 Cal. 313, 322, 83 P 54, 5 LRANS 174; Challiss v. Atchison, etc., R. Co., 16 Kan. 117, 127.

[a] **"Technically a right of way is an easement."**—Anderson v. Willson, 48 Cal. A. 289, 191 P 1016, 1019.

[b] **Right of way for a canal** is, properly speaking, nothing more than a mere easement in the land of another. Anderson v. Willson, 48 Cal. A. 289, 191 P 1016, 1019.

[17] Brown v. Young, 69 Iowa 625, 626, 29 NW 941; Shreveport, etc., R. Co. v. Hinds, 50 La. Ann. 781; Postal Tel. Cable Co. v. Louisiana Western R. Co., 49 La. Ann. 1270, 1278, 22 S 219; Lidgerding v. Zignego, 77 Minn. 421, 424, 80 NW 360, 361, 77 AmSR 677; Clawson v. Wallace, 16 Utah 300, 306, 52 P 9.

[18] Warren Borough v. Pleasant Bridge Co., 16 Pa. Co. 44, 45.

"Incorporeal rights" see Incorporeal 31 C. J. p 408.

[19] In re North Beach, etc., R. Co., 32 Cal. 499, 506; Anderson v. Willson, 48 Cal. A. 289, 191 P 1016, 1019 [cit Cyc]; Central Illinois Coal Min. Co. v. Illinois Power Co., 249 Ill. A. 199, 204 [cit Cyc]; Cincinnati, etc., R. Co. v. Geisel, 119 Ind. 77, 78, 21 NE 470; Clark v. Wabash R. Co., 132 Iowa 11, 13, 109 NW 309; S. E., etc., Shepherd Co. v. Shibles, 100 Me. 314, 318, 61 A 700; Powell v. Big Horn Low Line Ditch Co., 81 Mont. 430, 263 P 692 [cit Cyc]; Mannix v. Powell County, 60 Mont. 510, 199 P 914, 915 [cit Cyc]; Northern Pac. R. Co. v. Carland, 5 Mont. 146, 157, 3 P 134; Peo. v. State Tax Comrs., 67 Misc. 508, 509, 124 NYS 711. See generally Easements 19 C. J. p 856.

[a] **Easement of reclamation district** for its levee constitutes a "right of way." Reclamation Dist. No. 551 v. Sacramento County Super. Ct., 151 Cal. 263, 267, 90 P 545.

[b] **"The grant of a right of way is the grant of an easement."** Vandalia R. Co. v. Topping, 62 Ind. A. 657, 113 NE 421, 423; Muncie Electric Light Co. v. Joliff, 59 Ind. A. 349, 109 NE 433, 435.

[20] Gulick v. Fisher, 92 Md. 353, 357, 48 A 375.

"Easement appurtenant" see Easements § 4.

[21] McGhee v. Wilson, 111 Ala. 615, 620, 20 S 619, 56 AmSR 72; Shaw

*By WM. HOWARD BUCHANAN (Right of Property—Ringleader inclusive).

Denoting tenure. The term denotes the tenure by which land is held;[42] it is descriptive of the easement right and not of the land to which it is affixed.[43]

By custom. A right of way by custom is one that appertains to a certain district or territory, but not to any particular tenement forming part of that territory.[44] Nor is it confined to owners of land within that territory.[45]

From necessity. A right of way from necessity is where a man having several tracts of land sells one which is surrounded by the others, having no way of ingress and egress but through one of those reserved.[46]

General or special. The grant of a right of way, per se, and nothing else, may be a footway, or it may be a general right of way, that is, a right of way not only for people on foot, but for people on horseback, or people in carts, carriages, and other vehicles.[47]

In gross or appendant. A right of way may be either in gross[48] or appendant.[49]

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v. Proffitt, 57 Or. 192, 203, 109 P 584, 110 P 1092, AnnCas1913A 63 [cit Cyc].

[22] Manbeck v. Jones, 190 Pa. 171, 173, 42 A 536.

[23] Shaw v. Proffitt, 57 Or. 192, 193, 109 P 584, 110 P 1092, AnnCas 1913A 63 [cit Cyc].

[a] **For irrigation ditch,** an easement; a charge or burden upon the land of one for the benefit of another. Blake v. Boye, 38 Colo. 55, 62, 88 P 470, 8 LRANS 418.

[24] Stuyvesant v. Woodruff, 21 N. J. L. 133, 136, 47 AmD 156.

"Incorporeal hereditament" see Property § 31.

[25] Manbeck v. Jones, 190 Pa. 171, 173, 42 A 536.

[26] Louisiana Sulphur Min. Co. v. Brimstone R., etc., Co., 143 La. 743, 79 S 324, 325.

"Servitude" see Easements § 1 text and note 2 [a].

[27] Wild v. Deig, 43 Ind. 455, 458, 13 AmSR 399; Anderson L. Dict. [quot Postal Tel. Cable Co. v. Southern R. Co., 90 Fed. 30, 32].

[a] **"Common highway" distinguished.**—Lanier v. Booth, 50 Miss. 410, 413.

[b] **"Common way" distinguished.**—3 Cruise Dig. p 100 [quot Dinehart v. Wells, 2 Barb. (N. Y.) 432, 435].

[c] **"King's highway" distinguished.**—3 Cruise Dig. p 100 [quot Dinehart v. Wells, 2 Barb. (N. Y.) 432, 435]. "King's highway" see Highways § 1 text and note 72 [a].

"Public highway" distinguished see Highways § 1 text and note 7 [a].

"Private way" see Private § 33.

[28] Lanier v. Booth, 50 Miss. 410, 413 (distinguishing a "common highway").

[a] **Similar definition.**—"The privilege which an individual, or a particular description of persons, such as the inhabitants of the village of A., or the owners or occupiers of the farm of B., may have of giving over another person's grounds." 3 Cruise Dig. p 100 [quot Dinehart v. Wells, 2 Barb. (N. Y.) 432, 435].

[29] Ballard v. Titus, 157 Cal. 673, 681, 110 P 118; Kripp v. Curtis, 71 Cal. 62, 63, 11 P 879.

[30] Driscoll v. Boston El. R. Co., 223 Mass. 533, 536, 112 NE 219.

[31] San Rafel Ranch Co. v. Ralph Rogers Co., 154 Cal. 76, 77, 96 P 1092.

[32] Williams v. Western Union R. Co., 50 Wis. 71, 76, 5 NW 482.

[33] Kalinowski v. Jacobowski, 52 Wash. 359, 362, 100 P 852.

[34] Clawson v. Wallace, 16 Utah 300, 306, 52 P 9.

[35] Stuyvesant v. Woodruff, 21 N. J. L. 133, 136, 47 AmD 156 [quot Cass County v. Chicago, etc., R. Co., 25 Nebr. 348, 353, 41 NW 246, 2 LRA 188].

[36] Bodfish v. Bodfish, 105 Mass. 317, 319 [quot Cass County v. Chicago, etc., R. Co., 25 Nebr. 348, 353, 41 NW 246, 2 LRA 188].

[37] Poole v. Greer, (Del.) 65 A 767; Peo. Bryan v. State Tax Comrs., 67 Misc. 508, 509, 124 NYS 711.

[38] Seery v. Waterbury, 82 Conn. 567, 570, 74 A 908, 25 LRANS 681, 18 AnnCas 73.

[39] Postal Tel. Cable Co. v. Southern R. Co., 90 Fed. 30, 32.

[40] Knox v. Louisiana R., etc., Co., 157 La. 602, 607, 102 S 685.

[41] Bosley v. Susquehanna Canal, 3 Bland (Md.) 63, 67.

[42] San Pedro, etc., R. Co. v. Pillsbury, 23 Cal. A. 675, 680, 139 P 669.

[43] San Pedro, etc., R. Co. v. Pillsbury, supra. See Atlantic, etc., R. Co. v. Lesueur, 2 Ariz. 428, 19 P 157, 160, 1 LRA 244.

[44] Graham v. Walker, 78 Conn. 130, 61 A 98, 99, 112 AmSR 93, 2 LRANS 983, 3 AnnCas 641.

[45] Graham v. Walker, supra.

"Easement" distinguished see Easements § 14.

[46] Lawton v. Rivers, 13 S. C. L. 445, 447, 13 AmD 741. See also Easements §§ 114–126.

Way of necessity as highway see Highways § 1 text and note 71 [d].

[47] Speer v. Erie R. Co., 72 N. J. Eq. 411, 413, 65 A 1024.

[48] Alley v. Carleton, 29 Tex. 74, 94 AmD 260.

[a] **Right of way in gross** (1) "is attached to and vests the right in the person to whom it is granted. . . . Being attached to the person [it] cannot be assigned or granted over to another. And, since this is the case, it must be claimed by grant or from prescription by the claimant in his own person, and does not arise in this manner where it can be fairly construed to be appurtenant to another estate." Alley v. Carleton, 29 Tex. 74, 94 AmD 260. (2) "A right of way in gross is a mere personal privilege to the owner of the land." Brasington v. Williams, 143 S. C. 223, 141 SE 375, 382.

Easement in gross see Easements § 5.

[49] Alley v. Carleton, 29 Tex. 74, 94 AmD 260.

[a] **Right of way appendant** "is incident to an estate, one terminus of which is the land or tenement of the party claiming it. It inheres in the land, concerns the premises, and pertains to its enjoyment, and

[§ 3] **C. Phrases.** "Clearing right-of-way,"[50] "exclusive right of way,"[51] "existing rights of way,"[52] "free right of way,"[53] "less railroad right of way,"[54] "public right of way by user,"[55] "railroad right of way,"[56] "real estate and rights of way,"[57] "reasonable right of way,"[58] "right of way as located,"[59] "right-of-way clearing,"[60] "right of way for a canal,"[61] and "some rights of way."[62]

RIGHTS, BILL OF.[63]

RIGHT TO OPEN AND CLOSE.[64]

RIGHT TO TRIAL BY JURY.[65]

RIGHT, WRIT OF.[66]

RIGIDITY. As used with reference to a ladder, a relative term.[67]

RIGIDLY. To the same extent;[68] exactly.[69]

RIM. As a noun, the border, edge, or margin of anything.[70] Phrase: "Upturned rim continuously connected."[71]

As a verb, to furnish with a rim.[72]

Rimming. The enlarging of a hole drilled for oil.[73] Phrase: "Rimming out."[74]

As an adjective, the word may be employed[75] as in the phrase "rim bender."[76]

RING. [§ 1] **A. As Noun,** a circular band, especially of precious metal, to be worn usually on the finger.[77] Also a combination for illegal or otherwise improper purposes.[78]

[§ 2] **B. As Adjective,** the word may be employed.[79]

Ring waste. A highly purified article of scoured wool, made from wool top or combed wool.[80]

[§ 3] **C. As Verb.** To sound, as a bell.[81]

Ring up fares. A term said to mean pulling a rope at the side of a car upon receipt of each fare to move the index one point on the circular scale of the regulator, the registry of the fare being announced by the stroke of a bell.[82]

RING-DROPPING. A trick variously practiced.[83]

RING FIGHT.[84]

RINGING UP or **RINGING OUT.**[85]

RINGLEADER. A leader of any body of men or animals;[86] not necessarily a word of bad import.[87]

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passes with it. . . . It may be derived from express grant, from necessity, by implication, from a grant in which it is not expressed, and by prescription." Alley v. Carleton, 29 Tex. 74, 94 AmD 260.

Easement see Easements § 4.

[50] Laine v. Kennedy, 43 N. B. 173, 175.

[51] See Exclusive 23 C. J. p 275 text and note 70.

[52] See Exist 25 C. J. p 168 text and note 77.

[53] See Free 27 C. J. p 894 text and note 95.

"Free right of passage" equivalent see Free 27 C. J. p 894 text and note 94 [a].

[54] Roxana Petroleum Corp. v. Jarvis, 127 Kan. 365, 273 P 661, 665.

[55] See Public § 2 text and note 15, § 72 text and note 3 [c].

[56] See Railroads § 2 text and note 68.

Railroad right of way generally see Railroads §§ 193–199.

[57] Kinney v. Citizens' Water, etc., Co., 173 Ind. 252, 259, 90 NE 129, 26 LRANS 195.

[58] See Reasonable 52 C. J. p 1187 text and note 55.

[59] Akers v. United New Jersey R., etc., Co., 43 N. J. L. 110, 111.

[60] Laine v. Kennedy, 43 N. B. 173, 175.

[61] Anderson v. Willson, 48 Cal. A. 289, 191 P 1016, 1019. See also Canals §§ 4–10.

[62] Anderson v. Willson, supra.

[63] See Bill of Rights 7 C. J. p 1181; Constitutional Law § 444.

[64] **Right to open and close:** Generally see Criminal Law §§ 2083–2085; Trial [38 Cyc 1300 et seq.]. In claim case see Executions § 529.

[65] See Criminal Law § 641; Juries §§ 12–103.

[66] See Real Actions §§ 2–25.

[67] [a] **"The longer the ladder, and the fewer and less effective the braces,** the greater the flexibility, the less the rigidity." Joseph Halstead Co. v. U. S. Fire Escape Counter-Balance Co., 257 Fed. 95, 168 CCA 307.

[68] State v. Feuerhaken, 96 Iowa 299, 301, 65 NW 299.

[69] State v. Feuerhaken, supra.

[70] Lincoln v. Waterbury Button Co., Inc., 297 Fed. 619, 620.

"Border" 9 C. J. p 139.

"Edge" 19 C. J. p 1012.

"Margin" 38 C. J. p 991.

[71] Lincoln v. Waterbury Button Co., Inc., 297 Fed. 619, 620.

[72] Webster New Int. D.

[73] Lincoln v. Waterbury Button Co., Inc., supra. See generally Mines and Minerals 40 C. J. p 717.

[74] Hanna v. Smith, 173 Mich. 483, 139 NW 256, 259.

[75] Cotton v. Owensboro Wheel Co., (Ky.) 97 SW 763.

[76] Cotton v. Owensboro Wheel Co., supra.

[77] Webster New Int. D.

As baggage see Carriers § 1560 text and note 10.

As chattel see Chattel § 1 text and note 80.

Return of ring see Breach of Marriage Promise § 21 text and note 96.

[78] Schomberg v. Walker, 132 Cal. 224, 228, 64 P 290.

[79] Webster New Int. D.

[80] Standard Varnish Works v. U. S., 59 Fed. 456, 457, 8 CCA 178.

[81] Webster New Int. D.

[82] Pittsburgh, etc., R. Co. v. McCurdy, 114 Pa. 554, 557, 8 A 230, 60 AmR 363.

[83] Black L. D.

[a] **"One mode is as follows,** the circumstances being taken from Patrick's Case, East P. C. 678: The prisoner, with accomplices, being with their victim, pretend to find a ring wrapped in paper, appearing to be a jeweler's receipt for a 'rich, brilliant diamond ring.' They offer to leave the ring with the victim if he will deposit some money and his watch as a security. He lays down his watch and money, is beckoned out of the room by one of the confederates, while the others take away his watch, etc. This is a larceny." Black L. D. See Rex v. Watson, 2 Leach C. C. 640, 168 Reprint 422; Rex v. Marsh, 1 Leach C. C. 345, 168 Reprint 276; Rex v. Patch, 1 Leach C. C. 238, 168 Reprint 221.

Cheats generally see Cheat 11 C. J. p 747; False Pretenses 25 C. J. p 582; Gaming 27 C. J. p 961.

[84] See Prize Fighting § 1 text and note 4 [f].

[85] See Gaming § 120.

Validity of transaction see Gaming § 275.

[86] Webster New Int. D.

[87] Miller v. David, L. R. 9 C. P. 118, 125.

RIOT

By Francis J. Ludes

[Matters not in this Title, treated elsewhere in this Work, see Cross References infra p 828]

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CROSS REFERENCES

Affray 2 C. J. p 383.
Breach of the Peace 9 C. J. p 385.
Conviction of assault as bar see **Criminal Law** § 456.
Conviction of other offense under charge of riot see **Indictments and Informations** § 525.
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Joinder of charge of assault and battery see **Indictments and Informations** § 351.
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Militia 40 C. J. p 660.
Mob 40 C. J. p 1231.
Prize Fighting 50 C. J. p 411.
Unlawful Assembly [39 Cyc 831].

I. DEFINITION

[§ 1] **A. In General.** It has been said that a correct idea of the offense of riot is only to be obtained by analyzing the cases which have been decided.[1] However, a riot is commonly defined as a tumultuous disturbance of the peace by three or more persons, assembled and acting with a common intent; either in executing a lawful private enterprise in a violent and turbulent manner, to the terror of the people, or in executing an unlawful enterprise in a violent and turbulent manner.[2] The modern definition of riot is in harmony with and follows the common-law definition.[3] It has no technical import, as distinguished from its signification when used in the everyday affairs of life,[4] and the legal meaning of the word corresponds with the meaning given to it in ordinary usage,[5] and is practically synonymous with "mob" in legal usage.[6]

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[1] State v. Brazil, 24 S. C. L. 257.

[2] U. S.—U. S. v. Fenwick, 25 F. Cas. No. 15,086, 4 Cranch C. C. 675; U. S. v. Stewart, 27 F. Cas. No. 16,401a, 2 Hayw. & H. 280.

Ga.—Dixon v. State, 105 Ga. 787, 793, 31 SE 750; Jacobs v. State, 20 Ga. 839, 841.

Ill.—Darst v. Peo., 51 Ill. 286, 2 AmR 301.

Ind.—Kiphart v. State, 42 Ind. 273, 275; State v. Dillard, 5 Blackf. 365, 35 AmD 128; State v. Acra, 2 Ind. A. 384, 28 NE 570, 571.

Ky.—American Cent. Ins. Co. v. Stearns Lumber Co., 145 Ky. 225, 140 SW 148, 36 LRANS 566, AnnCas1913B 628; Spring Garden Ins. Co. v. Imperial Tobacco Co., 132 Ky. 7, 116 SW 234, 136 AmSR 164, 20 LRANS 277.

Mass.—Com. v. Runnels, 10 Mass. 518, 520, 6 AmD 148.

N. H.—State v. Russell, 45 N. H. 83, 84.

N. Y.—Marshall v. Buffalo, 50 App. Div. 149, 153, 64 NYS 411; Peo. v. White, 55 Barb. 606, 613; Peo. v. Judson, 11 Daly 1, 17.

N. C.—State v. Simpson, 12 N. C. 504, 505.

Pa.—Lycoming F. Ins. Co. v. Schwenk, 95 Pa. 89, 92, 40 AmR 629; Com. v. Cribs, Add. 277; In re Charge to Grand Jury, 4 PaLJ 29.

S. C.—State v. Sims, 16 S. C. 486, 490.

Utah.—Peo. v. O'Loughlin, 3 Utah 133, 149, 1 P 653.

Wis.—Aron v. Wausau, 98 Wis. 592, 597, 74 NW 354, 40 LRA 733.

Eng.—Clifford v. Brandon, 2 Campb. 358, 366, 170 Reprint 1183; Rex v. James, 5 C. & P. 153, 24 ECL 500, 172 Reprint 918; Rex v. Billingham, 2 C. & P. 234, 12 ECL 545, 172 Reprint 106; Reg. v. Cunninghame, 16 Cox C. C. 420; Reg. v. Soley, 11 Mod. 115, 116, 88 Reprint 935, 2 Salk. 594, 91 Reprint 503; Anonymous, 6 Mod. 43, 87 Reprint 806.

[a] **Hawkins' definition.**—"A tumultuous disturbance of the peace by three or more persons assembling together of their own authority, with an intent mutually to assist one another against any one who shall oppose them in the execution of some enterprise of a private nature, and afterward actually executing the same in a violent and turbulent manner, to the terror of the people, whether the act itself was lawful or unlawful." 1 Hawkins P. C. 513 [quot Roberts v. State, 21 Ark. 183, 185; Cherryvale v. Hawman, 80 Kan. 170, 101 P 994, 995, 133 AmSR 195, 23 LRANS 645, 18 AnnCas 149; Spring Garden Ins. Co. v. Imperial Tobacco Co., 132 Ky. 7, 116 SW 234, 236, 136 AmSR 164, 20 LRANS 277; Adamson v. New York, 188 N. Y. 255, 258, 80 NE 937, 117 AmSR 863, 10 LRANS 925; Marshall v. Buffalo, 50 App. Div. 149, 153, 64 NYS 411; People v. Judson, 11 Daly (N. Y.) 1, 83; State v. Hughes, 72 N. C. 25, 26; State v. Stalcup, 23 N. C. 30, 31, 35 AmD 732; Com. v. Martin, 7 Pa. Dist. 219, 225, 9 Kulp 69; State v. Johnson, 43 S. C. 123, 125, 20 SE 988; State v. Connolly, 37 S. C. L. 337, 338; State v. Brazil, 24 S. C. L. 257, 260; State v. Brooks, 19 S. C. L. 361, 362; State v. Cole, 13 S. C. L. 117, 119; State v. Creighton, 10 S. C. L. 256, 257; Reg. v. Kelly, 6 U. C. C. P. 372]; American Cent. Ins. Co. v. Stearns Lumber Co., 145 Ky. 255, 140 SW 148, 149, 36 LRA NS 566, AnnCas1913B 628; London, etc., F. Ins. Co. v. Bolands, Ltd., [1924] A. C. 836. To same effect Bouvier L. D.; 1 Russell Crimes p 265 [quot Spring Garden Ins. Co. v. Imperial Tobacco Co., 132 Ky. 7, 116 SW 234, 136 AmSR 164, 20 LRANS 277].

[b] **Lord Coke's definition.**—"Riot, in the common law, signifieth when three or more do any unlawful act, as to beat a man, or to hurt him in his park, chase, or warren, or to enter or take possession of another man's land, or to cut or destroy his corn, grass, or other profit." Coke Litt. [quot Peo. v. O'Loughlin, 3 Utah 133, 147, 1 P 653].

[c] **Lord Holt's definition.**—"If a number of men assemble with arms, in terrorem populi, although no act be done, it is a riot." Reg. v. Soley, 11 Mod. 115, 116, 88 Reprint 935, 2 Salk. 594, 91 Reprint 503 [quot State v. Brazil, 24 S. C. L. 257, 260].

[d] **Blackstone's definition.**—"A 'riot' is where three or more actually do an unlawful act of violence, either with or without a common cause or quarrel, as, if they beat a man, or hunt and kill game in another's park, chase, warren, or liberty, or do any other unlawful act with force and violence, or even do a lawful act, as removing a nuisance, in a violent and tumultuous manner." 4 Blackstone Comm. 146, 147 [quot Spring Garden Ins. Co. v. Imperial Tobacco Co., 132 Ky. 7, 116 SW 234, 235, 136 AmSR 164, 20 LRANS 277; Marshall v. Buffalo, 50 App. Div. 149, 153, 64 NYS 411; Peo. v. Judson, 11 Daly (N. Y.) 1, 56; Spruill v. North Carolina Mut. L. Ins. Co., 46 N. C. 126, 127; State v. Sims, 16 S. C. 486, 490].

[e] **Bishop's definition.**—"Such disorderly conduct in three or more assembled persons, actually accomplishing an object, as is calculated to terrify others." 2 Bishop Cr. L. § 1143 [quot Spring Garden Ins. Co. v. Imperial Tobacco Co., (Ky.) 116 SW 234, 236; Marshall v. Buffalo, 50 App. Div. 149, 153, 64 NYS 411; Peo. v. O'Loughlin, 3 Utah 133, 147, 1 P 653].

[f] **Statutory definitions.**—(1) "Any use of force or violence, or any threat to use force or violence if accompanied by immediate power of execution, by three or more persons acting together and without authority of law is riot." Okl. Comp. L. (1909) § 2497; Lord Or. L. § 2068; Johnson v. State, 16 Okl. Cr. 428, 183 P 926; Proctor v. State, 5 Okl. Cr. 553, 115 P 630; Crawford v. Ferguson, 5 Okl. Cr. 377, 115 P 278, 45 LRANS 519; Cochran v. State, 4 Okl. Cr. 379, 111 P 974; State v. Stephanus, 53 Or. 135, 99 P 428, 17 AnnCas 1146; State v. Seeley, 51 Or. 131, 94 P 37; State v. Mizis, 48 Or. 165, 85 P 611, 86 P 361. (2) "If three or more persons

For **later cases, developments** and **changes** in the law see **Annotations,** same title and section number.

Inciting to riot. The gist of this offense is its tending to provoke a breach of the peace, even though the parties may have assembled in the first instance for an innocent purpose,[7] and it is an offense at common law.[8]

[§ 2] **B. Distinguished from Other Offenses.** Riot, rout, and unlawful assembly are kindred offenses and the greater includes the less;[9] yet the several offenses are clearly distinguishable each from the others.[10] A rout differs from a riot in that the persons do not actually execute their purpose, but only make some motion towards its execution;[11] but what degree of execution of their purpose will convert a rout into a riot may often be difficult to determine.[12] An unlawful assembly differs from a riot in that if the parties assemble in a tumultuous manner, and actually execute their purpose with violence, it is a riot; but if they merely meet upon a purpose, which, if executed, would make them rioters, and, having done nothing, they separate without carrying their purpose into effect, it is an unlawful assembly.[13] Riot is an offense distinct from affray,[14] insurrection,[15] treason,[16] or trespass.[17]

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shall assemble together with intent to do any unlawful act with force and violence against the person or property of another, or to do any unlawful act against the peace," etc. Kan. Gen. St. (1901) § 2269; Cherryvale v. Hawman, 80 Kan. 170, 101 P 994, 133 AmSR 195, 23 LRANS 645, 18 AnnCas 149. (3) "If two or more persons do an unlawful act of violence or any other act in a violent and tumultuous manner, they shall be guilty of a riot," etc. Ga. Pen. Code § 354; Dixon v. State, 105 Ga. 787, 31 SE 750. (4) "Any use of force or violence disturbing the public peace, or any threat to use such force and violence, if accompanied by immediate power of execution, by two or more persons acting together and without authority of law is a riot." Peo. v. Ortiz, 17 Porto Rico 1149; Peo. v. O'Loughlin, 3 Utah 133, 1 P 653; Porto Rico Pen. Code § 359; Utah Comp. L. § 5054 p 614.

[g] **Other definitions.**—(1) "If parties assemble in a tumultuous manner, and actually execute their purpose with violence, it is a riot at common law." State v. Stephanus, 53 Or. 135, 99 P 428, 17 AnnCas 1146. (2) "Where three or more actually do an unlawful act of violence, either with or without a common cause of quarrel, or do a lawful act in a violent or tumultuous manner." Com. v. Martin, 7 Pa. Dist. 219, 225, 9 Kulp 69. (3) An unlawful act committed with force and violence by three or more constitutes a riot. Burrill L. D.; Stroud Jud. D. [quot Marshall v. Buffalo, 50 App. Div. 149, 153, 64 NYS 411]. (4) "The tumultuous disturbance of the public peace by an unlawful assembly of three or more persons, in the execution of some private object." Webster D. [quot Spring Garden Ins. Co. v. Imperial Tobacco Co., 132 Ky. 7, 116 SW 234, 136 AmSR 164, 20 LRANS 277]. (5) "A riot is (a) where an unlawful assembly has actually begun to execute the purpose for which it is assembled, by a breach of the peace and to the terror of the public; or (b) where a lawful assembly has formed and proceeded to execute an unlawful purpose to the terror of the people, although they had not that purpose when they assembled." Clark Elem. L. p 119.

[3] Ky.—Spring Garden Ins. Co. v. Imperial Tobacco Co., 132 Ky. 7, 116 SW 234, 136 AmSR 164, 20 LRANS 277.

La.—Dupin v. Mutual Ins. Co., 5 La. Ann. 482.

Me.—State v. Snow, 18 Me. 346.

Mass.—Com. v. Gibney, 2 Allen 150.

N. C.—State v. Hughes, 72 N. C. 25; State v. Stalcup, 23 N. C. 30, 35 AmD 732.

Pa.—Lycoming F. Ins. Co. v. Schwenk, 95 Pa. 89, 40 AmR 629.

Wis.—Aron v. Wausau, 98 Wis. 592, 74 NW 354, 40 LRA 733.

"Brawls" defined 9 C. J. p 319.

[4] Spring Garden Ins. Co. v. Imperial Tobacco Co., 132 Ky. 7, 116 SW 234, 136 AmSR 164, 20 LRANS 277.

[5] Spring Garden Ins. Co. v. Imperial Tobacco Co., supra.

[a] **"Riot," as used in a life policy,** wherein it is provided that the policy shall be void if the insured die by means of any riot, means where three or more persons actually do some unlawful act, either with or without a common cause. Spruill v. North Carolina Mut. L. Ins. Co., 46 N. C. 126, 127.

[b] **As used in L. (1855) c 428,** making a city liable for "property destroyed by riot," which act was passed before riot was made a statutory crime, the word is to be construed as having its common-law meaning. Marshall v. Buffalo, 50 App. Div. 149, 153, 64 NYS 411.

[6] Marshall v. Buffalo, supra.

"Mob" defined 40 C. J. p 1231.

"Mob violence" defined 40 C. J. p 1232.

[7] Com. v. Esick, 65 Pa. Super. 498; Com. v. Zeber, 65 Pa. Super. 497; Com. v. Weston, 65 Pa. Super. 497; Com. v. Detwiler, 65 Pa. Super. 494; Com. v. Tepsick, 65 Pa. Super. 493; Com. v. Blum, 65 Pa. Super. 493; Com. v. Merrick, 65 Pa. Super. 482, 499.

[a] **Counseling must be done** in such a manner that it carries with it the force of the crime. Peo. v. Echavarria, 29 Porto Rico 824.

[8] U. S. v. Fenwick, 25 F. Cas. No. 15,086, 4 Cranch C. C. 675; Com. v. Merrick, 65 Pa. Super. 499; Com. v. Esick, 65 Pa. Super. 498; Com. v. Zeber, 65 Pa. Super. 497; Com. v. Weston, 65 Pa. Super. 497; Com. v. Detwiler, 65 Pa. Super. 494; Com. v. Tepsick, 65 Pa. Super. 493; Com. v. Blum, 65 Pa. Super. 493; Com. v. Merrick, 65 Pa. Super. 482.

[9] State v. Sumner, 29 S. C. L. 599, 42 AmD 387; State v. Brazil, 24 S. C. L. 257, 258; Hawkins P. C. c 65 § 9 [quot Follis v. State, 37 Tex. Cr. 535, 537, 40 SW 277].

[10] State v. Sumner, 29 S. C. L. 599, 42 AmD 387; Hawkins P. C. c 65 § 9 [quot Follis v. State, 37 Tex. Cr. 535, 537, 40 SW 277].

[a] **Apt illustration of distinctions.**—"If three or more persons meet together for the purpose of beating another who lives a mile off, there is an unlawful assembly. While they are on the road to carry out the purpose, there is a rout. Where they make the attack and beat him, there is a riot." Clark Elem. L. p 119.

[11] State v. Sumner, 29 S. C. L. 599, 42 AmD 387; Peo. v. Alonso, 19 Porto Rico 426.

[a] **A rout** is (1) "where three or more meet to do an unlawful act upon a common ground, . . . and make some advances towards it." Blackstone Comm. [quot Peo. v. Judson, 11 Daly (N. Y.) 1, 56]. (2) "A tumultuous meeting of three or more persons upon some common purpose, to do an unlawful act, making some motion towards its execution." State v. Sumner, 29 S. C. L. 599, 600, 42 AmD 387. (3) "An assembly moving forward towards the execution of its unlawful design." Follis v. State, 37 Tex. Cr. 535, 40 SW 277 [quot Hawkins P. C. c 65 § 9]. (4) "An unlawful assembly which has made a motion toward the execution of the common purpose of the persons assembled." Clark Elem. L. p 119.

[12] State v. Sumner, 29 S. C. L. 599, 42 AmD 387.

See U. S. v. Fenwick, 25 F. Cas. No. 15,086, 4 Cranch C. C. 675 (it is not necessary that an act of violence should have been perpetrated).

[13] State v. Stephanus, 53 Or. 135, 99 P 428, 17 AnnCas 1146; Rex v. Birt, 5 C. & P. 154, 24 ECL 501, 172 Reprint 919; Reg. v. Pugh, Holt K. B. 636, 90 Reprint 1251.

Purpose of original assembly see infra §§ 6, 7.

Unlawful assembly generally see Unlawful Assembly [39 Cyc 831].

[14] See Affray § 6.

[a] **An unlawful assembly,** riotously and tumultuously disturbing the selectmen of a town in the exercise of their duty on a public day and in a public place and obstructing the inhabitants of the town in the use of their constitutional privilege of election is a riot, and not an affray. Com. v. Runnels, 10 Mass. 518, 6 AmD 148.

[15] See Insurrection § 3.

[16] See cases infra this note.

[a] **The offense is not treason** if the object of the assembly is to resist a statute, but not to overthrow government. Aron v. Wausau, 98 Wis. 592, 74 NW 354, 40 LRA 733.

[b] **"Riot, insurrection, and civil commotion"** were held to import occasional local or temporary outbreaks of unlawful violence, which, though temporarily destructive in their effects, did not rise to the proportions of organized rebellion against the government. Boon v. Ætna Ins. Co., 40 Conn. 575, 584.

Treason generally see Treason [38 Cyc 950].

[17] See cases infra this note.

[a] **A trespass** is the disturbance

II. NATURE AND ELEMENTS OF OFFENSE[18]

[§ 3] **A. In General.** Riot is essentially an offense against the public peace and good order, and looks to this rather than an infraction of the personal rights of any particular individual as such.[19] It involves the execution of an agreement, express or implied between three or more persons to commit an assault or battery or a breach of the peace.[20] In some jurisdictions it is held to be composed of three necessary elements: (1) An unlawful assembly; (2) an intent mutually to assist against lawful authority; (3) acts of violence.[21] Under statutes in some jurisdictions, the elements of the crime are the use of force or violence, or threats to use force and violence accompanied by immediate power of execution;[22] and unless these elements exist, there can be no riot.[23] In England, the following elements have been held necessary: (1) A number of persons, three at least; (2) a common purpose; (3) the execution or inception of the common purpose; (4) an intent to help one another by force if necessary against any person who may oppose them in the execution of their common purpose; and (5) force or violence not merely used in demolishing a building, but displayed in such a manner as to alarm at least one person of reasonable firmness and courage.[24] The place where the riot occurs is immaterial.[25]

[§ 4] **B. Acts Constituting Offense.**[26] The violent and turbulent enterprises of bodies of men have uniformly been considered as dangerous to the rights of other citizens.[27] Thus where a band of persons makes an uproar and displays arms,[28] or marches on a public street with violence and without a permit,[29] or makes an assault accompanied with loud threats and threatening display of force,[30] or forcibly destroys the property of another,[31] a riot may be committed, often in combination with another offense. Civil officers may commit a riot by a digression from the line of duty.[32] Mischief makers may become rioters while indulging in a charivari,[33] or in holi-

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of another in the enjoyment of a lawful right, and if it is done by numbers unlawfully combined, the same act is a riot. Com. v. Runnels, 10 Mass. 518, 6 AmD 148 [quot Peo. v. O'Loughlin, 3 Utah 133, 1 P 653].

[18] **Felony or misdemeanor** see infra § 40.

[19] Taylor v. State, 8 Ga. A. 241, 68 SE 945.

[20] Perkins v. State, (Okl. Cr.) 250 P 544.

[21] State v. Hoffman, (N. C.) 154 SE 314.

Definition of offense see supra § 1.

[22] Cochran v. State, 4 Okl. Cr. 379, 111 P 974.

Statutory definitions see supra § 1.

[23] Cochran v. State, 4 Okl. Cr. 379, 111 P 974.

[24] Pitchers v. Surrey County, [1923] 2 K. B. 57; Ford v. Metropolitan Police, [1921] 2 K. B. 344; Field v. Metropolitan Police, [1907] 2 K. B. 853; Boggan v. Motor Union Ins. Co., [1922] 2 Ir. 184, 222.

[25] See cases infra this note.

[a] **Public place.**—It is not necessary that the act constituting a riot must be committed in a public place. Carmody v. State, 178 Ind. 158, 98 NE 870.

[b] **Military camp.**—A riot is a riot even though the rioters are soldiers and it takes place in a military camp. Pitchers v. Surrey County, 39 T. L. R. 7.

[26] **Evidence to establish riot** see infra § 33.

[27] Com. v. Cribs, Add. (Pa.) 277; Higgins v. Minaghan, 78 Wis. 602, 47 NW 941, 23 AmSR 428, 11 LRA 138.

[a] **Kicking a foot ball** in a town, although an amusement, when accompanied by circumstances of noise and tumult, such as were calculated to excite terror and alarm among the inhabitants of the town, was said to be a riot. 2 Chitty Cr. L. p 494 [cit State v. Brazil, 24 S. C. L. 257, 261].

[28] See cases infra this note.

[a] **Arming of men,** to the number of three or more, with guns, in organized force, in a peaceful neighborhood, to the terror of the citizens, is riot. Com. v. Armstrong, 11 Phila. (Pa.) 656.

[b] **Where three men in front of a house at night** curse and threaten the occupant in loud voices, repeatedly firing a gun, thereby greatly frightening him and the members of his family, each participating in such conduct, they are all guilty of riot. Lewis v. State, 2 Ga. A. 659, 58 SE 1070.

[29] Com. v. Frishman, 235 Mass. 449, 126 NE 838.

[30] Ga.—Stafford v. State, 93 Ga. 207, 19 SE 50; Stokes v. State, 73 Ga. 816; Rachels v. State, 51 Ga. 374; Jacobs v. State, 20 Ga. 839.

Ill.—Logg v. Peo., 92 Ill. 598.

Ind.—Bolin v. State, 193 Ind. 302, 139 NE 659; Kiphart v. State, 42 Ind. 273; State v. Acra, 2 Ind. A. 384, 28 NE 570.

N. H.—State v. Russell, 45 N. H. 83.

S. C.—State v. Jackson, 28 S. C. L. 13.

Tex.—McKinney v. State, (Cr.) 68 SW 176.

[a] **Illustrations.**—(1) Where defendant and another assaulted complaining witness under circumstances indicating a previous agreement to use violence. Stafford v. State, 93 Ga. 207, 19 SE 50. (2) Where committee, presenting request to foreman, came with hundreds of followers shouting demands, and frightened the foreman's wife. Bolin v. State, 193 Ind. 302, 139 NE 659. (3) Where persons in a riotous, tumultuous, and violent manner attempt to commit a violent injury on the person of another, violently threatening to beat, cut, and shoot him, the offense is riot. State v. Acra, 2 Ind. A. 384, 28 NE 570. (4) Where persons assemble for the purpose and with the intent of violently beating, bruising, and injuring another person, and actually carry out that purpose. McKinney v. State, (Tex. Cr.) 68 SW 176.

[b] **An assault** committed by three or more with a preconceived intent has been held to constitute a riot. Peo. v. White, 55 Barb. 606 [aff 32 N. Y. 465].

[31] Spring Garden Ins. Co. v. Imperial Tobacco Co., 132 Ky. 7, 116 SW 234, 236, 136 AmSR 164, 20 LRANS 277; Lycoming F. Ins. Co. v. Schwenk, 95 Pa. 89, 40 AmR 629; State v. Brooks, 19 S. C. L. 361.

[a] **Where a breaker at a coal mine** was set afire at night by a party of men who fired a number of shots and drove the watchman away, there was riot. Lycoming F. Ins. Co. v. Schwenk, 95 Pa. 89, 96, 40 AmR 629.

[b] **Five masked men, forcibly breaking at night into a dwelling house,** and compelling the occupant to vacate, under threats of personal violence, and then burning the building, constitutes a riot, within the meaning of a fire insurance policy stipulating against loss or damage by fire caused by riot, etc. Germania F. Ins. Co. v. Deckard, 3 Ind. A. 361, 28 NE 868.

[32] See cases infra this note.

[a] **Where police officers forcibly and turbulently** take property which may not lawfully be taken without an order of court, they are guilty of riot. Darst v. Peo., 51 Ill. 286, 2 AmR 301.

[b] **An officer cannot break down the doors** of an outbuilding when he holds an execution, without a previous demand and refusal to open them, and if he does he may be guilty of riot. Douglass v. State, 6 Yerg. (Tenn.) 525.

[c] **If a sheriff and posse,** on the way to take a felon, turn aside and attack a peaceable unoffending citizen, both the sheriff and posse would be guilty of riot. State v. Cole, 13 S. C. L. 117.

[d] **An information will lie** for a riotous entry into a house after the expiration of the term to enforce a forfeiture. Rex v. Stroude, 2 Show. 149, 89 Reprint 852.

[33] State v. Brown, 69 Ind. 95, 35 AmR 210; Bankus v. State, 4 Ind. 114; Higgins v. Minaghan, 78 Wis. 602, 47 NW 941, 23 AmSR 428, 11 LRA 138.

day celebrations.[34] Intimidating[35] or resisting[36] civil officers may constitute a riot and so may the coercion of workmen.[37] Malicious mischief,[38] night disorders,[39] pole raising,[40] and prize fights[41] may also become riots. The forcible appropriation of property is an act of riotous tendency,[42] while public meetings[43] are prolific sources of this offense. A disturbance at a theater may result in riot[44] and an act of trespass is often accompanied by it.[45]

[§ 5] **C. Number of Persons Necessary.** The common-law rule requires that three or more persons must act together in committing the offense,[46] and most of the statutes defining riot provide that the offense cannot be committed by less than three persons;[47] but a number of states, in their riot statutes, fix the minimum number of persons at two.[48]

34. Madisonville v. Bishop, 113 Ky. 106, 67 SW 269, 23 KyL 2363, 57 LRA 130.

[a] **Where one thousand people** were assembled in the main street of a city celebrating Christmas by obstructing traffic and discharging bombs and skyrockets and other missiles loaded with powerful explosives, at private property, endangering life and preventing the use of the street for business, such conduct was held riotous. Madisonville v. Bishop, 113 Ky. 106, 67 SW 269, 23 KyL 2363, 57 LRA 130. But see Aron v. Wausau, 98 Wis. 592, 74 NW 354, 40 LRA 733 (where a street was occupied by a crowd of thirty or more persons obstructing the sidewalks and unlawfully exploding firecrackers and other fireworks whereby plaintiff was injured, such conduct was held not riotous as there was nothing to indicate that the crowd had any common intent or purpose).

35. U. S. v. Stewart, 27 F. Cas. No. 16,401a, 2 Hayw. & H. 280; Green v. State, 109 Ga. 536, 35 SE 97.

[a] **Illustrations.**—(1) Where a crowd, bearing deadly weapons and acting in an excited manner, prevented a sheriff and his posse from removing a prisoner from a jail. Green v. State, 109 Ga. 536, 35 SE 97. (2) Where three or more persons opposed the mayor in keeping the polls open and preserving the peace on election day. U. S. v. Stewart, 27 F. Cas. No. 16,401a, 2 Hayw. & H. 280.

36. State v. Seeley, 51 Or. 131, 94 P 37.

[a] **Although not terrifying others,** an assault upon and beating of peace officers in a tumultuous manner has been held to constitute a riot. State v. Sims, 16 S. C. 486.

37. Peo. v. O'Loughlin, 3 Utah 133, 1 P 653.

38. State v. Alexander, 41 S. C. L. 5.

Malicious mischief generally see 38 C. J. p 356.

39. Com. v. Cribs, Add. (Pa.) 277.

[a] **Illustration.**—Thus, where a band of men, consisting of eight or ten persons, disguised, paraded at night through the streets of a town, armed with guns or pistols, or both, and marched backward and forward through the streets, shooting guns and blowing horns, to the terror and alarm of the inhabitants, they were guilty of a riot. State v. Brazil, 24 S. C. L. 257, 258.

40. Com. v. Morrison, Add. (Pa.) 274.

41. State v. Sumner, 29 S. C. L. 599, 42 AmD 387.

[a] **Illustration.**—Where one thousand spectators were assembled and a magistrate forbade the fight, whereupon a person in the crowd insisted that the fight proceed and the magistrate attempted to arrest him, and a tumult arose and a forcible rescue was accomplished. Rex v. Billingham, 2 C. & P. 234, 12 ECL 545, 172 Reprint 106.

42. State v. Simpson, 12 N. C. 504.

43. See cases infra this note.

[a] **Thus** (1) where a call of a public meeting is addressed exclusively to persons favorable to its objects, the interference of individuals hostile to its proceedings, and the breaking up and dispersion of the meeting by them, is a riot of a flagrant kind. Com. v. Daley, 4 PaLJ 150. (2) So where three or more persons by agreement go to a church where divine service is to be performed, and laugh and talk during the performance of the same in a manner which might be excusable in a tavern, and in so doing manifest a determination to resist by force any effort that may be made to remove them, or prevent their so doing, they are guilty of riot. Com. v. Dupuy, Brightly (Pa.) 44. (3) And where a public meeting is called to concert measures for the relief of certain persons in custody, and a magistrate, fearing a disturbance, posts a notice to the effect that the meeting will not be permitted; and the police, under such a notice, attempt to prevent such an assembly and three or more persons attempt to break through the cordon of police to reach the place of assembly, such an attempt has been held to constitute a riot. Reg. v. Cunninghame, 16 Cox C. C. 420.

44. Peo. v. Judson, 11 Daly (N. Y.) 1.

[a] **Hissing actor.**—If a body of men go to the theater with the settled intention of hissing an actor and thereupon effect this object by tumult and disorder they are guilty of riot. Clifford v. Brandon, 2 Campb. 358, 366, 170 Reprint 1183.

45. U. S.—U. S. v. Fenwick, 25 F. Cas. No. 15,086, 4 Cranch C. C. 675.

Ga.—Sanders v. State, 60 Ga. 126.

Ind.—State v. Scaggs, 6 Blackf. 37.

Nebr.—Meese v. State, 15 Nebr. 558, 560, 20 NW 33.

Va.—Samanni v. Com., 16 Gratt. (57 Va.) 543.

Eng.—Rex v. Wyvill, 7 Mod. 286, 87 Reprint 1245.

[a] **Illustrations.**—(1) An assemblage for the purpose of seizing a man without lawul authority, executed by tumultuously surrounding his house, and entering it, is a riot. U. S. v. Fenwick, 25 F. Cas. No. 15,086, 4 Cranch C. C. 675. (2) Where four persons violently and unlawfully burst open an outer door of a dwelling-house and then and there tear down and carry off one of the window shutters, accompanying these acts by throwing missiles against the house, a riot is committed. State v. Scaggs, 6 Blackf. (Ind.) 37.

46. U. S.—U. S. v. Fenwick, 25 F. Cas. No. 15,086, 4 Cranch C. C. 675; U. S. v. Stewart, 27 F. Cas. No. 16,401a, 2 Hayw. & H. 280.

Ala.—Thompson v. State, 106 Ala. 67, 17 S 512.

Fla.—Ammons v. State, 9 Fla. 530.

Ky.—White v. Com., 10 Bush. 557.

Md.—Beard v. State, 74 Md. 130, 21 A 700.

Mass.—Com. v. Gibney, 2 Allen 150.

Mich.—Stout v. Keyes, 2 Dougl. 184, 43 AmD 465.

N. H.—State v. Russell, 45 N. H. 83.

Pa.—Shouse v. Com., 5 Pa. 83; Com. v. Dupuy, Brightly 44.

S. C.—State v. Jackson, 28 S. C. L. 13.

Tenn.—State v. Allison, 3 Yerg. 428.

Eng.—Reg. v. Cunninghame, 16 Cox C. C. 420; Reg. v. Ellis, Holt K. B. 636, 90 Reprint 1252; Rex v. Sudbury, 12 Mod. 262, 88 Reprint 1309, 2 Salk. 593, 91 Reprint 502.

[a] **Illustration.**—"By the common law, where three persons are together for a common, unlawful purpose, and acting in concert, it is not necessary, to constitute a riot, that all should do some physical act. It is enough, if two, or perhaps one, does the unlawful deed, if the other be aiding, assisting and abetting. He becomes an actor by aiding and abetting. Suppose one actually pulls down a building, while the other two stand by to watch and keep others off, they become participators in the act." State v. Straw, 33 Me. 554, 556.

47. See statutory provisions; and cases infra this note.

[a] **Two persons** acting together cannot commit a riot. Proctor v. State, 5 Okl. Cr. 553, 115 P 630.

[b] **Where two of an assembly** of persons flog another, the offense is riot, involving concert of action between three or more persons. Perkins v. State, (Okl. Cr.) 250 P 544.

[c] **A negro servant or slave** with two white persons may commit a riot. State v. Calder, 13 S. C. L. 462; State v. Thackham, 1 S. C. L. 358.

[d] **That the same identical act** should be done by three persons is unnecessary, it being sufficient if they had a common purpose to do the act complained of, or were engaged in aiding or assisting one another in accomplishing such common purpose, although the individual act of each was separate from that of the others. State v. Mizis, 48 Or. 165, 85 P 611, 86 P 361.

48. See statutory provisions; and cases infra this note.

[a] **One person alone** cannot commit a riot. State v. Egan, 10 La. Ann. 698; Peo. v. O'Loughlin, 3 Utah 133, 1 P 653; Harison v. Errington, Poph. 202, 79 Reprint 1292.

[b] **Where a single person** is engaged in an act of violence, and others stand by encouraging him without yielding physical aid, there is no riot. Scott v. U. S., Morr. (Iowa) 142.

[c] **Where four persons were jointly tried** and convicted, it was held error to sustain a writ of certiorari on ground of insufficiency of evidence as to three of the defendants, because one person cannot com-

Further the statute may make the number depend upon whether arms are carried.[49]

[§ 6] **D. Purpose of Original Assembly—1. Lawful.** It is not necessary that the riotous violence should have been premeditated by the assembled perpetrators;[50] therefore the original assembly may have been by accident or for a lawful purpose.[51] To this view there is a dissenting opinion; but it seems to be based on an erroneous idea of what had been the English rule,[52] the early English cases holding that where, in a lawful assembly, a sudden fray happens "between" the persons assembled, there is no riot,[53] but if a stranger is attacked,[54] or the assembly was originally unlawful,[55] a riot is accomplished.

[§ 7] **2. Unlawful.** If parties assemble unlawfully[56] or for an unlawful purpose,[57] and execute any part of an unlawful purpose with violence,[58] such acts may make a riot.

[§ 8] **E. Mutual or Common Intent and Concert of Action.** It has been said that "a mutual intent to assist one another against any who shall oppose them" is an element of the offense of riot,[59] but it seems that, while this specific intention may be held by rioters, it is not in general essential to the offense,[60] and a previous agreement[61] or conspiracy need not be shown.[62] The intention which is generally an element of the offense is the intent to join in or encourage the acts which constitute the riot, namely, the assembly, violence, turbulence, and the act violently and turbulently performed.[63] In some jurisdictions it is necessary that there be concert

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mit the offense of riot. Lewis v. State, 5 Ga. A. 496, 63 SE 570.

[49] See statutory provisions.

[50] U. S.—U. S. v. Peaco, 27 F. Cas. No. 16,018, 4 Cranch C. C. 601.

Me.—State v. Snow, 18 Me. 346.

N. Y.—Peo. v. Judson, 11 Daly 1.

S. C.—State v. Cole, 13 S. C. L. 117.

Eng.—Reg. v. Ellis, Holt K. B. 636, 90 Reprint 1252.

[51] U. S.—U. S. v. McFarland, 26 F. Cas. No. 15,674, 1 Cranch C. C. 140.

Ind.—Bolin v. State, 193 Ind. 302, 139 NE 659.

Ky.—Louisville v. Lougher, 209 Ky. 299, 272 SW 748.

Me.—State v. Snow, 18 Me. 346.

Mass.—Com. v. Runnels, 10 Mass. 518, 6 AmD 148.

N. Y.—Solomon v. Kingston, 24 Hun 562 [aff 96 N. Y. 651].

Oh.—Champaign County v. Church, 62 Oh. St. 318, 57 NE 50, 78 AmSR 718, 48 LRA 738.

Pa.—Com. v. Cribs, Add. 277.

S. C.—State v. Cole, 13 S. C. L. 117.

Tex.—Blackwell v. State, 30 Tex. A. 672, 18 SW 676.

Wis.—State v. Dean, 71 Wis. 678, 38 NW 341.

Eng.—Rex v. Hubson, East P. C. 258; Reg. v. Ellis, Holt K. B. 636, 90 Reprint 1252.

[a] **Where persons assembled for a lawful purpose,** do afterwards associate together to commit an unlawful act, such association will be considered as assembling together for that purpose. State v. Cole, 13 S. C. L. 117.

[b] **If a sudden disturbance** arises among persons meeting together for an innocent purpose, they will be guilty of a mere affray; but if they form parties and engage in violent proceedings with promise of mutual assistance, or if impelled with a sudden disposition to demolish buildings, they are rioters, and are not excused by the propriety of their original design. Com. v. Esick, 65 Pa. Super. 498; Com. v. Zeber, 65 Pa. Super. 497; Com. v. Weston, 65 Pa. Super. 497; Com. v. Detwiler, 65 Pa. Super. 494; Com. v. Tepsick, 65 Pa. Super. 493; Com. v. Blum, 65 Pa. Super. 493, 498; Com. v. Merrick, 65 Pa. Super. 482, 499.

[c] **After the assemblage has been formed,** if the public speaker or his hearers should engage in any unlawful speech or conduct of such a nature as to be reasonably calculated to produce a breach of the peace, the assemblage would become unlawful, and if fights or affrays should result therefrom, a riot would be created. Louisville v. Lougher, 209 Ky. 299, 272 SW 748.

[d] **The purpose** for which persons, who do an act in a violent and tumultuous manner, may have assembled is no part of the crime under the statute. Bolin v. State, 193 Ind. 302, 139 NE 659.

[52] State v. Hoffman, (N. C.) 154 SE 314; State v. Hughes, 72 N. C. 25; Spruill v. North Carolina Mut. L. Ins. Co., 46 N. C. 126; State v. Stalcup, 23 N. C. 30, 35 AmD 732 (where the English case [Rex v. Birt, 5 C. & P. 154, 24 ECL 501, 172 Reprint 919] does not bear out the opinion).

[53] Reg. v. Ellis, Holt K. B. 636, 90 Reprint 1252; Anonymous, 6 Mod. 43, 87 Reprint 806.

[54] Reg. v. Ellis, Holt K. B. 636, 90 Reprint 1252.

[55] Anonymous, 6 Mod. 43, 87 Reprint 806.

[56] State v. Johnson, 89 Iowa 594, 57 NW 302; Meese v. State, 15 Nebr. 558, 20 NW 33; Com. v. Kinney, 2 Va. Cas. (4 Va.) 139.

[57] U. S.—U. S. v. Fenwick, 25 F. Cas. No. 15,086, 4 Cranch C. C. 675; U. S. v. Peaco, 27 F. Cas. No. 16,018, 4 Cranch C. C. 601.

Ga.—Fisher v. State, 78 Ga. 258.

Ind.—State v. Scaggs, 6 Blackf. 37.

Iowa.—State v. Johnson, 89 Iowa 594, 57 NW 302.

Nebr.—Meese v. State, 15 Nebr. 558, 20 NW 33.

N. H.—State v. Batchelder, 5 N. H. 549.

Porto Rico.—Peo. v. Ortiz, 17 Porto Rico 1149.

Va.—Com. v. Kinney, 2 Va. Cas. 139.

Eng.—Rex v. Birt, 5 C. & P. 154, 24 ECL 501, 172 Reprint 919.

[58] See infra § 12.

[59] U. S. v. Fenwick, 25 F. Cas. No. 15,086, 4 Cranch C. C. 675; Peo. v. Judson, 11 Daly (N. Y.) 1; In re Charge to Grand Jury, 4 PaLJ 29; State v. Connolly, 37 S. C. L. 337; State v. Cole, 13 S. C. L. 117.

[60] U. S.—U. S. v. McFarland, 26 F. Cas. No. 15,674, 1 Cranch C. C. 140.

Ga.—Jemley v. State, 121 Ga. 346, 49 SE 292.

Mass.—Com. v. Berry, 5 Gray 93.

N. H.—State v. Russell, 45 N. H. 83; State v. Renton, 15 N. H. 169.

N. Y.—Peo. v. Judson, 11 Daly 1.

Pa.—In re Charge to Grand Jury, 4 PaLJ 29.

[a] **"It would be endless,** as well as superfluous, to examine whether every particular person engaged in a riot was in truth one of the first assembly, or had a previous knowledge of their design." In re Charge to Grand Jury, 4 PaLJ 29, 32.

See to same effect Com. v. Merrick, 65 Pa. Super. 499; Com. v. Blum, 65 Pa. Super. 498; Com. v. Esick, 65 Pa. Super. 498; Com. v. Zeber, 65 Pa. Super. 497; Com. v. Weston, 65 Pa. Super. 497; Com. v. Detwiler, 65 Pa. Super. 494; Com. v. Tepsick, 65 Pa. Super. 493; Com. v. Blum, 65 Pa. Super. 493; Com. v. Merrick, 65 Pa. Super. 482.

[b] **Premeditation** by three or more persons assembled, or promises of mutual assistance, before or at the time of committing the actual violence are unnecessary. U. S. v. Peaco, 27 F. Cas. No. 16,018, 4 Cranch C. C. 601. But see State v. Snow, 18 Me. 346 (holding that there must be some degree of premeditation for the execution of a common purpose).

[61] Peo. v. Alonso, 19 Porto Rico 426.

[62] Grier v. State, 11 Ga. A. 767, 76 SE 70.

[63] Ga.—Hunter v. State, 127 Ga. 43, 55 SE 1044; Baptist v. State, 109 Ga. 546, 35 SE 658; Tripp v. State, 109 Ga. 489, 34 SE 1021; Dixon v. State, 105 Ga. 787, 31 SE 750; Prince v. State, 30 Ga. 27; Nowell v. State, 32 Ga. A. 505, 123 SE 908; Walker v. State, 17 Ga. A. 525, 87 SE 711; Grier v. State, 11 Ga. A. 767, 76 SE 70; Lewis v. State, 5 Ga. A. 496, 63 SE 570, 571; Croy v. State, 4 Ga. A. 457, 61 SE 847; Stanfield v. State, 1 Ga. A. 532, 57 SE 953.

Me.—State v. Snow, 18 Me. 346, 347.

Mass.—Com. v. Runnels, 10 Mass. 518, 6 AmD 148.

N. Y.—Peo. v. Judson, 11 Daly 1.

Oh.—Champaign County v. Church, 62 Oh. St. 318, 348, 57 NE 50, 78 AmSR 718, 48 LRA 738.

Okl.—Casteel v. State, 13 Okl. Cr.

of action.[64]

[§ 9] **F. Enterprise of Private Nature.** The term "riot" is sometimes limited to the tumultuous disturbances which arise in the execution of private enterprises or quarrels,[65] as distinguished from a public attempt to overthrow or subvert the government, which is treason.[66]

[§ 10] **G. Riotous Execution of Lawful Enterprise—1. In General.** In order that the execution of an otherwise lawful act may constitute a riot, violence must be actually employed[67] and the act must be done in a tumultuous manner[68] so as to disturb the public peace[69] or cause terror to citizens in the community.[70] The common-law offense of riot did not include that class of riots where two or more persons with a common intent do any act in a violent and tumultuous manner.[71] The offense in such a case is wholly one against the public peace and tranquillity, and though the act be violently done, if there is no attendant tumult which disturbs the public peace, there is no riot.[72]

[§ 11] **2. In Terrorem Populi.**[73] The phrase "in terrorem populi" is used by Hawkins as descriptive of the offense denominated a riot; but it is clear that there may be a riot without terrifying anyone.[74] Where the act consists of going about armed, the gist of the offense consists alone in the terror to the public, inspired by the conduct of the parties,[75] but where an unlawful act is committed, the element of terror is unnecessary.[76] The ingredient of terror excited does not require that more than one person be alarmed.[77]

[§ 12] **H. Execution of Unlawful Enterprise.** It seems that the violent and turbulent execution of any unlawful act capable of being so committed, by a sufficient number of persons, may be a riot,[78] even

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19, 161 P 330; Proctor v. State, 5 Okl. Cr. 553, 115 P 630.

Or.—State v. Mizis, 48 Or. 165, 85 P 611, 86 P 361.

Pa.—Com. v. Cribs, Add. 277.

S. C.—State v. Connolly, 37 S. C. L. 337; State v. Cole, 13 S. C. L. 117.

Tenn.—West v. State, 9 Humphr. 66.

Wis.—Aron v. Wausau, 98 Wis. 592, 74 NW 354, 40 LRA 733.

[a] **Although the individual acts** of the rioters be separate, they constitute riot if done in accomplishing a common purpose. State v. Mizis, 48 Or. 165, 85 P 611, 86 P 361.

[64] Jemley v. State, 121 Ga. 346, 49 SE 292; Coney v. State, 113 Ga. 1060, 39 SE 425; Tripp v. State, 109 Ga. 489, 34 SE 1021; Dixon v. State, 105 Ga. 787, 31 SE 750; Stafford v. State, 93 Ga. 207, 19 SE 50; Prince v. State, 30 Ga. 27; Nowell v. State, 32 Ga. A. 505, 123 SE 908; Walker v. State, 17 Ga. A. 525, 87 SE 711; Oglesby v. State, 12 Ga. A. 684, 78 SE 134; Grier v. State, 11 Ga. A. 767, 76 SE 70; Croy v. State, 4 Ga. A. 457, 61 SE 847; Lewis v. State, 2 Ga. A. 659, 58 SE 1070; Stanfield v. State, 1 Ga. A. 532, 57 SE 953; Peo. v. Judson, 11 Daly (N. Y.) 1; Casteel v. State, 13 Okl. Cr. 19, 161 P 330; Proctor v. State, 5 Okl. Cr. 553, 115 P 630.

[a] **The concert of action may exist** in the execution of the act. It is not necessary that the parties should deliberate beforehand, that they should interchange views with each other before commencing the execution of the design. Peo. v. Judson, 11 Daly (N. Y.) 1, 84.

[b] **A person acting alone,** who fired a shot in the air and one at rioters attacking a procession, of which he was a member, cannot be convicted of riot. Reg. v. Corcoran, 26 U. C. C. P. 134.

[65] Peo. v. Judson, 11 Daly (N. Y.) 1; Homestead Case, 1 Pa. Dist. 785.

[66] Peo. v. Judson, 11 Daly (N. Y.) 1; Homestead Case, 1 Pa. Dist. 785, 12 Pa. Co. 97.

[67] Ga.—Jacobs v. State, 20 Ga. 839; Taylor v. State, 8 Ga. A. 241, 68 SE 945; Croy v. State, 4 Ga. A. 457, 61 SE 847; Lewis v. State, 2 Ga. A. 659, 58 SE 1070.

Ind.—Kiphart v. State, 42 Ind. 273; State v. Voshall, 4 Ind. 589; Bankus v. State, 4 Ind. 114; State v. Dillard, 5 Blackf. 365, 35 AmD 128.

Pa.—Com. v. Cribs, Add. 277.

S. C.—State v. Blair, 47 S. C. L. 93; State v. Brooks, 19 S. C. L. 361.

Utah.—Peo. v. O'Laughlin, 3 Utah 133, 147, 1 P 653.

[a] **"Force" and "violence"** do not necessarily mean actual use of physical force accompanied with turbulence or violence; but any unlawful act, however apparently peaceable and quiet, when done with such numbers, in such manner, and under such circumstances as to show that the actors intended to and were capable of carrying out and did so carry out an unlawful purpose in an unlawful manner, rendering resistance thereto apparently, in the minds of reasonable men of ordinary courage, dangerous to life or property, is such "force" and "violence" as is contemplated by the statute. Peo. v. O'Laughlin, 3 Utah 133, 134, 1 P 653.

[b] **Statutory exception.**—A statute may require that the act, done or attempted to be done, be an unlawful act executed in a violent and turbulent manner, to constitute riot. Smith v. State, 14 Mo. 147.

[68] Ga.—Jacobs v. State, 20 Ga. 839; Taylor v. State, 8 Ga. A. 241, 68 SE 945; Croy v. State, 4 Ga. A. 457, 61 SE 847; Lewis v. State, 2 Ga. A. 659, 58 SE 1070.

Ind.—Kiphart v. State, 42 Ind. 273; State v. Voshall, 4 Ind. 589; Bankus v. State, 4 Ind. 114; State v. Dillard, 5 Blackf. 365, 35 AmD 128.

Pa.—Com. v. Cribs, Add. 277.

S. C.—State v. Blair, 47 S. C. L. 93; State v. Brooks, 19 S. C. L. 361.

Utah.—Peo. v. O'Loughlin, 3 Utah 133, 1 P 653.

[a] **Illustrations.**—(1) A charivari continuing until 2 A. M., the noise being heard a mile away, was held to be a riot, although the participants were unarmed, in good humor, remained on the highway, and refrained from indecent language. Bankus v. State, 4 Ind. 114. (2) Whatever rights a committee of five might have had to visit a foreman, and present a request, they violated the law when they came with hundreds of followers, shouting a demand, by which they frightened the foreman's wife and drove him away. Bolin v. State, 193 Ind. 302, 139 NE 659.

[69] Taylor v. State, 8 Ga. A. 241, 68 SE 945.

[70] Bolin v. State, 193 Ind. 302, 139 NE 659.

[71] Taylor v. State, 8 Ga. A. 241, 68 SE 945.

[72] Taylor v. State, supra.

[a] **Neither noise nor violence alone** attending the performance of a lawful act can make a riot, both being essential to cause the reaction necessary to change the quality of a lawful act. Taylor v. State, 8 Ga. A. 241, 68 SE 945. To same effect Barron v. State, 74 Ga. 833.

[73] **In terrorem populi** 31 C. J. p 359 note 92 [a].

[74] Com. v. Runnels, 10 Mass. 518, 519, 6 AmD 148 [quot Marshall v. Buffalo, 50 App. Div. 149, 154, 64 NYS 411].

[a] **Actual fright is unnecessary** as it is enough "if the action of the parties implicated be so violent and tumultuous as to be likely to cause fright, and if individuals are frightened." 2 Wharton Cr. L. §§ 1537, 1544 [quot Spring Garden Ins. Co. v. Imperial Tobacco Co., 132 Ky. 7, 116 SW 234, 236, 136 AmSR 164, 20 LRANS 277].

[75] Com. v. Runnels, 10 Mass. 518, 6 AmD 148; State v. Sims, 16 S. C. 486; State v. Whitesides, 1 Swan (Tenn.) 88; Rex v. Hughes, 4 C. & P. 373, 19 ECL 560, 172 Reprint 462.

[76] See infra § 12.

[77] Peo. v. O'Laughlin, 3 Utah 133, 1 P 653.

[a] **Immediate power** of executing their purpose is necessary under the Utah statute. Peo. v. O'Laughlin, 3 Utah 133, 148, 1 P 653.

[78] Del.—State v. Townsend, 2 Del. 543.

Ga.—Green v. State, 109 Ga. 536, 35 SE 97; Fisher v. State, 78 Ga. 258; Bolden v. State, 64 Ga. 361; Sanders v. State, 60 Ga. 126; Rachels v. State, 51 Ga. 374; Davenport v. State, 38 Ga. 184; Croy v. State, 4 Ga. A. 457, 61 SE 847.

Ill.—Darst v. Peo., 51 Ill. 286, 2 AmR 301; Dougherty v. Peo., 5 Ill. 179.

Ind.—Germania F. Ins. Co. v. Deckard, 3 Ind. A. 361, 28 NE 868; State v. Acra, 2 Ind. A. 384, 28 NE 570.

Iowa.—State v. Johnson, 89 Iowa 594, 57 NW 302.

Me.—State v. Straw, 33 Me. 554.

though no person or persons are actually terrified.[79]

[§ 13] **I. Reading Riot Act Unnecessary.** At common law a riot is no less a riot because the proclamation from the riot act has not been read.[80] If the proclamation be not read the parties are guilty of the common-law offense, which is a misdemeanor.[81]

III. PARTIES TO OFFENSE

[§ 14] **A. In General.** A rioter is one who inflames people's minds and induces them by violent means to accomplish an illegal object.[82] A corporation cannot in general be indicted for riot.[83]

[§ 15] **B. Active Rioters.** All concerned in an unlawful assembly are equally guilty of the subsequent acts done by any of them in furtherance of the common object of the assembly,[84] and all who are present at the commission of any riotous act and actively engage therein by act, sign, or word are principal rioters.[85] All those who incite others to commit riot,[86] or actively participate in enterprises which reasonably lead to riot, if a riot results, may be principal rioters,[87] although absent from the place

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Mass.—Com. v. Campbell, 7 Allen 541, 83 AmD 705; Com. v. Berry, 5 Gray 93.

Mo.—Smith v. State, 14 Mo. 147.

N. H.—State v. Russell, 45 N. H. 83; State v. Batchelder, 5 N. H. 549.

Or.—Newby v. Terr., 1 Or. 163.

Pa.—Lycoming F. Ins. Co. v. Schwenk, 95 Pa. 89, 40 AmR 629; Shouse v. Com., 5 Pa. 83; Homestead Case, 1 Pa. Dist. 785.

Porto Rico.—Peo. v. Ortiz, 17 Porto Rico 1149.

S. C.—State v. Jenkins, 48 S. C. L. 215, 94 AmD 132; State v. Littlejohn, 1 S. C. L. 316.

Tenn.—Douglass v. State, 6 Yerg. 525.

Tex.—McKinney v. State, (Cr.) 68 SW 176.

Va.—Com. v. Kinney, 2 Va. Cas. (4 Va.) 139.

Wis.—State v. Dean, 71 Wis. 678, 38 NW 341.

Eng.—Reg. v. Howell, 9 C. & P. 437, 38 ECL 259, 173 Reprint 901; Rex v. Hughes, 4 C. & P. 373, 19 ECL 560, 172 Reprint 462; Reg. v. Ellis, Holt K. B. 636, 90 Reprint 1252; Reg. v. Casey, Ir. R. 8 C. L. 408; Rex v. Sudbury, 12 Mod. 262, 88 Reprint 1309, 2 Salk. 593, 91 Reprint 502; Reg. v. Wallis, 1 Salk. 334, 91 Reprint 294.

79. Ind.—Thayer v. State, 11 Ind. 287.

Mass.—Com. v. Runnels, 10 Mass. 518, 6 AmD 148.

S. C.—State v. Sims, 16 S. C. 486.

Tenn.—State v. Whitesides, 1 Swan 88.

Eng.—Reg. v. Soley, 11 Mod. 115, 88 Reprint 935, 2 Salk. 594, 91 Reprint 503.

[a] **The essence of a "riot"** may be the terrorem populi or it may be the committing of some unlawful act with violence, or in a violent and tumultuous manner. State v. Sims, 16 S. C. 486, 490.

80. State v. Russell, 45 N. H. 83; Rex v. Fursey, 6 C. & P. 81, 25 ECL 332, 172 Reprint 1155.

81. Rex v. Fursey, supra.

82. Spies v. Peo., 122 Ill. 1, 198, 12 NE 865, 961, 17 NE 898, 3 AmSR 320 [cit Reg. v. Sharpe, 3 Cox C. C. 288]; Com. v. Esick, 65 Pa. Super. 498; Com. v. Zeber, 65 Pa. Super. 497; Com. v. Weston, 65 Pa. Super. 497; Com. v. Detwiler, 65 Pa. Super. 494; Com. v. Tepsick, 65 Pa. Super. 493, 498; Com. v. Blum, 65 Pa. Super. 493; Com. v. Merrick, 65 Pa. Super. 482, 499.

[a] **A person who joins himself to rioters,** after the riot begins, or encourages them by words, signs or gestures, or otherwise takes part in their proceedings, is a rioter. Com. v. Jenkins, Thach. Cr. (Mass.) 118; Peo. v. White, 55 Barb. 606 [aff 32 N. Y. 465]; In re Charge to Grand Jury, 4 PaLJ 29.

[b] **One seen coming from the rioters** armed and intoxicated, styling himself the leader, was held a rioter. State v. Brazil, 24 S. C. L. 257.

[c] **Servants.**—One who commits an unlawful act while acting as the servant, or by the direction, of another, is as guilty as if he acted for himself, and may be one of three committing a riot. State v. Jackson, 28 S. C. L. 13; State v. Calder, 13 S. C. L. 462; State v. Thackam, 1 S. C. L. 358; State v. Bugbee, 22 Vt. 32.

83. Reg. v. Great North of England R. Co., 9 Q. B. 315, 58 ECL 315, 115 Reprint 1294; 1 Blackstone Comm. pp 476, 477.

84. U. S.—U. S. v. Fenwick, 25 F. Cas. No. 15,086, 4 Cranch C. C. 675.

Ga.—Green v. State, 109 Ga. 536, 35 SE 97; O'Quinn v. State, 39 Ga. A. 829, 148 SE 618.

Ill.—Bell v. Mallory, 61 Ill. 167.

N. Y.—Marshall v. Buffalo, 50 App. Div. 149, 64 NYS 411.

Pa.—Com. v. Cribs, Add. 277; Com. v. Merrick, 65 Pa. Super. 499; Com. v. Blum, 65 Pa. Super. 498; Com. v. Esick, 65 Pa. Super. 498; Com. v. Zeber, 65 Pa. Super. 497; Com. v. Weston, 65 Pa. Super. 497; Com. v. Detwiler, 65 Pa. Super. 494; Com. v. Tepsick, 65 Pa. Super. 493; Com. v. Blum, 65 Pa. Super. 493; Com. v. Merrick, 65 Pa. Super. 482; In re Charge to Grand Jury, 4 PaLJ 29.

Eng.—Reg. v. Howell, 9 C. & P. 437, 38 ECL 259, 173 Reprint 901; Rex v. Billingham, 2 C. & P. 234, 12 ECL 545, 172 Reprint 106; Reg. v. Ellis, Holt K. B. 636, 90 Reprint 1252.

[a] **Where an assembly was originally lawful** and certain of those assembled suddenly undertake and commit a riot, only those who act are guilty of riot. Reg. v. Ellis, Holt K. B. 636, 90 Reprint 1252.

85. U. S.—U. S. v. Fenwick, 25 F. Cas. No. 15,086, 4 Cranch C. C. 675.

Ind.—Bolin v. State, 193 Ind. 302, 139 NE 659; Doan v. State, 26 Ind. 495.

Iowa.—Scott v. U. S., Morr. 142.

Mass.—Com. v. Frishman, 235 Mass. 449, 126 NE 838.

Pa.—Com. v. Merrick, 65 Pa. Super. 499; Com. v. Blum, 65 Pa. Super. 498; Com. v. Esick, 65 Pa. Super. 498; Com. v. Zeber, 65 Pa. Super. 497; Com. v. Weston, 65 Pa. Super. 497; Com. v. Detwiler, 65 Pa. Super. 494; Com. v. Tepsick, 65 Pa. Super. 493; Com. v. Blum, 65 Pa. Super. 493; Com. v. Merrick, 65 Pa. Super. 482.

[a] **Every person who encourages** or promotes or takes part in a riot, whether by words, signs, or gestures, or by wearing the badge or ensigns of the rioters, is guilty of the offense. In re Charge to Grand Jury, 4 PaLJ 29; Clifford v. Brandon, 2 Campb. 358, 170 Reprint 1183. To same effect Bolin v. State, 193 Ind. 302, 139 NE 659; Com. v. Jenkins, Thach. Cr. (Mass.) 118; State v. Mizis, 48 Or. 165, 180, 85 Pa. 611, 86 P 361.

86. Bolin v. State, 193 Ind. 302, 139 NE 659; Newby v. Terr., 1 Or. 163; Com. v. Merrick, 65 Pa. Super. 499; Com. v. Blum, 65 Pa. Super. 498; Com. v. Esick, 65 Pa. Super. 498; Com. v. Zeber, 65 Pa. Super. 497; Com. v. Weston, 65 Pa. Super. 497; Com. v. Goldberg, 65 Pa. Super. 494; Com. v. Detwiler, 65 Pa. Super. 494; Com. v. Tepsick, 65 Pa. Super. 493; Com. v. Blum, 65 Pa. Super. 493; Com. v. Merrick, 65 Pa. Super. 482; Reg. v. Sharpe, 3 Cox C. C. 288.

[a] **Inflammatory speeches.**—If persons are assembled together to the number of three or more, and speeches are made to those persons to excite and inflame them, with a view to incite them to acts of violence, and if that same meeting is so connected, in point of circumstances, with a subsequent riot that you cannot reasonably sever the latter from the incitement that was used, those who incited are guilty of riot, although they are not present when it occurs. Reg. v. Sharpe, 3 Cox C. C. 288.

[b] **Persons assembled with intent to whip a man,** or to have it done, are guilty of a riot, although some other person inflicts the blows. Newby v. Terr., 1 Or. 163.

[c] **Although no riot results,** a defendant may be convicted of counseling others to commit a riot. Peo. v. Dessus, 12 Porto Rico 330.

87. U. S.—U. S. v. Fenwick, 25 F. Cas. No. 15,086, 4 Cranch C. C. 675.

Ill.—Bell v. Mallory, 61 Ill. 167.

Pa.—Com. v. Cribs, Add. 277; Com. v. Merrick, 65 Pa. Super. 499; Com. v. Blum, 65 Pa. Super. 498; Com. v. Esick, 65 Pa. Super. 498; Com. v. Zeber, 65 Pa. Super. 497; Com. v. Weston, 65 Pa. Super. 497; Com. v. Detwiler, 65 Pa. Super. 494; Com. v. Tepsick, 65 Pa. Super. 493; Com. v. Blum, 65 Pa. Super. 493; Com. v. Merrick, 65 Pa. Super. 482.

S. C.—State v. Blair, 47 S. C. L. 93.

Eng.—Reg. v. Howell, 9 C. & P. 437, 38 ECL 259, 173 Reprint 901; Reg. v. Wallis, 1 Salk. 334, 91 Reprint 294.

where the riot is committed.[88]

[§ 16] **C. Quiescent Rioters.** Persons merely present at a riot who neither do nor say anything in furtherance of the offense are not rioters,[89] but it has been said that a presumption of guilt may be drawn as to all who are present and not actually assisting in the suppression of a riot,[90] although the contrary has been held.[91] If persons are present in order to lend the courage of their presence to the rioters,[92] or to assist if necessary,[93] they may be equally guilty with the principals.

[§ 17] **D. After Notice To Disperse.** Under the old common law and the English statutes, if the statutory riot act was properly and carefully read to rioters, and they refused to desist and disperse, and remained assembled for one hour or more, the rioters thereupon become felons.[94] Generally, in the United States, an order by a peace officer, directing rioters to disperse, brands those who remain as rioters[95] and causes them, by remaining, to declare their intent to be considered as members of the mob.[96]

IV. PROSECUTION AND PUNISHMENT

[§ 18] **A. Indictment or Information[97]—1. In General.** General rules relating to the form[98] and substance[99] of indictments and informations apply to indictments and informations for riot.[1] It is not necessary to allege a proclamation to disperse.[2] In cases where two grades of offense are the result of the same act, it would seem that the state should unite both offenses in the same indictment under separate counts.[3]

Where the offense is defined by statute the indictment must be framed with reference to the statute,[4] although it is sufficient in general to follow the language of the statute,[5] and the common law precedents as to each element of the offense need not be followed.[6] But where the statutory offense is essentially the same as the common-law offense of riot, an indictment which is good at common law is also good under the statute.[7]

[§ 19] **2. Particular Averments—a. Participants.** It is not necessary to allege the names of three or more persons charged with riot.[8] It is sufficient to name those who are known[9] and to allege that the others are unknown.[10]

[§ 20] **b. Purpose of Assembly.** Where an unlawful assembly has ripened into a riot it has been said that the unlawful assembly must be charged in the indictment.[11] From the common-law forms it seems that the disturbance of the peace is a sufficiently precise statement of the purposes of the rioters,[12] although it has been said that the indictment should show explicitly for what act the rioters assembled.[13] It need not allege that the defendants assembled to assist each other in the execution of an act of a private nature,[14] or that they executed the act for which they assembled.[15]

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[88] U. S. v. Fenwick, 25 F. Cas. No. 15,086, 4 Cranch C. C. 675; Com. v. Merrick, 65 Pa. Super. 499; Com. v. Blum, 65 Pa. Super. 498; Com. v. Esick, 65 Pa. Super. 498; Com. v. Zeber, 65 Pa. Super. 497; Com. v. Weston, 65 Pa. Super. 497; Com. v. Detwiler, 65 Pa. Super. 494; Com. v. Tepsick, 65 Pa. Super. 493; Com. v. Blum, 65 Pa. Super. 493; Com. v. Merrick, 65 Pa. Super. 482; State v. Blair, 47 S. C. L. 93; Reg. v. Howell, 9 C. & P. 437, 38 ECL 259, 173 Reprint 901.

[a] **One who begins a riot,** but leaves it before it is over, is responsible for all acts done in completion of the offense. State v. Blair, 47 S. C. L. 93.

[89] Bolin v. State, 193 Ind. 302, 139 NE 659; Com. v. Merrick, 65 Pa. Super. 499; Com. v. Blum, 65 Pa. Super. 498; Com. v. Esick, 65 Pa. Super. 498; Com. v. Zeber, 65 Pa. Super. 497; Com. v. Weston, 65 Pa. Super. 497; Com. v. Detwiler, 65 Pa. Super. 494; Com. v. Tepsick, 65 Pa. Super. 493; Com. v. Blum, 65 Pa. Super. 493; Com. v. Merrick, 64 Pa. Super. 482; Reg. v. Atkinson, 11 Cox C. C. 330.

[a] **"To make a man a party to a riot,** he must be active, either in doing or countenancing, or supporting, or ready, if necessary to support the unlawful act." Com. v. Craig, Add. (Pa.) 190.

[90] Com. v. Craig, supra; Com. v. Merrick, 65 Pa. Super. 499; Com. v. Blum, 65 Pa. Super. 498; Com. v. Esick, 65 Pa. Super. 498; Com. v. Zeber, 65 Pa. Super. 497; Com. v. Weston, 65 Pa. Super. 497; Com. v. Detwiler, 65 Pa. Super. 494; Com. v. Tepsick, 65 Pa. Super. 493; Com. v. Blum, 65 Pa. Super. 493; Com. v. Merrick, 65 Pa. Super. 482; In re Charge to Grand Jury, 4 PaLJ 29.

[91] State v. McBride, 19 Mo. 239.

[92] U. S. v. Peaco, 27 F. Cas. No. 16,018, 4 Cranch C. C. 601; State v. Straw, 33 Me. 554; Com. v. Frishman, 235 Mass. 449, 126 NE 838; Williams v. State, 9 Mo. 270.

[a] **That all should commit some physical act** is unnecessary; all being guilty as principals if they are present, consenting and in a position under which they might render aid and assistance. Com. v. Frishman, 235 Mass. 449, 126 NE 838.

[93] U. S. v. Peaco, 27 F. Cas. No. 16,018, 4 Cranch C. C. 601; State v. Straw, 33 Me. 554; Com. v. Frishman, 235 Mass. 449, 126 NE 838; Williams v. State, 9 Mo. 270.

[94] Rex v. Woolcock, 5 C. & P. 516, 24 ECL 684, 172 Reprint 1078; Rex v. Birt, 5 C. & P. 154, 24 ECL 501, 172 Reprint 919; Rex v. James, 5 C. & P. 153, 24 ECL 500, 172 Reprint 918; Rex v. Child, 4 C. & P. 442, 19 ECL 593, 172 Reprint 774.

[95] In re Charge to Grand Jury, 4 PaLJ 29.

[96] In re Charge to Grand Jury, supra.

"Mob" and "riot" are said to be synonymous terms. See supra § 1.

[97] See generally Indictments and Informations 31 C. J. p 548.

[98] See Indictments and Informations §§ 81 et seq, 155 et seq.

[99] See Indictments and Informations § 170 et seq.

[1] See cases infra this section; and §§ 19–26.

[2] State v. Russell, 45 N. H. 83.

[3] Com. v. Kinney, 2 Va. Cas. (4 Va.) 139.

Duplicity see infra § 26.

[4] Blackwell v. State, 30 Tex. A. 672, 674, 18 SW 676.

[a] **Indictments held sufficient.**—Lock v. State, 122 Ga. 730, 50 SE 932; Carter v. State, 7 Ga. A. 44, 65 SE 1072; Kiphart v. State, 42 Ind. 273; State v. Voshall, 4 Ind. 589; Bankus v. State, 4 Ind. 114; State v. Acra, 2 Ind. A. 384, 28 NE 570; State v. Scaggs, 6 Blackf. (Ind.) 37; State v. Dillard, 5 Blackf. (Ind.) 365, 35 AmD 128; Peo. v. Ortiz, 17 Porto Rico 1149.

[b] **Indictments held insufficient.**—Casteel v. State, 13 Okl. Cr. 19, 161 P 330; Blackwell v. State, 30 Tex. A. 672, 18 SW 676.

[c] **All the circumstances** which constitute the definition of the offense, in the act, must be stated so as to bring the defendant precisely within it. McWaters v. State, 10 Mo. 167.

[d] **Offense committed in a public place.**—An affidavit charging riot is sufficient without alleging that the offense was committed in a public place. Carmody v. State, 178 Ind. 158, 98 NE 870.

[e] **Riotous demolition.**—Where defendants are indicted for the felony of riotous demolition, the indictment may be sustained as for a misdemeanor at common law; that is, for a riot, with a statement of the demolition of the house as matter of aggravation. Reg. v. Casey, Ir. R. 8 C. L. 408.

[5] Com. v. Rankin, 9 Pa. Dist. & Co. 530; Bonneville v. State, 53 Wis. 680, 11 NW 427.

[a] **Information held insufficient** although following the language of the statute, where it neither describes the act which constitutes the offense, nor designates the act by any term or form of expression whereby the nature or character of the act may be understood with reasonable certainty. Peo. v. Carbine, 185 Ill. A. 161; Peo. v. Crilly, 185 Ill. A. 160.

[6] Whitley v. State, 66 Ga. 656.

[7] Roberts v. State, 21 Ark. 183; State v. Dillard, 5 Blackf. (Ind.) 365, 35 AmD 128.

[8] Com. v. Rankin, 9 Pa. Dist. & Co. 530; State v. Brazil, 24 S. C. L. 257; State v. Calder, 13 S. C. L. 462.

[9] See cases infra note 10.

[10] Martin v. State, 115 Ga. 255, 41 SE 576; Lewis v. State, 5 Ga. A. 496, 63 SE 570; Com. v. Berry, 5 Gray (Mass.) 93; State v. Brazil, 24 S. C. L. 257; State v. Calder, 13 S. C. L. 462; State v. O'Donald, 12 S. C. L. 532, 10 AmD 691; Anonymous, 3 Salk. 317, 91 Reprint 846.

[§ 21] **c. Inciting To Riot.** It is an indictable offense at common law to incite others to tumult and riot;[16] and the indictment need not aver that tumult and riot were thereby excited.[17]

[§ 22] **d. As to Terror.** If an indictment for riot alleges that an unlawful act has been committed, the words "in terrorem populi" are not necessary;[18] aliter where the offense consists of terrifying people.[19]

[§ 23] **e. As to Violence.** An allegation that the act upon which the offense is based was riotously, tumultuously, and violently committed is necessary to an indictment,[20] unless words equivalent thereto are used,[21] or the allegations show that the acts were done violently.[22]

[§ 24] **f. Lawful Act.** Where it is alleged that a lawful act was performed in a violent and tumultuous manner, a description of the violence and tumult should be connected with the description of the act.[23]

[§ 25] **g. Unlawful Act.** In general an indictment for riotously committing an unlawful act should set forth circumstances which show the commission of the unlawful act,[24] but it is unnecessary to state the circumstances constituting the violence and tumult.[25] It is sufficient if the facts charged consti-

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[a] **Indictment held sufficient.**—An indictment for riot which charged that two defendants, who were named, with divers other persons, "to the jurors unknown," to the number of ten did assemble, etc., was held sufficient to sustain a verdict of guilty against the two defendants who were tried and convicted. State v. Brazil, 24 S. C. L. 257.

[b] **Indictment held insufficient** which charged two defendants with riot, with "divers other persons, to wit, to the number of five," without alleging that the five others were unknown. State v. O'Donald, 12 S. C. L. 532, 10 AmD 691. See also Martin v. State, 115 Ga. 255, 41 SE 576 (holding that the objection would be good on a special demurrer but would not constitute any reason for arresting the judgment or granting a new trial).

[11] Com. v. Gibney, 2 Allen (Mass.) 150; State v. Hughes, 72 N. C. 25; Blackwell v. State, 30 Tex. A. 672, 18 SW 676; Reg. v. Soley, 11 Mod. 115, 88 Reprint 935, 2 Salk. 594, 91 Reprint 503. But see McWaters v. State, 10 Mo. 167 (holding that the word "unlawful" as used in the statute was never intended to enter into the definition of the offense).

[a] **An indictment should show** either an unlawful assemblage and its purpose, or a lawful assemblage and a subsequent agreement to commit an unlawful act. Casteel v. State, 13 Okl. Cr. 19, 161 P 330; Blackwell v. State, 30 Tex. A. 672, 18 SW 676.

[b] **Allegation that defendants unlawfully assembled,** prior to doing in an unlawful, violent, and tumultuous manner the act as charged, is no part of the description of the alleged offense. Bolin v. State, 193 Ind. 302, 139 NE 659; Kiphart v. State, 42 Ind. 273.

[12] U. S. v. Fenwick, 25 F. Cas. No. 15,086, 4 Cranch C. C. 675; Roberts v. State, 21 Ark. 183; Com. v. Jenkins, Thach. Cr. (Mass.) 118; State v. Russell, 45 N. H. 83; State v. Renton, 15 N. H. 169.

[a] **Illustration.**—On the trial of persons indicted for a riot, a count of the indictment setting forth that they, with others, riotously assembled, to the disturbance of the public peace, and then riotously began to pull down a certain dwelling-house, it was held to be sufficient, although it did not state the unlawful act which they were assembled to commit. Com. v. Jenkins, Thach. Cr. (Mass.) 118.

[b] **The disturbance of the peace** is an unlawful purpose which may be accomplished by noise, outcries, and general disorderly conduct without attacking the person or property of anyone. State v. Renton, 15 N. H. 169.

[13] Reg. v. Gulston, 2 Ld. Raym. 1210, 92 Reprint 298.

[a] **The act ought to be shown,** that the court might judge, whether the act was unlawful or not. Reg. v. Gulston, 2 Ld. Raym. 1210, 92 Reprint 298.

[14] State v. Russell, 45 N. H. 83.

[15] State v. Russell, supra.

[16] See supra §§ 1, 15.

[17] U. S. v. Fenwick, 25 F. Cas. No. 15,086, 4 Cranch C. C. 675; Peo. v. Dessus, 12 Porto Rico 330.

[18] Ind.—Thayer v. State, 11 Ind. 287.

Mass.—Com. v. Runnels, 10 Mass. 518, 6 AmD 148.

S. C.—State v. Sims, 16 S. C. 486.

Tenn.—State v. Whitesides, 1 Swan 88.

Eng.—Rex v. Hughes, 4 C. & P. 373, 19 ECL 560, 172 Reprint 462; Reg. v. Soley, 11 Mod. 115, 88 Reprint 935, 2 Salk. 594, 91 Reprint 503.

[19] Com. v. Runnels, 10 Mass. 518, 6 AmD 148; State v. Sims, 16 S. C. 486; State v. Brazil, 24 S. C. L. 257; State v. Whitesides, 1 Swan (Tenn.) 88; Rex v. Hughes, 4 C. & P. 373, 19 ECL 560, 172 Reprint 462; Reg. v. Soley, 11 Mod. 115, 88 Reprint 935, 2 Salk. 594, 91 Reprint 503.

[a] **"Lord Holt has given a distinction,** founded in good sense, between those indictments, in which the words in terrorem populi are essential, and those wherein they may be omitted. He says that, in indictments for that species of riots which consist in going about armed, &c., without committing any act, the words aforesaid are necessary, because the offence consists in terrifying the public; but in those riots in which an unlawful act is committed the words are useless." Com. v. Runnels, 10 Mass. 518, 519, 6 AmD 148 [quot Marshall v. Buffalo, 50 App. Div. 149, 154, 64 NYS 411].

[20] State v. Kutter, 59 Ind. 572; State v. Dillard, 5 Blackf. (Ind.) 365, 35 AmD 128; State v. Acra, 2 Ind. A. 384, 28 NE 570; Com. v. Runnels, 10 Mass. 518, 6 AmD 148; Martin v. State, 9 Mo. 286.

[a] **Indictment held sufficient.**—State v. Acra, 2 Ind. A. 384, 28 NE 570.

[b] **Indictment held insufficient.**—Martin v. State, 9 Mo. 286.

[21] State v. Kutter, 59 Ind. 572.

[22] Kiphart v. State, 42 Ind. 273.

[23] See cases infra this note.

[a] **In a disturbance near a dwelling house,** where verbal threats against the owner of the house were made, it should be alleged that the owner was in the house, or within hearing, at the time. State v. Hathcock, 29 N. C. 52.

[b] **Unlawfulness and violence.**—(1) Where an offense consists in three or more persons doing an act in a violent and tumultuous manner, it is not necessary, in order to sustain a prosecution for such an offense, that the act done should be unlawful. Although the word violent be not used in the affidavit or information, in describing the offense, if the allegation show that the act was done violently, it will be sufficient. Kiphart v. State, 42 Ind. 273. (2) Averment as to an unlawful act see infra § 25. (3) Averment as to violence see supra § 23.

[24] State v. Martin, 7 N. C. 533; Bonneville v. State, 53 Wis. 680, 11 NW 427; Reg. v. Solely, 11 Mod. 115, 88 Reprint 935, 2 Salk. 594, 91 Reprint 503.

[a] **Where a dwelling-house has been damaged,** ownership in others than the rioters should be alleged. State v. Martin, 7 N. C. 533; Reg. v. Soley, 11 Mod. 115, 88 Reprint 935, 2 Salk. 594, 91 Reprint 503.

[b] **In obstructing and breaking up a justice's court,** it is not necessary to allege or prove that the person holding the court was commissioner, or that he was proceeding lawfully in the business before him. State v. Boies, 34 Me. 235.

[25] Lock v. State, 122 Ga. 730, 50 SE 932; Baptist v. State, 109 Ga. 546, 35 SE 658; Com. v. Frishman, 235 Mass. 449, 126 NE 838; State v. Dean, 71 Wis. 678, 38 NW 341.

[a] **Indictments held sufficient.**—(1) An indictment alleging that certain named persons "did in a violent and tumultuous manner prevent the sheriff . . . from removing [from] the common jail" a prisoner therein confined sufficiently charges the offense of riot, as against a spe-

tute an attempt to commit an act of violence, which, if completed, would be an indictable offense.[26]

[§ 26] **h. Duplicity.** An indictment is not open to the objection of duplicity because it alleges a riotous assembly and an act of violence which of itself might constitute a distinct offense.[27]

[§ 27] **3. Issues, Proof, and Variance.** The general rules as to issues, proof, and variance[28] apply in prosecutions for riot.[29] Upon an indictment for riot it is not necessary to prove that the intended act of violence was perpetrated,[30] or that there was a proclamation to disperse,[31] or upon an indictment for inciting others to commit riot, that an act of violence was done in consequence of such incitement.[32] An allegation, which is merely incidental to, and not an essential part of, the offense of riot, need not be proved.[33] Where an indictment alleges that but two or three persons committed a riot, proof that less than the minimum number required[34] were engaged will not sustain the charge;[35] but where an indictment charges that certain persons, together with others to the jurors unknown, committed a riot,[36] the acquittal of one or two of the defendants cannot be offered as a reason for the discharge of the rest.[37]

[§ 28] **B. Defenses[38]—1. In General.** The absence of any essential element of the offense[39] may be set up as a defense; especially that the act or acts charged would not, even if true, constitute riot.[40]

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cial demurrer setting up that the indictment did "not allege any act done in a violent and tumultuous manner, which prevented" the sheriff from removing the prisoner. Aliter if the point had been made that the act charged was not set forth with sufficient particularity. Green v. State, 109 Ga. 536, 35 SE 97. (2) An indictment which alleges that defendants, "on the first day of September, 1888, at and within the county of Pope, then and there, being together, did riotously, and with force and violence assault, beat, wound, and ill-treat" a certain person, sufficiently charged a riot, and the time and place of its commission. Lambert v. Peo., 34 Ill. A. 637. (3) "That James Scaggs, jun., Thomas Scaggs, William Huff, and Jackson Trent, late of, &c., labourers, on, &c. at, &c. with force and arms, in a riotous, violent, and unlawful manner, did then and there violently and unlawfully burst open the outer door of the dwelling-house of one Thomas Smith, situate, &c. . . . contrary to the form of the statute, &c." State v. Scaggs, 6 Blackf. (Ind.) 37. (4) An affidavit and information charging that "on" etc., "in," etc., A, B and C "did then and there, in a riotous, tumultuous, and violent manner, assemble themselves together, and then and there, in a riotous, tumultuous, and violent manner . . . unlawfully attempt to commit a violent injury on the person of said affiant by then and there violently and unlawfully threatening to beat, cut, and shoot said affiant, contrary to the forms of the statute," etc., state facts sufficient to constitute a charge of riot. State v. Acra, 2 Ind. A. 384, 28 NE 570.

[26] State v. York, 70 N. C. 66; Bonneville v. State, 53 Wis. 680, 11 NW 427.

[a] **Illustration.**—As where an indictment charged that defendants "with force and arms at Columbia, in the county and State aforesaid, unlawfully, riotously and routously, did assemble and gather together to disturb the peace of the said State; and being so then and there assembled and gathered together, in and upon one E. R. Warner, a peace officer and policeman of the city of Columbia, in the county and State aforesaid . . . then and there unlawfully, riotously and routously, did make an assault; and then the said E. R. Warner . . . then and there unlawfully, riotously, and routously, did beat, bruise, and wound, and illtreat, and other wrongs to the said E. R. Warner . . . then and there unlawfully, riotously, and routously, did to the great damage of the said E. R. Warer . . . in contempt and defiance of the laws . . . against the form of the act of the General Assembly in such case made and provided, and against the peace and dignity of the State." State v. Sims, 16 S. C. 486, 487.

[27] State v. Russell, 45 N. H. 83; Rex v. Sudbury, 12 Mod. 262, 88 Reprint 1309, 2 Salk. 593, 91 Reprint 502.

[a] **Where statute** declares that if a person does this, or this, etc., an indictment upon such a statute may allege in a single count that defendant did as many of the forbidden things as the pleader chooses, employing the conjunction "and" where the statute has "or" and it will not be double, and will be established by proof of any one of them. Hobbs v. State, 133 Ind. 404, 32 NE 1019, 18 LRA 774.

[28] See Indictments and Informations § 438 et seq.

[29] See cases infra this note; and notes 30-37.

[a] **Where one person is indicted for assault** with intent to kill, it is not error to refuse to charge that defendant may be convicted of riot. Robinson v. State, 84 Ga. 674, 11 SE 544.

[b] **Under an indictment for riotously breaking** into an outhouse it is competent to show that the house was within the curtilage. Douglass v. State, 6 Yerg. (Tenn.) 525.

[c] **An indictment charging a riot and forcible trespass to land** which is in the actual possession of a tenant of the owner should charge the possession to be in the tenant and not in the owner; if the latter is charged to be in possession, proof of the possession of his tenant will not support the indictment. State v. Wilson, 23 N. C. 32.

[d] **Where defendants are charged** with assaulting another and attempting to injure her by throwing rocks, evidence, on a trial for riot, that they actually succeeded in striking her does not create such a variance between the allegations and proof as to require defendants' discharge. Carter v. State, 7 Ga. A. 44, 65 SE 1072.

[e] **The erection and exhibition of a stuffed Paddy,** constructed and exposed in such a way as to be calculated to produce a riot and disturbance, is a misdemeanor at common law, although if it should appear in evidence that the figure thus exposed was not a Paddy, but a Shelah, the two effigies appearing to be of an opposite character and the indictment averring it to be a Paddy, the variance is fatal. Com. v. Haines, 6 Pa LJ 239.

[30] U. S. v. Fenwick, 25 F. Cas. No. 15,086, 4 Cranch C. C. 675.

[31] Com. v. Frishman, 235 Mass. 449, 126 NE 838.

[32] U. S. v. Fenwick, 25 F. Cas. No. 15,086, 4 Cranch C. C. 675.

[33] Com. v. Frishman, 235 Mass. 449, 126 NE 838.

[a] **Stabbing of police officer.**—It need not be proved that the officer was stabbed by one of the rioters with a knife, or even that he was stabbed at all, though it is alleged in the indictment. Com. v. Frishman, 235 Mass. 449, 126 NE 838.

[34] See supra § 5.

[35] Ga.—Martin v. State, 115 Ga. 255, 41 SE 576; Lewis v. State, 5 Ga. A. 496, 63 SE 570.

Ind.—Hardebeck v. State, 10 Ind. 459; Turpin v. State, 4 Blackf. 72.

La.—State v. Egan, 10 La. Ann. 698.

Mass.—Com. v. Berry, 5 Gray 93.

Mo.—State v. Kuhlmann, 5 Mo. A. 588.

S. C.—State v. Brazil, 24 S. C. L. 257; State v. Calder, 13 S. C. L. 462; State v. O'Donald, 12 S. C. L. 532, 10 AmD 691.

Eng.—Rex v. Sudbury, 12 Mod. 262, 88 Reprint 1309, 2 Salk. 593, 91 Reprint 502.

[36] See supra § 19.

[37] See cases supra note 35.

[38] **Former jeopardy** see Criminal Law § 359 et seq.

[39] **Essential elements of offense** see supra §§ 3-13.

[40] See cases infra this note.

[a] **An unlawful act executed peaceably** and quietly by a number of persons is not a riot. Riley v. Peo., 29 Ill. A. 139; Reg. v. Hunt, 1 Cox C. C. 177.

[b] **Use of force,** in executing legal process, necessary to overcome resistance does not constitute riot. Graves v. State, 1 Ind. 368; Com. v. Taylor, 4 PaLJR 480.

[c] **Not acting without authority of law.**—Where defendant, on an attempt being made, by an officer without a warrant, to arrest him, retreated into a saloon, and upon the entry of two of the officer's assistants a fight ensued, whereupon defendant broke away and assisted his friends, a contention that defendant was not acting without authority of law in resisting the arrest and hence not liable under the statute, is untenable. State v. Seeley, 51 Or. 131, 94 P 37.

Acts constituting offense see supra § 4.

There can be no such thing as justification for riot.[41]

[§ 29] **2. Absence.** A person who joins the rioters after cessation of the riotous acts is not guilty of riot.[42]

[§ 30] **3. Nonparticipation.** It has been said that, in riotous and tumultuous assemblages, all who are present and are not actually assisting in their suppression are, in the presumption of law, participants;[43] but spectators who are so circumstanced may remove this presumption by proof of their actual nonparticipation and harmless intent,[44] although this proof will not avail them if they remain after notice to disperse.[45]

[§ 31] **C. Evidence[46]—1. Presumptions and Burden of Proof.** General rules with respect to the burden of proof[47] and presumptions[48] apply.[49] A presumption of common intent may arise from the circumstances and acts committed,[50] but the mere fact that three or more persons in a violent manner beat another does not raise a presumption of law that they assembled with that intent,[51] or, after being assembled, agreed mutually to assist one another in executing such purpose.[52] The state must prove beyond a reasonable doubt[53] every essential element of the offense.[54] Thus concert of action must be shown[55] when it is an element of the offense.[56] Where a riot includes a trespass, it is not necessary to prove the actual ownership of the property,[57] but its possession in some one other than the rioters should be shown.[58] A charge that some of the rioters are unknown is a negative averment and need not be proved,[59] the onus of disproving it being on the defendants.[60] After the state makes a prima facie case of riot, if there are matters of defense, it devolves upon the defendants to show what they are.[61]

[§ 32] **2. Admissibility.** The admissibility of the evidence is governed by the rules regulating the competency, materiality, and relevancy of the evidence in criminal prosecutions generally.[62] It has been held that the parties charged must be proved to have been present, before the fact of the riot can be given in evidence.[63] Where defendants' witnesses testify that they were of the party concerned in the riot they will not be allowed to give evidence of their intention in meeting.[64] The evidence should be competent[65] and relevant,[66] but to establish the identity of the parties where the offense is committed pursuant to a system or peculiar method, an extended inquiry into collateral facts may be proper.[67] Evidence which tends to show a common intent and concert of action is admissible.[68] The acts and declarations of one defendant, at the time of the riot[69] are admissible in evidence against all the defendants on trial,[70] but evidence of other acts by defendants at a different place and time is not admissible,[71] unless it is first shown that the various acts were all parts of one continuous transaction.[72] Testimony of a general feeling of alarm and disquiet is properly received to show that defendants disturbed the public peace,[73] but mere opinion evidence[74] is generally inadmissible.[75]

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[41] Peo. v. Brown, 193 App. Div. 203, 184 NYS 165.

[a] **That crimes were committed by others** in the course of the commission of the riot, which were ignored by the authorities is no justification for the crime of riot on the part of striking workmen. Peo. v. Brown, 193 App. Div. 203, 184 NYS 165.

[b] **Two sets of rioters.**—It is immaterial that there were two sets of rioters; the presumption is that the others will be brought to trial and on conviction the court will apportion the punishment. Whitley v. State, 66 Ga. 656.

[c] **Excitement,** whatever might be the cause, is no justification of the intended force and violence. U. S. v. Fenwick, 25 F. Cas. No. 15,086, 4 Cranch C. C. 675.

[42] Sloan v. State, 9 Ind. 565.

[43] See supra § 16.

[44] Com. v. Merrick, 65 Pa. Super. 499; Com. v. Blum, 65 Pa. Super. 498; Com. v. Esick, 65 Pa. Super. 498; Com. v. Zeber, 65 Pa. Super. 497; Com. v. Weston, 65 Pa. Super. 497; Com. v. Detwiler, 65 Pa. Super. 494; Com. v. Tepsick, 65 Pa. Super. 493; Com. v. Blum, 65 Pa. Super. 493; Com. v. Merrick, 65 Pa. Super. 482; In re Charge to Grand Jury, 4 PaLJ 29.

[45] In re Charge to Grand Jury, supra.

[46] **Evidence generally** see Criminal Law § 947 et seq.

[47] See Criminal Law § 993 et seq.

[48] See Criminal Law § 1005 et seq.

[49] See cases infra this section.

[50] State v. Seeley, 51 Or. 131, 94 P 37.

[51] State v. Kempf, 26 Mo. 429.

[52] State v. Kempf, supra.

[53] Proctor v. State, 5 Okl. Cr. 553, 115 P 630.

[54] **Elements of the offense** see supra §§ 3-13.

[55] Turner v. State, 120 Ga. 850, 48 SE 312; Coney v. State, 113 Ga. 1060, 39 SE 425.

[56] **Concert of action as element of offense** see supra § 8.

[57] State v. Wilson, 23 N. C. 32; State v. Bennett, 20 N. C. 170.

[58] State v. Wilson, 23 N. C. 32; State v. Bennett, 20 N. C. 170.

[59] State v. Blair, 47 S. C. L. 93.

[60] State v. Blair, supra.

[61] Logg v. Peo., 92 Ill. 598.

[62] See Criminal Law § 1034 et seq.

[63] Nicholson's Case, Lew. C. C. 300, 168 Reprint 1047.

[64] U. S. v. Dunn, 25 F. Cas. No. 15,007, 1 Cranch C. C. 165.

[65] State v. Johnson, 43 S. C. 123, 20 SE 988.

[a] **Members of secret society.**—Under an indictment for riot evidence may be received to show that the defendants were members of the same secret society, where it appears that the assault and battery grew out of a matter originating in the society. State v. Johnson, 43 S. C. 123, 20 SE 988.

[66] Shuler v. State, 126 Ga. 630, 55 SE 496; Hunt v. State, 116 Ga. 615, 42 SE 1004.

[67] Perkins v. State, (Okl. Cr.) 250 P 544.

[68] O'Quinn v. State, 39 Ga. A. 829, 148 SE 618.

[a] **Evidence of defendant's threats** to get his wife to beat prosecutrix is admissible to show a common intent and concert of action between defendant and his wife charged with riot. O'Quinn v. State, 39 Ga. A. 829, 148 SE 618.

[69] Shuler v. State, 126 Ga. 630, 55 SE 496.

[a] **Thirty minutes after the alleged riot,** what was said by one of two joint defendants, in the absence of the other defendant, and not of a character to throw light on the question of the guilt of either, was inadmissible. Shuler v. State, 126 Ga. 630, 55 SE 496.

[70] State v. Brazil, 24 S. C. L. 257; Peo. v. O'Loughlin, 3 Utah 133, 1 P 653.

[71] State v. Renton, 15 N. H. 169.

[72] Com. v. Campbell, 7 Allen (Mass.) 541, 83 AmD 705.

Evidence of other offenses generally see Criminal Law § 1132 et seq.

[73] Peo. v. O'Loughlin, 3 Utah 133, 1 P 653.

[a] **Testimony that a woman fainted,** from fright caused by the tumult, was properly admitted to throw light on the conduct of the accused. Johnson v. State, 124 Ga. 656, 52 SE 880.

[b] **Declarations, expressions of fear,** and acts of the residents of the neighborhood, during and while the acts of defendants were being performed, are admissible as tending to show a breach of the public peace, within the meaning of the statute defining riot. Peo. v. O'Loughlin, 3 Utah 133, 1 P 653.

[74] **Opinion evidence generally** see

[§ 33] **3. Weight and Sufficiency.** General rules relating to the weight and sufficiency of evidence[76] apply.[77] To sustain a conviction of one charged with the offense of riot it is necessary that the evidence should show the joint action,[78] of at least the requisite number of persons[79] with a common intent[80] to do an unlawful act of violence[81] or a lawful act in a violent and tumultuous manner.[82] Mutual intent[83] and concert of action[84] need not be established by positive proof, but may be inferred from the circumstances and acts committed.

[§ 34] **D. Trial—1. In General.** The general rules governing trials in criminal prosecutions[85] apply.[86] Riot, being originally a common-law misdemeanor, may be tried under common-law rules, wherever they still obtain.[87] It is entirely in the discretion of the court to determine whether several defendants shall be tried jointly or separately.[88]

[§ 35] **2. Questions of Law and Fact.** Applying general rules,[89] issues of fact must be determined by the jury[90] where the evidence is legally sufficient to warrant its submission.[91]

[§ 36] **3. Instructions.** General rules as to instructions[92] apply in prosecutions for riot.[93] The charge to the jury must define riot according to the law of the jurisdiction[94] and should be complete and correctly lay down the law,[95] and should be clear and

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Criminal Law § 1532 et seq.

[75] See cases infra this note.

[a] **Effect of use of certain words.**—Mere opinion evidence as to the effect of the use of certain words is inadmissible. Shuler v. State, 126 Ga. 630, 55 SE 496.

[b] **Effect of unlawful acts.**—Evidence of the effect upon the minds and feelings of the people in the vicinity, occasioned by the unlawful acts, was admissible as tending to show a breach of the public peace, within the meaning of the statute defining riot. Peo. v. O'Laughlin, 3 Utah 133, 1 P 653.

[76] See Criminal Law § 1559 et seq.

[77] See cases infra this section.

[a] **Evidence held sufficient:** (1) To sustain a conviction of riot. Hunt v. State, 116 Ga. 615, 42 SE 1004; Baptist v. State, 109 Ga. 546, 35 SE 658; Green v. State, 109 Ga. 536, 35 SE 97; Sims v. State, 87 Ga. 569, 13 SE 551; Perkins v. State, 78 Ga. 316; Sanders v. State, 60 Ga. 126; O'Quinn v. State, 39 Ga. A. 829, 148 SE 618; Kilcrease v. State, 21 Ga. A. 803, 95 SE 271; Walker v. State, 17 Ga. A. 525, 87 SE 711; Oglesby v. State, 12 Ga. A. 684, 78 SE 134; Lewis v. State, 2 Ga. A. 659, 58 SE 1070; Peo. v. Brown, 193 App. Div. 203, 184 NYS 165; Wilson v. State, 24 Okl. Cr. 332, 217 P 885; State v. Seeley, 51 Or. 131, 94 P 37; State v. Mizis, 48 Or. 165, 85 P 611, 86 P 361; Com. v. Merrick, 65 Pa. Super. 499; Com. v. Blum, 65 Pa. Super. 498; Com. v. Esick, 65 Pa. Super. 498; Com. v. Zeber, 65 Pa. Super. 497; Com. v. Weston, 65 Pa. Super. 497; Com. v. Detwiler, 65 Pa. Super. 494; Com. v. Goldberg, 65 Pa. Super. 494; Com. v. Tepsick, 65 Pa. Super. 493; Com. v. Blum, 65 Pa. Super. 493; Com. v. Merrick, 65 Pa. Super. 482; Peo. v. Ortiz, 17 Porto Rico 1149; State v. Brazil, 24 S. C. L. 257. (2) To sustain a conviction of inciting to riot. Com. v. Merrick, 65 Pa. Super. 499; Com. v. Blum, 65 Pa. Super. 498; Com. v. Esick, 65 Pa. Super. 498; Com. v. Zeber, 65 Pa. Super. 497; Com. v. Weston, 65 Pa. Super. 497; Com. v. Goldberg, 65 Pa. Super. 494; Com. v. Detwiler, 65 Pa. Super. 494; Com. v. Tepsick, 65 Pa. Super. 493; Com. v. Blum, 65 Pa. Super. 493; Com. v. Merrick, 65 Pa. Super. 482. (3) To sustain a conviction of riot committed while disguised. Darneal v. State, 14 Okl. Cr. 540, 174 P 290. (4) To justify a finding that defendant participated in a riot. Peo. v. Brown, 193 App. Div. 203, 184 NYS 165.

[b] **Evidence held insufficient** to sustain a conviction for riot. Stanfield v. State, 1 Ga. A. 532, 57 SE 953; Proctor v. State, 5 Okl. Cr. 553, 115 P 630.

[78] Dixon v. State, 105 Ga. 787, 31 SE 750.

[a] **Evidence held sufficient to show concert of action.**—Stafford v. State, 93 Ga. 207, 19 SE 50; Oglesby v. State, 12 Ga. A. 684, 78 SE 134; Grier v. State, 11 Ga. A. 767, 76 SE 70; Proctor v. State, 5 Okl. Cr. 553, 115 P 630.

[b] **Evidence held insufficient to show concert of action.**—Turner v. State, 120 Ga. 850, 48 SE 312; Coney v. State, 113 Ga. 1060, 39 SE 425; Tripp v. State, 109 Ga. 489, 34 SE 1021; Dixon v. State, 105 Ga. 787, 31 SE 750; State v. Calder, 13 S. C. L. 462.

[79] Dixon v. State, 105 Ga. 787, 31 SE 750.

[a] **Evidence held insufficient.**—Croy v. State, 4 Ga. A. 457, 61 SE 847.

[80] Dixon v. State, 105 Ga. 787, 31 SE 750.

[a] **Evidence held sufficient to show a common intent.**—Moncrief v. State, 36 Ga. A. 654, 137 SE 863; Oglesby v. State, 12 Ga. A. 684, 78 SE 134; Grier v. State, 11 Ga. A. 767, 76 SE 70; State v. Seeley, 51 Or. 131, 94 P 37; Peo. v. Judson, 11 Daly (N. Y.) 1.

[b] **Evidence held insufficient to show a common intent.**—Dixon v. State, 105 Ga. 787, 31 SE 750.

[81] Dixon v. State, supra.

[a] **Evidence held sufficient.**—Com. v. Frishman, 235 Mass. 449, 126 NE 838.

[82] Dixon v. State, 105 Ga. 787, 31 SE 750.

[a] **Evidence held sufficient.**—Bolin v. State, 193 Ind. 302, 139 NE 659.

[83] U. S. v. Fenwick, 25 F. Cas. No. 15,086, 4 Cranch C. C. 675; U. S. v. McFarland, 26 F. Cas. No. 15,674, 1 Cranch C. C. 140; U. S. v. Peaco, 27 F. Cas. No. 16,018, 4 Cranch C. C. 601; U. S. v. Stockwell, 27 F. Cas. No. 16,405, 4 Cranch C. C. 671; Walker v. State, 17 Ga. A. 525, 87 SE 711; Grier v. State, 11 Ga. A. 767, 76 SE 70; State v. Kempf, 26 Mo. 429; State v. Seeley, 51 Or. 131, 94 P 37; State v. Mizis, 48 Or. 165, 85 P 611, 86 P 361.

[84] Walker v. State, 17 Ga. A. 525, 87 SE 711; Grier v. State, 11 Ga. A. 767, 76 SE 70; Com. v. Jenkins, Thach. Cr. (Mass.) 118; Perkins v. State, (Okl. Cr.) 250 P 544.

[85] **Trial generally** see Criminal Law § 2000 et seq.

[86] See cases infra this section.

[87] U. S. v. McFarlane, 26 F. Cas. No. 15,675, 1 Cranch C. C. 163; Peo. v. White, 55 Barb. 606 [aff 32 N. Y. 465].

[88] Peo. v. White, supra; Peo. v. Judson, 11 Daly (N. Y.) 1; State v. Littlejohn, 1 S. C. L. 316.

Separate trials of codefendants generally see Criminal Law § 2006.

[89] See Criminal Law § 2272 et seq.

[90] State v. Hoffman, (N. C.) 154 SE 314.

[91] See case infra this note.

[a] **Evidence held sufficient** to take case to jury on issues respecting riot and whether defendants aided and abetted riot. State v. Hoffman, (N. C.) 154 SE 314.

Jury as judges of law and fact see Criminal Law § 2273.

[92] See Criminal Law § 2353 et seq.

[93] See cases infra this section.

[a] **Hypothetical illustration.**—Where the law is substantially charged, the court may refuse to give a hypothetical illustration in the language of a written request. Whitley v. State, 66 Ga. 656.

[94] Whitley v. State, supra.

[a] **Refusal to charge common law definition** along with the code definition has been held not erroneous. Whitley v. State, 66 Ga. 656.

[95] See cases infra this note.

[a] **Merely charging definition.**—In recharging on the law of riot, it is error to merely charge the definition, thereby omitting the elements of common intent and concert of action. Nowell v. State, 32 Ga. A. 505, 123 SE 908.

[b] **Common intent.**—It is error to charge that: "If the defendants 'united, with or without a common intent, in doing an unlawful act of violence, the acts and words of each one while the thing [was] in progress [became] the acts and words of the other.'" Hunter v. State, 127 Ga. 43, 55 SE 1044.

[c] **Instructions held correct.**—(1) As to effecting entire purpose. State v. Snow, 18 Me. 346. (2) As to persons liable. Bolin v. State, 193 Ind. 302, 139 NE 659. (3) As to manner of committing the offense. Taylor v. State, 8 Ga. A. 241, 68 SE 945.

[d] **Instruction held properly refused** which declared that persons who assembled peaceably may do acts in a violent and tumultuous manner after they have assembled, without being criminally liable. Bolin v. State, 193 Ind. 302, 139 NE 659.

explicit,[96] and not misleading.[97] They should not submit issues not in the case,[98] or invade the province of the jury.[99]

[§ 37] **4. Verdict.** General rules[1] govern the form and sufficiency of verdicts in prosecutions for riot.[2] Where the findings do not embrace the elements necessary to constitute a riot,[3] they must operate as an acquittal of the offense.[4] One good count in an indictment for riot and assault will ordinarily support a general verdict of guilty,[5] although the other counts may be defective.[6] A general verdict of guilty under an indictment for riot has been held to be sufficient, although the evidence merely establishes that defendants were guilty of rout[7] or unlawful assembly,[8] or an assault.[9] Upon an indictment properly charging a riot and an assault,[10] defendants may be found guilty of the assault and acquitted of the riot.[11] On an information for riotously diverting a watercourse, a verdict finding defendants not guilty of riot, but guilty of diverting a watercourse, is repugnant and void.[12] Where several persons are named in an indictment for riot, a verdict finding only one guilty is repugnant and void,[13] and all must be acquitted[14] unless the indictment contains an allegation that defendant committed the riot with others to the jurors unknown.[15] Where four defendants jointly indicted for a riot are put on trial and the state announces that it will claim no conviction as to two of them and then examines these two as witnesses against the others, a verdict is not void because it finds all guilty.[16]

[§ 38] **E. New Trial.** General rules[17] govern as to new trials in prosecutions for riot.[18] Thus a formal defect in the indictment is not ground for a new trial,[19] nor is the refusal of the court to give a hypothetical illustration of a riot,[20] or the giving of an instruction that is not prejudicial.[21] The subsequent acquittal of another joint defendant in a separate trial does not entitle one already convicted to a new trial.[22]

[§ 39] **F. Arrest of Judgment.** General rules[23] govern as to arrest of judgment in prosecutions for riot.[24] In states where three perpetrators are required[25] and a riot is charged as having been committed by a certain number of defendants who are named, if but two of the alleged are found guilty and all the rest are acquitted, finding less than the minimum number guilty furnishes ground for a motion in arrest of judgment,[26] aliter if the indictment

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96. See cases infra this note.

[a] **An unqualified charge** that, if a person at some distance when the riot takes place comes up immediately afterward and does violence on the same object, he is not guilty of a riot, is properly refused. Hibbs v. State, 24 Ind. 140.

[b] **Instructions held erroneous.**—Lambert v. Peo., 34 Ill. A. 637.

97. See cases infra this note.

[a] **Instruction held not misleading.**—When considered in connection with the other instructions an instruction that each of defendants must have been "acting in conjunction with not less than two other persons in committing the act," was held not objectionable, as misleading the jury to infer that any two persons would answer the requirement. State v. Mizis, 48 Or. 165, 85 P 611, 86 P 361.

[b] **Instructions held misleading.**—Hardebeck v. State, 10 Ind. 459.

98. See cases infra this note.

[a] **Where defendants were indicted for riot** and the evidence showed that they were engaged in beating another person in a violent and tumultuous manner, the court properly refused to charge the law as to assault and battery. Perkins v. State, 78 Ga. 316.

[b] **Instructions held properly refused.**—Bolin v. State, 193 Ind. 302, 139 NE 659; Com. v. Frishman, 235 Mass. 449, 126 NE 838.

99. Shuler v. State, 126 Ga. 630, 55 SE 496; State v. Kuhlman, 5 Mo. A. 588.

1. See Criminal Law § 2580 et seq.

2. See cases infra this section.

[a] **Construction of verdict.**—Where four persons are jointly indicted for riot and the verdict finds two of them guilty of "unlawful riot," and the other two guilty of "lawful riot," this was in effect a finding of not guilty of the latter two. Barron v. State, 74 Ga. 833.

3. Essential elements of the offense see supra §§ 3-13.

4. State v. Stephanus, 53 Or. 135, 99 P 428, 17 AnnCas 1146.

[a] **Where the verdict finds facts** from which the court can see that the assembly of defendants was not unlawful, defendants cannot be convicted of a riot. State v. Hughes, 72 N. C. 25.

[b] **A conviction cannot be sustained** where defendant is found guilty of a riot but not of the assault charged, for the verdict shows that the assault, the object of the riotous assembly, was never executed. Reg. v. Kelly, 6 U. C. C. P. (Ont.) 372.

5. State v. Connolly, 37 S. C. L. 337.

6. See cases supra note 5.

7. State v. Sumner, 29 S. C. L. 599, 42 AmD 387; State v. Brazil, 24 S. C. L. 257.

8. State v. Sumner, 29 S. C. L. 599, 42 AmD 387; State v. Brazil, 24 S. C. L. 257.

[a] **It is wholly immaterial,** after a general verdict of guilty on an indictment for riot, whether the facts proved establish that defendants are guilty of a riot, rout, or an unlawful assembly. State v. Brazil, 24 S. C. L. 257.

9. State v. Brazil, supra.

10. Joinder of riot and assault and battery see Indictments and Informations 31 C. J. p 784 note 99.

11. See case infra this note.

[a] **On an indictment for riot, and a riotous assault and battery,** by four persons, one of them may be convicted of the assault and battery, and the others acquitted of the whole. Shouse v. Com., 5 Pa. 83.

Conviction of an assault and battery under an indictment for riot see Indictments and Informations 31 C. J. p 870 note 6.

12. Rex v. Colson, 3 Mod. 72, 87 Reprint 47.

13. Martin v. State, 115 Ga. 255, 41 SE 576; Harison v. Errington, Poph. 202, 79 Reprint 1292.

Ground for arrest of judgment see infra § 39.

14. Lewis v. State, 5 Ga. A. 496, 63 SE 570; Turpin v. State, 4 Blackf. (Ind.) 72; Rex v. Sudbury, 12 Mod. 262, 88 Reprint 1309, 2 Salk. 593, 91 Reprint 502.

15. See cases supra note 14.

16. Sims v. State, 87 Ga. 569, 13 SE 551.

17. See Criminal Law § 2615 et seq.

18. See cases infra this section.

[a] **Where four persons are indicted for riot** and there is no allegation that others participated in the riot, and after conviction a new trial is granted to three of the defendants, a new trial should also be granted to the other defendant. Lewis v. State, 5 Ga. A. 496, 63 SE 570.

19. Martin v. State, 115 Ga. 255, 41 SE 576.

20. Whitley v. State, 66 Ga. 656.

21. Rachels v. State, 51 Ga. 374.

22. Simmons v. Terr., 11 Okl. 574, 69 P 787.

23. See Criminal Law § 2768 et seq.

24. See cases infra this section.

[a] **Where all the essential ingredients** of the crime of riot are contained in the indictment, a motion in arrest of judgment cannot prevail on the ground that no offense is charged. State v. Brazil, 24 S. C. L. 257.

25. See supra § 5.

26. Ga.—Martin v. State, 115 Ga. 255, 41 SE 576.

Ind.—Turpin v. State, 4 Blackf. 72.

La.—State v. Egan, 10 La. Ann. 698.

S. C.—State v. Brazil, 24 S. C. L.

had been that defendants with others committed the offense.[27] Where it is alleged that defendant committed the crime with others,[28] failure to state that the others are unknown is ground for arresting the judgment if less than the minimum number required are found guilty,[29] although the contrary has been held.[30] Where a number of persons are indicted for a riot and one is tried separately and found guilty, and the others are not yet taken,[31] or are tried and acquitted,[32] the court must nevertheless enter judgment against the first. This is the rule under statutes[33] in some jurisdictions.[34]

[§ 40] **G. Sentence and Punishment.** At common law the offense of riot is a misdemeanor.[35] By most of the state statutes riot is also made a misdemeanor;[36] but an occasional statute, although making the offense a misdemeanor, also makes the crime a felony where certain matters of aggravation have been laid and proved.[37] While the common-law offense provides for both a fine and jail imprisonment,[38] the imprisonment is not a necessary part of the punishment.[39] Riots are punishable as at common law, notwithstanding a statute,[40] but where a statute fixes the penalty for the common-law offense,[41] no other than the statutory penalty can be inflicted.[42] Statutes providing for the punishment of the crime[43] are solely for the guidance of the court in passing sentence[44] and do not classify any degrees of the crime.[45]

V. SUPPRESSION OF RIOT

[§ 41] **A. By Private Citizens.** Citizens may, on their own authority,[46] lawfully endeavor to suppress a riot[47] and may arm themselves for that purpose,[48] and whatever is honestly done by them[49] in the execution of that object[50] will be supported and justified by law. However, it would be more discreet in such cases to be assistant to the sheriff and other civil authorities.[51]

[§ 42] **B. By Civil Authorities—1. Posse Comitatus.**[52] It is a general rule that every citizen capa-

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257; State v. Calder, 13 S. C. L. 462.

Eng.—Rex v. Sudbury, 12 Mod. 262, 88 Reprint 1309, 2 Salk. 593, 91 Reprint 502.

[a] **Where six are indicted and two die** and two are acquitted, judgment will not be arrested as to the two found guilty. Rex v. Scott, 3 Burr. 1262, 97 Reprint 822, 1 W. Bl. 350, 96 Reprint 195.

[27] See cases supra note 26.

[28] See supra § 19.

[29] State v. O'Donald, 12 S. C. L. 532, 10 AmD 691.

[30] Martin v. State, 115 Ga. 255, 41 SE 576.

[31] State v. Pugh, 3 N. C. 55, 2 AmD 621.

[a] **Where one of several** indicted for a riot is convicted, the others not yet taken, he is estopped by the verdict to deny his guilt, and may be punished, although the others may be acquitted. State v. Pugh, 3 N. C. 55, 2 AmD 621.

[32] Simmons v. Terr., 11 Okl. 574, 69 P 787; State v. Allison, 3 Yerg. (Tenn.) 428. But see State v. Mooney, 1 Yerg. (Tenn.) 431 [dist State v. Pugh, 3 N. C. 55, 2 AmD 621] (holding that a defendant granted a separate trial was incompetent as a witness for the others, because if they had been acquitted on his evidence, he would then have stood alone in the indictment and ought to have been discharged).

[a] **The court cannot look to extrinsic facts** to find reasons to arrest the judgment, but must find them in the record of the one found guilty. State v. Allison, 3 Yerg. (Tenn.) 428.

[b] **Defendant is concluded by the record** and the subsequent acquittal of another of the joint defendants in a separate trial will not entitle the one convicted to a discharge. Simmons v. Terr., 11 Okl. 574, 69 P 787.

[33] See statutory provisions.

[34] Rachels v. State, 51 Ga. 374.

[35] U. S. v. McFarlane, 26 F. Cas. No. 15,675, 1 Cranch C. C. 163; Peo. v. White, 55 Barb. 606 [aff 32 N. Y. 465]; Reg. v. Casey, Ir. R. 8 C. L. 408.

[36] See statutory provisions.

[37] See statutory provisions; and cases infra this note.

[a] **In Alaska,** under Pen. Code § 112, which provides that a person convicted of riot under the preceding section shall be punished by imprisonment in the penitentiary not less than three nor more than fifteen years "if such person carried at the time of such riot any species of dangerous weapon, or was disguised, or encouraged or solicited other persons who participated in the riots to acts of force or violence," and in all other cases by imprisonment in the county jail not more than a year or by a fine, a court is without power to impose a penitentiary sentence where the indictment did not charge any of the acts of aggravation enumerated. Christensen v. U. S., 151 Fed. 766, 81 CCA 390.

[b] **In Oregon,** under a statute providing that a rioter who carries a dangerous weapon shall be imprisoned in the penitentiary, a defendant who participates in a riot, during the course of which other participants committed an assault with a dangerous weapon, may be sentenced to the penitentiary. State v. Mizis, 48 Or. 165, 85 P 611, 86 P 361.

[c] **In Virginia,** under a statute providing that if any rioter pulls down or destroys, in whole or in part, any dwelling house, or assists therein, he shall be confined in the penitentiary (1) a building of which part of the lower floor is used as a store and part as a dining room, and the upper part as sleeping quarters, is a dwelling house within the meaning of the statute (Samanni v. Com., 16 Gratt. (57 Va.) 543), (2) and the breaking of a door and window in the house so as to render them useless is sufficient to bring the guilty party within the statute (Samanni v. Com., supra), (3) and an intention to destroy the house is not necessary (Samanni v. Com., supra).

[d] **Aggravated riot not amounting to felony.**—Where persons are convicted of a riot, although with the aggravation of riotously rescuing a fugitive slave from his master, it is illegal to sentence them to the penitentiary, the proper imprisonment for such offense being in the county jail. Clellans v. Com., 8 Pa. 223.

[e] **Deadly or dangerous weapon.**—The instrument carried must be either a deadly or dangerous weapon per se; and a driving whip is not such a dangerous weapon. State v. Page, 15 S. D. 613, 91 NW 313.

[38] U. S. v. McFarlane, 26 F. Cas. No. 15,675, 1 Cranch C. C. 163.

[39] U. S. v. McFarlane, supra.

[40] U. S. v. McFarlane, supra.

[41] See statutory provisions.

[42] White v. Com., 10 Bush (Ky.) 557.

[43] See statutory provisions.

[44] Peo. v. Brown, 193 App. Div. 203, 184 NYS 165.

[45] Peo. v. Brown, supra; Johnson v. State, 16 Okl. Cr. 428, 183 P 926.

[46] State v. Coit, 8 OhS&CP 62; Com. v. Hare, 4 PaLJ 257; Com. v. Daley, 4 PaLJ 150.

[a] **It is the duty** of every good citizen to endeavor to suppress a riot. Respublica v. Montgomery, 1 Yeates (Pa.) 419.

[47] Pond v. Peo., 8 Mich. 150; State v. Coit, 8 OhS&CP 62; Com. v. Hare, 4 PaLJ 257; Com. v. Daley, 4 PaLJ 150.

[48] Com. v. Hare, 4 PaLJ 257; Com. v. Daley, 4 PaLJ 150.

[49] State v. Coit, 8 OhS&CP 62; Com. v. Hare, 4 PaLJ 257; Com. v. Daley, 4 PaLJ 150; Respublica v. Montgomery, 1 Yeates (Pa.) 419.

[50] State v. Coit, 8 OhS&CP 62; Com. v. Hare, 4 PaLJ 257; Com. v. Daley, 4 PaLJ 150.

[51] State v. Coit, 8 OhS&CP 62; Com. v. Hare, 4 PaLJ 257; Com. v. Daley, 4 PaLJ 150.

[52] **Defined** [35 Cyc 1526].

ble of bearing arms,[53] of every rank, description, and denomination,[54] is bound to yield a prompt obedience, when called to the assistance of the sheriff,[55] or other authorized peace officer,[56] to suppress a riot. A person neglecting to do so is guilty of an offense[57] for which he may be indicted,[58] and fined and imprisoned[59] at the discretion of the court.[60] It is also an offense for a magistrate to refuse to raise the posse, when necessity therefor arises.[61] With this posse the sheriff may exercise an authority, as their chief, which can hardly be distinguished from that of a general subduing a revolt.[62]

[§ 43] **2. Militia as Posse Comitatus.**[63] Where a force of militia reports to a civil officer to aid him to suppress riot, this force has no power to act independently of civil authority,[64] or to usurp its functions,[65] or take its place.[66] Such force may act simply as armed police,[67] subject to the control of magistrates[68] and other civil authorities.[69] While such a military force is acting strictly in aid of civil authorities, the military officers have only the same powers as have the civil officers,[70] and the military must perform only such service and render such aid as is required by a civil officer.[71] The military officers have a discretion as to the best means of executing an order received from civil authority;[72] but the service or duty must be first prescribed and designated by the civil authority.[73]

[§ 44] **C. By State—1. In General.** Primarily, the duty of protecting lives and property from the unlawful violence of mobs or rioters rests in the state.[74] This duty is not divested,[75] nor in any degree impaired or diminished,[76] by the delegation of the same duty to municipalities.[77]

In the District of Columbia it has been held that the president has power to call out the military in aid of the civil authorities.[78]

[§ 45] **2. Governor's Independent Action.** Except when inhibited by a state constitution,[79] the governor may dispense with certain statutory formalities[80] where an emergency exists,[81] and may direct the use of the state military forces in the suppression of a riot.[82] Where the governor orders out troops to quell a riot, the troops do not become a part of the sheriff's posse comitatus,[83] but are in the service of the state,[84] and all means necessary for the restoration of order may be used.[85]

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[53] In re Charge to Grand Jury, 4 PaLJ 29; Rex v. Pinney, 3 B. & Ad. 947, 23 ECL 412, 110 Reprint 349, 5 C. & P. 254, 24 ECL 552, 172 Reprint 962; Reg. v. Vincent, 9 C. & P. 91, 38 ECL 65, 173 Reprint 754; Rex v. Kennett, 5 C. & P. 282, 24 ECL 566, 172 Reprint 976.

[54] In re Charge to Grand Jury, 4 PaLJ 29.

[55] In re Charge to Grand Jury, supra.

[56] Rex v. Pinney, 3 B. & Ad. 947, 23 ECL 412, 110 Reprint 349, 5 C. & P. 254, 24 ECL 552, 172 Reprint 962; Reg. v. Brown, C. & M. 314, 41 ECL 175, 174 Reprint 522.

[a] **The marshal has a right** to take a posse, and to call on all citizens to aid him in arresting rioters; and the citizens have a right to arm themselves. U. S. v. Fenwick, 25 F. Cas. No. 15,086, 4 Cranch C. C. 675.

[57] In re Charge to Grand Jury, 4 PaLJ 29; Respublica v. Montgomery, 1 Yeates (Pa.) 419; Chapin v. Ferry, 3 Wash. 386, 28 P 754, 15 LRA 116; Reg. v. Brown, C. & M. 314, 41 ECL 175, 174 Reprint 522; Reg. v. Vincent, 9 C. & P. 91, 38 ECL 65, 173 Reprint 754.

[58] Reg. v. Brown, C. & M. 314, 41 ECL 175, 174 Reprint 522; Reg. v. Vincent, 9 C. & P. 91, 38 ECL 65, 173 Reprint 754.

[59] In re Charge to Grand Jury, 4 PaLJ 29.

[60] In re Charge to Grand Jury, supra.

[61] Rex v. Kennett, 5 C. & P. 282, 24 ECL 566, 172 Reprint 976.

[a] **It is prima facie evidence** of a criminal neglect of duty, where, on a riot taking place, a magistrate neither reads the proclamation from the Riot Act, nor restrains nor apprehends the rioters, nor gives any order to fire on them, nor makes any use of a military force under his command. Rex v. Kennett, 5 C. & P. 282, 24 ECL 566, 172 Reprint 976.

[62] Com. v. Shortall, 206 Pa. 165, 55 A 952, 98 AmSR 759, 65 LRA 193.

[a] **Every necessary means** to restore peace, and prevent criminal outrages against person or property may be used in the suppression of dangerous riots by the sheriff and his assistants. Com. v. Daley, 4 PaLJ 150.

[b] **Arms may be used** as in battle to bear down resistance; and if loss of life ensues, the circumstances will be a justification. The measure does not, however, cease to be civil, or fall beyond the rule which applies when a house is entered in the night by burglars, or a traveler shoots a highwayman who demands his money. Com. v. Shortall, 206 Pa. 165, 55 A 952, 98 AmSR 759, 65 LRA 193.

[63] **Independent action of militia in suppressing a riot** see infra § 45 text and notes 83, 84.

Expense of maintenance see Militia § 80.

[64] Ela v. Smith, 5 Gray (Mass.) 121, 66 AmD 356; State v. Coit, 8 OhS&CP 62.

[65] Ela v. Smith, 5 Gray (Mass.) 121, 66 AmD 356; State v. Coit, 8 OhS&CP 62.

[66] Ela v. Smith, 5 Gray (Mass.) 121, 66 AmD 356; State v. Coit, 8 OhS&CP 62.

[67] Ela v. Smith, 5 Gray (Mass.) 121, 66 AmD 356; State v. Coit, 8 OhS&CP 62.

[68] Ela v. Smith, 5 Gray (Mass.) 121, 66 AmD 356; State v. Coit, 8 OhS&CP 62.

[69] Ela v. Smith, 5 Gray (Mass.) 121, 66 AmD 356; State v. Coit, 8 OhS&CP 62.

[70] State v. Coit, supra.

[71] Chicago v. Chicago League Ball Club, 196 Ill. 54, 63 NE 695, 89 AmSR 243; Ela v. Smith, 5 Gray (Mass.) 121, 66 AmD 356; State v. Coit, 8 OhS&CP 62.

[72] Chicago v. Chicago League Ball Club, 196 Ill. 54, 63 NE 695, 89 AmSR 243; Ela v. Smith, 5 Gray (Mass.) 121, 66 AmD 356; State v. Coit, 8 OhS&CP 62.

[73] Ela v. Smith, 5 Gray (Mass.) 121, 66 AmD 356.

[74] Chicago v. Chicago League Ball Club, 196 Ill. 54, 63 NE 695, 89 AmSR 243.

[75] Chicago v. Chicago League Ball Club, supra.

[76] Chicago v. Chicago League Ball Club, supra.

[77] **Power of municipality to suppress** see Municipal Corporations § 208.

[78] U. S. v. Stewart, 27 F. Cas. No. 16,401a, 2 Hayw. & H. 280.

[79] See constitutional provisions.

[80] See statutory provisions.

[81] Chapin v. Ferry, 3 Wash. 386, 28 P 754, 15 LRA 116.

[a] **Danger imminent.**—Where a statute provides that a governor must request local authorities to suppress a riot, before he may act independently, this course of action is not binding on him, when, in his judgment, the danger of riot is so imminent as not to permit of the delay necessary to so many formalities. Chapin v. Ferry, 3 Wash. 386, 28 P 754, 15 LRA 116.

[b] **Decision not reviewable.**—The governor's decision that it is necessary to use the military forces, to suppress riot, is not one that may be reviewed by the courts. Chapin v. Ferry, 3 Wash. 386, 28 P 754, 15 LRA 116.

[82] Chapin v. Ferry, supra.

[83] Com. v. Shortall, 206 Pa. 165, 55 A 952, 98 AmSR 759, 65 LRA 193; Chapin v. Ferry, 3 Wash. 386, 28 P 754, 15 LRA 116.

[a] **Where the situation goes beyond county control,** the governor intervenes as the supreme executive, and he or his military representative becomes the superior commanding officer. Com. v. Shortall, 206 Pa. 165, 55 A 952, 98 AmSR 759, 65 LRA 193.

Militia as posse comitatus see supra § 43.

[84] Chapin v. Ferry, 3 Wash. 386, 28 P 754, 15 LRA 116.

[85] Com. v. Shortall, 206 Pa. 165, 55 A 952, 98 AmSR 759, 65 LRA 193.

***RIOT AND CIVIL COMMOTION INSURANCE.**[1] A form of insurance[2] which, among other things, insures against direct loss or damage caused to property by civil commotion,[3] riot,[4] or riot attending strike.[5]

RIOTER. One who inflames people's minds and induces them by violent means to accomplish an illegal object.[6]

RIOTOUS.[7] Partaking of the nature of an unlawful assembly or its acts;[8] seditious,[9] tumultuous,[10] or violent.[11] In a popular sense, wanton or boisterous.[12]

RIOTOUSLY.[13]

RIP. To separate or divide the parts of by cutting or tearing; tear or cut open or off; split.[14]

RIPA.[15] A Latin word meaning a bank;[16] a bank of stream not navigable;[17] a river bank;[18] shore of a river.[19]

RIPARIAN.[20] [§ 1] **A. In General.** A term derived from the Latin, riparius, of or belonging to the banks of a river,[21] in turn derived from ripa.[22] It has been defined as meaning of or pertaining to the bank of a river;[23] pertaining to or situated on the bank of a river;[24] relating to the bank of a stream or other water—river, lake, or sea.[25] Ordinarily, the term applies to a river and flowing water,[26] is used to describe the rights of owners of uplands along running streams or rivers,[27] and relates to the bank, and not the bed, of the stream.[28]

Phrases: "Riparian or other rights,"[29] and "riparian owner."[30]

[§ 2] **B. Riparian Property.** Property having a water frontage.[31]

Land, to be riparian, must have the stream flowing over it or along its borders.[32] The land must be located on the watershed of that portion of the stream which is in question.[33]

[§ 3] **Riparian Waters.** Waters of the ordinary flow and underflow of the stream;[34] water below the highest line of the normal flow of the river.[35]

RIPARIAN OWNER or RIPARIAN PROPRIETOR.[36]

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[1] **Exemption from liability in fire policy** see Fire Insurance § 437.

[2] **Insurance generally** see Insurance 32 C. J. p 950.

[3] **"Civil Commotion"** 11 C. J. p 794.

[4] **"Riot"** see ante § 1.

[5] See Brous v. Imperial Assur. Co., 130 Misc. 450, 224 NYS 136.

[a] **Particular policies construed.**—Kirshenbaum v. Massachusetts Bonding, etc., Co., 107 Nebr. 368, 186 NW 325; Brooklyn Clothing Corp. v. Fidelity-Phenix F. Ins. Co., 205 App. Div. 743, 200 NYS 208; Brous v. Imperial Assur. Co., 130 Misc. 450, 224 NYS 136; Brooklyn Clothing Corp. v. People's Nat. F. Ins. Co., 118 Misc. 674, 195 NYS 27.

[6] Spies v. Peo., 122 Ill. 1, 198, 12 NE 865, 17 NE 898, 3 AmSR 320. See Reg. v. Sharpe, 3 Cox C. C. 288. See also Riot § 1.

[7] **Riotous assembly** see Riot ante; Unlawful Assembly [39 Cyc 831].

[8] Webster D. [quot Madisonville v. Bishop, 113 Ky. 106, 109, 67 SW 269, 23 KyL 2363, 57 LRA 130].

[9] Webster D. [quot Madisonville v. Bishop, supra].

[10] Webster D. [quot Madisonville v. Bishop, supra].

[11] State v. Kutter, 59 Ind. 572, 574.

[12] State v. Kennan, 25 Wash. 621, 626, 66 P 62.

[13] See Riot ante.

[14] Century D.

[a] **"Tear" distinguished.**—Keenan v. Cherry, 47 R. I. 125, 131 A 309, 311.

[b] **Bars of lead or iron** may be broken or cut, but with respect to lead or iron in that shape the legislature would hardly apply the term "rip." State v. Stone, 30 N. J. L. 299, 300.

[15] See Riparian post.

[16] Century D. [quot Mobile Dry-Docks Co. v. Mobile, 146 Ala. 198, 203, 40 S 205, 3 LRANS 822, 9 Ann Cas 1229].

[17] Gough v. Bell, 22 N. J. L. 441, 464.

[18] Sutter v. Heckman, 1 Alaska 188, 192; Clements v. Watkins Land, etc., Co., 36 Tex. Civ. A. 339, 344, 82 SW 665.

"Bank" § 2.

[19] Anderson L. D. [quot Bathgate v. Irvine, 126 Cal. 135, 143, 58 P 442, 77 AmSR 158].

"Shore" [36 Cyc 432].

[20] **"Littoral"** see 38 C. J. p 69; Navigable Waters § 143.

[21] Mobile Dry-Docks Co. v. Mobile, 146 Ala. 198, 203, 40 S 205, 3 LRANS 822, 9 AnnCas 1229 [cit Century D.].

[22] Mobile Dry-Docks Co. v. Mobile, supra; Sutter v. Heckman, 1 Alaska 188, 192.

"Ripa" ante.

[23] Webster Int. D. [quot Mobile Dry-Docks Co. v. Mobile, 146 Ala. 198, 203, 40 S 205, 3 LRANS 822].

[24] Century D. [quot Mobile Dry-Docks Co. v. Mobile, supra; Mobile Transp. Co. v. Mobile, 128 Ala. 335, 348, 30 S 645, 86 AmSR 143, 64 LRA 333].

[25] Anderson L. D. [quot Bathgate v. Irvine, 126 Cal. 135, 143, 58 P 442, 77 AmSR 158].

[26] Rickey v. Toronto, 30 Ont. L. 523, 524, 5 OntWN 892, 19 DomLR 146.

[27] Sutter v. Heckman, 1 Alaska 188, 192.

Riparian rights see Navigable Waters §§ 143–205; Waters [40 Cyc 542].

[28] Lyon v. Fishmongers' Co., 1 App. Cas. 622, 683 [quot Meyers v. St. Louis, 8 Mo. A. 266, 273; Delaplaine v. Chicago, etc., R. Co., 42 Wis. 214, 229].

[29] Potomac Dredging Co. v. Smoot, 108 Md. 54, 58, 69 A 507.

[30] See Navigable Waters § 145; Waters [40 Cyc 558].

[31] Shepard's Point Land Co. v. Atlantic Hotel, 132 N. C. 517, 44 SE 39, 45, 61 LRA 937.

[32] Crawford Co. Hathaway, 67 Nebr. 325, 93 NW 781, 790, 108 Am SR 647, 60 LRA 889.

[a] **Lands which do not in any way border upon water of stream** are not riparian to it. Clements v. Watkins Land, etc., Co., 36 Tex. Civ. A. 339, 344, 82 SW 665.

[b] **Land extending beyond watershed.**—When an owner's lands bordered on a stream, the fact that a part of it extended beyond the natural watershed of the stream did not prevent that part from being riparian land. Jones v. Conn, 39 Or. 30, 39, 64 P 855, 65 P 1068, 87 AmSR 634, 54 LRA 630.

[c] **Land extending to levee.**—Those lands which actually extend to a river—that is, which come down to the banks of the river, are riparian, and on the borders of the Mississippi, and other navigable streams, where there are levees established according to law, the levees shall form the banks—the lands extending to the levee, although not actually washed by the river. Hart v. Orleans Parish Levee Comrs., 54 Fed. 559, 561.

[33] Gordonsville v. Zinn, 129 Va. 542, 106 SE 508, 513, 14 ALR 318.

[a] **Land which is not within watershed** of the river is not riparian thereto. Anaheim Union Water Co. v. Fuller, 150 Cal. 327, 88 P 978, 979, 11 LRANS 1062.

[34] Motl v. Boyd, 116 Tex. 82, 286 SW 458, 468.

[a] **"Flood waters" distinguished.**—Motl v. Boyd, 116 Tex. 82, 286 SW 458, 468.

[35] Parker v. El Paso Water Impr. Dist. No. 1, 116 Tex. 631, 297 SW 737, 743.

[a] **"Riparian waters."**—"All the waters in a stream below the highest line of its normal flow." Humphreys-Mexia Co. v. Arseneaux, 116 Tex. 603, 297 SW 225, 229, 53 ALR 1147.

[36] See Navigable Waters § 145

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*By WM. HOWARD BUCHANAN (Riot and Civil Commotion Insurance—Riparum Usus Publicus Est Jure Gentium, Sicut Ipsius Fluminis inclusive).

RIPARIAN PROPERTY.[37]

RIPARIAN RIGHTS.[38]

RIPARIAN WATERS.[39]

RIPARUM USUS PUBLICUS EST JURE GENTIUM, SICUT IPSIUS FLUMINIS.[40]

***RIPE.** Full grown; developed; finished;[41] ready for reaping or gathering;[42] ready for action;[43] also having experience, knowledge, or skill; wise or clever.[44]

RIPENING SEEDS OF CONTROVERSY. A state of fact indicating imminent and inevitable litigation.[45]

RIPPLING. In the process of flax manufacture, separating the boll from the stems.[46]

RIPRAP. A common name applied to broken stone used for beds, walls, and foundations in building and construction;[47] stone when laid into a kind of shingling upon the slope of a dirt embankment at such points as it is likely to be washed by water.[48] Also a kind of wall.[49]

RIPSAW. A machine consisting of a cast iron table in the center of which, running in a slit, is a small circular saw.[50]

RISERS. The name of two small wires leading up to and through the roof, commonly found in power houses.[51]

RISING OF COURT. A term used as equivalent to "final adjournment" or "the last day of the term."[52]

RISK.[53] Chance[54] of encountering hazard,[55] or peril,[56] or exposure[57] to such a chance;[58] danger, hazard, peril;[59] degree of exposure to loss or injury.[60]

In insurance law,[61] the danger or hazard of a

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text and note 74 [a]; Waters [40 Cyc 558 text and note 36].

37. See Riparian ante.

38. See Navigable Waters § 143 text and note 33 [a]. And see Waters [40 Cyc 557 et seq].

39. See Riparian ante.

40. A maxim meaning "The use of river-banks is by the law of nations public, like that of the stream itself. Peloubet Leg. Max. [cit Dig. 1, 8, 5].

41. Century D.

42. Webster New Int. D. See Norfolk Beet Sugar Co. v. Berger, 1 Nebr. (Unoff.) 151, 157, 95 NW 336 (in a contract for beets, "ripe" as the equivalent of the standard of quality agreed upon, namely, twelve per cent of sugar, with a purity coefficient of eighty).

"Green or ripe" see Green 28 C. J. p 825.

43. Webster New Int. D.

"Ripe for judgment" see Judgments § 209.

44. Century D.

45. In re Cryan, 301 Pa. 386, 152 A 675, 679 [quot in part In re Pittsburgh's Consolidated City Charter, 297 Pa. 502, 506, 147 A 525]. See Kariher's Pet., 284 Pa. 455, 131 A 265 [quot Reese v. Adamson, 297 Pa. 13, 15, 146 A 262, 263] (construing Uniform Declaratory Judgments Act of June 18, 1923, jurisdiction of a proceeding to obtain a declaratory judgment "will never be assumed unless the tribunal appealed to is satisfied that an actual controversy, or the ripening seeds of one, exists").

[a] **"Controversy" distinguished.**—"If differences between the parties concerned, as to their legal rights, have reached the stage of antagonistic claims, which are being actively pressed on one side and opposed on the other, an actual controversy appears, where, however, the claims of the several parties in interest, while not having reached that active stage, are nevertheless present, and indicative of threatened litigation in the immediate future, which seems unavoidable, the ripening seeds of a controversy appear." In re Cryan, 301 Pa. 386, 152 A 675, 679. "Controversy" see Actions § 29.

[b] **"Actual controversy" distinguished.**—An "actual controversy" is an immediate controversy; the ripening seeds of one; a controversy which is inevitable and imminent, between parties, all of whom are before the court. Sterrett's Est., 300 Pa. 116, 123, 150 A 159, 161.

Declaratory judgment see Judgments § 57.

Determination of abstract questions see Actions § 68; Courts §§ 78, 79; Equity §§ 138–140.

46. In re Eckstein, Treas. Dec. No. 25,710.

47. Encyclopædia Americana [quot U. S. v. Greene, 146 Fed. 801, 862].

48. Wood v. Vermont Cent. R. Co., 24 Vt. 608, 610.

49. Wood v. Vermont Cent. R. Co., supra.

50. Merritt v. Victoria Lumber Co., 111 La. 159, 35 S 497, 498.

51. Woelflen v. Lewiston-Clarkston Co., 49 Wash. 405, 95 P 493, 495.

[a] **"Lightning arresters" synonymous.**—Woelflen v. Lewiston-Clarkston Co., 49 Wash. 405, 95 P 493, 495. "Lightning arrester" see Lightning 37 C. J. p 660 text and note 37.

52. State v. Weaver, 11 Nebr. 163, 165, 8 NW 385, 386 (construing a statute requiring a party to reduce his exceptions to writing within such time as the court may direct, not exceeding forty days from "the rising of the court").

"Last day of the term" see Last 36 C. J. p 954 text and note 57.

53. Assumption of risk:
Carriers §§ 93, 99 (by shipper), §§ 1511–1514 (riding in dangerous place).
Landlord and Tenant §§ 911, 912 (by tenant).
Master and Servant §§ 882–1024 (by servant), §§ 1361–1372 (question of law or fact), §§ 1418–1425 (instructions).
Negligence § 203 (by licensee).
Railroads § 2124 (by licensee).
Seamen [35 Cyc 1245].
Workmen's Compensation Acts §§ 53–78.

54. "Chance" 11 C. J. p 279.

55. "Hazard" 29 C. J. p 236.

56. "Peril" 48 C. J. p 812.

[a] **"Peril" synonymous.**—Britannia Shipping Corp. v. Globe, etc., F. Ins. Co., 244 NYS 720, 721 ("the court is unable to see sufficient difference between the meanings of the respective terms to warrant a holding that a loss by theft, though not a 'peril,' is a 'risk' of the harbor").

57. "Exposure" 25 C. J. p 218.

58. Webster D. [quot United Benev. Assoc. v. Baker, (Tex. Civ. A.) 141 SW 541, 543]. See Britannia Shipping Corp. v. Globe, etc., F. Ins. Co., 244 NYS 720 ("risk" is "a word referring to exposure to mischance or evil or harm").

59. Webster D. [quot United Benev. Assoc. v. Baker, (Tex. Civ. A.) 141 SW 541, 543].

[a] **"Danger" synonymous.**—Bottig v. Polsky, 101 Or. 530, 201 P 188, 199 ("loading of a box car with empty barrels in the usual or ordinary manner does not involve a risk or danger").

"Danger" 17 C. J. p 1126.

60. Webster D. [quot United Benev. Assoc. v. Baker, (Tex. Civ. A.) 141 SW 541, 543].

"Injury" 32 C. J. p 514.

61. Insurance risk:
Generally see Insurance § 277 (commencement and duration), § 501–505 (material misrepresentation, statutory modification of consequences), §§ 715–756 (reinsurance).
Accident Insurance §§ 72–99.
Boiler Insurance § 3.
Burglary and Theft Insurance § 7.
Casualty Insurance 11 C. J. p 30.
Credit Insurance § 10.
Cyclone and Tornado Insurance § 7.
Fidelity Insurance § 4 et seq.
Fire Insurance §§ 243–278 (increasing risk), §§ 429–446.
Guaranty Insurance § 4.
Hail Insurance § 10.
Health Insurance § 7.
Industrial Insurance § 1.
Liability Insurance § 5 et seq.
Life Insurance § 170 (material misrepresentation, statutory modification of consequences), § 294 (military or naval service).
Lightning Insurance § 2.
Live-Stock Insurance §§ 18, 19.
Lloyd's Insurance §§ 17, 23.

*By CHARLES REZNIKOFF (Ripe—Robada inclusive).

loss by or to insured;[62] the casualty contemplated in a contract of insurance;[63] the degree of hazard[64] or danger upon which the premiums of insurance are calculated;[65] also defined as an obligation or contract of insurance on the part of insurer.[66]

Phrases in which "risk" has been employed are: "Any change increasing the risk,"[67] "assumption of risk,"[68] "at his own risk,"[69] "at owner's risk,"[70] "consent to risk,"[71] "extraordinary risk,"[72] "fact material to the risk,"[73] "imputed appreciation of risk,"[74] "increase the risk of loss,"[75] "incurring risk,"[76] "material to the risk,"[77] "necessary risk [or risks],"[78] "obvious and patent risk,"[79] "open visible risk,"[80] "ordinary risk" [or "ordinary risks"],[81] "owner's risk,"[82] "owner's risk against all casualties,"[83] "owner's risk of delay,"[84] "risk assumed,"[85] "risk commencing,"[86] "risk incidental to the employment,"[87] "risk of collision,"[88] "risk of seizure or capture,"[89] "risk of war" [or "risks of war"],[90] "risk ordinarily incident to the employment,"[91] "risk ordinarily incident to the work,"[92] "risk peculiar to the operation of a railroad,"[93] "shifting risk,"[94] and "usual risk of lighterage."[95] Phrases in which "risks" has been employed are: "All risks,"[96] "glaring risks,"[97] "obvious and ordinary risks,"[98] "obvious risks" [or "obvious risk"],[99] "risks and damages necessarily incident to the work and employment in which plaintiff was engaged,"[1] "risks of navigation,"[2] "risks of the employment,"[3] "risks of the service,"[4] "risks, perils or dangers of the seas, bays, harbors, rivers, and fires,"[5] and "the bidder takes the risk."[6]

RIVAL. A river bank or shore; a stream or wa-

Marine Insurance §§ 92–113 (commencement, duration, and termination), §§ 231–253 (deviation and change of risk), §§ 264–331.
Motor Vehicles § 46 et seq.
Mutual Benefit Insurance § 3.
Physician's defense see Liability Insurance § 61.
Plate Glass Insurance § 6.
Rent Insurance § 4.
Title Insurance [38 Cyc 348].
Workmen's Compensation Acts §§ 53–78.

[62] Webster D. [quot United Benev. Assoc. v. Baker, (Tex. Civ. A.) 141 SW 541, 543].

[63] Webster D. [quot United Benev. Assoc. v. Baker, supra].

[64] Black L. D. [quot United Benev. Assoc. v. Baker, supra].

[65] Peo. v. May, 162 App. Div. 215, 217, 147 NYS 487, 489.

[66] Black L. D. [quot United Benev. Assoc. v. Baker, (Tex. Civ. A.) 141 SW 541, 543]. See Continental Ins. Co. v. Ætna Ins. Co., 138 N. Y. 16, 21, 33 NE 724 ("The word 'risk,' in its ordinary and popular use, with reference to insurance, describes the liability assumed as specified on the face of the policy, and in that sense it is used in numerous statutes of this state regulating insurance companies, and in some adjudged cases").

[a] **In marine policy** the word has a double meaning, both the voyage commenced with necessary conditions to make the underwriters liable, and also the chance of loss during its performance. Bradford v. Symondson, 7 Q. B. D. 456, 464 ("used in the first sense by the authorities").

[b] **"Policies" not synonymous.**—London, etc., F. Ins. Co. v. Lycoming Ins. Co., 105 Pa. 424, 430 (as used in an agreement, "policies" mean the instruments in which the contracts of insurance are embodied, and "risks" the hazards at the places where the property insured is located).

[c] **"Stock subscriptions" distinguished.**—A statute prohibiting foreign insurance companies from taking "risks," except upon certain conditions, does not invalidate stock subscriptions, although such conditions have not been complied with. Stock subscriptions are not risks; "at least, not in legal parlance, though when taken in some corporations there is a sense in which they may well be called 'risks.' But in legal phraseology, they are as distinct as any transactions known to the law." Bartlett v. Chouteau Ins. Co., 18 Kan. 369. Foreign corporation doing business in state see Insurance § 29.

[67] See Any 3 C. J. p 230 note 74.

[68] See 5 C. J. p 1412; Master and Servant § 882.

[a] **"Contributory negligence" distinguished.**—See Master and Servant § 883; Negligence §§ 503, 1417.

[69] See At 5 C. J. p 1420 text and note 61.

[70] See At 5 C. J. p 1420 text and note 87.

[71] See Consent 12 C. J. p 515 note 28 [a].

[72] See Extraordinary 25 C. J. p 296 text and note 60; Master and Servant § 895.

[73] See Fact 25 C. J. p 335 text and note 6.

[74] See Impute 31 C. J. p 354 text and note 25 [a].

[75] Mutual L. Ins. Co. v. Dibrell, 137 Tenn. 528, 194 SW 581, LRA 1917E 554 (construing Shannon Code § 3306, "the same as 'increases the risk,' and both alike include the risk of loss involved in the issuance of the policy").

[76] See Incur 31 C. J. p 410 text and note 45.

[77] See Material 39 C. J. p 1385 text and note 13; Insurance §§ 501–505; Life Insurance § 170; Mutual Benefit Insurance § 68 note 82 [a] (3).

[78] See Necessary 45 C. J. p 580 text and note 71.

[79] See Obvious 46 C. J. p 891 text and note 72.

[80] See Open 46 C. J. p 1107 text and note 16.

[81] See Ordinary 46 C. J. p 1132 text and note 24; Master and Servant §§ 907, 1418 note 26 [e].

[82] See Property § 52 text and note 56; At 5 C. J. p 1420 text and note 87.

[83] See Property § 52 text and note 57; Against 2 C. J. p 400 note 1.

[84] See Property § 52 text and note 58.

[85] See Mutual Benefit Insurance § 68 note 82 [a] (4).

[86] See Beginning 7 C. J. p 1030 note 33 [b].

[87] See Workmen's Compensation Acts § 64.

[88] See Collision § 1 text and notes 51–64.

[89] In re Tonnevold, [1916] 2 K. B. 551 (construing charter party).

[90] Dennehy v. U. S., 15 F. (2d) 196 (war risk insurance).

[91] Atchison, etc., R. Co. v. Mills, 49 Tex. Civ. A. 349, 108 SW 480, 481 [quot Texas, etc., R. Co. v. Kelly, 98 Tex. 123, 80 SW 79 ("a risk of injury that does not arise out of an act of negligence on the part of the defendant or its servants, and, whenever a risk is created by an act of negligence on the part of a railroad company or its employés, this is not a risk ordinarily incident to the employment")].

[92] See Master and Servant § 907 note 15 [a].

[93] See Operation 46 C. J. p 1113 note 24 [d]; Master and Servant §§ 922–928.

[94] See [35 Cyc 2014]; Fire Insurance § 92.

[95] See Usual [39 Cyc 873].

[96] See All 2 C. J. p 1134 text and note 91.

[97] See Master and Servant § 1421 note 50 [c].

[98] See Obvious 46 C. J. p 891 text and note 71.

[99] See Obvious 46 C. J. p 891 text and note 76.

[1] Nelson v. C. Heinz Stove Co., 320 Mo. 655, 8 SW(2d) 918, 921 ("those that cannot be avoided even by the highest degree of care"). See also Necessarily 45 C. J. p 579 text and note 98.

[2] Pitcher v. Hennessey, 48 N. Y. 415, 419 (a broader term than "perils of navigation" or "perils of the sea" within the meaning of a contract). See also Marine Insurance § 272; Shipping [36 Cyc 238].

[3] Ouelette v. J. H. Mendell Engineering, etc., Co., 79 N. H. 112, 115, 105 A 414 ("commonly used to describe situations involving a dereliction from duty, rather than the chances which remain after ordinary care has been used to make the situation a safe one. It is the chance of injury arising out of some want of care").

[4] Ouelette v. J. H. Mendell Engineering, etc., Co., supra ("commonly used to describe situations involving a dereliction from duty, rather than the chances which remain after ordinary care has been used to make the situation a safe one. It is the chance of injury arising out of some want of care").

[5] Britannia Shipping Corp. v. Globe, etc., F. Ins. Co., 244 NYS 720, 722 (does not include loss by theft).

[6] Womack v. Tidwell, 38 Ga. A. 232, 143 SE 620, 621 ("when he refuses to comply with his bid and lets the property be sold again . . . he takes the chance of the property bringing more or less than he bid,

tercourse.[7]

RIVER. [§ 1] **A. As Noun.**[8] A word derived from the Latin "rivus,"[9] in turn derived from a Greek verb signifying "to flow."[10] In an ordinary sense, a body of water,[11] or a body of flowing water;[12] a considerable body of water flowing with a perceptible current in a certain definite course or channel, and usually without cessation during the entire year;[13] a considerable stream of water that has a current of its own, flowing from a higher level, that constitutes its source, to its mouth, where it debouches;[14] a current[15] of water;[16] a flood or flowing course;[17] a land current of water;[18] a large inland stream of water flowing into the sea, a lake, or another river;[19] a large stream of water flowing through a certain portion of the earth's surface, and discharging itself into the sea, a lake, marsh, or another river;[20] a large stream of water flowing in a channel[21] on land toward the ocean, a lake, or another river;[22] a natural stream of water flowing betwixt banks or walls in a bed of considerable depth and width, being so called whether its current sets always one way or flows and reflows with the tide;[23] a running stream, pent on each side by walls or banks;[24] a running stream of water pent in on either side by banks, shores or walls;[25] a stream flowing in a channel into another river, into the ocean, or into a lake or sea;[26] a stream of water;[27] water flowing in a channel between banks more or less defined.[28] Rivers are said to be public or private, navigable or nonnavigable.[29]

Larger than brook or rivulet. In popular language, a river is an inland current of water formed by the confluence of brooks and small streams;[30] a body, current, or stream of flowing water of no specific dimensions, larger than a brook or rivulet,[31]

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thus eliminating or increasing his liability").

7. See Hudson v. Tabor, 1 Q. B. D. 225, 232 ("according to Du Cange." As used in a case in 37 Liber Assiz. pl. 10 the word is used in the latter sense).

8. River:

- In general see Commerce §§ 83–86; Navigable Waters 45 C. J. p 398; Waters [40 Cyc 542].
- As a boundary:
  - Boundaries §§ 59–68.
  - International Law § 27.
  - Municipal Corporations § 62.
  - States [36 Cyc 840].
  - Towns [38 Cyc 601].
- Bank of see Bank 6 C. J. p 1178.
- Bed of see Bed 7 C. J. p 1022.
- Collision in see Collision 11 C. J. p 1004 et seq.
- Distinguished from:
  - Bay see Bay 11 C. J. p 1013 note 31 [b].
  - Lake see Waters [40 Cyc 553 text and note 13, 634 note 75].
- Ferries 25 C. J. p 1047 et seq.
- Fishing right in see Fish § 9 et seq.
- Fresh-water river see 27 C. J. p 906.
- Internationalized see International Law § 27.
- Judicial notice of see Evidence §§ 1861, 1862.
- Levees see Levees and Flood Control 36 C. J. p 995 et seq.
- Logs in see Logs and Logging §§ 116–120.
- Pilots 48 C. J. p 1182.
- Private see Private 50 C. J. p 369; Navigable Waters § 3 note 14 [c]; Waters [40 Cyc 553 text and note 15].
- Synonymous with:
  - Kill see 35 C. J. p 913.
  - Stream [36 Cyc 1334 text and note 81].
- "Tidal navigable river" see Navigable Waters § 3 note 17 [a].

9. Chamberlain v. Hemingway, 63 Conn. 1, 6, 27 A 239, 38 AmSR 330, 22 LRA 45; State v. Gilmanton, 14 N. H. 467, 477.

[a] "'**Rivus**' is used constantly by the Latin authors in a sense that implies a current from a source to a mouth." Chamberlain v. Hemingway, 63 Conn. 1, 6, 27 A 239, 38 AmSR 330, 22 LRA 45. To same effect State v. Gilmanton, 14 N. H. 467, 477 ("a flowing of water from one point to another").

10. State v. Gilmanton, supra.

11. Berlin Mills Co. v. Wentworth's Location, 60 N. H. 156.

"Body of water" as including "river" see Body 8 C. J. p 1135 note 60 [c].

12. Shelby County Bd. of Comrs. v. Castetter, 7 Ind. A. 309, 312, 33 NE 986, 987, 34 NE 687.

13. Century D. [quot Chamberlain v. Hemingway, 63 Conn. 1, 6, 27 A 239, 38 AmSR 330, 22 LRA 45]. See State v. Gilmanton, 9 N. H. 461, 464 (a current would indicate that the water at a certain place was a river instead of a bay).

[a] **"Watercourse" compared.**—A broader and more comprehensive word than "river." Shelby County Bd. of Comrs. v. Castetter, 7 Ind. A. 309, 312, 33 NE 986, 34 NE 687.

14. The Garden City, 26 Fed. 766, 772 [quot Chamberlain v. Hemingway, 63 Conn. 1, 5, 27 A 239, 38 AmSR 330, 22 LRA 45].

[a] **Civilians** held that a stream might acquire the denomination of a river either by its magnitude or by the common acceptance of the neighborhood. Reg. v. Meyers, 3 U. C. C. P. (Ont.) 305, 317.

[b] **"Seacoast" included.**—Reg. v. Grey, L. R. 1 Q. B. 469, 472 ("'river' may also be used so as to include the neighboring seacoast").

[c] **"Strait" or "gut" distinguished.**—The Garden City, 26 Fed. 766, 772 ("The 'East river,' so called, has none of these three essential elements [a current of its own, flowing from a higher level, its source, to its mouth, where it debouches]. It has no source distinguishable from its mouth, nor has it any current of its own. It is a mere strait or gut, connecting the Atlantic ocean, through Long Island sound on the east, with the Atlantic ocean, through the upper and lower bays of New York on the south. It is swept by the tides, and has no current except such as the tides give it. Its whole length from Throg's neck to Governor's island is about seventeen miles"). "Gut" 28 C. J. p 1321 text and note 43; "Strait" [36 Cyc 1332].

15. Richardson D. [quot State v. Gilmanton, 14 N. H. 467, 478].

16. Rees Encycl. [quot State v. Gilmanton, supra].

17. Richardson D. [quot State v. Gilmanton, supra].

[a] **"Flood" distinguished.**—"A river," according to the civilians, "was distinguished from a common current occasioned by land floods, because one had always a constant stream regularly confined within banks, and the other might be casual and temporary, flowing over a level. A temporary inundation by floods was not accounted to deserve the appellation of a river." Reg. v. Meyers, 3 U. C. C. P. (Ont.) 305, 317.

18. Johnson D. [quot State v. Gilmanton, 14 N. H. 467, 478].

19. Worcester D. [quot The Garden City, 26 Fed. 766, 772; Chamberlain v. Hemingway, 63 Conn. 1, 6, 27 A 239, 241, 38 AmSR 330, 22 LRA 45].

20. Imperial D. [quot The Garden City, 26 Fed. 766, 772; Chamberlain v. Hemingway, 63 Conn. 1, 6, 27 A 239, 38 AmSR 330, 22 LRA 45].

21. Webster D. [quot State v. Gilmanton, 14 N. H. 467, 478 ("'a large stream' which implies a current")].

22. Webster D. [quot The Garden City, 26 Fed. 766, 772; Chamberlain v. Hemingway, 63 Conn. 1, 6, 27 A 239, 241, 38 AmSR 330, 22 LRA 45; Harlan, etc., Co. v. Paschall, 5 Del. Ch. 435, 463].

23. Bouvier L. D. [quot Berlin Mills Co. v. Wentworth, 60 N. H. 156].

24. Woolrych D. [quot Alabama v. Georgia, 23 How. (U. S.) 505, 513, 16 L. ed. 556].

25. State v. Faudre, 54 W. Va. 122, 125, 46 SE 269, 102 AmSR 927, 63 LRA 877 [quot State v. Chemical Co., (N. J. Ch.) 107 A 164, 166].

26. Stormonth D. [quot The Garden City, 26 Fed. 766, 772; Chamberlain v. Hemingway, 63 Conn. 1, 6, 27 A 239, 38 AmSR 330, 22 LRA 45].

27. Richardson D. [quot State v. Gilmanton, 14 N. H. 467, 478].

28. Berlin Mills Co. v. Wentworth's Location, 60 N. H. 156; Rex v. Oxfordshire, 1 B. & Ad. 289, 20 ECL 489, 109 Reprint 794; New Hamburg v. Waterloo County, 22 Ont. 193, 202.

29. McHardy v. Ellice, 37 U. C. Q. B. (Ont.) 580, 590.

30. McHardy v. Ellice, supra.

31. Johnson D. [quot Harlan, etc., Co. v. Paschall, 5 Del. Ch. 435, 463; Webster D. [quot The Garden City, 26 Fed. 766, 772; Chamberlain v. Hemingway, 63 Conn. 1, 6, 27 A 239, 241, 38 AmSR 330; Harlan, etc., Co. v. Paschall, 5 Del. Ch. 435, 463]; Worcester D. [quot The Garden City, supra; Chamberlain v. Hemingway, supra]; Com. v. Garner, 3 Gratt. (44 Va.) 624, 669.

[a] **"Brook," "rivulet" distinguished.**—"A brook is the name given

less than a sea;[32] a running stream of no specific dimensions, larger than a brook or rivulet, and pent on either side by walls or banks.[33] However, while the term may ordinarily be used "in a high and large sense,"[34] it is sometimes applied to very humble streams.[35]

A river consists of water, bed, and banks;[36] the main channel alone does not constitute the river.[37] A river is the stream in all its conditions and stages.[38] A river begins at its source when it comes to the surface,[39] and is a river from the point where the water comes to the surface and begins to flow in a channel until it mixes with the sea, lake, or other water.[40]

[§ 2] **B. As Adjective,** the term is sometimes employed as in the phrases[41] "river bed,"[42] "river fish,"[43] and "river front."[44]

R. L. D. An abbreviation of "Retail Liquor Dealer."[45]

R. M. L. D. An abbreviation of "Retail Malt Liquor Dealer."[46]

ROAD. [§ 1] **A. As Noun,**[47] in its usual sense "road" is defined elsewhere in this work.[48]

In maritime law, a place where ships may ride at anchor at some distance from the shore;[49] an open passage of the sea which, although it lies out at sea, yet in respect of the situation of the land adjacent, and the depth and wideness of the place, is a safe place for the common riding or anchoring of ships.[50]

Phrases: "Road of public easement;"[51] also "roads and ways necessary to promote the transportation of the raw products of mine or farm or forest,"[52] and "roads, tramways, trails, flumes, ditches, or pipe lines."[53]

[§ 2] **B. As Adjective,** the term may be employed.[54]

Phrases: "Road brand,"[55] "road crossing,"[56]

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to rivers of the smallest description, and if the waters be increased by those of another brook, the name of brook is changed into that of rivulet. When several rivulets unite and so produce a considerable volume of running water, this watercourse takes the name of river." McHardy v. Ellice, 37 U. C. Q. B. (Ont.) 580, 590.

[b] **"Creek" not synonymous.**—"Every river cannot with propriety be said to be a creek or every creek a river." McHardy v. Ellice, 37 U. C. Q. B. (Ont.) 580, 590 [rev 1 Ont. A. 628, 636] (construing a statute providing for the maintenance of bridges, "the Legislature used the word 'river' . . . as meaning a stream of water larger than what would be commonly or could be properly called a creek in Canada"). "Creek" 15 C. J. p 1453.

32. Woolrych D. [quot Alabama v. Georgia, 23 How. (U. S.) 505, 513, 16 L. ed. 556].

33. Shelby County v. Castetter, 7 Ind. A. 309, 33 NE 986, 987, 34 NE 687.

34. McHardy v. Ellice, 1 Ont. A. 628, 636.

35. McHardy v. Ellice, supra.

36. Howard v. Ingersoll, 13 How. (U. S.) 381, 391, 14 L. ed. 189; State v. Richardson, 140 La. 329, 72 S 984, 987; Morgan v. Livingston, 6 Mart. (La.) 19, 229; Eastman v. St. Anthony Falls Water-Power Co., 43 Minn. 60, 64, 44 NW 882; Dodge County v. Saunders County, 70 Nebr. 442, 97 NW 617, 619; Starr v. Child, 20 Wend. (N. Y.) 149, 153; Gavit v. Chambers, 3 Oh. 495, 497; Motl v. Boyd, 116 Tex. 82, 286 SW 458, 467. See Louisiana, etc., R. Transf. Co. v. Long, (Miss.) 131 S 84, 87 ("under the law the term 'river' includes the bed of the stream, up to its state of ordinary high water"); Per Robertson, in Com. v. Garner, 3 Gratt. (44 Va.) 624, 669 ("the writers on national law . . . tell us a river is not to be considered as so much water merely, but as water flowing in a particular channel and enclosed in certain banks, citing Grotius De Jure Belli ac Pacis, book 2, ch. 3, § XVII, 1").

[a] **"These several parts [constitute] the river,** the whole river. It is a compound idea; it cannot exist without all its parts. Evaporate the water, and you have a dry hollow. If you could sink the bed, instead of a river you would have a fathomless gulf. Remove the bank, and you have a boundless flood." Howard v. Ingersoll, 13 How. (U. S.) 381, 391, 14 L. ed. 189 [quot State v. Richardson, 140 La. 329, 72 S 984, 987; Dodge County v. Saunders County, 70 Nebr. 442, 446, 97 NW 617].

[b] **"Mississippi River,"** in its usual sense, includes the bed of the stream up to its ordinary state of high water. Minor v. New Orleans, 115 La. 301, 38 S 999, 1003. "Mississippi River" 40 C. J. p 1226.

37. Schermerhorn v. Hudson River R. Co., 38 N. Y. 103, 104. But see Peo. v. Gold Run Ditch, etc., Co., 66 Cal. 138, 4 P 1152, 1155, 56 AmR 80 ("the river itself is the water flowing in its channel").

[a] **Thus,** the water of the river surrounds its islands, "and, for convenience, the different channels may have received different names, but they are the river still." Schermerhorn v. Hudson River R. Co., 38 N. Y. 103, 104.

38. Com. v. Garner, 3 Gratt. (44 Va.) 624, 669.

"Equally the river when reduced even far below ordinary low water, or when full to the top of its banks, or even when swelled by freshets beyond them." Com. v. Garner, supra (per Robertson, J.).

[a] **As a boundary** (1) however, "river" has been said to mean the stream in its ordinary state of high water. Minor v. New Orleans, 115 La. 301, 38 So. 999, 1003. (2) On the other hand, as a boundary between states, it has been said to mean a permanent river, that is, the river within low-water mark. Handly v. Anthony, 5 Wheat. (U. S.) 374, 381, 5 L. ed. 113.

39. Chamberlain v. Hemingway, 63 Conn. 1, 5, 27 A 239, 38 AmSR 330, 22 LRA 45; Dudden v. Clutton Union Guardians of Poor, 1 H. & N. 627, 629, 156 Reprint 1353.

40. Chamberlain v. Hemingway, 63 Conn. 1, 6, 27 A 239, 38 AmSR 330, 22 LRA 45.

[a] **"It may sometimes be dry,** but it must appear that the water usually flows in a particular direction and has a regular channel with bed, banks, or sides." Chamberlain v. Hemingway, 63 Conn. 1, 6, 27 A 239, 38 AmSR 330, 22 LRA 45.

41. See cases infra notes 42, 44.

42. See Bed 7 C. J. p 1022.

Of fresh-water river see Fresh-water River 27 C. J. p 906 note 99 [a].

43. **Including eels** see Fish § 45 note 20 [a].

44. Eastman v. St. Anthony Falls Water-Power Co., 43 Minn. 60, 64, 44 NW 882 (as used in a deed, "it [river front] evidently was not intended to refer to any part of the river bed, but is a description applicable to the shores above low-water mark, and, used in connection with 'land under water,' lends support to the construction . . . that it was intended to grant the submerged land above low-water mark.").

45. State v. Nippert, 74 Kan. 371, 86 P 478, 479; Billingsley v. State, 4 Okl. Cr. 597, 113 P 241, 243 (initials used in records of the revenue service).

"Retail liquor dealer" ante.

46. Topeka v. Stevenson, 79 Kan. 394, 99 P 589, 131 AmSR 297, 17 Ann Cas 491 (initials used in a retail liquor dealer's permit).

47. **Indicative of easement** see Easements § 94 note 45 [b].

48. See Highways § 1.

49. The Steamer J. W. Everman, 14 F. Cas. No. 7,591, 2 Hughes 17, 28.

[a] **Hampton Roads.**—"In the very name . . . is implied a place of anchorage at a distance from the shore." The Steamer J. W. Everman, 14 F. Cas. No. 7,591, 2 Hughes 17, 28.

[b] **"Roadstead" synonymous.**—See The Steamer J. W. Everman, 14 F. Cas. No. 7,591, 2 Hughes 17, 28 ("a road or roadstead").

"Roadstead" see Collision § 1.

50. Lord Hale, De Juris Maris Pt. 2 c 2 [quot The Cuzco, 225 Fed. 169, 176; U. S. v. Morel, 26 F. Cas. No. 15,807, Brunn. Coll. Cas. 373].

51. Fendall v. Miller, 99 Or. 610, 196 P 381, 384 [quot Towns v. Klamath County, 33 Or. 225, 53 P 604, 606 (a grant of an easement "to be used as a road of public easement," indicates that it was to be an open public way, a public thoroughfare)].

52. Flora Logging Co. v. Boeing, 43 F. (2d) 145, 148 (includes "logging railroad").

"Logging railroad" see Logs and Logging § 14.

53. See Mines and Minerals § 850 note 79 [a].

54. See cases infra notes 55–66.

55. See Animals § 85 note 3 [b].

"Brand" 9 C. J. p 318.

56. Chandler v. Peninsula Light, etc., Co., 152 Va. 903, 147 SE 249 (in "road district,"[57] "road duty,"[58] "road engine,"[59] "road law,"[60] "road overseer,"[61] "road patrolman,"[62] "road precinct,"[63] "road supervisor,"[64] "road tax,"[65] and "road vehicle."[66]

ROADBED.[67] In common roads, the material part of the road;[68] the whole material laid in place and ready for travel.[69]

In railroad parlance a "roadbed" is a word of plain import,[70] with a well understood meaning.[71] It has been said that, strictly speaking,[72] and in its restricted sense,[73] the roadbed is the bed or foundation[74] on which the superstructure of the railroad rests.[75] In a less strict sense "roadbed" has been

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a statute relating to the height of wires above road crossings). See also Railroads §§ 2, 336–410.

"All road crossings" see All § 3 text and note 92.

"Any road crossing" see Any § 6 text and note 32.

"Crossing" 17 C. J. p 385.

57. See Highways §§ 268–277.

"District" 18 C. J. p 1292.

58. Best v. Birmingham, 16 Ala. A. 631, 80 S 695, 696.

[a] **"Street duty" distinguished.**—"The terms 'road duty' and 'street duty' have separate and distinct fields of operation, the one referring to roads, outside of the city, the other to streets, inside the city." Best v. Birmingham, 16 Ala. A. 631, 80 S 695, 696.

"Duty" 19 C. J. p 841.

Street work by inhabitants see Municipal Corporations § 3704.

Work on roads by taxpayers see Highways §§ 515–521.

59. Central of Georgia R. Co. v. Goodson, 118 Ga. 833, 45 SE 680, 681.

[a] **"Yard engine" distinguished.**—Engines which regularly run between different points on a railroad line are known as "road engines," in contradistinction to "yard engines," which perform service only in the yards. Central of Georgia R. Co. v. Goodson, 118 Ga. 833, 45 SE 680, 681.

"Engine" 20 C. J. p 1260.

60. Columbia, etc., Turnp. Co. v. Hughes, 131 Tenn. 267, 174 SW 1108 (a term that has by the statutes of the state acquired a well-known meaning, applicable only to the general road system of a county).

61. See Highways §§ 288–307½.

"Overseer" 46 C. J. p 1162.

62. Hop v. Brink, 205 Iowa 74, 217 NW 551, 554 (an office created and defined by statute, the appointment to which is made by the board of supervisors of the county). See also Highways §§ 288–307½.

[a] **Road superintendent** is not a road patrolman. Hop v. Brink, 205 Iowa 74, 217 NW 551, 554.

63. See Highways § 268 note 45 [e].

"Precinct" 49 C. J. p 1319.

64. See Highways §§ 288–307½.

65. See Highways §§ 491–521.

"Tax" see Taxation [37 Cyc 706].

66. See Licenses § 81 note 9 [b].

"Vehicle" [39 Cyc 1125].

67. Roadbed:
Accident Insurance § 154.
Construction of see Railroads § 315.
Defects in:
  Master and Servant §§ 505–514.
  Motor Vehicles § 366.
  Railroads § 315.
Motor Vehicles § 373.
Regulations as to see Street Railroads [36 Cyc 1461].

68. Standard D. [quot Hardenburgh v. Employers' Liability Assur. Corp., 78 Misc. 105, 138 NYS 662, 663].

69. Webster New Int. D. [quot Hardenburgh v. Employers' Liability Assur. Corp., supra]; Stix v. Travelers' Indemn. Co., 175 Mo. A. 171, 157 SW 870, 872 [quot Rouse v. St. Paul F. & M. Ins. Co., 203 Mo. A. 603, 219 SW 688].

[a] **"Gutters" included.**—Stix v. Travelers' Indemn. Co., 175 Mo. A. 171, 157 SW 870, 872 ("obviously the roadbed involved here consisted of that portion between the gutters on either side which was constructed for travel, and not to the gutters designed for the purpose of draining water from the adjacent roadbed" [quot Rouse v. St. Paul F. & M. Ins. Co., 203 Mo. A. 603, 219 SW 688]).

[b] **"Roadway" synonymous.**—Applied to common roads, "roadbed" and "roadway" ordinarily mean the same thing. Santa Clara County v. Southern Pac. R. Co., 118 U. S. 394, 413, 6 SCt 1132, 4 L. ed. 118; San Francisco v. Canadian Pac. R. Co., 63 Cal. 467, 469, 49 AmR 98. See Canadian Nat. R. Co. v. Edmonton, (Alta.) 5 West Wkly 1088.

70. In re United New Jersey R., etc., Co., 75 N. J. L. 385, 67 A 1075, 1076.

71. Standard L. Ins. Co. v. Langston, 60 Ark. 381, 385, 30 SW 427.

72. Dunn v. Burlington, etc., R. Co., 35 Minn. 73, 80, 27 NW 448.

73. State v. Hannibal, etc., R. Co., 135 Mo. 618, 637, 37 SW 532.

74. "Foundation" 26 C. J. p 1003.

75. Webster D. [quot Santa Clara County v. Southern Pac. R. Co., 118 U. S. 394, 413, 6 SCt 1132, 30 L. ed. 118; San Francisco v. Central Pac. R. Co., 63 Cal. 467, 469, 49 AmR 98; Shreveport v. Shreveport Belt R. Co., 107 La. 785, 32 S 189; Atty.-Gen. v. Detroit, 148 Mich. 71, 121, 111 NW 860; Cass County v. Chicago, etc., R. Co., 25 Nebr. 348, 41 NW 246, 247, 2 LRA 188]; Worcester D. [quot Santa Clara County v. Southern Pac. R. Co., 118 U. S. 394, 413, 6 SCt 1132, 30 L. ed. 118; San Francisco v. Central Pac. R. Co., 63 Cal. 467, 469, 49 AmR 98; Shreveport v. Shreveport Belt R. Co., 107 La. 785, 787, 32 S 189]. See Standard L., etc., Ins. Co. v. Langston, 60 Ark. 381, 385, 30 SW 427; San Francisco, etc., R. Co. v. Stockton, 149 Cal. 83, 84 P 771, 774; Canadian Nat. R. Co. v. Edmonton, (Alta.) 5 WestWkly 1088.

"In the ordinary and popular acceptation . . . as applied to railroads." Santa Clara County v. Southern Pac. R. Co., 118 U. S. 394, 413, 6 SCt 1132, 30 L. ed. 118.

[a] **Similar definitions.**—(1) "The bed or foundation upon which rests the superstructure of rails and sleepers." In re New York Bay R. Co., 75 N. J. L. 389, 67 A 1049, 1051; In re United New Jersey R., etc., Co., 75 N. J. L. 385, 386, 67 A 1075, 1076. (2) "The bed or foundation on which the superstructure (ties, rails, etc.) rests." Webster New Int. D. [quot Hardenburgh v. Employers' Liability Assur. Co., 78 Misc. 105, 138 NYS 662, 663]. (3) "The bed upon which the superstructure of the railroad rests." Dunn v. Burlington, etc., R. Co., 35 Minn. 73, 80, 27 NW 448, 451. (4) The foundation on which the superstructure of a railroad rests. Webster D. [quot San Francisco, etc., R. Co. v. State Bd. of Equalization, 60 Cal. 12, 34]. (5) "The mere foundation upon which the superstructure of ties, rails, etc., rests." State v. Hannibal, etc., R. Co., 135 Mo. 618, 637, 37 SW 532.

[b] **From standpoint of engineering,** it is the bed or foundation on which the superstructure of ties and rails is made to rest. McClure v. Great Western Acc. Assoc., 133 Iowa 224, 110 NW 466, 119 AmSR 598, 8 LRANS 970, 12 AnnCas 41 ("the definition common to all the authorities").

[c] **"Railroad" compared.**—(1) It has a broader significance than "roadbed" since "railroad" includes the roadbed and the superstructure including crossties, rails, and fastenings. Skiles v. St. Louis, etc., R. Co., 130 Mo. A. 162, 108 SW 1082, 1084. (2) "Railroad" synonymous see Railroads § 1 text and note 26.

[d] **"Right of way" compared.**—"'Roadbed' does not of necessity include the entire right of way." McClure v. Great Western Acc. Assoc., 133 Iowa 224, 110 NW 466, 119 AmSR 598, 8 LRANS 970, 12 AnnCas 41. See Northern Pac. R. Co. v. Brogan, 52 Mont. 461, 158 P 820, 823 (roadbed is a part of the "right of way," in the sense in which "right of way" is used in the congressional grants). "Right of way" ante.

[e] **"Road" synonymous.**—Where statutory definitions of "road" and "roadbed" are alike, the words mean substantially the same thing. See Nashville, etc., R. Co. v. Board of Equalization for Assessment, etc., 122 Tenn. 1, 122 SW 467, 474.

[f] **"Roadway" compared.**—(1) Applied to railroads, "roadbed" and "roadway" do not mean the same. Santa Clara County v. Southern Pac. R. Co., 118 U. S. 394, 6 SCt 1132, 1142, 30 L. ed. 118; San Francisco v. Central Pac. R. Co., 63 Cal. 467, 469, 49 AmR 98. See Grand Trunk Pac. R. Co. v. Calgary, 55 Can. S. C. 103, 111 (construing ordinance relating to assessment, per Idington, J., "I cannot hold 'roadbed' and 'roadway' as interchangeable terms in this connection"); Canadian Nat. R. Co. v. Edmonton, (Alta.) 5 WestWkly 1088. (2) "Roadway" has the more extended signification. Santa Clara County v. Southern Pac. R. Co., supra; San Francisco v. Central Pac. R. Co., supra [quot Chicago, etc., R. Co. v. Cass County, 8 N. D. 18, 20, 76 NW 239]. See Canadian Nat. R. Co. v. Edmonton, supra. (3) "In addition to the part denominated road-bed, the roadway includes whatever space of ground the company is allowed by law in which to construct its road-bed and lay its track." San Francisco v. Central Pac. R. Co., 63 Cal. 467, 469, 49 AmR 98 [quot Chicago, etc., R. Co. v. Cass County, supra]. See Canadian Nat. R. Co. v. Edmonton, (Alta.) 5 WestWkly 1088. "Roadway" post.

defined as that part of the right of way especially prepared for the emplacement of ties, rails, and other necessary superstructures, and to which the ties, rails, and other necessary superstructures are affixed;[76] the road, including the roadway[77] or right of way,[78] with the roadbed and its superstructure of ties, rails, etc., in place thereon;[79] and accordingly it has been said that the roadbed may include land for sidings and turnouts,[80] snowsheds,[81] and crossing planks,[82] but not the rails and ties,[83] a railroad bridge,[84] a coal and ore terminal,[85] or steamers.[86] From an engineering standpoint, the roadbed includes all that is necessary to support the superstructure.[87] By statute, the roadbed of a railroad may include all side tracks, switches, trestles, bridges, and the ties, rails, fastenings, and superstructure of every kind.[88]

Phrases: "Damage by striking any portion of the roadbed,"[89] "franchise, roadway, road-bed, rails, and rolling stock,"[90] "roadbed and track,"[91] and "roadbed of any railway."[92]

ROADHOUSE. A certain kind of restaurant.[93]

ROADMASTER. A foreman employed by the supervisors to oversee the men employed on the roads and keep their time.[94]

ROADSTEAD.[95]

ROADWAY.[96] A road.[97]

Roadway of street is the portion used for horses and vehicles.[98]

Applied to railroads,[99] the right of way.[1] Ac-

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[g] **"Superstructure" compared.**—"Although the word 'superstructure' might, in present railway engineering phraseology, be limited to sleepers, rails, and fastenings . . . yet we have no doubt that the legislature of that day, adopting the ordinary meaning of the word, intended by it the roadbed, with whatever had been constructed upon it." Philadelphia v. Philadelphia, etc., R. Co., 177 Pa. 292, 298, 35 A 610, 34 LRA 564 (construing statute, excepting from taxation by ordinance for city purposes, "superstructure and water stations"). "Superstructure" [37 Cyc 604].

[h] **"Track" synonymous.**—Mobile, etc., R. Co. v. Alabama Midland R. Co., 87 Ala. 520, 522, 6 S 407, 408 [expl Anniston, etc., R. Co. v. Jacksonville, etc., R. Co., 82 Ala. 297, 2 S 710] (but adding "'roadbed' . . . must include a sufficient space on either side of the track to allow trains to pass each other in safety," but "does not include, necessarily, the whole embankment which supports the track"). But see Railroad 51 C. J. § 2 note 34 [d].

76. Great Northern R. Co. v. Flathead County, 61 Mont. 263, 268, 202 P 198 [quot Chicago, etc., R. Co. v. Murray, 55 Mont. 162, 170, 174 P 704, 706].

"Under this definition, it is any and all parts of the right of way especially prepared, under the tracks, over the tracks, and coterminous with the limits of the right of way, if required for the emplacement of necessary structures forming an integral part of the continuous railroad property." Great Northern R. Co. v. Flathead County, supra.

77. **"Roadway"** post.

78. **"Right of way"** ante.

79. State v. Hannibal, etc., R. Co., 135 Mo. 618, 637, 37 SW 532.

80. Philadelphia v. Philadelphia, etc., R. Co., 177 Pa. 292, 298, 35 A 610, 34 LRA 564.

81. Great Northern R. Co. v. Flathead County, 61 Mont. 263, 202 P 198, 200.

82. Woosley v. Wabash R. Co., (Mo. A.) 274 SW 871.

83. Atty. Gen. v. Detroit, 148 Mich. 71, 95, 111 NW 860. But see supra note 75 [g].

84. Cass County v. Chicago, etc., R. Co., 25 Nebr. 348, 41 NW 246, 247, 2 LRA 188 [overr Chicago, etc., R. Co. v. Richardson County, 61 Nebr. 519, 525, 85 NW 532].

85. Philadelphia v. Philadelphia, etc., R. Co., 177 Pa. 292, 298, 35 A 610, 34 LRA 564.

86. San Francisco v. Cent. Pac. R. Co., 63 Cal. 467, 469, 49 AmR 98.

87. Osgood v. U. S. Health, etc., Ins. Co., 76 N. H. 475, 84 A 50, 51, Ann Cas1913C 425 [cit Century D.; Webster New Int. D.].

"It is manifest that this would ordinarily be much more than the mere width of such superstructure." Osgood v. U. S. Health, etc., Ins. Co., supra.

88. See Nashville, etc., R. Co. v. Board of Equalization for Assessment, etc., 122 Tenn. 1, 122 SW 467, 474.

89. See Motor Vehicles § 373.

90. Santa Clara County v. Southern Pac. R. Co., 118 U. S. 394, 6 SCt 1132, 1140, 30 L. ed. 118.

91. St. Louis Southwestern R. Co. v. Grayson, 72 Ark. 119, 124, 78 SW 777, 778 (in a statute establishing a drainage and levee district, includes the right of way).

92. Osgood v. U. S. Health, etc., Ins. Co., 76 N. H. 475, 84 A 50, 51, Ann Cas1913C 425 (as used in an accident insurance policy, "all that part of the right of way which may be swept by the moving rolling stock").

93. U. S. v. Boasberg, 283 Fed. 305, 306 ("a phrase with a well-known meaning").

"Restaurant" ante.

94. Andrus v. Shippen Tp., 34 Pa. Co. 312, 315. See Highways § 301 note 75 [f].

95. See Collision § 1 text and note 65. See also "Road" ante.

96. **Roadway:**
Adverse Possession § 477 (unoccupied land).
Easements 19 C. J. p 856.
Highways 29 C. J. p 353 et seq.
Municipal Corporations §§ 2267–3596 (public improvements), §§ 3597–4029 (use and regulation of public places).
Railroads §§ 192–199 (extent of way or land acquired).
"Roadbed" compared see Roadbed ante.
"Track" synonymous see Railroads § 2.

97. Cherry v. Atlantic Coast Line R. Co., 189 N. C. 90, 116 SE 192, 193.

[a] **Either public or private,** according to its location. Central Illinois Coal Min. Co. v. Illinois Power Co., 249 Ill. A. 199, 204.

"Road" ante.

98. J. Burton Co. v. Chicago, 236 Ill. 383, 86 NE 93, 95, 15 AnnCas 965.

[a] **"It may be coextensive** with the street." J. Burton Co. v. Chicago, 236 Ill. 383, 86 NE 93, 95, 15 Ann Cas 965.

[b] **"Curbing" included.**—Barber Asphalt Pav. Co. v. Abrahamson, 38 Cal. A. 109, 175 P 490 (for purposes of Vrooman Act § 20, relating to street improvements, so that acceptance of roadway includes, curbing). "Curb" 17 C. J. p 454.

[c] **"Alley" not synonymous.**—Central Illinois Coal Min. Co. v. Illinois Power Co., 249 Ill. A. 199, 204. See Henderson v. Carey-Reed Co., 180 Ky. 449, 202 SW 882 (the "roadway" of an alley is not the entire alley—it does not include a strip of ground covered by a platform). "Alley" 2 C. J. p 1150.

[d] **"Right of way" not synonymous.**—Central Illinois Coal Min. Co. v. Illinois Power Co., 249 Ill. A. 199, 204. As to railroads see infra text and notes 1–3. "Right of way" ante.

[e] **"Highway" not synonymous.**—Central Illinois Coal Min. Co. v. Illinois Power Co., 249 Ill. A. 199, 204. "Highway" see Highways § 1.

[f] **"Street" not synonymous.**—Central Illinois Coal Min. Co. v. Illinois Power Co., 249 Ill. A. 199, 204.

99. See Taxation [37 Cyc 844].

1. San Francisco, etc., R. Co. v. State Bd. of Equalization, 60 Cal. 12, 34; Chicago, etc., R. Co. v. Cass County, 8 N. D. 18, 20, 76 NW 239. See Canadian Nat. R. Co. v. Edmonton, (Alta.) 5 WestWkly 1088.

[a] **"Right of way" synonymous.**—Atchison, etc., R. Co. v. Los Angeles County, 158 Cal. 437, 111 P 250, 251 [quot San Francisco, etc., R. Co. v. Stockton, 149 Cal. 83, 84 P 771]. See Northern Pac. R. Co. v. Brogan, 52 Mont. 461, 158 P 820, 822 (as used in a constitutional provision, relating to taxation, "roadway" is not synonymous with "right of way," as that term was used in the railroad land grants, but is synonymous with "right of way" when used to designate the bare strip of ground upon which the roadbed, rails, and other necessary appliances of the road are laid or erected, and not as including any of the improvements upon or annexed to that strip—the naked land used for right of way purposes). See also Adverse Possession § 477 note 53 [e] (1). But see Grand Trunk Pac. R. Co. v. Calgary, 55 Can. S. C. 103, 111 (in an ordinance relating to assessment and taxation, per Idington, J., "'right of way' not convertible into 'roadway' in this connection").

[b] **"Railroad" compared.**—The word has received a more extended signification than "roadway." U. S. Trust Co. v. Atlantic, etc., R. Co., 8 N. M. 673, 689, 47 P 725.

cording to the ordinary and popular meaning of the word as applied to railroads, it includes simply the continuous strip of land within which the railroad is constructed;[2] whatever space of ground the company is allowed by law in which to construct its roadbed and lay its track.[3] "Roadway" has, however, been held to include not only the strip of land upon which the main line is constructed, but all ground necessary for the construction of sidetracks, turnouts, connecting tracks, station houses, freight houses, and all other accommodations necessary to accomplish the objects of the incorporation [of the railroad].[4] To a large extent the definition of "roadway" or what it comprises is a question of fact to be decided in each case.[5] It may not include the yards and the stations,[6] a telegraph line,[7] or steamers.[8]

Phrases: "Franchise, roadway, road-bed, rails, and rolling stock,"[9] "present roadway,"[10] "roadway of any street,"[11] "the roadway of any street or other public ground,[12] and "the roadway thereof and the superstructure thereon."[13]

ROAST.[14]

ROASTER.[15]

ROB.[16] To take something away from by force.[17]

In mining, to mine coal or ore without provision for the preservation of the mine.[18]

ROBADA. A Spanish word meaning "stolen;"[19] equivalent to "hurtada"[20] but not limited to "robo" (robbery).[21]

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2. San Francisco, etc., R. Co. v. Stockton, 149 Cal. 83, 90, 84 P 771, 774.

3. Santa Clara County v. Southern Pac. R. Co., 118 U. S. 394, 6 SCt 1132, 1142, 30 L. ed. 118; Atchison, etc., R. Co. v. Los Angeles County, 158 Cal. 437, 111 P 250, 251; San Francisco, etc., R. Co. v. Stockton, 149 Cal. 83, 84 P 771, 774; San Francisco v. Central Pac. R. Co., 63 Cal. 467, 469, 49 AmR 98; Chicago, etc., R. Co. v. Cass County, 8 N. D. 18, 20, 76 NW 239. See Canadian Nat. R. Co. v. Edmonton, (Alta.) 5 WestWkly 1088 ("In the ordinary and popular acceptation of the word as applied to railroads").

"But another way of saying that it is the continuous strip of land, not exceeding in width the nine rods permitted by law [Civ. Code § 465 subd 4], which the company acquires and uses for the construction and maintenance of its roadbed and railroad track." San Francisco, etc., R. Co. v. Stockton, supra.

4. Chicago, etc., R. Co. v. Cass County, 8 N. D. 18, 76 NW 239 [disappr San Francisco, etc., R. Co. v. Stockton, 149 Cal. 83, 84 P 771, 774].

5. Grand Trunk Pac. R. Co. v. Calgary, 55 Can. S. C. 103, 108, 114 (per Davies, J.).

6. Grand Trunk Pac. R. Co. v. Calgary, supra (per Brodem, J., dissenting). See Canadian Nat. R. Co. v. Edmonton, (Alta.) 5 WestWkly 1088.

7. Northern Pac. R. Co. v. Brogan, 52 Mont. 461, 158 P 820.

8. San Francisco v. Central Pac. R. Co., 63 Cal. 467, 469, 49 AmR 98.

9. Santa Clara County v. Southern Pac. R. Co., 118 U. S. 394, 6 SCt 1132, 1140, 30 L. ed. 118 (construing state constitution and statute, as not including fences).

10. See Municipal Corporations § 2443½ text and note 1.

11. Joplin v. Freeman, 125 Mo. A. 717, 103 SW 130, 131 (as used in a statute relating to street improvements the phrase is not broad enough to include sidewalks. It indicated "the intention of the legislature to discriminate between that part of the street used as a highway for general travel from that part used exclusively as a sidewalk for pedestrians").

12. J. Burton Co. v. Chicago, 236 Ill. 383, 86 NE 93, 95, 15 AnnCas 965 (as used in an ordinance, does not mean "a portion of a street between two curbs, two sidewalks, and, in some instances, two parkways," and may include alleys, which may or may not have sidewalks).

13. Grand Trunk Pac. R. Co. v. Calgary, 55 Can. S. C. 103, 110 (construing ordinance relating to assessment and taxation, per Idington, J., "the acreage of trackage and superstructure of any kind in use for actual running of the railway").

14. See Mines and Minerals § 92.

15. **"Coffee roaster"** 11 C. J. p 947.

16. **In colloquial sense** see Libel and Slander § 139.

17. Webster New Int. D. See also Robbery post p 1001.

18. Webster New Int. D.

[a] **"Robbed,"** as used in coal mining operations, constitutes all stumps, pillars, and walls removed, and all the coal remaining in place in entries, cross entries, rooms, and other mining openings which had previously been made in removing the coal therefrom. Sagamore Coal Co. v. Clark, (Ky.) 109 SW 349, 350. See Lloyd v. Catlin Coal Co., 210 Ill. 460, 71 NE 335, 338 (as meaning to weaken the supporting pillars of coal so that the miners may save extra labor in cutting air passages).

[b] **"Robbing a mine."**—Taking out the pillars of ore or coal which have been left standing to support the roof while the mass is being taken out. Cumberland Coal, etc., Co. v. Gray, 152 Fed. 939, 940, 82 CCA 87. See Sagamore Coal Co. v. Clark, (Ky.) 109 SW 349, 351 ("according to the evidence 'robbing' a mine is more dangerous than ordinary mining, as the work of removing stumps and pillars constituting supports to the mine roof to get the coal they contain often leaves the roof or upper walls of the mine without sufficient support").

19. U. S. v. Baguio, 25 Philippine 575. See also Burglary 9 C. J. p 1006; Larceny 36 C. J. p 721.

20. U. S. v. Baguio, supra.

21. U. S. v. Baguio, supra. See also Robbery post p 1001.

ROBBERY

By Douglas Robinson Gray

[Matters not in this Title, treated elsewhere in this Work, see Cross References infra p 1007]

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I. DEFINITIONS AND DISTINCTIONS

[§ 1] **A. Definitions[1]—1. Robbery—a. At Common Law.** At common law robbery is the felonious taking of goods or money from the person or presence of another by means of force or intimidation.[2]

[§ 2] **b. Under Statute.[3]** Statutory definitions in many jurisdictions are a substantial codification of the common law definition,[4] and have been so declared by the courts.[5]

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[1] **Attempt and assault with intent to commit robbery** see infra § 217.

Bank robbery see infra § 242.

Robbery with other offenses:
Homicide see infra § 245.
Rape see infra § 252.

[2] U. S.—U. S. v. Jones, 26 F. Cas. No. 15,494, 3 Wash. C. C. 209.

Ala.—Douglass v. State, 21 Ala. A. 289, 107 S 791; Parks v. State, 21 Ala. A. 177, 106 S 218.

Ariz.—Ramirez v. Terr., 9 Ariz. 177, 80 P 391.

Ark.—Martin v. State, 178 Ark. 1117, 13 SW (2d) 597; Clary v. State, 33 Ark. 561.

Cal.—In re Myrtle, 2 Cal. A. 383, 84 P 334; Peo. v. Cleary, 1 Cal. A. 50, 81 P 753.

Ga.—Long v. State, 12 Ga. 293.

Ill.—O'Donnell v. Peo., 224 Ill. 218, 79 NE 639.

Iowa.—State v. Kegan, 62 Iowa 106, 17 NW 179.

Ky.—Lanford v. Com., 209 Ky. 693, 273 SW 492; Howard v. Com., 198 Ky. 453, 248 SW 1059; Stockton v. Com., 125 Ky. 268, 101 SW 298, 30 KyL 1302.

Mass.—Com. v. Humphries, 7 Mass. 242.

Mo.—State v. Lawler, 130 Mo. 366, 32 SW 979, 51 AmSR 575.

N. H.—State v. Gorham, 55 N. H. 152.

Pa.—Com. v. Snelling, 4 Binn. 379; Com. v. Anagustov, 82 Pa. Super. 156.

Tenn.—Hammond v. State, 3 Coldw. 129.

Va.—Butts v. Com., 145 Va. 800, 133 SE 764; Green v. Com., 133 Va. 695, 112 SE 562; Houston v. Com., 87 Va. 257, 12 SE 385.

W. Va.—Franklin v. Brown, 73 W. Va. 727, 81 SE 405, LRA1915C 557 (application for release on habeas corpus); State v. McCoy, 63 W. Va. 69, 59 SE 758.

Wyo.—McGinnis v. State, 16 Wyo. 72, 91 P 936.

[a] **Blackstone's definition.**—"The felonious and forcible taking from the person of another of goods or money to any value, by violence or putting him in fear." 4 Blackstone Comm. p 242 [quot Com. v. Prewitt, 82 Ky. 240, 241; State v. Hackett, 166 La. 261, 117 S 141, 143; State v. England, 148 La. 178, 86 S 728, 729; Com. v. Humphries, 7 Mass. 242, 244; State v. Luhano, 31 Nev. 278, 102 P 260, 262; State v. Gorham, 55 N. H. 152, 166; State v. Holt, 192 N. C. 490, 135 SE 324, 325; Com. v. Anagustov, 82 Pa. Super. 156, 158; Houston v. Com., 87 Va. 257, 12 SE 385, 386; State v. Dengel, 24 Wash. 49, 63 P 1104; State v. McAllister, 65 W. Va. 97, 63 SE 758, 760, 131 AmSR 955].

[b] **Lord Mansfield says** robbery is "a felonious taking of property from the person of another by force." 2 East P. C. p 725 [quot State v. Gorham, 55 N. H. 152, 167; State v. Holt, 192 N. C. 490, 135 SE 324, 325]. To same effect Breckinridge v. Com., 97 Ky. 267, 30 SW 634, 635, 17 KyL 163.

[c] **Other definitions** are: (1) "A felonious taking of money or goods, to any value, from the person of another, or in his presence, against his will, by violence or putting him in fear." 2 East P. C. p 707 [quot State v. Gorham, 55 N. H. 152, 166]. To same effect State v. Burke, 73 N. C. 83, 87. (2) "The felonious and violent taking of any money or goods from the person of another, putting him in fear, be the value thereof above or under one shilling." 1 Hale P. C. p 532 [quot Peo. v. O'Hara, 332 Ill. 436, 163 NE 804, 806]. (3) "Robbery, accurately defined, is 'the felonious and forcible taking from the person of another, goods or money to any value, by violence or putting him in fear.'" Bouvier L. D. [quot Deal v. U. S., 274 U. S. 277, 47 SCt 613, 615, 71 L. ed. 1045]. (4) "Robbery, at common law, is the taking with intent to steal, of personal property in possession of another, from his person or in his presence, by violence or putting him in fear." 34 Cyc 1796 [quot Peo. v. Covelesky, 217 Mich. 90, 185 NW 770, 772].

[3] **Degrees of robbery** see infra §§ 56–64.

[4] See statutory provisions; and cases infra this note.

[a] **In Idaho** under a statute (§ 6590 Rev. Codes) defining robbery as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear," "the essence of that crime is the felonious taking of personal property in the possession of another by means of force or fear." State v. Brill, 21 Ida. 269, 121 P 79.

[b] **In Illinois** under a statute defining robbery as "the felonious and violent taking of money, goods, or other valuable thing, from the person of another by force or intimidation" (Cr. Code § 246, Cahill Rev. St. [1925] c 38 par 515), "the gist of the offense of robbery is the force or intimidation and taking from the person of another, against his will, a thing belonging to him or in his custody." Peo. v. Carpenter, 315 Ill. 87, 145 NE 664, 665; Peo. v. Fiereto, 303 Ill. 186, 135 NE 417, 418; Peo. v. Nolan, 250 Ill. 351, 95 NE 140, 34 LRA NS 301, AnnCas1912B 401.

[c] **In New York** under a statute defining robbery as "the unlawful taking of personal property, from the person or in the presence of another, against his will, by means of force,

Statutes prescribing a punishment for robbery without defining the crime[6] do not change the common law definition,[7] which consequently prevails in such jurisdictions.[8]

Statutes prescribing a form of indictment for robbery are not to be construed as definitions of the offense.[9]

Enactment of a statute creating the new offense of train robbery[10] does not repeal a prior statute defining robbery generally.[11]

Enactment of statutes classifying robbery without division into degrees[12] does not repeal existing statutes defining robbery.[13]

[§ 3] 2. **Automobile Banditry.** Automobile banditry as defined by statute consists in the use or attempt to use an automobile, aeroplane, or other self-propelling vehicle to facilitate escape from the scene of a robbery or other felony.[14]

[§ 4] 3. **Conjoint Robbery.** Conjoint robbery is a term which has been used under statutes prescribing punishment therefor,[15] as describing robbery committed by two or more persons.[16]

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or violence, or fear of injury, immediate or future, to his person or property, or the person or property of a relative or member of his family, or of any one in his company at the time of the robbery," [Pen. L. § 2120] robbery is "the unlawful taking of personal property from the person or in the presence of another by means of force or violence." Peo. v. Marwig, 227 N. Y. 382, 125 NE 535, 22 ALR 845. To same effect Peo. v. Emieleta, 238 N. Y. 158, 144 NE 487 (both cases prosecutions for homicide in commission of robbery).

[d] **In Oklahoma** under a statute defining robbery as "a wrongful taking of personal property in the possession of another from his person or immediate presence and against his will, accomplished by means of force or fear (Comp. St. [1921] § 1784), "to constitute 'robbery' the taking must be either directly from the person or immediate presence and against the will of the party robbed, and must be by force or a previous putting in fear." Randall v. State, 33 Okl. Cr. 262, 243 P 983. To same effect Sanders v. State, (Okl. Cr.) 287 P 842.

[e] **In Texas** under a statute providing that "If any person by assault, or violence, or by putting in fear of life or bodily injury, shall fraudulently take from the person or possession of another, any property with intent to appropriate the same to his own use, he shall be punished by confinement in the penitentiary for life, or for a term of not less than five years; and, when a firearm or other deadly weapon is used or exhibited in the commission of the offense, the punishment shall be death, or by confinement in the penitentiary for any term not less than five years" (Pen. Code art 1327 [856]) "the offense of robbery consists of the fraudulent taking from the person or possession of another of property by some of the means named in the statute." Thompson v. State, 90 Tex. Cr. 125, 234 SW 406, 408.

Common-law definition see supra § 1.

[5] Peo. v. Shuler, 28 Cal. 490, 492; State v. Gorham, 55 N. H. 152, 166; Crews v. State, 3 Coldw. (Tenn.) 350, 353.

"The statutes of most of our states against robbery are merely a reassertion of the common law." State v. Gorham, supra.

"By our Statute robbery is defined to be: 'The felonious taking, from the person of another, goods or money of any value, by violence, or putting in fear.' . . . the one statutory definition, is, in substance, the same as at common law. The elements necessary to make out this offense in the one case, are demanded in the other." Crews v. State, supra.

"The fifty-ninth section of the Act concerning crimes and punishments defines robbery as follows: 'Robbery is the felonious and violent taking of money, goods or other valuable thing from the person of another by force or intimidation.' This in no material respect is different from the common law definition of the crime of robbery." Peo. v. Shuler, supra.

[6] See statutory provisions.

[7] Com. v. Clifford, 8 Cush. (Mass.) 215; Com. v. Humphries, 7 Mass. 242.

[8] Ala.—Douglass v. State, 21 Ala. A. 289, 107 S 791.

Ky.—Cosby v. Com., 185 Ky. 503, 217 SW 357; Com. v. Prewitt, 82 Ky. 240.

Pa.—Com. v. Anagustov, 82 Pa. Super. 156.

Va.—Butts v. Com., 145 Va. 800, 133 SE 764; Houston v. Com., 87 Va. 257, 12 SE 385.

W. Va.—Franklin v. Brown. 73 W. Va. 727, 81 SE 405, LRA1915C 557.

"Our statute does not define robbery, so that we have to look to the common law for the definition." Butts v. Com., 145 Va. 800, 133 SE 764, 767.

[a] **In Louisiana** (1) the statute prescribes a punishment for robbery (Rev. St. § 809, 1 Marr Rev. St. § 1700) without defining it, and the crime has been judicially defined as follows: "'Robbery' is the felonious taking of the property of another from his person, or in his presence, against his will, by violence or by putting him in fear." State v. Wilson, 136 La. 345, 67 S 26. (2) "Robbery is a common-law offense, and the English Common law must be resorted to for the definition of it." State v. England, 148 La. 178, 86 S 728, 729.

[9] Com. v. Weiner, 255 Mass. 506, 152 NE 359, 360.

"G. L. c. 277, § 39, defines 'robbery,' when used in an indictment, to mean 'the taking and carrying away of personal property of another from his person and against his will, by force and violence, or by assault and putting in fear, with intent to steal'; and section 79 furnishes as a form for an indictment for robbery, 'in cases in which [it is] applicable,' 'under chapter 265, § 19, that A. B., did assault C. D. with intent to rob him, and thereby did rob and steal from the person of said C. D. (mention the property), of the property of said C. D.' Even without the authority given by section 79 for the use of any form of indictment authorized by law, it is manifest that the section contemplates that there may be facts which constitute the offense to which the form given may not be appropriate, and that it does not establish the form as a definition of the offense." Com. v. Weiner, supra.

Indictments:
For robbery generally see infra §§ 82-119.
Statutory forms see Indictments and Informations § 172.

[10] **Train robbery** see Railroads § 2349.

[11] Smith v. Terr., 4 Ariz. 95, 78 P 1035 (habeas corpus case).

[12] See infra §§ 65-69.

[13] Wissinger v. State, (Okl. Cr.) 264 P 631; Wells v. State, 34 Okl. Cr. 179, 245 P 1007.

[a] **Use of firearms.**—Wissinger v. State, (Okl. Cr.) 264 P 631; Wells v. State, 34 Okl. Cr. 179, 245 P 1007.

[b] **Conjoint robbery.**—Wells v. State, 34 Okl. Cr. 179, 245 P 1007.

[14] See statutory provisions.

[a] **In Indiana** there is "an act defining the crime of automobile banditry and prescribing the punishment therefor" which provides as follows: "If two or more persons, co-operating and aiding each other therein, shall commit a felony, having at the time on or near the premises where such felony is committed an automobile, motorcycle, aeroplane, or other self-moving conveyance, by the use of which they escape, attempt to escape or intend to escape, or having committed such felony, they seize an automobile, motorcycle, aeroplane, or other self-moving conveyance by the use of which they escape, or attempt to escape, they and each of them shall be guilty of automobile banditry, and upon conviction thereof shall be imprisoned in the state prison for any determinate period not less than ten (10) years nor more than twenty-five (25) years." Gen. L. (1921) c 32 § 1.

Evidence sufficient to convict see infra § 177 text and note 97.

Robbery of motor vehicle see Motor Vehicles § 1495.

[15] See infra § 67.

[16] Simpson v. State, (Okl. Cr.) 266 P 783.

[a] **A classification of robbery.**—"It is contended that, since the robbery is charged to have been committed by two persons, the prosecution should have been under the conjoint robbery statute (section 1793, Comp. St. 1921). There is but one definition of robbery under the statutes of this state. That is robbery as defined by section 1784, Comp. St. 1921. Conjoint robbery, as referred to in section 1793, Comp. St. 1921 is merely robbery as defined by section 1784, when committed by two or more per-

[§ 5] **4. Highway Robbery.** Highway robbery[17] is robbery committed on or near the highway.[18] A robbery committed on a railroad track[19] or wharf[20] is not committed in a highway within the meaning of such statutes. Robbery committed in plain view of[21] and within a reasonable distance from[22] a highway is highway robbery. The fact that neither accused nor prosecutor knew of the road, constitutes no defense.[23]

[§ 6] **5. Plain Robbery.** "Plain robbery" is a term having no technical meaning,[24] but sometimes used to distinguish robbery without aggravation from the aggravated classification of the offense.[25]

[§ 7] **6. Rapina.** Rapina, as the term is used in the civil law, is "the violent taking from the person of another of money or goods for the sake of gain."[26]

[§ 8] **7. Reif.** Reif is a term of old Scotch law meaning robbery.[27]

[§ 9] **8. Robo.** "Robo" under the Philippine penal code consists in taking, with intent to gain, any personal property by the use of violence or intimidation against any person or force upon any thing.[28] It is a hybrid crime peculiar to the Philippines, being broader in its scope than either the "rapina" of the civilians,[29] or the "robbery" of the common law.[30] While the offense is often called "robbery," it includes sundry crimes which would be classified as distinct offenses at common law.[31]

Robo en cuadrilla, as that term is used under statutes making it a classification of robbery subject to increased penalty,[32] is shown where robbery is committed by more than three persons armed and acting in concert.[33] It is not shown, however, where the robbers numbered three or less,[34] nor where, although more than three in number, only three or less were armed.[35]

[§ 10] **9. Rob.** Broadly speaking, to rob is to steal[36] or thieve.[37]

[§ 11] **B. Distinctions.**[38] Robbery has been distinguished from assault,[39] bribery,[40] coercion,[41] extortion,[42] false pretenses,[43] larceny,[44] theft,[45] and

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sons. The latter section is a statute of classification and not of definition." Simpson v. State, (Okl. Cr.) 266 P 783, 784.

[17] **Brigandage or bandolerismo** see Bandolerismo 6 C. J. p 1176.

[18] State v. Holt, 192 N. C. 490, 135 SE 324; State v. Brown, 113 N. C. 645, 18 SE 51.

[a] **Similar definition.**—"Robbery committed on or near the public highway." Encyclopedic D. [quot Anderson v. Hartford, etc., Indemn. Co., 77 Cal. A. 641, 247 P 507 (insurance case)].

[b] **History of highway robbery** see Anderson v. Hartford, etc., Indemn. Co., 77 Cal. A. 641, 247 P 507.

"Highway" defined generally see Highways § 1.

"Highwayman" 29 C. J. p 352.

[19] State v. Johnson, 61 N. C. 140.

[20] State v. Cowan, 29 N. C. 239.

[21] State v. Nicholson, 124 N. C. 820, 32 SE 813.

[22] State v. Nicholson, supra.

[a] **Fifty to seventy five yards from county road.**—State v. Nicholson, 124 N. C. 820, 32 SE 813.

[23] State v. Nicholson, supra.

[24] Peo. v. Blumberg, 314 Ill. 567, 145 NE 627.

[25] Peo. v. Blumberg, supra.

Robbery aggravated by:
Conjoint commission see infra § 67.
Dangerous or deadly weapon see infra § 65.

[26] Cyclopedic L. D.

[27] 2 Burrill L. D. (2d ed.) p 398. See also Black L. D. [cit Cowell].

[28] Philippine Pen. Code (1911) art 502.

Distinction between robo and bandolerismo see Bandolerismo 6 C. J. p 1176.

[29] See supra § 7.

[30] **Common-law and statutory definitions following same** see supra §§ 1, 2.

[31] U. S. v. Flores, 19 Philippine 178, 185.

"The crime of robbery, in its various phases as defined by the Penal Code of these Islands, includes the common-law crimes of burglary, robbery, and some cases of extortion. It does not seem strange or illogical, therefore, to hold the crime proved in the case at bar to be robbery, although in Anglo-Saxon jurisdictions it would probably not be so denominated." U. S. v. Flores, supra.

[32] See statutory provisions.

[33] U. S. v. Giron, 5 Philippine 257; U. S. v. Palilio, 4 Philippine 198; U. S. v. Castro, 4 Philippine 87.

[34] U. S. v. De los Santos, 5 Philippine 565.

[35] U. S. v. Celestino, 14 Philippine 34; U. S. v. Cabuncal, 11 Philippine 415; U. S. v. Aquino, 11 Philippine 244; U. S. v. Melegrito, 11 Philippine 229.

"The criminal act should not be classified as robbery en cuadrilla, for the reason that the record does not show that the four persons who committed the crime were all armed; one of them, only, was seen to carry a stick, and article 505 of the code requires that four or more armed persons unite in the robbery." U. S. v. Barroga, 21 Philippine 161, 163.

"The fact that the thieves, of whom there were more than three, were all armed has not been established, for which reason the deed only deserves to be classified as simple robbery, without the character of cuadrilla." U. S. v. Celestino, 14 Philippine 34, 36.

[36] Baygents v. State, 154 Miss. 36, 122 S 187.

[37] Holland v. State, 110 Tex. Cr. 384, 10 SW (2d) 561.

[38] **Robo as distinct from bandolerismo** see Bandolerismo 6 C. J. p 1176.

[39] Peo. v. Seaman, 101 Cal. A. 302, 281 P 660.

[a] **Assault with deadly weapon.**—"The gravamen of an alleged assault [with a deadly weapon] is the attack. . . . The gravamen of an alleged robbery is the taking, by means of force or fear, of personal property in the possession of another from his person or immediate presence." Peo. v. Seaman, 101 Cal. A. 302, 281 P 660, 661.

As included in robbery see supra § 6.

Criminal assault generally see Assault and Battery §§ 173-371.

[40] See Bribery § 1.

[41] U. S. v. Abrille, 36 Philippine 807.

[a] **Intention of accused.**—"The distinction between the two lines of decisions, the one holding to robbery and the other to coercion, is deemed to be the intention of the accused. Was the purpose with intent to gain to take the property of another by the use of force or intimidation? Then, conviction for robbery. Was the purpose, without authority of law but still believing himself the owner or the creditor, to compel another to do something against his will, and to seize property? Then, conviction for coercion under article 497 of the Penal Code. The motives of the accused are the prime criterion. (5 Groizard, Código Penal, p. 716.) And there was no common robber in the present case, but a man who had fought bitterly for title to his ancestral estate, taking the law into his own hands and attempting to collect what he thought was due him." U. S. v. Abrille, 36 Philippine 807, 809.

Robo see supra § 9.

[42] See Extortion § 2 text and note 10.

[43] See False Pretenses § 98.

[44] See infra text and notes 47-57.

[45] U. S. v. Rosales, 1 Philippine 300.

[a] **Distinction illustrated.**—"The taking of a bull belonging to Brigido Bonafe from the corral where he was inclosed on the night of Saturday, the 7th of November, 1891, and the destruction of part of the said corral, cannot be properly classified as robbery, but constitutes the crime of theft, since, as in order to take the animal away, it was not necessary to destroy the corral or to cut the stakes driven into the ground. The only thing that was done was to pull up some of these stakes for the purpose of making the opening the thieves required, and so the man in charge found the corral the next day." U. S. v. Rosales, 1 Philippine 300,

forcible trespass.[46]

Larceny. In a generic sense larceny and robbery are but different degrees of the same crime,[47] robbery being merely an aggravated form of larceny[48] or theft,[49] the aggravation consisting in the use of actual or constructive violence against the person of the victim.[50] In other words, robbery may be briefly defined as a forcible larceny from the person.[51] While robbery has been termed an aggravated form of larceny, it is a distinct crime.[52] There can be no robbery without violence, and no larceny with it.[53] Therein lies the principal distinction between larceny,[54] including larceny from the person,[55] and robbery. A further distinction is that the crime of larceny may or may not include a taking from the person or presence,[56] whereas the crime of robbery must include such a taking.[57]

II. NATURE AND ELEMENTS OF OFFENSE

[§ 12] **A. In General.** Robbery is a felony both at common law[58] and under the statutes,[59] and constitutes an offense against both person and property.[60] It has been characterized as a grave,[61] seri-

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Robbery as aggravated theft see infra text and note 49.

[46] State v. Deal, 64 N. C. 270; State v. Sowls, 61 N. C. 151, 154.

[a] **Distinction stated.**—"The distinction between robbery and forcible trespass is, that in the former there is, and in the latter there is not, a felonious intention to take the goods, and appropriate them to the offender's own use." State v. Sowls, 61 N. C. 151, 154. To same effect State v. Deal, 64 N. C. 270, 273.

[47] Cosby v. Com., 185 Ky. 503, 217 SW 357.

[48] Fla.—Montsdoca v. State, 84 Fla. 82, 93 S 157, 27 ALR 1291.

Okl.—Berry v. State, (Cr.) 279 P 982; Hill v. State, 19 Okl. Cr. 406, 200 P 253.

Tex.—Holland v. State, 110 Tex. Cr. 384, 10 SW (2d) 561.

Va.—Butts v. Com., 145 Va. 800, 133 SE 764.

W. Va.—State v. Morris, 96 W. Va. 291, 122 SE 914.

"Larceny" defined see Larceny §§ 1-4.

[49] Holland v. State, 110 Tex. Cr. 384, 10 SW (2d) 561.

[50] Cal.—Peo. v. Clary, 72 Cal. 59, 13 P 77.

Fla.—Montsdoca v. State, 84 Fla. 82, 93 S 157, 27 ALR 1291.

Ky.—Southerland v. Com., 217 Ky. 94, 288 SW 1051.

Nev.—State v. Luhano, 31 Nev. 278, 102 P 260.

N. J.—State v. McDonald, 89 N. J. L. 421, 99 A 128.

Or.—State v. Parr, 54 Or. 316, 103 P 434.

Wash.—State v. Johnson, 19 Wash. 410, 53 P 667.

W. Va.—State v. McCoy, 63 W. Va. 69, 59 SE 758.

Force or intimidation as element of robbery see infra §§ 24-44.

[51] Cal.—Peo. v. Clary, 72 Cal. 59, 13 P 77; Peo. v. Jones, 53 Cal. 58.

Fla.—Montsdoca v. State, 84 Fla. 82, 93 S 157, 27 ALR 1291.

Ind.—Hickey v. State, 23 Ind. 21.

Iowa.—State v. Wasson, 126 Iowa 320, 101 NW 1125.

Kan.—Guffey v. Continental Casualty Co., 109 Kan. 61, 197 P 1098 (action on insurance policy); State v. Segemond, 40 Kan. 107, 19 P 370, 10 AmSR 169.

Ky.—Southerland v. Com., 217 Ky. 94, 288 SW 1051.

La.—State v. Wales, 168 La. 322, 122 S 52.

Mass.—Com. v. Clifford, 8 Cush. 215.

Nev.—State v. Luhano, 31 Nev. 278, 102 P 260.

N. J.—State v. McDonald, 89 N. J. L. 421, 99 A 128.

Okl.—Berry v. State, (Cr.) 279 P 982; Randall v. State, 33 Okl. Cr. 262, 243 P 983; Hill v. State, 19 Okl. Cr. 406, 200 P 253.

Or.—State v. Parr, 54 Or. 316, 103 P 434.

Va.—Butts v. Com., 145 Va. 800, 133 SE 764.

Wash.—State v. Johnson, 19 Wash. 410, 53 P 667.

W. Va.—State v. McAllister, 65 W. Va. 97, 63 SE 758, 131 AmSR 955.

[a] **Robbery is "a compound larceny** composed of the crime of larceny from the person with the aggravation of force, actual or constructive, used in the taking." Montsdoca v. State, 84 Fla. 82, 93 S 157, 159, 27 ALR 1291.

[52] Butts v. Com., 145 Va. 800, 133 SE 764, 767.

"Robbery is an aggravated form of larceny, but is treated as a distinctive crime." Clark Cr. L. (2d ed.) p 323 [quot Butts v. Com., supra].

[53] Montsdoca v. State, 84 Fla. 82, 93 S 157, 27 ALR 1291.

Actual or constructive violence as element of robbery see infra § 24.

[54] Ark.—Clary v. State, 33 Ark. 561.

Fla.—Montsdoca v. State, 84 Fla. 82, 93 S 157, 27 ALR 1291.

Ky.—Armstrong v. Com., 190 Ky. 217, 227 SW 162.

Mass.—Com. v. Humphries, 7 Mass. 242.

Nev.—State v. Luhano, 31 Nev. 278, 102 P 260.

Okl.—Randall v. State, 33 Okl. Cr. 262, 243 P 983; Hill v. State, 19 Okl. Cr. 406, 200 P 253.

[a] **Blackstone said:** "Previous violence or putting in fear is the criterion that distinguished robbery from other larcenies." 2 Comm. p 1404 [quot State v. Luhano, 31 Nev. 278, 102 P 260, 262].

[55] Doyle v. State, 77 Ga. 513; Peo. v. Ryan, 239 Ill. 410, 88 NE 170; Peo. v. Campbell, 234 Ill. 391, 84 NE 1035, 123 AmSR 107. See also Larceny § 63.

Distinction between larceny from the person and robbery by snatching see infra § 41 text and note 60½.

[56] See Larceny §§ 55-63.

[57] Armstrong v. Com., 190 Ky. 217, 227 SW 162.

[58] 4 Blackstone Comm. pp 97, 241 et seq; 9 Halsbury L. Eng. p 661.

[59] Killingsworth v. State, 90 Fla. 299, 105 S 834.

Within rule making unintended homicide in commission of a felony murder see Homicide § 70 text and note 68.

[60] Henderson v. State, 172 Ala. 415, 55 S 816; Brown v. State, 120 Ala. 342, 25 S 182; Thomas v. State, 91 Ala. 34, 9 S 81; Douglass v. State, 21 Ala. A. 289, 107 S 791; Parks v. State, 21 Ala. A. 177, 106 S 218; Terr. v. Kim Ung Pil, 26 Hawaii 725; Hill v. State, 42 Nebr. 503, 60 NW 916 (prosecution for homicide in course of robbery).

"Robbery is an offense against the person as well as against the property of the party robbed, against the person by violence, and against the property by manucaption with felonious intent of taking the property." Brown v. State, 120 Ala. 342, 25 S 182, 184.

[a] **In the Philippines** (1) under a code provision that: "The crime of robbery is committed by any person who, with intent to gain, shall take any personal property by the use of violence or intimidation against any person or force upon anything" (Pen. Code art 502), robbery may be committed by forcibly taking property from a house without occupants at the time of the taking. U. S. v. Bajet, 25 Philippine 105, 107 (where the court said: "The crime is classified as one of robbery of an inhabited house, since the building was used as a dwelling, although there was no one actually present in the house at the time of the robbery, and such casual absence cannot bring the crime within the classification of robbery in an uninhabited place, for the reason that the building was ordinarily inhabited and intended as a dwelling, the inhabitants of which might have suffered bodily harm during the commission of the crime, and it is on this account that the penal law punishes more severely the robbery of a house used as a dwelling than that committed in an uninhabited place"). (2) But the crime would ordinarily be classified as burglary. See Burglary 9 C. J. p 1006; and especially § 156 text and note 71 [e].

[61] Franklin v. Brown, 73 W. Va. 727, 81 SE 405, LRA1915C 557.

ous,[62] aggravated,[63] infamous,[64] and heinous[65] crime.[66]

Elements enumerated. Generally speaking the elements of robbery are the taking,[67] of personal property or money[68] from the person or presence[69] of another, by actual or constructive force,[70] without his consent,[71] and with the animus furandi or intent to steal.[72] In defining and discussing the crime of robbery the foregoing elements, in whole or in part, often have been stated by the courts.[73]

Included crimes.[74] While distinct therefrom,[75] every robbery includes a larceny,[76] and may include an assault[77] or assault and battery.[78]

[§ 13] **B. Particular Elements**[79]**—1. Taking or Asportation in General.** To constitute robbery there must be an asportation.[80] In other words, it must appear that the property was taken from the possession of the victim into that of the robber.[81] But the crime is consummated if the robber acquires possession of the property for even a short time,[82] and his subsequent disposition of the property taken is immaterial.[83]

Compelling another to execute an obligation[84] is not robbery,[85] nor is it robbery to compel another to secure a negotiable instrument from a third person for eventual delivery to defendant.[86]

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[62] Buckley v. State, 79 Nebr. 86, 112 NW 283.

[63] Buckley v. State, supra.

[64] U. S. v. Evans, 28 App. (D. C.) 264.

[65] State v. Williams, (Mo.) 292 SW 19.

[66] **Grades or degrees of robbery** see infra §§ 55–71.

Punishment see infra §§ 204–215.

[67] See infra § 13.

[68] See infra §§ 14–19.

[69] See infra §§ 20–23.

[70] See infra §§ 24–44.

[71] See infra §§ 45–48.

[72] See infra §§ 49–53.

[73] Ala.—Henderson v. State, 172 Ala. 415, 55 S 816; Thomas v. State, 91 Ala. 34, 9 S 81.

Ill.—Peo. v. Brooks, 334 Ill. 549, 166 NE 35; Peo. v. Knox, 302 Ill. 471, 134 NE 923.

Kan.—Guffey v. Continental Casualty Co., 109 Kan. 61, 197 P 1098 (action on insurance policy).

La.—State v. Hackett, 166 La. 261, 117 S 141.

Utah.—Peo. v. Hughes, 11 Utah 100, 39 P 492.

Va.—Houston v. Com., 87 Va. 257, 12 SE 385.

[a] **Elements stated and explained.**—"To constitute this offense there must be (1) violence, but it need only be slight, for anything which calls out resistance is sufficient; or, what will answer in place of actual violence, there must be such demonstrations as put the person robbed in fear. The demonstrations or fear must be of a physical nature, with the single exception that, if one parts with his goods through fear of a threatened charge of sodomy, the taking is robbery. There must therefore be (2) a larceny embracing the same elements as a simple larceny; and (3) the taking must be from what is technically called the 'person,' the meaning of which expression is not that it must necessarily be from the actual contact of the person, but it is sufficient if it is from the personal protection and presence." Houston v. Com., 87 Va. 257, 12 SE 385, 387.

[b] **Lord Mansfield's enumeration.**—"In 2 East's P. C. 725, Lord Mansfield states that the true nature and original definition of robbery were the felonious taking of property from the person of another by force, in which there were three things to be observed: First, that it must be done feloniously; second, that it must be from the person of another; and, third, that it must be done by force." Peo. v. Knox, 302 Ill. 471, 134 NE 923, 927.

[74] **Conviction of under indictment for robbery** see Indictments and Informations §§ 497, 523.

[75] See supra § 11.

[76] Peo. v. Sheasbey, 82 Cal. A. 459, 255 P 836; State v. Hackett, 166 La. 261, 117 S 141; State v. McDonald, 89 N. J. L. 421, 99 A 128.

"Larceny is a necessary ingredient of the crime of robbery." State v. McDonald, supra.

Robbery as aggravated larceny see supra § 11.

[77] Com. v. Anagustov, 82 Pa. Super. 156, 158.

[78] Com. v. Anagustov, supra.

"Under all authorities the offense involves assault, assault and battery, or putting in fear; and the latter is constructive assault. There can be no robbery without an assault or putting in fear." Com. v. Anagustov, supra.

[79] **As element of larceny** see Larceny §§ 43–63.

Asportation defined generally see Asportation 5 C. J. p 607.

[80] Ala.—Henderson v. State, 172 Ala. 415, 55 S 816.

Ill.—Peo. v. Campbell, 234 Ill. 391, 84 NE 1035, 123 AmSR 107, 14 Ann Cas 186.

Mass.—Com. v. Clifford, 8 Cush. 215.

Philippine.—U. S. v. Alcantara, 6 Philippine 387.

Va.—Green v. Com., 133 Va. 695, 112 SE 562.

W. Va.—State v. McAllister, 65 W. Va. 97, 63 SE 758, 131 AmSR 955.

[81] U. S. v. Alcantara, 6 Philippine 387; Green v. Com., 133 Va. 695, 112 SE 562; State v. McAllister, 65 W. Va. 97, 63 SE 758, 131 AmSR 955.

[a] **"The taking must be the securing dominion** or absolute control of the property. The absolute dominion must exist at some time, though it be only momentary." Green v. Com., 133 Va. 695, 112 SE 562, 563.

[b] **Passively receiving property** delivered to defendant for safekeeping and subsequently misappropriating the same is an offense, but not the offense of robbery because there is no "taking" in the technical sense of that word as used in the law of robbery. U. S. v. Alcantara, 6 Philippine 387 (jewels).

[82] Peo. v. Campbell, 234 Ill. 391, 84 NE 1035, 123 AmSR 107, 14 Ann Cas 186; State v. Burke, 73 N. C. 83; Rex v. Lapier, 1 Leach C. C. 320, 168 Reprint 263; Rex v. Peat, 1 Leach C. C. 228, 168 Reprint 216.

[a] **One minute.**—State v. Burke, 73 N. C. 83.

[b] **Fraction of a minute.**—Rex v. Peat, 1 Leach C. C. 228, 168 Reprint 216.

[c] **A single second.**—Rex v. Lapier, 1 Leach C. C. 320, 168 Reprint 263.

[83] State v. Burke, 73 N. C. 83; Brown v. State, 61 Tex. Cr. 334, 136 SW 265; Rex v. Lapier, 1 Leach C. C. 320, 168 Reprint 263; Rex v. Peat, 1 Leach C. C. 228, 168 Reprint 216.

[a] **Abandonment.**—Where defendant had seen his victim put two hundred dollars into his coat pocket, and the next day held him up and deprived him of the coat, he was guilty of robbery even though the money was no longer in the coat and defendant on discovering this threw the coat away. Under such circumstances defendant was guilty of robbing the victim of his coat, the offense having been complete when he forcibly deprived his victim thereof, and the subsequent disposition of the coat being immaterial. Brown v. State, 61 Tex. Cr. 334, 136 SW 265.

[b] **Loss.**—Where defendant forcibly tore an earring from a lady's ear, but had no sooner secured the earring than he lost it again when it fell into her hair, he was nevertheless guilty of a completed robbery. Rex v. Lapier, Leach C. C. 320, 168 Reprint 263.

[c] **Return to owner.**—Where defendant by threat of violence secured his victim's purse, but immediately returned it with the remark: "If you value your purse you will please to take it back, and give me the contents of it," and at this instant defendant was overpowered, the offense had been completed when he took the purse and consequently his immediate return thereof and subsequent apprehension before he could escape with it did not prevent conviction for robbery. Rex v. Peat, 1 Leach C. C. 228, 168 Reprint 216.

[84] **Not attempt to rob** see infra § 217 text and note 38.

[85] McKeown v. State, 34 Okl. Cr. 381, 246 P 659; Rex v. Phipoe, 2 Leach C. C. 673, 168 Reprint 438.

[a] **At common law.**—Where defendant threatened her victim with a carving knife and thus induced him to execute a promissory note in defendant's favor, the crime was not robbery, for the note written with defendant's ink on defendant's paper could not be considered as property of the victim taken from the latter. Rex v. Phipoe, 2 Leach C. C. 673, 168 Reprint 438.

[b] **Under a statute** defining robbery as the wrongful taking of personal property in the possession of another from his person or immediate presence and against his will, accomplished by means of force or fear, compelling another to execute and deliver an instrument purporting to create an obligation is not robbery, because there is no taking of property. McKeown v. State, 34 Okl. Cr. 381, 246 P 659, 660 (where the court said: "There was not a taking of

[§ 14] **2. Property Taken—a. Nature of Property—(1) In General.** The same property which is the subject of larceny[87] is the subject of robbery,[88] and the crime of robbery does not otherwise depend upon the kind of property taken.[89]

[§ 15] **(2) Choses in Action and Documents Evidencing Same.**[90] At common law choses in action are not a subject of robbery,[91] nor are the evidences thereof as such subjects of robbery.[92] But the physical evidence of a chose in action may be the subject of robbery in so far as it represents a memorandum of value to the person from whom taken.[93]

Under statutes making it robbery feloniously and forcibly to take "money or personal property" when read in connection with other statutory provisions making the evidences of choses in action the subject of larceny,[94] physical evidences of choses in action may be the subject of robbery.[95] Under the rule that robbery is merely an aggravated form of larceny,[96] and under statutes providing that the subjects of theft shall embrace every species of personal property capable of being taken,[97] evidences of choses in action may be the subjects of robbery.[98]

[§ 16] **b. Value.**[99] So long as the property taken has some value,[1] the amount of its value is immaterial both at common law[2] and under statutes containing no requirement respecting the amount of value.[3] An actual pecuniary value is not essential, so long as it appears that the property had some value to the person robbed.[4]

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property from the person or immediate presence of another, but a settlement of a claimed injury under duress, or on extortion by the defendant").

[c] **Conviction of robbery reversed because crime really extortion.**—Where any person, by extortionate means, obtains from another his signature to any paper or instrument, whereby, if such signature were freely given, a debt, demand, charge, or right of action is created, the offense is "extortion" and not "robbery." McKeown v. State, 34 Okl. Cr. 381, 246 P 659.

Choses in action as subjects of robbery see infra § 15.

Obtaining money or property by threats see Threats [38 Cyc 289].

86. State v. McAllister, 65 W. Va. 97, 63 SE 758, 131 AmSR 955.

[a] **Check.**—Where defendants threatened to kill one Wallace unless he gave them two hundred dollars, and while accompanied by the armed defendants Wallace persuaded a friend to give to him a check for two hundred dollars to the order of one of the defendants, giving such friend another check drawn by Mrs. Wallace to the order of such friend in exchange, all of this occurring in West Virginia, prior to going to Kentucky where the friend's check was delivered by Wallace to one of the defendants, there was no robbery committed in West Virginia, because nothing was there taken by defendant. State v. McAllister, 65 W. Va. 97, 63 SE 758, 131 AmSR 955 (whether there was a robbery in Kentucky, quære).

87. See Larceny §§ 5-42.

88. State v. Lapista, 30 Del. 260, 105 A 676; State v. Trexler, 4 N. C. 188, 6 AmD 558.

89. Stephens v. State, 92 Fla. 43, 109 S 303; State v. Burke, 73 N. C. 83.

Choses in action see infra § 15.

90. **As subjects of larceny** see Larceny §§ 8, 26, 27.

Compelling execution of instrument see supra § 13 text and notes 84-86.

91. Holland v. State, 110 Tex. Cr. 384, 10 SW (2d) 561 (stating common law rule although decided under statute).

92. Jackson v. State, 69 Ala. 249. See State v. McAllister, 65 W. Va. 97, 63 SE 758, 131 AmSR 955 (quære whether taking a check can constitute robbery).

[a] **Promissory note.**—"If by putting in fear, or by actual violence to the person, a promissory note is extorted, this is not robbery, for the note is void. It is of no value to the wrongdoer, and of no detriment to him from whom it is forced." Jackson v. State, 69 Ala. 249, 252.

93. Jackson v. State, 69 Ala. 249, 252; Rex v. Bingley, 5 C. & P. 602, 24 ECL 729, 172 Reprint 1118.

"Taking by violence from the person of the prosecutor a slip of paper containing a memorandum of a sum of money, which was due or owing to him from another, is robbery. The paper was not evidence of the debt which could have been used against the debtor, but it was evidence that reminded the prosecutor of the existence and amount of the debt; and, as was said by the court, his keeping of it showed that he considered it of some value." Jackson v. State, supra.

94. See statutory provisions. And see Larceny § 27.

95. Turner v. State, 1 Oh. St. 422.

[a] **Bank notes** regarded not as money but as personal property. Turner v. State, 1 Oh. St. 422.

96. See supra § 11.

97. See statutory provisions.

98. Holland v. State, 110 Tex. Cr. 384, 10 SW (2d) 561.

[a] **Check.**—Holland v. State, 110 Tex. Cr. 384, 10 SW (2d) 561, 563.

99. **As affecting grade or degree of offense** see infra § 70.

1. Ware v. State, 12 Ala. A. 101, 67 S 763; Peo. v. Carpenter, 315 Ill. 87, 145 NE 664; Peo. v. Fiereto, 303 Ill. 186, 135 NE 417; State v. McAllister, 65 W. Va. 97, 63 SE 758, 131 AmSR 955.

2. Ware v. State, 12 Ala. A. 101, 67 S 763; Jackson v. State, 69 Ala. 249; James v. State, 53 Ala. 380; State v. Burke, 73 N. C. 83; Rex v. Bingley, 5 C. & P. 602, 24 ECL 729, 172 Reprint 1118.

[a] **"A penny as well as a pound** forcibly extorted, constitutes a robbery, the gist of the offense being the force and terror." Roscoe Cr. Ev. p 908 [quot James v. State, 53 Ala. 380, 387].

3. Ark.—Clary v. State, 33 Ark. 561, 563.

Cal.—Peo. v. Stevens, 141 Cal. 488, 75 P 62.

Fla.—Stephens v. State, 92 Fla. 43, 109 S 303.

Ga.—McDow v. State, 110 Ga. 293, 34 SE 1019.

Ill.—Peo. v. Carpenter, 315 Ill. 87, 145 NE 664; Peo. v. Fiereto, 303 Ill. 186, 135 NE 417; Peo. v. Christy, 302 Ill. 343, 134 NE 713.

Kan.—State v. Tucker, 115 Kan. 203, 222 P 96.

Mo.—State v. Craft, 23 SW (2d) 183.

Okl.—Berry v. State, (Cr.) 279 P 982.

Philippine.—U. S. v. De la Cruz, 12 Philippine 87.

Tex.—Thompson v. State, 90 Tex. Cr. 125, 234 SW 406.

Wash.—State v. Denby, 143 Wash. 288, 255 P 141; State v. Rowan, 84 Wash. 158, 146 P 374, 375.

[a] **Whether the victim is robbed of ten cents or ten thousand dollars is immaterial.**—State v. Tucker, 115 Kan. 203, 222 P 96.

[b] **About three dollars.**—Where the defense to a charge of robbery was that nothing of value was taken from the victim, proof that the defendants took two one dollar bills and some silver was sufficient to sustain a conviction of robbery. Peo. v. Christy, 302 Ill. 343, 134 NE 713.

Amount as fixing degree see infra § 70.

4. Jackson v. State, 69 Ala. 249; Rex v. Bingley, 5 C. & P. 602, 24 ECL 729, 172 Reprint 1118.

[a] **Memorandum slip.**—A, who attacked B and by violence took from him a piece of paper on which was written a memorandum respecting money due B, was properly found guilty of robbery, as "the prosecutor, by carrying this memorandum in his pocket, shewed that he considered that it was of some value to himself." Rex v. Bingley, 5 C. & P. 602, 603, 24 ECL 729, 172 Reprint 1118.

[b] **Old valise.**—"It was not necessary, as these instructions import, that it should have been proved in every event, that the valise had any specific pecuniary value. If there was evidence showing that it was not worthless—that it was not wholly unfit for use, or that the owner kept and preserved it as of value to him, it was the subject of robbery, though the pecuniary value which could be imputed to it was nominal, insignificant, or incapable of estimation." Jackson v. State, 69 Ala. 249, 252.

[§ 17] **c. Ownership—(1) By Person from Whom Taken.** It is not essential that property should be taken from the actual owner,[5] or holder of the legal title,[6] a qualified or special property right in the victim being sufficient.[7] In other words, the charge of robbery may be sustained by proof that property was forcibly taken from the care,[8] custody,[9] control,[10] management,[11] or possession,[12] of one having a right superior to that of the robber.[13] It must, however, appear that the person from whose presence property was taken had control or dominion over it, even though he did not actually own it,[14] and, according to certain authority, his custody thereof must be of a character sufficient to serve as the basis of a possessory action.[15] The foregoing rules apply both at common law and under statutes declaratory thereof, in this respect,[16] and the courts have pointed out that there is no difference between the common law and particular statutory provisions in respect to the victim's ownership or possession of property.[17]

Robbing a thief. Robbery may be committed by

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5. Ala.—Montgomery v. State, 169 Ala. 12, 53 S 991.

Ark.—Lanahan v. State, 176 Ark. 104, 2 SW (2d) 55.

Cal.—Peo. v. Anderson, 80 Cal. 205, 22 P 139; Peo. v. Shuler, 28 Cal. 490; Peo. v. Vice, 21 Cal. 344.

Ga.—Stegar v. State, 39 Ga. 583, 99 AmD 472.

Ill.—Peo. v. Ziderowski, 325 Ill. 232, 156 NE 274.

La.—State v. Hobgood, 46 La. Ann. 855, 15 S 406.

Mass.—Com. v. Clifford, 8 Cush. 215.

Mich.—Peo. v. Cabassa, 249 Mich. 543, 229 NW 442; Durand v. Peo., 47 Mich. 332, 11 NW 184.

Minn.—State v. Schnachtel, 157 Minn. 272, 196 NW 674.

Mo.—State v. Montgomery, 181 Mo. 19, 79 SW 693, 67 LRA 343, 2 AnnCas 261.

Mont.—State v. Reagin, 64 Mont. 481, 210 P 86 (homicide in course of attempted robbery).

Nebr.—Peterson v. State, 115 Nebr. 302, 212 NW 610.

Nev.—State v. Ah Loi, 5 Nev. 99.

N. Y.—Peo. v. Madas, 201 N. Y. 349, 94 NE 857, AnnCas1912B 229; Brooks v. Peo., 49 N. Y. 436, 10 AmR 398.

Okl.—Robards v. State, 37 Okl. Cr. 371, 259 P 166.

Philippine.—U. S. v. Albao, 29 Philippine 86.

Tex.—Reese v. State, 91 Tex. Cr. 457, 239 SW 619.

Eng.—Spencer's Case, 2 East P. C. 712.

[a] **Apparent ownership is sufficient.**—State v. Hobgood, 46 La. Ann. 855, 15 S 406.

[b] **Child of owner.**—Montgomery v. State, 169 Ala. 12, 53 S 991 (emancipation of child immaterial, as child's title made no difference where he at any rate had possession); Brooks v. Peo., 49 N. Y. 436, 10 AmR 398, 1 Cow. Cr. 503.

[c] **Employee of owner.**—Peo. v. Cabasso, 249 Mich. 543, 229 NW 442; State v. Montgomery, 181 Mo. 19, 79 SW 693, 67 LRA 343; Reese v. State, 91 Tex. Cr. 457, 239 SW 619.

6. Montgomery v. State, 169 Ala. 12, 53 S 991; Com. v. Weiner, 255 Mass. 506, 509, 152 NE 359; State v. Huffman, (Mo.) 238 SW 430; Ibeck v. State, 112 Tex. Cr. 287, 16 SW (2d) 232 (1st case).

"The essence of robbery is the exertion of force, actual or constructive, against another in order to take personal property of any value whatsoever, with the intention of stealing it, from the protection which the person of that other affords. . . . It is not affected by the state of the legal title to the goods taken." Com. v. Weiner, supra.

[a] **Robber interrupting sale.**—Where one Floyd was buying an auto from one Bertagni and had paid Bertagni one thousand and fifty dollars when defendant came along and forcibly took the money, in a prosecution for robbing Bertagni it was not material whether or not the sale had been consummated and title to the money had actually passed to Bertagni, as defendant was equally guilty whether Bertagni held the money as owner or bailee. State v. Huffman, (Mo.) 238 SW 430.

[b] **Title in fee need not be in victim.**—Ibeck v. State, 112 Tex. Cr. 287, 16 SW (2d) 232 (1st case).

7. Peo. v. Knox, 302 Ill. 471, 134 NE 923, 927.

"The rule is satisfied by a showing of qualified or special property in the person assaulted in the thing taken in the robbery. The reason for this rule finds its basis in the common law, and is recognized by numerous states in this country and by the courts of England." Peo. v. Knox, supra.

8. Peo. v. Ziderowski, 325 Ill. 232, 156 NE 274; Peo. v. Filipak, 322 Ill. 546, 153 NE 673; Ibeck v. State, 112 Tex. Cr. 287, 16 SW (2d) 232 (1st case).

9. Peo. v. Filipak, 322 Ill. 546, 153 NE 673; Peo. v. Cabassa, 249 Mich. 543, 229 NW 442; State v. Montgomery, 181 Mo. 19, 79 SW 693, 67 LRA 343, 2 AnnCas 261; Robards v. State, 37 Okl. Cr. 371, 259 P 166.

10. Ala.—Montgomery v. State, 169 Ala. 12, 53 S 991.

Ark.—Lanahan v. State, 176 Ark. 104, 2 SW (2d) 55.

Ill.—Peo. v. Filipak, 322 Ill. 546, 153 NE 673.

Mich.—Peo. v. Cabassa, 249 Mich. 543, 229 NW 442.

Okl.—Robards v. State, 37 Okl. Cr. 371, 259 P 166.

Tex.—Ibeck v. State, 112 Tex. Cr. 287, 16 SW (2d) 232.

11. Ibeck v. State, supra.

12. Ala.—Montgomery v. State, 169 Ala. 12, 53 S 991.

Ark.—Lanahan v. State, 176 Ark. 104, 2 SW (2d) 55.

Cal.—Peo. v. Dean, 66 Cal. A. 602, 226 P 943.

Ga.—Stegar v. State, 39 Ga. 583, 99 AmD 472.

Ill.—Peo. v. Ziderowski, 325 Ill. 232, 156 NE 274.

La.—State v. Hobgood, 46 La. Ann. 855, 15 S 406.

Mo.—State v. Huffman, 238 SW 430; State v. Montgomery, 181 Mo. 19, 79 SW 693, 67 LRA 343, 2 AnnCas 261.

Mont.—State v. Reagin, 64 Mont. 481, 210 P 86 (prosecution for homicide in commission of attempted robbery).

Philippine.—U. S. v. Albao, 29 Philippine 86.

Tex.—Reese v. State, 91 Tex. Cr. 457, 239 SW 619; Clark v. State, 87 Tex. Cr. 107, 220 SW 100.

Eng.—Spencer's Case, 2 East P. C. 712.

"The possession of the property is sufficient. Ownership is not necessary." U. S. v. Albao, 29 Philippine 86, 107.

[a] **Possession by officer of law.**—The possession of an undersheriff, robbed of property taken under process of law, though claimed by a third person, is sufficient possession to support robbery, as against party accused. State v. Reagin, 64 Mont. 481, 210 P 86 (prosecution for homicide in commission of attempted robbery).

[b] **Exclusive possession is sufficient.**—Lanahan v. State, 176 Ark. 104, 2 SW (2d) 55.

[c] **Legal possession is sufficient.**—Stegar v. State, 39 Ga. 583, 99 AmD 472.

13. Effect of ownership by accused see infra § 18.

Robbing thief see infra text and note 18.

14. State v. Lawler, 130 Mo. 366, 32 SW 979, 983; State v. Hall, 54 Wash. 142, 102 P 888.

[a] **"For instance,** if A. takes the property of B. from the immediate presence of C. by force or putting in fear, A. is not guilty of the crime of robbery unless B. had control and dominion over C.'s property at the time of the taking." State v. Hall, 54 Wash. 142, 102 P 888.

[b] **Rule applied.**—Where an indictment mentioned only W as the owner, and then alleged a forcible taking from the presence of W's wife, who was not alleged to have even a special property in the money taken, it was insufficient to charge robbery. State v. Lawler, 130 Mo. 366, 32 SW 979.

15. State v. Lawler, supra.

[a] **"The turning point and test rule** in all cases of this sort may be formulated into this question: Did the party alleged in the indictment to be the owner have such a special property or right of possession in the goods as would enable him to maintain an action for them if taken out of his custody? If this interrogatory be answered affirmatively, then prosecution will lie in the name of such alleged owner; otherwise, not." State v. Lawler, 130 Mo. 366, 32 SW 979, 983, 51 AmSR 575.

16. See supra text and notes 5–15.

17. See cases infra this note.

[a] **Particular statutory provisions** (1) defining robbery as the forcible taking of property of another (State v. Adams, 58 Kan. 365, 49 P 81; Com. v. Weiner, 255 Mass. 506, 152 NE 359 [where the court said: "G. L. c. 277, § 39, defines 'robbery' when used in an indictment, to mean 'The taking and carrying away of per-

taking property even from one who has himself stolen it.[18]

[§ 18] **(2) By Accused.** To be the subject of robbery, the ownership or right of possession of the property taken must be in another than defendant.[19] The owner of property is ordinarily[20] not guilty of robbery in forcibly taking it from another,[21] as where he violently retakes his property from one who has acquired it unlawfully.[22]

Gambling proceeds. It is generally held that the loser in a game of chance may forcibly retake his lost property or money without being guilty of robbery,[23] although some authorities make a distinction between fairly conducted and unfairly conducted games, holding that one who loses fairly is guilty of robbery in retaking his losses by force[23½] but is not guilty of robbery in retaking that of which he has been cheated.[23⅓] Further it has been held that a winner is not guilty of robbery in taking his winnings from the banker of the game[23¼] or directly from the loser.[23⅕]

[§ 19] **(3) Contraband[24] Property.** Contraband property may be the subject of robbery.[25] Statutes providing that no property rights shall exist in property of a specified character,[26] do not preclude private ownership of such property sufficient to make it the subject of robbery.[27]

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sonal property of another from his person and against his will, by force and violence, or by assault and putting in fear, with intent to steal'; . . . The grammatical construction of § 39 indicates that 'the personal property of another,' taken 'from his person,' shall belong to him; but it does not make clear the extent of his proprietary interest in it. We do not think the definition was intended to narrow the language of Com. v. Clifford, 8 Cush. (Mass.) 215, which declared that the property taken away must be that of the person robbed or of some third person. That case did not set out who the third person must be, but it seems that the court assumed him to be any one other than the robber; for the essential point of the decision was that an indictment which failed to set out the ownership was insufficient, and the reason given was that in the absence of such an allegation, the charge might be proved by evidence that the accused took from the victim property belonging to himself which he had the right to retake forcibly, no robbery having been committed"]), (2) or as forcibly taking property from the person of another (Peo. v. Cabassa, 249 Mich. 543, 229 NW 442 [where the court said: "The first offense mentioned and described by the statute in the language, 'If any person shall assault another and shall feloniously rob, steal and take from his person any money or other property,' covers a robbery of the kind alleged in the first count in the information to have been committed. McMullen, though not the actual owner of the property stolen, was in custody and control of it"]) have been construed as not changing the rule that the victim's possession of the property taken is sufficient without actual ownership.

[18] State v. Wales, 168 La. 322, 122 S 52; Com. v. Finn, 108 Mass. 466; U. S. v. Albao, 29 Philippine 86.

Alleging right to possession in indictment see infra § 98.

[19] Peo. v. Vice, 21 Cal. 344; Peo. v. Sheasbey, 82 Cal. A. 459, 255 P 836; Com. v. Clifford, 8 Cush. (Mass.) 215.

Rules in larceny see Larceny §§ 74–84.

[20] See Triplett v. Com., 122 Ky. 35, 91 SW 281, 283, 28 KyL 974 (wherein the court held defendant not guilty of robbery in retaking property under a claim of right because there was no felonious intent, and then added: "We do not mean to hold that one may not be guilty of robbery . . . by the wrongful taking of his own property, if he thereby designs to commit a fraud or entail a loss upon a rightful bailee or upon another").

Larceny by stealing one's own property from bailee see Larceny § 150.

[21] Ala.—Douglass v. State, 21 Ala. A. 289, 107 S 791.

Cal.—Peo. v. Vice, 21 Cal. 344.

Iowa.—State v. Wasson, 126 Iowa 320, 101 NW 1125.

Okl.—Johnson v. State, 24 Okl. Cr. 326, 218 P 179.

Tex.—Smedley v. State, 30 Tex. 214; Temple v. State, 86 Tex. Cr. 219, 215 SW 965; Barnes v. State, 9 Tex. A. 128.

Wash.—State v. Steele, 150 Wash. 466, 273 P 742.

But see Black v. State, 3 Yerg. (Tenn.) 588 (where defendants were indicted for forcibly taking a slave and evidence of their alleged title to the property was rejected on the theory that ownership would furnish no defense to the charge. It is not clear, however, whether the charge was robbery or some different crime).

[a] **"It is well settled** that one cannot be guilty of robbery by taking his own specific property from the possession of another, although the taking may be accomplished under such circumstances as would amount to robbery if the property belonged to the person from whom it was taken." Temple v. State, 86 Tex. Cr. 219, 215 SW 965, 966.

[b] **Though he may be guilty of another offense** the owner of property is not guilty of robbery in taking it from the person of the possessor. Peo. v. Vice, 21 Cal. 344.

[c] **Reason for rule.**—"The rule, moreover, is not without reason in its support. A contrary rule would prevent an owner of property who caught a thief in the act of carrying away his property from retaking the property by force or by putting the thief in fear, contrary to that general principle that a man has the right to protect his property against the unlawful invasion of another by such acts of force as are necessary to so protect it." State v. Steele, 150 Wash. 466, 273 P 742, 744.

Taking under claim of right as affecting intent see infra § 52.

[22] State v. Price, 38 Ida. 149, 219 P 1049; Com. v. Clifford, 8 Cush. (Mass.) 215; Fisher v. State, 102 Tex. Cr. 229, 277 SW 386, 42 ALR 740; Glenn v. State, 49 Tex. Cr. 349, 92 SW 806, 13 AnnCas 774; State v. Steele, 150 Wash. 466, 273 P 742.

[a] **Forcibly retaking from thief.**—State v. Price, 38 Ida. 149, 219 P 1049.

[23] Gant v. State, 115 Ga. 205, 41 SE 698; State v. Price, 38 Ida. 149, 219 P 1049; Sikes v. Com., 34 SW 902, 17 KyL 1353; Thompson v. Com., 18 SW 1022, 13 KyL 1916.

[a] **Illustration.**—In a prosecution for robbery, an instruction that, if a person losing at cards voluntarily delivers the money lost to the winner's actual possession, the winner owns the money, so that the forcible taking of it from his possession may constitute robbery, is reversible error. State v. Price, 38 Ida. 149, 219 P 1049.

Right to recover gambling losses generally see Gaming §§ 314–331.

[23½] Coker v. State, 71 Tex. Cr. 504, 160 SW 366; Blain v. State, 34 Tex. Cr. 448, 31 SW 368.

[23⅓] Cole v. State, 104 Tex. Cr. 533, 286 SW 204 (fraudulent dice); Fisher v. State, 102 Tex. Cr. 229, 277 SW 386, 42 ALR 740 (marked cards); Temple v. State, 86 Tex. Cr. 219, 215 SW 965 (false statement as to number of cards in deck) [dist Blain v. State, supra, and Carroll v. State, infra].

[a] **Defendant's mere claim** that his money was won by unfair practices is insufficient to save him from a charge of robbery in retaking by force losses peaceably paid over and in the possession of his opponent. Carroll v. State, 42 Tex. Cr. 30, 57 SW 99.

[23¼] Palmer v. State, 71 Tex. Cr. 335, 160 SW 349.

[a] **Illustration.**—If defendant himself wins under the rules of the game, and the "banker" takes the money and puts it "in the game," defendant is not guilty of robbery in forcibly taking his original stake and winnings. Palmer v. State, 71 Tex. Cr. 335, 160 SW 349.

[23⅕] Smith v. State, (Tex. Cr.) 81 SW 712 (craps).

[24] **"Contraband" defined** see 13 C. J. p 210.

[25] Lout v. State, 34 Okl. Cr. 73, 244 P 818 (prosecution for homicide in commission of robbery); Arner v. State, 19 Okl. Cr. 23, 197 P 710; U. S. v. Albao, 29 Philippine 86.

[a] **Intoxicating liquor.**—Arner v. State, 19 Okl. Cr. 23, 197 P 710.

[b] **Opium.**—U. S. v. Albao, 29 Philippine 86.

[26] See statutory provisions.

[27] Ray v. Com., 230 Ky. 656, 20 SW (2d) 484, 66 ALR 1297.

"No contention is made that the whisky taken was without value. Counsel rely solely, to sustain their contention, upon the proposition that the prosecuting witness had no property rights in it. . . . It is the business of the state, through its duly constituted peace officers, to bring

[§ 20] **3. Taking from Person, Presence, or Possession**[28]**—a. Necessity for.** Since robbery is an offense against the person as well as against property,[29] it is essential to the crime that there should be a taking from the "person" of the victim.[30] To satisfy this requirement, however, it is sufficient if property be taken from his "presence."[31] In other words, the property must be actually or constructively taken from the person,[32] or as some authorities have phrased the rule, it must be taken from the "person or presence,"[33] or from the "person or possession"[34] of the victim.

From "possession" and person or presence. Under statutes defining robbery as a wrongful taking of personal property in the possession of another from his person or immediate presence,[35] it must appear that the taking was not only from the person or presence but also from the possession[36] of the victim. But if the property is on the person of the victim, and not merely in his presence, his possession thereof sufficiently appears.[37]

[§ 21] **b. What Constitutes Taking from Person—(1) At Common Law.** At common law it is not necessary that the property should be taken from the physical person of the victim,[38] the requirement that it be taken from his "person" being satisfied if it is taken from his "presence."[39]

[§ 22] **(2) Under Statutes.** The requirement of a taking from the person is satisfied by a taking from the presence under statutes defining robbery as a felonious and forcible taking from the "person,"[40]

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such action as the law prescribes against contraband property and its users, and it is not the privilege of highwaymen to hold up at the point of a gun the possessors of contraband property and take it away from them by force, nor did the Legislature so intend by merely providing that such possessor should have no property rights in the property when unlawfully kept." Arner v. State, 19 Okl. Cr. 23, 197 P 710, 712.

[28] **Necessity of alleging in indictment** see infra § 100.

[29] See supra § 12 text and note 60.

[30] U. S.—Weisman v. U. S., 1 F. (2d) 696, 697 [quot Cyc]; U. S. v. Jones, 1 F. Cas. No. 15,494, 3 Wash. C. C. 209.

Cal.—Peo. v. Beck, 21 Cal. 385.

Ga.—Stegar v. State, 39 Ga. 583, 99 AmD 472.

Hawaii.—Terr. v. Kim Ung Pil, 26 Hawaii 725, 732 [cit Cyc].

Ill.—O'Donnell v. Peo., 224 Ill. 218, 79 NE 639.

Iowa.—State v. Leighton, 56 Iowa 595, 9 NW 896.

Mo.—State v. Lawler, 130 Mo. 366, 32 SW 979, 51 AmSR 575.

Tenn.—Crews v. State, 3 Coldw. 350; Kit v. State, 11 Humphr. 167.

Va.—Houston v. Com., 87 Va. 257, 12 SE 385.

Eng.—Rex v. Phipoe, 2 Leach C. C. 673, 168 Reprint 438.

[31] See infra §§ 21, 22.

[32] Crews v. State, 3 Coldw. (Tenn.) 350, 353.

"The taking must be felonious and forcible, from the person of the party robbed, either active [actual] or constructive. It is actual, when, in fact, the taking is immediately from the person; and constructive, when in the possession of the party robbed, as if the robber having first assaulted the owner, takes away his horse standing near, or having put him in fear, drives away his cattle, or takes up his pelisse or cloak, which the owner, to save it from the robber, had thrown into the bush." Crews v. State, supra.

[33] Ala.—Henderson v. State, 172 Ala. 415, 55 S 816.

Ark.—Clary v. State, 33 Ark. 561.

Ill.—Peo. v. Carpenter, 315 Ill. 87, 145 NE 664; Peo. v. Sicks, 299 Ill. 282, 132 NE 573.

Hawaii.—Terr. v. Kim Ung Pil, 26 Hawaii 725.

Mo.—State v. Lawler, 130 Mo. 366, 32 SW 979, 51 AmSR 575.

[34] Hamilton v. Com., 12 Ky. Op. 613; Whitt v. Com., 1 Ky. Op. 185.

[35] See statutory provisions.

[36] Peo. v. Ham Tong, 155 Cal. 579, 102 P 263, 132 AmSR 110, 24 LRA NS 481; Peo. v. Ho Sing, 6 Cal. A. 752, 93 P 204.

[37] Rasberry v. State, 4 Okl. Cr. 613, 103 P 865, 872.

"Property may be in the possession of a person and still not be on his person; but it is impossible for property to be on the person without also being in the possession of such person. Therefore it is a necessary presumption, and this court takes judicial notice of the fact, that property is in the possession of the person who has it on his person." Rasberry v. State, supra.

[38] Waters v. State, 22 Ala. A. 644, 119 S 248; Douglass v. State, 21 Ala. A. 289, 107 S 791; James v. State, 53 Ala. 380; Com. v. Dantine, 261 Pa. 496, 104 A 672 (prosecution for homicide in commission of robbery); Houston v. Com., 87 Va. 257, 12 SE 385.

[a] **Illustration.**—A, traveling with B, and having been intrusted with B's goods to help carry them, by violence feloniously exerted against B, carried off the goods. A was guilty of robbery, since up to the time of the violence his possession was constructively that of B, and the taking being in B's presence, was constructively from his person. James v. State, 53 Ala. 380.

[39] Ala.—Rice v. State, 204 Ala. 104, 85 S 437; Hill v. State, 145 Ala. 58, 40 S 654; Douglass v. State, 21 Ala. A. 289, 107 S 791.

Hawaii.—Terr. v. Kim Ung Pil, 26 Hawaii 725 (stating common law rule but decided under statute).

Pa.—Com. v. Dantine, 261 Pa. 496, 104 A 672 (prosecution for homicide in commission of robbery).

Va.—Houston v. Com., 87 Va. 257, 12 SE 385.

Eng.—Rex v. Selway, 8 Cox C. C. 235; Rex v. Francis, Str. 1015, 93 Reprint 1004; Rex v. Grey, East P. C. 708; Rex v. Donnally, 1 Leach C. C. 193, 199, 168 Reprint 241.

[a] **Taking from direct personal control.**—Taking property from the presence of a person and under his direct physical personal control, as where the property is lying beside the victim, is the equivalent of taking from his person. Rice v. State, 204 Ala. 104, 85 S 437.

[b] **By the great weight of authority,** the words "taking from the person of another," as used in connection with the common-law definition of robbery, are not restricted in application to those cases in which the property taken is in actual contact with the person of the one from whom it is taken, but include within their meaning the taking by violence or intimidation from the person wronged, in his presence, of property which either belongs to him or which is under his personal protection and control." Douglass v. State, 21 Ala. A. 289, 107 S 791, 793.

[40] Fla.—Wood v. State, 98 Fla. 703, 124 S 44.

Ga.—Crawford v. State, 90 Ga. 701, 17 SE 628, 35 AmSR 242 (homicide in course of robbery).

Ill.—Peo. v. O'Hara, 332 Ill. 436, 163 NE 804; Peo. v. Carpenter, 315 Ill. 87, 145 NE 664; Peo. v. Sicks, 299 Ill. 282, 132 NE 573; O'Donnell v. Peo., 224 Ill. 218, 79 NE 639.

Iowa.—State v. Calhoun, 72 Iowa 432, 34 NW 194, 2 AmSR 252.

Mass.—Com. v. Homer, 235 Mass. 526, 127 NE 517; Com. v. Homer, 235 Mass. 526, 127 NE 517.

Mich.—Peo. v. Cabassa, 249 Mich. 543, 229 NW 442, 444; Peo. v. Covelesky, 217 Mich. 90, 185 NW 770.

Nebr.—Hill v. State, 42 Nebr. 503, 60 NW 916.

Oh.—Turner v. State, 1 Oh. St. 422.

Tenn.—Crews v. State, 3 Coldw. 350.

"The words 'from the person of another,' as used in our statute, have the same meaning with which they were used at common law, and robbery may be committed by violence or putting in fear and feloniously taking money or other property from the person or in the presence or under the immediate control and possession of the person assaulted." Peo. v. O'Hara, 332 Ill. 436, 163 NE 804, 806.

[a] **Illustration.**—As to jewelry delivered to defendant by the complaining witness' maid, it was unnecessary, in order to establish robbery, to prove that property was taken from person of the complaining witness; it being enough if it was in her protection or control, and that by violence or putting in fear she was compelled to surrender it. Com. v. Homer, 235 Mass. 526, 127 NE 517.

[b] **From money drawer and bank vault** in presence of cashier having custody and control thereof. Wood v. State, 98 Fla. 703, 124 S 44.

"person or presence,"[41] or "person or possession"[42] of another. It is not necessary that the property taken should have been in actual contact with the person of the victim.[43]

[§ 23] **c. What Constitutes Taking from Presence or Possession.** Under the rule that a taking from the "presence" of another is equivalent to a taking from his "person,"[44] by "presence" is meant a possession or control so immediate that violence or intimidation is essential to sunder it.[45] But property may be in the possession and control of another without being in his presence,[46] and it is not robbery to take property from the possession or control of a person so far absent that neither force nor intimidation is used to effect the taking.[47] Whether or not there was a taking from the "presence" is therefore a question to be determined in accordance with the circumstances of the particular case.[48]

Possession. Under statutes providing that a person shall be punished for robbery if he feloniously and forcibly takes property "from the person or possession of another,"[49] or defining robbery as the forcible and felonious taking of property "in the possession of another, from his person or immediate presence,"[50] forcibly taking money from a place under the personal protection of the victim is taking it from his "possession."

[§ 24] **4. Force or Intimidation—a. Necessity for—(1) In General.** There can be no robbery without violence,[51] actual or constructive,[52] used or threatened.[53] Force or intimidation is the very gist of the crime,[54] its distinguishing characteristic,[55] and all the authorities hold that to establish robbery it must be shown that the taking was accomplished either by force or by putting in fear.[56]

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[41] Terr. v. Kim Ung Pil, 26 Hawaii 725, 732; State v. Smith, 113 Kan. 737, 216 P 302, 303; State v. Lamb, 242 Mo. 398, 146 SW 1169; State v. Lawler, 130 Mo. 366, 32 SW 979, 51 AmSR 575; Peo. v. Emieleta, 238 N. Y. 158, 144 NE 487 (prosecution for homicide in course of robbery); Peo. v. Madas, 201 N. Y. 349, 94 NE 857, AnnCas1912B 229.

"It was not necessary to a conviction to show . . . the taking of the property directly from her person. . . . It is enough if the property is taken in her presence." State v. Smith, supra.

[42] Ibeck v. State, 112 Tex. Cr. 287, 16 SW (2d) 232.

"The only other exception to the charge was for its failure to tell the jury that in order to make appellant guilty of robbery, the property taken must have been on or about Compton's person. This we think not a sound rule. One may be robbed of money or other property not taken from his person." Ibeck v. State, supra.

[43] Wood v. State, 98 Fla. 703, 124 S 44; State v. Calhoun, 72 Iowa 432, 34 NW 194, 2 AmSR 252; Peo. v. Covelesky, 217 Mich. 90, 185 NW 770.

[44] See supra §§ 21, 22.

[45] State v. Calhoun, 72 Iowa 432, 34 NW 194, 2 AmSR 252; Peo. v. Cabassa, 249 Mich. 543, 229 NW 442; State v. Williams, (Mo.) 183 SW 308.

[a] **From the "person" statute.**—"The thought of the statute, as expressed in the language, is that the property must be so in the possession or under the control of the individual robbed that violence or putting in fear was the means used by the robber to take it. If it be away from the owner, yet under his control, in another room of the house, as in this case, it is nevertheless in his personal possession; and, if he is deprived thereof, it may well be said it is taken from his person. Goods are called personal property in the law, and presumed to accompany the person. If taken from the owner, this relation of owner and property is surrendered, and the goods are separated from the person." State v. Calhoun, 72 Iowa 432, 436, 34 NW 194, 2 AmSR 252 [quot Peo. v. Cabassa, 249 Mich. 543, 229 NW 442, 444].

[b] **"Person or presence" statute.**—In a prosecution for robbery, where money was taken from a ticket office, it was done "in the presence of" the station agent, who had been shot, and was lying on the floor of the waiting room, and could hear the noise through the open ticket window, which connected the two rooms. State v. Williams, (Mo.) 183 SW 308.

[46] Peo. v. Carpenter, 315 Ill. 87, 145 NE 664; Peo. v. Sicks, 299 Ill. 282, 132 NE 573.

[47] Peo. v. Carpenter, 315 Ill. 87, 145 NE 664, 665; Peo. v. Sicks, 299 Ill. 282, 132 NE 573; Whitt v. Com., 1 Ky. Op. 185.

[48] See cases infra this note.

[a] **Taking from presence shown.**—(1) Defendants, who forcibly entered an express car and by violence ejected the express agent, cut the train into two parts and moved a portion about a quarter of a mile, where they blew the safe, were guilty of robbery. State v. Kennedy, 154 Mo. 268, 55 SW 293. (2) While B was in his smokehouse, about fifteen paces from his house, defendant came up and said that if B put his head out, he would "shoot it off." B, being thus detained, codefendant entered the house and carried off valuables of B, who did not know why he was detained until defendants had left. This was a sufficient taking in the presence of B to constitute robbery. Clements v. State, 84 Ga. 660, 11 SE 505, 20 AmSR 385.

[b] **Taking from presence not shown.**—A and B were walking together, B carrying A's bundle, when C and D came up and assaulted A. B threw down the bundle, and ran to the assistance of A, when C took it up and made off with it. C and D were indicted for robbery, A being the prosecutor. It was held, that they could not be convicted of the robbery, but only of simple larceny, as the thing stolen was not in the personal custody of the prosecutor. Rex v. Fallows, 5 C. & P. 508, 24 ECL 680, 172 Reprint 1075.

[49] Reese v. State, 91 Tex. Cr. 457, 239 SW 619; Clark v. State, 87 Tex. Cr. 107, 220 SW 100.

[a] **Locked safe.**—Where two defendants, one of whom knew the combination of a safe, at the point of a pistol held up a railroad employee on duty in the ticket office, but who did not know the combination, and opening the safe stole the contents thereof, they were guilty of robbery in taking the money from the "possession" of the ticket agent as against the contention that the crime was not robbery but theft because the money was not taken from the person or possession of the ticket agent. Reese v. State, 91 Tex. Cr. 457, 239 SW 619.

[b] **Car driven by another.**—Where an automobile salesman demonstrating a car for persons who stated a desire to buy permitted one of those persons to drive the car, but remained in it himself, he did not thereby part with possession of the car, so that taking the car from him thereafter by force was robbery, and his "possession" continued even after he had been induced to get out of the car and enter a house. Clark v. State, 87 Tex. Cr. 107, 220 SW 100.

[50] Peo. v. Dean, 66 Cal. A. 602, 226 P 943.

[a] **Money in a theater** at night must be considered in possession of janitors and watchmen, so that its taking by force against them constituted robbery and not larceny. Peo. v. Dean, 66 Cal. A. 602, 226 P 943.

[51] Anderson v. Hartford Acc., etc., Co., 77 Cal. A. 641, 247 P 507 (action on insurance policy); Montsdoca v. State, 84 Fla. 82, 93 S 157, 27 ALR 1291.

Robbery by snatching see infra § 41.

[52] Montsdoca v. State, 84 Fla. 82, 93 S 157, 159, 27 ALR 1291.

"As for taking by force, it may be either actual or constructive. 'Constructive force' is anything which produces fear sufficient to suspend the power of resistance and prevent the free exercise of the will." Montsdoca v. State, supra.

"Violence need not be actual to constitute the offense of robbery. It is robbery to create in the person to be despoiled a reasonable apprehension of violence to avoid which he parts with the thing. An assault which has not traveled to a battery, or probably any such array of force as is calculated to create the reasonable apprehension, though short of a technical assault, suffices." Montsdoca v. State, supra.

[53] State v. Roselli, 109 Kan. 33, 198 P 195 (prosecution for murder in course of robbery).

[54] Peo. v. Goldberg, 302 Ill. 559, 135 NE 84; Peo. v. Knox, 302 Ill. 471, 134 NE 923; Peo. v. Jones, 290 Ill. 603, 125 NE 256, 257; Peo. v. Nolan, 250 Ill. 351, 95 NE 140, 34 LRANS 301, AnnCas1912B 401.

[55] Armstrong v. Com., 190 Ky. 217, 227 SW 162; Reese v. State, 91 Tex. Cr. 457, 239 SW 619.

[56] Ala.—Henderson v. State, 172

But both need not be present.[57] Taking by actual force without intimidation is robbery,[58] and conversely, taking by intimidation without use of actual force is also robbery.[59] In other words, force and intimidation are alternative requirements, and either is sufficient without the other.[60]

Statutes defining robbery ordinarily include force or intimidation or some phase thereof,[61] as an essential element of the crime; and except where the classification of[62] or punishment for[63] the offense is in issue, the question of which was used is unimportant.[64]

[§ 25] **(2) Particular Statutory Provisions.** Under statutes defining robbery as a taking by assault,

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Ala. 415, 55 S 816.

Ariz.—Reynolds v. State, 14 Ariz. 537, 132 P 434.

Ark.—Gordon v. State, 125 Ark. 111, 187 SW 913, AnnCas1918A 419; Bowlin v. State, 72 Ark. 530, 81 SW 838; Routt v. State, 61 Ark. 594, 34 SW 262; Clary v. State, 33 Ark. 561.

Cal.—MacGruer v. Fidelity, etc., Co., 89 Cal. A. 227, 264 P 501 (action on insurance policy).

Del.—State v. Lapista, 30 Del. 260, 105 A 676.

Ga.—Doyle v. State, 77 Ga. 513; Long v. State, 12 Ga. 293.

Ill.—Peo. v. Goldberg, 302 Ill. 559, 135 NE 84; Peo. v. Jones, 290 Ill. 603, 125 NE 256; Collins v. Peo., 39 Ill. 233.

Iowa.—State v. Osborne, 116 Iowa 479, 89 NW 1077.

Ky.—Brown v. Com., 135 Ky. 635, 117 SW 281, 135 AmSR 471, 21 Ann Cas 672; Jones v. Com., 57 SW 472, 22 KyL 388; Farrell v. Com., 11 Ky. Op. 386.

La.—State v. England, 148 La. 178, 86 S 728.

Mo.—State v. Holmes, 317 Mo. 9, 295 SW 71, 58 ALR 652 [quot Cyc]; State v. Cantrell, 290 Mo. 232, 234 SW 800.

N. J.—State v. McDonald, 89 N. J. L. 421, 99 A 128.

Okl.—Ellis v. State, 38 Okl. Cr. 243, 260 P 93; Ellis v. State, 38 Okl. Cr. 243, 260 P 93; Nelson v. State, 11 Okl. Cr. 259, 145 P 315; Monaghan v. State, 10 Okl. Cr. 89, 134 P 77, 46 LRANS 1149.

Philippine.—Peo. v. Chan Wat, 49 Philippine 114; U. S. v. Martin, 23 Philippine 58; U. S. v. Blanco, 10 Philippine 298; U. S. v. Nueca, 7 Philippine 511.

Tex.—Palmer v. State, 71 Tex. Cr. 335, 160 SW 349; Gallagher v. State, 34 Tex. Cr. 306, 30 SW 557.

Va.—Houston v. Com., 87 Va. 257, 12 SE 385.

Wash.—State v. Parsons, 44 Wash. 299, 87 P 349, 120 AmSR 1003, 7 LRA NS 566, 12 AnnCas 61.

Wis.—Gilloti v. State, 135 Wis. 634, 116 NW 252.

Eng.—Rex v. Smith, 2 East P. C. 783.

"Force or intimidation . . . is an indispensable element of robbery." Doyle v. State, 77 Ga. 513, 515.

"If neither of these elements is present, then the crime of robbery is not proven." Peo. v. Goldberg, 302 Ill. 559, 135 NE 84, 85.

[a] **Actual violence or reasonable apprehension thereof.**—To constitute robbery, there must be actual violence, or such a demonstration or threats as will create a reasonable apprehension of bodily injury if the victim resists. State v. McDonald, 89 N. J. L. 421, 99 A 128.

Different rule under "snatching" statute see infra § 41 text and notes 55, 56.

Force against property see infra § 30.

[57] Graves v. Com., 186 Ky. 479, 217 SW 356; Com. v. Titsworth, 98 SW 1028, 30 KyL 402; State v. Luhano, 31 Nev. 278, 102 P 260.

[58] Cal.—Peo. v. Ortega, 7 Cal. A. 480, 94 P 869.

Miss.—Baygents v. State, 154 Miss. 36, 122 S 187.

Mo.—State v. Broderick, 59 Mo. 318.

N. Y.—Peo. v. Glynn, 54 Hun 332, 7 NYS 555 [aff 123 N. Y. 631, 25 NE 953].

Philippine.—Peo. v. Chan Wat, 49 Philippine 114.

Eng.—Merriman v. The Hundred of Chippenham, 2 East P. C. 709; Davies' Case, 2 East P. C. 709; Rex v. Lapier, 1 Leach C. C. 320, 168 Reprint 263.

"If force be used, fear is not an essential ingredient." State v. Broderick, 59 Mo. 318, 320.

[a] **Where the victim testified that he was not afraid,** nevertheless the fact that he was knocked down and his money taken was sufficient to show commission of robbery. Peo. v. Ortega, 7 Cal. A. 480, 94 P 869. To same effect Baygents v. State, 154 Miss. 36, 122 S 187.

[b] **Tearing a ring from a lady's ear,** so quickly as to give no time for fear and so forcibly as to bring the blood, is robbery. Rex v. Lapier, 1 Leach C. C. 320, 168 Reprint 263.

[c] **Forcible seizure of jewels from person of mistress,** without use of threats or intimidation is robbery. Peo. v. Chan Wat, 49 Philippine 114.

[59] Ala.—Hood v. State, 18 Ala. A. 287, 92 S 30; Stanley v. State, 18 Ala. A. 60, 88 S 183 [certiorari den 205 Ala. 431, 88 S 449].

Ark.—Clary v. State, 33 Ark. 561.

Del.—State v. Lapista, 30 Del. 260, 105 A 676.

Kan.—State v. Smith, 113 Kan. 737, 216 P 302.

Ky.—Lissenbee v. Com., 198 Ky. 639, 249 SW 782.

Nev.—State v. Luhano, 31 Nev. 278, 102 P 260.

Okl.—Cochran v. State, 4 Okl. Cr. 379, 111 P 974.

Eng.—Spencer's Case, 2 East P. C. 712; Rex v. Simons, 2 East P. C. 712; Taplin's Case, 2 East P. C. 712; Rex v. Blackham, 2 East P. C. 711.

[a] **Fear as constructive violence.**—"The principle, indeed, of robbery is violence, but it has been often holden, that actual violence is not the only means by which a robbery may be effected, but that it may be effected by fear, which the law considers as constructive violence." Clary v. State, 33 Ark. 561, 564.

[b] **"It is well understood** that robbery may be committed by putting one in fear without other force or violence." Lissenbee v. Com., 198 Ky. 639, 640, 249 SW 782.

[c] **Highway robbery.**—State v. Lapista, 30 Del. 260, 105 A 676.

[60] Ark.—Clary v. State, 33 Ark. 561.

Miss.—McDaniel v. State, 16 Miss. 401, 47 AmD 93.

Mo.—State v. Broderick, 59 Mo. 318.

N. H.—State v. Gorham, 55 N. H. 152.

N. Y.—Peo. v. Glynn, 54 Hun 332, 7 NYS 555 [aff 123 N. Y. 631, 25 NE 953].

N. C.—State v. Burke, 73 N. C. 83.

Tex.—Tones v. State, 48 Tex. Cr. 363, 88 SW 217, 122 AmSR 759, 1 LRA NS 1024; Pendy v. State, 34 Tex. Cr. 643, 31 SW 647; Bond v. State, 20 Tex. A. 421.

[a] **By definition.**—"The words of the definition of robbery are in the alternative, 'violence or putting in fear,' and it appears that if the property be taken by either of these means, against the will of the party, such taking will be sufficient to constitute robbery." Clary v. State, 33 Ark. 561, 564.

[b] **Highway robbery.**—State v. Burke, 73 N. C. 83.

Allegation in indictment of violence or putting in fear see infra § 105.

[61] See infra § 25.

Robbery by snatching see infra § 41.

[62] See passim infra §§ 55–71.

[63] See passim infra §§ 206–214.

[64] See cases infra this note.

[a] **In Massachusetts** it has been held that even under a statute using the conjunctive "and" in place of the usual disjunctive "or," and defining robbery as taking "by force and violence, or other assault, *and* (italics ed.) putting in fear" (St. [1804] c 142 § 7) "a larceny committed with actual force and violence, *or* (italics ed.) with a constructive force by any assault and putting in fear, is to be adjudged a robbery." Com. v. Humphries, 7 Mass. 242, 244.

[b] **In New Hampshire** under a statute defining robbery as a taking "by assault or by violence and putting in fear" (Gen. St. c 264 § 16; Pub. St. c 278 § 17) it has been held that an indictment omitting the words "putting in fear" is good, because the statute is a substantial codification of the common law and the requirements of force or putting in fear are equally alternative whether the prosecution be at common law or under statute. State v. Gorham, 55 N. H. 152.

[c] **In Texas.**—"Our statute says that, if any person by assault or violence, or by putting in fear of life or bodily injury, shall fraudulently take from the person or possession of another property, with the intention to appropriate the same to his own use, he shall be guilty of robbery, etc. So that it would seem from the wording of this statute one taking property by assault or by violence, or by putting in fear of life or bodily injury, without assault and violence, would be guilty of robbery." Williams v. State, 51 Tex. Cr. 361, 102 SW 1134, 1135, 123 AmSR 884.

violence, putting in fear of life, or putting in fear of bodily injury, a taking by any one,[65] or by any combination[66] of these methods may constitute robbery. Under a statute punishing as a particular classification of robbery any taking by force, violence, assault or putting in fear, the offense may be committed by taking in any one or more of the specified ways.[67]

[§ 26] **b. Time of—(1) Prior, Contemporaneous, and Subsequent Force or Intimidation Generally.** The force or intimidation essential to robbery[68] need not precede the taking of the property.[69] But it must either precede or be contemporaneous with such taking,[70] in the sense that the force or intimidation is concurrent[71] or concomitant[72] with the taking. Subsequent force cannot relate back to the act of taking so as to be considered force accompanying the act,[73] and the general rule is that violence or intimidation subsequent to a taking by other means will not render the act robbery.[74]

Subsequent force as part of precedent taking.[75] Although there be a measurable period of time between the taking and subsequent force, if the latter occurs so soon after the former as to be part of the same transaction, the violence is legally concomitant with the taking.[76]

[§ 27] **(2) Previous Force without Accompanying Purpose To Rob.** Even though the violence precedes the taking, and results from causes other than an intent to rob, feloniously taking the property of a victim rendered helpless by one's own violence has been held robbery,[77] although there is authority to the contrary.[78]

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[65] Robinson v. State, 67 Tex. Cr. 79, 149 SW 186, 67 Tex. Cr. 170, 149 SW 190; Green v. State, 66 Tex. Cr. 446, 147 SW 593.

[66] Robinson v. State, 67 Tex. Cr. 170, 149 SW 190; Robinson v. State, 67 Tex. Cr. 79, 149 SW 186; Green v. State, 66 Tex. Cr. 446, 147 SW 593.

[67] Montsdoca v. State, 84 Fla. 82, 93 S 157, 27 ALR 1291.

[68] See supra § 24.

[69] Armstrong v. Com., 190 Ky. 217, 227 SW 162.

[a] **Accompanying sufficient.**—The force employed or the putting of the person robbed in fear is not required to precede the taking of the property, but if both or either accompany the taking of the property the offense is robbery. Armstrong v. Com., 190 Ky. 217, 227 SW 162.

[70] Ala.—Thomas v. State, 91 Ala. 34, 9 S 81.

Ark.—Gordon v. State, 125 Ark. 111, 187 SW 913, AnnCas1918A 419; Routt v. State, 61 Ark. 594, 34 SW 262.

Cal.—Peo. v. Stevens, 141 Cal. 488, 75 P 62.

Fla.—Montsdoca v. State, 84 Fla. 82, 93 S 157, 27 ALR 1291; Colbey v. State, 46 Fla. 112, 35 S 189, 110 AmSR 87.

Ga.—Fanning v. State, 66 Ga. 167.

Ill.—Peo. v. Jones, 290 Ill. 603, 125 NE 256.

Ind.—Shinn v. State, 64 Ind. 13, 31 AmR 110.

Kan.—State v. Miller, 53 Kan. 324, 36 P 751.

Ky.—Jones v. Com., 74 SW 263, 24 KyL 2481.

Mo.—State v. Holmes, 317 Mo. 9, 295 SW 71, 58 ALR 652 [quot Cyc]; State v. Parker, 262 Mo. 169, 170 SW 1121, 1123, LRA1915C 121 [cit Cyc].

Oh.—Hanson v. State, 43 Oh. St. 376, 1 NE 136.

Okl.—Monaghan v. State, 10 Okl. Cr. 89, 96, 134 P 77, 46 LRANS 1149 [quot Cyc].

Eng.—Rex v. Jackson, Leach C. C. 267, 168 Reprint 236.

[a] **"This violence** must precede or accompany the taking of the property." Routt v. State, 61 Ark. 594, 34 SW 262 [quot Gordon v. State, 125 Ark. 111, 114, 187 SW 913, AnnCas 1918A 419]. To same effect Martin v. State, 178 Ark. 1117, 13 SW (2d) 597, 598.

[b] **"If putting in fear is relied on,** it must be the fear under duress of which the possession [of the property] is parted with. . . . 'The fear of physical ill must come before the relinquishment of the property to the thief, and not after; else, the offense is not robbery.' 2 Bish. Cr. Law, § 1175." Thomas v. State, 91 Ala. 34, 36, 9 S 81 [quot Gordon v. State, 125 Ark. 111, 114, 187 SW 913, AnnCas 1918A 419; Routt v. State, 61 Ark. 594, 596, 34 SW 262].

[71] Tiller v. State, 11 Oh. Cir. Ct. N. S. 461, 32 Oh. Cir. Ct. 704.

[72] Tiller v. State, supra; Ellis v. State, 38 Okl. Cr. 243, 260 P 93; Monaghan v. State, 10 Okl. Cr. 89, 134 P 77, 46 LRANS 1149.

[73] Jones v. Com., 115 Ky. 592, 74 SW 263, 24 KyL 2481, 103 AmSR 340.

When considered part of precedent taking see infra text and note 76.

[74] Ala.—Thomas v. State, 91 Ala. 34, 9 S 81.

Ark.—Routt v. State, 61 Ark. 594, 34 SW 262; Clary v. State, 33 Ark. 561.

Cal.—Peo. v. Stevens, 141 Cal. 488, 75 P 62.

Ga.—Long v. State, 12 Ga. 293.

Ill.—Peo. v. Jones, 290 Ill. 603, 125 NE 256.

Ky.—Dawson v. Com., 74 SW 701, 25 KyL 5.

Mo.—State v. Holmes, 317 Mo. 9, 295 SW 71, 58 ALR 652.

[a] **Force or intimidation after taking by trick.**—(1) Where defendant asked another to get him a glass of water so that he could see how certain diamonds looked in the water, and such other left the diamonds with defendant and then went to get the water, and thereafter defendant followed her out, drawing a revolver, forced her into the basement and locked the door, he was not guilty of robbery because the force or violence was used subsequently to instead of before or contemporaneously with the taking of the diamonds. State v. Holmes, 317 Mo. 9, 295 SW 71, 58 ALR 652. (2) Where defendant persuaded his victim voluntarily to hand him a gun for examination, and on learning that it was loaded threatened to shoot the victim, and by this intimidation secured the gun, he was not guilty of robbery. Thomas v. State, 91 Ala. 34, 9 S 81.

[b] **Resenting accusation.**—Where defendant stealthily and successfully picked his victim's pocket, but shortly thereafter was accused of being a thief and in resentment attacked his accuser, such subsequent force did not make the crime robbery. Peo. v. Jones, 290 Ill. 603, 125 NE 256.

[75] **Relation back generally** see supra text and notes 73, 74.

[76] Peo. v. Glynn. 54 Hun 332, 334, 7 NYS 555 [aff 123 N. Y. 631, 25 NE 953]; Tiller v. State, 11 Oh. Cir. Ct. N. S. 461, 32 Oh. Cir. Ct. 704; Sherman v. State, 4 Oh. Cir. Ct. 531, 2 Oh. Cir. Dec. 691.

[a] **Illustrations.**—(1) Where defendants took property upon the deck of a schooner, and on being discovered by the captain in charge used actual force to remove the property from the deck to a small boat in which they escaped, and it was contended by the defense that there was no robbery because the taking possession of the property was without force, the court in denying such contention ruled that the use of force in removing the property from the captain's presence was sufficient to make the crime robbery. Peo. v. Glynn, 54 Hun 332, 7 NYS 555 [aff 123 N. Y. 631, 25 NE 953]. (2) "The circumstances of the taking as detailed by the prosecuting witness show that while examining rings in the store . . . , the plaintiff in error grabbed the tray containing them from the counter, placed it under his arm and ran to the door. The prosecuting witness immediately pursued him. The plaintiff in error succeeded in getting out of the door and proceeded to close it when the prosecuting witness attempted to prevent this closing, and after this struggle at the door the plaintiff in error escaped with the property. . . . Was the grabbing of the tray, the pursuit through the store, the struggle to escape at the door a part of the act by which the taking was effected? We think that they were. The taking of the property from the prosecuting witness or from his presence and under his control was not effected until these various acts of violence were completed, for the reason that plaintiff in error did not succeed in his attempt to possess himself of the property until after all these acts of violence occurred." Tiller v. State, 11 Oh. Cir. Ct. N. S. 461, 462, 32 Oh. Cir. Ct. 704.

[77] Peo. v. Jordan, 303 Ill. 316, 135 NE 729; Hope v. Peo., 83 N. Y. 418, 38 AmR 460.

[a] **Quarrel and robbery as afterthought.**—If, as the result of a quarrel, a fight occurs, in which one of the parties is overcome, and the other then, without having formed the intention before the fight began, takes

[§ 28] **(3) Subsequent Force To Aid Escape.** Force or intimidation employed subsequent to the taking and merely as a means of escape is insufficient basis for a charge of robbery.[79]

[§ 29] **(4) Subsequent Force To Prevent Recapture of Property.** If property is taken without force or intimidation, the subsequent use of force[80] or intimidation[81] to prevent retaking of the property by the victim does not render the act robbery.

[§ 30] **c. What Constitutes Force Generally—(1) In General.** Where force is relied upon as an element of the crime,[82] it must be such as effects the transfer of the property from the victim to the robber.[83] It must amount to actual personal violence,[84] except under statutes making force against property an element of robbery, in which case violence against property is sufficient without violence against the person.[85]

Place exerted. The particular place in which the force is exerted is immaterial.[86]

[§ 31] **(2) Degree of Force.** The amount or degree of force requisite to robbery is such force as is actually sufficient to overcome the victim's resistance,[87] as by bewildering and confusing him,[88] and of course force amounting to a substantial physical struggle is sufficient.[89] If the force used is sufficient to overcome resistance, the particular degree of violence employed is immaterial as an element of the crime,[90] and becomes important only

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the money of the vanquished one, the offense committed is robbery. Peo. v. Jordan, 303 Ill. 316, 135 NE 729.

[b] **Intimidation to get information.**—Where a person who has put another in a state of terror for the purpose of extorting information from him avails himself of the state of terror so created to enable him to take property then discovered for the first time, such taking constitutes robbery. Hope v. Peo., 83 N. Y. 418, 38 AmR 460.

[78] U. S. v. Birueda, 4 Philippine 229, 230.

"The fact that the owner of the money and his companions were tied at the time can not be considered as violence, because they had been tied for some hours previously for a reason entirely foreign to the fact of the taking of the money. The idea of taking the money grew, evidently, in the minds of the appellant and his codefendants after the former were captured, as appears from all the evidence adduced in the case." U. S. v. Birueda, supra.

[a] **In Kentucky** it has been held that (1) although a deputy marshal had the right to arrest, without a warrant, persons who were drunk and disorderly, and following such arrest to search them to ascertain whether they possessed weapons or other means of resisting his authority, or of effecting their escape if imprisoned, if in making such search he obtained money from them, it was his duty to return it upon discharging them from arrest, and if, after making the arrest, he took advantage of the duress under which such arrest placed them, and by force or putting them in fear took from them money in their possession feloniously, intending at the time to convert it to his own use, his act was robbery. Wynn v. Com., 135 Ky. 447, 122 SW 516. (2) On the other hand, if the deputy searched persons in good faith, and not for the purpose of robbing them, but after thus getting the money feloniously kept and converted it to his own use, his act in so doing constituted petit larceny rather than robbery. Wynn v. Com., supra.

[79] Colbey v. State, 46 Fla. 112, 35 S 189, 110 AmSR 87; Jones v. Com., 115 Ky. 592, 74 SW 263, 24 KyL 2481, 103 AmSR 340; State v. Spivey, (Mo.) 204 SW 259; Hill v. State, 19 Okl. Cr. 406, 200 P 253, 254.

[80] Howard v. Com., 198 Ky. 453, 248 SW 1059 (homicide prosecution wherein defense was resistance to alleged robbery); Jones v. Com., 115 Ky. 592, 74 SW 263, 24 KyL 2481, 103 AmSR 340; State v. Spivey, (Mo.) 204 SW 259.

[a] **Does not change larceny to robbery.**—Generally if, after property has been taken surreptitiously, force is exercised by the taker in his endeavor to get away with it, or in resistance of the attempt of the person robbed to retain it or recover it from the robber, this does not convert the larceny into robbery. State v. Spivey, (Mo.) 204 SW 259.

[81] Dawson v. Com., 74 SW 701, 25 KyL 5; State v. Spivey, (Mo.) 204 SW 259; State v. Parker, 262 Mo. 169, 170 SW 1121, LRA1915C 121; Peo. v. McGinty, 24 Hun (N. Y.) 62; Rex v. Francis, 2 East P. C. 708; Harman's Case, 2 Rolle 154, 81 Reprint 721.

[82] **Force and intimidation as alternative requirements** see supra § 24.

[83] Thomas v. State, 91 Ala. 34, 9 S 81; Martin v. State, 178 Ark. 1117, 13 SW (2d) 597, 598; Gordon v. State, 125 Ark. 111, 187 SW 913, AnnCas 1918A 419; Routt v. State, 61 Ark. 594, 34 SW 262.

"If force is relied on in proof of the charge, it must be the force by which another is deprived of his property and the accused gains possession of it." Martin v. State, supra.

[84] Ga.—Long v. State, 12 Ga. 293; Barksdale v. State, 24 Ga. A. 115, 100 SE 45; Tanner v. State, 24 Ga. A. 132, 100 SE 44.

Ill.—Peo. v. Ryan, 239 Ill. 410, 88 NE 170.

Ky.—Stockton v. Com., 125 Ky. 268, 101 SW 298, 30 KyL 1302.

Mont.—State v. Paisley, 36 Mont. 237, 92 P 566.

N. J.—State v. Donohue, (Sup.) 59 A 12.

Okl.—Monaghan v. State, 10 Okl. Cr. 89, 96, 134 P 77, 46 LRANS 1149 [quot Cyc].

[a] **"Actual force,"** in one definition of robbery, implies personal violence, and if there is any injury to the person or any struggle to obtain possession of property before it is taken, it is the force contemplated by the penal code. Tanner v. State, 24 Ga. A. 132, 100 SE 44.

[b] **If the article be taken without any sensible or material violence to the person,** and without any struggle for its possession, it is merely "larceny from the person" and not "robbery." Peo. v. Ryan, 239 Ill. 410, 88 NE 170.

Degree of force immaterial see infra § 31.

[85] See cases infra this note.

[a] **In the Philippines** to constitute robbery as defined by the penal code there must be (1) violence or intimidation against the person (see supra § 24 text and note 56) (2) or force with regard to the property taken (U. S. v. Nueca, 7 Philippine 511). (3) If neither force to a thing nor violence nor intimidation to the person is present, there is no robbery. U. S. v. Birueda, 4 Philippine 229.

[86] Com. v. Weiner, 255 Mass. 506, 509, 152 NE 359.

"That the force is exerted within a store or building rather than on the highway or out of doors is immaterial." Com. v. Weiner, supra.

[87] Cal.—Peo. v. Clayton, 89 Cal. A. 405, 264 P 1105.

Fla.—Martin v. State, 129 S 112; Montscoda v. State, 84 Fla. 82, 93 S 157, 158, 27 ALR 1291 [cit Cyc]; Colbey v. State, 46 Fla. 112, 35 S 189, 110 AmSR 87.

Ida.—Terr. v. McKern, 3 Ida. 15, 26 P 123.

Ky.—Armstrong v. Com., 190 Ky. 217, 227 SW 162; Williams v. Com., 50 SW 240, 20 KyL 1850.

N. H.—State v. Gorham, 55 N. H. 152.

Okl.—Monaghan v. State, 10 Okl. Cr. 89, 96, 134 P 77, 46 LRANS 1149 [quot Cyc].

Tex.—Rylee v. State, 90 Tex. Cr. 482, 236 SW 744, 745 [cit Cyc].

Wash.—State v. Parsons, 44 Wash. 299, 87 P 349, 120 AmSR 1003, 7 LRANS 566, 12 AnnCas 61.

"Any forcible taking of property from the possession of another by means which overcome resistance, however slight, is a taking by the infliction of actual injury." State v. Gorham, 55 N. H. 152, 158.

[a] **Any force** sufficient to take one's property against the will is sufficient to show robbery. Armstrong v. Com., 190 Ky. 217, 227 SW 162.

[88] Mahoney v. Peo., 3 Hun (N. Y.) 202, 5 Thomps. & C. 329.

[89] Peo. v. Ortega, 7 Cal. A. 480, 94 P 869; Peo. v. Ryan, 239 Ill. 410, 88 NE 170.

[a] **Knocking a man down** and squeezing his money from his hand is so obviously robbery as to merit no discussion of a claim to the contrary. Peo. v. Ortega, 7 Cal. A. 480, 94 P 869.

[90] Ark.—Sutton v. State, 162 Ark. 438, 258 SW 632.

Cal.—Peo. v. Clayton, 89 Cal. A. 405, 264 P 1105.

Del.—State v. Lapista, 30 Del. 260, 105 A 676.

Fla.—Martin v. State, 129 S 112; Montsdoca v. State, 84 Fla. 82, 93 S when considered in connection with the grade of the offense[91] or the punishment to be imposed.[92] It is not necessary to show a personal injury,[93] nor a blow,[94] nor force sufficient to overcome any resistance the victim was capable of offering.[95] In fact robbery by force may exist, although the victim makes no resistance.[96]

[§ 32] **(3) Administration of Poison.** Administration of poison rendering the victim helpless to resist the taking of his property is sufficient to constitute force,[97] of a constructive character,[98] supporting a charge of robbery.

[§ 33] **d. What Constitutes Intimidation Generally—(1) In General.** Intimidation as the word is used in the law of robbery,[99] means putting in fear.[1] To constitute robbery by intimidation, it is essential that the property taken be surrendered because of the apprehension of injury,[2] and that the fear be that under compulsion of which the victim parts with his property.[3] If there exists reasonable belief that injury will result from noncompliance with the robber's demand, the necessary "fear" is present.[4]

Caused by defendant.[5] The fear essential to robbery must be caused by defendant,[6] intentionally,[7] and not arise from the mere temperamental timidity of the victim.[8]

[§ 34] **(2) Degree of Intimidation.** The intimidation must be such as to cause a reasonable apprehension of danger.[9] But the fear aroused need not amount to great terror,[10] panic,[11] nor hysteria.[12] It is sufficient, if the fear is strong enough to overcome the victim's resistance and induce him to part with the property under its compulsion.[13]

[§ 35] **(3) Particular Fears—(a) Bodily Injury—aa. In General.** Putting the victim in fear of

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157, 158, 27 ALR 1291 [cit Cyc].

Ind.—Seymour v. State, 15 Ind. 288.

Nev.—State v. Snyder, 41 Nev. 453, 172 P 364.

N. Y.—Peo. v. Foley, 44 Hun 628.

Okl.—Monaghan v. State, 10 Okl. Cr. 89, 96, 134 P 77, 46 LRANS 1149 [quot Cyc].

R. I.—State v. McCune, 5 R. I. 60, 61, 70 AmD 176.

Tex.—Rylee v. State, 90 Tex. Cr. 482, 236 SW 744, 745 [cit Cyc].

Wash.—State v. Parsons, 44 Wash. 299, 87 P 349, 120 AmSR 1003, 7 LRA NS 566, 12 AnnCas 61.

[a] **No matter how slight the act of force** may be, the crime is robbery if such force is sufficient to overcome the victim's resistance. State v. Parsons, 44 Wash. 299, 87 P 349, 120 AmSR 1003, 7 LRANS 566, 12 AnnCas 61.

[b] **Highway robbery.**—State v. Lapista, 30 Del. 260, 105 A 676; State v. McCune, 5 R. I. 60, 70 AmD 176.

Pocket picking see infra § 43.

Snatching see infra §§ 40, 41.

[91] See passim infra §§ 55–71.

[92] Monaghan v. State, 10 Okl. Cr. 89, 96, 134 P 77, 46 LRANS 1149 [quot Cyc].

Punishment generally see infra §§ 204–215.

[93] Com. v. Davis, 66 SW 27, 23 KyL 1717.

[94] Com. v. Davis, 66 SW 27, 23 KyL 1717.

[95] Rylee v. State, 90 Tex. Cr. 482, 236 SW 744.

[96] Moran v. State, 125 Ga. 33, 53 SE 806; McIntyre v. State, 41 Ga. A. 352, 152 SE 914.

[97] State v. Snyder, 41 Nev. 453, 172 P 364.

[a] **Unconscious victim.**—Where defendant administered poison to produce unconsciousness and took money from a cash register in a saloon of which the unconscious person had charge, he was guilty of robbery, since the administration of the poison constituted constructive force. State v. Snyder, 41 Nev. 453, 172 P 364.

[b] **Conscious but helpless.**—Williams v. State, 51 Tex. Cr. 361, 102 SW 1134, 123 AmSR 884 (putting arm around man vomiting from drugged drink and picking his pocket while he was conscious thereof, but too weak and sick to resist).

[98] State v. Snyder, 41 Nev. 453, 172 P 364.

[a] **On analogy to rape.**—"We are unable to see why a different rule should be established in a case wherein robbery is charged and in which force is an essential element, than in a case wherein rape is the charge, wherein force is likewise an essential element. If constructive force may be used in the one case, why not in the other? No satisfactory reason has been advanced why a different rule should exist, and we are unable to think of one worthy to be mentioned, and are therefore of the opinion that the trial court did not err in holding that constructive force was resorted to by appellant." State v. Snyder, 41 Nev. 453, 172 P 364, 365.

[99] **Defined generally** see Intimidation 33 C. J. p 478.

[1] Clary v. State, 33 Ark. 561; Tanner v. State, 24 Ga. A. 132, 100 SE 44.

"'Intimidation,' in our code definition of robbery, is synonymous with the 'putting in fear' in the common law." Shehany v. Lowry, 170 Ga. 70, 152 SE 114, 115 (application for habeas corpus).

[a] **Another definition.**—"'Intimidation' is 'the use of violence or threats to influence the conduct or compel the consent of another.'" New Standard D. [quot Shehany v. Lowry, 170 Ga. 70, 152 SE 114, 115 (application for habeas corpus)].

[2] Steward v. Peo., 224 Ill. 434, 79 NE 636; Rippetoe v. Peo., 172 Ill. 173, 50 NE 166; U. S. v. Sosa, 4 Philippine 172; Rex v. Reane, 2 Leach C. C. 616, 168 Reprint 410.

[3] Martin v. State, 178 Ark. 1117, 13 SW (2d) 597.

[4] Peo. v. Bodkin, 304 Ill. 124, 136 NE 494; Horn v. State, 89 Tex. Cr. 220, 230 SW 693.

[5] **Method of arousing fear** see infra § 36.

[6] State v. Parker, 262 Mo. 169, 170 SW 1121, LRA1915C 121; State v. Weinhardt, 253 Mo. 629, 161 SW 1151.

[7] State v. Weinhardt, supra.

Intention to steal see infra §§ 49–53.

[8] State v. Parker, 262 Mo. 169, 177, 170 SW 1121, LRA1915C 121.

[a] **Objective fright essential.**—"The fright of him who is robbed must be under the law an objective fright; it must have been due, in short, to some act on the part of the accused, and not arise from the mere temperamental timidity of the person whose property happens to be stolen from his person or presence." State v. Parker, 262 Mo. 169, 177, 170 SW 1121, LRA1915C 121.

[9] Montsdoca v. State, 84 Fla. 82, 93 S 157, 159, 27 ALR 1291; Com. v. Titsworth, 98 SW 1028, 30 KyL 402; Davis v. Com., 54 SW 959, 21 KyL 1295; State v. Carmans, Tapp. (Oh.) 65.

"The menace must be of a sort to excite reasonable apprehension of danger." Montsdoca v. State, supra.

[10] Clary v. State, 33 Ark. 561; State v. Nicholson, 124 N. C. 820, 32 SE 813.

[11] Horn v. State, 89 Tex. Cr. 220, 230 SW 693, 694.

"'Fear' in this connection does not mean a panic of fright to the extent of losing one's senses or control." Horn v. State, supra.

[12] Ross v. State, 31 Okl. Cr. 143, 237 P 469; Horn v. State, 89 Tex. Cr. 220, 230 SW 693.

[a] **Fear may exist without hysteria** and the fact that a woman cashier retained her composure when held up at the point of a gun does not negative the element of intimidation where she made no resistance to the robbery, because believing she would be shot if she resisted. Ross v. State, 31 Okl. Cr. 143, 237 P 469.

[13] Sutton v. State, 162 Ark. 438, 258 SW 632; Clary v. State, 33 Ark. 561; Montsdoca v. State, 84 Fla. 82, 93 S 157, 27 ALR 1291; State v. Parsons, 44 Wash. 299, 87 P 349, 120 AmSR 1003, 7 LRANS 566, 12 Ann Cas 61.

[a] **Moving cause.**—"It is sufficient that the putting in fear overcome the resistance on the part of the person from whom the property is taken and is the moving cause inducing him to part unwillingly with his property." Sutton v. State, 162 Ark. 438, 258 SW 632, 634.

[b] **Even a slight cause of fear** is sufficient. Sutton v. State, 162 Ark. 438, 258 SW 632. To same effect. State v. Parsons, 44 Wash. 299, 87 P 349, 120 AmSR 1003, 7 LRANS 566, 12 AnnCas 61.

bodily injury is sufficient intimidation to sustain a charge of robbery.[14] Actual fear need not be proved,[15] as a legal presumption of fear will arise from facts clearly indicating a cause therefor.[16] It is not necessary that the victim should have feared bodily injury if he did not resist,[17] it being sufficient if he feared it in the event he should resist.[18]

A short separation of victim and defendant after intimidation and before the property is taken will not necessarily preclude the presence of intimidation as an element of the offense.[19]

Particular statutory provisions. Under a statute defining robbery as a felonious taking from another "by violence to his person or by putting such person in fear of some immediate injury to his person," it is an essential element of robbery by intimidation that the victim was put in fear of "immediate" bodily injury.[20]

Bodily injury to others. Under the statutes in some jurisdictions robbery may be committed by a taking effected through putting the victim in fear of bodily injury to other persons.[21]

[§ 36] **bb. Method of Arousing Fear.** The fear of bodily injury sufficient to support a charge of robbery may be aroused by a word,[22] or gesture,[23] as where the victim is threatened with a gun[24] or knife.[25]

Even indirect language of a threatening character may be sufficient to constitute intimidation.[26]

Statutes grading robbery by use of dangerous or deadly weapons. Under a statute defining robbery as a taking "by force or fear," and further providing that robbery with a dangerous or deadly weapon is first degree, and all other robbery second degree, the use of a dangerous or deadly weapon is not an essential element of the crime.[27]

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14. Ga.—Long v. State, 12 Ga. 293.

N. Y.—Brooks v. Peo., 49 N. Y. 436, 10 AmR 398, 1 Cow. Cr. 503.

N. D.—State v. Sanders, 14 N. D. 203, 103 NW 419.

Philippine.—U. S. v. Martin, 23 Philippine 58; U. S. v. Garcia, 4 Philippine 151; U. S. v. Ginete, 3 Philippine 641.

Tenn.—Britt v. State, 7 Humphr. 45.

Tex.—Coffelt v. State, 27 Tex. A. 608, 11 SW 639, 11 AmSR 205.

Eng.—Rex v. Blackham, 2 East P. C. 711.

15. Haley v. Com., 210 Ky. 554, 276 SW 519; Wissinger v. State, (Okl. Cr.) 264 P 631; Ross v. State, 31 Okl. Cr. 143, 237 P 469.

16. Haley v. Com., 210 Ky. 554, 276 SW 519; Wissinger v. State, (Okl. Cr.) 264 P 631; Ross v. State, 31 Okl. Cr. 143, 237 P 469.

[a] **"Where a pistol is pointed in a threatening manner** at an owner or custodian of money, who thereupon permits it to be taken, such act is 'robbery' although the custodian or owner may not be in actual fear, since fear is presumed where such act is committed violently and against the will of the person robbed." Ross v. State, 31 Okl. Cr. 143, 237 P 469 [quot Wissinger v. State, (Okl. Cr.) 264 P 631, 632].

17. Ross v. State, 31 Okl. Cr. 143, 237 P 469; Horn v. State, 89 Tex. Cr. 220, 230 SW 693.

18. Ross v. State, 31 Okl. Cr. 143, 237 P 469; Horn v. State, 89 Tex. Cr. 220, 230 SW 693.

[a] **Victim retaining composure.**—"In this case it was not essential to constitute robbery that the custodian of the money taken become hysterical and believe that she would meet death if she failed to immediately respond to the demands made. It is sufficient if the demand, with the display of firearms as shown by the evidence, caused her to stand aside and permit the money in her custody to be taken in the manner disclosed by the evidence. The delivery or taking the money is not rendered voluntary because the witness did not see fit to endanger her safety by attempting to resist. . . . A defendant will hardly be heard to say that, by holding up another at the point of a gun, and taking property from his person or immediate presence, he is not guilty of robbery, merely because the person robbed was able to exercise self-control." Ross v. State, 31 Okl. Cr. 143, 237 P 469, 470.

19. Tipton v. State, 23 Okl. Cr. 86, 212 P 612, 31 ALR 1074.

[a] **Fear continuing during separation.**—Where defendant, displaying a gun, threatened to shoot a doctor whom he accused of mistreating defendant's wife, unless the doctor paid him one thousand dollars, and where under fear of his life the doctor walked to a bank with defendant following, and then the doctor went into the bank alone, procured the money, and came out and paid defendant, the fact that there was a short separation of defendant and the person robbed, who was still laboring under fear of personal violence while separated from defendant, did not change the fact that the money was taken by intimidation so as to constitute robbery. Tipton v. State, 23 Okl. Cr. 86, 212 P 612, 31 ALR 1074.

20. Webb v. State, 99 Miss. 545, 55 S 356.

Immediate character of danger as affecting degree or classification of offense see passim infra §§ 55–71.

21. See statutory provisions.

22. Clary v. State, 33 Ark. 561.

23. Clary v. State, supra; Ross v. State, 31 Okl. Cr. 143, 237 P 469.

"A threat may be made and be just as potent by some act or gesture as if made by words." Ross v. State, supra.

24. Ala.—Stanley v. State, 18 Ala. A. 60, 88 S 183 [certiorari den 205 Ala. 431, 88 S 449].

Kan.—State v. Smith, 113 Kan. 737, 216 P 302.

Ky.—Haley v. Com., 210 Ky. 554, 276 SW 519.

Okl.—Wissinger v. State, (Cr.) 264 P 631.

Philippine.—U. S. v. Howard, 4 Philippine 238.

Tex.—Reyes v. State, (Cr. A.) 102 SW 1156.

Wash.—State v. Casto, 120 Wash. 557, 207 P 952.

[a] **Taking with hand on pistol.**—"Under Acosta's testimony, when appellant reached over with his left hand and took the money he had his right hand on his pistol, and as he was straightening up, he pulled his pistol and presented it towards Acosta, and defied him to take his money from him, and turned and walked away. These acts are incidents too close together for a fine spun theory that he was not put in fear of his life, or that there was no assault. We believe these facts show both an assault upon Acosta and fear on his part; for as stated by him, when he saw the pistol, he was afraid to do anything for fear of bodily harm at the hands of appellant." Reyes v. State, (Tex. Cr.) 102 SW 1156, 1158.

[b] **Extortion or robbery.**—The taking of money from complaining witness, a soldier, by threatening him with a revolver, when by prearranged plan he was discovered in a room in a hotel with a woman, was robbery rather than extortion. State v. Casto, 120 Wash. 557, 207 P 952.

Use of dangerous or deadly weapon as affecting grade or degree of robbery see infra §§ 56, 57, 61, 65.

25. State v. Luhano, 31 Nev. 278, 102 P 260.

[a] **Flashing a knife and telling the victim** to keep still is sufficient intimidation to show robbery. State v. Luhano, 31 Nev. 278, 102 P 260.

26. Sweat v. State, 90 Ga. 315, 12 SE 275.

[a] **Vague and indirect threats** leading the victim to fear death at the hands of officers who have arrested him on a trumped up charge of homicide, or at the hands of a mob, if he does not consent to their appropriation of his money, show intimidation sufficient to constitute robbery. Sweat v. State, 90 Ga. 315, 17 SE 275.

27. Peo. v. Clayton, 89 Cal. A. 405, 264 P 1105, 1109.

"Adverting to the language contained in section 211 of the Penal Code, it will be noted that the statute is silent as to the method which may be employed by the robber in committing the crime by which he either exerts force upon or produces fear in his victim. No authority is cited by appellant for including within the proposed instruction the proposition that in committing the crime of which defendant was specifically charged it was necessary that the force applied by defendant must have

[§ 37] **(b) Fear of Rape.** Taking property from a woman given to induce defendant to desist from an assault with intent to rape, is robbery.[28]

[§ 38] **(c) Injury to Property.** Robbery may be committed by obtaining property from the person of another by threats of injury to his property.[29]

[§ 39] **(d) Threats of Arrest and Prosecution.** Ordinarily[30] taking property by means of threats of arrest and criminal prosecution is not robbery.[31]

Threatened accusation of sodomy. Although the doctrine has been called an excrescence on the law,[32] it is a well settled exception to the general rule that the threat of prosecution for sodomy may constitute intimidation supporting a charge of robbery.[33] Such threats are sufficient whether the party threatened is guilty or innocent of the unnatural crime.[34] But if the victim gives the defendant money without being actually in fear but merely for the purpose of subsequent prosecution, it has been held that there is no robbery.[35]

Threats accompanied by actual force or intimidation. Where threats to arrest or prosecute for crimes other than sodomy are accompanied by actual force or threat of bodily injury, robbery is shown.[36]

[§ 40] **e. Snatching**[37]**—(1) In General.** There is a conflict in the cases decided under the common law and statutes substantially similar with respect to the element of force or intimidation,[38] as to whether mere snatching of property constitutes robbery.[39] According to one view such snatching without further indication of violence, is robbery.[40]

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been 'real and direct,' and that it 'was caused by means of some dangerous weapon.'" Peo. v. Clayton, supra.

As affecting degree of robbery see infra § 56.

[28] Rex v. Blackham, 2 East P. C. 711.

[29] Lanford v. Com., 209 Ky. 693, 273 SW 492, 493 [cit Cyc]; Rex v. Brown, 2 East P. C. 731; Rex v. Simons, 2 East P. C. 731; Rex v. Astley, East P. C. 729; Rex v. Taplin, East P. C. 712.

"The fear which will make a felonious taking, as here, robbery need not necessarily be fear of bodily harm as insisted by appellant. Robbery may be committed by obtaining property from the person of another by threats of injury to his property." Lanford v. Com., supra.

[a] **Threat to tear down growing corn and to level house.**—Rex v. Simons, 2 East P. C. 731.

[b] **Threat to bring a mob and burn victim's house.**—Rex v. Brown, 2 East P. C. 731.

[30] See cases infra this note.

[a] **In the Philippines.**—(1) The crime of robbery as defined by the Penal Code includes some cases of common-law extortion. U. S. v. Flores, 19 Philippine 178. (2) Accordingly taking money under threats of arrest and criminal prosecution may constitute robbery. U. S. v. Sanchez, 26 Philippine 83; U. S. v. Martin, 23 Philippine 58, 63 ("threats of arrest . . . sufficient to constitute force and intimidation"); U. S. v. Recio, 21 Philippine 511; U. S. v. Osorio, 21 Philippine 237 ("Robbery then is unquestionably the proper classification for the crime committed against said Chinaman, from whom sham officers of the law succeeded in securing the sum of P 300, under pressure and menace of arrest, indictment and trial for violation of the opium law, for such procedure constitutes intimidation"); U. S. v. Flores, 19 Philippine 178; U. S. v. Smith, 3 Philippine 20. (3) Even though under the common law system of jurisprudence the crime would be classified as "extortion" (see Extortion § 1 et seq) (4) or "threats" (see Threats [38 Cyc 293, 294]). (5) Bribery is, however, a distinct and different crime in Philippine jurisprudence. See Bribery § 1 text and note 13.

Unnatural crime see infra text and notes 32-35.

[31] Fla.—Montsdoca v. State, 84 Fla. 82, 93 S 157, 27 ALR 1291; Simmons v. State, 41 Fla. 316, 25 S 881.

Ga.—Long v. State, 12 Ga. 293.

Ill.—Peo. v. Bodkin, 304 Ill. 124, 136 NE 494, 495.

Tenn.—Britt v. State, 7 Humphr. 45.

Tex.—Williams v. State, 12 Tex. A. 240.

Eng.—Rex v. Edwards, 5 C. & P. 518, 24 ECL 685, 172 Reprint 1079; Rex v. Wood, 2 Leach C. C. 721, 168 Reprint 461.

"It is undoubtedly the law, as argued by counsel for the plaintiffs in error, that extorting money by threats of prosecution will not amount to robbery, save in the instance of threats of prosecution for an unnatural crime, crimen innominatum." Peo. v. Bodkin, supra.

[a] **Reasons for rule.**—(1) To obtain money by a threat to take the party before a magistrate and thence to prison is not robbery, for the threat of legal imprisonment ought not so to alarm any mind as to induce the person to part with his property. Rex v. Wood, 2 Leach C. C. 721, 168 Reprint 461. (2) "Threat of prosecution for a crime is generally regarded as insufficient to create fear upon the theory that a man in the hands of the law is not legally presumed to be in danger of bodily harm." Montsdoca v. State, 84 Fla. 82, 93 S 157, 159.

[b] **Threat to accuse husband of indecent assault.**—Obtaining money from a woman by threatening to accuse her husband of an indecent assault is not robbery. Rex v. Edwards, 5 C. & P. 518, 24 ECL 685, 172 Reprint 1079, 1 M. & Rob. 257, 174 Reprint 88.

[32] Montsdoca v. State, 84 Fla. 82, 93 S 157, 27 ALR 1291.

[33] Ga.—Long v. State, 12 Ga. 293.

Nebr.—Thompson v. State, 61 Nebr. 210, 85 NW 62, 87 AmSR 453.

N. Y.—Peo. v. McDaniels, 1 Park. Cr. 198.

Tenn.—Britt v. State, 7 Humphr. 45.

Eng.—Rex v. Gardner, 1 C. & P. 479, 12 ECL 278, 171 Reprint 1282; Rex v. Hickman, Leach C. C. 278, 168 Reprint 241; Rex v. Jones, Leach C. C. 139, 168 Reprint 171; Rex v. Donnally, Leach C. C. 193, 168 Reprint 199; Rex v. Elmstead, 2 Russell, Cr. & M. 106.

[a] **Reason for exception.**—"So abominable is the crime, and so destructive is even the accusation of it, of all social right and privilege, that the law considers that the accusation is a coercion which men cannot resist." Long v. State, 12 Ga. 293, 319.

[34] Long v. State, 12 Ga. 293; Rex v. Gardner, 1 C. & P. 479, 12 ECL 278, 171 Reprint 1282.

[35] Rex v. Fuller, R. & R. 408, 168 Reprint 870.

[36] Fla.—Montsdoca v. State, 84 Fla. 82, 93 S 157, 27 ALR 1291.

Ga.—Sweat v. State, 90 Ga. 315, 17 SE 273; Bussey v. State, 71 Ga. 100, 51 AmR 256.

Ill.—Peo. v. Bodkin, 304 Ill. 124, 136 NE 494.

Nebr.—Williams v. State, 51 Nebr. 711, 71 NW 729.

Tex.—Williams v. State, (Tex. Cr. A.) 55 SW 500; McCormick v. State, 26 Tex. A. 678, 9 SW 277.

"'If . . . such threats or accusations are accompanied with force, actual or constructive, and the property or money is given up in consequence of this force, the transaction is robbery.'" Long v. State, 12 Ga. 293, 319 [quot Peo. v. Bodkin, 304 Ill. 124, 136 NE 494, 495].

[a] **Illustration.**—One who made an attack upon an automobile driver on a public highway, grasped the driver by the shoulder, shook him, and commanded him to get out of the automobile, forcefully took possession of the automobile, and represented himself to be an officer of the law, and threatened the driver with prosecution for some imaginary offense, and thereby induced the traveler to part with money, was guilty of robbery as there was fear of bodily injury. Montsdoca v. State, 84 Fla. 82, 93 S 157, 27 ALR 1291.

[37] **Attempt to snatch** see infra § 224.

Pocket picking see infra § 43.

[38] **Statute modifying common-law rule** see infra § 41.

[39] Stockton v. Com., 125 Ky. 268, 101 SW 298, 30 KyL 1302.

[40] State v. Carr, 43 Iowa 418; Brown v. Com., 135 Ky. 635, 117 SW 281, 135 AmSR 471, 21 AnnCas 672; Jones v. Com., 112 Ky. 689, 66 SW 633, 23 KyL 2081, 99 AmSR 330, 57 LRA 432; Stockton v. Com., 125 Ky. 268, 101 SW 298, 30 KyL 1302.

But the weight of authority holds that mere snatching is not robbery,[41] as where the property is snatched so quickly as to allow no time for resistance.[42] Irrespective of these conflicting views, the authorities unite in condemning snatching as robbery where there is concurrent intimidation,[43] or actual violence in excess of mere snatching,[44] as where the force used in snatching is so great as to knock the victim down,[45] or where the property is so attached to the person[46] or apparel[47] of the victim as to afford resistance, although there is authority holding that the attachment of the property

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[a] **No chance to resist.**—"The snatching or grabbing and jerking of pocketbook out of the witness' hand was probably done so quickly that he had no chance to actively resist; and, if this be true, we think such taking or snatching must be construed as taking by violence or force." Jones v. Com., 112 Ky. 689, 66 SW 633, 634, 99 AmSR 330, 57 LRA 432 (common law).

[b] **Sudden snatching enough.**—"Nor are we prepared to admit that a sudden snatching of a purse from the hand is not the use of such force as to constitute robbery. On the contrary, with due deference to the authority cited by counsel, we hold that a sudden snatching from the hand or person of another constitutes the force and violence sufficient under our statute [requiring a taking by "force or violence, or by putting in fear"] to constitute robbery." State v. Carr, 43 Iowa 418, 423.

[c] **Grabbing money.**—Evidence that one of defendants asked the prosecutor for a dime with which to buy beer, and that, on the latter's drawing money from his pocket, the other defendant suddenly and forcibly wrenched the money (about six dollars) from the prosecutor's hand, and fled, authorized a conviction for robbery, and an instruction on larceny was properly refused. Brown v. Com., 135 Ky. 635, 117 SW 281, 135 AmSR 471, 21 AnnCas 672.

[d] **Snatching ten dollar bill from victim's hand and running.**—Stockton v. Com., 125 Ky. 268, 101 SW 298, 30 KyL 1302.

41. Ala.—Evans v. State, 80 Ala. 4.

Ark.—Coon v. State, 109 Ark. 346, 160 SW 226; Routt v. State, 61 Ark. 594, 34 SW 262.

D. C.—Williams v. U. S., 3 App. 335.

Ga.—Jackson v. State, 114 Ga. 826, 40 SE 1001, 88 AmSR 60; Spencer v. State, 106 Ga. 692, 32 SE 849; Doyle v. State, 77 Ga. 513. But see McDow v. State, 110 Ga. 293, 34 SE 1019 (decided before passage of the robbery by snatching statute, and where in the official syllabus the court said: "Where one demanded of another an article of value in the hands of the latter, and, upon refusal to deliver, declared, 'I will take it any way,' accompanying the words with a forcible snatching of and running off with the article, the same being done against the actual consent of the person in possession of the article, the offense of robbery was committed, if there was an intent to steal"). Rule in Georgia under particular statutory provisions see infra § 41.

Ill.—Peo. v. Ryan, 239 Ill. 410, 88 NE 170.

Ind.—Bonsall v. State, 35 Ind. 460.

La.—State v. West, 106 La. 274, 30 S 848.

Mass.—Com. v. Ordway, 12 Cush. 270.

Mo.—State v. Spivey, 204 SW 259; State v. Sommers, 12 Mo. A. 374.

N. Y.—Peo. v. Hall, 6 Park. Cr. 642; McCloskey v. Peo., 5 Park. Cr. 299.

N. C.—State v. Henderson, 66 N. C. 627; State v. John, 50 N. C. 163, 69 AmD 777.

Okl.—Ellis v. State, 38 Okl. Cr. 243, 260 P 93; Monaghan v. State, 10 Okl. Cr. 89, 96, 134 P 77, 46 LRANS 1149 [quot Cyc].

S. C.—State v. Watson, 7 S. C. 63, 67.

Tenn.—Enos v. State, 3 Heisk. 58 note.

Tex.—Johnson v. State, 35 Tex. Cr. 140, 32 SW 537; Boyd v. State, (Cr.) 29 SW 157.

Va.—Johnson v. Com., 24 Gratt. (65 Va.) 555.

Eng.—Reg. v. Walls, 2 C. & K. 214, 61 ECL 214, 175 Reprint 89; Rex v. Gnosil, 1 C. & P. 304, 12 ECL 182, 171 Reprint 1206; Rex v. Baker, Leach C. C. 290, 168 Reprint 247; Rex v. Macaulay, 1 Leach C. C. 287, 168 Reprint 246.

"Merely snatching the property from the person of another, without violence or putting in fear, is not robbery." Monaghan v. State, 10 Okl. Cr. 89, 134 P 77, 46 LRANS 1149 [quot Ellis v. State, 38 Okl. Cr. 243, 260 P 93, 95].

[a] **No struggle or injury.**—The mere snatching of money from another's hands without any struggle or injury to the owner does not constitute robbery. Coon v. State, 109 Ark. 346, 160 SW 226.

42. Jarrott v. State, 96 Tex. Cr. 239, 257 SW 256.

[a] **Illustration.**—Snatching money from another's hand so suddenly as not to allow time for resistance is not robbery, but theft from the person. Jarrott v. State, 96 Tex. Cr. 239, 257 SW 256.

43. Evans v. State, 80 Ala. 4.

44. Ala.—Evans v. State, 80 Ala. 4.

Ark.—Routt v. State, 61 Ark. 594, 34 SW 262.

Cal.—Peo. v. Crowley, 100 Cal. 478, 35 P 84.

Ga.—Smith v. State, 117 Ga. 320, 43 SE 736, 97 AmSR 165; Burke v. State, 74 Ga. 372; Bowen v. State, 16 Ga. A. 110, 84 SE 730.

Ill.—Peo. v. Campbell, 234 Ill. 391, 84 NE 1035, 123 AmSR 107, 14 AnnCas 186; Klein v. Peo., 113 Ill. 596.

Ky.—Perry v. Com., 85 SW 732, 27 KyL 512.

Mo.—State v. Spivey, 204 SW 259.

Oh.—Sherman v. State, 4 Oh. Cir. Ct. 531, 2 Oh. Cir. Dec. 691.

Okl.—Ellis v. State, 38 Okl. Cr. 243, 260 P 93; Monaghan v. State, 10 Okl. Cr. 89, 134 P 77, 46 LRANS 1149.

Pa.—Com. v. Hollister, 157 Pa. 13, 27 A 386, 25 LRA 349.

R. I.—State v. McCune, 5 R. I. 60, 70 AmD 176.

Tex.—Reese v. State, 91 Tex. Cr. 457, 239 SW 619.

Eng.—Davies' Case. 2 East P. C. 709; Rex v. Lapier, Leach C. C. 320, 168 Reprint 263; Rex v. Moore, 1 Leach C. C. 335, 168 Reprint 270; Rex v. Mason, R. & R. 419, 168 Reprint 876.

45. Evans v. State, 80 Ala. 4.

[a] **Illustration.**—Where defendant snatched a woman's satchel with such force that he knocked her down, it was robbery as against the contention that mere snatching cannot constitute the offense. Evans v. State, 80 Ala. 4.

46. Ga.—Smith v. State, 117 Ga. 320, 43 SE 736.

Ill.—Peo. v. Campbell, 234 Ill. 391, 84 NE 1035, 123 AmSR 107.

Mo.—State v. Spivey, 204 SW 259.

Okl.—Ellis v. State, 38 Okl. Cr. 243, 260 P 93; Monaghan v. State, 10 Okl. Cr. 89, 96, 134 P 77, 46 LRANS 1149 [quot Cyc].

Eng.—Rex v. Lapier, Leach C. C. 320, 168 Reprint 263; Rex v. Moore, Leach C. C. 335, 168 Reprint 270.

[a] **Ear.**—Rex v. Lapier, Leach C. C. 320, 168 Reprint 263 (where an earring was snatched from a woman's ear, the blood being drawn from her ear).

[b] **Finger.**—Smith v. State, 117 Ga. 320, 43 SE 736 (where a purse secured by a steel chain around the owner's finger was suddenly snatched with force sufficient to break the chain and injure the owner's finger, the offense was robbery).

[c] **Hair.**—Rex v. Moore, Leach C. C. 335, 168 Reprint 270 (where a diamond pin was snatched from a lady's hair so violently as to take with it part of her hair).

47. Ill.—Peo. v. Campbell, 234 Ill. 391, 84 NE 1035, 123 AmSR 107, 14 AnnCas 186.

Ky.—Perry v. Com., 85 SW 732, 27 KyL 512.

Mo.—State v. Spivey, 204 SW 259; State v. Broderick, 59 Mo. 318.

Okl.—Ellis v. State, 38 Okl. Cr. 243, 260 P 93; Monaghan v. State, 10 Okl. Cr. 89, 96, 134 P 77, 46 LRANS 1149 [quot Cyc].

R. I.—State v. McCune, 5 R. I. 60, 70 AmD 176.

Eng.—Rex v. Mason, R. & R. 419, 168 Reprint 876.

[a] **Breaking chain.**—It is robbery where defendant snatches a watch from the owner's person with sufficient force to break the chain. Perry v. Com., 85 SW 732, 27 KyL 512.

[b] **Tearing button-hole.**—Where defendant, in snatching a watch, tore the chain from the button-hole and from the watch, the crime was robbery. State v. Broderick, 59 Mo. 318.

[c] **Highway robbery.**—Snatching a watch with such force as to break a ribbon by which it was attached to the victim's neck shows force sufficient to convict for highway robbery. State v. McCune, 5 R. I. 60, 70 AmD 176. But see U. S. v. Sims, 27 F. Cas. No. 16,290, 4 Cranch C. C. 618 (holding that snatching is not highway robbery, even if breaking a ribbon holding a watch).

to the person or apparel does not turn snatching into robbery,[48] or where a physical struggle,[49] or blow[50] accompanies the snatching.

Knocking property out of the holder's personal possession and taking it away has been held robbery, because some force was required to secure the property.[51] Other authorities have held that merely knocking property from the owner's hand and picking it up after he has left is not robbery.[52]

[§ 41] **(2) Statutes Modifying Common Law.**[53] Under a statute defining robbery as a taking by force or intimidation "or the sudden snatching, taking, or carrying away" of anything of value "without the consent of the owner or person in possession or control thereof," mere snatching is robbery.[54] Neither force[55] nor intimidation[56] is essential.[57] But it must appear that the victim was conscious that his property was being taken,[58] although if he acquires such knowledge at any time before the taking is completed, the statute is satisfied.[59] The difference between the sneak thief and the snatch thief under the statute lies in the stealth of the taking,[60] and it has been said that the only difference between robbery by snatching and larceny from the person is that in the latter case the property is abstracted without the knowledge of its possessor.[60½]

[§ 42] **f. Artifice and Trickery in General.** Taking property from another by artifice or trickery is not robbery.[61]

[§ 43] **g. Pocket Picking.**[62] Where there is neither actual violence nor intimidation, the act of picking pockets is not robbery.[63] The force used in stealthy abstraction of property from the pocket of the victim,[64] or in open rifling of the pockets of one unconscious,[65] is not the character of violence essential to robbery. But if force or intimidation is used in place of stealth, the crime is robbery.[66]

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[48] Peo. v. Hall, 6 Park. Cr. (N. Y.) 642.

[49] Peo. v. Campbell, 234 Ill. 391, 84 NE 1035, 123 AmSR 107, 14 AnnCas 186; State v. Spivey, (Mo.) 204 SW 259, 261.

"Snatching a valuable article from another is always denominated robbery where any force is exercised . . . to overcome the resistance of the person robbed." State v. Spivey, supra.

[a] **Illustration.**—Where the victim discovered that defendant was attempting to snatch a diamond pin from his tie when it was half out, and thereupon a physical struggle ensued for possession of the pin. Peo. v. Campbell, 234 Ill. 391, 84 NE 1035, 123 AmSR 107, 14 AnnCas 186.

[50] Sherman v. State, 4 Oh. Cir. Ct. 531, 2 Oh. Cir. Dec. 691.

[a] **Snatching and striking** the victim in the face so soon after the snatching as to be practically concomitant therewith is robbery. Sherman v. State, 4 Oh. Cir. Ct. 531, 2 Oh. Cir. Dec. 691.

[51] Peo. v. Clayton, 89 Cal. A. 405, 264 P 1105.

[a] **From under arm.**—Where defendant twice knocked a strong box under the arm of his victim, and at the second attempt succeeded in gaining possession of the box, there was sufficient force used to make the crime robbery as against the contention that it was merely larceny. Peo. v. Clayton, 89 Cal. A. 405, 264 P 1105.

[52] Peo. v. McGinty, 24 Hun (N. Y.) 62; Rex v. Francis, Str. 1015, 93 Reprint 1004.

[53] **Attempt to snatch** see infra § 224.

Under statutes substantially in accord with common law see supra § 40.

[54] Pride v. State, 125 Ga. 750, 54 SE 688; Williams v. State, 9 Ga. A. 170, 70 SE 890.

Rule in Georgia before passage of such statute see supra § 40.

[55] Hickey v. State, 125 Ga. 145, 53 SE 1026; Hall v. State, 41 Ga. A. 368, 153 SE 199, 200; Williams v. State, 9 Ga. A. 170, 70 SE 890. But see Moore v. State, 20 Ga. A. 190, 92 SE 963 (holding that to constitute the offense of robbery by sudden snatching, the element of force is necessary).

"Prior to the act of 1903 (Ga. L. 1903 p 43), amending the former definition of robbery (Pen. Code 1895, § 151), 'violence of some kind was indispensably essential to the offense of robbery. Without violence there could be no robbery.' Since the amendment, violence is not an essential element of that offense, but 'robbery by suddenly taking or carrying away the property of another without his consent,' can be committed without violence of any kind." Hall v. State, supra.

[56] Hickey v. State, 125 Ga. 145, 53 SE 1026.

[57] **General rule requiring force or intimidation in robbery** see supra § 24.

[58] Morris v. State, 125 Ga. 36, 53 SE 564; Williams v. State, 9 Ga. A. 170, 70 SE 890.

Georgia rule where robbery is by force or intimidation see infra § 45 text and notes 78–80.

[59] Hall v. State, 41 Ga. A. 368, 153 SE 199; Williams v. State, 9 Ga. A. 170, 70 SE 890.

[60] Hickey v. State, 125 Ga. 145, 53 SE 1026; Hall v. State, 41 Ga. A. 368, 153 SE 199; Williams v. State, 9 Ga. A. 170, 70 SE 890.

[a] **If the possessor becomes conscious, even in the taking,** that his property is being taken away from him, and this knowledge is obtained before the taking is complete, the offense of robbery is committed." Williams v. State, 9 Ga. A. 170, 70 SE 890, 891 [quot Hall v. State, 41 Ga. A. 368, 153 SE 199].

[60½] Hall v. State, supra; Williams v. State, supra.

Distinction between larceny and robbery in general see supra § 11.

[61] Ala.—Thomas v. State, 91 Ala. 34, 9 S 81.

Ga.—Doyle v. State, 77 Ga. 513.

Ind.—Shinn v. State, 64 Ind. 13, 31 AmR 110.

Mo.—State v. Cantrell, 290 Mo. 232, 234 SW 800.

Tex.—Clark v. State, 87 Tex. Cr. 107, 220 SW 100.

[a] **Taking held not by trick.**—Where the demonstrator of an automobile was induced by trick to leave it and enter a house, where he was threatened with a pistol and bound, and the prospective purchasers then took the car, the demonstrator retained "possession" within the meaning of Pen. Code (1911) art 1327, defining robbery, until the others took actual possession of it so that they obtained possession by force, and not by trick. Clark v. State, 87 Tex. Cr. 107, 220 SW 100.

[62] **Snatching** see supra §§ 40–41.

[63] Ala.—Ex p. Carson, 17 Ala. A. 345, 85 S 827 (application for bail).

Ark.—Martin v. State, 178 Ark. 1117, 13 SW (2d) 597.

Fla.—Colbey v. State, 46 Fla. 112, 35 S 189, 110 AmSR 87.

Ga.—Morris v. State, 125 Ga. 36, 53 SE 564; Fanning v. State, 66 Ga. 167.

Ida.—Terr. v. McKern, 3 Ida. (Hasb.) 15, 26 P 123.

Ill.—Peo. v. Jones, 290 Ill. 603, 125 NE 256; Hall v. Peo., 171 Ill. 540, 49 NE 495.

Ind.—Brennon v. State, 25 Ind. 403.

Ky.—Sutton v. Com., 154 Ky. 799, 159 SW 589; Adams v. Com., 153 Ky. 88, 154 SW 381, 44 LRANS 637; Bibb v. Com., 112 SW 401, 33 KyL 726; Dawson v. Com., 74 SW 701, 25 KyL 5; Jones v. Com., 115 Ky. 592, 74 SW 263, 24 KyL 2481, 103 AmSR 340.

Mo.—State v. Cantrell, 290 Mo. 232, 234 SW 800; State v. Spivey, 204 SW 259; State v. Parker, 262 Mo. 169, 170 SW 1121, LRA1915C 121.

Oh.—State v. Whitten, 82 Oh. St. 174, 92 NE 79, 80; State v. Strear, 10 OhNPNS 204.

Okl.—Nelson v. State, 11 Okl. Cr. 259, 145 P 315.

Eng.—Harman's Case, 2 Rolle 154, 81 Reprint 721.

[a] **Engaging victim in conversation.**—Accused, who inserted his hand in the pocket of prosecutor and stole the money therein, while his accomplice engaged prosecutor in conversation, unaccompanied by any force or threat, was not guilty of robbery. State v. Parker, 262 Mo. 169, 170 SW 1121, LRA1915C 121.

[b] **Stealthily picking a drunkard's pocket.**—Peo. v. Jones, 290 Ill. 603, 125 NE 256.

[c] **Sitting astride an unconscious man and rifling his pockets.**—Brennon v. State, 25 Ind. 403.

[64] Peo. v. Jones, 290 Ill. 603, 125

Shoving and pushing a victim unaware of the pocket picking has been held to show sufficient force to render the act robbery.[67]

[§ 44] **h. Forced Sale, Gift, Etc.** If force or fear is the moving cause inducing the victim to part with his property, it makes no difference by what other circumstances the taking may be accompanied.[68] In such case the act is robbery, even though the taking is in the guise of a sale,[69] gift,[70] or legal confiscation.[71] On the other hand, if the element of force or intimidation is in fact absent, the taking is not robbery.[72]

[§ 45] **5. Consent**[73]—**a. In General.** It is essential to the commission of the crime of robbery that the taking should be without the consent of the victim.[74]

Against the will. Under the civil law it would

NE 256; State v. Strear, 10 OhNPNS 204.

Force used to render conscious victim unaware of taking see infra § 45 text and note 79.

65. Hall v. Peo., 171 Ill. 540, 49 NE 495, 496; Brennon v. State, 25 Ind. 403.

"When the force used is to prevent the resistance of or to overpower the person robbed, there such force makes the offense robbery. If one should rifle the pockets of a sleeping or an unconscious person, even to the unbuttoning of clothes and turning out of pockets, such offense would not be robbery." Hall v. Peo., supra.

Taking property from victim rendered unconscious by violence of defendant see infra § 45 text and notes 77, 78.

66. Carter v. State, 3 Ga. A. 477, 60 SE 216; Keys v. State, 60 Tex. Cr. 279, 131 SW 1068; Williams v. State, 51 Tex. Cr. 361, 102 SW 1134, 123 Am SR 884; Tones v. State, 48 Tex. Cr. 363, 88 SW 217, 122 AmSR 759, 1 LRA NS 1024, 13 AnnCas 455; Rex v. Gascoigne, Leach C. C. 280, 168 Reprint 243.

[a] **Using force when discovered.**—Where one in an attempt to commit larceny from the person was caught by his intended victim with his hand in his pocket, and a struggle ensued, the former endeavoring to take the money and the latter resisting the effort, and the money was finally taken by the infliction of physical injuries, robbery was committed. Carter v. State, 3 Ga. A. 477, 60 SE 216.

[b] **Helpless but conscious victim.**—Prosecutor went into a saloon, and after taking several drinks became nauseated, and while vomiting, and in a measure helpless, accused, the bartender, took hold of him without his consent, and ran his hand first in prosecutor's left pocket. Prosecutor told him to take his hand out. Accused then withdrew his hand, threw his left hand around prosecutor as if to hold him, and ran his right hand into prosecutor's right pocket, which the prosecutor endeavored to prevent, meanwhile, telling accused to let his money alone; but accused seized prosecutor's pocket-book, jerking it out of his pocket, with the money in it, and refused to return it. This was held to constitute such a taking of property by assault as to constitute robbery within the provisions of a statute providing that if a person by assault or violence, or by putting in fear of life or bodily injury, shall fraudulently take from the person or possession of another property with the intention to appropriate it to his own use, he shall be guilty of robbery. Williams v. State, 51 Tex. Cr. 361, 102 SW 1134, 123 AmSR 884.

[c] **Intimidation.**—Where a person orders others to hold up their hands, and through fear of life they do so, and he goes through their pockets and takes money, he is guilty of robbery and not mere theft. Keys v. State, 60 Tex. Cr. 279, 131 SW 1068.

[d] **Where an officer,** under pretense of making a search, holds up the victim's hands and extracts money from his pocket, this is robbery. Tones v. State, 48 Tex. Cr. 363, 88 SW 217, 122 AmSR 759, 1 LRANS 1024.

67. Snyder v. Com., 55 SW 679, 21 KyL 1538; Com. v. Snelling, 4 Binn. (Pa.) 379.

Effect of victim being unaware of taking see infra § 45 text and note 77 et seq.

68. State v. Parsons, 44 Wash. 299, 87 P 349, 120 AmSR 1003, 7 LRANS 566, 12 AnnCas 61.

69. Spencer's Case, 2 East P. C. 712; Rex v. Simons, 2 East P. C. 712.

[a] **At inadequate price.**—Where the prosecutor had certain corn in his possession, and defendant came along with a great mob marching in military order, and defendant said if he did not sell the corn for thirty shillings a load they would take it anyway, whereupon the prosecutor sold for thirty shillings a load that which was worth thirty eight shillings a load, defendant was convicted and executed for robbery. Spencer's Case, 2 East P. C. 712.

70. Taplin's Case, 2 East P. C. 712.

[a] **Asking alms with a drawn sword** and thereby securing a colorable gift by means of intimidation. 2 East P. C. p 711.

[b] **Mob begging.**—Where a boy knocked violently at the door of one Mahon's house and said, "God bless your honour, remember the poor mob," and on being told to go along, said he would fetch his captain, went away and returned with his captain and the rest of the mob, some of whom remarked, "God bless the gentleman, he is always generous," and on Mahon's asking the captain, "How much?" the latter replied, "Half-a-crown, Sir," whereupon Mahon gave him half a crown to the cheers of the mob, whereas he had intended to give him only a shilling, this was held robbery by the captain. Taplin's Case, 2 East P. C. 712.

71. State v. Parsons, 44 Wash. 299, 87 P 349, 120 AmSR 1003, 7 LRANS 566, 12 AnnCas 61.

[a] **Personating officers.**—Where defendants falsely represented to the victim that they were officers of the law authorized to arrest him and to take his property and money, but such representations were insufficient to induce the victim to surrender his property, and it was only under compulsion of actual force and intimidation that he did surrender it, the offense was robbery. State v. Parsons, 44 Wash. 299, 87 P 349, 120 AmSR 1003, 7 LRANS 566, 12 AnnCas 61.

72. U. S. v. Sosa, 4 Philippine 172.

[a] **Begging with a bolo.**—An armed man's request for money is not necessarily sufficient to show intimidation, and where defendants were given money while engaged in bona fide begging, the fact that they were at the time armed with bolos to be used for cutting camachiles did not of itself establish intimidation making the act robbery where the other circumstances failed to indicate that the money was given under fear of injury. U. S. v. Sosa, 4 Philippine 172.

73. **Other offenses:**
Burglary see Burglary §§ 21, 22.
Larceny see Larceny §§ 85-100.

74. Ala.—Jackson v. State, 69 Ala. 249.

Cal.—Peo. v. Anderson, 59 Cal. A. 408, 211 P 254.

Ga.—Shehany v. Lowry, 170 Ga. 70, 152 SE 114; Long v. State, 12 Ga. 293.

Ill.—Peo. v. Goldberg, 302 Ill. 559, 135 NE 84.

Ind.—Seymour v. State, 15 Ind. 288.

Okl.—Shouquette v. State, 25 Okl. Cr. 169, 219 P 727.

Wash.—State v. Casto, 120 Wash. 557, 207 P 952.

Eng.—Rex v. Fuller, R. & R. 408, 168 Reprint 870.

[a] **"If the taking is with the consent or at the direction** of the person whom it is charged the accused robbed there is no robbery." Peo. v. Goldberg, 302 Ill. 559, 562, 135 NE 84, 85.

[b] **Facts held sufficient to show nonconsent.**—Peo. v. Anderson, 59 Cal. A. 408, 211 P 254 (victim's expressed willingness to submit to threatened arrest for immoral conduct rather than give up his property, when defendant shoved him back onto bed and by threat of violence induced him to give it up).

[c] **In Texas,** under a statute silent as to consent, but defining robbery as a felonious taking from the person or possession of another by violence or putting in fear, (1) it has been stated that want of consent is not an element of the offense. Wilson v. State, 111 Tex. Cr. 134, 11 SW (2d) 803. (2) Other authority states that the taking must be without the victim's consent. Burkhalter v. State, 93 Tex. Cr. 504, 247 SW 539, 545 (cit Cyc to the effect that lack of consent is essential, and where the court said: "Of course, if Rivera [the victim] consented to the robbery, the offense was not committed"); Tones v. State, 48 Tex. Cr. 363, 88 SW 217, 122 Am SR 759, 1 LRANS 1024. (3) The true rule in Texas would appear to be that a consent induced by force or intimidation is not such as to preclude conviction for robbery (Guyon v. State, 89 Tex. Cr. 287, 230 SW 408 [holding that where defendant, who was armed with a pistol, by threats forced the custodian of bank funds to

appear that the taking must be not only without the consent, but also against the conscious will of the victim to constitute robbery.[75] In common-law jurisdictions it has been broadly stated that the taking must be against the will of the victim,[76] but this would appear to mean no more than that the taking must be without conscious consent, as in such jurisdictions it is robbery to take from an unconscious victim reduced to that condition by violence of the taker.[77]

Victim unconscious or otherwise unaware of taking. It is not essential that the victim be conscious,[78] nor aware of the robbery if conscious,[79] provided force is used to render him unconscious, or unaware of the taking.[80]

[§ 46] **b. By Whom Given.** To constitute a defense to a charge of robbery, consent must be given by the victim,[81] or by some one authorized to represent him in this respect.[82]

[§ 47] **c. What Constitutes—(1) In General.** "Consent" as used in the law of robbery has been said to mean a voluntary yielding of the will[83] by one with power to act,[84] and cannot exist where there is either force[85] or intimidation.[86]

[§ 48] **(2) Consent for Purpose of Entrapping Robber.**[87] Where property is taken with the consent of the victim, given without knowledge of defendant and for the purpose of catching him in the commission of the act, the taking of the property is not robbery.[88] But it has also been held that carrying marked money in anticipation of being robbed is not consent constituting a defense.[89]

[§ 49] **6. Intent[90]—a. Necessity for Felonious Intent or Animus Furandi.** In the absence of contrary statute,[91] there can be no robbery without a

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open the vault, the fact of the custodian's consent, does not change the offense from robbery]), (4) and that in stating that lack of consent is not an element of the crime, the courts mean merely that a taking by force or intimidation is equivalent to a taking without consent (Brown v. State, 61 Tex. Cr. 334, 136 SW 265 [where the court held that to constitute robbery, the taking need not be "without the consent of the owner and fraudulently done"; a taking by putting in fear of life or bodily injury being sufficient]). See also Coulson v. State, 102 Tex. Cr. 8, 277 SW 135 (where the court stated the converse of this proposition; that is, stated that a taking without consent was equivalent to a taking by violence or putting in fear). (5) As to necessity of alleging lack of consent in indictment see infra § 110 text and note 96 [a].

Necessity of alleging in indictment or information see infra § 110.

[75] See case infra this note.

[a] **Distinction illustrated.**—"Upon appeal to the Supreme Court of Spain it was held that the appellant had been improperly convicted of theft. The point upon which the court there discriminated the offense from theft was that the seizure had been effected against the will of the owner. Upon this feature of the case, the court, after comparing the definitions of theft and robbery in the Penal Code, observed that for robbery it is necessary that there should be a taking against the will of the owner and for theft it suffices that consent on the part of the owner is lacking. (8 Crim. Jur., 235.) In the case before us the offense was committed against the manifest will of Yu Lay and not merely without her consent." Peo. v. Chan Wat, 49 Philippine 114, 116.

[76] Peo. v. Goldberg, 302 Ill. 559, 135 NE 84.

[77] See infra text and note 78 et seq.

[78] Bowen v. State, 16 Ga. A. 110, 84 SE 730, 732; Rex v. Hawkins, 3 C. & P. 392, 14 ECL 626, 172 Reprint 470; 4 Blackstone Comm. pp 243, 244.

"To constitute robbery by force, it is not essential that the victim shall be conscious. While it is not robbery to abstract property furtively from the person of one who is unconscious, that offense is committed where, to accomplish the taking, he is beaten or bodily injury is inflicted upon him." Bowen v. State, supra.

[79] Bowen v. State, supra.

"Under the common law, and under the decisions of our Supreme Court relative to robbery by force or intimidation, it is not essential that the person robbed should be conscious at the time the robbery is committed that something is being taken away from him." Bowen v. State, supra.

Rule under snatching statute see supra § 41.

Using force to divert attention from pocket-picking see supra § 43 text and note 67.

[80] **Pocket-picking as not robbery** see supra § 43.

[81] Peo. v. Goldberg, 302 Ill. 559, 135 NE 84.

[82] Peo. v. Goldberg, supra; Shouquette v. State, 25 Okl. Cr. 169, 219 P 727, 733.

"It is also well settled that the consent of the owner to the forcible taking of his property must be given by some one having authority to consent to the particular act." Shouquette v. State, supra.

[83] Shehany v. Lowry, 170 Ga. 70, 152 SE 114, 115.

" 'Consent' is 'a voluntary yielding of the will,' or 'a rational and voluntary concurrence in an act.' " New Standard D. [quot Shehany v. Lowry, supra].

[a] **"A 'compelled consent'** is in law no consent at all." Shehany v. Lowry, 170 Ga. 70, 152 SE 114, 115.

"Consent" defined generally see Consent § 1.

[84] Shehany v. Lowry, 170 Ga. 70, 152 SE 114, 115.

"Consent supposes a physical power to act; a moral power of acting, and a serious, determined, and free use of these powers." Bouvier L. D. [quot Shehany v. Lowry, supra].

[85] Shehany v. Lowry, supra.

"Where money is taken by one from another violently by force and intimidation, as is charged in the present indictment, it would be impossible for the person upon whom such violence, force, and intimidation were exerted to legally consent to such taking, and the 'wrongful and fraudulent' taking would therefore be without the consent of such owner; and we think that the language in which the offense is charged in the present indictment would convey to the jury the nature of the offense charged against the defendant so plainly that it would be easily understood. . . . We hold in this case, where a robbery is charged as having been committed 'wrongfully, fraudulently, and violently, by force and intimidation,' that these words clearly imply that the taking was without the consent of the person alleged to have been robbed." Shehany v. Lowry, supra.

"It is charged that the defendant committed the offense of 'robbery, for that said accused . . . with force and arms did wrongfully, fraudulently, and violently, by force and intimidation, take from the person of R. C. Parker, with intent to steal the same,' etc. It would seem that the language used necessarily conveys a clear implication that the money was taken without the consent of the owner as that term is understood in law." Shehany v. Lowry, supra.

[86] Shehany v. Lowry, supra.

"Bearing in mind the meaning of the word 'consent,' it would seem to follow that there can be no legal consent given in the face of intimidation." Shehany v. Lowry, supra.

[87] **Effect in prosecutions for other offenses:**
Burglary see Burglary § 22.
Larceny see Larceny §§ 94–99.

[88] Stanley v. State, 25 Okl. Cr. 195, 219 P 734; Shouquette v. State, 25 Okl. Cr. 169, 219 P 727.

[a] **Rule stated.**—Where property is taken with the consent of the owner, such taking does not constitute robbery, although the object of the taking is to entrap the perpetrator, who has no knowledge of such consent, but really intends to commit the crime. Stanley v. State, 25 Okl. Cr. 195, 219 P 734; Shouquette v. State, 25 Okl. Cr. 169, 219 P 727.

[89] Tones v. State, 48 Tex. Cr. 363, 88 SW 217, 122 AmSR 759, 1 LRANS 1024.

[90] **Intent to intimidate** see supra § 33 text and note 7.

[91] See case infra this note.

[a] **In Minnesota** it has been stated in a robbery case that, "criminal intent is not necessarily an element of a crime defined by statute. . . . The statute does not in terms make intent a necessary element in the crime of robbery." State v. Bruno, 141 Minn. 56, 58, 169 NW 249 (where,

criminal,[92] felonious,[93] or, under an express statute, a fraudulent[94] intent. The animus furandi,[95] or intent to steal, is essential to the crime.[96] In other words, there must be a criminal intent of a character including the specific intent to rob.[97] Where there is no intent to deprive the owner of his property permanently and to convert it to his own use, one is not guilty of robbery in forcibly taking property in the course of an arrest,[98] nor in pursuance of a sufficient[99] or insufficient[1] warrant; nor under military orders,[2] nor as a matter of self-protection,[3] nor by mistake,[4] nor merely as a joke.[5]

Secrecy is not necessary as an element of the felonious intent essential to robbery.[6]

The element of force or intimidation is not a substitute for the intent to steal.[7]

[§ 50] **b. Time of Forming Intent—(1) In General.** The intent to steal must be present at the time

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however, the court did not decide as to the necessity of intent as an element of robbery, the decision being merely that an instruction as to the necessity of intent was not required where the facts clearly proved its existence so that no issue was raised on this point).

92. Butts v. Com., 145 Va. 800, 133 SE 764.

Criminal intent generally see Criminal Law §§ 41-50.

93. Ala.—Henderson v. State, 172 Ala. 415, 55 S 816; Thomas v. State, 91 Ala. 34, 9 S 81.

Mich.—Peo. v. McKeighan, 205 Mich. 367, 171 NW 500.

N. Y.—Peo. v. Hall, 6 Parker Cr. 642.

Okl.—Johnson v. State, 24 Okl. Cr. 326, 218 P 179.

Va.—Jordan v. Com., 25 Gratt. (66 Va.) 943.

Wash.—State v. Steele, 150 Wash. 466, 273 P 742, 745.

"It is essential that the taking be with a felonious intent, and, unless it is so taken, the act of taking is not robbery." State v. Steele, supra.

94. Glenn v. State, 49 Tex. Cr. 349, 92 SW 806, 13 AnnCas 774.

95. See case infra this note.

[a] **Defined.**—"Now what is this animus furandi? It is generally translated as 'an intent to steal.' But what is an intent to steal? It is an intent to feloniously deprive the owner permanently of his property. But 'feloniously' in this connection simply means 'with criminal intent.'" Butts v. Com., 145 Va. 800, 133 SE 764, 768.

96. U. S.—In re Lewis, 83 Fed. 159.

Ala.—Kennedy v. State, 208 Ala. 66, 93 S 822.

Ark.—Brown v. State, 28 Ark. 126.

Cal.—Peo. v. Sheasbey, 82 Cal. A. 459, 255 P 836.

Colo.—Analytis v. Peo., 68 Colo. 74, 188 P 1113.

Fla.—Montsdoca v. State, 84 Fla. 82, 93 S 157, 27 ALR 1291.

Ga.—Sledge v. State, 99 Ga. 684, 26 SE 756.

Iowa.—State v. Hollyway, 41 Iowa 200, 20 AmR 586.

Kan.—Guffey v. Continental Casualty Co., 109 Kan. 61, 197 P 1098 (action on insurance policy).

Ky.—Southerland v. Com., 217 Ky. 94, 288 SW 1051; Triplett v. Com., 122 Ky. 35, 91 SW 281, 28 KyL 974.

Mich.—Peo. v. McKeighan, 205 Mich. 367, 171 NW 500.

Miss.—McCray v. State, 153 Miss. 587, 121 S 291; Jones v. State, 95 Miss. 121, 48 S 407, 21 AnnCas 1137; Woods v. State, 6 S 207.

Mo.—State v. Smith, 174 Mo. 586, 74 SW 624; State v. Woodward, 131 Mo. 369, 33 SW 14; State v. O'Connor, 105 Mo. 121, 16 SW 510.

Nebr.—Langford v. State, 32 Nebr. 782, 49 NW 766.

N. Y.—Peo. v. Hall, 6 Parker Cr. 642.

N. C.—State v. Nicholson, 124 N. C. 820, 32 SE 813.

N. D.—State v. Fordham, 13 N. D. 494, 101 NW 888.

Oh.—State v. Carmans, Tapp. 97.

Okl.—Johnson v. State, 24 Okl. Cr. 326, 218 P 179.

Pa.—Com. v. White, 133 Pa. 182, 19 A 350, 19 AmSR 628.

Philippine.—Peo. v. Cara, 48 Philippine 217; U. S. v. Alabot, 38 Philippine 698; U. S. v. Abrille, 36 Philippine 807; U. S. v. Manluco, 28 Philippine 360; U. S. v. Vega, 2 Philippine 167.

Tex.—Barton v. State, (Cr.) 227 SW 317.

Utah.—Peo. v. Hughes, 11 Utah 100, 39 P 492.

Va.—Jordan v. Com., 25 Gratt. (66 Va.) 943.

Wash.—State v. Byers, 136 Wash. 620, 241 P 9, 10 [quot Cyc].

W. Va.—State v. McCoy, 63 W. Va. 69, 59 SE 758.

Eng.—Rex v. Hall, 3 C. & P. 409, 14 ECL 635, 172 Reprint 477; Reg. v. Edwards, 1 Cox C. C. 32; Rex v. Gnosil, 1 C. & P. 304, 12 ECL 182, 171 Reprint 1206.

B. C.—Rex v. Ford, 13 B. C. 109, 12 CanCrCas 555.

"It is not a robbery if the animus furandi is lacking." Southerland v. Com., 217 Ky. 94, 288 SW 1051, 1053.

"To constitute robbery the taking must in all cases be accompanied with a felonious intent, or animus furandi." Johnson v. State, 24 Okl. Cr. 326, 218 P 179, 181.

As to necessity of alleging intent in indictment see infra § 111.

97. Killingsworth v. State, 90 Fla. 299, 105 S 834; Peo. v. McKeighan, 205 Mich. 367, 171 NW 500, 502. See Guffey v. Continental Casualty Co., 109 Kan. 61, 197 P 1098 (action on insurance policy).

"An intent to commit a simple assault would not justify a conviction." Peo. v. McKeighan, supra.

[a] **Intent permanently to deprive owner of property** and to convert to taker's use, is essential. Guffey v. Continental Casualty Co., 109 Kan. 61, 197 P 1098 (action on insurance policy).

98. State v. Morris, 96 W. Va. 291, 122 SE 914, 918.

"Where an officer transcends his authority in the performance of what he conceives to be his official duty, and carries property away in good faith, it is not robbery, because the essential element of intent to steal is lacking." State v. Morris, supra.

[a] **Even though it was not entirely clear that an arrest was made or attempted,** if a special constable in an altercation with a drunken man confiscated the latter's liquor and pistol, but without intent to steal them, this was not robbery. State v. Morris, 96 W. Va. 291, 122 SE 914.

99. U. S. v. Cuison, 4 Philippine 194, 196.

"An officer who takes possession of personal property by means of a search warrant lawfully issued and properly served cannot be held liable for the crime of robbery of the said property." U. S. v. Cuison, supra.

1. In re Lewis, 83 Fed. 159.

2. State v. Sowls, 61 N. C. 151; U. S. v. Atienza, 2 Philippine 242.

[a] **Taking victim's sword in obedience to captain's order to disarm** was not robbery, and even if no such order was given, the soldier was not guilty of robbery if he bona fide believed that he was acting under such an order. State v. Sowls, 61 N. C. 151.

Act of war as defense see infra § 77.

Command of superior as defense see infra § 75.

3. Southerland v. Com., 217 Ky. 94, 288 SW 1051; Rex v. Holloway, 5 C. & P. 524, 24 ECL 688, 172 Reprint 1082.

[a] **Taking gun in fight.**—If defendant in fact took and kept another's pistol, while engaged in a rough and tumble fight, merely to prevent his opponent from shooting him, defendant was not guilty of robbery because the animus furandi was lacking. Southerland v. Com., 217 Ky. 94, 288 SW 1051.

4. Johnson v. State, 24 Okl. Cr. 326, 218 P 179.

[a] **Taking without knowledge.**—Where defendant forcibly took a roll of bills belonging to him, and by mistake also took a cashier's check hidden in the roll of bills and which check did not belong to defendant, he was not guilty of robbery of the bills because they were his own property, and was not guilty of robbery of the cashier's check because he took it by mistake. Johnson v. State, 24 Okl. Cr. 326, 218 P 179.

5. Com. v. White, 133 Pa. 182, 19 A 350, 19 AmSR 628.

[a] **Despite the use of violence or menace** it has been held that it is not robbery to obtain property merely as a joke. Com. v. White, 133 Pa. 182, 19 A 350, 19 AmSR 628.

6. State v. Bradburn, 104 N. C. 881, 10 SE 526.

7. Peo. v. Sheasbey, 82 Cal. A. 459, 255 P 836.

[a] **Illustration.**—Under a statute defining robbery as the felonious taking of personal property by means of force or fear, force or fear alone is insufficient to supply the "felonious" element, which can be supplied only by the intent to steal or animus furandi. Peo. v. Sheasbey, 82 Cal. A. 459, 255 P 836.

of the taking.[8] Taking property without a present intent to steal is not converted into robbery because of a subsequent illegal appropriation of the property,[9] although such subsequent misappropriation is a circumstance to be considered in determining the existence of the requisite intent at the time of the taking.[10]

[§ 51] **(2) Premeditation.**[11] Premeditation is not essential to the felonious intent necessary to the commission of the offense of larceny.[12]

[§ 52] **c. Claim of Right.**[13] As a general rule it is not robbery to take property under a bona fide claim of right or title thereto.[14] Cases held within this rule and therefore not robbery include the forcible taking under a bona fide claim of specific property,[15] or property taken as security,[16] of gambling gains[17] or losses,[18] and of money taken from the alleged thief in reimbursement for money honestly believed to have been stolen.[19]

Collection of debt. It has been both affirmed[20] and denied[21] that collection by force or intimidation of a debt honestly believed due constitutes robbery.

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[8] Ala.—Kennedy v. State, 208 Ala. 66, 93 S 822.

Philippine.—U. S. v. Atienza, 2 Philippine 242.

Va.—Jordan v. Com., 25 Gratt. (66 Va.) 943, 947.

W. Va.—State v. Morris, 96 W. Va. 291, 122 SE 914, 917.

Eng.—Rex v. Holloway, 5 C. & P. 524, 24 ECL 688, 172 Reprint 1082.

"The intent to steal the property at the time it is first taken is just as essential to the crime of robbery as the use of force in the taking." State v. Morris, supra.

"No subsequent felonious purpose will render the previous taking felonious." Jordan v. Com., supra.

[a] **On manucaption.**—"An essential factor in robbery is that the taking should, at the time of manucaption, have been with a larcenous intent." Kennedy v. State, 208 Ala. 66, 93 S 822.

[9] U. S. v. Atienza, 2 Philippine 242; State v. Morris, 96 W. Va. 291, 122 SE 914, 915.

"To constitute the crime of robbery in this case the intent to steal, take, and carry away the pistol must have existed in the minds of the accused at the time the prosecuting witness was disarmed. Any subsequent appropriation or carrying away of the pistol, although illegal, does not make it robbery." State v. Morris, supra.

[10] Kennedy v. State, 208 Ala. 66, 93 S 822.

"Notwithstanding the entertainment by the accused of a larcenous intent after the taking, that otherwise constituted robbery, does not suffice to afford the concurring larcenous intent requisite to constitute robbery, the fact that accused carried the property away, retained its possession on his flight, was a circumstance, inconclusive, of course, that the jury was entitled to consider in ascertaining whether the taking was defensive, protective, as defendant asserted, or that it was in consequence of a larcenous intent." Kennedy v. State, supra.

[11] **As element of crime in general** see Criminal Law §§ 41-50.

"Premeditation" defined see 49 C. J. p 1327.

[12] Peo. v. Pedel, 81 Cal. A. 558, 254 P 298, 299.

"Deliberation or premeditation is not an element of the crime of robbery." Peo. v. Pedel, supra.

[13] **Actual ownership of property taken** see supra § 18.

Taking by police or military see supra § 49 text and notes 98-2.

[14] Ark.—Brown v. State, 28 Ark. 126.

Cal.—Peo. v. Sheasbey, 82 Cal. A. 459, 255 P 836.

Colo.—Analytis v. Peo., 68 Colo. 74, 188 P 1113.

Ga.—Crawford v. State, 90 Ga. 701, 17 SE 628, 35 AmSR 242.

Iowa.—State v. Wasson, 126 Iowa 320, 101 NW 1125; State v. Hollyway, 41 Iowa 200, 20 AmR 586.

Ky.—Triplett v. Com., 122 Ky. 35, 91 SW 281, 28 KyL 974.

Mo.—State v. Culpepper, 293 Mo. 249, 238 SW 801.

N. C.—State v. Deal, 64 N. C. 270.

Oh.—State v. Carmans, Tapp. 65.

Okl.—Johnson v. State, 24 Okl. Cr. 326, 218 P 179.

Philippine.—Peo. v. Cara, 48 Philippine 217; U. S. v. Abrille, 36 Philippine 807; U. S. v. Vega, 2 Philippine 167.

Tex.—Glenn v. State, 49 Tex. Cr. 349, 92 SW 806.

Utah.—Peo. v. Hughes, 11 Utah 100, 39 P 492.

Va.—Butts v. Com., 145 Va. 800, 133 SE 764, 768 [cit Cyc].

Wash.—State v. Steele, 150 Wash. 466, 273 P 742.

Eng.—Rex v. Hall, 3 C. & P. 409, 14 ECL 635, 172 Reprint 477.

B. C.—Rex v. Ford, 13 B. C. 109, 12 CanCrCas 555.

[a] **"The basis of these decisions** is the lack of a criminal intent, as there can be no animus furandi, or criminal intent, where the property is taken under a bona fide claim of right." Butts v. Com., 145 Va. 800, 133 SE 764, 768.

[15] Ark.—Brown v. State, 28 Ark. 126.

Cal.—Peo. v. Sheasbey, 82 Cal. A. 459, 255 P 836.

Ky.—Triplett v. Com., 122 Ky. 35, 91 SW 281, 28 KyL 974.

N. Y.—Peo. v. Hall, 6 Parker Cr. 642.

Okl.—Johnson v. State, 24 Okl. Cr. 326, 218 P 179.

Philippine.—U. S. v. Manluco, 28 Philippine 360.

Eng.—Rex v. Hall, 3 C. & P. 409, 14 ECL 639, 172 Reprint 477.

[a] **Cotton bales.**—Brown v. State, 28 Ark. 126.

[b] **Game trap.**—Rex v. Hall, 3 C. & P. 409, 14 ECL 635, 172 Reprint 477 (holding that, where A had set wires in which game was caught, and B, a gamekeeper, found them, and took the game and wires for the use of the lord of the manor, whereupon A demanded them with menaces, and B gave them up, and the jury found that A acted under a bona fide impression that the game and wires were his property, there was no robbery).

[c] **Marked money.**—Johnson v. State, 24 Okl. Cr. 326, 218 P 179.

[d] **Range, pump, and machinery.**—Peo. v. Sheasbey, 82 Cal. A. 459, 255 P 836 (forcibly retaken from installment purchaser by seller).

[e] **Timber.**—U. S. v. Manluco, 28 Philippine 360.

[16] Peo. v. Hall, 6 Parker Cr. (N. Y.) 642.

[17] State v. Steele, 150 Wash. 466, 273 P 742.

[a] **Crap winnings.**—State v. Steele, 150 Wash. 466, 273 P 742.

[18] Peo. v. Hughes, 11 Utah 100, 39 P 492; Rex v. Ford, 13 B. C. 109, 12 CanCrCas 555.

Ownership of gambling gains or losses see supra § 18 text and note 23 et seq.

[19] Analytis v. Peo., 68 Colo. 74, 188 P 1113; Glenn v. State, 49 Tex. Cr. 349, 92 SW 806, 13 AnnCas 774.

[a] **One who had reason to believe,** and did believe, that another had stolen one hundred dollars from him, and, acting on that belief, took by force from such other person money which he had, did not commit robbery. Analytis v. Peo., 68 Colo. 74, 188 P 1113.

[20] Fannin v. State, 51 Tex. Cr. 41, 100 SW 916, 918, 123 AmSR 874, 10 LRANS 744.

"We are not willing to lay down the proposition that if a man collects a debt by force and threats, and putting in fear, he will not be guilty of robbery. There might be peculiar facts and circumstances which would exonerate him, and which the jury might consider in mitigation of the punishment, but no man has a right, as we understand the law, to take the law in his own hands, and at the point of a six-shooter, putting the debtor in fear of his life or serious bodily injury, collect a debt, however just, and then defend against it, on the ground that the property was not fraudulently taken because appellant owed him the money, and would not pay him. This is more than a simple trespass, and it will be a dangerous doctrine to hold that a man can thus collect his debts. If it was specific property that appellant had a right to, under the circumstances he might use force to get or regain possession of same without being guilty of robbery; and, under the circumstances of this case, where appellant had no right to any specific property, the prosecutor owing him a debt for wages, the amount of which was even controverted, and he simply drew a pistol and made prosecutor pay him what he (appellant) claimed was due, we hold that this was not a good defense, and the court did not err in charging the jury as he did." Fannin v. State, supra.

[21] State v. Hollyway, 41 Iowa 200, 203, 20 AmR 586; State v. Culpepper, 293 Mo. 249, 238 SW 801; Butts v. Com., 145 Va. 800, 133 SE 764; Reg. v. Hemmings, 4 F. & F. 50, 176 Reprint 462.

Unliquidated damages. It has been held that the rule that taking under a claim of right is not robbery[22] should not be extended to protect from such charge one who by force or intimidation collects unliquidated damages.[23]

[§ 53] **d. Intoxication.**[24] Intoxication sufficient to prevent the forming of a felonious intent is a good defense to a charge of robbery.[25]

[§ 54] **7. Motive.** Under the general rule,[26] the specific motive or ultimate object to be attained by the robbery is immaterial.[27]

The subsequent use of the property by the robber does not affect his guilt,[28] as it is not necessary that his motive should be appropriation of the stolen property to his personal use.[29]

III. GRADE, DEGREE, OR CLASSIFICATION OF OFFENSE[30]

[§ 55] **A. In General.** Under statutes in some jurisdictions robbery is divided into degrees,[31] or otherwise classified[32] in accordance with the nature and extent of the violence or intimidation employed, and other circumstances of aggravation.[33]

[§ 56] **B. Degrees of Robbery—1. First Degree—a. With Dangerous or Deadly Weapon.**[34] Under statutes classifying robbery by one armed with a dangerous or deadly weapon as robbery in the first degree, the word "armed" means furnished or equipped.[35] The actual display[36] or use[37] of the weapon is unnecessary, as it is the possible use to which the weapon might have been put that controls.[38] It is not necessary to prove a technical assault.[39] Statutory provisions as to robbery with a "dangerous or deadly" weapon, are violated if the weapon used be either "dangerous" or "deadly."[40]

"We do not see how it can be said to be robbery where the defendant by putting in fear compels his debtor to pay that which the defendant in good faith believes to be a just and honest debt then due. The felonious intent is wanting." State v. Hollyway, supra.

[a] **Admitted debt.**—"How about collecting an admitted debt by use of threats accompanied by the presentation of firearms against the debtor? B, a debtor, has in his pocket ten $5 bills. His title to each is perfect. He owes A $5. A has not now, and never had, any title or possession of either of the bills. A presents a pistol to B and says, 'Pay me the $5 you owe me immediately, else I will kill you.' B, out of fear, hands him one of the $5 bills. Has not A, by trespass, taken the bill, with intent to deprive B permanently of his property? Undoubtedly, but with no dishonest or criminal intent. . . . He took an unlawful means of collecting his debt, and was guilty of an aggravated assault, but not of robbery, and so the cases hold." Butts v. Com., 145 Va. 800, 133 SE 764, 768.

[b] **Disputed debt.**—If the prosecuting witness owed to defendant, or if defendant in good faith believed the witness owed him the money which defendant compelled the witness to pay by force or threats, defendant was not guilty of robbery because the felonious intent was wanting. State v. Culpepper, 293 Mo. 249, 238 SW 801.

22. See supra text and note 14.

23. Tipton v. State, 23 Okl. Cr. 86, 212 P 612, 615, 31 ALR 1074.

"Many courts have held that the taking and retention of the property of another for the purpose of paying or securing the payment of a debt would not necessarily constitute larceny or robbery. . . . We refuse, however, to extend this somewhat mooted doctrine so as to cover cases where the taking of the property is for the purpose of forcibly collecting uncertain liquidated damages for an alleged criminal assault. To hold otherwise would amount to an invitation to those aggrieved by the criminal acts of others to assume the functions of judge, jury, and sheriff to violently and forcibly compensate themselves for the injury or assumed injury inflicted, to any extent deemed adequate by the aggrieved person alone, and that such violence would amount to no more than a mere trespass or simple assault." Tipton v. State, supra.

[a] **For tort.**—In a prosecution for robbery, where the taking of the property is for the purpose of forcibly collecting uncertain unliquidated damages as compensation for an alleged felonious assault on the taker's wife, such forcible taking may constitute robbery, and does not come within the rule that the forcible taking and retention of the property of another for the purpose of securing the payment of a debt might not be deemed robbery. Tipton v. State, 23 Okl. Cr. 86, 212 P 612, 31 ALR 1074.

24. Effect in criminal prosecutions generally see Criminal Law §§ 81–87.

25. State v. Byers, 136 Wash. 620, 241 P 9. But see State v. Stebbins, 188 Mo. 387, 395, 87 SW 460 (where the court said: "Drunkenness could not justify, excuse or mitigate the offense," where there was no claim that defendant was insane).

26. See Criminal Law § 43.

27. Tipton v. State, 23 Okl. Cr. 86, 212 P 612, 31 ALR 1074.

[a] **Avarice, revenge, or curiosity.**—"The taking of something of value from another, by means of force or fear of injury, is the gist of the offense of robbery; whether the motives leading up to the assault grew out of avarice, revenge, or curiosity is immaterial. None of these motives would justify robbery, or change the degree of the offense, or operate to mitigate the punishment therefor." Tipton v. State, 23 Okl. Cr. 86, 212 P 612, 615, 31 ALR 1074.

28. Hope v. Peo., 83 N. Y. 418, 38 AmR 460.

29. Jordan v. Com., 25 Gratt. (66 Va.) 943.

30. Distinct offenses:
Attempts and assaults see infra §§ 217–241.
Bank robbery see infra §§ 242–244.
Robbery with other offenses:
  Homicide see infra §§ 245–251.
  Rape see infra §§ 252–254.

Snatching under statute see supra § 41.

Terms defined:
"Conjoint robbery" see supra § 4.
"Highway robbery" see supra § 5.
"Robo en cuadrilla" see supra § 8.

31. See infra §§ 56–64.

32. See infra §§ 65–69.

33. See statutory provisions.

34. As basis of classification without division into degrees see infra § 65.

Use of such weapons as first degree robbery under statutes not specifically referring thereto see infra § 58 text and note 53.

35. Peo. v. Hall, (Cal. A.) 287 P 533.

"'Armed' with a dangerous weapon means furnished or equipped with weapons of offense or defense." Peo. v. Hall, supra.

36. Peo. v. Hall, supra.

"The evidence showed that both defendants were armed with a revolver, and that, in addition thereto, one of them was possessed of a black-jack. Whether or not they exposed these deadly weapons in order to carry out their criminal act is of no consequence. The fact that they had them in their possession available for immediate use is sufficient to bring the case within the statute." Peo. v. Hall, supra.

37. Peo. v. Seaman, 101 Cal. A. 302, 281 P 660; Peo. v. Freeman, 86 Cal. A. 374, 260 P 826.

[a] **Even though no effort was made to use the weapon as such** the fact that defendant was armed with a deadly or dangerous weapon, is sufficient to show first degree robbery. Peo. v. Freeman, 86 Cal. A. 374, 260 P 826.

38. Peo v. Seaman, 101 Cal. A. 302, 281 P 660.

39. Peo. v. Hall, (Cal. A.) 287 P 533; Peo. v. Seawright, 72 Cal. A. 414, 237 P 796.

"Section 211a of the Penal Code, which declares that 'all robbery which is perpetrated by torture or by a person being armed with a dangerous or deadly weapon, is robbery in the first degree,' does not require proof that there was an actual assault upon the person with a deadly weapon, but only that the accused was armed with a dangerous or deadly weapon." Peo. v. Hall, supra.

40. Peo. v. Seaman, 101 Cal. A. 302, 281 P 660.

Whether or not the weapon is "dangerous or deadly" depends on the attendant circumstances,[41] and the possible use thereof.[42] An unloaded revolver is a dangerous weapon within the meaning of the statute.[43]

[§ 57] **b. Armed with Dangerous Weapon or Aided by Accomplice.** Under a statute defining robbery in the first degree as a robbery committed by one armed with a dangerous weapon or aided by an accomplice actually present,[44] an armed robber acting with an armed accomplice actually present may be convicted of first degree robbery.[45]

[§ 58] **c. Actual Violence or Fear of Immediate Personal Injury.** Under statutes defining robbery in the first degree as taking from another "by violence to his person or by putting him in fear of some immediate injury to his person,"[46] one or the other is essential.[47] But either is sufficient to constitute first degree robbery,[48] as the statutes do not define different offenses but merely one offense which may be committed in different ways.[49] A technical assault need not be proved.[50] It is not necessary that force should be used after the taking has been completed.[51] If intimidation is relied on, the fear aroused must be of immediate injury.[52]

Robbery by use of a deadly and dangerous weapon is included within first degree robbery under such statutes.[53]

[§ 59] **d. Fear of Immediate Injury.**[54] Under statutes providing that the fear forming an element of robbery may be the fear of an unlawful injury to the person or property of the victim, immediate or future, and that when accomplished by means of putting the person in fear of immediate injury to his person it is first degree robbery,[55] putting the victim in fear of immediate personal peril is first degree robbery.[56]

[§ 60] **e. Infliction of Bodily Injury.** Under a statute classifying as first degree, robbery committed (1) with a dangerous weapon, or (2) aided by an accomplice actually present, or (3) whenever the

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[a] **The words "deadly" and "dangerous"** are to be given distinct and different meanings in construction of the statute. Peo. v. Seaman, 101 Cal. A. 302, 281 P 660.

[41] Peo. v. Freeman, 86 Cal. A. 374, 260 P 826, 827.

[42] Peo. v. Freeman, supra.

"Notwithstanding the fact that ordinarily and in and of itself the instrumentality may be in fact comparatively harmless, if, considering the attendant circumstances, together with the present ability of its possessor, the instrument is capable of being used in a deadly or dangerous manner, for the purpose of the particular occasion only, the character of the instrument may be established." Peo. v. Freeman, supra.

"It is patent that ordinarily, and without the aid of some animate agency, a gun in itself, either loaded or unloaded, possesses no qualities either dangerous or deadly. In other words, it is only by its use, whether arising from human or other manipulation, that it assumes a deadly character, or one dangerous to life or limb; and just so, only in a lesser degree, is any other invention, device, or instrument." Peo. v. Freeman, supra.

[43] Peo. v. Freeman, supra; Peo. v. Shaffer, 81 Cal. A. 752, 254 P 666, 667.

[a] **Use as bludgeon.**—"It is a matter of common knowledge, that in committing robbery pistols are frequently used as bludgeons rather than as firearms. The fact, therefore, that a person perpetrating such crime is armed with a pistol is enough to justify the conclusion that the pistol used by him is a 'dangerous' weapon within the meaning of said section 211a of the Penal Code, even though it be not loaded." Peo. v. Egan, 77 Cal. A. 279, 246 P 337 [quot Peo. v. Freeman, 86 Cal. A. 374, 260 P 826, 827; Peo. v. Shaffer, 81 Cal. A. 752, 254 P 666, 667].

[44] See statutory provisions.

[45] Peo. v. Paradiso, 248 N. Y. 123, 161 NE 443, 444.

"The defendant had no pistol. Robbery having been committed, it became a first degree robbery for two reasons: First, one of the principals had a dangerous weapon; second, the defendant was aided by an accomplice actually present. Because the two were acting together it would have been robbery, first degree, if neither had had a pistol." Peo. v. Paradiso, supra.

[46] See statutory provisions; and case infra this note.

[a] **In Kansas.**—"'Every person who shall be convicted of feloniously taking the property of another from his person or in his presence, and against his will, by violence to his person or by putting him in fear of some immediate injury to his person, shall be adjudged guilty of robbery in the first degree.' Gen. Stat. [1915] § 3443." State v. Smith, 113 Kan. 737, 216 P 302, 303.

[47] State v. Spivey, (Mo.) 204 SW 259.

[48] State v. Smith, 113 Kan. 737, 216 P 302; State v. Curtis, (Mo.) 23 SW (2d) 122, 124; State v. Bater, (Mo.) 232 SW 1012; State v. Williams, (Mo.) 183 SW 308; State v. Flynn, 258 Mo. 211, 167 SW 516.

"A reading of section 3307 [Rev. St. (1919)] advises that it defines robbery in the first degree. This degree of robbery may result from either violence to the person or the putting in fear of some immediate injury to the person." State v. Curtis, supra.

Force and intimidation as alternative phases of element of offense see supra § 24.

[49] State v. Williams, (Mo.) 183 SW 308; State v. Parker, 262 Mo. 169, 170 SW 1121, LRA1915C 121; State v. Montgomery, 109 Mo. 645, 19 SW 221, 32 AmSR 684.

[a] **Either separately or both together.**—Rev. St. (1909) § 4530, providing that one feloniously taking the property of another on his person or in his presence and against his will, by violence or by putting him in fear of immediate injury, shall be guilty of "robbery in the first degree," defines but one offense, which may be committed by either of the two methods designated, or by both at the same time. State v. Williams, (Mo.) 183 SW 308.

[50] State v. Smith, 113 Kan. 737, 216 P 302, 303.

"It was not necessary to a conviction to show violence to her person. . . . A robbery may be committed without a search of the clothing or an assault upon the person of the victim. If in her fright she had dropped her purse and the defendant had taken it from the ground, it would have constituted robbery." State v. Smith, supra.

[51] State v. Parker, 262 Mo. 169, 170 SW 1121, 1123, LRA1915C 121.

"Force to prevent arrest, or to prevent recovery of the stolen property after the asportation of the property is complete and after detachment from the person of the owner of the property is consummated, are not necessary elements of robbery in the first degree." State v. Parker, supra.

[52] State v. Howerton, 59 Mo. 91, 92.

"In robbery in the first degree, it is indispensable that the putting in fear should be of some immediate injury. This distinguishes it from robbery in the second degree, ([Wagner St.] § 21) where the fear may arise from the threatened injury to be inflicted at a different time. Unless the violence which puts the party in fear is of some immediate injury to his person, there can be no robbery in the first degree." State v. Howerton, supra.

[53] State v. Curtis, (Mo.) 23 SW (2d) 122; State v. Williams, (Mo.) 263 SW 198.

Statutes specifically referring to use of such weapons see supra §§ 56, 57; and infra § 61.

[54] **Fear of future injury as second degree robbery** see infra § 62.

[55] See statutory provisions.

[56] Tipton v. State, 23 Okl. Cr. 86, 212 P 612, 31 ALR 1074.

[a] **"Where one points a pistol** at another, and with threats and menace of death compels the person assaulted to leave the presence of the one making the assault to procure money and property, which, when procured, is delivered to the person making the assault, while the person assaulted is under continued fear and duress, this constitutes [first degree] robbery." Tipton v. State, 23 Okl. Cr. 86, 212 P 612, 31 ALR 1074.

offender inflicts grievous bodily harm,[57] defendant may be guilty of robbery with a dangerous weapon, even though he inflicts no bodily harm.[58]

[§ 61] **2. Second Degree—a. Without Dangerous or Deadly Weapon.** Under statutes providing that robbery committed with a dangerous or deadly weapon is robbery in the first degree,[59] and, that all other robbery is in the second degree,[60] robbery committed without a dangerous or deadly weapon is second degree robbery.[61]

[§ 62] **b. Fear of Future Injury.** Under statutes providing that the fear forming an element of robbery may be the fear of unlawful injury to the person or property of the victim, immediate or future, and that when accomplished by means of putting the person in fear of immediate injury to his person, it is robbery in the first degree,[62] and in all other cases in the second degree,[63] putting him in fear of future injury to person[64] or property[65] is second degree robbery.

[§ 63] **c. Under Circumstances Not Amounting to First Degree Robbery.** Under statutes defining robbery in the first degree as a robbery committed by one armed with a dangerous weapon or aided by an accomplice actually present,[66] or when grievous bodily injury is inflicted, and defining robbery in the second degree as any robbery by violence or by putting the person robbed in fear of immediate injury, and not amounting to robbery in the first degree,[67] it is possible for two persons to be guilty of one robbery in the second degree.[68]

[§ 64] **3. Third Degree.** Under statutes defining robbery in the first and second degrees as "all robbery accomplished by force or violence, or by fear of immediate injury to the person," and robbery in the third degree as all other robbery,[69] where the evidence shows that if defendant committed any robbery it was by force and violence, he cannot be convicted of robbery in the third degree.[70]

[§ 65] **C. Classification without Division into Degrees[71]—1. With Dangerous or Deadly Weapon.[72]** Statutes prescribing an increased penalty for robbery with a dangerous or deadly weapon without providing for formal "degrees" of robbery[73] do not define an offense,[74] but create a classification of the existing offense of robbery.[75] Under such statutes actual use of the weapon is not necessarily essential to constitute such classification of robbery.[76] A loaded revolver pointed at the victim within shooting distance is a dangerous weapon as a matter of law.[77] Under a statute making robbery with a "dangerous" weapon a particular classification of the crime and silent as to "deadly" weapons,[78] a court apparently drawing no distinction between "dangerous" and "deadly" has defined a "deadly weapon" as an instrument that is or may be used for offense or defense and is capable of producing death.[79]

[§ 66] **2. Wounding or Striking; Intent To Maim.[80]** Under a statute creating a classification of robbery where the robber assaults another and feloniously takes while armed a dangerous weapon with intent, if resisted, to kill or maim, or being so armed does wound or strike the victim,[81] the elements of the offense are assault, robbery, being armed with a dangerous weapon, and either actual wounding or striking or intent to kill or maim, if resisted.[82]

[§ 67] **3. Robbery Committed by Two or More Persons.** A statute providing an increased penalty whenever two or more persons conjointly commit a robbery or where the whole number of persons conjointly committing a robbery and persons present and aiding such robbery amount to two or more,[83] does not define an offense but merely classifies the existing offense of robbery,[84] and a robbery committed by two or more need not be prosecuted under the conjoint robbery statute.[85] A statute enacted after such conjoint robbery statute and providing an increased punishment for robbery with a dangerous weapon,[86] does not repeal the conjoint robbery statute,[87] and applies whether robbery is committed singly[88] or conjointly.[89]

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[57] See statutory provisions.

[58] State v. Bruno, 141 Minn. 56, 169 NW 249, 250.

"It is urged that the court should have instructed the jury that in order to accomplish robbery the defendant must have inflicted grievous bodily harm. This is not the statute, nor is it the law. Robbery may be committed by one armed with a dangerous weapon though no bodily harm is in fact inflicted. General Statutes [1913] §§ 8635, 8636." State v. Bruno, supra.

[59] See supra § 56.

[60] See statutory provisions.

[61] Peo. v. Seaman, 101 Cal. A. 302, 281 P 660, 661.

"If a person is about to commit a robbery, there are several courses open to him. If he goes empty-handed he may succeed or he may fail, and in addition thereto, he may be killed. If he succeeds in committing the offense and is thereafter tried, he will have the benefit of claiming robbery in the second degree." Peo. v. Seaman, supra.

[62] See supra § 59.

[63] See statutory provisions.

[64] Tipton v. State, 23 Okl. Cr. 86, 212 P 612, 314, 31 ALR 1074.

"Where the taking is accomplished by putting the person robbed in fear of immediate peril it is robbery in the first degree; where it is accomplished by means of fear of future injury to the person or property it would be robbery in the second degree." Tipton v. State, supra.

[65] Tipton v. State, supra.

[66] See supra § 57.

[67] See statutory provisions.

[68] Peo. v. Thompson, 198 N. Y. 396, 91 NE 838.

[69] See statutory provisions.

[70] Peo. v. Massett, 7 NYS 839, 7 NYCr 393.

[71] **Punishment for robbery** see infra §§ 204–215.

[72] **As first degree robbery** see supra §§ 56, 57.

[73] See statutory provisions.

[74] Wells v. State, 34 Okl. Cr. 179, 245 P 1007; Randall v. State, 33 Okl. Cr. 262, 243 P 983.

[75] Wells v. State, 34 Okl. Cr. 179, 245 P 1007; Randall v. State, 33 Okl. Cr. 262, 243 P 983, 984.

[76] Peo. v. Cassin, 322 Ill. 276, 153 NE 381.

[77] Schiner v. State, 178 Wis. 83, 189 NW 261, 262.

"It is true an empty revolver merely pointed at a person, and not used to strike with, is not a dangerous weapon, however much the person at whom it is pointed may be put to fear. A loaded revolver pointed at a person within shooting distance is a dangerous weapon as a matter of law." Schiner v. State, supra.

[78] See statutory provisions.

[79] Peo. v. Dwyer, 324 Ill. 363, 155 NE 316, 317.

"Some weapons are deadly per se; others, owing to the manner in which they are used, become deadly." Peo. v. Dwyer, supra.

"A weapon with which death may be easily and readily produced is a deadly weapon; anything made for the purpose of destroying life or for another purpose, or not made by man at all, if it is a thing with which death can be easily and readily produced, the law recognizes as a deadly weapon." Peo. v. Dwyer, supra.

[80] **Proof essential to support indictment charging wounding or maiming** see infra § 142.

[81] See statutory provisions.

[82] Schiner v. State, 178 Wis. 83, 189 NW 261.

[83] See statutory provisions.

[84] Simpson v. State, (Okl. Cr.) 266 P 783; Wells v. State, 34 Okl. Cr. 179, 245 P 1007; Richards v. State, 22 Okl. Cr. 199, 210 P 295, 296.

[§ 68] **4. Use of Actual Force or Intimidation.** Statutes defining robbery as a wrongful taking by force or intimidation, and punishing robbery by actual force more severely than robbery by intimidation,[90] create the single offense of robbery and separate it into different grades.[91]

[§ 69] **5. Snatching.** Statutory provisions defining robbery by snatching[92] create a distinct grade or classification of the offense.[93]

[§ 70] **D. Value.**[94] Under statutes silent as to value, and classifying robbery in accordance with the nature or extent of the force or intimidation employed,[95] the value of the property taken is not material to the grade[96] or degree[97] of the offense.

[§ 71] **E. Return of Property.** In the absence of statutory provision to that effect,[98] return of the propery taken by robbery does not reduce the grade of the offense.[99]

IV. DEFENSES

[§ 72] **A. In General.** The defense of limitations[1] and matters of defense consisting in the absence of a necessary element of the crime,[2] are treated elsewhere.

[§ 73] **B. Capacity To Commit Crime.**[3] The general capacity of particular parties to commit robbery[4] or crime generally[5] is treated elsewhere.

[§ 74] **C. Redelivery of Property.**[6] Where the offense of robbery is actually completed, the redelivery of the property to the owner is no defense.[7]

[§ 75] **D. Command of Superior.**[8] It is not a defense that the robbery was committed under the command of a superior.[9]

[§ 76] **E. Legal Arrest.**[10] Arresting officers who use violence and rob the party arrested are not exonerated on account of the legality of the arrest.[11]

[§ 77] **F. Act of War.**[12] It is a defense that property was taken as an act of war.[13]

[§ 78] **G. Trespass by Victim.** Trespass by the victim on defendant's property does not justify defendant in robbing the trespasser.[14]

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[85] Simpson v. State, (Okl. Cr.) 266 P 783.

[86] See supra § 65 text and note 73.

[87] Wells v. State, 34 Okl. Cr. 179, 245 P 1007.

[88] Simpson v. State, (Okl. Cr.) 266 P 783.

[89] Simpson v. State, supra.

[90] See statutory provisions.

[91] Long v. State, 12 Ga. 293, 315; Tanner v. State, 24 Ga. A. 132, 100 SE 44, 45.

"When the Code speaks of force, it means actual violence; and when it speaks of intimidation, it still means force, not actual and direct, but exerted upon the person robbed by operating upon his fears—the fear of injury to his person, or property, or character. The law considers, however, that actual violence is attended with more immediate and serious consequences than violence by intimidation; and therefore it is that a distinction is made in the punishment. The former constitutes the offense with greater enormity. The offense, I conclude, is single, for the reason stated, and the element of force is necessary to constitute it in either case. It was so considered at common law." Long v. State, supra [quot in Tanner v. State, supra].

Robbery by snatching see infra § 69.

[92] See supra § 41.

[93] Pride v. State, 124 Ga. 791, 53 SE 192.

[94] **Value as element** see supra § 16.

[95] See supra §§ 56–69.

[96] Stephens v. State, 92 Fla. 43, 109 S 303.

[97] State v. Howerton, 58 Mo. 581.

[98] See statutory provisions.

[99] Cole v. State, 104 Tex. Cr. 533, 286 SW 204, 207.

"It seems to have been the theory to some extent of both the prosecution and the defense that in robbery the return of the property before the beginning of the prosecution would have the same effect as in theft, namely, to reduce the grade of the offense to a misdemeanor. This is the statutory rule applicable to theft, but, in the absence of a statute, it is believed that it would not be applicable to robbery." Cole v. State, supra.

[a] **A statute so providing with reference to theft** is inapplicable to robbery. Cole v. State, 104 Tex. Cr. 533, 286 SW 204.

[1] See Criminal Law §§ 340–358.

[2] See supra §§ 12–54.

[3] **Persons liable** see infra §§ 79–81.

[4] **Drunkard** see supra § 53.

[5] See Criminal Law §§ 71–89.

[6] **As evidence that criminal intent was lacking** see infra § 152 text and note 15; and § 175 text and notes 49, 50.

[7] Peo. v. Strauss, 75 Cal. A. 447, 243 P 67, 70; Peo. v. Anderson, 59 Cal. A. 408, 211 P 254; McGinty v. State, 97 Ga. 368, 23 SE 831; Rex v. Peat, Leach C. C. 228, 168 Reprint 216.

"Where the offense of robbery is once actually completed by the felonious and violent taking of property from the person of another into the possession of the thief, it cannot be purged by any subsequent redelivery of the property to the owner; and this is true although the thief may have retained possession but a short length of time." McGinty v. State, supra [quot Peo. v. Strauss, supra].

[a] **Too small to keep.**—Where defendants took money from their victim at the point of a revolver, but on finding that he had only three dollars returned the money as too small a sum to be worth keeping, the redelivery of the money did not cure the prior completed robbery. Peo. v. Strauss, 75 Cal. A. 447, 243 P 67.

Affecting grade or degree see supra § 71.

[8] **Effect on criminal responsibility in general** see Criminal Law § 56.

[9] Thomas v. State, 134 Ala. 126, 33 S 130.

Acting under military orders as affecting intent see supra § 49 text and note 2.

[10] **Taking property under warrant as affecting intent** see supra § 49 text and notes 99, 1.

[11] Tones v. State, 48 Tex. Cr. 363, 88 SW 217, 122 AmSR 759, 1 LRANS 1024.

[12] **Acting under military orders as affecting intent** see supra § 49 text and note 2.

[13] Com. v. Flanary, 1 Ky. Op. 183; Hammond v. State, 3 Coldw. (Tenn.) 129.

[14] Hardeman v. State, 14 Ala. A. 35, 70 S 979.

V. PERSONS LIABLE[15]

[§ 79] **A. Persons Present—1. Participants.** If several associate together to commit robbery, and are present ready to aid and assist, all are guilty,[16] as principals or accessories.[17] Thus one present and aiding and abetting in the commission of a robbery is liable to conviction for the crime, even though he did not participate in the actual taking of the property,[18] or received none of the proceeds,[19] and irrespective of any particular agreement made between codefendants.[20] Defendant's failure to talk much in connection with the execution of the crime is an immaterial circumstance.[21]

Near scene to aid escape. Persons remaining near the scene of the robbery with intent to aid in the robbers' escape are guilty[22] without proof of conspiracy.[23]

Insanity of a corobber will not preclude liability of one present and aiding in the commission of the crime.[24]

Use of dangerous weapon. Under statutes making robbery with a dangerous weapon a particular classification of the offense,[25] an unarmed defendant present at a robbery by armed codefendants is guilty of robbery with a dangerous weapon.[26] It is not necessary to prove an agreement among the codefendants as to use of a dangerous weapon.[27]

[§ 80] **2. Nonparticipants.** One aiding in a robbery without felonious intent is not liable therefor.[28]

Mere presence. In accordance with general rules[29] defendant's mere presence at the scene of the robbery will not render him liable as an aider and abettor.[30] But if his presence was due to a preconceived plan to rob, his presence will establish his guilt.[31]

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[15] **General rules** see Criminal Law §§ 99-161.

[16] Cal.—Peo. v. Macchiaroli, 54 Cal. A. 665, 202 P 474.

Mass.—Com. v. Ryan, 154 Mass. 422, 28 NE 289.

Mo.—State v. Stewart, 127 Mo. 290, 29 SW 986.

Nev.—State v. O'Keefe, 23 Nev. 127, 43 P 918, 62 AmSR 768.

N. Y.—Peo. v. McElroy, 14 NYS 203.

Wash.—State v. Malsogoff, 88 Wash. 419, 153 P 379.

Wis.—Fifer v. State, 189 Wis. 50. 206 NW 861, 863.

"Having concocted the general scheme of the holdup, and each party particularly having assisted therein in performing his allotted part of the plot, they are all guilty under the law." Fifer v. State, supra.

[a] **Joint enterprise.**—Where defendant and two others held up a man and woman seated in an automobile and defendant robbed the man while the others robbed the woman, and all then drove away in the automobile, there was a joint enterprise and defendant was guilty of robbing the woman. Peo. v. Macchiaroli, 54 Cal. A. 665, 202 P 474.

[17] See Criminal Law §§ 107-147.

[18] Hood v. State, 18 Ala. A. 287, 92 S 30; Com. v. Ryan, 154 Mass. 422, 28 NE 289; State v. Harmon, (Mo.) 296 SW 391; State v. Affronti, 292 Mo. 53, 238 SW 106; State v. Bater, (Mo.) 232 SW 1012; State v. Stewart, 127 Mo. 290, 29 SW 986; Green v. State, 108 Tex. Cr. 320, 300 SW 65.

[a] **Holding horse while accomplice takes property from driver.**—Com. v. Ryan, 154 Mass. 422, 28 NE 289.

[b] **Pointing pistol at pedestrian while accomplice takes his watch.**—State v. Stewart, 127 Mo. 290, 29 SW 986.

[c] **Holding victim's hands while confederate goes through pockets.**—State v. Bater, (Mo.) 232 SW 1012.

[d] **Covering victim with gun while companion rifles cash register.**—State v. Harmon, (Mo.) 296 SW 391.

[19] Southerland v. Com., 217 Ky. 94, 288 SW 1051.

[a] **Illustration.**—One who is present aiding and abetting a robbery is punishable for the robbery, although receiving none of the money. Southerland v. Com., 217 Ky. 94, 288 SW 1051.

[20] Searcy v. State, 89 Tex. Cr. 550, 232 SW 799.

[21] Sparks v. State, 100 Tex. Cr. 553, 555, 271 SW 631.

"It is also insisted that the talking between prosecuting witness and the three men implicated and engaged in the alleged threatening, was done by one Morris and that very little was said by the appellant. We are unable to see how this could absolve appellant if his guilty connection with the making of the threats is shown, and that he acted with Morris and was present endorsing, backing up and participating with Morris in the criminal transaction." Sparks v. State, supra.

[22] Clernt v. State, 109 Nebr. 628, 192 NW 209; State v. Brummett, 116 Wash. 407, 199 P 726.

[a] **Driver of car.**—A defendant who was not present in the room when a robbery was committed, but who, under agreement with those who actually committed the crime, took them to the scene thereof in an automobile and remained there to aid their escape after the commission of the offense, can be convicted of robbery. State v. Brummett, 116 Wash. 407, 199 P 726.

[23] State v. Reich, 293 Mo. 415, 239 SW 835.

Conspiracy to rob see Conspiracy § 49.

[24] Pruitt v. State, 91 Tex. Cr. 189, 237 SW 572.

[a] **Belief in sanity.**—"If appellant agreed with Alford to commit a robbery, believing him sane at the time, and was present at the time the robbery was committed, and aided him in the commission, appellant could be punished therefor, although it afterwards transpired that Alford was insane and not subject to punishment." Pruitt v. State, 91 Tex. Cr. 189, 237 SW 572, 574.

[25] See supra §§ 56, 57, 65.

[26] Peo. v. Byrnes, 302 Ill. 407, 134 NE 730; Peo. v. Cunningham, 300 Ill. 376, 133 NE 270; Peo. v. Paradiso, 248 N. Y. 123, 161 NE 443.

[a] **Illustrations.**—(1) In a prosecution for robbery, where four accused persons visited the scene of the crime with a common purpose, and three of them were armed with revolvers and used them in committing the crime, the unarmed defendant could be rightly indicted and convicted for robbery with a dangerous weapon. Peo. v. Cunningham, 300 Ill. 376, 133 NE 270. (2) Conviction under an indictment charging robbery with a revolver may be sustained by proof that one of several robbers had and used a revolver, this justifying conviction of all. Peo. v. Byrnes, 302 Ill. 407, 134 NE 730.

[27] Searcy v. State, 89 Tex. Cr. 550, 232 SW 799, 800.

"Proof of an acting together of a number of persons in a robbery would make out the guilt of all, and if the weapon used in the assault was a pistol, proof would not be necessary that it was agreed among the alleged principals that a pistol should be used." Searcy v. State, supra.

[28] Williams v. Com., 110 SW 339, 33 KyL 330; Rex v. Hawkins, 3 C. & P. 392, 14 ECL 626, 172 Reprint 470. See Peo. v. O'Regan, 221 App. Div. 331, 223 NYS 339 (holding that an instruction that, if accused drove the automobile used by robbers without knowing of the robbery, but thereafter, on learning thereof, failed to notify the authorities and took a share of the proceeds, he was equally guilty, was erroneous as in such event his guilt, if any, would be only as an accessory after the fact).

[a] **Merely picking up money** thrown down by the victim and handing it to the robber is insufficient to render one liable without further proof of intent to participate in the robbery. Williams v. Com., 110 SW 339, 33 KyL 330.

[b] **No common intent.**—If a gang of poachers attack a gamekeeper and leave him senseless on the ground, and one of them returns and steals his money, that one only can be convicted of robbery, as it was not in pursuance of any common intent. Rex v. Hawkins. 3 C. & P. 392, 14 ECL 626, 172 Reprint 470.

[29] See Criminal Law § 121.

[30] Peo. v. Powers, 293 Ill. 600, 127 NE 681; Ellsworth v. State, 92 Tex. Cr. 334, 244 SW 147, 149.

"The presence of the accused at the scene of the offense is not enough. It must be shown by sufficient testimony that he knew the intent of the party claimed to be his coprincipal, and that, so knowing, he aided by acts or encouraged by words or gestures said coprincipal in the commission of the offense." Ellsworth v. State, supra.

Intent to commit a different crime. Persons combining in an assault are not guilty of robbery committed by one of them without proof that those not actually taking the property participated in the specific intent to rob.[32] Under statutes making the offense of extorting property on a threat to accuse the victim of sodomy, a crime distinct from robbery,[33] one participating in a common purpose to so extort property, and present part of the time at the scene of the crime, but neither intending to aid nor actually aiding in a robbery by violence, is not liable for a robbery committed by his confederate.[34] But the accidental circumstance that another crime was contemplated and committed contemporaneously with the robbery will not exculpate a defendant intending to aid in the commission of robbery.[35] Where robbery occurs as a natural and proximate outcome of other unlawful acts, it has been held that all persons participating in such other unlawful acts are guilty of robbery,[36] and may be convicted as principals, even though they lacked the original intent to commit robbery where they aided and abetted after discovering that robbery was being committed.[37]

[§ 81] **B. Persons Absent.** To be guilty of robbery one need not necessarily be present at the commission of the crime.[38] Persons absent from the scene of the robbery may be liable to prosecution therefor as principals or accessories before or after the fact,[39] if they were particeps criminis before[40] or after,[41] the commission of the robbery.

Merely receiving the proceeds of the robbery, with knowledge thereof, will not necessarily render one liable for robbery.[42]

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31. Peo. v. Powers, 293 Ill. 600, 127 NE 681.

[a] **Man remaining in automobile.**—Where some of the occupants of an automobile left the automobile and committed robbery, the mere presence of defendant in the automobile at the time of the robbery, and his failure to take active measures to prevent the crime, would not make him a principal; but he would be guilty as such if the robbery was in pursuance of a common design, to which he had assented, even though he did not actively participate in the commission of the crime. Peo. v. Powers, 293 Ill. 600, 127 NE 681.

32. Peo. v. Foley, 59 Mich. 553, 26 NW 699.

33. See statutory provisions.

Taking by threatened accusation of sodomy as robbery see supra § 39.

34. Reg. v. Henry, 9 C. & P. 309, 38 ECL 187, 173 Reprint 847, 2 Moody C. C. 118, 169 Reprint 47.

35. Ferguson v. State, 32 Ga. 658.

[a] **Jail break.**—The prisoner, being confined in jail with a number of others, in different cells, having effected his escape from his cell into the body of the jail, broke the locks of the doors of the others, and when the jailor made his appearance, a number of them rushed upon, seized, blindfolded, and robbed him. On these facts all of the prisoners are guilty of the robbery, although it did not appear affirmatively that the prisoner personally participated in the act of the robbery, nor in fact who did commit the robbery. The presumption being that the robbery was the common intent of all. Had the facts shown that an escape from the jail was the common intent, and that the robbery formed no part of the original design, but was an independent act by some others of the party, in which prisoner did not participate, the case might have been different. Ferguson v. State, 32 Ga. 658.

36. Moeller v. Peo., 70 Colo. 223, 226, 199 P 414.

"If they all went out intending such molestation and one or more in the course thereof committed robbery they were all guilty of robbery, because robbery is a natural and proximate outcome of an enterprise of riot and battery under circumstances like the present, and frequently accompanies it, as in this case. All companions are guilty of what grows naturally and proximate out of a common unlawful purpose." Moeller v. Peo., supra.

[a] **Rioting strikers.**—Where street car strikers conspired to do riotous violence and battery, and pursuant to such conspiracy some of the strikers committed robbery and assault with intent to do great bodily harm, all of the parties to conspiracy were guilty of robbery and assault to do great bodily harm. Moeller v. Peo., 70 Colo. 223, 227, 199 P 414.

37. Moeller v. Peo., supra.

"These defendants, even if they went out merely unlawfully to molest in a trifling way, when they saw that the purpose of their companions was to rob and continued to assist them, were guilty as principals." Moeller v. Peo., supra.

[a] **Illustration.**—Where defendants joined a part of other street car strikers, who went to the end of a car line and robbed and assaulted a conductor and a motorman, and where defendants participated in the robbery and assault, they were guilty of robbery and assault as principals, regardless of their original intention in joining the other strikers. Moeller v. Peo., 70 Colo. 223, 199 P 414.

38. Peo. v. Wilson, 76 Cal. A. 688, 245 P 781; Peo. v. Cania, 217 App. Div. 34, 216 NYS 478; State v. Heyward, 11 S. C. L. 312, 10 AmD 604; Ashworth v. State, 31 Tex. Cr. 419, 20 SW 982.

39. See Criminal Law §§ 107-147. Peo. v. Baker, 94 Cal. A. 687, 271 P 777.

40. Peo. v. Wilson, 76 Cal. A. 688, 245 P 781; Peo. v. Anderson, 59 Cal. A. 408, 211 P 254; Peo. v. Sartori, 43 Cal. A. 304, 184 P 879; State v. La Rocca, 168 La. 204, 121 S 744; State v. Walters, 135 La. 1070, 66 S 364; State v. Roderman, 297 Mo. 143, 248 SW 964.

"Although perhaps it was not conclusively shown that appellant was actually present at the time when and at the place where the robbery occurred, after an examination of the transcript of the evidence, this court is convinced that it was ample to justify the conclusion by the jury that defendant either aided and abetted in the commission of the crime, or, not having been present where the crime was committed, advised and encouraged its commission—which is sufficient to meet the requirements of the statute." Peo. v. Baker, 94 Cal. A. 687, 689, 271 P 777.

[a] **A prearranged and detailed plan** of the robbery need not be shown in order to convict one absent from the scene of the robbery but aiding and abetting its commission. Peo. v. Sartori, 43 Cal. A. 304, 184 P 879.

[b] **Even though the plan contemplated defendant's presence** at the robbery, his absence will not prevent his conviction if he did not communicate a withdrawal from the scheme to his fellow robbers. Peo. v. Wilson, 76 Cal. A. 688, 245 P 781.

41. Heyen v. State, 114 Nebr. 783, 210 NW 165.

[a] **Harboring a robber** renders defendant liable provided it appears that he did so with knowledge of such robber's guilt. Heyen v. State, 114 Nebr. 783, 210 NW 165.

42. Peo. v. Shephardson, 48 Cal. 189.

[a] **Not accessary.**—One who receives money obtained by robbery, with knowledge that it was so obtained, is not an accessary to the robbery. Peo. v. Shephardson, 48 Cal. 189.

[b] **In the Philippines** (1) under a code provision defining accessories as "those who, having knowledge of the commission of the crime, and without having participated therein, either as principals or accomplices, take part subsequent to its commission" by profiting or assisting the offenders to profit by the effects of the crime, by concealing or destroying the evidence of the crime, or by harboring, concealing, or assisting in the escape of the offender under certain circumstances (see statutory provisions), (2) one may be convicted as an accessory to a robbery, although he did not participate in the crime (U. S. v. Montano, 3 Philippine 110, 111 [where the court said: "In order to convict the defendant of the crime of being accessory to the crime of robbery committed as shown by the evidence in this case, it was not necessary to show that he had participated therein. It was sufficient to show that he had knowledge of it, and the proof shows that he acquired such knowledge when he was told by the owners that these carabaos had been taken away from the owners by robbery. After having obtained this knowledge he disposed of the property or concealed the same so that the owners were deprived of their property—the body and effect of the crime"]), (3) and had no knowledge that the property was stolen at the time that he received it (U. S. v. Montano, 3 Philippine 110, 111 [where the court said: "The owners were not able to recover possession of their

Use of dangerous weapon. Under statutes classifying robbery in accordance with its commission with a dangerous weapon with intent to kill or maim, if resisted,[43] an absent defendant may be liable for robbery of such classification without proof that he participated in his codefendant's intent to kill or maim.[44]

Insanity of codefendant. One procuring another, whom he knows to be insane, to commit a robbery is liable for the robbery, even though absent from the scene of the crime.[45]

Robbery of uninhabited house. Under a statute providing, inter alia, that those who directly force or induce others to commit a crime are to be considered as principals,[46] one instigating another to commit a robbery of an uninhabited house and furnishing the means of accomplishing it is guilty thereof as a principal.[47]

VI. PROSECUTION AND PUNISHMENT

[§ 82] **A. Indictment or Information—1. In General.** In accordance with general rules,[48] and in the absence of statutory provisions to the contrary,[49] an indictment or information for robbery must allege all the elements of the offense.[50] In jurisdictions where statutes prescribe a punishment for robbery without defining the crime,[51] an indictment or information following the common-law definition of the crime[52] is sufficient.[53] In jurisdictions where the statutes define the crime[54] the indictment should allege all the elements of the crime so defined.[55]

[§ 83] **2. Taking and Asportation.** A taking of

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property by reason of the disposal of the same by the defendant after he had been informed that the carabaos had been taken from the owners through robbery"]).

[43] See passim supra §§ 55–71.

[44] Killingsworth v. State, 90 Fla. 299, 105 S 834.

[a] **"One charged as accessory before the fact** to the commission of robbery, alleged to have been committed by the person charged as principal armed with a pistol and with intent to kill the person robbed if he should resist, may be convicted as accessory before the fact without showing that he likewise had an intention that the person to be robbed should be killed if he resisted." Killingsworth v. State, 90 Fla. 299, 300, 105 S 834.

[45] Pruitt v. State, 91 Tex. Cr. 189, 237 SW 572.

[46] See statutory provisions.

[47] U. S. v. Galuran, 12 Philippine 339.

[a] **One instigating another** to rob an uninhabited house and supplying money to buy a false key, and also promising a specified payment for each article taken, is guilty as a principal of robbery by force against property. U. S. v. Galuran, 12 Philippine 339.

[48] See Indictments and Informations § 238.

[49] See statutory provisions.

Following language of statute see Indictments and Informations § 268 text and note 48.

Statutory forms in general see Indictments and Informations § 172.

[50] State v. England, 148 La. 178, 86 S 728, 729; State v. Patterson, 42 La. Ann. 934, 8 S 529; Brookman v. Com., 151 Va. 522, 145 SE 358.

"Indictments for robbery must set out specifically all the essential elements of the crime at common law, and the indictment in this case is defective in that it does not set out the essential elements of the crime." State v. England, supra.

[a] **In substance.**—"An indictment for robbery must set out, in substance, all the elements of that crime as a common-law offense." State v. Patterson, 42 La. Ann. 934, 8 S 529.

[b] **Necessary allegations enumerated.**—"To constitute a good and sufficient indictment for robbery, the indictment must allege a felonious taking of personal property of another, against his will, from his person, or what is equivalent thereto, in his presence, by force or putting him in fear." Brookman v. Com., 151 Va. 522, 145 SE 358, 359.

[c] **Immaterial omission.**—The omission of the word "rob" will not invalidate the indictment where the facts as charged constitute robbery. State v. Robinson, 29 La. Ann. 364.

[d] **Forms held sufficient.**—(1) Common form. Houston v. Com., 87 Va. 257, 12 SE 385, 387 ("The indictment should contain all the allegations essential in simple larceny, with the additional matter that makes the larceny robbery. The common form by which to effect this is to say that, at a time and place, the defendant, 'in and upon one B., feloniously did make an assault, and him, the said B., in bodily fear did feloniously put, and [setting out the things taken and their values as in simple larceny] of the moneys, goods, and chattels of the said B. from the person and against the will of the said B., then and there feloniously and violently did steal, take, and carry away against the peace and dignity of the commonwealth of Virginia'"). (2) Other forms. Davis v. Com., 230 Ky. 589, 20 SW (2d) 455; Com. v. Finn, 120 Ky. 693, 86 SW 693, 27 KyL 771; Bolden v. Com., 11 Ky. Op. 183; Com. v. Harding, 1 Ky. Op. 132; State v. Wilcoxen, 38 Mo. 370; State v. Gill, 21 Mont. 151, 53 P 184; State v. Gorham, 55 N. H. 152; Reardon v. State, 4 Tex. A. 602; Brookman v. Com., 151 Va. 522, 145 SE 358.

[e] **Form held insufficient.**—State v. England, 148 La. 178, 86 S 728.

[51] See supra §§ 1–10.

[52] See supra § 1.

[53] Houston v. Com., 87 Va. 257, 12 SE 385, 387.

"Inasmuch as the first clause of our statute under which the indictment in the present case was found merely regulates the punishment without defining the crime of robbery, it is clear, upon principle and authority, that any indictment under this clause of our statute drawn as at the common law will be sufficient." Houston v. Com., supra.

[a] **No statutory robbery.**—"The objection to the indictment, stated generally, seems to be that it does not charge the offense of 'statutory robbery.' This is true, but it is true simply because there is in Virginia no such thing as 'statutory robbery.' The offense of robbery was not created by the statute, but was, at a very early period, and still is, a common-law offense, and was adopted by us at the foundation of our state government, with the great body of the common law then adopted, and the crime, with its common-law definition, has remained unchanged. The statute above quoted does no more, and was intended to do no more, than to regulate the punishment of the pre-existing well defined common-law offense. This is apparent from the initial words of the statute: 'If any person commit robbery,'—that is, by any of the means expressed in the first clause,—'he shall be punished,' etc.; the statute in no way even pretending to define the offense of robbery; and for the obvious reason that the legislature intended to adopt the common-law definition, and along with it the settled legal meaning of the words and phrases necessary to charge the offense." Houston v. Com., 87 Va. 257, 12 SE 385, 386.

[54] See supra §§ 1–10.

[55] See cases infra this note; and passim §§ 83–118.

[a] **Forms held sufficient.**—Anderson v. State, 28 Ind. 22; State v. Henry, 47 La. Ann. 1587, 18 S 638; State v. Faudi, (Mo.) 11 SW (2d) 1014; State v. Flynn, (Mo.) 292 SW 413; State v. Hahn, 316 Mo. 229, 289 SW 845; State v. Butler, 316 Mo. 264, 289 SW 636; State v. Wallace, (Mo.) 278 SW 663; State v. Strada, (Mo.) 274 SW 34; State v. Yates, (Mo.) 252 SW 641; State v. Barber, (Mo.) 242 SW 664; State v. Affronti, 292 Mo. 53, 238 SW 106; State v. Luhano, 31 Nev. 278, 102 P 260; Hill v. State, 19 Okl. Cr. 406, 200 P 253; Killion v. State, 19 Okl. Cr. 215, 198 P 625; U. S. v. Aquino, 11 Philippine 244.

[b] **Held insufficient.**—"Walter Blackwell, late of the county and District aforesaid, on the 27th day of January, 1908, in said county and district, did then and there represent to H. B. Dobbins that he was an officer and watchman, and did then and there threaten to arrest the said H. B. Dobbins and put him in jail, and did then and there willfully and feloniously take, steal, and carry away the personal property of the said H. B. Dobbins, consisting of a suit case, the value of $4 and one suit of clothes, value $20, delivered to the said Walter Blackwell by the said H. B. Dobbins, through fear of threatened injury to his person by the said Walter Blackwell, said property being the property

the property, being an essential element of the offense,[56] must of course be alleged in the indictment or information.[57] While there is authority to the effect that an indictment for robbery must allege a "carrying away" of the property,[58] the better rule is that, where the taking is properly alleged, it is unnecessary to charge a carrying away.[59]

[§ 84] **3. Property Taken[60]—a. Nature of Property—(1) Necessity for Description.** The indictment or information must describe the property taken.[61]

[§ 85] **(2) Sufficiency of Description—(a) In General.** It is not essential for the indictment or information to contain an accurate[62] or definite[63] description of the property taken. An indictment sufficiently describes the property taken, if it enables the jury to identify the chattels stolen with those referred to in the indictment, and shows the court that the articles are the subject of robbery.[64]

[§ 86] **(b) Goods and Chattels.** Pursuant to the rule above stated[65] particular descriptions of goods and chattels have been held sufficient.[66]

[§ 87] **(c) Choses in Action.**[67] In accordance with rules above stated[68] as applied by courts sometimes differing in their conclusions on similar states of fact,[69] particular descriptions of choses in action have been held sufficient[70] or insufficient[71] in indictments for robbery.

[§ 88] **(d) Money[72]—aa. In General.** Where the property taken is money, it is ordinarily sufficient to give a general description thereof by amount.[73] In stating this rule,[74] some courts have qualified it by holding or stating that it must be further alleged that a more particular description is

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of H. B. Dobbins, against the peace and dignity of the state of Mississippi." Blackwell v. State, 94 Mass. 240, 48 S 290.

56. See supra § 13.

57. Brookman v. Com., 151 Va. 522, 145 SE 358; and infra cases passim §§ 84–99.

Allegation as to nature of taking see infra §§ 100–104.

58. Com. v. Clifford, 8 Cush. (Mass.) 215.

59. Crutcher v. State, 19 Ala. A. 529, 98 S 652, 653; Terry v. State, 13 Ind. 70; Thompson v. State, 35 Tex. Cr. 511, 34 SW 629; State v. Smith, 40 Wash. 615, 82 P 918.

"In an indictment charging robbery, it is not necessary to charge that the property forcibly taken was carried away." Crutcher v. State, supra.

60. Subjects of robbery generally see supra §§ 14–19.

61. Holland v. State, 110 Tex. Cr. 384, 10 SW (2d) 561, 563.

"In charging the offense of robbery, as in charging larceny or theft, a description of the property taken is essential." Holland v. State, supra.

62. Peo. v. Carpenter, 315 Ill. 87, 145 NE 664; Peo. v. Fiereto, 303 Ill. 186, 135 NE 417.

63. Wood v. State, 98 Fla. 703, 124 S 44.

64. Cal.—Peo. v. Chuey Ying Git, 100 Cal. 437, 34 P 1080.

Fla.—Stephens v. State, 92 Fla. 43, 109 S 303, 304 [cit Cyc].

Ill.—Peo. v. Nolan, 250 Ill. 351, 95 NE 140, 34 LRANS 301, AnnCas1912B 401 [cit Cyc].

Ind.—Brennon v. State, 25 Ind. 403; Terry v. State, 13 Ind. 70.

Ky.—Hooper v. Com., 204 Ky. 32, 263 SW 659; Nichols v. Com., 3 Ky. Op. 258.

N. Y.—Peo. v. Loop, 3 Park. Cr. 559.

N. C.—State v. Burke, 73 N. C. 83.

N. D.—State v. Sanders, 14 N. D. 203, 103 NW 419.

Wash.—State v. Johnson, 19 Wash. 410, 53 P 667.

W. Va.—State v. McCoy, 63 W. Va. 69, 59 SE 758.

[a] **"A general description** of the property to show that it is personalty and to bar another indictment for the same offense," is sufficient. Nichols v. Com., 3 Ky. Op. 258, 260.

65. See supra § 85.

66. See cases infra this note.

[a] **"A bunch of keys** of the value of one dollar." Nevill v. State, 133 Ala. 99, 101, 32 S 596.

[b] **"A knife** of the value of seventy-five cents." Nevill v. State, 133 Ala. 99, 101, 32 S 596.

[c] **"Certain personal property** then and there belonging to said John Sandberg, to wit, one leather pocketbook, one small, gold-framed photograph, picture of said John Sandberg, one hunting knife. . . . All of the above-described property being of the aggregate value of five ($5) dollars." State v. Sanders, 14 N. D. 203, 205, 103 NW 419.

[d] **"One pin"** of a stated value is a sufficient description of a diamond stud. Peo. v. Nolan, 250 Ill. 351, 95 NE 140, 34 LRANS 301, AnnCas1912B 401.

[e] **"One pocket-book** of the value of fifty cents." Terry v. State, 13 Ind. 70.

[f] **"One purse** of the value of 25 cents." State v. McCoy, 63 W. Va. 69, 59 SE 758.

[g] **"Personal property,** to wit, money, jewelry and hair ornaments." Peo. v. Chuey Ying Git, 100 Cal. 437, 34 P 1080.

[h] **"Shoes, cigarettes and jewelry,** all the personal property of the said James Mitchell, Felix Girard and Albert Hudson, and a subject of larceny." Hooper v. Com., 204 Ky. 32, 33, 263 SW 659.

67. As subject of robbery see supra § 15.

68. See supra §§ 85, 86.

69. Compare infra text and note 70 [b] with infra text and note 71 [a].

70. See cases infra this note.

[a] **"One time check** of the value of 50 cents." State v. McCoy, 63 W. Va. 69, 59 SE 758.

[b] **Promissory notes.**—(1) "It is also contended that the information is insufficient, in that it fails to make a particular description of the notes alleged to have been taken at the time of the robbery; that the description 'notes of the value of $435.00' is not a sufficient description of said notes, in that it does not set out the dates, the amounts of the notes, the payees or payors on said notes, nor the dates when the notes became due. This description was sufficient to sustain a charge of robbery." Berry v. State, (Okl. Cr.) 279 P 982, 985. (2) An indictment for robbery of "one promissory note of the value of $50.85," sufficiently describes the property. State v. McCoy, 63 W. Va. 69, 59 SE 758.

71. See case infra this note.

[a] **Check.**—An indictment alleging robbery of one John Long by taking a check described merely as, "One check of the value of $12.35, the same being the property of the said John Long," described the check insufficiently so that the indictment was open to a motion to quash. Holland v. State, 110 Tex. Cr. 384, 10 SW (2d) 561.

72. Value see infra § 94.

73. Ala.—Boyd v. State, 153 Ala. 41, 45 S 591.

Cal.—Peo. v. Stevens, 141 Cal. 488, 75 P 62; Peo. v. Richards, 136 Cal. 127, 68 P 477; Peo. v. Howard, 3 Cal. A. 36, 84 P 462.

Fla.—Wood v. State, 98 Fla. 703, 124 S 44.

Ga.—Humphries v. State, 100 Ga. 260, 28 SE 25.

Ill.—Peo. v. Jordan, 303 Ill. 316, 135 NE 729.

Ky.—Hooper v. Com., 204 Ky. 32, 263 SW 659.

La.—State v. Devine, 51 La. Ann. 1296, 26 S 105.

Mass.—Com. v. Griffiths, 126 Mass. 252.

Mo.—State v. Calvert, 209 Mo. 280, 107 SW 1078; State v. Rush, 95 Mo. 199, 8 SW 221; State v. Burnett, 81 Mo. 119.

Tex.—Gunter v. State, 90 Tex. Cr. 147, 233 SW 843; Noe v. State, 78 Tex. Cr. 661, 182 SW 1122; Parrent v. State, (Cr.) 76 SW 474; White v. State, (Cr.) 57 SW 100; Colter v. State, 37 Tex. Cr. 284, 39 SW 576; Thompson v. State, 35 Tex. Cr. 511, 34 SW 629.

Utah.—State v. La Chall, 28 Utah 80, 77 P 3.

"Allegation that property taken consisted of money of value of named amount was legally sufficient." Wood v. State, 98 Fla. 703, 124 S 44.

74. See supra text and note 73.

unknown,[75] or that wherever possible it is better practice to include a more definite description.[76]

[§ 89] **bb. Kind, Denomination, and Number of Pieces.** It has been held unnecessary to allege the kind,[77] denominations,[78] or number of pieces,[79] taken, although there is authority to the contrary.[80]

Particular statutory provisions. In some jurisdictions there are statutes expressly[81] or by necessary implication[82] providing that money taken in robbery may be described as a specified sum without specification of kind, denomination, or number of pieces. Statutes of this character in terms referring to indictments for larceny[83] have been held applicable to indictments for robbery.[84]

[§ 90] **cc. Lawfulness.** While it is customary in an indictment or information to include an allegation that the money taken was then and there lawful or current as such,[85] there is authority to the effect that such an allegation is unnecessary.[86]

[§ 91] **dd. Foreign Money.** Money of a foreign country being regarded as personal property,[87] should, under general statutes requiring a description of property by name, kind, quantity and number,[88] be so described in the indictment.[89]

[§ 92] **ee. Particular Descriptions.** As complying with the rules above stated,[90] particular descriptive allegations have been held sufficient as to the taking of money generally,[91] or of a certain sum,[92] or of paper money,[93] or coins.[94] On the other hand, particular descriptions, as not complying with the rules above stated,[95] have been held insufficient.[96]

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[75] Ala.—Brown v. State, 120 Ala. 342, 25 S 182; Owens v. State, 104 Ala. 18, 16 S 575.

Del.—State v. Stewart, 17 Del. 433, 42 A 624.

Ind.—McQueen v. State, 82 Ind. 72.

Mont.—Terr. v. Bell, 5 Mont. 562, 6 P 60.

N. Y.—Quinlan v. Peo., 6 Park. Cr. 9.

Tex.—Wade v. State, 35 Tex. Cr. 170, 32 SW 772, 60 AmSR 31; Winston v. State, 9 Tex. A. 143.

[76] Wood v. State, 98 Fla. 703, 124 S 44.

[a] **Statement of rule and qualification.**—"While it is the more approved practice to describe as definitely as the circumstances or the evidence before the grand jury reasonably permits, especially in cases where such description has a real bearing upon the guilt or innocence of the accused, yet if the information had merely alleged that the property taken by the robbery consisted of money of the value of a named amount, such allegation would have been legally sufficient, and would have supported a conviction, if the evidence had shown the robbery of any particular kind of money of value, even though the value was less than the amount alleged." Wood v. State, 98 Fla. 703, 124 S 44, 46.

[77] Maxwell v. State, 9 Ga. A. 875, 72 SE 445; Bracher v. State, 72 Tex. Cr. 198, 161 SW 124; State v. Johnson, 19 Wash. 410, 53 P 667.

[a] **Whether gold, silver, or paper** money was taken need not be alleged. Maxwell v. State, 9 Ga. A. 875, 72 SE 445.

[78] Maxwell v. State, 9 Ga. A. 875, 72 SE 445; Bracher v. State, 72 Tex. Cr. 198, 161 SW 124; State v. Johnson, 19 Wash. 410, 53 P 667.

[79] State v. Johnson, supra.

[80] See cases infra this note.

[a] **Kind.**—Croker v. State, 47 Ala. 53.

[b] **Denominations.**—Arnold v. State, 52 Ind. 281, 21 AmR 175.

[c] **Number of pieces.**—Arnold v. State, 52 Ind. 281, 21 AmR 175.

Particular descriptions held sufficient or insufficient see infra § 92.

[81] See statutory provisions.

[82] See case infra this note.

[a] **In Illinois** "the Criminal Code [Hurd Rev. St. (1921) c 38] provides in section 6 of division 11 that every indictment shall be deemed sufficiently technical which states the offense in the terms and language of the statute creating the offense or so plainly that the nature of the offense may be easily understood by the jury, and section 9 of division 11 provides that no motion in arrest of judgment or writ of error will be sustained for any matter not affecting the real merits of the offense charged in the indictment. The language of the statute descriptive of the offense of robbery includes money, and the gist of the offense is the force and intimidation used in the taking. Whether or not, under the strict rules of pleading which prevailed at common law, it was necessary in the indictment to describe the kind of money taken, that rule has no application under our statute. Each count in this indictment charges the offense in the language of the statute so plainly that its nature can be easily understood, and the objection made does not affect the real merits of the offense charged." Peo. v. Jordan, 303 Ill. 316, 317, 135 NE 729.

[83] See Larceny § 275.

[84] Hooper v. Com., 204 Ky. 32, 263 SW 659; Cosby v. Com., 185 Ky. 503, 217 SW 357; State v. Johnson, 19 Wash. 410, 53 P 667.

[a] **In Texas.**—Code Cr. Proc. (1911) arts 458, 468, providing that a general description in an indictment of any property by name, kind, quality, number, and ownership is sufficient, and that, in an indictment for theft of money, it is sufficient to describe it as money, an indictment for robbery, which describes the money stolen as seventy dollars in gold, current money of the United States, and one hundred and sixty dollars in bank notes, current money of the United States, is sufficient, although the prosecutor can give a full description of both the gold and the bank notes by stating the denominations thereof." Terrell v. State, 76 Tex. Cr. 428, 174 SW 1088.

[b] **Only amount need be specified.**—"As the Code declares it shall not be necessary in an indictment for the larceny of money to specify 'the coin, number, denomination or kind,' it follows that the only requirement is to state the amount thereof. This the indictment does with sufficient accuracy 'to enable a person of common understanding to know what is intended, and with such degree of certainty as to enable the court to pronounce judgment, on conviction, according to the right of the case,' and that is all an indictment need do." Cosby v. Com., 185 Ky. 503, 217 SW 357, 358.

[85] See cases infra this note; and passim infra § 92.

[a] **Allegations held sufficient.**—(1) "The indictment described the property alleged to have been taken as one $2 bill, and three $1 bills, lawful currency of the United States of America.' Appellants demurred to the indictment on the theory that the clause 'lawful currency of the United States of America,' referred only to the 'three $1 bills,' and did not refer to the 'one $2 bill.' The demurrer was properly overruled. The allegations 'one $2 bill' and 'three $1 bills,' it will be noted, are connected by the conjunctive word 'and,' and not by the disjunctive word 'or.' . . . 'Lawful currency of the United States of America,' thus used, refers to both the 'one $2 bill' and 'three $1 bills.'" Burke v. State, 18 Ala. A. 152, 89 S 162, 163. (2) "Where an information charges the taking of money by robbery, describing the property as 'money, both coin and currency in the approximate amount of $458.00,' the information will be interpretated as alleging current money of the United States." Roach v. State, (Okl. Cr.) 287 P 1095. (3) "Where an information charges the taking of money by robbery, describing the property as '$200 in ten and twenty dollar bills,' the information will be interpreted as alleging current money of the United States." Jenkins v. State, (Okl. Cr.) 280 P 477.

[86] Griffith v. Com., 9 Ky. Op. 513.

"The indictment is good. It is immaterial whether the notes were lawful currency of the country or not. The indictment is for robbery. If the notes are of any value the party committing the offense is guilty. No technical description can be given of them and none other should be required." Griffith v. Com., supra.

Foreign money see infra § 91.

[87] Wade v. State, 35 Tex. Cr. 170, 32 SW 772, 60 AmSR 31.

[88] See statutory provisions.

[89] Wade v. State, supra.

[a] **Description held insufficient.**—"One dollar in Mexican money, of the value of fifty cents." Wade v. State, 35 Tex. Cr. 170, 32 SW 772, 60 AmSR 31.

[90] See supra §§ 88-91.

[91] See cases infra this note.

[a] **"About $18 in money."**—Cosby v. Com., 185 Ky. 503, 217 SW 357.

[b] **"Fifty dollars in money,** of the value of fifty dollars." Maxwell v. State, 9 Ga. A. 875, 72 SE 445.

[c] **"Eleven dollars in money, which then and there passed current as money** of the United States of America and of the value of eleven dollars." Noe v. State, 78 Tex. Cr. 661, 662, 182 SW 1122.

[d] **"Four dollars of good and lawful money** of the United States of America and of the value of four dollars." Peo. v. Jordan, 303 Ill. 316,

[§ 93] **b. Value**[97]**—(1) In General.** It must appear from the indictment or information that the article taken had some value.[98] Although there is authority to the contrary,[99] the general rule is that value need not be averred by a distinct and specific allegation,[1] nor accurately,[2] unless required by statute.[3]

Where several articles are taken, the separate value need not be alleged.[4] But it has been held that where articles of different kinds are alleged to have been taken, and only the collective value of the whole is averred, there can be no conviction of robbery upon proof of taking one kind alone.[5]

[§ 94] **(2) Money.**[6] In an indictment or information for robbery by taking money, it is customary to allege the amount taken, and an additional allegation as to value is often included.[7] But as the term money itself imports some value,[8] of which fact the court will take judicial notice,[9] it is not necessary, even when the allegations must show some value,[10] to describe money with respect to its value,[11] and, at

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135 NE 729.

[e] **"Money, both coin and currency** in the approximate amount of $458.00." Roach v. State, (Okl. Cr.) 287 P 1095.

92. See infra this note.

[a] **"The sum of $88.30."**—Hooper v. Com., 204 Ky. 32, 263 SW 659.

93. See cases infra this note.

[a] **"'Five dollars in paper money** of the value of five dollars' sufficiently describes the property alleged to have been stolen." Humphries v. State, 100 Ga. 260, 28 SE 25.

[b] **"Thirty dollars of greenbacks."**—Wesley v. State, 61 Ala. 282.

[c] **"One United States note,** commonly called greenback, of the value of ten dollars." McEntee v. State, 24 Wis. 43.

[d] **"One hundred and sixty dollars in bank notes, current money** of the United States of America, of the value of one hundred and sixty dollars, a better description of the money being to the grand jury unknown." Terrell v. State, 76 Tex. Cr. 428, 174 SW 1088, 1089.

[e] **"$200 in ten and twenty dollar bills."**—Jenkins v. State, (Okl. Cr.) 280 P 477. To same effect Roach v. State, (Okl. Cr.) 287 P 1095.

[f] **"The sum of $1745 in paper currency** of the United States of America." State v. Shonhausen, 26 La. Ann. 421. To same effect State v. Carro, 26 La. Ann. 377.

[g] **"One $10 bill, of the lawful currency** of the United States of America, of the denomination of $10." Boyd v. State, 153 Ala. 41, 43, 45 S 591.

[h] **"One twenty-dollar bill** of the value of twenty dollars, and four five dollar bills of the value of twenty dollars." Baldwin v. State, 204 Ala. 91, 85 S 304; Walker v. State, 17 Ala. A. 416, 85 S 305.

[i] **"Forty dollars, paper currency,** money of the United States of America, of the value of forty dollars." Gables v. State, (Tex. Cr.) 68 SW 288.

94. See cases infra this note.

[a] **"Current silver coin of the realm** of the value of one dollar and fifteen cents." Montgomery v. State, 169 Ala. 12, 53 S 991.

[b] **"Thirty cents in specie coin of the United States,** consisting of one piece of the denomination of twenty-five cents and one piece of the denomination of five cents." Nevill v. State, 133 Ala. 99, 101, 32 S 596.

[c] **"Fifty cents in money,** which then and there passed current as money of the United States of America, and of the value of fifty cents." Gables v. State, (Tex. Cr.) 68 SW 288.

[d] **"One half dollar, one quarter dollar, and four dimes,** in silver coinage of the U. S. A." Montgomery v. State, 169 Ala. 12, 16, 53 S 991.

[e] **"Seventy dollars in gold, current money** of the United States of America, of the value of seventy dollars." Terrell v. State, 76 Tex. Cr. 428, 174 SW 1088, 1089.

[f] **"Three silver dollars in coin** of the value of three dollars." Kirk v. State, 35 Tex. Cr. 224, 32 SW 1045.

[g] **"Silver coin of the value of,"** etc. Compton v. State, 67 Tex. Cr. 15, 148 SW 580; State v. Jackson, 26 W. Va. 250.

[h] **"Two dollars in silver coin** money of the United States, of the value of two dollars." Moore v. State, 36 Tex. Cr. 88, 35 SW 668.

[i] **"Three copper cent pieces,** each of the value of one cent." Moore v. State, 36 Tex. Cr. 88, 35 SW 668.

95. See supra §§ 88–91.

96. See cases infra this note.

[a] **"'Fifteen dollars in gold coin'** without any specification of the number of pieces, or of the character or identity of the coin, or any portion of it," is an insufficient description. Arnold v. State, 52 Ind. 281, 21 AmR 175.

[b] **"'One two bill,** lawful currency of the United States of America' etc." Watts v. State, (Ala.) 39 S 455 (indictment bad on demurrer).

[c] **"Ten dollars in money of United States currency"** is too indefinite a description, as the term "currency" may mean coin, bank notes, or notes issued by the government. Croker v. State, 47 Ala. 53.

97. As element of offense see supra § 16.

98. Peo. v. Carpenter, 315 Ill. 87, 145 NE 664; Peo. v. Fiereto, 303 Ill. 186, 135 NE 417; Peo. v. Nolan, 250 Ill. 351, 95 NE 140, 34 LRANS 301, AnnCas1912B 401; Com. v. Cahill, 12 Allen (Mass.) 540.

99. Com. v. Cahill, supra. See Jackson v. State, 69 Ala. 249 (decided under statute, but containing dicta to the effect that a distinct averment of value was essential at common law).

[a] **On analogy to larceny.**—While the value of the property taken is immaterial, both at common law and under statute it must be property subject of larceny, and the indictment for robbery must contain distinct averments as to value such as would be essential in larceny indictments. Com. v. Cahill, 12 Allen (Mass.) 540.

Necessity for alleging value in indictment for larceny see Larceny § 301.

1. Kan.—In re Wheatley, 114 Kan. 747, 220 P 213 (a habeas corpus case expressly disapproving State v. Sagermond, 40 Kan. 107, 19 P 370, 10 AmSR 169 so far as the latter held that there must be an allegation of value).

Ky.—Baldwin v. Com., 2 KyL 439; Bolden v. Com., 11 Ky. Op. 183; Nichols v. Com., 3 Ky. Op. 258.

Me.—State v. Perley, 86 Me. 427, 30 A 74, 41 AmSR 564.

N. C.—State v. Brown, 113 N. C. 645, 18 SE 51.

Tex.—Thompson v. State, 90 Tex. Cr. 15, 234 SW 401; Gunter v. State, 90 Tex. Cr. 147, 233 SW 843, 844; Williams v. State, 34 Tex. Cr. 523, 31 SW 405; Williams v. State, 10 Tex. A. 8.

Wash.—State v. Rowan, 84 Wash. 158, 146 P 374.

"The value of the property taken in a robbery case is not necessary to be stated in the indictment." Gunter v. State, supra.

[a] **Where use of the words "goods and chattels"** sufficiently implies value without any further allegation thereof. Buntin v. State, 68 Ind. 38 (indictment for attempt to rob).

2. Peo. v. Nolan, 250 Ill. 351, 95 NE 140, 34 LRANS 301, AnnCas1912B 401.

3. Jackson v. State, 69 Ala. 249.

[a] **Where the form of indictment for robbery prescribed by code** contains a distinct averment as to value, an indictment omitting such averment is bad. Jackson v. State, 69 Ala. 249.

4. Jackson v. State, supra; Com. v. Cahill, 12 Allen (Mass.) 540.

5. Com. v. Cahill, supra.

6. Allegations as to value of money generally see Indictments and Informations § 276 text and notes 3, 4.

7. See supra §§ 88–92.

8. Peo. v. Carpenter, 315 Ill. 87, 145 NE 664; Peo. v. Fiereto, 303 Ill. 186, 135 NE 417.

9. Roach v. State, (Okl. Cr.) 287 P 1095; Jenkins v. State, (Okl. Cr.) 280 P 477.

10. See supra § 93.

11. Peo. v. Carpenter, 315 Ill. 87, 145 NE 664; Peo. v. Fiereto, 303 Ill. 186, 135 NE 417; Roach v. State, (Okl. Cr.) 287 P 1095, 1097; Jenkins v. State, (Okl. Cr.) 280 P 477, 478;

For **later cases, developments** and **changes** in the law see **Annotations,** same title and section number.

least in the absence of preliminary objection, an allegation that money of value unknown was taken will support a conviction for robbery.[12]

Surplusage. Where the indictment or information contains an allegation of a particular value, such allegation may be treated as surplusage.[13]

[§ 95] **c. Ownership or Right to Possession[14]—(1) In General.** There is authority stating broadly that the indictment or information should contain an allegation as to the ownership of the property taken.[15] But the true rule would seem to be that an allegation as to ownership is not essential,[16] except in so far as such an allegation may be necessary to identify the property taken,[17] or to negative defendant's ownership thereof.[18]

[§ 96] **(2) Absence of Ownership by Accused.** The general rule[19] is that the indictment or information should contain allegations sufficient to negative accused's ownership of the property taken.[20] In other words, there should be an allegation setting out the ownership of the property taken, in so far as necessary to negative the idea that accused was taking his own property.[21]

Sufficiency of allegations. Allegations held sufficient to negative accused's ownership of the property

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Carlile v. State, 97 Tex. Cr. 477, 262 SW 489.

"The first contention is that the information is insufficient in failing to particularly describe the money taken in the robbery and in failing to allege the value of it. The information described the property taken as '$200 in ten and twenty dollar bills.' This is a sufficient allegation on this point. Where an information charges that money is taken either by larceny or robbery, it is properly construed to mean money of the United States, and the court will take judicial knowledge of its value." Jenkins v. State, supra [quot Roach v. State, supra].

[a] **Foreign money.**—Carlile v. State, 97 Tex. Cr. 477, 262 SW 489, 490 (wherein the court said: "The indictment upon which the former trial was had described the property taken from Dennett as 'two hundred pesos in Mexican money,' but did not allege its value. This was unimportant, however, as in an indictment for robbery it is unnecessary to allege value; it not affecting the penalty").

[12] Peo. v. Hewitt, 78 Cal. A. 426, 248 P 1021.

[a] **Illustration.**—An information charging defendant with taking "a certain sum of money, the amount of which is to the district attorney unknown," is sufficient on appeal to support a conviction for robbery, where no demurrer was interposed. Peo. v. Hewitt, 78 Cal. A. 426, 248 P 1021.

[13] State v. Denby, 143 Wash. 288, 255 P 141.

[14] **As element of offense** see supra §§ 17-19.

[15] Boles v. State, 58 Ark. 35, 37, 22 SW 887; State v. Wasson, 126 Iowa 320, 101 NW 1125.

"The sufficiency of the indictment was challenged both by demurrer and by motion in arrest of judgment; and we think it is obviously defective in failing to allege the ownership of the money charged to have been taken. That allegation is found in all the common law precedents of indictments for robbery, and we have been unable to find any adjudged case in which it has been dispensed with under a statute similar to ours." Boles v. State, supra.

[16] Cal.—Peo. v. Sampson, 99 Cal. A. 306, 278 P 492.

Minn.—State v. Schnachtel, 157 Minn. 272, 196 NW 674.

Mo.—State v. Williams, 183 SW 308.

Philippine.—U. S. v. Gimeno, 3 Philipine 233.

Tenn.—Clemons v. State, 92 Tenn. 282, 21 SW 525.

Tex.—Williams v. State, 37 Tex. Cr. 147, 38 SW 999.

[17] Peo. v. Sampson, 99 Cal. A. 306, 278 P 492; Owen v. Com., 76 SW 3, 25 KyL 466.

"The rule is also that as a part of the description of the stolen property, and to aid in its identification, the indictment must aver its ownership, or show that the owner is unknown if that is a fact. . . . But the statement of the ownership is only a part of the description of the stolen property, and, if it is otherwise identified, the failure to charge in the indictment the ownership would not be material." Owen v. Com., supra.

[a] **Allegation sufficient.**—"The indictment before us charges that the property stolen was taken from the person of Marsh Atkinson by the defendant with the fraudulent intent to deprive said Atkinson permanently of his property. If it had been charged in addition that the things taken were Atkinson's property, nothing would have been added to the legal sense or to the definiteness of the description of the stolen property. The charge that it was stolen from the person of Marsh Atkinson was just as definite as a charge that it was his property, since proof of the taking of the property from his person would have been held sufficient proof of his ownership. To identify the property as that taken from the person of Marsh Atkinson is certainly as sufficient to apprise the defendant of what is meant as it would be to identify it as belonging to Atkinson." Owen v. Com., 76 SW 3, 4, 25 KyL 466.

[18] See infra § 96.

[19] [a] **In Oregon.**—Under Bellinger & C. Comp. § 1305, declaring the manner of stating the act constituting the crime, as set forth in the appendix to the Code, sufficient, where the form there given is applicable, and 1 Bellinger & C. Comp. p 750 form No. 9, prescribing the form for robbery as "feloniously took a gold watch (or as the case may be) from the person of C. D., and against his will, by violence to his person," an indictment for robbery need not state the name of the owner of the property alleged to have been taken. State v. Eddy, 46 Or. 625, 81 P 941, 82 P 707; State v. Dilley, 15 Or. 70, 13 P 648 ("The indictment at common law would have been defectve. It would have been necessary under that system to have averred specially to whom the money belonged. The fact that it might have belonged to the robber, and not to the person robbed, had to be negatived. The presumption was that the person having possession of it owned it, but that did not answer the nicety of the law, as it then existed. It had to be affirmatively alleged that it was the property of some one aside from the person who forcibly compelled its surrender to himself. But our statute has dispensed with the necessity of so useless a requirement. It has provided, in express terms, what shall be a sufficient statement in an indictment for robbery, being armed with a dangerous weapon").

Effect of defendant's plea see infra text and note 26.

[20] Higgins v. State, (Tex. A.) 19 SW 503. And see infra text and note 21.

[a] **Fatal defect.**—An indictment for robbery is fatally defective in failing to allege the ownership of the property taken in one other than defendant. Higgins v. State, (Tex. A.) 19 SW 503.

[21] U. S.—U. S. v. McNemara, 26 F. Cas. No. 15,701, 2 Cranch C. C. 45.

Ala.—Dorsey v. State, 134 Ala. 553, 33 S 350.

Ark.—Boles v. State, 58 Ark. 35, 22 SW 887.

Cal.—Peo. v. Ammerman, 118 Cal. 23, 50 P 15; Peo. v. Hicks, 66 Cal. 103, 4 P 1093; Peo. v. Vice, 21 Cal. 344; In re Myrtle, 2 Cal. A. 383, 84 P 335.

Ida.—State v. Brill, 21 Ida. 269, 121 P 79.

Ind.—Welch v. State, 195 Ind. 87, 143 NE 354.

Iowa.—State v. Wasson, 126 Iowa 320, 101 NW 1125.

Mass.—Com. v. Clifford, 8 Cush. 215.

Okl.—Wilson v. State, 28 Okl. Cr. 102, 228 P 1108.

Tex.—Smedly v. State, 30 Tex. 214; Higgins v. State, (A.) 19 SW 503; Parker v. State, 9 Tex. A. 351; Barnes v. State, 9 Tex. A. 128.

Wash.—State v. Morgan, 31 Wash. 226, 71 P 723; State v. Dengel, 24 Wash. 49, 63 P 1104.

Wyo.—McGinnis v. State, 16 Wyo. 72, 91 P 936.

[a] **In holding an indictment insufficient** it has been said: "Had the indictment charged that the gun was the property of the person from whom it was taken, it would probably have been supported by proof that this article was in his legal custody and control, though belonging to some third party. But in this indictment there is no allegation that it belonged to any one, much less does it affirmatively appear that it is the property of some one other than the defendants." Smedly v. State, 30 Tex. 214, 217.

taken include allegations that the property was unlawfully taken from the person and possession of the victim,[22] or that the property belonged to some one other than accused,[23] as to a third person.[24] An allegation that accused took the property "feloniously" has been held insufficient to aver ownership in one other than accused.[25]

Plea of accused, it has been held, may be such as to cure lack of or defective allegations in the indictment as to negativing the ownership of the property by accused.[26]

[§ 97] **(3) Ownership by Victim.**[27] The general rule is that it is not necessary to allege that the person from whom the property was taken was the owner thereof,[28] it being sufficient if it appears from the allegations that accused was not the owner.[29] Irrespective of where the legal title really lies, ownership may properly be laid in the person from whose physical possession the property was taken.[30] It is also permissible to lay the ownership in one neither the accused nor the person from whom the property was taken,[31] and in this connection it is not essential to allege that the person from whom the property was taken held the same in behalf of the actual owner.[32]

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[22] State v. Brill, 21 Ida. 269, 121 P 79. See Wilson v. State, 28 Okl. Cr. 102, 228 P 1108 (where the court said: "It is contended that the information is fatally defective in that it nowhere lays the ownership of the property stolen. The information charges: 'Did take, steal, and carry away from the person and possession of him, the said Claude Deshazo, certain personal property, to wit, one diamond set ring, one diamond set shirt stud, and $40 lawful money of the United States of America, with the unlawful, willful, wrongful and felonious intent then and there on the part of them, the said W. K. Decker and Homer Wilson, to rob and deprive the said Claude Deshazo of the aforesaid property, and to convert the same to the use and benefit of them the said W. K. Decker and Homer Wilson.' . . . The allegations above set forth are sufficient in themselves to negative the idea that the property in the possession of Deshazo alleged to have been forcibly taken from his person was not the property of Decker and Wilson").

[a] **Illustration.**—"An information charging robbery, in that the defendant 'did then and there, and by means of said fear inspired in the said Efton Carr, as aforesaid, willfully, unlawfully, and feloniously take, steal, and carry away from the person of said Efton Carr, and against the will of him, the said Efton Carr, certain personal property then and there being in the possession of, and on the person of said Efton Carr, to wit, eight dollars in silver coin, lawful money of the United States of America, and of the value of eight dollars,' is sufficient, and negatives the idea that said silver coin was the property of the defendant." State v. Brill, 21 Ida. 269, 121 P 79.

[23] Peo. v. Hale, 64 Cal. A. 523, 222 P 148.

[24] Welch v. State, 195 Ind. 87, 143 NE 354.

[a] **It was sufficient** to allege that the property belonged to an oil company from whose employee it was taken, was a sufficient allegation that it was not the property of defendant. Welch v. State, 195 Ind. 87, 143 NE 354.

[25] McGinnis v. State, 16 Wyo. 72, 91 P 936.

[a] **"Feloniously" has no reference to ownership.**—An information for robbery, which alleges that accused "feloniously" took from a person named by violence a specified sum, is fatally bad for failing to allege the ownership of the property; the word "feloniously" characterizing the act as being done with a criminal intent, and not being a substitute for an allegation of ownership. McGinnis v. State, 16 Wyo. 72, 91 P 936.

[26] In re Myrtle, 2 Cal. A. 383, 84 P 335, 339.

"It must appear either from the language of the information or the plea of the defendant that the property taken is not the property of the defendant." In re Myrtle, supra.

[a] **Plea of guilty** to a complaint charging robbery fully except that it omitted allegations of ownership has been held sufficient to show that defendant did not own the property taken so as to justify his conviction and cure the error in the complaint. In re Myrtle, 2 Cal. A. 383, 84 P 335.

[27] **As element of offense** see supra §§ 17-19.

[28] State v. Wales, 168 La. 322, 122 S 52; State v. Craft, 299 Mo. 332, 253 SW 224; Wilson v. State, 28 Okl. Cr. 102, 228 P 1108; Clemons v. State, 92 Tenn. 282, 21 SW 525.

[a] **Custody.**—Information alleging that defendant made an assault on the assistant cashier of a bank, who was at the time in lawful custody of money belonging to the bank, and, by putting him in fear of some immediate injury to his person, feloniously did rob and steal, etc., was sufficient, although it did not charge that the assistant cashier was owner of the money taken, or that he had any interest therein. State v. Craft, 299 Mo. 332, 253 SW 224.

[b] **Possession.**—"As to the matter of ownership, further than is to be inferred from the possession, the indictment is entirely silent. Is that a fatal defect? We think not. The statute declares that 'robbery is the felonious and forcible taking from the person of another goods or money of any value, by violence, or putting the person in fear' (Mill. & V. Code, § 5380;) and the indictment here contains all the words of the statute, or their full equivalent, and more besides." Clemons v. State, 92 Tenn. 282, 21 SW 525, 526.

[29] Wilson v. State, 28 Okl. Cr. 102, 228 P 1108, 1109; Dickson v. State, 26 Okl. Cr. 403, 224 P 723.

"It is not necessary in a robbery case to allege . . . that the property belonged to the party from whose possession it was forcibly taken. All that is requisite is an allegation that it belongs to some other person than the defendant." Wilson v. State, supra.

Necessity and sufficiency of allegations as to nonownership of accused see supra § 96.

[30] Ala.—Montgomery v. State. 169 Ala. 12, 53 S 991.

Ill.—Peo. v. Jordan, 303 Ill. 316, 135 NE 729.

Mo.—State v. Wilhite, 317 Mo. 388, 295 SW 82; State v. Montgomery, 181 Mo. 19, 79 SW 693, 67 LRA 343, 2 AnnCas 261 (discussing and overr State v. Morledge, 164 Mo. 522, 65 SW 226, and State v. Lawler, 130 Mo. 366, 32 SW 979, 51 AmSR 575, in so far as the latter cases hold contrary to the text rule).

Okl.—Dickson v. State, 26 Okl. Cr. 403, 224 P 723.

Tex.—Guyon v. State, 89 Tex. Cr. 287, 230 SW 408; Bell v. State, 77 Tex. Cr. 146, 177 SW 966.

"So far as the sufficiency of the charge is concerned, the ownership of the property taken may be laid in the one in possession of same at the time of the robbery." State v. Craft, 299 Mo. 332, 253 SW 224, 226.

"In charging . . . robbery it is proper to allege that the money or property taken was the property of the person in lawful possession of it, although he was not the actual owner, unless such possession was that of a mere custodian." State v. Wilhite, 317 Mo. 388, 295 SW 82.

[a] **Bank president.**—"Mr. Pondrom was president of the bank, in charge and control of its assets. He was clearly within the rule; his possessory rights were such that it was proper to charge that the property taken from him was his property," even though title thereto was in the bank. State v. Wilhite, 317 Mo. 388, 295 SW 82, 83.

[b] **Minor.**—Robbery being an offense against the person as well as against the property, an indictment charging the property to be that of a minor, which in fact was money his father had sent him to collect and bring to him, is sufficient. Montgomery v. State, 169 Ala. 12, 53 S 991.

[c] **Officer of law.**—Property levied on by an officer, being in his exclusive possession, ownership may be alleged in him in an indictment for robbery. Bell v. State, 77 Tex. Cr. 146, 177 SW 966.

[31] Com. v. Weiner, 255 Mass. 506, 152 NE 359, 360.

"The defendant, intending to steal goods which happened to belong to Skinner, assaulted Ives whose duty it was to protect them from thieves, put him in fear and forcibly took them away. Such an act is robbery, and the doer is properly convicted of robbery on in indictment which lays the ownership of the goods taken away in the true owner and not in the person attacked." Com. v. Weiner, supra.

[32] Peo. v. Dean, 66 Cal. A. 602. 226 P 943; State v. Schnachtel, 157 Minn. 272, 196 NW 674.

Under particular statutory provisions. Under statutes providing that if an offense is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured is immaterial,[33] an erroneous allegation as to ownership of the property taken does not make the indictment bad.[34]

[§ 98] **(4) Right to Possession by Victim**[35]**—(a) In General.** It is not necessary to allege that the victim's possession of the property taken was lawful.[36] The reasons for this rule have been stated to be that the possession is presumed lawful,[37] or, on the other hand, that robbery is shown, even if the victim's possession was unlawful.[38]

Particular statutory provisions. Under a statute defining robbery as a felonious taking of the property of another from the person or presence of such other, or from the person of his wife, servant, clerk, or agent,[39] the indictment or information will be sufficient to charge robbery, even though it alleges a taking from one other than those specified in the statute.[40]

[§ 99] **(b) Joint Possession.** The indictment or information may properly allege possession in either of two joint possessors of property taken.[41]

[§ 100] **4. Taking from Person, Presence, or Possession**[42]**—a. Necessity of Allegation.** The indictment or information must allege a taking from the person or presence of the victim.[43]

From possession.[44] Under statutes providing that to constitute robbery the taking must be of property in the possession of another from his person or im-

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[a] **As agent.**—"It is contended that the information is defective in not alleging that Lohman and Micotti, alleged to have had the possession of the personal property, were the agents of the Oakland-San Francisco Theater Company, alleged to have been the owner of the same. We see no merit in the objection." Peo. v. Dean, 66 Cal. A. 602, 226 P 943, 945.

[b] **Clerk.**—"The first point made is that the indictment is defective, in that while charging the felonious taking of the property of Shapira Bros. in the presence and against the will of one Deeny, it does not charge that the latter had any 'special interest in or charge or control over the property taken.' . . . The property, jewelry of very considerable value, was taken from the store of Shapira Bros. in St. Paul. Deeny was the clerk in charge of the stock and premises at the time of the robbery. It might have been better pleading to have indicated in the indictment his relationship to the stolen property. However, it was not necessary." State v. Schnachtel, 157 Minn. 272, 196 NW 674.

[c] **Stranger.**—"An indictment for robbery, charging defendant with the felonious taking of the property of A., in the presence and against the will of B., by force and violence, is not fatally defective because it fails to aver that B. had any relationship to A., or the possession or control of the property or any duty with respect to it. It was not necessary that the indictment negative the idea that B. might have been a stranger to both the property and its owner." State v. Schnachtel, 157 Minn. 272, 196 NW 674.

Lawfulness of possession see infra § 98.

[33] See statutory provisions.

[34] Peo. v. Smith, 78 Cal. A. 68, 248 P 261.

"It is sufficient to sustain a charge of robbery if the property feloniously and forcibly taken from the person of another belonged to any person other than the defendant; and under section 956 of the Penal Code an erroneous allegation as to ownership of the property is immaterial, if the offense is otherwise described with sufficient certainty to identify the act of robbery, the identity of the act of robbery being the same no matter upon whom the injury involved in the larceny which is included in the robbery might fall." Peo. v. Smith, supra.

[35] **Allegations as to taking from person, presence, or possession** see infra §§ 100-104.

[36] Danzey v. State, 126 Ala. 15, 16, 28 S 697; Welch v. State, 195 Ind. 87, 143 NE 354; State v. Wales, 168 La. 322, 122 S 52.

[a] **Illustration.**—An indictment alleging that accused took from the possession of A property belonging to B, is good as against the contention that it was defective in failing to further allege that A was "lawfully in possession or that he was the legal custodian." Danzey v. State, 126 Ala. 15, 16, 28 S 697.

[37] Danzey v. State, supra; Welch v. State, 195 Ind. 87, 143 NE 354.

"It will be presumed, unless the contrary apears, that his possession was lawful." Welch v. State, supra.

[38] State v. Wales, 168 La. 322, 122 S 52.

[a] **Thief.**—The lawfulness of the victim's possession need not be alleged because it would be robbery to take property from the peaceable possession of even one who had himself stolen it. State v. Wales, 168 La. 322, 122 S 52.

Lawfulness of victim's possession as element of offense see supra § 17.

Recapturing own property from unlawful possessor as not robbery see supra § 18.

[39] See statutory provisions.

[40] State v. Craft, 299 Mo. 332, 253 SW 224.

[a] **Not words of limitation.**—"The gravamen of the offense consists in the taking by violence, or by putting in fear, the money or property of another from one who was at the time in the lawful possession of the same. Whether that one was the owner or the legal custodian is immaterial so far as the charging of the offense is concerned. The words of the statute, therefore, defining those from whom the unlawful taking of property shall constitute robbery may be disregarded as words of description rather than of limitation. State v. Craft, 299 Mo. 332, 341, 253 SW 224.

[b] **Person in lawful possession.**—It is not necessary that the person alleged to have been in lawful possession of the property taken be limited to those named in the statute. State v. Craft, 299 Mo. 332, 253 SW 224.

[41] Thompson v. State, 91 Tex. Cr. 234, 237 SW 926.

[a] **Business.**—Property being in the joint possession of two persons engaged together in business, an indictment for robbery based on the taking of it correctly alleges the possession in one of them. Thompson v. State, 91 Tex. Cr. 234, 237 SW 926.

[42] **As element of offense** see supra §§ 20-23.

[43] Ala.—Henderson v. State, 172 Ala. 415, 55 S 816; Hill v. State, 145 Ala. 58, 40 S 654.

Cal.—Peo. v. Beck, 21 Cal. 385.

Ky.—Breckinridge v. Com., 97 Ky. 267, 30 SW 634, 17 KyL 163.

Miss.—Smith v. State, 82 Miss. 793, 35 S 178.

Mo.—State v. Lawler, 130 Mo. 366, 32 SW 979, 51 AmSR 575.

Tenn.—Kit v. State, 11 Humphr. 167.

Tex.—Smith v. State, 37 Tex. Cr. 342, 39 SW 933.

Utah.—Peo. v. Kerm, 8 Utah 268, 30 P 988.

"The offense of robbery, its vital element, being against the person, as well as the property, it is imperative that the indictment either pursue the Code form wherein the term 'person' is employed, or else that the averments particularly describe such a taking as, in legal effect, amounts to a taking from the person, viz., in the presence of the party offended against, and who then had the property 'under his direct, physical, personal control'—a taking not necessarily from actual contact of the body, but from under his personal protection." Henderson v. State, 172 Ala. 415, 55 S 816.

[a] **From wagon.**—(1) Where an indictment alleged the taking of personal property "from the wagon" of complainant, but did not charge a taking from complainant's person, or a taking of property under his then present personal protection, it was fatally defective. Henderson v. State, 172 Ala. 415, 55 S 816. (2) "The averment is that the property was taken 'from his wagon.' This allegation signifies the place from which the goods were taken, but does not, in any sense, refer the act to the person, as that is understood in legal parlance, when robbery is the crime intended to be charged. The indictment would not sustain a judgment of conviction of robbery." Henderson v. State, 172 Ala. 415, 55 S 816.

[44] **Allegation of taking from possession as not equivalent to allegation of taking from person or presence** see infra §§ 101, 103.

mediate presence,[45] an indictment charging that property was taken from the "presence" of the victim, but failing to charge his "possession," is defective.[46] But where the charge is that it was taken from his "person," a further allegation that it was also taken from his "possession" is not necessary.[47]

[§ 101] **b. Sufficiency—(1) From Person.** An allegation of a taking from the presence of the victim, is sufficient averment that it was taken from his "person,"[48] as the latter word is used in the law of robbery.[49] An allegation that property was taken from the "possession" of another is not sufficient as an allegation that it was taken from his "person."[50]

From "another person." An allegation that property was taken from "another person," is not sufficient as an allegation that it was taken from "the person of another."[51]

[§ 102] **(2) From Presence.** Aside from statutes relative to possession,[52] and in accordance with the rule requiring the victim to be in control of property taken from his presence,[53] it has been held that where an indictment alleges a taking from the "presence" of another, it must further allege his control or dominion over the property taken from his presence.[54]

[§ 103] **(3) From Person or Presence.** No set form of words is necessary to constitute an allegation of a taking from the person or presence of the victim, any language from which this may reasonably be inferred being sufficient.[55] But an allegation that property was taken from the "person or possession" of another is not equivalent to an allegation that it was taken from his "person or presence."[56]

Use of disjunctive. Since a taking from the "presence" of the victim is equivalent to a taking from his "person,"[57] and since synonymous terms may properly be laid in the disjunctive in an indictment,[58] it would seem on principle that an indictment for robbery may properly allege a taking from the person "or" presence, and there is judicial authority expressly to such effect;[59] but other authority is directly contrary.[60]

[§ 104] **(4) From Person or Possession.**[61] Under a statute making it robbery to take from the person "or" possession,[62] an indictment alleging a taking from the person "and" possession has been held sufficient.[63]

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[45] See supra § 20.

[46] Peo. v. Ham Tong, 155 Cal. 579, 102 P 263, 24 LRANS 481; Peo. v. Walbridge, 123 Cal. 273, 55 P 902; Peo. v. Ho Sing, 6 Cal. A. 752, 93 P 204; Rasberry v. State, 4 Okl. Cr. 613, 103 P 865, 872.

"In cases when property is taken in the immediate presence of its owner, it must be alleged that he was also in possession of such property, or the offense of robbery will not be charged." Rasberry v. State, supra.

[a] **On demurrer.**—Where an indictment did charge that property was taken from the "presence" of the victim, but did not charge that it was taken from his "possession," the indictment was demurrable. Peo. v. Ho Sing, 6 Cal. A. 752, 93 P 204.

[47] Peo. v. Walbridge, 123 Cal. 273, 55 P 902; Peo. v. Ah Sing, 95 Cal. 654, 30 P 796; Rasberry v. State, 4 Okl. Cr. 613, 103 P 865 [reh den 4 Okl. Cr. 634, 112 P 759].

[a] **One allegation includes the order.**—"When the allegation is that the property was taken from the person of another, it will be but an unnecessary repetition to allege that such property was in the possession of such person, for the first allegation necessarily includes the latter." Rasberry v. State, 4 Okl. Cr. 613, 103 P 865, 872.

[b] **The contention is too technical** to merit consideration, as an allegation of a taking from the actual person of the victim necessarily imports a taking from the possession. Peo. v. Walbridge, 123 Cal. 273, 55 P 902.

[48] State v. Wilson, 136 La. 345, 67 S 26; State v. Craft, 299 Mo. 332, 253 SW 224.

[a] **"The words 'in his presence' are by judicial construction** held to be substitutionary or tantamount in meaning to the words 'from his person,'" so that it is not essential that a taking "from the person" be alleged in so many words, an allegation of a taking from the presence being a sufficient allegation of a taking from the person. State v. Craft, 299 Mo. 332, 342, 253 SW 224.

[49] **Taking from person or presence as equivalent requirements** see supra §§ 20–22.

[50] Smith v. State, 37 Tex. Cr. 342, 39 SW 933.

[51] Peo. v. Beck, 21 Cal. 385.

[52] See supra § 100 text and notes 44–47.

[53] See supra § 17; especially text and note 14.

[54] State v. Hall, 54 Wash. 142, 102 P 888.

[a] **For instance,** where an information alleged that defendant took the property of the Spokane Merchants' Association from the immediate presence of G. E. Parsons, it was fatally defective for failure to allege possession of, or control or dominion over, the property by said Parsons. State v. Hall, 54 Wash. 142, 102 P 888.

[55] See cases infra this note.

[a] **Form sufficient.**—(1) An indictment charging "that the defendants, being each armed with a loaded revolver, made an assault upon Bruce Shaw, Ira Aull, Lyndall Wells, and Maude Quinn and by force and intimidation put them in bodily fear and danger of their lives, and 'from the personal possession, custody, and control of the said Bruce Shaw, Ira Aull, Lyndall Wells, and Maude Quinn then and there feloniously, forcibly, violently, and by intimidation did rob, steal, take, and carry away' the property described in the count, 'of the money, funds, and property of the Kincaid Trust & Savings Bank, a banking corporation,'" is not open to the objection that it fails to allege directly and certainly a taking either from the person or from the presence of the persons assaulted. Peo. v. O'Hara, 332 Ill. 436, 163 NE 804, 806. (2) "It does not say in so many words the property was taken from the person of McNeal, but it distinctly says that it was taken from McNeal, after saying he was in the possession of it at the time it was taken, and that it was taken from him by force, by pointing pistols and other weapons at him, and by putting him in fear. With these statements in the indictment, all to be taken as true on demurrer, we not only think it certain to a common intent, to a person of common understanding, that the money was taken from the person of McNeal, but that it is impossible to draw from the language used any other conclusion than that it was so taken. We think it sufficiently clear to enable the court to pronounce judgment on conviction, according to the right of the case. In this opinion we do not intend to indicate or sanction any change in the essential elements of the law of robbery, as that the property must be taken from the person of another, or in his presence, for such, accompanied by the assault, we regard as the distinguishing elements of the crime of robbery from larceny, but only to affirm that this is sufficiently charged in the indictment in this case." Breckinridge v. Com., 97 Ky. 267, 30 SW 634, 636, 17 KyL 163.

Use of disjunctive see infra text and notes 57–60.

[56] Hill v. State, 145 Ala. 58, 40 S 654.

[57] See supra §§ 21, 22, 101.

[58] See Indictments and Informations § 181 text and note 30.

[59] Terr. v. Kim Ung Pil, 26 Hawaii 725 [cit and disappr Slover v. Terr., 5 Okl. 506, 49 P 1009].

[60] Slover v. Terr., 5 Okl. 506, 49 P 1009.

[61] **Necessity of alleging taking "from possession" in addition to "from person or presence"** see supra § 100.

[62] See supra § 22.

[63] McCormick v. State, 110 Tex. Cr. 214, 8 SW (2d) 164.

[§ 105] **5. Force or Intimidation**[64]**—a. Necessity of Allegation.** Whenever force or intimidation is a necessary element of the crime,[65] it must be alleged in an indictment or information for robbery that the taking was accomplished by force or intimidation.[66]

[§ 106] **b. Sufficiency—(1) In General.** It is not necessary to allege both force and intimidation, an allegation of either being sufficient.[67] But if both force and intimidation are alleged, this does not render the indictment or information bad.[68]

An allegation of a taking "with force and arms" is not equivalent to an allegation of a taking by force or putting in fear,[69] and according to some authority is insufficient as a charge of robbery.[70] But in accordance with the rule that an allegation of either force or fear is sufficient,[71] better reasoned authority holds that an indictment charging robbery "with force and arms" is sufficient.[72]

Ability to injure. An allegation of present ability to commit a violent injury is not necessary.[73]

[§ 107] **(2) Degree of Force.**[74] In an indictment for robbery by actual violence, it is not necessary to include allegations as to the degree of force employed,[75] except where important as constituting an aggravating circumstance.[76]

[§ 108] **(3) Nature of Force or Intimidation Employed.** Except as the matter may be material to the degree or classification of the offense,[77] or under particular statutory provisions,[78] the indictment or information need not allege the kind or manner of force used,[79] nor the nature of the fear aroused,[80] nor the means by which the victim was intimidated.[81]

[§ 109] **(4) Particular Statutory Provisions.**[82] Under a statute providing for punishment of one who feloniously takes another's property "by assault or violence or by putting in fear of life, or bodily injury,"[83] the indictment must charge a taking by one of the modes specified in the statute.[84] Under a statute defining robbery as a felonious taking by assault and putting in fear or by “force and violence,”[85] an allegation of a taking “forcibly and by violence” sufficiently alleges a taking by force and violence.[86] Under a statute defining robbery as a felonious taking “by assault or by putting in fear of life or bodily injury,” and further providing that if a firearm or other deadly weapon is used, the punishment shall be death or a prescribed period of imprisonment,[87] ordinary robbery may be charged without stating the instrument or means by which the assault was made.[88] If the indictment charges use of a deadly weapon in such a form that striking out that portion would leave no charge of assault, violence or putting in fear, there can be no conviction for ordinary robbery.[89]

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[64] **Allegation of taking by force as equivalent to allegation of taking against will** see infra § 110.

[65] See supra §§ 24-44.

[66] Ark.—Sutton v. State, 162 Ark. 438, 258 SW 632.

Ga.—Lampkin v. State, 87 Ga. 516, 13 SE 523.

Ill.—Collins v. Peo., 39 Ill. 233.

Ind.—Craig v. State, 157 Ind. 574, 62 NE 5.

Iowa.—State v. Brewer, 53 Iowa 735, 6 NW 62.

Ky.—Blanton v. Com., 58 SW 422, 22 KyL 515.

La.—State v. England, 148 La. 178, 86 S 728; State v. Cook, 20 La. Ann. 145.

Mass.—Com. v. Humphries, 7 Mass. 242.

Miss.—State v. Presley, 91 Miss. 377, 44 S 827.

Mo.—State v. Montgomery, 109 Mo. 645, 19 SW 221, 23 AmSR 684.

Mont.—State v. Gill, 21 Mont. 151, 53 P 184.

N. C.—State v. Brown, 113 N. C. 645, 18 SE 51; State v. Cowan, 29 N. C. 239.

N. D.—State v. Sanders, 14 N. D. 203, 103 NW 419.

Tenn.—McTigue v. State, 4 Baxt. 313.

Tex.—Wiley v. State, (Cr. A.) 43 SW 995; Trimble v. State, 16 Tex. A. 115.

Utah.—State v. Waldron, 28 Utah 14, 76 P 1135; State v. Davis, 28 Utah 10, 76 P 705.

Wis.—Gillotti v. State, 135 Wis. 634, 116 NW 252.

[a] **Such averments are sacramental.**—State v. England, 148 La. 178, 86 S 728.

[67] Ark.—Sutton v. State, 162 Ark. 438, 258 SW 632; Traver v. State, 72 Ark. 524, 81 SW 615; Young v. State, 50 Ark. 501, 8 SW 828; Clary v. State, 33 Ark. 561.

Ky.—Blanton v. Com., 58 SW 422, 22 KyL 515.

Mass.—Com. v. Humphries, 7 Mass. 242.

Miss.—Cunningham v. State, 28 S 750.

Mo.—State v. Lawler, 130 Mo. 366, 32 SW 979, 51 AmSR 575; State v. Stinson, 124 Mo. 447, 27 SW 1098.

Mont.—State v. Paisley, 36 Mont. 237, 92 P 566.

Tex.—Burns v. State, (Cr.) 70 SW 24.

[a] **Forms held sufficient.**—(1) To charge robbery by force. State v. Paisley, 36 Mont. 237, 92 P 566; Gilloti v. State, 135 Wis. 634, 116 NW 252. (2) To charge robbery by intimidation. Peo. v. Conrad, 299 Ill. 473, 132 NE 466.

Force or intimidation as alternative requirements see supra § 24.

[68] Lampkin v. State, 87 Ga. 516, 13 SE 523; State v. Williams, (Mo.) 183 SW 308; State v. Flynn, 258 Mo. 211, 167 SW 516.

[a] **The allegations are not inconsistent,** as both force and intimidation may be used by the robber. State v. Flynn, 258 Mo. 211, 167 SW 516.

[b] **One crime.**—"The indictment in the present case does not charge two distinct offenses. Robbery by force and robbery by intimidation are two grades of the same offense, and both grades may be charged in the same count." Lampkin v. State, 87 Ga. 516, 13 SE 523, 524. To same effect Long v. State, 12 Ga. 293.

Snatching as grade of robbery see supra § 69.

[69] State v. England, 148 La. 178, 86 S 728.

[70] State v. England, supra; Com. v. Mills, 3 Pa. Super. 161.

[71] See supra text and note 67.

[72] Lanford v. Com., 209 Ky. 693, 273 SW 492; Robinson v. State, 67 Tex. Cr. 170, 149 SW 190; Robinson v. State, 67 Tex. Cr. 79, 149 SW 186.

[a] **As averment of robbery by force.**—Where an indictment alleged that defendant took another's property "unlawfully, willfully, and feloniously with force and arms, and by putting him in fear," even if it was assumed that the indictment was insufficient as an allegation of putting in fear because it did not aver the kind of fear (which, however, was unnecessary), nevertheless it was sufficient as an averment of robbery by force. Lanford v. Com., 209 Ky. 693, 273 SW 492.

[b] **As averment of robbery by "violence" under statute.**—An indictment charging robbery by "force and arms" sufficiently alleged that the offense was effected by "violence" within the meaning of a statute defining robbery, inter alia, as a taking by violence. Robinson v. State, 67 Tex. Cr. 79, 149 SW 186.

[73] Craig v. State, 157 Ind. 574, 62 NE 5.

[74] **Not element of crime** see supra § 31.

[75] State v. Paisley, 36 Mont. 237, 92 P 566.

[76] See statutory provisions; and infra § 213.

Degrees of offense see infra § 115.

[77] See infra § 115 et seq.

[78] See statutory provisions. And compare infra § 109.

[79] State v. Paisley, 36 Mont. 237, 92 P 566.

[80] Lanford v. Com., 209 Ky. 693, 273 SW 492, 493 [cit Cyc].

See State v. Clancy, 20 Mont. 498, 52 P 267 (where the court refused to decide whether the kind of fear must be specified, as in any event there was a sufficient allegation of force).

[a] **Indictment alleging merely a taking "by putting in fear,"** without averring of what the victim was put in fear, whether of bodily harm, or injury to property, or reputation, was sufficient. Lanford v. Com., 209 Ky. 693, 273 SW 492.

[81] State v. Moore, 203 Mo. 624, 102 SW 537, 538; State v. Sanders, 14 N. D. 203, 103 NW 419.

"It is insisted that the information is bad, in that it fails to inform the defendant of the nature of the instrument or the means by which he put the prosecuting witness in fear of immediate injury to his person. As to this neither the common law nor our statute requires the grand jury or the prosecuting attorney to set out the means by which the victim of a robbery is put into fear." State v. Moore, supra.

[82] **As to degree or classification of offense** see infra § 114 et seq.

[83] See supra § 25.

[84] Shoemake v. State, 89 Tex. Cr. 480, 232 SW 518; Robinson v. State, 67 Tex. Cr. 170, 149 SW 190; Robin-

“Accomplished by” force or fear. Under statutes defining robbery as a felonious taking “accomplished by” means of force or fear,[90] an information is sufficient if it alleges a taking accomplished “with” force or fear,[91] but is insufficient if it alleges a taking “accompanied” by force or fear.[92]

Fear of “immediate” injury. Under a statute providing that any one feloniously taking the personal property of another “by violence to his person or by putting such person in fear of some immediate injury to his person,” shall be guilty of robbery,[93] an indictment charging robbery by putting in fear must allege that the fear was of “immediate” injury.[94]

[§ 110] **6. Consent.**[95] Except as the rule may be changed by statute,[96] it must appear from the indictment or information that the victim did not consent to the taking of his property.[97] But it is not

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son v. State, 67 Tex. Cr. 79, 149 SW 186.

[a] **Sufficient allegation of taking by violence.**—Robinson v. State, 67 Tex. Cr. 79, 149 SW 186.

[b] **Insufficient allegation of taking by assault.**—An indictment charging that defendants “did then and there unlawfully in and upon A., make an assault, and then and there by said ———, fraudulently and against the will of the said A., take from the person,” etc., was insufficient to charge robbery, since it omitted the allegation that defendants took the property by means of an assault. Shoemake v. State, 89 Tex. Cr. 480, 232 SW 518.

85. See supra § 25.

86. Gillotti v. State, 135 Wis. 634, 116 NW 252, 253.

“There is no appreciable distinction between the two expressions. One could not perpetrate an offense ‘forcibly and by violence’ without doing so by force and violence. To make a distinction between the two expressions fatal to an information, especially after conviction, would be a most clear violation of the statutory demand and the settled judicial policy that ‘the court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party. . . .’ Section 2829, St. 1898.” Gillotti v. State, supra.

87. See supra § 25.

88. Perez v. State, 92 Tex. Cr. 444, 244 SW 548.

“Under this statute, to charge ordinary robbery it is sufficient to charge that an assault was made without stating the instrument or means by which the assault was made, and if it is desired to prosecute for a felony less than capital, the indictment should be so drawn.” Perez v. State, supra.

Necessity of such averment in indictment for robbery with firearm, etc. see infra § 117 text and note 40.

89. Perez v. State, 92 Tex. Cr. 444, 244 SW 548.

“In the instant case . . . the pleader has chosen to depart from the form ordinarily used, and to charge an assault with a deadly weapon, thus characterizing the case as a capital one. If the part of the indictment which charges that the assault was made with a deadly weapon be abandoned, then there is nothing left in the indictment upon which to prosecute. In other words, striking out the words ‘assault with a deadly weapon’ from the indictment (as the indictment in this case is drawn) strikes from it an element of the offense, and gives the case a different aspect from an indictment which contains an averment appropriate to charge ordinary robbery; but with the added averment that, in committing the assault, a deadly weapon was used, in such an indictment the latter averment may be abandoned without in any sense marring the perfection of that part of the indictment which charges ordinary robbery.” Perez v. State, supra.

90. See supra § 25.

91. State v. Pemberton, 39 Mont. 530, 104 P 556.

[a] **Equivalent word.**—“The sufficiency of the information is attacked on two grounds: . . . (2) that it is not alleged that the taking of the property was accomplished by force or fear. The statute defines robbery as follows: ‘Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.’ Rev. Codes § 8309. . . . It is . . . said that the word ‘with’ does not appropriately express the means by which the taking was accomplished, and hence that one of the elements of the crime, as defined by the statute, to wit, that it must have been accomplished by force or fear, is omitted from the charge. This contention is also without substantial merit. It is always better that the charge be made in the language of the statute, but the necessity to pursue this course is not imperative in any case. Terms expressive of the same idea may be employed provided only they embody the essential elements of the crime as defined in the statute.” State v. Pemberton, 39 Mont. 530, 104 P 556, 557.

92. State v. Johnson, 26 Mont. 9, 66 P 290, 291.

“Between ‘accomplished’ and ‘accompanied’ a clear distinction in meaning exists. For example, thunder often accompanies lightning, but thunder is not the means or agency whereby the physical results of lightning are accomplished. Again, the means by which an act could have been accomplished may have accompanied the doing of the act without being the efficient means or agency; that is, without accomplishing it.” State v. Johnson, supra.

93. See supra § 25.

94. Webb v. State, 99 Miss. 545, 55 S 356.

[a] **Failure to so allege is a fatal defect.**—Webb v. State, 99 Miss. 545, 55 S 356.

Allegation as essential when charging degree or classification of offense see infra § 115.

95. **Nonconsent as element of offense** see supra §§ 45–48.

96. See statutory provisions.

[a] **In Texas.**—(1) The authorities are conflicting as to whether nonconsent is an element of robbery under a statute silent as to consent. See supra § 45 text and note 74 [c]. (2) But it appears settled that the indictment need not allege a taking without the victim's consent (Wilson v. State, 111 Tex. Cr. 134, 11 SW (2d) 803; McCormick v. State, 110 Tex. Cr. 214, 8 SW (2d) 164), (3) nor against his will (McCormick v. State, supra [where the court said: “In an indictment for robbery, where the statutory elements of the offense are averred, it is not necessary to allege ‘want of consent,’ nor that the taking was ‘against the will’ of the owner”]). (4) Where, however, such terms are used, their use will not vitiate the indictment (Wilson v. State, supra); (5) and they may be rejected as surplusage (Wilson v. State, supra; McCormick v. State, supra), (6) at least where the taking was by assault and violence (Chancey v. State, 58 Tex. Cr. 54, 124 SW 426).

97. Cal.—Peo. v. Riley, 75 Cal. 98, 16 P 544.

Ga.—Scott v. State, 25 Ga. A. 553, 103 SE 732.

Ill.—Peo. v. Carpenter, 315 Ill. 87, 145 NE 664.

Ind.—Anderson v. State, 28 Ind. 22.

Iowa.—State v. Kegan, 62 Iowa 106, 17 NW 179.

La.—State v. Wilson, 136 La. 345, 67 S 26.

Miss.—State v. Presley, 91 Miss. 377, 44 S 827.

Mo.—State v. Massey, 274 Mo. 578, 204 SW 541.

Or.—State v. Parr, 54 Or. 316, 103 P 434.

Pa.—Acker v. Com., 94 Pa. 284.

Utah.—State v. La Chall, 28 Utah 80, 77 P 3.

necessary to show this by an express allegation that the taking was against his will,[98] or "against"[99] or "without"[1] his consent. The lack of consent may be implied from equivalent allegations,[2] such as allegations that the property was taken by force or intimidation.[3]

Sufficiency of particular phrases. In accordance with the foregoing principles,[4] it has been held that consent was sufficiently denied where the indictment or information alleged that the taking was accomplished by means of "force,"[5] "force and fear,"[6] "force and intimidation,"[7] or "force and violence;"[8] or that it was done "unlawfully, feloniously, forcibly, and violently."[9]

[§ 111] **7. Intent[10]—a. Necessity of Allegation.** The intent to steal, or animus furandi, should be alleged in some form in the indictment or information.[11]

Wash.—State v. Denby, 143 Wash. 288, 255 P 141.

[a] **Apt words.**—"Any information attempting to charge the crime of robbery which fails substantially to allege that the taking of the property was against the will of the person robbed would be palpably bad. For obviously no person can be robbed when he consents to or acquiesces in the taking of his property. There must be apt words in the information which negative the idea of consent or acquiescence." State v. Massey, 274 Mo. 578, 204 SW 541, 542.

[b] **"It must appear from some source** in an information for robbery that the taking was not with the consent of the victim." State v. Denby, 143 Wash. 288, 255 P 141, 143.

[c] **Alleging "with" consent.**—"The indictment in this case, which charged the offense of robbery, failing to allege that the fraudulent, wrongful, and violent taking of the property was without the consent of the owner, but, on the contrary, alleging that the taking was with his consent, set forth no crime under the laws of this state; and the verdict of 'guilty of robbery by force and violence' and the judgment based thereon were void, and the court erred in overruling the defendant's motion to arrest the judgment." Scott v. State, 25 Ga. A. 553, 103 SE 732.

[98] Cal.—Peo. v. Riley, 75 Cal. 98, 16 P 544.

Ill.—Peo. v. Carpenter, 315 Ill. 87, 145 NE 664.

Ind.—Anderson v. State, 28 Ind. 22; Terry v. State, 13 Ind. 70.

La.—State v. Wilson, 136 La. 345, 67 S 26; State v. Patterson, 42 La. Ann. 934, 8 S 529.

Miss.—State v. Presley, 91 Miss. 377, 44 S 827.

Mo.—State v. Massey, 274 Mo. 578, 204 SW 541.

Or.—State v. Parr, 54 Or. 316, 103 P 434.

Pa.—Acker v. Com., 94 Pa. 284.

Utah.—State v. La Chall, 28 Utah 80, 77 P 3.

Wash.—State v. Denby, 143 Wash. 288, 255 P 141.

[a] **The set and fixed phrase,** "against the will" need not be used in an indictment for robbery. State v. Massey, 274 Mo. 578, 204 SW 541.

[b] **Tautological.**—"In an information for robbery of money from a person named therein, and which alleges force, violence, and putting said person in fear by defendants, the words 'against his will' would be tautological; and they are unnecessary." State v. Wilson, 136 La. 345, 67 S 26.

[99] Peo. v. Carpenter, 315 Ill. 87, 145 NE 664.

[1] Peo. v. Shuler, 28 Cal. 490; Shehany v. Lowry, 170 Ga. 70, 152 SE 114.

[2] Shehany v. Lowry, supra; State v. Massey, 274 Mo. 578, 204 SW 541, 543; Acker v. Com., 94 Pa. 284.

"While it is held, both at common law and under statutes defining 'robbery,' with a uniformity which is almost universal, that the indictment must charge that the taking of the property is 'against the will' of the person robbed, the cases hold and the text-books likewise lay down the rule that it is not an absolute prerequisite that the set and fixed phrase of the statute or of the common law be used to negative the fact of consent; that any other word or words which clearly allege that the caption of the property taken was without the consent of the person robbed is sufficient." State v. Massey, supra.

[3] Cal.—Peo. v. Riley, 75 Cal. 98, 16 P 544.

Ga.—Shehany v. Lowry, 170 Ga. 70, 152 SE 114.

Ind.—Anderson v. State, 28 Ind. 22; Terry v. State, 13 Ind. 70.

Iowa.—State v. Kegan, 62 Iowa 106, 17 NW 179.

La.—State v. Wilson, 136 La. 345, 67 S 26; State v. Patterson, 42 La. Ann. 934, 8 S 529.

Miss.—State v. Presley, 91 Miss. 377, 44 S 827.

Mo.—State v. Massey, 274 Mo. 578, 204 SW 541.

Or.—State v. Parr, 54 Or. 316, 103 P 434.

Utah.—State v. La Chall, 28 Utah 80, 77 P 3.

Wash.—State v. Denby, 143 Wash. 288, 255 P 141.

"Manifestly, either physical violence or intimidation implies a restraint of violence, and nothing else; and the addition of the phrase 'against his will,' would have been an unnecessary tautology, instead of a requisite element of description." State v. Patterson, 42 La. Ann. 934, 8 S 529.

[4] See supra text and notes 96-3.

[5] State v. Massey, 274 Mo. 578, 204 SW 541.

[a] **"The noun 'force'** means 'power exerted against will or consent.' Webster's Dictionary," and accordingly an indictment alleging a taking by force sufficiently alleges a taking against the will. State v. Massey, 274 Mo. 578, 204 SW 541, 543.

[6] Peo. v. Riley, 75 Cal. 98, 16 P 544; State v. La Chall, 28 Utah 80, 77 P 3.

[7] Shehany v. Lowry, 170 Ga. 70, 152 SE 114, 115.

"In the present case it is charged that the defendant committed the offense of 'robbery, for that said accused . . . with force and arms did wrongfully, fraudulently, and violently, by force and intimidation, take from the person of R. C. Parker, with intent to steal the same,' etc. It would seem that the language used necessarily conveys a clear implication that the money was taken without the consent of the owner as that term is understood in law." Shehany v. Lowry, supra.

[8] State v. Kegan, 62 Iowa 106, 17 NW 179; State v. Patterson, 42 La. Ann. 934, 8 S 529; State v. Denby, 143 Wash. 288, 255 P 141.

[9] State v. Presley, 91 Miss. 377, 44 S 827.

"In the case before us we think the indictment charges a condition of things manifestly against the will of the party robbed. Technical law is good law under proper circumstances, but not where it shocks common sense. One cannot 'unlawfully, feloniously, forcibly, and violently' rob and steal from the person of another, without it being against his will." State v. Presley, supra.

[10] **As element of offense** see supra §§ 49-53.

[11] U. S.—Vane v. U. S., 254 Fed. 32, 165 CCA 442.

Ala.—Chappell v. State, 52 Ala. 359.

Ark.—Keeton v. State, 70 Ark. 163, 66 SW 645.

Ga.—Holland v. State, 8 Ga. A. 202, 68 SE 861.

Hawaii.—Terr. v. Kim Ung Pil, 26 Hawaii 725.

Iowa.—State v. Kegan, 62 Iowa 106, 17 NW 179.

Ky.—Ward v. Com., 14 Bush 233.

La.—State v. Henry, 47 La. Ann. 1587, 18 S 638.

Miss.—McCray v. State, 153 Miss. 587, 121 S 291; Jones v. State, 95 Miss. 121, 48 S 407, 21 AnnCas 1137.

Mo.—State v. Brown, 104 Mo. 365, 16 SW 406.

Mont.—State v. Gill, 21 Mont. 151, 53 P 184.

Nebr.—Smith v. State, 72 Nebr. 345, 100 NW 806.

Nev.—State v. Switzer, 38 Nev. 108, 145 P 925.

N. C.—State v. Brown, 113 N. C. 645, 18 SE 51.

N. D.—State v. Fordham, 13 N. D. 494, 101 NW 888.

Oh.—Boose v. State, 10 Oh. St. 575; Matthews v. State, 4 Oh. St. 539; Turner v. State, 1 Oh. St. 422.

Okl.—Rasberry v. State, 4 Okl. Cr. 613, 103 P 865.

Philippine.—U. S. v. Alabot, 38 Philippine 698.

Tex.—Murphy v. State, 43 Tex. Cr. 515, 67 SW 108.

[a] **Fatal omission.**—"In this there are two counts; the first of which is in the form prescribed by the Revised Code (p. 809, Form No. 12), except that it does not contain the word 'feloniously,' in charging the acts constituting the offence. This omission is fatal. Without it,

Willfulness. An indictment charging an unlawful and felonious taking need not also allege that the taking was willful.[12]

Wrongfulness. An allegation charging that the act was committed feloniously need not further charge that it was done wrongfully.[13]

[§ 112] **b. Sufficiency—(1) In General.** According to certain authorities an indictment or information for robbery must allege the intent to steal expressly, and in so many words.[14] Other courts take the view that an indictment or information is sufficient if it employs any apt language indicating the existence of the intent to steal.[15] Under the latter view it is not necessary to use the word "steal,"[16] and is sufficient to allege that the property was taken feloniously[17] or fraudulently.[18]

[§ 113] **(2) Act as to Which Intent Should Be Alleged.** The allegation of intent to steal should be made with reference to the actual taking,[19] of the property, and need not be made with reference to an assault preceding such taking.[20] If the taking is alleged to have been felonious, it is not necessary further to allege that the putting in fear was done feloniously.[21]

[§ 114] **8. Grade, Degree, or Classification of Offense[22]—a. In General.** An indictment or information for robbery need not allege facts showing the degree or other classification of the robbery.[23] But

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or some corresponding expression, there is nothing in the indictment to show that the persons engaged in the affair were not merely indulging in mischievous sport, instead of being actuated animo furandi." Chappell v. State, 52 Ala. 359, 360.

12. Lissenbee v. Com., 198 Ky. 639, 249 SW 782.

[a] **Rule applied.**—An indictment for robbery, charging that the property was taken unlawfully and feloniously, is not objectionable for omitting the word "willfully," since the words "unlawfully and feloniously" clearly import a willful act. Lissenbee v. Com., 198 Ky. 639, 249 SW 782.

13. Rasberry v. State, 4 Okl. Cr. 613, 103 P 865.

"Every felonious act is necessarily a wrongful act. Therefore, in an information or indictment for robbery, when it is alleged that the act was feloniously done, this in substance and effect charges that it was wrongfully done, and it is not necessary to go further and allege that such act was wrongful." Rasberry v. State, supra.

14. McCray v. State, 153 Miss. 587, 121 S 291; Jones v. State, 95 Miss. 121, 48 S 407, 21 AnnCas 1137.

[a] **Rule applied.**—(1) An indictment, which alleges that accused willfully, unlawfully, and feloniously took the property of prosecutor from his person and against his will, by violence and by putting him in fear of immediate injury, but fails to charge an intent to steal, is defective. Jones v. State, 95 Miss. 121, 48 S 407, 21 AnnCas 1137. (2) "Indictment for robbery charging that defendant, with force and arms, willfully, unlawfully, and feloniously took personal property of one J. W. from person of said J. W. against his will, by violence to his person or by putting said J. W. in fear of some immediate injury to his person, held not to charge an offense, since there was no charge of intent on part of defendant to steal personal property taken from person of J. W." McCray v. State, 153 Miss. 587, 121 S 291.

15. U. S.—Vane v. U. S., 254 Fed. 32.

Ark.—Keeton v. State, 70 Ark. 163, 66 SW 645.

Ga.—Holland v. State, 8 Ga. A. 202, 68 SE 861.

Hawaii.—Terr. v. Kim Ung Pil, 26 Hawaii 725.

La.—State v. Henry, 47 La. Ann 1587, 18 S 638.

Mo.—State v. Huffman, 238 SW 430; State v. Lasson, 292 Mo. 155, 238 SW 101.

Nev.—State v. Switzer, 38 Nev. 108, 145 P 925.

[a] **Rule applied.**—An indictment based on Rev. St. (1919) § 3307, covering the requirements of the statutes, was held good, although not charging that defendant committed the acts "with the felonious intent on his part to convert said money to his own use without the consent of the owner." State v. Huffman, (Mo.) 238 SW 430.

[b] **Forms held sufficient.**—(1) "The argument of appellant is that the indictment is uncertain as to the intent, and duplicitous in its effect; but it is not subject to that criticism. It specifically charges that the defendant did, against the will and consent of Gentry Carson, with force and arms, take, steal, and carry away $25 of his lawful money, with the felonious and fraudulent intent then and there to convert the same to his own use, and to deprive permanently the said Gentry Carson of his property." Davis v. Com., 230 Ky. 589, 20 SW (2d) 455, 456. (2) Other forms. State v. Henry, 47 La. Ann. 1587, 18 S 638; State v. Gill, 21 Mont. 151, 53 P 184.

[c] **In Philippines.**—(1) The intent to gain or commission of robbery "con animo de lucro" need not be specifically alleged, as it will be implied from an allegation of a taking of another's property by force or violence. U. S. v. Alabot, 38 Philippine 698. To same effect U. S. v. San Pedro, 4 Philippine 405. (2) "When a complaint alleges, as this one does, that the defendant, armed with a gun, at midnight entered the house of the complaining witness, and after beating him with the butt of the gun took from his family money and other property and departed with it, it is not necessary to add thereto the statement that the defendant acted 'feloniously.'" U. S. v. Gimeno, 3 Philippine 233.

16. Keeton v. State, 70 Ark. 163, 66 SW 645.

17. Keeton v. State, supra; Terr. v. Kim Ung Pil, 26 Hawaii 725, 735; State v. Switzer, 38 Nev. 108, 109, 145 P 925.

"The word 'feloniously' used in the body of the indictment, in a legal sense, means, 'done with intent to commit crime.' Its use in an indictment has uniformly been held to be a sufficient averment of the intent necessary to constitute the crime." State v. Switzer, supra [quot Terr. v. Kim Ung Pil, supra].

"The words, 'feloniously did take from the person,' etc., as used in the indictment, import stealing lucri causa and an asportation with intent to deprive the person in the lawful possession of the property in the goods." Keeton v. State, 70 Ark. 163, 165, 66 SW 645.

[a] **Illustration.**—Where an information charged that defendant did "willfully, unlawfully and feloniously take from the person of and in the presence of Jack Vera . . . of the personal goods and chattels of the said Jack Vera," etc., it was not open to the objection that it was fatally defective for failure to allege that the property was taken with intent to commit a larceny, as the use of the word "feloniously" was a sufficient allegation of the necessary intent. State v. Switzer, 38 Nev. 108, 145 P 925.

18. Holland v. State, 8 Ga. A. 202, 68 SE 861.

[a] **Intent to steal implied.**—The word "fraudulently" in an indictment alleging that accused unlawfully, wrongfully, fraudulently, etc., took certain property from the owner by force, implies an intent to steal. Holland v. State, 8 Ga. A. 202, 68 SE 861.

19. Webster v. State, 146 Miss. 682, 111 S 749, 750.

"The intent to steal which must be alleged and proven . . . is with reference to the property taken, the intent to steal which is here sufficiently alleged, for an allegation that a person 'did feloniously take, steal, and carry away property,' of course, includes the idea that he took the property with the intention of stealing it." Webster v. State, supra.

20. Webster v. State, supra.

[a] **In a prosecution for the complete offense of robbery,** it is sufficient to allege that the taking was with the intent to steal without also alleging that the assault preceding such taking was made with the intent to steal. Webster v. State, 146 Miss. 682, 111 S 749.

21. State v. Brown, 104 Mo. 365, 16 SW 406.

22. **Generally** see supra §§ 55-71.

Conviction of included offense see Indictments and Informations §§ 497, 504, 523.

23. Peo. v. Tognola, 83 Cal. A. 34, 256 P 455; Peo. v. Egan, 77 Cal. A. 279, 246 P 337, 339; Wissinger v. State, (Okl. Cr.) 264 P 631.

"In cases of murder, arson, and burglary it has been held that allegations for such purpose are not essential, . . . and no valid reason appears why a different rule of pleading should be required in charging the where it is sought to charge accused with a particular degree or other classification of robbery, it is ordinarily held that the indictment or information must allege facts sufficient to bring the charge within the definition[24] of such degree or other classification in order to sustain a conviction therefor,[25] although there is authority to the contrary.[26]

[§ 115] **b. Degrees. Dangerous or deadly weapon.** Under statutes classifying as first degree, robbery committed while armed with a dangerous or deadly weapon,[27] it is not necessary to describe[28] or name[29] the deadly weapon, nor, according to one authority, is it even necessary to allege that accused was armed with a deadly weapon.[30]

Force or fear of immediate personal injury. Under statutes defining first degree robbery as one accomplished by force or fear of immediate personal injury,[31] an indictment charging robbery by intimidation is defective as a charge of first degree robbery if it fails to set forth the facts so as to show the nature of the injury feared.[32]

Particular forms. In accordance with general principles above stated,[33] particular indictments or informations have been held sufficient as charging first[34] or second[35] degree robbery.

[§ 116] **c. Classification without Formal Degrees—(1) Committed by Two or More.** Under statutes providing one maximum punishment for robbery committed singly, and another and greater maximum punishment for robbery committed with a companion,[36] conviction under an indictment charging that AB "and" CD committed a specified robbery is sufficient to justify imposition of sentence under the joint robbery statute as against the contention that "with" should have been used instead of "and."[37]

An indictment for conjoint robbery need not allege a conspiracy.[38]

[§ 117] **(2) Dangerous or Deadly Weapon.** Under statutes not dividing the offense into formal degrees, but making robbery while armed with a dangerous or deadly weapon a classification of the crime more serious than when committed while not so armed,[39] to charge such classification of robbery the indictment or information must contain appropriate allegations respecting a dangerous or deadly weapon.[40] To charge the classification of robbery without a dangerous or deadly weapon, it is ordinarily not necessary expressly to aver the absence of such weapon,[41] although there is authority to the contrary.[42] An indictment properly charging robbery but failing properly to charge use of a dangerous or deadly weapon, is sufficient to sustain a conviction of

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crime of robbery. The point is therefore without merit." Peo. v. Egan, supra.

[24] See supra §§ 55–71; and see passim supra §§ 1–10.

[25] Cal.—Peo. v. Tognola, 83 Cal. A. 34, 256 P 455.

Fla.—Martin v. State, 129 S 112.

Mich.—Peo. v. Calvin, 60 Mich. 113, 26 NW 851.

Minn.—State v. O'Neill, 71 Minn. 399, 73 NW 1091.

Mo.—State v. Holmes, 289 SW 904.

Okl.—Slover v. Terr., 5 Okl. 506, 49 P 1009.

Pa.—Com. v. Dolinak, 86 Pa. Super. 455.

Tex.—Perez v. State, 92 Tex. Cr. 444, 244 SW 548.

Wis.—Gillotti v. State, 135 Wis. 634, 116 NW 252.

[a] **Complaint held sufficient to charge robbery of inhabited house.**—Peo. v. Jagon, 49 Philippine 555.

Particular degrees or classifications see infra §§ 115–118.

[26] Peo. v. Tognola, 83 Cal. A. 34, 256 P 455.

[27] See supra § 56.

[28] Peo. v. Tognola, 83 Cal. A. 34, 256 P 455.

[29] Peo. v. Tognola, supra.

[30] Peo. v. Tognola, supra.

Contrary rule under other statutes see infra § 117 text and note 40.

Specific elements of degree or classification generally see supra §§ 56, 61, 65.

[31] See supra § 59.

[32] Slover v. Terr., 5 Okl. 506, 49 P 1009.

[33] See supra § 114.

[34] State v. Holmes, 316 Mo. 122, 289 SW 904; State v. McCullough, 316 Mo. 42, 289 SW 811; State v. Baldwin, (Mo.) 281 SW 940; State v. Roberts, 311 Mo. 521, 278 SW 971; State v. McCombs, (Mo.) 259 SW 440; State v. Roderman, 297 Mo. 143, 248 SW 964.

[a] **Aided by accomplice actually present.**—Peo. v. Roof, 138 App. Div. 633, 122 NYS 677.

[b] **Putting in fear of immediate injury to person.**—State v. Goodwin, (Mo.) 300 SW 723.

[35] See case infra this note.

[a] **Without dangerous weapon but by actual force and violence.**—State v. O'Neil, 71 Minn. 399, 73 NW 1091.

[36] See supra § 67.

[37] Com. v. Dolinak, 86 Pa. Super. 455.

[a] **Robo en cuadrilla,** form held sufficient to charge. U. S. v. Aquino, 11 Philippine 244. See also Bandolerismo 6 C. J. p 1176; En Cuadrilla 20 C. J. p 1249.

[38] Wilson v. State, 28 Okl. Cr. 102, 228 P 1108, 1109.

"It is first contended that the information fails to state the facts showing a conspiracy between Wilson and his codefendant Decker. This is unnecessary under the statutory provisions of this state. Section 2574, Compiled Statutes 1921." Wilson v. State, supra.

[a] **Forms held sufficient.**—Wilson v. State, 28 Okl. Cr. 102, 228 P 1108; Rasberry v. State, 4 Okl. Cr. 613, 103 P 865, 4 Okl. Cr. 634, 112 P 759.

[39] See supra § 65.

[40] Martin v. State, (Fla.) 129 S 112; Perez v. State, 92 Tex. Cr. 444, 244 SW 548; Gillotti v. State, 135 Wis. 634, 116 NW 252, 253.

Rule under different statutes see supra § 115.

[a] **Capital offense.**—Under a statute providing that if a firearm or other deadly weapon is used in robbery, the punishment shall be death or life imprisonment, an averment that a deadly weapon was used is essential to charge such classification of robbery. Perez v. State, 92 Tex. Cr. 444, 244 SW 548.

[b] **Indictment held sufficient.**—Peo. v. Carpenter, 315 Ill. 87, 145 NE 664, 665 ("The indictment charges that the plaintiffs in error feloniously made an assault with a dangerous weapon on Ohlemiller and robbed him. The indictment was sufficient").

Sufficiency without such averment as charge of ordinary robbery see supra § 109 text and notes 88, 89.

[41] Martin v. State, (Fla.) 129 S 112; Gillotti v. State, 135 Wis. 634, 116 NW 252, 253.

"To hold that neglect to charge absence of such characteristic is fatal as to the lowest grade of the offense does seem, 'as claimed by the state,' extremely technical and entirely out of harmony with the policy of our system heretofore indicated. It would seem, looking to the substance of things, that an allegation as to whether the offender was 'armed with a dangerous weapon' is only essential to show that the offense is one of a higher degree than the lowest which would include the latter." Gillotti v. State, supra.

[a] **Illustration.**—St. (1898) § 4378, provides that any person who shall by force and violence, or by assault and putting in fear, feloniously rob, steal, and take from the person of another any money or other property which may be the subject of larceny, the robber not being armed with a dangerous weapon, shall be punished, etc. Held that an information charging that defendants did feloniously make an assault on prosecutor, and did take certain described property from his person and against his will, feloniously, forcibly, and by violence, and by putting prosecutor in fear, and did take, steal, and carry the same away, stated an offense under such section, although it did not allege that defendants were not armed with a dangerous weapon. Gillotti v. State, 135 Wis. 634, 116 NW 252.

[42] Peo. v. Calvin, 60 Mich. 113, 26 NW 851.

robbery without a dangerous weapon.[43]

Description of weapon. Where the indictment charges that accused was armed with a firearm, it need not further allege that it was loaded.[44]

[§ 118] **(3) Highway Robbery.**[45] Under statutes making highway robbery a particular classification of the offense[46] and providing that this classification of the crime shall consist in "robbing any person in or near any public highway,"[47] an indictment is incorrect which alleges that the offense was committed "in"[48] or "near"[49] the highway, instead of using the disjunctive phrase "in or near" the highway. It is not necessary to specify the particular highway.[50]

[§ 119] **9. Joinder of Parties.**[51] General rules[52] apply with respect to joint indictments or informations in prosecutions for robbery.[53]

[§ 120] **B. Issues, Proof, and Variance**[54]**—1. In General.** In accordance with general rules[55] in a prosecution for robbery the state must prove both the commission of the offense[56] and the guilty participation of accused therein[57] as charged in the indictment or information.[58]

[§ 121] **2. Time of Offense.** In accordance with general rules,[59] under an allegation of a robbery committed on a specified date, the prosecution may prove commission of the offense at any time within the period of limitations.[60]

[§ 122] **3. Participation**[61] **in Robbery.**[62] Where two or more participated in the commission of the offense,[63] failure to prove that an accused participated in the actual taking may not constitute a variance.[64] Failure to prove that other persons participated in the robbery as charged is not necessarily a variance.[65] An indictment charging that accused and another, as principals, committed robbery, was sufficient to inform accused that he was charged with entering into a conspiracy to commit the crime and that pursuant to such conspiracy the crime was committed, so as to authorize evidence of such conspiracy.[66]

[§ 123] **4. Identification of Victim.**[67] The proof must correspond with the allegations as to the identity of the person robbed.[68]

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[43] Peo. v. Boer, 262 Ill. 152, 104 NE 162.

[a] **Disregarded as surplusage.**—Where, in one count, defendant was properly charged with robbery and at the end of such count was incorporated an allegation that defendant used a dangerous weapon with intent to kill or maim himself [instead of the victim] if resisted, the erroneous allegation as to use of a dangerous weapon could be disregarded as surplusage and the indictment could support a conviction of robbery. Peo. v. Boer, 262 Ill. 152, 104 NE 162.

[44] Peo. v. Dwyer, 324 Ill. 363, 155 NE 316.

[a] **Pistol.**—"An indictment which charges that the defendant was armed with a pistol charges that he was armed with a deadly weapon," without necessity of the further allegation that it was loaded. Peo. v. Dwyer, 324 Ill. 363, 155 NE 316.

[45] **Defined** see supra § 5.

[46] See statutory provisions.

[47] See statutory provisions.

[48] State v. Burke, 73 N. C. 83, 88; State v. Anthony, 29 N. C. 234.

"Without stopping to inquire whether an indictment following the very words of the statute and laying the offence 'in or near' the public highway, would be good, it is sufficient to say, that the indictment in this case charges the offence to have been committed in the highway, which is the most precise and unobjectionable, if not the only proper way of laying it, instead of in the disjunctive." State v. Burke, supra.

[a] **"In the common and public highway of the state"** is indefinite as to the particular place where the robbery was committed, but is sufficiently certain to apprise the prisoner of the place of offense and to support a plea of autrefois acquit. State v. Wilson, 67 N. C. 456.

[49] State v. Anthony, 29 N. C. 234.

[a] **There may be two counts,** one alleging "in" and the other "near" the highway as the place of robbery. State v. Anthony, 29 N. C. 234.

[50] State v. Burke, 73 N. C. 83; State v. Wilson, 67 N. C. 456.

[51] **Joint commission of robbery as affecting classification of offense:** Generally see supra § 67. Indictment see supra § 116.

[52] See Indictments and Informations §§ 312–319.

[53] Ray v. Com., 230 Ky. 656, 20 SW (2d) 484, 66 ALR 1297; Rex v. Rafferty, 2 Lew. C. C. 271, 168 Reprint 1151.

[a] **Averment of being together.**—Where several are indicted for robbery, it is not necessary to aver that they were together. Rex v. Rafferty, 2 Lew. C. C. 271, 168 Reprint 1151.

[54] **Conviction of included offenses** see Indictments and Informations §§ 497, 523.

[55] See Indictments and Informations §§ 438–481.

[56] Peo. v. Brooks, 334 Ill. 549, 166 NE 35.

Evidence of the crime generally see infra §§ 144–180.

[57] Peo. v. Brooks, 334 Ill. 549, 166 NE 35.

[a] **Corpus delicti and identity.**—"Proof sufficient to sustain a conviction of the crime of robbery involves the proof of two distinct propositions: First, that money, goods, or other valuable thing was feloniously and violently taken from the person of another by force or intimidation; and, second, that it was done by the person charged and none other—in other words, proof of the corpus delicti and the identity of the accused." Peo. v. Brooks, 334 Ill. 549, 166 NE 35, 37.

[58] **Charging the offense** see supra §§ 82–119.

[59] See Indictments and Informations § 454.

[60] Perry v. State, 69 Tex. Cr. 644, 155 SW 263.

[a] **December 2 and 23.**—"Those bills that complain that whereas the indictment alleged that 'the offense was committed on or about the 3d day of December, that the court erred in permitting the witnesses to testify that the offense occurred on December 23d,' present no error. The state could prove any date within the period of limitation." Perry v. State, 69 Tex. Cr. 644, 155 SW 263, 264.

[61] **Of person accused generally** see Indictments and Informations §§ 455–458.

[62] **Necessity of proving** see supra § 120.

[63] See supra § 79. See also Criminal Law §§ 99–161.

[64] State v. Harmon, (Mo.) 296 SW 391; State v. Malsogoff, 88 Wash. 419, 153 P 379, 381.

[a] **Proof that defendant held the gun** while a codefendant took the money is sufficient. State v. Harmon, (Mo.) 296 SW 391.

[b] **Standing guard outside building where robbery was committed.**—State v. Malsogoff, 88 Wash. 419, 153 P 379.

[65] Collins v. State, 77 Tex. Cr. 156, 178 SW 345.

[a] **Different counts.**—Where the count of the indictment on which he was tried charged accused as principal in committing a robbery, and did not name any other person, the fact that persons named in other counts as principals were shown not to have participated does not constitute a variance. Collins v. State, 77 Tex. Cr. 156, 178 SW 345.

[66] Ray v. Com., 230 Ky. 656, 20 SW (2d) 484, 66 ALR 1297.

[67] **General rules** see Indictments and Informations §§ 463–468.

Legal existence of corporation see infra § 134.

[68] Sparks v. State, 77 Tex. Cr. 154, 177 SW 968; Eshelman v. State, (Tex. Cr.) 177 SW 969.

[a] **Evidence held sufficient** to show that person named in indictment was the one robbed. Peo. v. Cummings, 338 Ill. 636, 170 NE 750.

[b] **Evidence held insufficient** to establish the identity of the person robbed with the person named in the indictment as having been robbed. Sparks v. State, 77 Tex. Cr. 154, 177 SW 968; Eshelman v. State, (Tex. Cr.) 177 SW 969.

For **later cases, developments** and **changes** in the law see **Annotations,** same title and section number.

Name. Where identity is sufficiently established, a variance between the name of the victim as stated in the indictment or information and his real name as shown by the proof is immaterial.[69] But where identity is not established, a variance as to names is fatal.[70]

[§ 124] 5. **Taking.**[71] In a prosecution for robbery it is essential to prove that there was a taking of the property.[72]

[§ 125] 6. **Property Taken**[73]**—a. Nature or Character—(1) In General.** The evidence must show a taking of some property answering substantially to that described as taken.[74]

Evidence admissible[75] **under pleadings.** Evidence that property other than that alleged to have been taken was found in the possession of accused may be admissible where bearing on the issue of his participation in the robbery.[76]

[§ 126] **(2) Chattels.**[77] Evidence that accused took a chattel substantially, although not exactly, answering the description alleged in the indictment or information is not a fatal variance.[78]

[§ 127] **(3) Money—(a) In General.** Where the indictment or information contains a specific description of the money taken,[79] the proof must correspond to such description.[80] But where the indictment charges the taking of a certain sum without a specific description, it is unnecessary to prove the kind or character of money taken.[81]

Statutes relative to larceny providing that on a trial for larceny of money or bank-notes, the particular species need not be proved[82] have been held applicable to prosecutions for robbery.[83]

[§ 128] **(b) Current or Lawful Money of United States.** Allegations that accused took lawful or current money of the United States may be supported by evidence of the general character of the money taken without specific testimony to the effect that the money was current or lawful,[84] and it is not necessary under such allegations to prove that the money was technically legal tender.[85] It is sufficient to

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69. Peo. v. Gonzales, 6 Cal. Unrep. Cas. 263, 56 P 804; Peo. v. Decina, 306 Ill. 260, 137 NE 844.

[a] **Name by which known.**—There was no fatal variance because person robbed was stated in indictment to be John Ross, while his real name was John Rossi; the injured party having adopted Ross as his name when he went into business, and being generally known by that name, since "it is sufficient to sustain an averment of a particular name that a person is usually or popularly known by such name." Peo. v. Decina, 306 Ill. 260, 137 NE 844, 845.

70. Parks v. State, 21 Ala. A. 177, 106 S 218.

[a] **Rule applied.**—Where indictment charging robbery named Wesley Duke as the victim, and the evidence tended to show that J. W. Duke was the victim, variance held reversible error. Parks v. State, 21 Ala. A. 177, 106 S 218.

71. As element of offense see supra § 13.

72. Peo. v. Foss, 85 Cal. A. 269, 259 P 123.

[a] **A conviction for "robbery" cannot be sustained** where evidence did not show any taking. Peo. v. Foss, 85 Cal. A. 269, 259 P 123.

Necessity of proving elements of crime generally see Indictments and Informations § 438 text and note 54.

73. Subjects of robbery see supra §§ 14–19.

74. Peo. v. Richards, 136 Cal. 127, 68 P 477; Com. v. Cahill, 12 Allen (Mass.) 540. Compare Burke v. Peo., 148 Ill. 70, 35 NE 376 (where it was alleged that defendants took a pocketbook and specified kinds and denominations of money therein, and the proof showing the taking of a pocketbook containing undescribed money was held sufficient to support a conviction. While the court rested its decision on the ground that proof of the description of the property taken need not correspond with the allegations, it will be noted that allegations and proof did correspond in the facts that (1) a pocketbook was taken, and (2) it contained money).

75. Generally see infra § 165.

76. Kellum v. State, 91 Tex. Cr. 272, 238 SW 940.

[a] **Other property of victim.**—Testimony that victim's property was found in possession of defendant was admissible, though not the particular property alleged in the indictment to have been taken. Kellum v. State, 91 Tex. Cr. 272, 238 SW 940.

77. Money see infra §§ 127–129.

78. State v. Alexander, 66 Kan. 726, 72 P 227.

[a] **Gold watch.**—Where it was alleged that defendant took a gold watch, proof that he took a gold-filled watch was not a variance. State v. Alexander, 66 Kan. 726, 72 P 227.

79. See passim supra §§ 88–92.

80. Scott v. Com., 9 Ky. Op. 835; McCaskey v. State, 76 Tex. Cr. 255, 174 SW 338.

[a] **"Greenback currency."**—"Whether it was necessary to give any description of the bills or money alleged to have been taken, it is unnecessary to decide. It is sufficient that the thing taken was charged to be two dollars in 'greenback currency.' It was necessary to identify the offense charged with that proven, that it should have been proved by some sort of evidence that the currency taken was greenback currency." Scott v. Com., 9 Ky. Op. 835, 839.

[b] **Proof of two nickels under allegation of one dime.**—The variance between an indictment alleging that accused robbed prosecutor of "one ten-cent piece, commonly known as one dime," and the proof of robbery of "two five-cent pieces of money, commonly known as nickels," is fatal. McCaskey v. State, 76 Tex. Cr. 255, 174 SW 338.

Number or quantity of bills or coins see infra § 130.

81. Webb v. State, 110 Tex. Cr. 503, 7 SW (2d) 562, 9 SW (2d) 335.

[a] **Sum of $500.**—"The point made in the motion that the indictment charged that the money taken 'was current money of the United States' seems to be based upon a mistake of fact. The indictment does not contain such an averment. It charges that from Berry there was taken the sum of $500. With that averment the evidence corresponded. Under the averment, it is unnecessary to prove either the character or the value of the money." Webb v. State, 110 Tex. Cr. 503, 7 SW (2d) 562, 564, 9 SW (2d) 335.

82. See Larceny §§ 374–376.

83. State v. Rodgers, 21 Mont. 143, 53 P 97.

[a] **Bank-notes.**—Pen. Code § 2109, providing that on a trial for larceny of money or bank-notes, the allegations of the indictment are sustained if defendant be proved to have stolen any money or notes, although the particular species be not proved, is applicable to a prosecution for robbery. State v. Rodgers, 21 Mont. 143, 53 P 97.

84. Jenkins v. State, 131 Ark. 312, 198 SW 877; State v. Brache, 63 Wash. 396, 115 P 853.

[a] **Rule applied.**—(1) "The indictment alleged that the money stolen was lawful money of the United States; and it is said the testimony does not establish this allegation. It does not appear that any witness said, in express terms, that the money stolen was lawful money of the United States. But this is the necessary meaning of all that was said on that subject. The cashier described the money as $645 in gold, and as currency and silver and minor coin. Other witnesses used the same terms, and also referred to portions of the money as greenbacks and as bills, and it is perfectly obvious that in each instance the witness was talking about the medium of exchange circulating in this country which we call money and which is measured in dollars, and we conclude, therefore, that there was no failure of proof on this subject." Jenkins v. State, 131 Ark. 312, 198 SW 877, 879. (2) Proof that one was robbed of one dollar and seventy-five cents in "silver" and of "a twenty-dollar gold piece and one five" sufficiently showed a robbery of "lawful money of the United States," as charged in the information, in the absence of specific objection at the trial and countervailing evidence, as the jury could properly presume that this was lawful money of the United States. State v. Brache, 63 Wash. 396, 115 P 853.

85. Jackson v. State, 60 Tex. Cr. 273, 131 SW 1076.

[a] **Rule applied.**—"Appellant insists that the court was in error in not giving his special requested instruction which, in substance, is as follows: 'That the meaning and

show that accused took greenbacks,[86] or silver,[87] or dollars.[88] Conversely, an indictment charging the taking of dollars may be supported by proof of the taking of lawful money of the United States.[89]

[§ 129] **(c) Foreign Money.** An indictment charging the taking of foreign money of specified denomination may be supported by proof of the taking of gold coin only, where the evidence shows such denomination may consist of either gold or silver coins.[90] Under an allegation charging a taking of paper money of a foreign country, it is not a variance to prove the taking of bank bills passing current as money.[91]

[§ 130] **b. Number or Quantity.** Where an indictment alleges the taking of several articles, it is sufficient to prove the taking of any one of them.[92] It must, however, be shown that accused took some one of the things alleged.[93]

[§ 131] **c. Value.** While it must appear that the thing taken had a value,[94] it is not necessary to prove the amount of the value.[95] Consequently a conviction may be sustained on proof of either a greater[96] or a less[97] value than that alleged in the indictment

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signification of the term "lawful money" as alleged in the indictment is legal tender coin, or legal tender treasury notes of the United States, and does not mean nor include United States treasury warrants, and does not include bank bills though they pass as current, nor gold certificates, and unless you find in this case from the evidence that the money taken from H. B. Steele, if you find that it was so taken, was lawful money as herein defined, you will acquit the defendant.' This charge does not present the law as it is held in this state. The court charged the jury that if they should believe from the evidence beyond a reasonable doubt that appellant took the money described in the indictment, or any part thereof, with intent to deprive Steele of the value of said money, or any part thereof, he would be guilty. The money described in the indictment, under our decisions, is lawful current money of the United States. The court, therefore, did not err in refusing the requested instruction." Jackson v. State, 60 Tex. Cr. 273, 131 SW 1076.

86. Haskins v. State, 148 Ark. 351, 230 SW 5.

[a] **Allegation of taking good and lawful money** of the United States may be supported by proof that he took "greenbacks." Haskins v. State, 148 Ark. 351, 230 SW 5.

87. State v. Mitchell, 36 Ida. 724, 214 P 217.

[a] **United States currency.**—"The information charged robbery by the felonious taking 'from the person, possession and immediate presence of one Manual Coster, $10 in currency of the value of $10 in gold coin of the United States of America,' while the proof shows the taking of silver money of uncertain amount. This is no variance. Silver money is currency." State v. Mitchell, 36 Ida. 724, 214 P 217.

88. Jenkins v. State, 131 Ark. 312, 198 SW 877; Eshelman v. State, (Tex. Cr.) 177 SW 969; Sparks v. State, 77 Tex. Cr. 154, 177 SW 968. But see Early v. State, 56 Tex. Cr. 61, 118 SW 1036 (where the court said: "The indictment charges appellant with taking one $10 bill and one $5 bill, current money of the United States of America, of the value of $15. The evidence shows only that he took 'a $10 bill and a $5 bill.' No witness undertakes to testify what character of money, or that it was in fact money, further than the expressions '$5 bill' and '$10 bill.' There is not a word of evidence that indicates it was United States currency of any sort, greenbacks, national bank bills, or treasury notes; but the evidence leaves it just as stated—'a $5 bill and a $10 bill.' Why it is thus left is not explained in the record. This allegation of the indictment must be proved. The evidence is too indefinite in this respect").

[a] **Reason for rule.**—A charge that one robbed another of six dollars "lawful money of the United States" is sustained by proof that the accused took "dollars" in money since only in the United States is the "dollar" used as a monetary denomination. Eshelman v. State, (Tex. Cr.) 177 SW 969; Sparks v. State, 77 Tex. Cr. 154, 177 SW 968.

89. Thompson v. State, 90 Tex. Cr. 125, 234 SW 406.

[a] **Rule applied.**—An indictment for robbery, describing the property stolen as "six hundred dollars," was sufficient to authorize proof that money of the United States was taken; the "dollar" being the monetary unit or standard of value of the United States (U. S. Comp. St. § 6448; Rev. St. § 3571 [U. S. Comp. St. § 6541]), while foreign money comes under the general description of "property" in Code Cr. Proc. art. 458. Thompson v. State, 90 Tex. Cr. 125, 234 SW 406.

90. Carlile v. State, 97 Tex. Cr. 477, 262 SW 489.

[a] **Mexican pesos.**—Under an indictment charging robbery of "pesos in Mexican money," uncontradicted testimony of state's witness that he had been engaged in banking business in Mexico, and knew that "peso" meant either gold or silver coin, warranted a conviction on proof of robbery of gold coins only. Carlile v. State, 97 Tex. Cr. 477, 262 SW 489.

91. Allen v. U. S., 115 Fed. 3, 52 CCA 597.

[a] **Canadian chartered bank bills.**—Allen v. U. S., 115 Fed. 3, 52 CCA 597.

92. Ala.—Brown v. State, 120 Ala. 342, 25 S 182; Davis v. State, 3 Ala. A. 71, 57 S 493.

Ark.—Phillips v. State, 36 Ark. 282.

Fla.—Williams v. State, 42 Fla. 205, 27 S 898.

N. D.—State v. Sanders, 14 N. D. 203, 103 NW 419.

Tex.—White v. State, (Cr.) 57 SW 100.

Wash.—State v. Smith, 40 Wash. 615, 82 P 918.

93. Spanish v. State, 67 Fla. 414, 65 S 457.

[a] **Mere proof of total value insufficient.**—Under an information charging a robbery from the person of a ten dollar bill, a five dollar bill, a one dollar bill, and a silver dollar, all of the value of seventeen dollars, proof that seventeen dollars were taken is insufficient, without proof of the taking of at least one of the alleged items making up the total. Spanish v. State, 67 Fla. 414, 65 S 457.

Description of money generally see supra §§ 127–129.

94. See supra § 16.

95. Hyde v. State, 168 Ark. 580, 271 SW 330; State v. Denby, 143 Wash. 288, 255 P 141.

[a] **Even when amount was alleged** in the information, this rule was recognized. State v. Denby, 143 Wash. 288, 255 P 141, 143.

96. Hyde v. State, 168 Ark. 580, 271 SW 330; Bracher v. State, 72 Tex. Cr. 198, 161 SW 124.

[a] **Ten dollars alleged and fourteen dollars proved.**—Where an indictment alleged that C was robbed of ten dollars, proof that he was robbed of fourteen dollars was not a variance. Bracher v. State, 72 Tex. Cr. 198, 161 SW 124.

97. Ala.—Davis v. State, 3 Ala. A. 71, 57 S 493.

Ark.—Hyde v. State, 168 Ark. 580, 271 SW 330.

Fla.—Wood v. State, 98 Fla. 703, 124 S 44.

Mo.—State v. Deviney, 278 SW 726.

Tex.—Jones v. State, 64 Tex. Cr. 510, 143 SW 621; Robinson v. State, 62 Tex. Cr. 645, 138 SW 704; Fannin v. State, 51 Tex. Cr. 41, 100 SW 916, 123 AmSR 874, 10 LRANS 744.

[a] **Any amount sufficient.**—(1) "The indictment alleged that it was something over $11 taken; whereas, Denke testified it was $10 and some cents taken. This is not a variance. Under the allegation there was $11 and some cents, it will be sufficient to show that any amount of money was taken. It is not necessary to show that the exact amount stated in the indictment was taken. It is sufficient if any amount was taken." Robinson v. State, 62 Tex. Cr. 645, 138 SW 704, 705. (2) "The complaint that the indictment, having alleged that $74 was taken in the form of $10 bills, $5 bills, and $2 bills, that the proof must show that $10 bills were taken and $5 bills were taken, and $2 bills were taken, is incorrect. It is not necessary to prove that all the property alleged was taken. Proof of any part is sufficient." Jones v. State, 64 Tex. Cr. 510, 143 SW 621, 622.

[b] **$11 alleged and proof of over $10 and under $11.**—Robinson v. State, 62 Tex. Cr. 645, 138 SW 704.

[c] **$150 alleged and $89.25 proved.**—Hyde v. State, 168 Ark. 580, 271 SW 330.

[d] **$1,100 alleged and $193 proved.**—State v. Deviney, (Mo.) 278 SW 726.

[e] **Returning the change.**—Where accused was charged with robbery under an indictment alleging that he took a ten-dollar bill from prosecutor, proof that defendant claiming eight dollars from prosecutor for wages compelled him to deliver up a ten-dollar bill, and thereafter returned two

or information, such difference between allegation and proof not constituting a material variance.

Evidence of value may be admissible even though no value is alleged.[98]

[§ 132] **d. Ownership, Custody, or Possession—(1) In General.** Where both ownership and possession are laid in one person, proof of a taking from the presence of other persons is a fatal variance.[99] But variance as to actual ownership is immaterial where the allegations and proof correspond as to the identity of the person from whose custody and control the property was taken.[1] Where ownership is properly alleged in one person, and proved, failure to sustain a further allegation of ownership in another person is not material.[2]

Particular statutory provisions.[3] Under statutes providing that if a crime involves commission of an offense to the person or property, and be described in other respects with sufficient certainty to identify the act, an erroneous allegation as to the person injured or owner of the property taken is not material,[4] a variance between the name of the person alleged to have been robbed and the one proved to have been robbed is nevertheless fatal where the identity of the victim is essential to identification of the act of robbery committed.[5]

Evidence admissible. Under an indictment or information charging accused with "robbing" a specified person, evidence is admissible to show that such person was custodian of the property taken which was owned by others.[6]

[§ 133] **(2) Where Ownership Laid in Victim.** Where ownership is laid in the person from whose person or presence the property was taken,[7] it is not a fatal variance to prove that actual ownership, or legal title, was in a third person,[8] such as a relative,[9] or employer.[10] A fortiori there is no fatal variance where the proof shows that the victim actually owned a portion of the property taken,[11] or had a part interest in the whole,[12] or title per tout and not per my.[13]

Conflicting evidence as to ownership. Where the information alleges ownership in the person from whom property was taken, and the proof is conflicting as to whether such person or a third party owned the property, such evidence does not consti-

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dollars change, did not constitute a variance. Fannin v. State, 51 Tex. Cr. 41, 100 SW 916, 123 AmSR 874, 10 LRANS 744.

[98] Thompson v. State, 90 Tex. Cr. 15, 234 SW 401.

[a] **Reason for rule.**—In a prosecution for robbery, where property alleged to have been taken was a diamond ring, the court did not err in allowing the state to prove the value of the diamond, over the objection that such proof was incompetent, inasmuch as no value was alleged in the indictment. This is true because an allegation of value is unnecessary and proof of value would affect neither the question of guilt nor that of penalty. Thompson v. State, 90 Tex. Cr. 15, 234 SW 401.

[99] Crews v. State, 3 Coldw. (Tenn.) 350.

[1] Peo. v. Kozel, 303 Ill. 112, 135 NE 208.

[a] **Illustration.**—Where an indictment for robbing a bank referred to it as "the Bank of C.," the fact that it was referred to in evidence as "C. State Bank" was immaterial, where it further appeared that the indictment and proof corresponded with respect to the person from whose immediate custody and control the money was taken. Peo. v. Kozel, 303 Ill. 112, 135 NE 208.

[b] **Evidence held sufficient to prove ownership as against claim of variance.**—Peo. v. Rogers, 303 Ill. 578, 136 NE 470; Peo. v. Sobzcak, 286 Ill. 157, 121 NE 592.

[2] Peo. v. Rogers, 303 Ill. 578, 136 NE 470.

[3] See also infra § 133.

[4] See statutory provisions.

[5] Lissenbee v. Com., 198 Ky. 639, 249 SW 782.

[a] **Property taken not particularly described except with reference to owner.**—The misnomer of the owner of the property taken in an indictment for robbery is material, where there was no particular description of the property taken, and no statement of any act or acts by which the particular transaction could be identified, except the name of the victim, so that the indictment would not be a bar to a subsequent prosecution for robbery of the victim, naming him correctly, and did not give defendant notice of the offense for which he was to be tried, and therefore variance between allegation and proof is not immaterial, under Cr. Code Pract. § 128. Lissenbee v. Com., (Ky.) 249 SW 782.

[6] State v. Reich, (Mo.) 239 SW 835.

[a] **Illustration.**—Evidence that the person named in the information as robbed was in actual possession of the money only as cashier of the company owning it was admissible as against contention that Const. art 2 § 22, giving defendant the right to demand the nature and cause of the accusation, was thereby violated. State v. Reich, (Mo.) 239 SW 835.

[7] **Propriety of such allegation** see supra § 97.

[8] Ala.—Montgomery v. State, 169 Ala. 12, 53 S 991.

Ark.—Jenkins v. State, 131 Ark. 312, 198 SW 877.

Cal.—Peo. v. Smith, 78 Cal. A. 68, 248 P 261.

Mo.—State v. Montgomery, 181 Mo. 19, 79 SW 693, 67 LRA 343, 2 AnnCas 261.

N. Y.—Brooks v. Peo., 49 N. Y. 436, 10 AmR 398, 1 Cow. Cr. 503.

Tex.—Guyon v. State, 89 Tex. Cr. 287, 230 SW 408.

[9] Montgomery v. State, 169 Ala. 12, 53 S 991; Brooks v. Peo., 49 N. Y. 436, 10 AmR 398, 1 Cow. Cr. 503.

[a] **Father.**—"Robbery is an offense against the person as well as against the property of the person robbed. The person robbed in this case being rightfully in possession of the money when it was taken (having been sent by his father to collect and bring the money to him), and he being the person from whom it was taken, the indictment properly charged the property to be that of the minor. Nor does it constitute a material variance, such as to prevent a conviction, if the proof shows or tends to show that the legal title to the property was in the father of the minor robbed." Montgomery v. State, 169 Ala. 12, 16, 53 S 991.

[10] Jenkins v. State, 131 Ark. 312, 198 SW 877; Peo. v. Smith, 78 Cal. A. 68, 248 P 261; State v. Montgomery, 181 Mo. 19, 79 SW 693, 67 LRANS 343, 2 AnnCas 261.

[a] **Rule applied.**—"The indictment charged appellant with having robbed one Wilbur A. Johnson of the sum of $17,996, 'the personal property of said Wilbur A. Johnson.' The evidence proved that the money belonged to the Pacific Gas & Electric Company, a corporation, by whom Johnson was employed, but was in Johnson's possession at the time of the robbery, and that he was robbed of the same while on his way to deposit the money in the bank. The variance complained of was immaterial." Peo. v. Smith, 78 Cal. A. 68, 248 P 261.

[11] State v. Craft, (Mo.) 23 SW (2d) 183.

[12] State v. Fair, 35 Wash. 127, 76 P 731, 102 AmSR 897.

[a] **Partnership.**—Under statutes providing that in the prosecution of any offense committed in stealing, etc., it shall not be deemed a variance if it appear that either general or special property in the whole or part of personalty stolen was in the person alleged to be owner, where an indictment alleges ownership in the person from whose presence the property was taken, and the proof shows that the property belonged to a copartnership of which he was a member, there is no fatal variance. State v. Fair, 35 Wash. 127, 76 P 731, 102 AmSR 897.

[13] State v. Craft, (Mo.) 23 SW (2d) 183.

[a] **Husband and wife.**—Although only a part of the money of which the person was robbed belonged to him, while the other portion belonged to his wife, where defendants in a robbery prosecution robbed him of that portion as the evidence tended to show, there was no material variance between the information and proof showing the portion was the wife's, since the gravamen of the offense of robbery is the taking of property of another, and since, if husband and wife owned money jointly and by entirety, then each owned a whole interest in the money, holding per tout et non per my. State v. Craft, (Mo.) 23 SW (2d) 183.

tute a variance authorizing the court to take the case from the jury, the issue of ownership being for the latter to decide.[14]

Particular statutory provisions.[15] Under a statute providing that when an offense involves commission of a private injury, and is described with sufficient certainty to identify the act, an erroneous allegation as to the person injured is not material,[16] where an information alleges ownership in the person from whom property was taken, accused may be convicted even if the proof shows actual ownership to have been in a third person.[17]

[§ 134] **(3) Where Ownership Laid in Third Person.** Where the indictment alleges that property taken from one person belonged to a third person, it has been held that ownership must be proved as laid.[18] Other authority is to the effect that where ownership is laid in a third person, and custody or possession is laid in the victim,[19] the allegations as to the third person's ownership are surplusage which need not be proved.[20]

Existence of corporate owner. Under this latter view[21] it is unnecessary to sustain by proof allegations as to the legal existence of a corporation alleged to be actual owner of the property.[22] A fortiori proof of the legal existence of a corporation alleged to be owner is unnecessary where the proof shows the victim to be the actual owner of part of the property taken.[23]

[§ 135] **(4) Where Care, Custody, Control, or Possession Laid in Victim.** Under the general rule[24] material allegations of the victim's possession of the property taken must be proved as laid.[25] Proof supporting allegations that property was in the care, custody, control, or possession of the person from whom taken is sufficient, without proof that he owned such property.[26] Under an allegation of possession in one of the persons from whom property was taken, proof that the property was in their joint possession is not a variance.[27]

[§ 136] **7. From Person, Presence, or Possession.**[28] An indictment or information charging a taking from the "person" may be supported by proof of a taking from the "presence,"[29] as such proof does not constitute a fatal variance.[30]

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[14] Peo. v. Anderson, 80 Cal. 205, 22 P 139.

[15] See also supra § 132.

[16] See statutory provisions.

[17] Peo. v. Anderson, 80 Cal. 205, 22 P 139.

[18] Staples v. State, 114 Ga. 256, 40 SE 264.

"Though an indictment for robbery need not charge that the property alleged to have been forcibly taken from the person of the victim in fact belonged to a third person, if it does so charge it is essential that the state prove the case as laid." Staples v. State, 114 Ga. 256, 40 SE 264.

[19] See supra § 98.

[20] Peo. v. Rogers, 303 Ill. 578, 136 NE 470.

"There was no failure to prove ownership as alleged. The proof in the record shows that the Western Newspaper Union is a corporation by user. . . . Even if the proof had not established the existence of the corporation, the allegation that the Western Newspaper Union is a corporation and was the owner of the property might be regarded as mere surplusage. The indictment alleges, also, that the money was in the possession of Plomgren as the agent of the company and that it was taken from him by force and violence. This amounts, in robbery, to a sufficient charge that the property was the property of Plomgren, possession of property being a sufficient ownership under this offense as against the robber." Peo. v. Rogers, 303 Ill. 578, 136 NE 470, 472.

[21] See supra text and notes 19, 20.

[22] Peo. v. Filipak, 322 Ill. 546, 153 NE 673, 675; Peo. v. Rogers, 303 Ill. 578, 136 NE 470; Peo. v. Knox, 302 Ill. 471, 134 NE 923, 927.

"A majority of the courts of this country hold, in a case where an indictment charges the property to have been in the possession and care of the person robbed, that the allegation of such possession, supported by proof, is sufficient to sustain a conviction for robbery though the one assailed does not own the property." Peo. v. Knox, supra.

[23] Peo. v. Bernstein, 304 Ill. 351, 136 NE 683; Peo. v. Hansen, 263 Ill. 44, 104 NE 1069.

[a] **Illustration.**—Where an indictment charged defendant with having robbed a railroad ticket agent of property belonging to the company, and also of the agent's own property, and the evidence was sufficient to sustain a conviction for robbery of the agent's property, a verdict of guilty will not be reversed because of the failure to prove that the railroad company was a corporation. Peo. v. Hansen, 263 Ill. 44, 104 NE 1069.

[24] See Indictments and Informations § 471.

[25] Wilson v. State, 111 Tex. Cr. 134, 11 SW (2d) 803 (where the indictment alleged taking from the possession of O'Keefe, Parrish, and Copeland property owned and possessed by all three, and the court said: "The claim is further made that the proof shows possession and special ownership of the property taken in O'Keefe and Parrish only, while the indictment alleges such possession and ownership in three, viz. O'Keefe, Parrish, and Copeland, which constituted a fatal variance, and demanded a peremptory charge to acquit. The allegation of possession and ownership was a material one, and proof was necessary to sustain it as laid").

[26] Peo. v. Ziderowski, 325 Ill. 232, 156 NE 274; Peo. v. Filipak, 322 Ill. 546, 153 NE 673; Peo. v. Knox, 302 Ill. 471, 134 NE 923.

[a] **Bookkeeper in charge of office robbed.**—"One of the variances charged between the allegations of the indictment and the proof is that the prosecution should have proved that the money taken belonged to the three individuals composing the partnership of A. H. Ross & Sons. The indictment alleges that the money taken was in the care, custody, and control of Margruite Lonson. The evidence shows that she was the bookkeeper in charge of the safe and its contents, and that she was the only person present in the office when the robbery was committed. . . . An allegation in an indictment which charges that the property taken was in the care and possession of the person robbed, supported by proof, is sufficient to sustain a conviction for robbery, even though the person assailed does not own the property." Peo. v. Ziderowski, 325 Ill. 232, 156 NE 274, 279.

[27] Carreon v. State, 90 Tex. Cr. 572, 236 SW 985.

[a] **Illustration.**—"Both Darbyshire and Nold were assaulted and covered with pistols by two men. Darbyshire testified that as manager he had the care and control of the money as they were taking it from the bank to their place of business. The most that can be said is that it may have been in their joint possession. The facts do not show such exclusive care, control, and management in Nold as would render fatal an allegation of possession in Darbyshire. The fact that Nold, and not Darbyshire, picked up the sack to carry it across the sidewalk into their place of business would not, we think, make it inappropriate to still charge possession in Darbyshire. They were both present and acting together in conveying the money." Carreon v. State, 90 Tex. Cr. 572, 236 SW 985, 986.

[28] **As element of offense** see supra §§ 20-23.

[29] State v. Eddy, (Mo.) 199 SW 186; State v. Lamb, 242 Mo. 398, 146 SW 1169.

[30] Peo. v. Funk, 325 Ill. 57, 155 NE 838; State v. Smith, 113 Kan. 737, 216 P 302, 303; State v. Harmon, (Mo.) 296 SW 391; State v. Lamb, 141 Mo. 298, 42 SW 827.

"While the evidence did not prove all the allegations in the information, namely, the taking of property directly from her person, it did sufficiently establish the charge that the offense was committed in her presence, and under the statute it is robbery if the property is taken either from the person or in the presence of the party by fear of immediate injury to the person. There was no variance between the information and the evidence." State v. Smith, supra.

[a] **From cash register.**—Where an information charged a taking from

Possession. Under statutes defining "robbery" so as to include a taking from the "possession" as well as from the "person" of another,[31] an indictment alleging a taking from the person and possession of the victim may be supported by proof of taking from his possession only.[32]

[§ 137] **8. Force or Intimidation[33]—a. In General.** An indictment charging robbery by both force and intimidation may be sustained by proof of either,[34] and proof of one without the other is no variance.[35]

[§ 138] **b. Intimidation.[36]** Where the indictment alleges a taking by intimidation, and is silent as to actual force, intimidation must be proved.[37] Such an indictment may be supported by proof of both force and intimidation,[38] but if the force alone should be proved under such an indictment, there is a fatal variance.[39]

Persons intimidated. Under an indictment charging intimidation of several persons, it is necessary to prove intimidation only of the particular person from whose possession the property was taken.[40]

Evidence admissible. Under an indictment charging a taking by threats of future injury, evidence of threats of immediate injury is admissible.[41]

[§ 139] **c. Assault.** Proof of the use of a dangerous or deadly weapon is sufficient to support an allegation of an assault in a robbery prosecution.[42] An indictment charging a joint assault on two or more persons cannot be supported by proof of an assault on only one or the other of two,[43] but may be established by proof of the use of a weapon to threaten all of several.[44]

[§ 140] **9. Classification of Offense[45]—a. Actual Force or Intimidation.** Under statutes classifying robbery according to whether the taking was by actual force or by intimidation,[46] accused cannot be convicted of robbery by intimidation on evidence showing robbery by force.[47] Under statutes making robbery by threats to do some illegal act injurious to the character, person, or property of another one classification of the offense, and robbery by assault, or violence, or putting in fear of life or bodily injury a different and more serious classification of the crime,[48] on an indictment for the lower classification of robbery it is not a variance to prove both threats and assault by violence.[49] Under an indictment silent as to whether accused was armed with a dangerous or deadly weapon, evidence showing the use of such a weapon may be admissible,[50] and does

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the "person" of the victim, proof that the money was taken from a cash register in the presence of, and under the control of, the victim was not a fatal variance. State v. Harmon, (Mo.) 296 SW 391.

[31] See supra § 20.

[32] Briggs v. State, 108 Tex. Cr. 544, 2 SW (2d) 238.

[33] **As affecting classification of offense** see infra § 68.

[34] Montsdoca v. State, 84 Fla. 82, 93 S 157, 27 ALR 1291.

[a] **Use of conjunctive.**—"Where an indictment charges the alternative ingredients of the offense of robbery conjunctively, the charge will be sustained if either alternative ingredient is proven." Montsdoca v. State, 84 Fla. 82, 93 S 157, 27 ALR 1291.

[35] Graves v. Com., 186 Ky. 479, 217 SW 356.

[a] **Force alone proved.**—Since robbery may be accomplished if the owner is deprived of his property either by force or by putting in fear, evidence showing that defendant robbed the owner of his watch by force without putting him in fear was not a fatal variance from the indictment charging robbery by force, violence, and putting in fear. Graves v. Com., 186 Ky. 479, 217 SW 356.

[36] **As element of offense** see supra § 24 et seq.

[37] Glass v. Com., 6 Bush (Ky.) 436, 437:

"The offense alleged in the indictment was that the defendant feloniously took certain treasury notes, the property of George Messmore, 'in his presence and against his will, by putting him in fear of some immediate injury to his person.' To authorize a conviction of the offense so charged and traversed by the plea of not guilty, it was incumbent on the commonwealth to prove the fact that the treasury notes were taken in Messmore's presence by putting him in fear." Glass v. Com., supra.

[38] State v. Sanders, 14 N. D. 203, 103 NW 419.

[39] State v. Crowell, 149 Mo. 391, 50 SW 893, 73 AmSR 402.

[40] State v. Emmons, 285 Mo. 54, 225 SW 894.

[a] **Allegations as to fear of others mere surplusage.**—In a prosecution for bank robbery, under Rev. St. (1909) § 4530, where the evidence showed that the bank's agent and cashier was in charge of its property, it was necessary to show only that he was put in fear; so that, although the information charged that not only the cashier, but also the president and a stockholder of the bank, who were present, were put in fear, an instruction requiring a finding only that the cashier in charge was put in fear was proper, the allegation as to the president and stockholder being surplusage. State v. Emmons, 285 Mo. 54, 225 SW 894.

[41] State v. Howerton, 58 Mo. 581.

"On the trial, the prosecution was permitted to introduce evidence showing threats of immediate injury to Gennan, and that is assigned for error, because the indictment alleged that the property was obtained by threats of injury to be inflicted at a different [i. e. future] time. But there is no force in this objection. The evidence was admissible to prove that the threats of violence operated on the fears of Gennan, and it had a very important bearing, and constituted an essential element in the offense." State v. Howerton, supra.

[42] State v. Eddy, (Mo.) 199 SW 186.

[a] **Presenting pistol and threatening to blow head off.**—"It is strenuously urged that there is a variance between the charge and the proof, in that the information herein charges a robbery by an assault and a taking of the property from the person of the prosecuting witness by putting him in fear of an immediate injury to his person; but that the evidence fails to establish an assault, and fails to show that the property was taken from the person of the prosecuting witness. There is nothing of merit in these contentions. The evidence shows that Kennedy, the accomplice of the defendant, presented a pistol at the prosecuting witness, while within a few feet of the latter, and threatened to blow the head off of the prosecuting witness, and that Kennedy afterwards compelled the prosecuting witness to go behind the prescription case and lie down. It requires no citation of authorities to demonstrate that this was an assault." State v. Eddy, (Mo.) 199 SW 186, 187.

[43] Pate v. State, 91 Tex. Cr. 471, 239 SW 967.

[44] Wilson v. State, 111 Tex. Cr. 134, 11 SW (2d) 803.

"Nor is there any merit in appellant's claim that the proof fails to sustain a joint assault upon the three persons named as alleged in the indictment. It shows, in substance, that a pistol was waved and exhibited in the presence of all three, and that all three were compelled to lay down while the money was taken." Wilson v. State, supra.

[45] **Conviction of included offense** see Indictments and Informations § 497.

[46] See supra § 68.

[47] Story v. State, 12 Ga. A. 644, 77 SE 914.

[48] See supra § 68.

[49] Williams v. State, 34 Tex. Cr. 523, 31 SW 405.

[a] **Both threats and gun play.**—Where defendant was indicted for robbery by threatening to do an illegal act to the person of the victim, and the proof showed that in addition to threatening injury to the victim defendant also assaulted him by pointing a gun at him, the proof of the assault in addition to the threats did not constitute a variance. Williams v. State, 34 Tex. Cr. 523, 31 SW 405.

[50] Coulson v. State, 102 Tex. Cr. 8, 277 SW 135.

[a] **To prove assault and violence.**—"The objection that there was no

not show a fatal variance.[51]

[§ 141] **b. Dangerous or Deadly Weapon.**[52] Under an indictment charging that all defendants were armed with a dangerous or deadly weapon,[53] proof that one was not so armed does not constitute a fatal variance.[54]

[§ 142] **c. Wounding or Striking.** Under statutes making it a more serious classification of the crime where, in the course of a robbery, defendant armed with a dangerous weapon wounds or strikes his victim,[55] an indictment charging both a wounding and a striking may be supported by proof of either.[56] But if the evidence shows neither a wounding nor a striking, but merely that defendant was armed with a dangerous weapon, it is insufficient to support such indictment.[57]

[§ 143] **d. Highway Robbery.**[58] An indictment for robbery on or near the highway cannot be supported by proof that the offense was committed in a building alongside the highway.[59] Where the indictment alleges only that the robbery was committed "in" the highway, proof that the offense was committed "near" the highway is a variance.[60]

[§ 144] **C. Evidence—1. Burden of Proof and Presumptions—a. In General.** In accordance with general rules,[61] in a prosecution for robbery the state has the burden of proving the elements of the offense,[62] and defendant's guilty participation therein.[63]

[§ 145] **b. Elements of Offense.** The prosecution has the burden of proving the animus furandi, or intent to steal.[64] Criminal intent may be inferred from a taking with intent to appropriate to the taker's own use.[65] The burden rests on the state to prove the use of force or intimidation.[66] A presumption of fear will arise from evidence showing reasonable grounds therefor,[67] as in the case of a violent taking of property against the owner's will.[68] Possession of the property by the complaining witness, or his agent, at the time it was stolen, is presumptive evidence of ownership.[69] Where the property is owned by another than the one from whose person or presence it was taken, the state need not prove such owner's nonconsent to the taking,[70] the burden resting on defendant to establish consent as an affirmative defense.[71]

[§ 146] **c. Defendant's Possession of Stolen Property.** Defendant's possession of the property stolen is not of itself sufficient to raise a presumption of guilt,[72] nor to cast upon him the burden of proving his innocence.[73] When considered in connection with other facts, such possession may[74] or

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allegation in the indictment that the robbery was by the use of a gun or other deadly weapon is equally untenable. The indictment charged the robbery as being by an assault and by violence and whether the placing of the gun to the prosecuting witness' back put him in fear of death or serious bodily injury or not, it certainly constituted an assault and violence." Coulson v. State, 102 Tex. Cr. 8, 10, 277 SW 135.

[51] Wyatt v. State, 58 Tex. Cr. 115, 124 SW 929, 930, 137 AmSR 926.

"While the pistol was used in making the assault, it was used as a bludgeon only, and not for the purpose of shooting. Concede that under this state of facts the state would have been justified in charging robbery by means of deadly weapons, still we are of opinion that under the circumstances appellant cannot be heard to complain that the state did not so charge, but only prosecuted him for robbery by means of an assault and violence." Wyatt v. State, supra.

[52] See supra § 65.

[53] See supra § 117.

[54] Peo. v. Cunningham, 300 Ill. 376, 133 NE 270.

[a] **Rule applied.**—In a prosecution for robbery, where four accused persons visited the scene of the crime with a common purpose, and three of them were armed with revolvers and used them in committing the crime, the unarmed defendant was at least an accessary before the fact, and could be rightly indicted and convicted as a principal, and a conviction on an indictment charging that each of the four was armed with a revolver will be upheld. Peo. v. Cunningham, 300 Ill. 376, 133 NE 270.

[55] See supra § 66.

[56] McDuffee v. State, 55 Fla. 125, 46 S 721.

[57] Com. v. Gallagher, 6 Metc. (Mass.) 565.

[a] **Mere scratch on face** is not a "wound" within the meaning of the statute. Com. v. Gallagher, 6 Metc. (Mass.) 565.

[b] **Putting arms around victim's neck and throwing him to ground** is force, but not the particular kind of violence essential to "striking," which latter implies force applied with an impetus, that is, a blow. Com. v. Gallagher, 6 Metc. (Mass.) 565.

[58] **Defined** see supra § 5.

[59] State v. Stewart, 17 Del. 433, 42 A 624.

[60] State v. Cowan, 29 N. C. 239.

[61] See Criminal Law §§ 993–1004.

[62] See cases infra § 145.

[63] Peo. v. Bertlini, 171 App. Div. 460, 157 NYS 599, 34 N. Y. Cr. 260 [rev on other grounds 218 N. Y. 584, 113 NE 541]; Peo. v. Cassidy, 160 App. Div. 651, 146 NYS 15.

[a] **"Upon the issue of identification,** the burden of proof rests upon the people, and the defendant was entitled to the benefit of any reasonable doubt." Peo. v. Bertlini, 171 App. Div. 460, 157 NYS 599, 604, 34 N. Y. Cr. 260 [rev on other grounds 218 N. Y. 584, 113 NE 541].

[b] **Participation as principal.**—Stringfellow v. State, 111 Tex. Cr. 504, 14 SW (2d) 1031.

Possession of stolen property see infra § 146.

[64] Com. v. Crecorian, 264 Mass. 94, 162 NE 7.

[65] Long v. State, 12 Ga. 293.

[66] Com. v. Crecorian, 264 Mass. 94, 162 NE 7.

[67] Long v. State, 12 Ga. 293.

[68] Wissinger v. State, (Okl. Cr.) 264 P 631; Ross v. State, 31 Okl. Cr. 143, 237 P 469.

[69] Peo. v. Oldham, 111 Cal. 648, 44 P 312.

[70] Williams v. State, 37 Tex. Cr. 147, 38 SW 999.

[71] Williams v. State, supra.

[a] **Illustration.**—It being necessary under the statute of robbery only to charge a forcible and fraudulent taking from the person and possession of another, the state need not prove, where a third person other than the one robbed was the true owner, that defendant did not have the true owner's consent, but proof of the contrary is for defendant. Williams v. State, 37 Tex. Cr. 147, 38 SW 999.

[72] State v. Martin, (Mo.) 262 SW 1047.

Sufficiency to support conviction see infra § 180.

[73] State v. Harris, 194 Iowa 1304, 191 NW 83, 84.

"It is not correct to say that any burden of proof is cast upon the defendant. Such an instruction implies a legal presumption of guilt, obligatory upon the jury, if the defendant fail to meet the burden thus cast upon him. Nor was it proper to fix honesty of acquisition of the possession of the property as a standard of explanation sufficient to rebut the prima facie case. If the defendant's explanation should show that he acquired his possession in a manner independent of the facts charged in the indictment and consistent with his innocence thereof, it would be a sufficient explanation for the purpose of his defense, even though it were tainted with other dishonesty." State v. Harris, supra.

[74] State v. Wasson, 126 Iowa 320, 101 NW 1125; U. S. v. Divino, 18 Philippine 425.

[a] **Recent character of possession.**—A presumption of guilt may arise from the recent possession of stolen property. State v. Wasson, 126

For **later cases, developments** and **changes** in the law see **Annotations,** same title and section number.

may not[75] warrant an inference of guilt.

[§ 147] **d. Robbery with Dangerous Weapon.** In a prosecution for robbery while armed with a dangerous weapon,[76] there is no presumption that a pistol or revolver used in conection with the robbery was loaded,[77] although the jury may be authorized to draw the inference that it was loaded.[78]

[§ 148] **2. Admissibility**[79]**—a. In General.** While the evidence admissible in a prosecution for robbery must conform to the general rules[80] as to relevancy, competency, and materiality,[81] subject to such rules the entire transaction may be shown,[82] and evidence may be admitted which tends to corroborate that already introduced for the prosecution[83] or defense.[84] In corroboration of the victim's testimony it is proper to introduce evidence of other persons to the effect that the victim was seen near the place of the alleged robbery at about the time of its alleged commission,[85] as to his actual possession of property similar to that he claims was taken,[86] or as to the victim's nervous condition following the alleged commission of the offense;[87] and where the victim claims to have been assaulted or

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Iowa 320, 101 NW 1125.

[b] **Absence of evidence of ownership.**—"While the persons who committed the robbery were not recognized and their identity is entirely unknown, nevertheless, the accused, having been found in possession of the stolen carabao shortly after the commission of the crime, without the documents necessary under the law to justify ownership and possession, and he not having made the slightest explanation as to that possession, his conviction under the evidence presented in this case is justified by law." U. S. v. Divino, 18 Philippine 425, 427.

75. Peo. v. Albero, 223 App. Div. 442, 228 NYS 441 [app dism 248 N. Y. 599, 162 NE 540].

[a] **Absence of identification by eyewitnesses.**—"The defendants have not been convicted of criminally receiving stolen property, knowing it to have been stolen. They stand convicted of a robbery which is claimed to have taken place in the presence of five witnesses, no one of whom has identified either defendant as a participant therein, and this, notwithstanding that the crime took place in a well-lighted room and under circumstances which gave to the witnesses opportunity to observe closely the faces, build, and manner of dress of the criminals. Common experience teaches that witnesses to crimes of this character do not so easily forget the faces of those who rob them at the point of a gun. In these circumstances, we think that any inference of guilt of the robbery which arose from possession of some of its proceeds was repelled and overcome, and that the verdict convicting the appellants was against the weight of the evidence." Peo. v. Albero, 223 App. Div. 442, 228 NYS 441, 442.

76. See supra §§ 56, 57, 61, 65.

77. State v. Ragan, 123 Or. 521, 262 P 954.

78. State v. Parr, 54 Or. 316, 103 P 434.

79. **Prosecutions for assault or attempts** see infra § 235.

80. See Criminal Law §§ 1034–1558.

81. Ala.—Montgomery v. State, 169 Ala. 12, 53 S 991; Brewer v. State, 16 Ala. A. 501, 79 S 199.

Cal.—Peo. v. Clark, 106 Cal. 32, 39 P 53.

Ga.—Lampkin v. State, 87 Ga. 516, 13 SE 523.

Ill.—Peo. v. McGuirk, 312 Ill. 257, 143 NE 855.

Iowa.—State v. Beck, 73 Iowa 616, 35 NW 684.

Ky.—Webb v. Com., 11 Ky. Op. 792.

Md.—Duffy v. State, 151 Md. 456, 135 A 189.

Mich.—Peo. v. Becker, 48 Mich. 43, 11 NW 779.

Mo.—State v. Rebasti, 306 Mo. 336, 267 SW 858.

Mont.—State v. Howard, 30 Mont. 518, 77 P 50.

Nebr.—Heyen v. State, 114 Nebr. 783, 210 NW 165.

Okl.—Robinson v. State, 8 Okl. Cr. 667, 130 P 121.

Or.—State v. Parr, 54 Or. 316, 103 P 434.

Tex.—Colter v. State, 37 Tex. Cr. 284, 39 SW 576; Thompson v. State, 35 Tex. Cr. 511, 34 SW 629.

Vt.—State v. Totten, 72 Vt. 73, 47 A 105.

Va.—Thompson v. Com., 88 Va. 45, 13 SE 304.

82. Iowa.—State v. Miller, 83 Iowa 291, 49 NW 90.

Ky.—Pickerel v. Com., 30 SW 617, 17 KyL 120.

Mont.—State v. Howard, 30 Mont. 518, 77 P 50.

Nebr.—Peterson v. State, 115 Nebr. 302, 304, 212 NW 610 [cit Cyc].

N. Y.—Hope v. Peo., 83 N. Y. 418, 38 AmR 460.

Tex.—Knight v. State, 102 Tex. Cr. 13, 277 SW 138; Montgomery v. State, 101 Tex. Cr. 474, 276 SW 250; Perry v. State, 69 Tex. Cr. 644, 155 SW 263; Harris v. State, 55 Tex. Cr. 469, 117 SW 839; Underwood v. State, 39 Tex. Cr. 409, 46 SW 245; Williams v. State, 34 Tex. Cr. 523, 31 SW 405.

Wash.—State v. Malsogoff, 88 Wash. 419, 153 P 379.

[a] **Illustration.**—"Appellant complains that the court permitted the prosecuting witness to say that someone held something that left like a gun against his back at the time he was being robbed, and also at the court's action in permitting the prosecuting witness to state that he was a little scared at that time. It being proper to show all the conditions and circumstances occurring at the time the offense is alleged to have been committed, which was germane thereto, this testimony was properly admitted under this rule." Montgomery v. State, 101 Tex. Cr. 474, 476, 276 SW 250.

[b] **Description of scene of crime.**—It was not error to allow the boy alleged to have been robbed to testify that he could not see a companion from the place of the robbery, as the evidence was admissible in describing the scene of the crime, and tending to show that the boy was alone, and not accompanied by his companion, who had left a certain town with him. Montgomery v. State, 169 Ala. 12, 53 S 991.

[c] **Conversation as to robbery.**—Testimony for the state that on the night of the alleged robbery defendant asked the witness to come and go with them, given in detailing a conversation with defendant in regard to the robbery, was admissible. Perry v. State, 69 Tex. Cr. 644, 155 SW 263.

83. Ala.—Montgomery v. State, 169 Ala. 12, 53 S 991; Boyd v. State, 153 Ala. 41, 45 S 591; Ware v. State, 12 Ala. A. 101, 67 S 763.

Mass.—Com. v. Watson, 109 Mass. 354.

Mo.—State v. Balch, 136 Mo. 103, 37 SW 808.

Nebr.—Tracey v. State, 46 Nebr. 361, 64 NW 1069.

Tex.—Coulson v. State, 102 Tex. Cr. 8, 277 SW 135; Delaney v. State, 48 Tex. Cr. 594, 90 SW 642.

84. Hunter v. State, 113 Tex. Cr. 90, 18 SW (2d) 1084.

[a] **Illustration.**—Where defendant, prosecuted for robbery by assault, set up the defense that the prosecuting witness had given a woman five dollars for an act of intercourse, that the fight ensued due to the fact that the prosecuting witness attempted to recover a portion thereof, and that defendant attempted to aid the woman, it was held that refusal to permit defendant to show that the part of the town where the offense was committed was occupied by negro prostitutes, defendant and woman both being negroes, was error, since such evidence would have a tendency to lend color to the defense. Hunter v. State, 113 Tex. Cr. 90, 18 SW (2d) 1084.

85. Montgomery v. State, 169 Ala. 12, 53 S 991.

86. Boyd v. State, 153 Ala. 41, 45 S 591; Bradley v. State, 103 Ala. 29, 15 S 640; Peo. v. Linares, 142 Cal. 17, 75 P 308.

[a] **Possession of money.**—It was permissible for the state to prove by others than the person robbed that he had money on his person shortly before the robbery, and to do so it was competent to show that he was spending money in a near-by saloon, whence he went in a short time to the place where he was robbed, and that he drew out his pocketbook at the saloon, and was seen with money out in front of the saloon. Boyd v. State, 153 Ala. 41, 45 S 591.

[b] **Money of particular description.**—Bradley v. State, 103 Ala. 29, 15 S 640.

[c] **Possession before and not after robbery.**—Peo. v. Linares, 142 Cal. 17, 75 P 308.

Admission to prove ownership see infra § 149.

87. Walker v. State, 105 Tex. Cr. 141, 287 SW 497.

injured in the course of the robbery, other evidence may be introduced in support of his testimony to such effect.[88] So, under general rules[89] evidence as to other particular matters has been held admissible[90] or inadmissible.[91]

Complaint of robbery. Evidence that the victim complained of the robbery immediately after it occurred is admissible as part of the res gestæ.[92] Conversely, evidence explaining the victim's failure to complain is likewise admissible.[93]

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[88] Anderson v. State, 209 Ala. 36, 95 S 171; Tracey v. State, 46 Nebr. 361, 64 NW 1069.

[a] **Fact of blood stains** on victim's handkerchief and eye shade from a wound in his head, was competent to corroborate the victim's testimony as to the fact and circumstances of the robbery and the conditions under which it was perpetrated. Anderson v. State, 209 Ala. 36, 95 S 171.

[b] **Torn bills.**—Where there was evidence that, in the scuffle between defendant and the prosecutor, two bills in the prosecutor's hand were torn in two, the torn pieces remaining with the prosecutor were admissible in corroboration of his testimony as to the assault. Tracey v. State, 46 Nebr. 361, 64 NW 1069.

Admission to prove element of force see infra § 150.

[89] See Criminal Law §§ 1034–1558.

[90] See cases infra this note.

[a] **Age of victim.**—Anderson v. State, 209 Ala. 36, 95 S 171.

[b] **Disposition of stolen property.**—(1) Where the prosecuting witness claimed that, when in accused's restaurant, accused and another removed from his person a roll of bills, a question as to what was done with the bills after they were taken from the prosecuting witness is not improper, on the ground that it was not shown that accused was present at that time, the testimony called for being material, and it being obvious that accused was near. Peo. v. Osaki, 25 Cal. A. 329, 143 P 789. (2) Disposition by defendant as tending to connect him with commission of the crime see infra § 162.

[c] **Finding stolen property in possession of third person.**—A police officer may testify that a third person, who had the stolen watch in his possession, called it to the officer's attention, that the officer went to the police station, examined the records, and then took possession of it, although this did not take place in accused's presence. McMillan v. State, 66 Tex. Cr. 288, 146 SW 1190.

[d] **Internal revenue license.**—Where the prosecutor was assaulted and robbed under an alleged conspiracy, while endeavoring to secure evidence of an illegal sale of liquor, the state may show that defendant, the proprietor of the place where the robbery occurred, had a United States internal revenue license, and explained that he got it to avoid prosecution by the federal authorities. Phillips v. State, 73 Tex. Cr. 317, 164 SW 1004.

[e] **Use of alias.**—On cross-examination of accused, evidence as to his use of other names is relevant and material, it being proper to list a witness's accuracy or veracity and to go into his history to do so. State v. Murray, 316 Mo. 31, 292 SW 434, 438.

[f] **Evidence that defendant directed sheriff to place where bag taken was hidden.**—Silver v. State, 110 Tex. Cr. 512, 8 SW (2d) 144, 9 SW (2d) 358, 60 ALR 290.

[91] See cases infra this note.

[a] **Ability of witness to purchase liquor at speakeasy.**—Exclusion of evidence whether the state's witness could obtain whisky at a speakeasy where the robbery occurred was not error as it was wholly irrelevant and immaterial whether or not the proprietor of the speakeasy had sufficient confidence in the discretion of the witness to sell him intoxicating liquor. Duffy v. State, 151 Md. 456, 135 A 189.

[b] **Accessary's explanation of failure to tell police of robber's presence.**—In a prosecution of an accessary after the fact for harboring bank robbers, a ruling preventing him from telling the jury in answer to the question why he did not tell a police officer was not erroneous, where the question was not so framed as to elicit a proper defense such as duress, etc. Heyen v. State, 114 Nebr. 783, 210 NW 165.

[c] **Attempt to escape from jail following incarceration.**—Webb v. Com., 11 Ky. Op. 792.

[d] **Character of cabaret where robbery committed.**—In a prosecution for robbery of the proprietor and others in a cabaret, the court did not err in not permitting accused to bring out what kind and character of persons frequented and worked in the cabaret, and what kind of business was there carried on, that intoxicating liquor was unlawfully sold there, immoral women employed, and unseemly conduct indulged in, all with the connivance of the officers of the law, since such matters would give no one the right to rob the proprietor or shoot up his place. Thompson v. State, 90 Tex. Cr. 15, 234 SW 401.

[e] **Civil action to recover robbery losses.**—In a prosecution for the robbery of a bank messenger, exclusion of evidence offered by defendant that the bank had instituted a civil action to recover the amount so stolen was held not error. The evidence was offered to show animus and the interest of the bank in a criminal prosecution, but the court said the evidence could add nothing to the interest already established from the fact of robbery, and, if anything, might soften the jury toward defendant by showing that the bank would be civilly compensated for its loss. State v. Rebasti, 306 Mo. 336, 267 SW 858.

[f] **Conflicting accounts of defendant.**—Where a witness testified that defendant had made three statements as to where she had obtained the articles in question, it was error to allow the witness, who had given the substance of one statement, to testify that he did not remember the other two statements, "except that they were different from each other and from the first statement." Moses v. State, 88 Ala. 78, 7 S 101, 16 AmSR 21.

[g] **"Crooked" gambling.**—(1) In a prosecution for robbery committed in the course of a poker game, wherein defendant had claimed that his money had been obtained by trick or fraud, evidence to show that the proprietor conducted a "crooked game" was inadmissible as it did not prove that defendant's money had been obtained by fraudulent winning at play constituting mere larceny within Pen. Code § 332. Peo. v. Horgan, 32 Cal. A. 1051, 162 P 399. (2) Rejection of defendant's evidence that one of the victims of an alleged robbery had used crooked dice in a crap game six months before the alleged robbery was not error. Cole v. State, 104 Tex. Cr. 533, 286 SW 204.

[h] **Defendant's mistreatment of witness for prosecution.**—Permitting testimony suggesting that defendant mistreated the state's witness was error, absent evidence showing defendant's participation in such mistreatment, as the evidence would tend to prejudice the jury against defendant. Levert v. State, (Ala.) 129 S 475.

[i] **Diagram of jail.**—Where no theory of the cause is advanced by defendant that would render material a plan or diagram of the interior of the jail in which defendants were incarcerated, a refusal to admit such a diagram is not error. State v. Parr, 54 Or. 316, 103 P 434.

[j] **Name of companion of victim.**—The court did not err in sustaining an objection to a question on cross-examination of the prosecuting witness as to who the young lady was in the automobile with him at the time of the alleged holdup, defendant having been furnished with a list of the witnesses whom the state expected to call, and the name of the girl not being given, and defendant apparently having no desire to call her. Peo. v. McGuirk, 312 Ill. 257, 143 NE 855.

[k] **Peace bond of defendant.**—In view of Rev. St. (1919) § 3748, authorizing defendant to be put under a peace bond if the jury find that there was good reason to fear the commission of an offense, the issues in the peace bond proceeding and the quantum of proof are different from those in a prosecution for the offense of robbery, and it was error to admit in evidence in the prosecution for robbery the fact that defendant had been put under a peace bond, as the jury might have concluded that the order requiring the peace bond was an adjudication on the merits against defendant in the robbery trial. State v. Culpepper, 293 Mo. 249, 238 SW 801.

[l] **Purpose of defendant's visit to town.**—A question of defendant to the witness, "Did or did not the accused visit you about July 9th, and, if so, how long did he remain in A.?" where counsel stated that it was not to show an alibi, but to show that accused came to A on a visit, and that he did not come for the purpose of robbery, and was simply knocking about A as a visitor was irrelevant. Montgomery v. State, 169 Ala. 12, 53 S 991.

[m] **Reward for conviction of robbers.**—In a prosecution for robbery of a jewelry store, the exclusion of the store owner's answer to the question, "Do you belong to any association which offers a reward for the arrest and conviction of any person who steals anything from your store?" was not error, in the absence of a showing that he, upon conviction, expected a reward, thus establishing an interest on his part in the conviction. State v. Costello, (Mo.) 252 SW 727.

[n] **Sobriety some hours after robbery.**—In a prosecution for robbery, committed between one and three o'clock, in the afternoon, a question to a witness as to the condition of the victim of the robbery, as to being drunk or sober, when he returned to his place "along towards dark," is not competent because of the difference in time. Robinson v. State, 8 Okl. Cr. 667, 130 P 121.

Habits and reputation.[94] Evidence as to the victim's moral habits,[95] or reputation for violence,[96] and as to defendant's professional reputation,[97] has been held inadmissible.

[§ 149] **b. Ownership of Property Taken.**[98] Evidence that the victim of a robbery had the property in his possession before the crime is admissible to prove ownership.[99] Failure to list property for taxation is not admissible to prove lack of ownership.[1]

[§ 150] **c. Force or Intimidation.**[2] To show that force and violence were used, the extent of the injuries inflicted on the person robbed may be proved.[3] This may be shown either by an attending physician[4] or by any other competent witness who saw the victim immediately after the robbery.[5] It is competent for the person robbed to testify that he was frightened.[6]

[§ 151] **d. Consent.** Evidence otherwise proper is admissible on the issue of the victim's consent to the taking of his property.[7]

[§ 152] **e. Intent.**[8] Evidence as to any relevant circumstance is admissible on the issue of intent.[9] But evidence offered on the issue of intent is properly excluded where it affords no legitimate inference with reference thereto.[10]

The prosecution may show criminal intent by evidence of defendant's conduct before[11] or after[12] the

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[o] **Theft insurance.**—In a prosecution for robbery of a jewelry store, it was not error to exclude testimony that the owner carried theft insurance, particularly where the question. "Do you carry insurance on your" was interrupted before completion and no subsequent statement made as to the fact sought to be proved. State v. Costello, (Mo.) 252 SW 727.

[p] **Third person's attempt to steal.**—Where defendant, accused of robbery, claimed that it was committed by F, evidence that F later tried to steal defendant's purse is inadmissible. State v. Totten, 72 Vt. 73, 47 A 105.

[92] People v. Murphy, 56 Mich. 546, 23 NW 215; Driscoll v. People, 47 Mich. 413, 11 NW 221; Robinson v. State, 8 Okl. Cr. 667, 130 P 121.

Res gestæ generally see Criminal Law §§ 1114-1121.

[93] Burkhalter v. State, 93 Tex. Cr. 504, 247 SW 539.

[a] **Illustration.**—Where a third person accompanied the complaining witness when robbed, and then promised to reimburse him if he would not complain, the complaining witness could show this promise as his reason for not promptly reporting the robbery. Burkhalter v. State, 93 Tex. Cr. 504, 247 SW 539.

[94] **Character and reputation in criminal prosecutions generally** see Criminal Law §§ 1122-1131.

[95] Brewer v. State, 16 Ala. A. 501, 79 S 199; Peo. v. Becker, 48 Mich. 43, 11 NW 779.

[a] **Drinking.**—The court properly refused to permit inquiry into the question whether the person robbed was a drinking man or not; the point not being material. Brewer v. State, 16 Ala. A. 501, 79 S 199.

[b] **Frequenting houses of ill fame.**—Where the witness testified that accused took him to a house of ill fame, and thence into the street where he was robbed, evidence that accused was not accustomed to visit such places was immaterial. Peo. v. Becker, 48 Mich. 43, 11 NW 779.

[96] Thompson v. State, 90 Tex. Cr. 15, 234 SW 401.

[a] **Dangerous man.**—The court did not err in refusing to permit defendant to prove the general reputation of the alleged injured party as being that of a dangerous and violent man, there being no claim on the part of either the state or accused of any facts or the existence of any issues which could have been affected, or made clearer either way, by proof of the injured party's reputation. Thompson v. State, 90 Tex. Cr. 15, 234 SW 401.

[97] Com. v. Homer, 235 Mass. 526, 127 NE 517.

[a] **As dentist.**—Where defendant dentist, among other contentions, claimed that the complaining witness owed him money for dental work, and the court permitted him to show the value of the work done by him, evidence tending to show his reputation as a dentist was properly excluded as unimportant. Com. v. Homer, 235 Mass. 526, 127 NE 517.

[98] **Subjects of robbery:** Generally see supra §§ 14-16. Ownership see supra §§ 17, 19.

[99] Bradley v. State, 103 Ala. 29, 15 S 640.

Admission to corroborate victim see supra § 148.

[1] State v. Hobgood, 46 La. Ann. 855, 15 S 406.

[2] **Element of offense** see supra §§ 24-44.

[3] Smith v. State, 207 Ala. 428, 93 S 397; Brown v. State, 120 Ala. 342, 25 S 182; State v. Alexander, 66 Kan. 726, 72 P 227; Raleigh v. State, 74 Tex. Cr. 484, 168 SW 1050.

[a] **In rebuttal.**—Where the state showed facts constituting robbery, and accused denied that he struck the prosecutor with his gun, testimony of a witness that he saw a man strike the prosecutor, and the testimony of a physician that he discovered scalp wounds caused by a blunt instrument, were proper in rebuttal. Raleigh v. State, 74 Tex. Cr. 484, 168 SW 1050.

Admission to corroborate testimony of victim see supra § 148.

[4] Com. v. Flynn, 165 Mass. 153, 42 NE 562.

[5] Com. v. Flynn, supra.

[6] Long v. State, 12 Ga. 293; Revier v. State, 105 Tex. Cr. 633, 289 SW 1015; Knight v. State, 102 Tex. Cr. 13, 277 SW 138; Dill v. State, 6 Tex. A. 113.

[a] **Fear to resist.**—Revier v. State, 105 Tex. Cr. 633, 289 SW 1015, 1016.

[7] Davis v. State, 159 Ala. 104, 48 S 694.

[a] **Willingness or consent.**—It being proper for the witness robbed to testify that he did not consent to the taking, an objection to a question calling on him to state whether he was willing or consented for the defendant to take his money is properly overruled. Davis v. State, 159 Ala. 104, 48 S 694.

[8] **As element** see supra §§ 49-53.

[9] Cole v. State, 104 Tex. Cr. 533, 286 SW 204; Rex v. Winkworth, 4 C. & P. 444, 19 ECL 594, 172 Reprint 775. And see cases infra text and notes 10-15.

[a] **Time of report of robbery** is properly shown where defense is based on claim that property was originally taken in attempt to recover that of which defendant had been cheated in a dice game and that he had attempted to return their property to certain of the persons from whom it had been taken who had not participated in the cheating. Cole v. State, 104 Tex. Cr. 533, 286 SW 204, 206.

[b] **Where defendants formed part of a mob** and advised the prosecutor to give money to the mob, evidence of demands made by the same mob at other places is admissible to show that the advice was not bona fide. Rex v. Winkworth, 4 C. & P. 444, 19 ECL 594, 172 Reprint 775.

[10] Cole v. State, 104 Tex. Cr. 533, 286 SW 204; Blain v. State, 34 Tex. Cr. 448, 31 SW 368.

[a] **Wink.**—Where the defense was that defendant in an effort to recover property of which he had been cheated in a dice game compelled all of the participants to put up their hands after which their money was taken from them, it is proper to refuse to allow defendant to testify that during the holdup he winked at several of the parties who were in line with their hands up to give them to understand that he did not mean any harm to them, and that all he wanted was to get back the money he believed he had been cheated out of in the dice game, since to permit him to testify that all this was included in and meant by him in a wink would appear to be going beyond a fair interpretation of a wink. Cole v. State, 104 Tex. Cr. 533, 286 SW 204, 206.

[b] **Gambling gains.**—Evidence that the money stolen was won by gambling from defendant has been held inadmissible. Blain v. State, 34 Tex. Cr. 448, 31 SW 368.

[11] State v. Fallon, 2 N. D. 510, 52 NW 318; State v. Shields, 13 S. D. 464, 83 NW 559; Gables v. State, (Tex. Cr.) 68 SW 288.

[a] **Drawing gun and ordering others off street** shortly before robbery occurred. State v. Fallon, 2 N. D. 510, 52 NW 318.

[b] **Drugging drink sold victim.**—Gables v. State, (Tex. Cr.) 68 SW 288.

[c] **Commenting on value of watch worn by person robbed.**—State v. Shields, 13 S. D. 464, 83 NW 559.

[12] Kennedy v. State, 208 Ala. 66, 93 S 822.

taking.

Defense. It is competent for defendant to testify that at the time of the alleged robbery he thought that he had a right to take the property as his own,[13] or to introduce any evidence legitimately tending to support such claim.[14] Evidence of an attempt to return the property is admissible on the issue of intent.[15]

[§ 153] **f. Connection with Crime—(1) In General.** Any evidence legitimately tending to connect defendant with commission of the robbery is admissible,[16] such as defendant's surprise and confusion on suddenly meeting the victim shortly after the robbery;[17] or his suspicious statement on observing the victim display money before the robbery;[18] or evidence showing defendant's effort to fabricate an alibi.[19] It is permissible to introduce evidence tending to identify defendant and the robber as the same person,[20] such as similarity in physical appearance,[21] or handwriting;[22] or to identify defend-

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[a] **Carrying away gun claimed to have been taken merely as protective measure.**—On the issue of whether the taking by defendant of a pistol, from one attempting without authority to arrest him, was with larcenous intent, or merely defensive and protective, as claimed by him, the fact that he carried it away and retained it on his flight to another state, although inconclusive, was a circumstance admissible for the jury's consideration. Kennedy v. State, 208 Ala. 66, 93 S 822.

[13] State v. Hollyway, 41 Iowa 200, 20 AmR 586; Peo. v. Hughes, 11 Utah 100, 39 P 492.

[14] State v. Culpepper, 293 Mo. 249, 238 SW 801.

[a] **Telegrams showing right to commissions.**—Where the defense was that the prosecuting witness owed to defendant the money taken as commissions on a real estate deal, in which the prosecuting witness had sold land to another for whom defendant resold it, telegrams from the first purchaser, referring defendant to the prosecuting witness, for the terms of the purchase, were admissible on behalf of defendant as establishing his agency in making the second sale and tending to show his good faith in claiming the commission from the prosecuting witness who refused to consummate the sale. State v. Culpepper, 293 Mo. 249, 238 SW 801.

[15] Cole v. State, 104 Tex. Cr. 533, 286 SW 204.

[a] **Rule applied.**—Defended on the ground that defendants merely retook money lost by the use of fraudulent dice, the exclusion of evidence of defendants' acts and declarations immediately after discovering that they had taken more than they lost and their efforts to restore it was error. Cole v. State, 104 Tex. Cr. 533, 286 SW 204.

Return of property as not in itself defense see supra § 74.

[16] Cal.—Peo. v. Meile, 97 Cal. A. 56, 274 P 1003; Peo. v. Strauss, 75 Cal. A. 447, 243 P 67; Peo. v. Smith, 74 Cal. A. 510, 241 P 267.

Ill.—Peo. v. McGuirk, 312 Ill. 257, 143 NE 855; Peo. v. Powloski, 311 Ill. 284, 142 NE 551.

Kan.—State v. Wise, 129 Kan. 155, 281 P 886, 887.

La.—State v. Skeahan, 167 La. 1003, 120 S 626.

Mo.—State v. Evans, 23 SW (2d) 152.

Nebr.—Peterson v. State, 115 Nebr. 302, 304, 212 NW 610 [cit Cyc]; Keating v. State, 67 Nebr. 560, 93 NW 980.

N. Y.—Hope v. Peo., 83 N. Y. 418, 38 AmR 460.

N. C.—State v. Harden, 177 N. C. 580, 98 SE 782.

Tex.—Revier v. State, 105 Tex. Cr. 634, 289 SW 1016; Burkhalter v. State, 93 Tex. Cr. 504, 247 SW 539; Brown v. State, 61 Tex. Cr. 334, 136 SW 265; Reardon v. State, 4 Tex. A. 602.

"The test of admissibility is the connection of the facts with the offense charged." Peo. v. McGuirk, 312 Ill. 257, 143 NE 855, 857.

[a] **Defendant's possession of memorandum with victim's name and telephone number.**—Peo. v. Strauss, 75 Cal. A. 447, 243 P 67.

[b] **Rental of safety deposit box under assumed name.**—Evidence that defendant, two days after robbery, rented a safety deposit box under an assumed name as admissible on the same theory as flight or concealment of the person. Peo. v. Meile, 97 Cal. A. 56, 274 P 1003.

[c] **Telephone calls.**—On a trial for robbing a doctor who had been summoned to a lonely spot by telephone, ostensibly to visit a sick boy, evidence of such telephone call, and evidence that defendants had previously telephoned another doctor, and, on learning that he was out, said he was not wanted unless he could come right away was relevant and material. Peo. v. Powloski, 311 Ill. 284, 142 NE 551.

[d] **Relation to servants of house robbed.**—Admission of testimony that servants in a home which was robbed were related to accused was proper, as showing the method by which the parties gained entrance to the home for the purpose of committing robbery. Peo. v. Smith, 74 Cal. A. 510, 241 P 267.

[17] State v. Harden, 177 N. C. 580, 98 SE 782.

[18] Brown v. State, 61 Tex. Cr. 334, 136 SW 265.

[19] Faulkner v. State, 104 Tex. Cr. 378, 283 SW 824.

[a] **Attempt to induce witness to testify falsely** that the latter was with defendant at his home at the time of the robbery. Faulkner v. State, 104 Tex. Cr. 378, 283 SW 824.

[20] Ala.—Anderson v. State, 209 Ala. 36, 95 S 171; Smith v. State, 207 Ala. 428, 93 S 397; Washington v. State, 188 Ala. 101, 66 S 34; Lewis v. State, 165 Ala. 83, 51 S 308.

Cal.—Peo. v. Griffin, 75 Cal. A. 561, 243 P 36; Peo. v. Hale, 64 Cal. A. 523, 222 P 148.

Ga.—Williams v. State, 27 Ga. A. 684, 109 SE 535.

Ill.—Peo. v. McGuirk, 312 Ill. 257, 143 NE 855; Peo. v. Maciejewski, 294 Ill. 390, 128 NE 489.

La.—State v. McCullough, 168 La. 161, 121 S 609; State v. Martin, 149 La. 673, 90 S 19.

Mass.—Com. v. Kelly, 186 Mass. 403, 71 NE 807.

Mich.—Peo. v. Londe, 230 Mich. 484, 203 NW 93.

Mo.—State v. Kowertz, 25 SW (2d) 113.

Nebr.—Peterson v. State, 115 Nebr. 302, 304, 212 NW 610 [cit Cyc].

Tex.—Ramos v. State, 107 Tex. Cr. 606, 298 SW 431; Faulkner v. State, 104 Tex. Cr. 378, 283 SW 824; Arlington v. State, 98 Tex. Cr. 68, 263 SW 593; Tabor v. State, 52 Tex. Cr. 387, 107 SW 1116; Davis v. State, (Cr.) 44 SW 1099.

Wash.—State v. Malsogoff, 88 Wash. 419, 153 P 379.

[a] **Testimony as to previous identification by victim.**—In a prosecution in which alibi was a defense, admission of testimony as to the identification of accused by the prosecuting witness at the city prison, where the victim pointed out accused crossing a corridor and also picked him from a lineup of twelve or fifteen prisoners, was not error, in the absence of a showing that the identification was not a bona fide one. Peo. v. Hale, 64 Cal. A. 523, 222 P 148.

[b] **Testimony not positive.**—Testimony of the victim, even if not positive as to the identification of defendant, was competent and admissible. Peo. v. Maciejewski, 294 Ill. 390, 128 NE 489.

[c] **Companionship with robber.**—Evidence showing defendant's arrest a week after the robbery in company with a man whose description corresponded to the younger of two bank robbers was properly admitted to establish identity. State v. Kowertz, (Mo.) 25 SW (2d) 113.

Defendant's possession of:
Weapons see infra § 158.
Stolen property see infra § 163.
Other identifying property see infra § 165.

[21] Ramos v. State, 107 Tex. Cr. 606, 298 SW 431; Faulkner v. State, 104 Tex. Cr. 378, 283 SW 824.

[a] **Scar on face.**—Faulkner v. State, 104 Tex. Cr. 378, 283 SW 824.

[b] **Size, build, and features.**—Ramos v. State, 107 Tex. Cr. 606, 298 SW 431.

[22] Peo. v. Griffin, 75 Cal. A. 561, 243 P 36.

[a] **Illustration.**—Testimony of bank employees, who identified defendant as the person who had taken out safety deposit boxes under different names and who had signed certain entry slips with such names, was held admissible, notwithstanding that it incidentally revealed that defendant had assumed different names, where the purpose of the testimony was to connect defendant with such signatures and then to use them for comparison with signatures of a man who placed an automobile in garage, which had been identified as the one used in perpetrating a robbery. Peo. v. Griffin, 75 Cal. A. 561, 243 P 36.

ant by the sound of the exhaust of his car,[23] a laundry mark,[24] or the use of a wig.[25]

Evidence inadmissible. Where, under the general rules,[26] evidence offered on the issue of identification is improper, it will be excluded,[27] as in the case of evidence offered by the prosecution as to identification on a preliminary hearing,[28] or evidence offered by the defense as to physical characteristics differing from those of the robber but acquired subsequent to defendant's arrest.[29]

Corroborative evidence. Evidence supporting the claim of a witness that he knew defendant well enough to identify him is admissible.[30]

Rebuttal. Evidence otherwise proper is admissible in rebuttal of an identification claimed to be erroneous.[31]

[§ 154] **(2) Presence at or near Scene of Crime.** Evidence is admissible to show that defendant was at or near the scene of the robbery shortly before[32] or after[33] commission of the crime. Evidence may also be introduced to show that defendant visited the scene of the robbery some time before its commission for the purpose of familiarizing himself with the surroundings.[34]

Companion. Evidence as to the presence of a companion of defendant in the general locality of the robbery at about the time of its commission is inadmissible where the companion has not been connected with the robbery.[35]

[§ 155] **(3) Motive.** While motive is immaterial as an element of the offense,[36] evidence of motive may properly be admitted to connect defendant with commission of the robbery.[37]

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23. Williams v. State, 27 Ga. A. 684, 109 SE 535.

[a] **Circumstance for consideration.**—On a trial for robbery committed at a store, testimony of a witness that the exhaust of the car in which the robbers came to the store sounded like that of the car in which defendant and others left the same store about thirty minutes earlier was properly admitted as a circumstance to be considered with other evidence in determining the identity of the robbers, over the objection that the witness could not identify the car by the sound of the exhaust. Williams v. State, 27 Ga. A. 684, 109 SE 535.

24. State v. Malsogoff, 88 Wash. 419, 153 P 379.

[a] **Rule applied.**—Evidence that the laundry mark on a handkerchief found near the scene of the robbery and another laundry mark on the collar defendant was wearing when arrested were the same is properly considered. State v. Malsogoff, 88 Wash. 419, 153 P 379.

25. Lewis v. State, 165 Ala. 83, 51 S 308.

[a] **Illustration.**—Where, on the trial of a woman for robbery, the prosecutor testified that the woman who helped rob him had long hair, and a witness for accused testified that the woman she saw running from prosecutor had bushy hair, and accused at the trial had short, nappy hair, it was competent for the state to ascertain whether she habitually wore a wig, and to prove that she owned one, and that one was found in her house shortly after the offense. Lewis v. State, 165 Ala. 83, 51 S 308.

26. See supra § 148; and see Criminal Law §§ 1050-1056.

27. Peo. v. Rybak, 120 Misc. 814, 200 NYS 513; State v. Evans, 98 Or. 214, 192 P 1062, 193 P 927.

[a] **Additional identification.**—In a prosecution for robbery in the first degree, where complainant positively identified defendant on the trial, it was error to admit testimony that complainant identified defendant after the robbery as one of three men who had robbed him. Peo. v. Rybak, 120 Misc. 814, 200 NYS 513.

[b] **Protestations of innocence.**—While, under Lord L. § 727, declaring that evidence may be given of a declaration or act of another in the presence and within the observation of a party, and his conduct in relation thereto, the state might introduce evidence of defendant's strong protestation of innocence when the prosecuting witness identified him as a robber, it would clearly be immaterial to introduce it as showing identification of defendant by the prosecuting witness. State v. Evans, 98 Or. 214, 192 P 1062, 193 P 927.

28. Peo. v. Moretti, supra (holding, however, that such evidence could be used for impeachment).

29. State v. Curtis, (Mo.) 23 SW (2d) 122.

30. Peo. v. Bolton, 324 Ill. 322, 155 NE 310; State v. Newman, 245 Mo. 495, 150 SW 1050.

[a] **Illustrations.**—(1) In a prosecution for robbery committed at a garage, where defendant's identity was in issue, checks, given by defendant at the garage previous to the date of the robbery and which defendant had later offered to take up and which were finally returned unpaid, were held admissible to show that the complaining witnesses had opportunity to become acquainted with defendant and to recognize him. Peo. v. Bolton, 324 Ill. 322, 155 NE 310. (2) Evidence that accused visited the house the night before the robbery, pretending to search for another, was admissible to corroborate the nurse at the house, who testified to seeing accused then, and also when the robbery was committed. State v. Newman, 245 Mo. 495, 150 SW 1050.

31. Hackins v. State, 212 Ala. 606, 103 S 468.

[a] **Facts which might have influenced witness to err in picking defendant from line of suspects.**—Hackins v. State, 212 Ala. 606, 103 S 468.

32. Washington v. State, 188 Ala. 101, 66 S 34; Montgomery v. State, 169 Ala. 12, 53 S 991; State v. Newman, 245 Mo. 495, 150 SW 1050.

[a] **Two hours before.**—Where the prosecutor testified that he was robbed while about three quarters of a mile from a town by accused and five other negroes, the testimony of a witness that he had seen accused in the town about two hours before the crime, and that he was at the time with a crowd, was admissible. Washington v. State, 188 Ala. 101, 66 S 34.

[b] **Presence in city twenty-four hours before robbery.**—"We see no error in permitting the witness Patrick Newman to testify that defendant came into his home the night before the robbery. It was not an attempt to prove an independent crime, but was a legitimate effort to prove that defendant was in St. Louis less than 24 hours before the robbery, which, though very slight evidence of his guilt, was some evidence of that fact." State v. Newman, 245 Mo. 495, 150 SW 1050, 1051.

33. Anderson v. State, 209 Ala. 36, 95 S 171; Peo. v. Elliott, (Cal. A.) 285 P 401.

[a] **Arrest of defendant near scene of robbery** and shortly after its commission. Anderson v. State, 209 Ala. 36, 95 S 171.

[b] **Remote but admissible.**—In a prosecution for robbery committed about 9:30 o'clock, testimony that the witness saw the men on the highway at 11 o'clock, although remote, was admissible. Peo. v. Elliott, (Cal. A.) 285 P 401.

34. Sweeney v. State, 161 Ark. 278, 256 SW 73.

[a] **Two weeks before.**—In a prosecution for robbery, the court did not err in admitting testimony that the witness saw accused two weeks before the date of the robbery near the scene of the robbery, and that, when the witness and others got up and left, he followed them up the creek, and that there was a thicket which was a resort where the witness and others went to play cards and shoot craps every Sunday, being admissible to identify accused and to prove that he had visited the scene and obtained knowledge of the surroundings. Sweeney v. State, 161 Ark. 278, 256 SW 73.

35. Dillard v. State, (Ark.) 298 SW 27.

[a] **Illustration.**—In a robbery trial, testimony as to seeing defendant's companion at a certain town before dark on the night of the robbery committed after 9:30 P. M. in a city fifty-six miles away, while the witness was going away from such city, was held properly excluded, as immaterial, where the witness did not see defendant with such person and the latter was not identified as the principal or accessary. Dillard v. State, (Ark.) 298 SW 27.

36. See supra § 54.

37. Peo. v. Tanner, 36 Cal. A. 20, 171 P 439; Faulkner v. State, 104 Tex. Cr. 378, 283 SW 824; Armstrong v. State, 34 Tex. Cr. 248, 30 SW 235.

[a] **Evidence that defendant was greatly in need of money** to pay his debts may be introduced to show motive. Armstrong v. State, 34 Tex. Cr. 248, 30 SW 235.

[b] **Knowledge that victim had money.**—In a trial for robbery with firearms, the prosecuting witness' testimony as to the amount of money he had in his purse the day before the robbery, and his statement at such time in defendant's presence that he

[§ 156] **(4) Change in Defendant's Economic Circumstances.** Evidence is admissible to show that defendant's financial or economic circumstances improved after the robbery.[38]

[§ 157] **(5) Weapons or Other Instruments of Crime—(a) Attempt To Purchase.** Defendant's attempt before the robbery to purchase weapons or other articles suitable for use in committing the offense may be shown in evidence.[39]

[§ 158] **(b) Possession of—aa. By Defendant.** Where defendant's possession of weapons[40] or other instruments of crime[41] affords no reasonable inference of guilt of the offense charged it should be excluded. But subject to this qualification, and in accordance with general rules,[42] evidence is admissible in a robbery prosecution to show that accused owned, possessed, or had access to tools, implements, or other articles with which the robbery was or might have been committed,[43] and especially when the article is of a lethal nature.[44] Thus it is ordinarily permissible to prove defendant's ownership or possession of weapons before[45] or after[46] commission of the robbery, as where weapons were later found in defendant's car,[47] or in a room occupied

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was going to see another on the next day about a sum owed him, was held admissible to show motive, and that defendant had reason to believe that the witness had and was collecting money. Faulkner v. State, 104 Tex. Cr. 378, 283 SW 824.

[c] **Refusal of victim to join I. W. W.** may have been a motive for his robbery by members of that organization, and for this reason evidence bearing thereon was properly admitted, even though the truth or falsity of defendant's membership in the I. W. W. was otherwise irrelevant. Peo. v. Tanner, 36 Cal. A. 20, 171 P 439.

[38] State v. Wales, 168 La. 322, 122 S 52; Martin v. State, 94 Tex. Cr. 175, 249 SW 839; Perry v. State, 69 Tex. Cr. 644, 155 SW 263.

[a] **Bank deposits.**—Testimony that accused had, after the robbery, deposited large sums of money in two other banks is not error, because the money so deposited was not identified as the money taken in the robbery. Martin v. State, 94 Tex. Cr. 175, 249 SW 839 (where the court said: "It is to be conceded that the nearer in point of time to the alleged robbery is the possession of property, the fruits of such crime, the stronger the probative force of such possession. The fact that appellant was engaged in a small business and apparently continued therein after the robbery, and that within two or three months he began to deposit large sums of money, much of which was in currency, without any apparent source of such income, seems to us admissible as a circumstance or as circumstances against him, and that the objection of remoteness goes to the weight and not the admissibility of the testimony").

[b] **Paying off debts.**—Martin v. State, 94 Tex. Cr. 175, 249 SW 839; Perry v. State, 69 Tex. Cr. 644, 155 SW 263, 265 (where the court said: "Mrs. C. J. Brown testified that a few days before the robbery she had loaned appellant some money, and that on the day after the robbery appellant had paid her back. This was admissible as a circumstance in the case. The motorman being robbed of money on Friday night, it was permissible to show that appellant had no money prior to that date, but had money the day after the robbery").

[c] **Improvement in attire.**—The circumstance that accused was shabbily dressed before robbery and well dressed afterwards was admissible, though state did not rely entirely on circumstantial evidence. State v. Wales, 168 La. 322, 122 S 52.

[39] Peo. v. Oldham, 111 Cal. 648, 44 P 312.

[a] **Cartridges.**—Evidence is competent that before the robbery defendant had attempted to buy cartridges for his gun. Peo. v. Oldham, 111 Cal. 648, 44 P 312.

[40] Williams v. State, 51 Nebr. 711, 71 NW 729.

[41] Williams v. State, supra.

[a] **"Flash roll" and similar instruments of confidence man.**—Williams v. State, 51 Nebr. 711, 71 NW 729.

Burglars' tools see infra text and notes 54, 55.

[42] See Criminal Law § 1045.

[43] Peo. v. Powloski, 311 Ill. 284, 142 NE 551; Armstrong v. Com., 190 Ky. 217, 227 SW 162; State v. Barone, 173 Minn. 232, 217 NW 104; State v. Conley, (Mo.) 238 SW 804.

[a] **Weapons not used.**—"It is contended that the court erred in the ruling, because it was not shown that the revolver was connected with the robbery. It is competent to prove that an accused, when arrested, possessed a weapon or tools suitable for the commission of the crime charged, even if no claim is made that the tools or deadly weapon was actually used in committing the crime." Peo. v. Powloski, 311 Ill. 284, 142 NE 551, 553.

[b] **Brass knucks and saws.**—"The alleged incompetent evidence complained of was that respecting the finding of the brass knucks and saws on his person by the policeman. This evidence, in connection with appellant's possession of the ring, of which Heintz had been robbed, and the pistol by means of which the robbery was effected, was clearly competent, as it tended to identify him as the perpetrator of the crime; also to prove a motive for its commission by him and his preparedness for resorting to deeds of violence in accomplishing it." Armstrong v. Com., 190 Ky. 217, 227 SW 162, 163.

[44] State v. Conley, (Mo.) 238 SW 804, 806.

"The testimony in regard to the finding of the pistols in the automobile was authorized under the rule which renders admissible evidence in regard to the possession of weapons, tools, implements, or any articles with which the particular crime was or might have been committed. Especially is this rule applicable where the possession of the instrument shown is of a lethal nature, such as a pistol, which may be made one of the necessary adjuncts in the commission of a crime characterized by violence, as in a case of robbery." State v. Conley, supra.

[45] State v. Nichols, 179 Minn. 301, 229 NW 99; State v. Switzer, 38 Nev. 108, 145 P 925.

[a] **Four days.**—Evidence that defendant about four days prior to the alleged robbery, had in his possession a revolver similar to that used in the robbery and found on his person after his arrest a few days subsequent to the offense was admissible. State v. Switzer, 38 Nev. 108, 145 P 925.

[b] **Eleven months.**—"Admitting evidence that defendant, at prior times and places, had in his possession a revolver similar to the one used by him in the robbery complained of, was not error. . . . In the discretion of the court, such evidence was admissible, although one of the occasions was some 11 months prior to the robbery charged." State v. Nichols, 179 Minn. 301, 229 NW 99.

[46] Ala.—Anderson v. State, 209 Ala. 36, 95 S 171.

Cal.—Peo. v. Ward, 77 Cal. 113, 19 P 373.

Ill.—Peo. v. Cunningham, 300 Ill. 376, 133 NE 270; Bow v. Peo., 160 Ill. 438, 43 NE 593.

La.—State v. Gordon, 115 La. 571, 39 S 625.

Minn.—State v. Barone, 173 Minn. 232, 217 NW 104; State v. Minot, 79 Minn. 118, 81 NW 753.

Mo.—State v. Woodard, 309 Mo. 19, 273 SW 1047; State v. Conley, 238 SW 804.

Tex.—Silver v. State, 110 Tex. Cr. 512, 8 SW (2d) 144, 9 SW (2d) 358, 60 ALR 290; Arlington v. State, 98 Tex. Cr. 68, 263 SW 593; Williams v. State, 34 Tex. Cr. 523, 31 SW 405; Crumes v. State, 28 Tex. A. 516, 13 SW 868, 19 AmSR 853.

[a] **Two months.**—Admission of evidence that a revolver was found on the person of accused two months after the commission of an alleged robbery was not error. Peo. v. Cunningham, 300 Ill. 376, 133 NE 270.

[b] **Eight months.**—Evidence in relation to weapons and cartridges found at defendant's arrest over eight months after robbery was admissible. State v. Barone, 173 Minn. 232, 217 NW 104.

[47] State v. Conley, (Mo.) 238 SW 804; Silver v. State, 110 Tex. Cr. 512, 8 SW (2d) 144, 9 SW (2d) 358, 60 ALR 290.

[a] **Illustration.**—In a prosecution for robbery committed by threats with pistols, evidence that pistols were found in the automobile occupied by defendant and his companions shortly after the robbery is admissible against defendant under the rule permitting evidence in regard to the possession of weapons, tools, or articles with which the particular crime was or might have been committed. State v. Conley, (Mo.) 238 SW 804.

by him,[48] or in an outbuilding adjacent to his residence.[49]

Introduction into evidence. In accordance with general rules,[50] weapons or other articles are admissible in evidence when it appears from other evidence that they were or might have been used in the robbery.[51]

Evidence offered by the defense as to how defendant acquired possession of a weapon used in the robbery will be excluded where immaterial.[52] Where the robber had ample time before arrest to dispose of a gun used in the robbery, it has been held that defendant cannot show that he had no gun when arrested.[53]

Burglar's tools. Evidence showing defendant's possession of burglar's tools is admissible where a burglary was attempted or committed in connection with the robbery.[54] But where such articles were not used in connection with the robbery, evidence of defendant's possession thereof is inadmissible.[55]

[§ 159] **bb. By Companion.** It is competent to show that codefendant had a weapon on his person when arrested for the robbery.[56]

[§ 160] **(c) Found near Scene of Crime.** It is permissible to show that cartridges found near the scene of the robbery were of the same caliber as defendant's gun.[57] But in the absence of testimony connecting the weapon with defendant or the robbery, evidence is admissible that following a conversation with defendant officers found a gun near the scene of the crime.[58]

[§ 161] **(6) Stolen Property or Property Similar Thereto—(a) Existence, Identification, and Description.** Evidence otherwise proper[59] is admissible to prove the existence[60] of the property stolen, or to identify[61] or describe[62] it.

Introducing property into evidence.[63] On sufficient identification,[64] it is permissible to introduce in evidence the stolen property itself.[65]

[§ 162] **(b) Disposition of.** Evidence is admis-

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48. Arlington v. State, 98 Tex. Cr. 68, 263 SW 593.

[a] **Rule applied.**—Evidence of the finding of pistols in a room occupied by defendant and a companion when arrested, which coincided in appearance with the description of those used in committing the offense, was admissible. Arlington v. State, 98 Tex. Cr. 68, 263 SW 593.

49. State v. Woodard, 309 Mo. 19, 273 SW 1047.

[a] **Hidden in smokehouse.**—Where there was evidence of defendant's attempt to rob a bank while armed with a pistol, and the state's witness testified that he was near defendant's house at the time of the latter's return on the day of the offense, and that defendant went into his smokehouse and then came to the witness, it was not improper to show by the witness that he went to the smokehouse with defendant's consent and found concealed therein a loaded pistol. "Testimony of this character is admissible as a circumstance tending to show the appellant's connection with the crime." State v. Woodard, 309 Mo. 19, 273 SW 1047, 1049.

50. See Criminal Law § 1225.

51. Peo. v. Allegretti, 291 Ill. 364, 126 NE 158.

[a] **Illustration.**—Pistols and a police star, taken from the automobile in which defendants were arrested, were properly admissible on a trial for robbery, where the evidence indicated that defendants knew that the weapons, or some of them, were in the car before they were arrested, and while driving about the city. Peo. v. Allegretti, 291 Ill. 364, 126 NE 158.

52. Peo. v. Kaswick, 319 Ill. 306, 150 NE 16.

[a] **Target pistol.**—In a prosecution for robbery while armed with a deadly weapon, it was not error to exclude evidence on behalf of defendants that a witness for the defense owned a target pistol used in the robbery and as to the manner of its coming into the possession of one of defendants using it. Peo. v. Kaswick, 319 Ill. 306, 150 NE 16.

53. Washington v. State, 188 Ala. 101, 66 S 34.

54. State v. Minot, 79 Minn. 118, 81 NW 753.

[a] **Files, drills, punches, ratchet, and explosives.**—State v. Minot, 79 Minn. 118, 81 NW 753.

55. Peo. v. Sansome, 84 Cal. 449, 24 P 143; State v. Shannon, 33 Mo. 596.

56. Peo. v. Dean, 308 Ill. 74, 139 NE 37.

[a] **Revolver.**—Peo. v. Dean, 308 Ill. 74, 139 NE 37.

57. State v. Malsogoff, 88 Wash. 419, 153 P 379.

58. Yeager v. State, 106 Tex. Cr. 462, 294 SW 200. See Smith v. State, 106 Tex. Cr. 434, 292 SW 877, 879 (where the court said: "That a new sawed-off shotgun was found in the San Antonio river at a certain place the day after the robbery might have been proved by the state; but that it was found as a result of declarations made by Jack Smith or one Hobrecht was not proper upon the trial of Kenneth Smith alone").

[a] **Rule applied.**—In a prosecution for robbery, admitting testimony that, after arresting defendants and placing them in jail and after a conversation with one defendant with reference to a gun, out of the presence and hearing of defendant on trial, the witness and others went to a certain spot and found the gun, there being no showing that the gun had any connection with the robbery or with defendant on trial, was error. Yeager v. State, 106 Tex. Cr. 462, 294 SW 200.

59. See supra § 148.

60. State v. Bailey, 90 Or. 627, 178 P 201.

[a] **Promissory note.**—In a robbery case, where defendant was charged with taking a note from the prosecuting witness, defendant denying that there was any note, the state was entitled to show that the note described in the indictment was placed in the hands of a bank for collection. "The state was entitled to trace the note, if there was one, from the time of its execution until its destruction." State v. Bailey, 90 Or. 627, 178 P 201, 205.

61. Ware v. State, 12 Ala. A. 101, 67 S 763.

[a] **Original purchase of property taken.**—In a prosecution for robbery, evidence as to where the prosecuting witness had bought the watches taken, corroborated by that of the one from whom he bought them, was admissible, since it aided in identifying the watches recovered as the watches that were taken. Ware v. State, 12 Ala. A. 101, 67 S 763.

62. Holland v. State, 110 Tex. Cr. 384, 10 SW (2d) 561; Cole v. State, 104 Tex. Cr. 533, 286 SW 204.

[a] **Particular kind of money,** as gold, silver, or currency. Cole v. State, 104 Tex. Cr. 533, 286 SW 204.

63. **Demonstrative evidence generally** see Criminal Law §§ 1221-1232.

64. See case infra this note.

[a] **Need not identify beyond reasonable doubt.**—In a criminal case the state is only required to establish the guilt of accused beyond a reasonable doubt, and not each separate circumstance or item of evidence, and hence was not required to identify property alleged to have been taken from one of the victims of the alleged robbery beyond a reasonable doubt in order to justify its admission in evidence. State v. Conroy, 82 Wash. 417, 144 P 538.

65. Holland v. State, 110 Tex. Cr. 384, 10 SW (2d) 561; State v. Conroy, 82 Wash. 417, 144 P 538.

[a] **Check.**—"There are some bills of exceptions complaining of the rulings of the court. The first of these is a complaint of the introduction in evidence of the check which was identified as the one that was taken from the injured party and found in the possession of the appellant. The objection urged was that it was immaterial and irrelevant. In bill No. 2 complaint is made of the testimony of the injured party describing the check and identifying it, and also stating from whom he got it; also giving his movements with the check up to the time it was taken from him. Bill No. 3 complains of the testimony of the person who issued the check, his identification of it, and his delivering it to Long in time and accord with his version of the affair. The bills mentioned seem to present no error. The check being the fruit of the alleged crime, it was competent to introduce it in evidence, and the relation of facts touching its possession and acquisition so far as they were detailed were pertinent and

sible to show that defendant attempted to get rid of the property stolen or property similar thereto.[66] It is also proper to show defendant's subsequent sale of property stolen,[67] or subsequent deposit of money meeting the general description of that taken in the robbery.[68]

[§ 163] **(c) Possession[69]—aa. By Defendant.** Possession by the accused of the stolen property shortly after the robbery is admissible against him,[70] as where it was found on his person,[71] or in business[72] or residential[73] premises occupied by defendant, or in the cell in which he was incarcerated after the robbery.[74] It is also proper to show defendant's subsequent possession of property or money which, because of its similarity to that taken, might have been the stolen property,[75] the fact that such evidence is inconclusive affecting its probative force, but not its admissibility.[76] The source from which witnesses finding stolen property learned that it was in defendant's possession does not affect the admissibility of such evidence.[77]

Exclusive character of possession. To be admissible as evidence inferring guilt, defendant's possession should be exclusive in the sense that it is in-

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proper." Holland v. State, 110 Tex. Cr. 384, 10 SW (2d) 561, 562.

[66] Anderson v. State, 209 Ala. 36, 95 S 171; Peo. v. Barnhill, 337 Ill. 413, 169 NE 210; Peo. v. Quigley, 217 Mich. 213, 185 NW 787.

[a] **Fumbling in pockets.**—Evidence that when defendant and another were arrested for robbery shortly after its commission certain moneys were taken from them, and that money was afterwards found in the automobile in which they were transported to the city hall, and that one of them, while in the automobile, kept fumbling in his pocket, though told to keep his hands out of his pockets, was admissible as tending to corroborate the evidence concerning the robbery, and the taking of money, and as tending to show an attempt on the part of the prisoner to get rid of the money. Anderson v. State, 209 Ala. 36, 95 S 171.

[b] **Hurried effort to dispose of under assumed name.**—Possession of recently stolen property, accompanied by an active and hurried effort, under an assumed name, to dispose thereof, is evidence to go to the jury upon the issue of whether the accused stole the property. Peo. v. Quigley, 217 Mich. 213, 185 NW 787.

[67] State v. Barber, (Mo.) 242 SW 664.

[a] **Illustration.**—In a prosecution for robbery, where defendant admitted that he drove the car in which the robbers came to the store of prosecuting witness and by which they made their escape, but claimed he was driving it for hire and had no knowledge of the robbery before or after it was committed, evidence that some time after the robbery defendant and one of the participants sold a part of the jewelry taken at the time of the robbery was competent. "The evidence complained of was clearly admissible as tending to show defendant's connection with the robbery." State v. Barber, (Mo.) 242 SW 664, 666.

[68] State v. Malsogoff, 88 Wash. 419, 153 P 379.

[a] **Deposit corresponding in character and proportionate amount.**—State v. Malsogoff, 88 Wash. 419, 153 P 379 (gold, silver, and currency taken by five robbers and about one-fifth of the amount taken deposited by defendant in gold, silver, and currency).

[69] **Possession of identifying property other than that stolen** see infra § 165.

Sufficiency of possession of stolen property to:
Raise presumption of guilt see supra § 146.
Support conviction see infra § 180.

[70] Cal.—Peo. v. Sullivan, 144 Cal. 471, 77 P 1000; Peo. v. Castile, 3 Cal. A. 487, 86 P 746; Peo. v. Salas, 2 Cal. A. 537, 84 P 295.

Mich.—Peo. v. Whitson, 43 Mich. 419, 5 NW 454.

Mo.—State v. Finn, 199 Mo. 597, 98 SW 9; State v. Hyatt, 179 Mo. 344, 78 SW 601; State v. Balch, 136 Mo. 103, 37 SW 808; State v. Wyatt, 124 Mo. 537, 27 SW 1096.

N. Y.—Peo. v. Mackinder, 80 Hun 40, 29 NYS 842.

Philippine.—U. S. v. Castro, 23 Philippine 67; U. S. v. Barroga, 21 Philippine 161.

Tex.—Glover v. State, 108 Tex. Cr. 46, 299 SW 240; Fitzgerald v. State, 87 Tex. Cr. 34, 219 SW 199; Thompson v. State, 35 Tex. Cr. 511, 34 SW 629.

Utah.—Peo. v. Kerm, 8 Utah 268, 30 P 988.

[a] **Possession of weapon taken from person robbed.**—State v. Finn, 199 Mo. 597, 98 SW 9.

[71] U. S. v. Castro, 23 Philippine 67.

[a] **Stolen stick-pin seen in defendant's shirt.**—U. S. v. Castro, 23 Philippine 67.

[72] State v. Hyatt, 179 Mo. 344, 78 SW 601.

[a] **In cellar of saloon of which defendant had charge.**—State v. Hyatt, 179 Mo. 344, 78 SW 601.

[73] State v. Wyatt, 124 Mo. 537, 27 SW 1096; Fitzgerald v. State, 87 Tex. Cr. 34, 219 SW 199.

[a] **House where arrested.**—Evidence that the stolen property was found the morning after the robbery, in the house where defendant was arrested, is competent. State v. Wyatt, 124 Mo. 537, 27 SW 1096.

[74] Peo. v. Whitson, 43 Mich. 419, 5 NW 454.

[75] Williams v. State, 123 Ala. 39, 26 S 521; Peo. v. Filipak, 322 Ill. 546, 153 NE 673; Peo. v. Deluce, 237 Ill. 541, 86 NE 1080; Arlington v. State, 98 Tex. Cr. 68, 263 SW 593; Harris v. Com., 129 Va. 751, 105 SE 541.

[a] **Bill with "binder and four horses thereon."**—In prosecution for robbery, where prosecuting witness testified that a ten dollar bill, taken from him, had "a binder and four horses on it" the fact that defendant had a similarly marked ten dollar bill on him at the time of the arrest was a circumstance to be considered by the jury, together with the other facts in the case, notwithstanding the existence of numerous other similarly marked bills in circulation. Harris v. Com., 129 Va. 751, 105 SE 541.

[b] **Marked money.**—Evidence that bill found in defendant's possession after arrest was peculiarly marked, as was one taken from complaining witness, was admissible. Arlington v. State, 98 Tex. Cr. 68, 263 SW 593.

[c] **Ten dollar gold certificate.**—"It is further contended that the admission in evidence of the $10 bill taken from Filipak's shoe was error. Brolet testified that among other bills he had been robbed of a $10 gold certificate. Shortly thereafter the police officers found in Filipak's shoe a bill of that character and denomination. One of the officers testified that at the police station Filipak denied, before his shoe was removed, that he had any money other than that found in his pockets. While there was no complete identification of the $10 certificate taken from Brolet, the similarity of the bill found to the one stolen, the denial by Filipak that he had the bill, and the brief interval between the robbery and the discovery of the bill in Filipak's shoe, were circumstances which tended to prove the charge." Peo. v. Filipak, 322 Ill. 546, 153 NE 673, 675.

[d] **Foreign coin.**—"The plaintiff in error further insists that the court committed error in permitting the two Kaspers to testify that they saw a Russian coin in the possession of the plaintiff in error, without identifying it as to amount or in other particulars. Plaintiff in error admitted the possession of a Russian coin, and did not attempt to show that it was different in amount from the one which the complaining witness testified had been taken from him. This evidence was competent. The weight to be given to it is for the jury." Peo. v. Deluce, 237 Ill. 541, 86 NE 1080, 1082.

[e] **Fifteen dollars.**—A letter written by defendant a few days after the robbery, in which he stated that he had got hold of about fifteen dollars, is admissible, in connection with other evidence, where it appeared that the amount taken was about fifteen dollars. Williams v. State, 123 Ala. 39, 26 S 521.

[76] Peo. v. Filipak, 322 Ill. 546, 153 NE 673.

[77] Fitzgerald v. State, 87 Tex. Cr. 34, 219 SW 199, 200.

"It could make no difference, as to the admissibility of such evidence, from what source the officers learned the whereabouts of said watch; and if there was any fact relevant to the question as to how the watch came to be in such place, which had defensive weight, it was appellant's right to have the same before the jury, to thus enable them to decide what weight to give to the finding of said watch at said place." Fitzgerald v. State, supra.

consistent with an independent possession by others.[78]

Explaining possession. Defendant may properly introduce evidence to explain on grounds compatible with innocence of the robbery his possession of the property stolen or property similar thereto.[79] But where there is no claim that money was found in defendant's possession, evidence offered by the defense as to receipt of money by defendant from proper sources should be excluded as immaterial.[80]

Lack of possession. Where there was ample time for the robber to dispose of the stolen property before the time of defendant's arrest, defendant cannot introduce evidence that no property of such description was found on his person when arrested.[81]

[§ 164] **bb. By Companion.**[82] It has been held proper to admit evidence showing possession of the stolen property by an accomplice[83] or intimate[84] of defendant.

[§ 165] **(7) Possession of Other Property Actually or Presumably in Possession of Robber.** Aside from and in addition to rules as to weapons[85] and stolen property,[86] it is permissible in identification of defendant to show that he possessed any articles actually or presumably possessed by the robber.[87] Evidence offered in rebuttal to the effect that defendant never possessed property of this character will be excluded where too remote to be relevant.[88]

[§ 166] **3. Weight and Sufficiency[89]—a. In General.** To convict of robbery the burden rests on the state[90] to prove beyond a reasonable doubt the commission of the offense[91] and defendant's guilty participation therein.[92] In the notes below are given references to cases in which the evidence was held sufficient to sustain a conviction of robbery,[93] as of robbery committed in a particular place,[94] such as | a bank,[95] store,[96] or house,[97] or of robbery commit-

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[78] Peo. v. Powloski, 311 Ill. 284, 142 NE 551.

Possession by companion see infra § 164.

[79] Buford v. State, 124 Miss. 418, 86 S 860; Chancey v. State, 50 Tex. Cr. 85, 96 SW 12.

[a] **Amount of money.**—Defendant may introduce evidence to account for the amount of money found on him after the robbery. Chancey v. State, 50 Tex. Cr. 85, 96 SW 12.

[b] **Time of possession.**—Where the state was permitted to prove that when the defendant was arrested for the robbery in question he had possession of a sum of money equal, approximately, to his share of the money if he participated in the robbery, it was error to refuse to permit to him to show that a reasonable time prior to the robbery he had such money and account for his possession, and one day prior to the robbery is too short a time to limit such evidence. Buford v. State, 124 Miss. 418, 86 S 860.

[80] Peo. v. Becker, 48 Mich. 43, 11 NW 779.

[81] Washington v. State, 188 Ala. 101, 66 S 34.

[a] **Money.**—Washington v. State, 188 Ala. 101, 66 S 34.

[82] **Exclusive character of defendant's personal possession** see supra § 163 text and note 78.

[83] Peo. v. Scott, 84 Cal. A. 642, 258 P 638; Coulson v. State, 102 Tex. Cr. 8, 277 SW 135.

[84] Clay v. State, 122 Ga. 136, 50 SE 56.

[a] **Woman.**—Where the article taken was a watch and the accused and a certain woman were very intimate, evidence that the watch was in the possession of the woman the morning after the robbery was admissible. Clay v. State, 122 Ga. 136, 50 SE 56.

[85] See supra §§ 157–160.

[86] See supra §§ 161–164.

[87] Anderson v. State, 209 Ala. 36, 95 S 171; Smith v. State, 207 Ala. 428, 93 S 397; Washington v. State, 188 Ala. 101, 66 S 34; State v. Martin, 149 La. 673, 90 S 19; Arlington v. State, 98 Tex. Cr. 68, 263 SW 593; Tabor v. State, 52 Tex. Cr. 387, 107 SW 1116.

[a] **Bloodstained revolver.**—Anderson v. State, 209 Ala. 36, 95 S 171 (found on defendant when arrested shortly after the robbery).

[b] **Bullet-riddled hat.**—Smith v. State, 207 Ala. 428, 93 S 397 (left in repair shop by defendant who claimed bullet hole a mere cigaret burn).

[c] **Car.**—Arlington v. State, 98 Tex. Cr. 68, 263 SW 593 (of same make and model as one used in commission of the robbery).

[d] **Conductor's pass.**—Tabor v. State, 52 Tex. Cr. 387, 107 SW 1116 (robbery committed on railroad train, pass issued to defendant showed he was on the train).

[e] **Envelope.**—Arlington v. State, 98 Tex. Cr. 68, 263 SW 593 (holding that where defendant at time of offense used automobile bearing foreign license, and at time of arrest in different city used same type of car bearing newly issued domestic license, evidence that envelope in which such domestic license was inclosed was found on premises occupied by defendant and companion in committing offense was admissible).

[f] **Goggles.**—Arlington v. State, 98 Tex. Cr. 68, 263 SW 593 (similar in appearance to those used by robber).

[g] **Grocery billhead.**—State v. Martin, 149 La. 673, 90 S 19 (exhibited to victim by negro before robbery and given to defendant, also a negro, by grocer who further testified that he had never given a similar billhead to any other negro).

[h] **Rain soaked clothing and muddy shoes.**—Washington v. State, 188 Ala. 101, 66 S 34 (robbery committed in rain, evidence admissible even though probative force not over strong).

[i] **Wrapping paper.**—Arlington v. State, 98 Tex. Cr. 68, 263 SW 593 (wherein the court held that evidence that paper, usable for wrapping and bearing advertisement of store at which defendant and companion bought articles and exhibited roll of bills immediately after offense, was found in room, occupied by them immediately before offense, from which they soon departed, was admissible).

Probative force of evidence see infra § 179.

[88] State v. Curtis, (Mo.) 23 SW (2d) 122.

[a] **Black or tan shoes.**—"The state's witnesses testified in their identification of defendant that, on the night of the robbery, he wore tan shoes and that, when they observed him the next day at the jail, he wore tan shoes. Defendant's testimony shows that on the day of the robbery he wore black shoes, and it may be inferred from his testimony that he did not at that time possess tan shoes. Defendant offered to show by a shoe dealer that, in September or October previous, he bought a pair of low black shoes from him and had another pair repaired, and that the shoes defendant wore at the trial were the same shoes sold him by the dealer. The fact that defendant had previously bought or owned black shoes, or that he owned them on the day of the robbery, would not have tended to show that the perpetrator of the robbery did not wear tan shoes. Moreover, the only relative and material question related to whether defendant wore tan shoes on the night of the robbery, not whether he ever wore such shoes." State v. Curtis, (Mo.) 23 SW (2d) 122, 124.

[89] **General rules** see Criminal Law §§ 1559–1999.

[90] See supra §§ 144–147.

[91] See infra §§ 167–175.

[a] **Corpus delicti.**—(1) Evidence sufficient to convict as against contention that corpus delicti was not proved. Peo. v. Strider, 96 Cal. A. 632, 274 P 601; Peo. v. Ferrara, 31 Cal. A. 1, 159 P 621; State v. Henry, 168 La. 855, 123 S 597; State v. Depriest, 288 Mo. 459, 232 SW 83; Bloomer v. Peo., 1 Abb. Dec. (N. Y.) 146, 3 Keyes 9. (2) Term defined see Criminal Law § 1578.

[b] **Completed offense.**—(1) Evidence held sufficient to show completed offense as against claim that only an attempt was proved. Peo. v. Bacciocco, 81 Cal. A. 19, 251 P 817; Peo. v. Rogers, 303 Ill. 578, 136 NE 470 (holding that evidence that defendant and his companions threatened prosecuting witness with guns and demanded that he deliver the package of money he was carrying to them, and that, when he attempted to flee, they followed him and knocked him unconscious with their guns, and that, when witness' companion reached him and he recovered consciousness, the package was gone, was sufficient to warrant the inference that the defendant and his companions took the money, though no witness testified to seeing them do so, and therefore establishes robbery, and not merely an assault with intent to rob). (2) Evidence held insufficient to support conviction for completed offense. Peo. v. Dahl, (Cal. A.) 290 P 608.

[92] See infra §§ 177–180.

[93] Ala.—Cowart v. State, 22 Ala. A. 300, 115 S 145.

Ariz.—Orme v. State, 276 P 321.

Ark.—Phillips v. State, 162 Ark. 541, 258 SW 403; Tarkington v. State, 154 Ark. 365, 242 SW 830; Benson v. State, 103 Ark. 87, 145 SW 883.

Cal.—Peo. v. Sampson, (A.) 286 P 434; Peo. v. Elliott, (A.) 285 P 401; Peo. v. Mesa, 101 Cal. A. 103, 281 P 83; Peo. v. Green, 93 Cal. A. 435, 269 P 687; Peo. v. Powell, 83 Cal. A. 62, 256 P 561; Peo. v. Hewitt, 78 Cal. A. 426, 248 P 1021; Peo. v. Dutro, 75 Cal. A. 138, 242 P 84; Peo. v. Yates, 71 Cal. A. 788, 236 P 185; Peo. v. Oakleaf, 66 Cal. A. 314, 226 P 24; Peo. v. Mahach, 65 Cal. A. 359, 224 P 130; Peo. v. McNabb, 63 Cal. A. 732, 219 P 1031; Peo. v. McNabb, 63 Cal. A. 755, 219 P 1028; Peo. v. Goulding, 60 Cal. A. 542, 213 P 277; Peo. v. Scott, 43 Cal. A. 439, 185 P 305; Peo. v. Tanner, 36 Cal. A. 20, 171 P 439; Peo. v. Ferrara, 31 Cal. A. 1, 159 P 621; Peo. v. Osaki, 25 Cal. A. 329, 143 P 789; Peo. v. Mario, 18 Cal. A. 70, 122 P 76; Peo. v. Boyd, 16 Cal. A. 130, 116 P 323; Peo. v. Crowley, 13 Cal. A. 322, 109 P 493.

D. C.—Smith v. U. S., 57 App. 71, 17 F. (2d) 223.

Ga.—Jones v. State, 10 Ga. A. 59, 72 SE 518; Holland v. State, 8 Ga. A. 202, 68 SW 861.

Ill.—Peo. v. Bell, 328 Ill. 446, 159 NE 807; Peo. v. McGuirk, 312 Ill. 257, 143 NE 855; Peo. v. Decina, 306 Ill. 260, 137 NE 844; Peo. v. Jordan, 303 Ill. 316, 135 NE 729; Peo. v. Gijga, 299 Ill. 172, 132 NE 506; Peo. v. Maciejewski, 294 Ill. 390, 128 NE 489; Peo. v. Sobzcak, 286 Ill. 157, 121 NE 592; Peo. v. Kielczewski, 269 Ill. 293, 109 NE 981; Peo. v. Strand, 268 Ill. 542, 109 NE 274.

Iowa.—State v. Newcomber, 174 NW 255; State v. Leete, 187 Iowa 305, 174 NW 253. See also State v. Becker, 159 Iowa 72, 140 NW 201 (where the evidence of defendant's guilt of robbery was sufficient to go to the jury, but conviction was reversed for failure to submit issue of assault with intent to rob).

Kan.—State v. Rose, 118 Kan. 583, 235 P 868.

Ky.—Nelson v. Com., 232 Ky. 568, 24 SW (2d) 276; Browder v. Com., 232 Ky. 205, 22 SW (2d) 615; Boyd v. Com., 194 Ky. 73, 238 SW 182; Aldridge v. Com., 192 Ky. 215, 232 SW 619; Armstrong v. Com., 190 Ky. 217, 227 SW 162; Hughes v. Com., 124 SW 788.

Mass.—Com. v. Crecorian, 264 Mass. 94, 162 NE 7.

Minn.—State v. Bruno, 141 Minn. 56, 169 NW 249; State v. Flockey, 128 Minn. 40, 150 NW 168; State v. Briggs, 122 Minn. 493, 142 NW 823.

Mo.—State v. Faudi, 11 SW (2d) 1014; State v. Brazel, 270 SW 273; State v. Cantrell, 256 SW 464; State v. Brown, 290 Mo. 177, 234 SW 785.

Nebr.—Gardiner v. State, 110 Nebr. 11, 192 NW 946; Curtis v. State, 97 Nebr. 397, 150 NW 264; Williams v. State, 91 Nebr. 605, 136 NW 1011; Bunge v. State, 87 Nebr. 557, 127 NW 899.

Nev.—State v. Lewis, 50 Nev. 212, 255 P 1002.

N. J.—State v. DeBellis, 136 A 603 [aff 104 N. J. L. 187, 138 A 923].

N. Y.—Bloomer v. Peo., 1 Abb. Dec. 146, 3 Keyes 9.

N. C.—State v. Dorsett, 182 N. C. 826, 109 SE 39.

Okl.—Lassiter v. State, (Cr.) 287 P 756; Luce v. State, 36 Okl. Cr. 49, 252 P 452; Randall v. State, 33 Okl. Cr. 262, 243 P 983; Cox v. State, 25 Okl. Cr. 252, 220 P 70; Hill v. State, 19 Okl. Cr. 406, 200 P 253; Moody v. U. S., 2 Okl. Cr. 662, 103 P 862, 103 P 1039.

Philippine.—U. S. v. Albao, 29 Philippine 86; U. S. v. Castro, 23 Philippine 67; U. S. v. Divino, 18 Philippine 425; U. S. v. Navarro, 18 Philippine 357; U. S. v. Gregorio, 4 Philippine 443 (as to one of two defendants); U. S. v. San Pedro, 4 Philippine 405; U. S. v. Fuentes, 4 Philippine 404; U. S. v. Palisoc, 4 Philippine 207; U. S. v. Almasan, 4 Philippine 186; U. S. v. Oangoang, 3 Philippine 312.

Tex.—Walker v. State, 105 Tex. Cr. 141, 287 SW 497; Williams v. State, 104 Tex. Cr. 565, 286 SW 237; Walker v. State, 104 Tex. Cr. 561, 286 SW 236; Mouhart v. State, 99 Tex. Cr. 463, 269 SW 801; Curtis v. State, 93 Tex. Cr. 448, 248 SW 362; Spiller v. State, 68 Tex. Cr. 195, 150 SW 1164; Robinson v. State, 62 Tex. Cr. 645, 138 SW 704.

Utah.—State v. Sullivan, 276 P 166.

Wash.—State v. Fateh-Mohamed, 76 Wash. 462, 136 P 676.

[a] **Accomplice's testimony.**—(1) Sufficiently corroborated by independent evidence. Fortman v. State, (Okl. Cr.) 280 P 1109. (2) Held sufficient to support conviction without corroboration. Peo. v. Piech, 333 Ill. 293, 164 NE 692.

[b] **Circumstantial evidence.**—Peo. v. Waugh, 30 Cal. A. 402, 158 P 336; Peo. v. Barnhill, 337 Ill. 413, 169 NE 210; State v. Dingman, 155 Iowa 332, 135 NW 1082; State v. Rose, 118 Kan. 583, 235 P 868; State v. Goodwin, (Mo.) 300 SW 723; State v. Snyder, 41 Nev. 453, 172 P 364; Bloomer v. Peo., 1 Abb. Dec. (N. Y.) 146, 3 Keyes 9; Brannon v. State, (Okl. Cr.) 264 P 835; Wilson v. State, 28 Okl. Cr. 102, 228 P 1108; State v. King, 67 Wash. 651, 122 P 323.

[c] **Confession aside,** other evidence held sufficient to convict. Peo. v. Bateman, 80 Cal. A. 151, 251 P 335.

[d] **Foreigner's testimony in broken English without aid of interpreter** held sufficient to support conviction where the witness understood the language. Peo. v. Holtzclaw, 76 Cal. A. 168, 243 P 894.

[e] **Victim's testimony corroborated by that of arresting officer.**—Cowart v. State, 22 Ala. A. 300, 115 S 145.

94. Cal.—Peo. v. White, (A.) 283 P 368.

Ida.—State v. Brill, 21 Ida. 269, 121 P 79.

Ill.—Peo. v. Nehrkorn, 305 Ill. 467, 137 NE 407.

Iowa.—State v. Bogardus, 188 Iowa 1293, 176 NW 327.

Mo.—State v. Kaplan, 16 SW (2d) 35.

Nebr.—Boonton v. State, 86 Nebr. 114, 125 NW 144.

N. J.—State v. Casuso, 6 N. J. Misc. 112, 140 A 27 [aff sub nom. State v. Legenza, 146 A 917].

Tex.—Phillips v. State, 73 Tex. Cr. 317, 164 SW 1004.

Wash.—State v. Parsons, 135 Wash. 353, 237 P 497.

[a] **Automobile of victim.**—State v. Bogardus, 188 Iowa 1293, 176 NW 327; State v. Parsons, 135 Wash. 353, 237 P 497.

[b] **Bakery plant.**—Peo. v. Knox, 302 Ill. 471, 134 NE 923.

[c] **Club.**—State v. Depriest, 288 Mo. 459, 232 SW 83.

[d] **Filling station.**—Peo. v. White, (Cal. A.) 283 P 368; Peo. v. Laird, 69 Cal. A. 511, 231 P 596.

[e] **Garage.**—Peo. v. Nehrkorn, 305 Ill. 467, 137 NE 407.

[f] **Ice cream plant.**—State v. Casuso, 6 N. J. Misc. 112, 140 A 27 [aff sub nom. State v. Legenza, (N. J.) 146 A 917].

[g] **Private office.**—Peo. v. Fisher, 303 Ill. 594, 136 NE 496.

[h] **Railroad ticket and telegraph office.**—State v. Allison, (Mo.) 300 SW 1069.

[i] **Speakeasy.**—Phillips v. State, 73 Tex. Cr. 317, 164 SW 1004.

[j] **Street car.**—State v. Brill, 21 Ida. 269, 121 P 79 (conductor); State v. Rebasti, 306 Mo. 336, 267 SW 858 (bank messenger).

[k] **Theatre.**—State v. Kaplan, (Mo.) 16 SW (2d) 35.

[l] **Viaduct.**—Boonton v. State, 86 Nebr. 114, 125 NW 144.

Where affecting classification of offense see infra § 176.

95. Ark.—Baldwin v. State, 119 Ark. 518, 178 SW 409.

Cal.—Peo. v. Booth, 72 Cal. A. 160, 236 P 987; Peo. v. Mendival, 62 Cal. A. 712, 217 P 793.

Ill.—Peo. v. Hildebrand, 307 Ill. 544, 139 NE 107.

Iowa.—State v. Patten, 191 Iowa 639, 182 NW 788 (entering bank with intent to rob as distinct offense in Iowa see infra § 242 text and note 49).

Mo.—State v. Beebe, 2 SW (2d) 712.

R. I.—State v. Miller, 142 A 662.

Wash.—State v. Simpson, 119 Wash. 653, 206 P 561.

Bank robbery as distinct offense see infra §§ 242–244.

96. Cal.—Peo. v. Foster, 198 Cal. 112, 243 P 667.

Ill.—Peo. v. Sicks, 299 Ill. 282, 132 NE 573.

Kan.—State v. King, 102 Kan. 155, 169 P 557.

Mo.—State v. Zoller, 1 SW (2d) 139.

Okl.—Holt v. State, 29 Okl. Cr. 386, 234 P 216; Vandergriff v. State, (Cr.) 282 P 897.

[a] **Candy.**—Peo. v. Foster, 198 Cal. 112, 243 P 667.

[b] **Drugs.**—State v. Zoller, (Mo.) 1 SW (2d) 139; State v. McCombs, (Mo.) 259 SW 440.

[c] **Furs.**—Peo. v. Robinson, 308 Ill. 398, 139 NE 599.

[d] **Jewelry.**—Peo. v. Sicks, 299 Ill. 282, 132 NE 573.

97. Ill.—Peo. v. Chalem, 336 Ill. 399, 168 NE 306.

Ky.—Anderson v. Com., 193 Ky. 663, 237 SW 45.

Minn.—State v. Duddy, 152 Minn. 179, 188 NW 261.

Miss.—Coleman v. State, 155 Miss. 482, 124 S 652.

Mo.—State v. Goodwin, 300 SW 723.

For **later cases, developments** and **changes** in the law see **Annotations,** same title and section number.

ted in connection with another distinct offense;[98] also to cases in which the evidence was held insufficient to sustain a conviction of robbery,[99] as of a robbery committed in a particular place.[1]

[§ 167] **b. Elements of Offense[2]—(1) In General.** In accordance with general rules,[3] the state must prove by direct or circumstantial evidence every element of the offense.[4]

[§ 168] **(2) Particular Elements—(a) Asportation.**[5] The evidence must be sufficient to show an actual taking of the property.[6]

Nebr.—Hukill v. State, 109 Nebr. 279, 190 NW 867.

[a] **Private residence.**—Fowler v. Com., 195 Ky. 80, 241 SW 814; Anderson v. Com., 193 Ky. 663, 237 SW 45; Coleman v. State, 155 Miss. 482, 124 S 652.

[b] **Rooming house.**—Peo. v. Chalem, 336 Ill. 399, 168 NE 306.

[c] **Shack.**—Hukill v. State, 109 Nebr. 279, 190 NW 867.

[d] **Vacant house.**—State v. Bater, (Mo.) 232 SW 1012 (victim dragged from street into vacant house and there robbed).

[98] Cal.—Peo. v. Pickens, 61 Cal. A. 405, 214 P 1027; Peo. v. Sharp, 58 Cal. A. 637, 209 P 266; Peo. v. Morales, 56 Cal. A. 270, 204 P 1088.

Kan.—State v. Hamilton, 119 Kan. 564, 240 P 416.

Mo.—State v. Silvey, 296 SW 128.

N. C.—State v. Dorsett, 182 N. C. 826, 109 SE 39.

Tex.—Walker v. State, 105 Tex. Cr. 141, 287 SW 497.

Wis.—Fifer v. State, 189 Wis. 50, 206 NW 861.

[a] **Assault.**—Peo. v. Pickens, 61 Cal. A. 405, 214 P 1027 (with deadly weapon); State v. Hamilton, 119 Kan. 564, 240 P 416 (under circumstances which would have constituted murder or manslaughter had death ensued); State v. Silvey, (Mo.) 296 SW 128 (felonious); State v. Dorsett, 182 N. C. 826, 109 SE 39 (as to one defendant of three convicted of robbery); Walker v. State, 105 Tex. Cr. 141, 287 SW 497 (indecent); Fifer v. State, 189 Wis. 50, 206 NW 861.

[b] **Burglary.**—Peo. v. Sharp, 58 Cal. A. 637, 209 P 266.

[c] **Kidnapping.**—Peo. v. Morales, 56 Cal. A. 270, 204 P 1088.

[d] **Larceny.**—State v. Hamilton, 119 Kan. 564, 240 P 416.

[99] Peo. v. Steinbuch, 306 Ill. 441, 138 NE 137; Ditman v. State, 36 Okl. Cr. 77, 252 P 449; Wever v. State, 22 Okl. Cr. 414, 211 P 1062; U. S. v. Palisoc, 36 Philippine 443; U. S. v. Gregorio, 4 Philippine 443 (as to one of two defendants); U. S. v. De la Pata, 3 Philippine 612.

[1] Peo. v. Cramer, 298 Ill. 509, 131 NE 657; State v. Burke, 197 Iowa 338, 197 NW 66; Nobles v. State, 154 Miss. 179, 122 S 392.

[a] **Restaurant.**—Peo. v. Cramer, 298 Ill. 509, 131 NE 657.

[b] **Store.**—Nobles v. State, 154 Miss. 179, 122 S 392.

[c] **Yards.**—State v. Burke, 197 Iowa 338, 197 NW 66.

[2] **Enumerated and discussed** see supra §§ 12-54.

[3] See Criminal Law § 1582.

[4] Ala.—Thomas v. State, 134 Ala. 126, 33 S 130.

Ariz.—Ramirez v. Terr., 9 Ariz. 177, 80 P 391.

Ark.—Rogers v. State, 109 SW 1160; Shell v. State, 84 Ark. 344, 105 SW 575.

Cal.—Peo. v. Nolan, 144 Cal. 75, 77 P 774; Peo. v. Patterson, 124 Cal. 102, 56 P 882; Peo. v. Barry, 90 Cal. 41, 27 P 62; Peo. v. Lum Yit, 83 Cal. 130, 23 P 228; Peo. v. White, 5 Cal. A. 329, 90 P 471; Peo. v. Gonzales, 6 Cal. Unrep. Cas. 263, 56 P 804; Peo. v. McDonald, 5 Cal. Unrep. Cas. 415, 45 P 1005.

Ga.—Hickey v. State, 125 Ga. 145, 53 SE 1026; Moran v. State, 125 Ga. 33, 53 SE 806; Johnson v. State, 1 Ga. A. 729, 57 SE 1056; Harris v. State, 1 Ga. A. 136, 57 SE 937.

Ill.—Peo. v. Campbell, 234 Ill. 391, 84 NE 1035, 123 AmSR 107; Steward v. Peo., 224 Ill. 434, 79 NE 636; Turley v. Peo., 188 Ill. 628, 59 NE 506; Rippetoe v. Peo., 172 Ill. 173, 50 NE 166; Hall v. Peo., 171 Ill. 540, 49 NE 495.

Ind.—Lee v. State, 156 Ind. 541, 60 NE 299; McCarty v. State, 127 Ind. 223, 26 NE 665; Brennon v. State, 25 Ind. 403.

Ky.—Kincaid v. Com., 78 SW 433, 25 KyL 1695.

Minn.—State v. Minot, 79 Minn. 118, 81 NW 753.

Mo.—State v. Calvert, 209 Mo. 280, 107 SW 1078; State v. Vaughan, 199 Mo. 108, 97 SW 879; State v. Davis, 186 Mo. 533, 85 SW 354; State v. Swisher, 186 Mo. 1, 84 SW 911; State v. Alexander, 184 Mo. 266, 83 SW 753; State v. Rowland, 174 Mo. 373, 74 SW 622; State v. Tate, 156 Mo. 119, 56 SW 1099; State v. Tate, 145 Mo. 667, 47 SW 792; State v. Moore, 106 Mo. 480, 17 SW 658.

Mont.—State v. Roach, 11 Mont. 227, 28 P 260; State v. Sullivan, 9 Mont. 174, 22 P 1088.

Nebr.—Walbridge v. State, 13 Nebr. 236, 13 NW 209.

N. Y.—Peo. v. McKenna, 118 App. Div. 766, 103 NYS 870; Peo. v. O'Neil, 6 N. Y. Cr. 226, 4 NYS 410.

N. C.—State v. Leach, 119 N. C. 828, 25 SE 858.

Oh.—McNeal v. State, 11 Oh. Dec. (Reprint) 782, 29 CincLBul 185.

Philippine.—U. S. v. Claravall, 34 Philippine 441.

S. D.—State v. Shields, 13 S. D. 464, 83 NW 559.

Tex.—Tabor v. State, 52 Tex. Cr. 387, 107 SW 1116; Reyes v. State, (Cr.) 102 SW 1156; Glenn v. State, 49 Tex. Cr. 349, 92 SW 806; Gables v. State, (Cr.) 68 SW 288; Brooks v. State, (Cr.) 37 SW 739; Rogers v. State, 32 Tex. Cr. 447, 24 SW 282; Odle v. State, 13 Tex. A. 612.

Va.—Wheeler v. Com., 86 Va. 658, 10 SE 924.

Wash.—State v. Jamieson, 45 Wash. 314, 88 P 214.

[a] **Evidence held sufficient.**—Brown v. State, 34 Ariz. 150, 268 P 618; Cathey v. State, 180 Ark. 1081, 24 SW (2d) 971; Peo. v. Pasqueria, 30 Cal. A. 625, 159 P 173; State v. Dingman, 155 Iowa 332, 135 NW 1082; State v. Harmon, 317 Mo. 354, 296 SW 397; Peo. v. Sperduto, 221 App. Div. 577, 224 NYS 529; Com. v. Earl, 91 Pa. Super. 447.

[b] **Evidence held insufficient.**—Reynolds v. State, 14 Ariz. 537, 132 P 434; Peo. v. Sylvis, 72 Cal. A. 632, 237 P 802; Peo. v. Brooks, 334 Ill. 549, 166 NE 35; U. S. v. Claravall, 34 Philippine 441.

[5] **As element of offense** see supra § 13.

[6] Peo. v. Brooks, 334 Ill. 549, 166 NE 35; Green v. Com., 133 Va. 695, 112 SE 562.

[a] **Pocket-book knocked from hand and left lying beside victim.**—Where the evidence showed defendant's assault and battery upon a woman, rendering her unconscious, that before the assault she had her pocket-book in her hand, that on recovering consciousness she saw defendant bending over her and kicked him, whereupon he ran, and that she then noticed her pocket-book lying a few feet away and on examination found its contents intact, the evidence was insufficient to support a conviction for robbery because there was nothing to show that defendant ever took the pocket-book or had it or its contents in his absolute control for even a moment. Green v. Com., 133 Va. 695, 112 SE 562.

[b] **Where property might have been lost instead of taken.**—"In the present case there is not sufficient evidence to show that Bados was robbed, or, if he was, that he was robbed by the defendant. Bados testified that there was a free for all fight, in which he, the defendant, and two other persons took part; that he did not see any one take his money, but that he first missed it while he was driving away in his cab after the fight was over. His shirt was torn and unbuttoned in front. It is just as consistent with the circumstances to conclude that the money dropped from his pocket and was lost in the scuffle as that it was stolen. There were a number of persons present at the scene of the fight, but Bados made no complaint to them that he was robbed. He testified that he did not know whether any one took the money or how he lost it. Under this state of evidence the proof is insufficient to establish the commission of the crime charged." Peo. v. Brooks, 334 Ill. 549, 166 NE 35, 37.

[c] **Sufficient evidence of taking.**—"The appellant first contends that the evidence is insufficient to support the verdict. The evidence of the complaining witness is to the effect that, on the date alleged in the information, he met the appellant and his codefendant in the town of Buckley; that they seized and carried him for some distance along the sidewalk; that the appellant abstracted from his trousers pocket all of his silver, amounting to about $1.75; that they then threw him onto the sidewalk, face downward; and that, when he got onto his feet, his pocketbook, containing 'a twenty-dollar gold piece and one five,' and which he was carrying in his inside coat pocket, was gone. There is some corroboration of this testimony. Our statute (Rem. & Bal. § 2418) defines robbery as the 'unlawful taking of personal property from the person of another . . . against his will and by means of force or violence, or fear of injury immediate or future to his person or property,' etc.

[§ 169] **(b) Property Taken**[7]**—aa. Existence.** The evidence should be sufficient to show that the property claimed to have been taken actually existed.[8]

[§ 170] **bb. Value.**[9] Any evidence showing that the property taken had some value is sufficient to establish this element of the crime,[10] such as the introduction into evidence of the article itself,[11] or testimony that the articles taken were articles which the person robbed "had purchased,"[12] by paying a specified sum of money.[13]

Value of United States coin need not be proved.[14]

[§ 171] **cc. Ownership and Possession.**[15] Where defendant makes no claim of right, the fact that the property taken was in the immediate possession or custody and control of the prosecuting witness is sufficient evidence of ownership to sustain a conviction.[16] Where ownership of the property is alleged to be in a corporation, it is sufficient to prove a de facto existence of such corporation.[17]

[§ 172] **(c) Person or Presence.**[18] The evidence must be sufficient to show a taking from the person or presence of the victim.[19]

[§ 173] **(d) Force, Intimidation, or Other Method of Taking.**[20] The evidence must be sufficient to

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The evidence of the taking of the money is ample to support the verdict. True, the appellant denied laying his hands upon the complaining witness except to assist him to arise after he had fallen from drunkenness, and denied the taking of the money. But the truth of the testimony was for the jury." State v. Brache, 63 Wash. 396, 115 P 853.

[7] **Subjects of robbery** see supra §§ 14–19.

[8] See case infra this note.

[a] **Evidence held sufficient** to establish existence and identification of promissory note taken in robbery by maker and subsequently burned by same person. State v. Bailey, 90 Or. 627, 178 P 201.

[9] **As element of offense** see supra § 16.

[10] Peo. v. Ferlito, 100 Cal. A. 355, 280 P 136. And see infra text and notes 11–13.

[a] **Shortage of funds following robbery in bank.**—"There was proof of the corpus delicti in that a party, identified as the defendant, entered the bank and with a drawn revolver made threats as to what he would do if any one interfered with him, and was heard handling money in the cage, and thereafter there was evidence that there was a shortage of the funds in the cage. It makes no difference what the amount of the shortage was; the theft of any amount would be sufficient to make the crime robbery." Peo. v. Ferlito, 100 Cal. A. 355, 280 P 136.

[11] Peo. v. Dumas, 161 Mich. 45, 125 NW 766.

[a] **Knife.**—Peo. v. Dumas, 161 Mich. 45, 125 NW 766.

[12] James v. State, 53 Ala. 380.

[13] U. S. v. De la Cruz, 12 Philippine 87.

[14] Barddell v. State, 144 Ala. 54, 39 S 975; Peo. v. Stevens, 141 Cal. 488, 75 P 62; State v. Helvin, 65 Iowa 289, 21 NW 645; State v. Hyde, 22 Wash. 551, 61 P 719.

[15] **As element of offense** see supra §§ 17–19.

[16] Cal.—Peo. v. Nelson, 56 Cal. 77; Peo. v. Ferrara, 31 Cal. A. 1, 159 P 621.

Ida.—State v. Brill, 21 Ida. 269, 121 P 79.

Ill.—Peo. v. Knox, 302 Ill. 471, 134 NE 923; Howard v. Peo., 193 Ill. 615, 61 NE 1016; Bow v. Peo., 160 Ill. 438, 43 NE 593.

Ind.—McAleer v. State, 200 Ind. 366, 163 NE 593.

La.—State v. Hobgood, 46 La. Ann. 855, 15 S 406.

Mont.—State v. Howard, 30 Mont. 518, 77 P 50.

Philippine.—U. S. v. Albao, 29 Philippine 86.

"Where the defendant makes no claim of ownership to the property taken, the fact that the property was taken from the possession of the prosecuting witness is sufficient proof of the ownership, or at least of the fact that the defendant was not the owner and had no right to its possession." State v. Brill, 21 Ida. 269, 274, 121 P 79.

[a] **In victim's pocket.**—Evidence that prosecuting witness got two checks, had them cashed, and that the money in his pocket, when attacked, was a part of their proceeds, is sufficient to show that the money was his property. Peo. v. Ferrara, 31 Cal. A. 1, 159 P 621.

[b] **Evidence sufficient to show victim was special owner.**—Guyon v. State, 89 Tex. Cr. 287, 230 SW 408.

[c] **Evidence sufficient to show victim's personal possession of property.**—"The rule is that once a fact is established inferences follow from it in proportion to the circumstances by which it is surrounded. One ever-present inference results as soon as a fact is proven to exist; namely, that as soon as it passes from the now to the then, so soon as it has passed from the present it is presumed to have remained as proven to exist until the contrary is shown. . . . Here the evidence is undisputed that Anderson was assaulted, knocked down, and badly bruised; the vest pocket where he kept his wallet was cut out, and it is established that nine days before the robbery he had the sum of $320 in his wallet when it was last inspected, and that he kept the wallet containing his money in the inside pocket of his vest. In our opinion the evidence is sufficient to establish the fact that Anderson in fact carried the money in his inside vest pocket, and that it was there at the time the robbery was committed." State v. Olson, (Mont.) 287 P 938, 940.

[d] **In the Philippines,** where a defendant, tried for robbery by cutting and removing crops, claimed the owner had given him permission to do so, the court, in holding the evidence insufficient to sustain a conviction, said: "Without discussing the question whether or not the crime of robbery may be committed by cutting zacate of spontaneous growth, we are of the opinion that, in view of the contradictory statements with reference to the identity of the lands upon which the zacate was cut, the recommendation of the Attorney-General that the decision of the lower court be reversed, the complaint be dismissed and the defendant discharged from the custody of the law, should be accepted, for the reason that the proof is not sufficiently clear and positive to show the guilt of the defendant, beyond a reasonable doubt." U. S. v. Mamonong, 21 Philippine 414, 416.

[17] Peo. v. Bernstein, 304 Ill. 351, 136 NE 683; Peo. v. Kozel, 303 Ill. 112, 135 NE 208; Peterson v. State, 115 Nebr. 302, 212 NW 610.

Proof of corporate existence generally see Corporations § 180.

[18] **As element of offense** see supra §§ 20–23.

[19] Peo. v. Sylvis, 72 Cal. A. 632, 237 P 802.

[a] **Evidence held sufficient.**—"The contention is that the proof utterly failed to show that the money was taken in the presence of Fritz Nensel. Defendants' position is based on the evidence that the money was taken from Mrs. Nensel's custody, while she and defendants were in the cellar, and that, at that time, Fritz Nensel was in the kitchen above them. From these facts it is argued that Mrs. Nensel and defendants, at the time of the robbery, were without the presence and hearing of Nensel. The facts for the state develop that both Mr. and Mrs. Nensel were unlawfully restrained by defendants, that both of them were in custody at the same time, and that the money was taken and the robbery committed while both of them were under restraint, and while they were only a few feet apart. The robbery, so the evidence tends to show, occurred as the result of the restraints. We have no hesitancy in reaching the conclusion that Nensel at least was within the constructive presence of defendants at the time the money was taken. The statute we think comprehends that degree of presence. However, as he was under the restraint and in the custody of defendants, thus permitting them to take the money against his will, we think, under the facts, that he was then in their actual presence." State v. Craft, (Mo.) 23 SW (2d) 183, 185.

[b] **Evidence held insufficient.**—Peo. v. Sylvis, 72 Cal. A. 632, 237 P 802 (where it appeared that the pocket-book taken was picked up from the ground after the victim had left the scene).

[20] **As element of offense** see supra §§ 24–44.

Evidence where affecting classification of offense see infra § 176.

For **later cases, developments** and **changes** in the law see **Annotations,** same title and section number.

prove a taking by force or intimidation,[21] or, where several different methods are specified in a statute defining robbery,[22] to show a taking by some one of such specified methods,[23] proof of any one being sufficient.[24] Where intimidation is relied upon,[25] it must be established by proof of conduct, words, or circumstances reasonably calculated to produce fear.[26] But it is not necessary that there be proof of actual fear, as fear may be presumed where there is just cause for it.[27]

Particular evidence held sufficient. In the notes below are given references to cases in which the evidence was held sufficient to show an assault,[28] or to show actual force,[29] or intimidation;[30] or to show the use of both force and intimidation,[31] or of either one or the other.[32]

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21. Reynolds v. State, 14 Ariz. 537, 132 P 434; Peo. v. O'Connor, 310 Ill. 403, 141 NE 748; Stevens v. State, 19 Nebr. 647, 28 NW 304.

22. See statutory provisions; and supra § 25.

23. Davis v. State, 150 Ga. 19, 100 SE 767; Easley v. State, 82 Tex. Cr. 238, 199 SW 476.

[a] **None of three methods.**—Where the evidence in a prosecution for robbery fails to show the use of any force or intimidation, or a sudden snatching, taking, or carrying away such as is defined to be robbery by Pen. Code (1910) § 148, defendant's conviction for robbery is unauthorized. Davis v. State, 24 Ga. A. 327, 100 SE 767.

24. State v. Bailey, 90 Or. 627, 178 P 201, 204.

"The crime of robbery is made out by proving that property was taken from the person by some one or more of the means enumerated in the statute." State v. Bailey, supra.

25. Force and intimidation as alternative requirements see supra § 24.

26. Easley v. State, 82 Tex. Cr. 238, 199 SW 476.

Particular evidence as to intimidation see infra text and notes 30–32, 35.

27. Ga.—Long v. State, 12 Ga. 293.

Ky.—Haley v. Com., 210 Ky. 554, 276 SW 519.

Mo.—State v. Kennedy, 154 Mo. 268, 55 SW 293; State v. Lamb, 141 Mo. 298, 42 SW 827; State v. Lawler, 130 Mo. 366, 32 SW 979, 51 AmSR 575.

Nebr.—Trimble v. State, 61 Nebr. 604, 85 NW 844.

Nev.—State v. Luhano, 31 Nev. 278, 102 P 260.

Philippine.—U. S. v. Santiago, 1 Philippine 716.

Tex.—Tones v. State, 48 Tex. Cr. 363, 88 SW 217, 122 AmSR 759, 1 LRA NS 1024.

Wash.—State v. Redmond, 122 Wash. 392, 210 P 772.

[a] **Leading case.**—Long v. State, 12 Ga. 293.

28. Montgomery v. State, 101 Tex. Cr. 474, 477, 276 SW 250; Robinson v. State, 62 Tex. Cr. 645, 138 SW 704, 705.

29. Ga.—Hines v. State, 16 Ga. A. 411, 85 SE 452.

Iowa.—State v. Duffy, 124 Iowa 705, 100 NW 796.

Ky.—Blanton v. Com., 58 SW 422, 22 KyL 515.

Mo.—State v. Evans, 23 SW (2d) 152.

Nev.—State v. Snyder, 41 Nev. 453, 172 P 364.

N. Y.—Peo. v. McElroy, 14 NYS 203; Bloomer v. Peo., 1 Abb. Dec. 146, 3 Keyes 9.

Tex.—Rylee v. State, 90 Tex. Cr. 482, 236 SW 744.

Wash.—State v. Parsons, 44 Wash. 299, 87 P 349, 7 LRANS 566.

[a] **Bruised and beaten condition** of victim a circumstance sufficient to show that actual force was used. Hines v. State, 16 Ga. A. 411, 85 SE 452.

[b] **Holding victim** while his property is taken. State v. Evans, (Mo.) 23 SW (2d) 152 (by companion); Rylee v. State, 90 Tex. Cr. 482, 236 SW 744 (by the holder).

[c] **Struggle** between victim and defendant in connection with attempt to pick the victim's pocket is sufficient to authorize the jury to infer use of actual force. Hines v. State, 16 Ga. A. 411, 85 SE 452.

[d] **Unconscious victim.**—(1) Evidence sufficient to show administration of drug rendering victim unconscious for purpose of robbery so as to establish a taking by force. State v. Snyder, 41 Nev. 453, 172 P 364, 365 (where the court said: "It is also contended in behalf of appellant that the evidence of the doctors shows that the condition in which Cooper was found could not have been caused by chloral hydrate, as contended by the state, for the reason that the witness Cooper testified that almost immediately upon drinking the beer testified to he became unconscious, because, as contended, chloral hydrate does not produce the condition of unconsciousness in which Cooper was found in less than 30 minutes, unless a dose is taken which will cause certain death. While one of the witnesses testified flatly that chloral hydrate would not produce unconsciousness in less than 30 minutes, Dr. Kistler, who had been called to attend Cooper, did not so testify; and, while his testimony was somewhat uncertain, he did state: 'At the time that I was called to treat the man, I supposed he was suffering from chloral poisoning. I have the same opinion now.' From an examination of the works of textwriters, it is apparent that what may be a medicinal dose for one person is a poisonous dose for another. In some instances a dose of 30 grains has proven fatal, while in other cases more than an ounce has been taken without ill effect. . . . We do not think the contention of appellant can be sustained"). (2) Evidence sufficient to show force applied to victim after he had become unconscious. Bowen v. State, 16 Ga. A. 110, 84 SE 730 (where the court said: "The evidence was sufficient to show that the prosecutor's watch, money, and other things of value, of which the indictment alleged he had been robbed by force, were taken from his person while he was drunk or unconscious from liquor furnished to him by the defendant, which probably was drugged, and that his watch chain was broken and bodily injuries were inflicted upon him while he was in that condition; and the circumstances authorized the jury to conclude that the watch chain was broken and the injuries were inflicted in the taking of these things from his person, and that the defendant was the perpetrator of the crime").

30. Ill.—Peo. v. Bodkin, 304 Ill. 124, 136 NE 494.

Ky.—Haley v. Com., 210 Ky. 554, 276 SW 519.

Mo.—State v. Hall, 7 SW (2d) 1001.

Nebr.—Williams v. State, 51 Nebr. 711, 71 NW 729.

Nev.—State v. Luhano, 31 Nev. 278, 102 P 260.

Tex.—Acosta v. State, 77 Tex. Cr. 643, 179 SW 870; Glasper v. State, 76 Tex. Cr. 310, 174 SW 585; McCormick v. State, 26 Tex. A. 678, 9 SW 277.

Wash.—State v. Redmond, 122 Wash. 392, 210 P 772.

[a] **Drawing knife.**—State v. Kelley, (Mo.) 284 SW 801; State v. Luhano, 31 Nev. 278, 102 P 260.

[b] **Masked men without guns.**—Where the victim of an alleged robbery was seated in a parked car with a young lady eating ice cream when two masked men suddenly came out of the bushes and stood on either side of the car, and without displaying guns or uttering threats, proceeded to take money from the lady's purse, and then ordered the prosecuting witness to step out of the car, whereupon they took his watch, money, and a one thousand dollar diamond, the evidence was sufficient to show intimidation notwithstanding the witness' testimony that "I wasn't to say scared," but "was afraid if I did resist them I would be injured." Horn v. State, 89 Tex. Cr. 220, 230 SW 693.

[c] **Pressing gun against head.**—State v. Redmond, 122 Wash. 392, 210 P 772.

[d] **Reasonable but mistaken belief that defendant had gun.**—Peo. v. Bodkin, 304 Ill. 124, 136 NE 494.

[e] **Suddenly prodding driver in back and demanding his money** when the driver did not even know defendant was in his car is sufficient to authorize an inference that the driver surrendered his money because of intimidation. State v. Craft, 299 Mo. 332, 253 SW 224.

[f] **Threatening attitude of three men demanding money of single victim.**—Peo. v. Bodkin, 304 Ill. 124, 136 NE 494.

31. Peo. v. Case, 77 Cal. A. 477, 246 P 1083; Com. v. Homer, 235 Mass. 526, 127 NE 517; State v. Luhano, 31 Nev. 278, 102 P 260; State v. Bailey, 90 Or. 627, 178 P 201.

[a] **Placing arm upon shoulders and holding pistol to face.**—Com. v. Homer, 235 Mass. 526, 127 NE 517.

[b] **Threatening to throw victim in well, binding hands and feet, and taking note from person while bound.**—State v. Bailey, 90 Or. 627, 178 P 201.

32. Peo. v. Ferrara, 31 Cal. A. 1, 159 P 621.

Particular evidence held insufficient. In the notes below are given references to cases in which the evidence was held insufficient to show an assault,[33] or force[34] or intimidation,[35] as where there is no evidence at all respecting the method of taking.[36]

[§ 174] **(e) Consent.** The nonconsent of the victim essential as an element of robbery[37] may be inferred from circumstances reasonably raising such an inference.[38]

[§ 175] **(f) Intent.** In accordance with general rules[39] the intent to steal essential as an element of robbery[40] must be affirmatively established.[41] But such intent may be made to appear by the circumstances which accompany the taking.[42]

Evidence held sufficient. In accordance with the circumstances involved the evidence in particular cases has been held sufficient to show intent to steal,[43] as against defendant's claim that he took in jest,[44] or under duress.[45]

Evidence insufficient. In accordance with the circumstances involved, evidence in particular cases has been held insufficient to prove intent to steal,[46] as where the evidence was insufficient to disprove defendant's contention that he took under claim of right.[47]

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33. Easley v. State, 82 Tex. Cr. 238, 199 SW 476; Peo. v. O'Connor, 310 Ill. 403, 141 NE 748.

34. Easley v. State, 82 Tex. Cr. 238, 199 SW 476.

35. Peo. v. O'Connor, 310 Ill. 403, 141 NE 748; Easley v. State, 82 Tex. Cr. 238, 199 SW 476.

[a] **Grabbing drunken man's purse.**—Where the victim of a robbery had been drinking and was sitting on the sidewalk of a busy thoroughfare and engaged in taking out his pocket-book to examine it with closed eyes, when defendants grabbed the pocket-book and carried it off, the victim's intoxication as evidenced by his actions was such as to preclude belief of his statement that defendants yelled threats of death in a loud voice, especially where a disinterested witness testifies that defendants merely pilfered the victim without force or threats after an auto had knocked him down, and there was insufficient evidence of either force or intimidation. Peo. v. O'Connor, 310 Ill. 403, 141 NE 748.

[b] **Where defendant had stick in his hand,** undescribed as to size, weight, length, or material of which made, and the evidence shows no demonstration or threat, the mere possession of this undescribed stick is insufficient to authorize an inference of intimidation. Easley v. State, 82 Tex. Cr. 238, 199 SW 476.

36. Reynolds v. State, 14 Ariz. 537, 132 P 434.

[a] **Evidence relating only to identification.**—Evidence that accused and the prosecutor were engaged in a game of cards, during which they indulged in friendly drinks, that when the prosecutor reached home in an intoxicated condition his pocketbook was missing, and that it was found the next morning empty at a place where he had become entangled in the wires of a fence, and that on such following morning accused had money in his possession, without any evidence as to when or by what means the money was taken from the prosecutor or that it was taken by means of force or fear, was insufficient to support a conviction for robbery, since, while it showed an opportunity by accused to take the money and subsequent possession of like property which would have been sufficient to connect him with the robbery when shown to have been committed, it had no weight in establishing the commission of the robbery. Reynolds v. State, 14 Ariz. 537, 132 P 434.

37. See supra §§ 45–48.

38. Peo. v. Goldberg, 302 Ill. 559, 135 NE 84; Stewart v. State, (Tex. Cr.) 31 SW 407.

[a] **Evidence held sufficient.**—(1) Generally. Stewart v. State, (Tex. Cr.) 31 SW 407. (2) Consent proved as against claim that victim hired robbers to defraud an insurance company. Peo. v. Goldberg, 302 Ill. 559, 135 NE 84.

39. See Criminal Law § 1583.

40. See supra §§ 49–53.

Evidence of particular intent governing classification of offense see infra § 176.

41. Coles v. State, 23 Oh. Cir. Ct. 313; Denman v. State, (Tex. Cr.) 47 SW 366.

42. Cal.—Peo. v. Hite, 135 Cal. 76, 67 P 57.

Ill.—Howard v. Peo., 193 Ill. 615, 61 NE 1016.

Mo.—State v. Carroll, 160 Mo. 368, 60 SW 1087.

N. Y.—Hope v. Peo., 83 N. Y. 418, 38 AmR 460.

Tex.—Tones v. State, 48 Tex. Cr. 363, 88 SW 217, 122 AmSR 759, 1 LRA NS 1024.

[a] **Defendant's declarations of another purpose,** made immediately before the robbery, are not conclusive on intent. Peo. v. Woody, 48 Cal. 80.

43. See cases infra this note.

[a] **Generally.**—Peo. v. Anderson, 59 Cal. A. 408, 211 P 254; Stone v. Peo., 71 Colo. 162, 204 P 897; Foster v. State, 83 Nebr. 264, 119 NW 475; Bell v. State, 77 Tex. Cr. 146, 177 SW 966.

[b] **Avoiding officer.**—Where the defense was that the money taken was due for drinks, but the evidence showed that defendant stealthily approached the customer and forcibly took more than the amount claimed to be due, and then tried to escape from a policeman who witnessed the act, and made no explanation when arrested, there was evidence sufficient to show criminal intent. State v. Carroll, 160 Mo. 368, 60 SW 1087.

[c] **Intent to steal particular property.**—Rice v. State, 204 Ala. 104, 85 S 437.

44. Caskey v. State, 95 Tex. Cr. 379, 254 SW 996.

45. Fox v. State, (Tex. Cr.) 18 SW (2d) 661; Tunnell v. State, 106 Tex. Cr. 49, 290 SW 182.

[a] **Illustration.**—"The testimony for the state shows that appellant and another man had the prosecuting witness drive them in his car to a point east of the city of Fort Worth and near what is known as Polytechnic. At this place the companion of appellant drew a pistol and ordered prosecuting witness to 'stick 'em up,' and then told appellant to go through him. The witness testified that thereupon the appellant went through his pockets and relieved him of a sum of money. He said that up to this time appellant had been pretending to be drunk, but that, during the process of the taking from him of the money, appellant seemed very sober and very much alive. . . . Appellant testified in his own behalf and admitted that he was present and took part in the robbery, but claimed that he was in fact drunk, and that what he did do he did through fear and while under duress. The trial court submitted this theory of the case to the jury in his charge, to which no exception was taken. In its rebuttal, the state introduced a witness who saw appellant near the place where the latter and his companion got in the car of prosecuting witness and apparently at a time shortly before that occurrence. This witness testified that appellant was not drunk at the time. We are of opinion that the evidence sufficiently supports the judgment." Fox v. State, (Tex. Cr.) 18 SW (2d) 661.

[b] **Sequestration.**—"The defense of sequestration is a familiar one in these cases, and is of such a character as not to be entitled to much consideration unless supported by strong evidence. Not only is there no evidence that the defendant was an involuntary member of the band, except as his own assertion to that effect, but the circumstance that the leader of the band allowed him to carry a revolver strongly discredits any such theory. We can entertain no doubt as to the defendant's guilt." U. S. v. Callotes, 2 Philippine 16.

46. See cases infra this note.

[a] **Generally.**—Hixon v. State, 38 Ga. A. 36, 142 SE 565; Barnes v. State, 100 Tex. Cr. 135, 272 SW 188.

[b] **Circumstantial evidence.**—"The accused was convicted of robbery. There was direct evidence as to a 'holdup' by the defendant, but the evidence as to his intent in so doing (whether he 'held up' the person named in the indictment with the intent to rob him, or with the intent to give him a beating, or with the intent to procure his arrest for automobile speeding) was wholly circumstantial, and was not sufficient to exclude every reasonable hypothesis save that of his guilt of the offense charged. It follows that his conviction was unauthorized, and that the refusal to grant a new trial was error." Hixon v. State, 38 Ga. A. 36, 142 SE 565.

47. Barnes v. State, 100 Tex. Cr. 135, 272 SW 188; State v. Morris, 96 W. Va. 291, 122 SE 914.

[a] **As special constable.**—"Where the indictment charges the accused

Voluntary return of stolen property[48] is entitled to some weight as evidence of absence of criminal intent,[49] but is not in itself sufficient to negative such intent.[50]

[§ 176] **c. Degree or Classification of Offense.** To convict of a particular degree[51] or other distinct classification[52] of robbery, the evidence should be sufficient to establish beyond a reasonable doubt the facts essential to constitute such particular degree or other classification of the crime.[53] The dangerous or deadly character of a weapon with which defendant was armed in committing a robbery may be established by circumstantial evidence.[54] Where the weapon is a firearm, to show its dangerous or deadly character it is not essential to prove that it was loaded.[55] In a prosecution for robbery, aggravated by the use of firearms, with intent to kill or maim if resisted, the intent to kill or maim may be found without proof that the gun was loaded.[56] In the notes below are given references to cases in which the evidence was held sufficient to support a conviction of robbery in the first,[57] second,[58] or third[59] degree, or of other specific classifications of the crime,[60] such as automobile banditry,[61] conjoint robbery,[62] highway rob-

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of robbing the prosecuting witness of a revolver, being armed with a deadly weapon, and the evidence and circumstances disclose that the accused, a special constable on his way to execute criminal process, accompanied by a companion for that purpose, upon reaching the home of the latter, found the prosecuting witness there with bottles of intoxicating liquors in his pocket and partially exposed to view, and after a short colloquy took him from his horse by force, assisted by his companion, having in their possession and ready for use their pistols, disarmed him of the revolver mentioned in the indictment, and took from him his liquor, and the pistol so taken is delivered, a day or so after, to a justice of the peace by a prohibition officer who, happening on the scene of the alleged robbery, assisted in disarming the prosecuting witness and the confiscation of his liquor, the essential element of the intent to steal, take and carry away the revolver on the part of the accused at the time they came into possession of the revolver is not clearly shown, and the taking under such circumstances does not warrant a conviction of robbery." State v. Morris, 96 W. Va. 291, 122 SE 914.

[b] **Taking as detective without consulting all of other officials.**—Barnes v. State, 100 Tex. Cr. 135, 272 SW 188.

[48] **As no defense** see supra § 74.

[49] Peo. v. Strauss, 75 Cal. A. 447, 243 P 67; Peo. v. Anderson, 59 Cal. A. 408, 211 P 254.

[50] Peo. v. Strauss, 75 Cal. A. 447, 243 P 67; Peo. v. Anderson, 59 Cal. A. 408, 211 P 254.

[51] **Degrees of offense** see supra §§ 56–64.

[52] **Classification of offense** see supra §§ 65–69.

[53] See cases infra notes 54–80.

[54] Peo. v. Sampson, 99 Cal. A. 306, 278 P 492; State v. Kowertz, (Mo.) 25 SW (2d) 113.

[a] **Manner of use.**—"The proof of the dangerous and deadly character of the weapon used by appellant and his companion was sufficient in this case. In the absence of countervailing testimony on the point, the jury was authorized to find that the revolvers or automatic pistols used in the robbery were what the robbers intended their victims to believe they were, to wit, dangerous and deadly weapons, and that their lives would be imperiled if they resisted the robbers who were armed therewith. By this we do not mean to say that an issue of fact upon the dangerous and deadly character of the weapon used could not be raised by the evidence. But we do intend to hold that, where nothing appears beyond the fact that a weapon is used in a robbery, in the manner dangerous and deadly weapons are ordinarily used to accomplish a robbery, the jury has the right, from such use alone, to draw the inference that the weapon so used was in fact a dangerous and deadly weapon." State v. Kowertz, (Mo.) 25 SW (2d) 113, 115 (use of such weapon justifies additional punishment for first degree robbery).

[b] **Nature of wound inflicted.**—"The character of weapon used by the defendant may be shown, of course, by circumstantial evidence, and proof that the victim was rendered unconscious by the blow and remained in that condition for a considerable time, together with the nature of the injury inflicted, warrants the inference, in the absence of other evidence, that a dangerous weapon was used." Peo. v. Sampson, 99 Cal. A. 306, 278 P 492, 493.

[55] State v. Kowertz, (Mo.) 25 SW (2d) 113.

[a] **Evidence held sufficient to prove weapon was loaded.**—Peo. v. Hall, 87 Cal. A. 634, 262 P 50; Peo. v. Seawright, 72 Cal. A. 414, 237 P 796.

[56] Peo. v. Deluce, 237 Ill. 541, 86 NE 1080.

[a] **Holding gun over victim.**—Where there was evidence that accused held a revolver while prosecutor was being robbed, the jury might find that accused intended to kill or maim, if resisted, though there was no proof that the revolver was loaded. Peo. v. Deluce, 237 Ill. 541, 86 NE 1080.

[b] **Evidence held sufficient to show intent.**—(1) Generally. Peo. v. Seawright, 72 Cal. A. 414, 237 P 796. (2) "In the instant case the evidence in question goes beyond what is necessary in accordance with the authorities cited to make out a prima facie case. In order to put the complainant in fear, the revolver was not merely pointed at him, with a threat, but was actually opened up, so as to exhibit the bullets. The desperate nature and character of the holdup in itself constitutes strong and powerful evidence indicative on the part of the defendants, together with the uttered threats, of an intention to accomplish their end, if need be, by the use of this revolver in such a way as to constitute the instrument a dangerous one as contemplated by the statute. We are satisfied from an examination of the record, . . . that all of the elements of the offense have been satisfactorily and abundantly proven." Schiner v. State, 178 Wis. 83, 189 NW 261, 263.

Sufficiency of evidence as to intent to steal see supra § 175.

[57] Cal.—Peo. v. Davis, (A.) 289 P 194; Peo. v. White, (A.) 283 P 368; Peo. v. Vejar, 93 Cal. A. 259, 269 P 671; Peo. v. Barnett, 87 Cal. A. 243, 261 P 1068; Peo. v. Scott, 84 Cal. A. 642, 258 P 638; Peo. v. Bacciocco, 81 Cal. A. 19, 251 P 817; Peo. v. Collins, 79 Cal. A. 127, 249 P 60; Peo. v. Strauss, 75 Cal. A. 447, 243 P 67.

Kan.—State v. Wise, 129 Kan. 155, 281 P 886; State v. Hamilton, 119 Kan. 564, 240 P 416; State v. King, 102 Kan. 155, 169 P 557.

Minn.—State v. Barone, 173 Minn. 232, 217 NW 104; State v. Duddy, 152 Minn. 179, 188 NW 261. See State v. Klashtorni, 177 Minn. 363, 225 NW 278 (where the court held the evidence sufficient to sustain a conviction for first degree robbery but reversed for error in instructions).

Mo.—State v. Pine, 18 SW (2d) 48; State v. Kaplan, 16 SW (2d) 35; State v. Ball, 321 Mo. 1171, 14 SW (2d) 638; State v. Selvaggi, 2 SW (2d) 765; State v. Beebe, 2 SW (2d) 712; State v. Zoller, 1 SW (2d) 139; State v. Goodwin, 300 SW 723; State v. Drew, 300 SW 473; State v. Harmon, 317 Mo. 354, 296 SW 397; State v. Harmon, 296 SW 391; State v. Flynn, 292 SW 413; State v. Holmes, 316 Mo. 122, 289 SW 904; State v. Ingram, 316 Mo. 268, 289 SW 637; State v. Butler, 316 Mo. 264, 289 SW 636; State v. Harvey, 289 SW 589; State v. Van Valkenburgh, 285 SW 978; State v. Strada, 274 SW 34; State v. Rebasti, 306 Mo. 336, 267 SW 858; State v. McCombs, 259 SW 440; State v. Kile, 253 SW 709; State v. Huffman, 238 SW 430; State v. Lasson, 292 Mo. 155, 238 SW 101; State v. Wilson, 237 SW 776; State v. Flynn, 258 Mo. 211, 167 SW 516; State v. Sydnor, 253 Mo. 375, 161 SW 692. See State v. James, 216 Mo. 394, 115 SW 994 (evidence held to support conviction, but conviction reversed on other grounds).

N. Y.—Hope v. Peo., 83 N. Y. 418, 38 AmR 460; Peo. v. Sperduto, 221 App. Div. 577, 224 NYS 529.

Okl.—Pope v. State, 34 Okl. Cr. 417, 246 P 657; Tipton v. State, 23 Okl. Cr. 86, 212 P 612, 31 ALR 1074; Wade v. State, 18 Okl. Cr. 592, 197 P 180.

[a] **Armed with dangerous or deadly weapon.**—Peo. v. Green, 93 Cal. A. 435, 269 P 687; Peo. v. Milburn, 89 Cal. A. 526, 265 P 285; Peo. v. Hall, 87 Cal. A. 634, 262 P 50; Peo. v. Wysong, 86 Cal. A. 329, 260 P 825; Peo. v. Case, 77 Cal. A. 477, 246 P 1083; Peo. v. Egan, 77 Cal. A. 279, 246 P 337; State v. Chodos, 147 Minn. 420, 180 NW 536; Peo. v. Prince, 143 App. Div. 524, 128 NYS 273, 26 N. Y. Cr. 81. See also infra text and note 69.

[58] Peo. v. Fallai, 99 Cal. A. 297, 278 P 449; Peo. v. Wilson, 93 Cal. A. 632, 269 P 951; Peo. v. Bryan, 91 Cal. A. 189, 266 P 972; Peo. v. Pedel, 81 Cal. A. 558, 254 P 298.

[59] State v. Rose, 118 Kan. 583, 235 P 868.

[60] See infra text and notes 61–71.

[61] Cazak v. State, 196 Ind. 63, 147 NE 138.

Defined see supra § 3.

[62] Roddy v. State, (Okl. Cr.) 287 P 765; Henry v. State, 32 Okl. Cr. 67, 240 P 128; Stockton v. State, 31 Okl.

bery,[63] robo en cuadrilla,[64] robbery with wounds[65] or personal violence,[66] robbery committed in an uninhabited place[67] or in the house of the victim,[68] robbery while armed with a dangerous or deadly weapon,[69] and robbery by intimidation[70] or by snatching;[71] also to cases in which the evidence was held insufficient to sustain a conviction of robbery in the first[72] or third[73] degree, or of other specific classifications of the crime,[74] such as robo en cuadrilla,[75] robbery by use of actual force,[76] robbery with wounds,[77] and robbery while armed with a dangerous or deadly weapon.[78]

To justify imposition of death penalty for robbery while armed with a dangerous or deadly weapon,[79] both defendant's connection with the crime and all elements of the particular statutory classification of robbery must be established by sufficient evidence.[80]

[§ 177] **d. Connection with Crime—(1) In General.** In accordance with general rules,[81] to warrant a conviction for robbery, the evidence must identify accused as the person who committed the crime.[82]

Particular evidence sufficient. In the notes below are given references to cases in which the evidence was held sufficient to show defendant's connection with, or participation in, the robbery,[83] as

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Cr. 234, 238 P 508; Brown v. State, 29 Okl. Cr. 195, 233 P 248; Wilson v. State, 28 Okl. Cr. 102, 228 P 1108; Richards v. State, 22 Okl. Cr. 199, 210 P 295; Rochel v. State, 21 Okl. Cr. 37, 204 P 466; McLaughlin v. State, 18 Okl. Cr. 627, 197 P 717; Meigs v. State, 14 Okl. Cr. 460, 172 P 974; Robinson v. State, 8 Okl. Cr. 667, 130 P 121.

Defined see supra § 4.

[63] Com. v. Nace, 59 Pa. Super. 210.

Defined see supra § 5.

[64] U. S. v. Lazaro, 34 Philippine 871; U. S. v. Sevilla, 30 Philippine 288; U. S. v. Martin, 23 Philippine 58; U. S. v. Romero, 22 Philippine 565; U. S. v. Tabanda, 20 Philippine 195; U. S. v. Bernales, 18 Philippine 525; U. S. v. De la Cruz, 12 Philippine 87; U. S. v. Quijano, 11 Philippine 368 (as to part of defendants); U. S. v. Manangan, 11 Philippine 186; U. S. v. Gamboa, 11 Philippine 39; U. S. v. De los Santos, 6 Philippine 411; U. S. v. Liuanag, 2 Philippine 107.

Defined see supra § 9.

[65] U. S. v. Mondejar, 19 Philippine 158.

[66] U. S. v. Hilario, 1 Philippine 202.

[67] U. S. v. Magsino, 2 Philippine 710.

[a] **Freight car.**—U. S. v. Magsino, 2 Philippine 710.

[68] U. S. v. Recio, 21 Philippine 511.

[69] Colo.—Bunch v. Peo., 87 Colo. 84, 285 P 766; Voris v. Peo., 75 Colo. 574, 227 P 551.

Fla.—Edge v. State, 99 Fla. 1242, 128 S 820.

Ill.—Peo. v. Cummings, 338 Ill. 636, 170 NE 750; Peo. v. Barnhill, 337 Ill. 413, 169 NE 210; Peo. v. Reid, 336 Ill. 421, 168 NE 344; Peo. v. Chalem, 336 Ill. 399, 168 NE 306; Peo. v. McCaffrey, 336 Ill. 111, 167 NE 795; Peo. v. Wilson, 334 Ill. 412, 166 NE 40; Peo. v. Sheets, 333 Ill. 624, 165 NE 141; Peo. v. Witt, 333 Ill. 258, 164 NE 682; Peo. v. Kircher, 333 Ill. 200, 164 NE 150; Peo. v. Giardiano, 332 Ill. 476, 163 NE 798; Peo. v. Lawson, 331 Ill. 380, 163 NE 149; Peo. v. Fahrner, 330 Ill. 516, 162 NE 133; Peo. v. Bell, 328 Ill. 446, 159 NE 807; Peo. v. Papke, 325 Ill. 410, 156 NE 375; Peo. v. Thompson, 321 Ill. 594, 152 NE 516; Peo. v. O'Donnell, 315 Ill. 568, 146 NE 490; Peo. v. Powlski, 311 Ill. 284, 142 NE 551; Peo. v. Jones, 310 Ill. 275, 141 NE 773; Peo. v. Dean, 308 Ill. 74, 139 NE 37; Peo. v. Mandrell, 306 Ill. 413, 138 NE 215; Peo. v. Bernstein, 304 Ill. 351, 136 NE 683; Peo. v. Byrnes, 302 Ill. 407, 134 NE 730; Peo. v. Christy, 302 Ill. 343, 134 NE 713.

Iowa.—State v. Mitchell, 195 Iowa 1073, 192 NW 1.

Mich.—Peo. v. Kolodzieski, 237 Mich. 654, 212 NW 958; Peo. v. Kellar, 214 Mich. 246, 183 NW 226.

Okl.—Nicholson v. State, (Cr.) 288 P 996; Strong v. State, (Cr.) 287 P 1091; Spears v. State, (Cr.) 287 P 1060; Sanders v. State, (Cr.) 287 P 842; Roddy v. State, (Cr.) 287 P 765; Smiddy v. State, (Cr.) 286 P 813; Vandergriff v. State, (Cr.) 282 P 897; Pierson v. State, (Cr.) 281 P 315; Fortman v. State, (Cr.) 280 P 1109; Newman v. State, (Cr.) 279 P 980; Patterson v. State, (Cr.) 279 P 356; Simpson v. State, (Cr.) 266 P 783; Young v. State, (Cr.) 263 P 167; Brown v. State, 29 Okl. Cr. 195, 233 P 248. See Williams v. State, 35 Okl. Cr. 171, 249 P 433 (evidence of robbery with firearms held sufficient to sustain conviction, but reversal required on other grounds).

Tex.—Kelly v. State, 111 Tex. Cr. 514, 17 SW (2d) 460; Smith v. State, 92 Tex. Cr. 300, 244 SW 138; Thompson v. State, 91 Tex. Cr. 234, 237 SW 926; Beard v. State, 87 Tex. Cr. 205, 220 SW 342; Green v. State, 66 Tex. Cr. 446, 147 SW 593.

Wis.—Fifer v. State, 189 Wis. 50, 206 NW 861.

See also supra text and note 57 [a].

[70] Edenfield v. State, 41 Ga. A. 252, 152 SE 615.

[71] Williams v. State, 9 Ga. A. 170, 70 SE 890, 891 (where the court said: "In the present case, though the testimony of the prosecuting witness is weak and to a degree self-contradictory, still there was testimony that he was conscious that something was being taken from his pocket, before or at least at the same time that the outcry was made that his money was being taken from him, and therefore the jury were authorized to find that his purse was suddenly taken away from him without his consent, but with his knowledge, and that the offense, if any, was robbery by sudden taking, and not larceny from the person or secret theft").

[72] Peo. v. Cania, 217 App. Div. 34, 216 NYS 478; Peo. v. Di Gregario, 205 App. Div. 629, 200 NYS 66.

[73] Peo. v. Kiernan, 202 App. Div. 542, 195 NYS 207.

[74] See infra text and notes 75-78.

[75] U. S. v. Alumisin, 15 Philippine 396; U. S. v. Quijano, 11 Philippine 368 (as to part of defendants); U. S. v. Vallesteros, 6 Philippine 401; U. S. v. Plana, 2 Philippine 9; U. S. v. Mendigoren, 1 Philippine 658.

Defined see supra § 9.

[76] Tanner v. State, 24 Ga. A. 132, 100 SE 44.

[a] **Illustration.**—Evidence that the two defendants conspired to rob a certain person, and that one defendant put a pistol in the face of such person and commanded him to hold up his hands, and that after he held up his hands the other defendant, without the consent of such person, took money from his pockets, did not show a "robbery by force." Tanner v. State, 24 Ga. A. 132, 100 SE 44. See to same effect Barksdale v. State, 24 Ga. A. 115, 100 SE 45.

[77] Com. v. Gallagher, 6 Metc. (Mass.) 565.

[a] **Slight scratch.**—An indictment under Rev. St. c 125 § 13, which alleges that defendant robbed A and struck and wounded him, is not proved, as to the wounding, by evidence that defendant made a slight scratch on A's face by rupturing the cuticle only. Com. v. Gallagher, 6 Metc. (Mass.) 565.

[78] O'Quinn v. State, (Okl. Cr.) 279 P 358; Cornett v. State, (Okl. Cr.) 274 P 676.

[79] See statutory provisions; and infra § 209.

[80] Silva v. State, 102 Tex. Cr. 415, 278 SW 216.

[81] See Criminal Law § 1584.

[82] Ark.—James v. State, 68 SW 247.

Cal.—Peo. v. Kelly, 146 Cal. 119, 79 P 846; Peo. v. Cappola, 6 Cal. Unrep. Cas. 232, 56 P 248; Peo. v. Castile, 3 Cal. A. 485, 86 P 745.

Ga.—Usom v. State, 97 Ga. 194, 22 SE 399.

Ill.—Schroeder v. Peo., 196 Ill. 211, 63 NE 678; Ogden v. Peo., 134 Ill. 599, 25 NE 755.

Iowa.—State v. Brafford, 121 Iowa 115, 96 NW 710; State v. Reasby, 100 Iowa 231, 69 NW 451; State v. Callahan, 96 Iowa 304, 65 NW 150; State v. Sipult, 81 Iowa 40, 46 NW 748.

Minn.—State v. Blanchard, 88 Minn. 82, 92 NW 504.

Mo.—State v. Rowland, 174 Mo. 373, 74 SW 622.

Nebr.—Keating v. State, 67 Nebr. 560, 93 NW 980.

N. Y.—Peo. v. Stack, 41 App. Div. 548, 58 NYS 691; Peo. v. Flanagan, 22 App. Div. 516, 48 NYS 241 [aff 158 N. Y. 722, 53 NE 1129].

Tex.—Carson v. State, (Cr.) 24 SW 643.

Wash.—State v. Fair, 35 Wash. 127, 76 P 731, 102 AmSR 897.

[83] Cal.—Peo. v. Summers, (A.) 290 P 464; Peo. v. White, (A.) 283 P 368; Peo. v. Meile, 97 Cal. A. 56, 274

against the claim of alibi,[84] as where the evidence was sufficient to show defendant's active participation,[85] or his guilt as an accomplice,[86] or aider and abettor,[87] rendering him liable as an accessary[88] or principal[89]

P 1003; Peo. v. Strider, 96 Cal. A. 632, 274 P 601; Peo. v. Green, 93 Cal. A. 435, 269 P 687; Peo. v. Redding, 93 Cal. A. 169, 269 P 197; Peo. v. Grace, 88 Cal. A. 222, 263 P 306; Peo. v. Brock, 87 Cal. A. 601, 262 P 369, 263 P 544; Peo. v. Costello, 87 Cal. A. 313, 262 P 75; Peo. v. Shaffer, 81 Cal. A. 752, 254 P 666; Peo. v. Griffin, 75 Cal. A. 561, 243 P 36; Peo. v. Booth, 72 Cal. A. 160, 236 P 987; Peo. v. Laird, 69 Cal. A. 511, 231 P 596; Peo. v. Foley, 57 Cal. A. 558, 207 P 492; Peo. v. Gorman, 14 Cal. A. 253, 111 P 285.

Ill.—Peo. v. McCaffrey, 336 Ill. 111, 167 NE 795; Peo. v. Tyler, 316 Ill. 67, 146 NE 740; Peo. v. O'Donnell, 315 Ill. 568, 146 NE 490; Peo. v. Hildebrand, 307 Ill. 544, 139 NE 107; Peo. v. Mandrell, 306 Ill. 413, 138 NE 215; Peo. v. Maciejewski, 294 Ill. 390, 128 NE 489.

Iowa.—State v. Bogardus, 188 Iowa 1293, 176 NW 327.

Kan.—State v. Goodman, 123 Kan. 19, 254 P 333.

Ky.—Anderson v. Com., 193 Ky. 663, 237 SW 45; Wynn v. Com., 135 Ky. 447, 122 SW 516.

La.—State v. Henry, 168 La. 855, 123 S 597.

Miss.—Coleman v. State, 155 Miss. 482, 124 S 652.

Mo.—Peo. v. Selvaggi, 2 SW (2d) 765; State v. Hahn, 316 Mo. 229, 289 SW 845; State v. Van Valkenburgh, 285 SW 978; State v. Deviney, 278 SW 726; State v. Bray, 246 SW 921; State v. Lasson, 292 Mo. 155, 238 SW 101; State v. Depriest, 288 Mo. 459, 232 SW 83.

Nebr.—Boonton v. State, 86 Nebr. 114, 125 NW 144.

N. Y.—Peo. v. Mahoney, 224 App. Div. 771, 230 NYS 213; Peo. v. Sperduto, 221 App. Div. 577, 224 NYS 529.

Okl.—Stockton v. State, 31 Okl. Cr. 234, 238 P 508; Sellers v. State, 27 Okl. Cr. 245, 226 P 109.

Pa.—Com. v. Fink, 93 Pa. Super. 57.

Philippine.—Peo. v. Luncay, 49 Philippine 464; U. S. v. Sevilla, 30 Philippine 288; U. S. v. De los Santos, 6 Philippine 411; U. S. v. Magsino, 2 Philippine 710.

Tex.—Carter v. State, 107 Tex. Cr. 568, 298 SW 424; Searcy v. State, 89 Tex. Cr. 550, 232 SW 799; Jackson v. State, 60 Tex. Cr. 273, 131 SW 1076.

[a] **Despite flour smeared on faces in attempt at disguise,** positive identification of defendants by witnesses who saw them by the light of a lamp, and who had known them prior to the robbery is sufficient to support a conviction. Coleman v. State, 155 Miss. 482, 124 S 652.

[b] **Detailed description** amply supporting identification. Peo. v. Hahn, 58 Cal. A. 704, 209 P 268.

[c] **Positive identification based upon ample time and opportunity to observe robber.**—State v. Boone, (Mo.) 289 SW 575.

[d] **Pay roll robbery.**—Peo. v. Berardi, 332 Ill. 295, 163 NE 668, 62 ALR 274; Com. v. Fink, 93 Pa. Super. 57.

[84] Ariz.—Bradley v. State, 279 P 256; Young Chung v. State, 15 Ariz. 79, 136 P 631.

Ark.—Anthony v. State, 163 Ark. 662, 259 SW 732; Sutton v. State, 162 Ark. 438, 258 SW 632; Williams v. State, 153 Ark. 289, 239 SW 1065; Baldwin v. State, 119 Ark. 518, 178 SW 409.

Cal.—Peo. v. Fallai, 99 Cal. A. 297, 278 P 449; Peo. v. Scott, 84 Cal. A. 642, 258 P 638; Peo. v. Bigelow, 64 Cal. A. 731, 222 P 622; Peo. v. Hale, 64 Cal. A. 523, 222 P 148; Peo. v. Truitt, 49 Cal. A. 727, 194 P 295; Peo. v. Valencia, 27 Cal. A. 407, 150 P 68.

Ill.—Peo. v. Yates, 339 Ill. 421, 171 NE 557; Peo. v. Wilson, 334 Ill. 412, 166 NE 40; Peo. v. Witt, 333 Ill. 258, 164 NE 682; Peo. v. Giardiano, 332 Ill. 476, 163 NE 798; Peo. v. Papke, 325 Ill. 410, 156 NE 375; Peo. v. Robinson, 308 Ill. 398, 139 NE 599; Peo. v. Hall, 308 Ill. 198, 139 NE 123; Peo. v. Nehrkorn, 305 Ill. 467, 137 NE 407; Peo. v. Martin, 303 Ill. 233, 135 NE 404; Peo. v. Knox, 302 Ill. 471, 134 NE 923; Peo. v. Christy, 302 Ill. 343, 134 NE 713; Peo. v. Cunningham, 300 Ill. 376, 133 NE 270; Peo. v. Scott, 261 Ill. 165, 103 NE 617.

Iowa.—State v. Bird, 196 Iowa 474, 194 NW 73; State v. O'Brien, 188 Iowa 165, 175 NW 769.

Ky.—Schuster v. Com., 232 Ky. 171, 22 SW (2d) 586.

Mich.—Peo. v. Kolodzieski, 237 Mich. 654, 212 NW 958; Peo. v. Kellar, 214 Mich. 246, 183 NW 226.

Minn.—State v. Barone, 173 Minn. 232, 217 NW 104; State v. Chodos, 147 Minn. 420, 180 NW 536.

Miss.—Coleman v. State, 155 Miss. 482, 124 S 652.

Mo.—State v. Ball, 321 Mo. 1171, 14 SW (2d) 638; State v. Beebe, 2 SW (2d) 712; State v. Boone, 289 SW 575; State v. Affronti, 292 Mo. 53, 238 SW 106.

Nebr.—Hukill v. State, 109 Nebr. 279, 190 NW 867; Booton v. State, 86 Nebr. 114, 125 NW 144.

Nev.—State v. Boyle, 248 P 48.

Okl.—Smiddy v. State, (Cr.) 286 P 813; Vandergriff v. State, (Cr.) 282 P 897; Berry v. State, (Cr.) 279 P 982; Young v. State, (Cr.) 263 P 167; Pope v. State, 34 Okl. Cr. 417, 246 P 657.

Philippine.—U. S. v. Turla, 38 Philippine 346; U. S. v. Tabandá, 20 Philippine 195; U. S. v. Manangan, 11 Philippine 186; U. S. v. Gamboa, 11 Philippine 39; U. S. v. Manabat, 7 Philippine 209; U. S. v. Vargas, 5 Philippine 136.

S. D.—State v. Hanrahan, 49 S. D. 434, 207 NW 224.

Tex.—Green v. State, 99 Tex. Cr. 251, 268 SW 746; Lay v. State, 82 Tex. Cr. 202, 198 SW 291; Bracher v. State, 72 Tex. Cr. 198, 161 SW 124; Hendricks v. State, 72 Tex. Cr. 75, 160 SW 1190.

Wis.—Schiner v. State, 178 Wis. 83, 189 NW 261.

[a] **Number of witnesses.**—Evidence held to support conviction for robbery, where one witness identified defendant and three testified to alibi for him. Peo. v. Yates, 339 Ill. 421, 171 NE 557.

[b] **Sharply conflicting evidence.**—Conviction for robbery, where accused was picked up by officers shortly after the crime and positively identified by the victims, was sustained, although there was evidence of an alibi and the testimony was sharply conflicting, the question in such a case being for the jury. Green v. State, 99 Tex. Cr. 251, 268 SW 746.

[c] **Judicial comment on defense.**—"An alibi is usually the main defense in most of these cases, and facts are generally presented which peculiarly call for solution at the hands of the jury. It is strenuously insisted that the testimony of defendant's witnesses on the question of alibi disproves his presence at the scene of the robbery. This issue was presented to the jury, and decided adversely to his contention. It is manifest from reading the reported cases that the alibi is taken into account when preparations are made to perpetrate the crime. With rapid transit now furnished in the use of automobiles, a defendant by honest testimony may be shown to have been at a certain place at a given time, and yet may have hurriedly driven to another point, committed a crime, and returned to the place where these witnesses located him. The testimony relating to alibi, like the other facts in the case, must be considered by the jury in passing upon the weight of the evidence." State v. Affronti, 292 Mo. 53, 238 SW 106, 111.

[85] Peo. v. Brennan, 35 Cal. A. 101, 169 P 239; Peo. v. Pasqueria, 30 Cal. A. 625, 159 P 173; U. S. v. Romero, 22 Philippine 565; Johnson v. State, (Tex. Cr.) 12 SW (2d) 1017.

[a] **Where defendant admitted he was present but denied that he participated.**—Johnson v. State, (Tex. Cr.) 12 SW (2d) 1017.

[86] DeBeauford v. State, 95 Tex. Cr. 398, 254 SW 572 (holding that the evidence of one of the principals to a robbery connecting defendant with it and defendant's confession admitting that he loaned a pistol to one of the principals for the purpose of being used in the robbery was sufficient to sustain a conviction of being an accomplice).

[87] Ark.—Williams v. State, 153 Ark. 289, 239 SW 1065.

Cal.—Peo. v. Davis, (A.) 289 P 194; Peo. v. Gianello, 68 Cal. A. 214, 228 P 671.

Colo.—Stone v. Peo., 71 Colo. 162, 204 P 897.

Ga.—Pirkle v. State, 11 Ga. A. 98, 74 SE 709.

Mo.—State v. Ball, 321 Mo. 1171, 14 SW (2d) 638.

N. Y.—Peo. v. Cania, 217 App. Div. 34, 216 NYS 478.

[a] **Presence at commission of crime.**—(1) Absent, but aiding and abetting. Peo. v. Sartori, 43 Cal. A. 304, 184 P 879; Peo. v. Cania, 217 App. Div. 34, 216 NYS 478. (2) Present, and aiding and abetting. Stone v. Peo., 71 Colo. 162, 204 P 897; Pirkle v. State, 11 Ga. A. 98, 74 SE 709.

[b] **Plotting robbery,** although not participating in physical acts. Peo. v. Clensey, 97 Cal. A. 71, 274 P 1018.

[c] **Woman defendant.**—Peo. v. Sanders, 73 Cal. A. 330, 238 P 372.

[88] See cases infra this note.

[a] **Before the fact.**—Mulligan v. Peo., 68 Colo. 17, 189 P 5 (evidence sufficient to go to jury); Whiting v. State, 97 Fla. 693, 122 S 2 (evidence sufficient to support conviction); Killingsworth v. State, 90 Fla. 299, 105 S 834 (evidence sufficient to sustain conviction); Com. v. Baldi, 250 Mass. 528, 146 NE 11 (as to one of two defendants).

[89] Cal.—Peo. v. Sampson, (A.) 286 P 434.

in accordance with controlling statutes[90] and general rules.[91]

Particular evidence insufficient. In the notes below are given references to cases in which the evidence was held insufficient to connect defendant with the robbery,[92] as against his claim of alibi,[93] or to show that he aided and abetted,[94] or was guilty as a principal.[95]

Automobile banditry.[96] Evidence held sufficient to show defendant's participation in automobile banditry is set forth in the note.[97]

[§ 178] **(2) Degree of Proof.** Under general rules,[98] identification of defendant as the robber must be established beyond a reasonable doubt.[99] If the evidence is sufficient to comply with this standard, it will support a conviction even though based on the testimony of a single witness,[1] and, it has been held, despite a preponderance of evidence in favor

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Ill.—Peo. v. Powers, 293 Ill. 600, 127 NE 681.

Mass.—Com. v. Baldi, 250 Mass. 528, 146 NE 11 (as to one of two defendants).

N. J.—State v. DeBellis, 136 A 603 [aff 104 N. J. L. 187, 138 A 923].

Philippine.—U. S. v. Barroga, 21 Philippine 161.

Tex.—McDaniel v. State, (Cr.) 10 SW (2d) 98.

[a] **Defendant's unexplained presence at scene of robbery and possession of fruits** thereof held to support jury's conclusion that he was principal (Pen. Code § 31). Peo. v. Sampson, (Cal. A.) 286 P 434.

[b] **Driver of car.**—Evidence that defendant, on trial for robbery, planned the robbery, drove accomplices to within one hundred feet of the scene of robbery, and handed one a revolver, held to sustain his conviction as principal rather than accessary before the fact. State v. DeBellis, 136 A 603 [aff 104 N. J. L. 187, 138 A 923].

[c] **Keeping watch.**—"The conceded facts warrant a finding by the jury that appellant was a principal offender, under articles 66, 67, and 69, vol. 1, P. C. 1925. There was evidence that he was present, keeping watch, aided in securing the safety of his confederates, and, from his actions in concert with them before, at the time of and subsequent to the unlawful act, an agreement to do so may be inferred." Moody v. State, 106 Tex. Cr. 55, 290 SW 161, 162.

[d] **Seated in car.**—"The argument is that, if the evidence showed any offense, it merely showed that the plaintiff in error was informed of the crime after it was committed, and may have been guilty as an accessary after the fact. But the evidence went much further than that. The facts that, when Miller saw Reinhart and proposed to 'get him,' the car was immediately stopped and the revolver procured from the seat between the plaintiff in error and Krenmyer, the association of the parties at the time and in the rooming house, and the division of the proceeds of the robbery, raised a justifiable inference of a common understanding, and that what was done by those who actively took part in the robbery was contemplated when the five started out in the racing car. The court did not err in refusing to set aside the verdict." Peo. v. Powers, 293 Ill. 600, 127 NE 681, 682.

[90] See Peo. v. Raymond, 338 Ill. 590, 170 NE 703 (before fact—guilty as principal under statute).

[91] See Criminal Law §§ 99-161.

[92] Cal.—Peo. v. Seawright, 72 Cal. A. 414, 237 P 796.

Ill.—Peo. v. Steinbuch, 306 Ill. 441, 138 NE 137.

Ind.—Wheat v. State, 195 Ind. 660, 146 NE 581.

Iowa.—State v. Burke, 197 Iowa 338, 197 NW 66.

Miss.—Nobles v. State, 154 Miss. 179, 122 S 392; Stuart v. State, 64 S 417.

Nebr.—Eggers v. State, 113 Nebr. 676, 204 NW 817.

N. Y.—Peo. v. Fitzsimmons, 144 App. Div. 211, 128 NYS 996, 26 N. Y. Cr. 171.

Philippine.—U. S. v. Quijano, 11 Philippine 368; U. S. v. Vallesteros, 6 Philippine 401.

Tex.—Owens v. State, 112 Tex. Cr. 270, 16 SW (2d) 239; Hilson v. State, 101 Tex. Cr. 449, 276 SW 272; Wilson v. State, 94 Tex. Cr. 348, 250 SW 1033.

[a] **Commission at defendant's house.**—Where the only evidence connecting defendant with the crime was that it was committed at his house, at night, by several persons with whom he was on intimate terms, and that, although denied credit for a trifling sum the day before the robbery, he had paid a bill of twenty-five dollars the next day, the evidence was insufficient to prove defendant's participation in the robbery. Walbridge v. State, 13 Nebr. 236, 13 NW 209.

[b] **Mere possibility of guilt.**—"Furthermore, Bados testified that two other persons besides himself and the defendant took part in the fight. If the money of Bados was taken by any one in the fight, it is just as probable that it was taken by one or both of his two other assailants, with whom it is not shown that the defendant was acting in concert. The rule is that, even though it 'be positively proved that one of two or more persons committed a crime, yet if there is any reasonable doubt as to which is the guilty party the accused must be acquitted.'" Peo. v. Brooks, 334 Ill. 549, 166 NE 35, 37.

[c] **Present but not participating.**—"This evidence is not sufficient to sustain the verdict of guilty, as against Hunter and Barger. It clearly shows, without dispute, that neither of them robbed the prosecuting witness; and, in the absence of any evidence tending to show that they conspired with the robbers, or had, or reasonably could have had, an understanding with them to meet them . . . or that they in any other way aided in the robbery or procured it to be committed, the mere fact that they were driving the car in which he was riding when the robbery occurred is not enough to support an inference that they participated in it. And merely being present when others committed a robbery did not make them guilty of that crime." Wheat v. State, 195 Ind. 660, 146 NE 581, 582.

[d] **Registering under assumed name** in the same hotel as the robbers within forty-eight hours after the crime, and being closely associated with them, is not sufficient to prove defendant's guilt of the crime. Peo. v. Cania, 217 App. Div. 34, 216 NYS 478.

[e] **That defendant overheard conversation relative to delivery of property stolen** before the robbery occurred, and that he knew one of the identified robbers, is not of itself sufficient evidence on which to convict defendant. Peo. v. Di Gregario, 205 App. Div. 629, 200 NYS 66.

[93] Peo. v. Cramer, 298 Ill. 509, 131 NE 657, 659; Peo. v. Caruso, 184 App. Div. 512, 172 NYS 47; U. S. v. Plana, 2 Philippine 9; Owens v. State, 112 Tex. Cr. 270, 16 SW (2d) 239.

"The proof that the defendant was not at the place of the robbery and could not have participated in it was complete, came from unquestioned sources, and was unaffected by any fact or circumstance, or by any testimony, except the discredited claim of identification. The judgment is reversed." Peo. v. Cramer, supra.

[94] State v. Gamber, 69 Wash. 66, 124 P 210.

[95] Stringfellow v. State, 111 Tex. Cr. 504, 14 SW (2d) 1031.

[96] **Defined** see supra § 3.

[97] See case infra this note.

[a] **Evidence sufficient to identify defendant as party using automobile to escape from scene of robbery.**—"Under the specification that the verdict is not sustained by sufficient evidence, the appellant claims that he was not sufficiently identified. However, a witness testified that she was in the bank at the time of the robbery and that the appellant was one of the robbers and that he was dressed in woman's clothes. This witness testified in part as follows: 'I was in the First National Bank of Dyer, on December 20, 1922, about 3 o'clock in the afternoon on business. I saw that man right there (indicating the defendant) in the bank. He had woman's clothes on. There were three men in the bank. They were right inside closing the vault. When they closed the vault they started away slowly walking backwards. I saw one of the party dressed as a woman. He was the last person to get in the machine. Two shots were fired. When the last was fired the person dressed as a woman was just going into the machine. They started off going toward Chicago Heights. I am sure this defendant was the man I saw there dressed as a woman.' The defendant testified that he was in another place in bed asleep at the time of the robbery. There was other testimony denying the state's evidence but it is within the province of the jury to determine what evidence they will believe and what they will not believe." Cazak v. State, 196 Ind. 63, 64, 147 NE 138.

[98] See Criminal Law § 1584 text and note 61; also §§ 1590, 1593-1998.

[99] Peo. v. O'Donnell, 315 Ill. 568, 146 NE 490.

[1] Peo. v. Foster, 198 Cal. 112, 243 P 667; Peo. v. Gentile, 326 Ill. 540, 158 NE 222; U. S. v. Mondejar, 19 Philippine 158.

of an alibi.[2] A conviction may be sustained although a witness fails to swear positively and testifies merely that he believes accused to be the robber,[3] and the jury may be justified in accepting testimony of identification despite mistakes or discrepancies therein as to minor matters of description.[4]

[§ 179] **(3) Circumstantial Evidence**[5]—**(a) In General.** Where the sum total of circumstantial evidence is sufficient,[6] defendant may be identified by his voice,[7] or particular manner of talking,[8] or by tracks,[9] or footprints,[10] or by any distinctive features of his person[11] or apparel,[12] or by any other evidence of a purely circumstantial character.[13] But where the sum total of circumstantial evidence falls short of complete identification, evidence of this character is insufficient to establish defendant's connection with the crime.[14]

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[a] **That other witnesses failed or refused to identify defendant** as the robber will not preclude conviction upon the testimony of one witness who did identify. Peo. v. Foster, 198 Cal. 112, 243 P 667 (refused); Peo. v. Fisher, 303 Ill. 594, 136 NE 496 (failed).

2. Schuster v. Com., 232 Ky. 171, 22 SW (2d) 586.

3. State v. Lucas, 57 Iowa 501, 10 NW 868; Asher v. Com., 221 Ky. 599, 299 SW 203; State v. Riddle, (Mo.) 23 SW (2d) 179.

4. Peo. v. Green, 93 Cal. A. 435, 269 P 687; Peo. v. Booth, 72 Cal. A. 160, 236 P 987; Peo. v. Hale, 64 Cal. A. 523, 222 P 148; State v. Brehan, 141 Wash. 516, 252 P 128.

[a] **Age.**—Peo. v. Booth, 72 Cal. A. 160, 236 P 987.

[b] **Clothing.**—Peo. v. Booth, 72 Cal. A. 160, 236 P 987 (disagreement between witnesses as to color).

[c] **Color of woman robber's eyes.**—Peo. v. Green, 93 Cal. A. 435, 269 P 687.

[d] **Stock of gun.**—"The fact that one witness could not say with certainty that there was or was not wood on the stock of the gun with which he was held up does not blot out the identification of the robbers. That the witness was frightened and excited was but natural, and, under the circumstances, we think he could not be expected to establish that he examined minutely a gun pressing against his body to enforce inactivity, and which was also partially concealed in the hand of the robber." Peo. v. Hale, 64 Cal. A. 523, 222 P 148, 150.

[e] **Tall or short.**—"It is contended that the evidence was insufficient to justify the verdict. The main basis of this contention is that, because the complaining witness, in describing the men charged, referred to two of them as being tall and the other short, when in fact they were all short men, his evidence is not credible. But the question of height is always a comparative one. While on the witness stand, he insisted on saying that two of them were tall, even though they stood up before him and their measurements were given. The identification by the state's witness was sufficient, if believed by the jury, to warrant the verdict." State v. Brehan, 141 Wash. 515, 252 P 128, 131.

[f] **Whether smooth shaven.**—Peo. v. Booth, 72 Cal. A. 160, 236 P 987.

5. **Possession of stolen property** see infra § 180.

6. See Criminal Law § 1584.

7. State v. Riddle, (Mo.) 23 SW (2d) 179; State v. Allison, (Mo.) 300 SW 1069; State v. Bell, (Mo.) 300 SW 504; State v. Sydnor, 253 Mo. 375, 151 SW 692; U. S. v. Manabat, 7 Philippine 209; Hill v. State, 108 Tex. Cr. 629, 2 SW (2d) 267.

[a] **Hearing is one of the five senses,** and knowledge acquired through it is as certain as though acquired through any other sense." State v. Bell, (Mo.) 300 SW 504, 506.

[b] **Has probative value.**—"Knowledge of a fact is communicated to a person through one or more of the five senses, which are hearing, seeing, feeling, smelling, and tasting. In some persons, a sense is more acute or developed more than in others. However, courts cannot undertake to say as a matter of law that testimony of a witness, based on one of his senses, has no probative value. In its consideration of the facts and circumstances, the jury may conclude that it is without probative value, but that it is so because the jury is the trier of the facts. Defendant does not seem to deny that it would have been direct evidence of that fact if Anderson had testified that he identified defendant as the robber by means of sight. It is none the less direct evidence that he identified defendant by his voice. The force of the identification of defendant by means of his voice was a question of fact and within the province of the jury, and, as the facts made a submissible case, the weight of this testimony was for the jury. The identification of defendant did not depend wholly upon circumstantial evidence, as defendant contends, for the identification of a person by means of his voice is direct evidence of identification, as much so as though the identification had been through sight." State v. Riddle, (Mo.) 23 SW (2d) 179, 182.

[c] **Voice of intimate friend.**—"The night was dark and there was no light in the house and the only mode by which the witness was able to identify the accused was by the sound of his voice. It was shown that she and the accused had known each other intimately since their youth, having lived in the same barrio for many years, so that there was nothing unreasonable in her assertion that she recognized the accused by his voice, although she could not see his face on account of the darkness." U. S. v. Manabat, 7 Philippine 209.

8. State v. Bogardus, 188 Iowa 1293, 176 NW 327.

[a] **Through nose.**—State v. Bogardus, 188 Iowa 1293, 176 NW 327.

9. Fowler v. Com., 195 Ky. 80, 241 SW 814.

[a] **Tracks corroborating identification.**—Positive identification by the prosecuting witness of defendants as two of the three who robbed him, although such identification was weakened by other circumstances appearing of record, but was also corroborated by tracks tending to connect defendants with the commission of the crime, was sufficient to sustain a verdict finding defendants guilty of the robbery. Fowler v. Com., 195 Ky. 80, 241 SW 814.

10. Moore v. State, 87 Tex. Cr. 569, 226 SW 415.

[a] **Cogent evidence.**—"The peculiarities of the footprints made by the shoes, and the exactness with which they correspond with the tracks made by the shoes worn by the appellant on the occasion, bring the case within a class in which footprints are regarded as a very high character of evidence of identification." Moore v. State, 87 Tex. Cr. 569, 226 SW 415, 416.

11. Peo. v. Chalem, 336 Ill. 399, 168 NE 306; State v. Allison, (Mo.) 300 SW 1069; State v. Bray, (Mo.) 246 SW 921.

[a] **Eyes.**—State v. Allison, (Mo.) 300 SW 1069.

[b] **False tooth.**—Peo. v. Chalem, 336 Ill. 399, 168 NE 306.

[c] **Form and shape.**—State v. Bray, (Mo.) 246 SW 921.

[d] **Mouth and chin of masked man.**—State v. Bray, (Mo.) 246 SW 921.

[e] **Size.**—State v. Allison, (Mo.) 300 SW 1069; State v. Higgins, 311 Mo. 599, 278 SW 977.

12. Peo. v. Gorman, 14 Cal. A. 253, 111 P 285; State v. Higgins, 311 Mo. 599, 278 SW 977; State v. Allison, (Mo.) 300 SW 1069.

[a] **Blue overalls and tan shoes.**—State v. Allison, (Mo.) 300 SW 1069.

[b] **Torn coat.**—Peo. v. Gorman, 14 Cal. A. 253, 111 P 285.

13. See case infra this note.

[a] **Torn pieces of paper** found in the woods may justify conviction of defendant for robbing a bank where they are put together so as to show a diagram of the bank robbed, drawn in defendant's handwriting and on the back of an advertisement of defendant's stallion service. Peo. v. Barnhill, 337 Ill. 413, 169 NE 210.

14. State v. Campbell, 69 Iowa 556, 29 NW 604; Maxwell v. State, 109 Tex. Cr. 533, 5 SW (2d) 991.

[a] **Form and size.**—Where the only evidence connecting defendant with the crime is the opinion of the person robbed that defendant was of the form and size of one of his assailants, and the fact that he associated much with one of those convicted, defendant should be acquitted. State v. Campbell, 69 Iowa 556, 29 NW 604.

[b] **Track in sand.**—"It will be observed that the main incriminating fact was a track made by an average size shoe with a break in it in sand not shown to be damp, and that appellant had neither a weapon nor the fruits of the robbery in his possession when arrested a few hours thereafter. Other slight circumstances are the similarity of his voice and walk given by witnesses whose observation was taken under stress of excitement, and whose opportunity to closely scrutinize the guilty party was very limited. A conviction in this case would rest upon identification of a track made in the wind-swept sand of West Texas. No other incriminating facts of any cogency are shown. The testimony for appellant, given without any contradiction, showed him to be one of the world's unfortunate poor, lured by the hope that the West held for him a promise of freedom from poverty and want. He faced instead a felony charge, without funds and without friends, and under circumstances not of his own making, which militated against an acquittal. We

[§ 180] **(b) Possession of Stolen Property.**[15] There is authority to the effect that defendant's unexplained possession of the stolen property is not of itself sufficient to show his guilt.[16] Other authority holds that such unexplained possession is alone sufficient to authorize,[17] although not to require,[18] a conviction. In any event, such evidence is of probative force,[19] and may be sufficient to prove defendant's connection with the robbery where it is supported by evidence of other incriminatory facts.[20]

Proof of possession. In accordance with the circumstances involved, evidence in particular cases has been held sufficient[21] or insufficient[22] to prove defendant's possession of the stolen property.

[§ 181] **D. Trial**[23]**—1. Questions for Jury**[24]**—a. In General.** Under general rules,[25] it is the province of the jury to pass upon the weight[26] and credibility[27] of the evidence. It is for the jury to resolve such conflicts as may arise,[28] and on conflicting evidence questions of fact are for the jury's determination,[29] it being for them to decide as to the guilt or innocence of the accused.[30]

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are not able to give our sanction to a conviction resting upon the evidence of identification as appearing in this record." Maxwell v. State, 109 Tex. Cr. 533, 5 SW (2d) 991, 992.

[15] **Circumstantial evidence generally** see supra § 179.

[16] Peo. v. Haughey, 79 Cal. A. 541, 250 P 406; Peo. v. Smith, 74 Cal. A. 510, 241 P 267.

[a] **Possession of similar property.**—"In view of the new trial, it may be proper to say, in consideration of a request made at this trial, that if the defendant's counsel had asked for an instruction that the mere possession of the defendant of the $50 bills taken from defendant upon his arrest did not alone warrant an inference that the defendant was guilty of the crime, it should have been given. Conscious, exclusive, and recent possession of the stolen property does warrant such an inference; . . . and such possession, when unexplained, is taken as conclusive. . . . But in this record the $50 bills found upon the defendant were not identified in the remotest degree with the $50 bills, or any of them, taken by the robbers, and there is no inherent feature in a piece of circulating currency that identifies it, short of private mark or note of its number, or the like. Of course, the possession of such bills admitted of argument against the defendant; but I speak only of the probative force thereof in this record." Peo. v. Bertline, 171 App. Div. 460, 157 NYS 599, 605 [rev on ground other evidence of identification should have been admitted 218 N. Y. 584, 113 NE 541].

[17] Peo. v. Deluce, 237 Ill. 541, 86 NE 1080; State v. Harris, 194 Iowa 1304, 191 NW 83.

[18] Peo. v. Deluce, 237 Ill. 541, 86 NE 1080; State v. Harris, 194 Iowa 1304, 191 NW 83.

[19] Peo. v. Haughey, 79 Cal. A. 541, 250 P 406, 407; State v. King, 67 Wash. 651, 122 P 323.

"While the possession of stolen property unexplained is not sufficient to show guilt, it is a circumstance tending to show guilt, and may be considered by the jury in connection with other testimony." Peo. v. Haughey, supra.

"Putting it in another way, possession of stolen property, if unexplained, 'is an item to be taken into consideration by the jury, together with other incriminating circumstances in arriving at a verdict.'" Peo. v. Smith, 74 Cal. A. 510, 241 P 267, 269.

[20] Peo. v. Smith, supra; State v. Conley, (Mo.) 238 SW 804.

"While it is true that possession of the stolen property immediately following a robbery is not in itself sufficient evidence to warrant a verdict of robbery, nevertheless slightly corroborative evidence taken with the evidence of other inculpatory circumstances, taken with the evidence of possession of the stolen property, is sufficient to support a conviction." Peo. v. Smith, supra.

[a] **Attempt to get rid of such property and failure to deny accusation of robbery.**—Peo. v. Smith, 74 Cal. A. 510, 241 P 267.

[21] See cases infra this note.

[a] **In car occupied by defendant.**—In a prosecution for robbery, evidence that a portion of the stolen money was found equally divided between three suit cases in an automobile occupied by defendant and two companions, with evidence identifying defendant and some of his companions as participants in the robbery, and as having traveled together in the automobile from the scene of the robbery, is sufficient possession of the property to sustain a conviction of defendant. State v. Conley, (Mo.) 238 SW 804.

[b] **In vest found in defendant's room.**—In a prosecution for robbery, evidence that a stolen watch was found in defendant's vest in the room occupied by him was sufficient to show his possession. Peo. v. Powloski, 311 Ill. 284, 142 NE 551 (holding also that the fact that a police officer was in accused's room more than once after his arrest for robbery was insufficient to raise a suspicion that a stolen watch found in accused's' vest was placed therein by any other than accused).

[c] **Two defendants.**—If defendants charged with róbbery of bonds were jointly engaged in the common undertaking of disposing of the bonds, they were both in possession thereof, within the rule as to the possession of recently stolen property, although only one of them had physical possession thereof. Peo. v. Quigley, 217 Mich. 213, 185 NW 787.

[22] See case infra this note.

[a] **Room occupied by others in defendant's house.**—Dorsey v. State, 25 Ariz. 139, 213 P 1011, 1012.

[23] **In criminal cases generally** see Criminal Law §§ 2000-2614.

[24] **Jury's determination of punishment** see infra § 205.

[25] See Criminal Law §§ 2290-2292.

[26] Ark.—Wright v. State, 177 Ark. 1039, 9 SW (2d) 233.

Cal.—Peo. v. Anderson, (A.) 288 P 1095.

Ill.—Peo. v. O'Donnell, 315 Ill. 568, 146 NE 490; Peo. v. Maciejewski, 294 Ill. 390, 128 NE 489.

Mich.—Peo. v. Czarnecki, 241 Mich. 696, 217 NW 781; Peo. v. Quigley, 217 Mich. 213, 185 NW 787.

Mo.—State v. Klegman, 1 SW (2d) 833; State v. Smith, 247 SW 154; State v. Lasson, 292 Mo. 155, 238 SW 101.

Oh.—Sydell v. State, 17 Oh. A. 418.

Okl.—Barnhart v. State, (Cr.) 287 P 803.

R. I.—State v. Miller, 142 A 662.

Tex.—Fitzgerald v. State, 87 Tex. Cr. 34, 219 SW 199.

[27] Cal.—Peo. v. Anderson, (A.) 288 P 1095.

Ill.—Peo. v. Kilbane, 322 Ill. 190, 152 NE 566.

Ky.—Davis v. Com., 230 Ky. 589, 20 SW (2d) 455.

Mo.—State v. Klegman, 1 SW (2d) 833; State v. Drew, 300 SW 473; State v. Harmon, 296 SW 391; State v. Smith, 247 SW 154.

Okl.—Barnhart v. State, (Cr.) 287 P 803.

[28] Wright v. State, 177 Ark. 1039, 9 SW (2d) 233, 234.

"It is the province of the jury to pass upon the conflicts in, and the weight of, the testimony." Wright v. State, supra.

[29] Ala.—Cowart v. State, 22 Ala. A. 300, 115 S 145.

Cal.—Peo. v. Bigelow, 64 Cal. A. 731, 222 P 622.

Ill.—Peo. v. Kilbane, 322 Ill. 190, 152 NE 566; Peo. v. Allegretti, 291 Ill. 364, 126 NE 158.

Kan.—State v. Tucker, 115 Kan. 203, 222 P 96.

Mo.—State v. Dickhout, 26 SW (2d) 937.

Tex.—Pearson v. State, 79 Tex. Cr. 609, 187 SW 336.

Wash.—State v. Denby, 143 Wash. 288, 255 P 141.

[a] **Evidence held sufficient to take case to jury.**—Reeves v. State, 17 Ala. A. 684, 88 S 197; State v. Tucker, 115 Kan. 203, 222 P 96; State v. Dickhout, (Mo.) 26 SW (2d) 937; Pearson v. State, 79 Tex. Cr. 609, 187 SW 336; State v. Denby, 143 Wash. 288, 255 P 141.

[30] Cal.—Peo. v. Grace, 88 Cal. A. 222, 263 P 306.

Ill.—Peo. v. Knox, 302 Ill. 471, 134 NE 923.

Kan.—State v. Tucker, 115 Kan. 203, 222 P 96.

Ky.—Davis v. Com., 230 Ky. 589, 20 SW (2d) 455; Maxey v. Com., 219 Ky. 745, 294 SW 507; Hughes v. Com., 124 SW 788.

Mo.—State v. McCullough, 316 Mo. 42, 289 SW 811; State v. Newland, 285 SW 400.

Nebr.—Gardiner v. State, 110 Nebr. 11, 192 NW 946.

Okl.—Noel v. State, 14 Okl. Cr. 548, 174 P 293.

[§ 182] **b. Identification of Property.** On conflicting evidence, the sufficiency of the identification of the property taken or alleged to have been taken is for the jury.[31]

[§ 183] **c. Elements of Offense.**[32] On conflicting evidence, it is for the jury to determine whether there was a taking,[33] by force[34] or intimidation,[35] with intent to steal,[36] and without the consent[37] of the victim.

[§ 184] **d. Dangerous or Deadly Weapon.**[38] Where the facts are undisputed, the dangerous or deadly character of a weapon with which accused was armed is a question for the court.[39] But where the evidence is doubtful, the question is for the jury.[40] Whether or not defendant used a gun is for the jury on conflicting evidence.[41]

[§ 185] **e. Degree of Offense.**[42] Where under statute the degree of robbery depends upon the dangerous or deadly character of a weapon used by defendant,[43] the jury should determine the degree in the sense of deciding whether or not the weapon was dangerous or deadly.[44]

Tex.—Pearson v. State, 79 Tex. Cr. 609, 187 SW 336.

Va.—Brookman v. Com., 151 Va. 522, 145 SE 358.

[a] **Meager evidence.**—"This evidence was meager, but sufficient to make an issue for the jury. It was the province of that tribunal to determine whether the defendant was guilty of the offense charged." Davis v. Com., 230 Ky. 589, 20 SW (2d) 455, 456.

[b] **Evidence of guilt held sufficient to:** (1) Authorize overruling of demurrer to the evidence. State v. Tucker, 115 Kan. 203, 222 P 96; State v. McCullough, 316 Mo. 42, 289 SW 811; State v. Dickens, (Mo.) 285 SW 445; State v. Baldwin, (Mo.) 281 SW 940; State v. Roberts, 311 Mo. 521, 278 SW 971; State v. Wallace, (Mo.) 278 SW 663 (clear and convincing evidence); State v. Smith, (Mo.) 247 SW 154; State v. Taylor, 293 Mo. 210, 238 SW 489 (substantial testimony); State v. Thompson, (Mo.) 238 SW 115. (2) Authorize overruling of motion to advise jury to acquit. Noel v. State, 14 Okl. Cr. 548, 174 P 293 (conjoint robbery). (3) Authorize refusal of peremptory instruction to acquit. State v. Bell, (Mo.) 300 SW 504; Pearson v. State, 79 Tex. Cr. 609, 187 SW 336. (4) Authorize refusal to direct verdict of not guilty. Peo. v. Grace, 88 Cal. A. 222, 263 P 306 (even if statute could be construed as authorizing directed verdict). (5) Require submission of guilt or innocence of accused to the jury. Peo. v. Clark, 61 Cal. A. 46, 214 P 248; Gardiner v. State, 110 Nebr. 11, 192 NW 946.

Connection with crime see infra § 186.

Elements of offense see infra § 183.

31. Com. v. Tolliver, 119 Mass. 312; Henderson v. State, 97 Tex. Cr. 247, 260 SW 868, 869.

"Whether the property taken was a pin or a stud, even if there be any difference between the two, was a question of fact for the jury, and the testimony concerning same making it appear that the article was called by the witnesses both a stud and a pin, we would uphold the refusal of the trial court for an instructed verdict based on the variance. However, we seriously doubt there being support of any claim of variance." Henderson v. State, supra.

[a] **Evidence sufficient to take case to jury.**—"A second objection in support of the motion is that the state, having alleged that the property taken from the prosecuting witness was moonshine whisky, was bound to prove the fact, and that they did not so prove it. But the witness testified that the kegs taken from his car at the time of the robbery contained moonshine whisky when they were placed in the cache, and that, when loading them into his car prior to the robbery, he opened one of them and took a drink of its contents and that it proved to be moonshine whisky. This, we are clear, was sufficient proof to take the question to the jury." State v. Denby, 143 Wash. 288, 255 P 141, 144.

32. **Enumerated and discussed** see supra §§ 12–54.

33. Cowart v. State, 22 Ala. A. 300, 115 S 145.

"Defendants admitted their presence and also having an altercation with Maxwell, but denied strenuously they attempted to or did rob the man. As stated, this conflict presented a question for the jury to determine." Cowart v. State, supra.

34. Cal.—Peo. v. Church, 116 Cal. 300, 48 P 125.

Iowa.—State v. Calhoun, 72 Iowa 432, 34 NW 194, 2 AmSR 252.

Ky.—King v. Com., 76 SW 341, 25 KyL 713; Farrell v. Com., 11 Ky. Op. 386.

Mo.—State v. Spivey, 204 SW 259.

Tex.—Thompson v. State, (Cr.) 26 SW 1081.

Wash.—State v. Casto, 120 Wash. 557, 207 P 952.

[a] **Woman robber putting arms around victim.**—Evidence that while prosecuting witness was engaged in conversation with accused, a woman, after her accomplices appeared on the scene, she threw her arms around him and took money out of his pocket, made the question whether force and violence were used one for the jury. State v. Spivey, (Mo.) 204 SW 259.

[b] **Evidence held sufficient to take case to jury.**—State v. Faudi, (Mo.) 11 SW (2d) 1014; Palmer v. State, 71 Tex. Cr. 335, 160 SW 349.

35. State v. Casto, 120 Wash. 557, 207 P 952.

[a] **Evidence held sufficient to take case to jury.**—Palmer v. State, 71 Tex. Cr. 335, 160 SW 349.

36. Iowa.—State v. Wegener, 180 Iowa 102, 162 NW 1040.

Ky.—Triplett v. Com., 122 Ky. 35, 91 SW 281, 28 KyL 974.

Mich.—Peo. v. Rubel, 221 Mich. 142, 190 NW 635.

N. Y.—Hope v. Peo., 83 N. Y. 418, 38 AmR 460; Bloomer v. Peo., 1 Abb. Dec. 146, 3 Keyes 9; Peo. v. Hall, 6 Park. Cr. 642.

N. C.—State v. Sowls, 61 N. C. 151.

Okl.—Johnson v. State, 24 Okl. Cr. 326, 218 P 179, 181.

"In all cases of this kind, the question whether the act is done with a felonious intent is one of fact for the jury." Johnson v. State, supra.

[a] **Voluntary character of participation in robbery.**—State v. Wegener, 180 Iowa 102, 162 NW 1040.

[b] **Evidence held sufficient to take case to jury.**—(1) Generally. Lunce v. Com., 232 Ky. 214, 22 SW (2d) 629. (2) Where it appeared that two others than defendant actually held up the person robbed while defendant was with another in an automobile and took them away from the scene after the robbery, evidence was sufficient to carry to the jury the question as to whether he understandingly co-operated and aided in the perpetration of the robbery. Peo. v. Rubel, 221 Mich. 142, 190 NW 635.

37. Boyd v. Com., 194 Ky. 73, 238 SW 182; State v. Casto, 120 Wash. 557, 207 P 952.

[a] **Evidence held sufficient to go to jury** where defendants testified that the victim voluntarily gave up his money to them under an agreement to divide the spoils of gambling in which all had theretofore participated with others, and where victim testified defendants took his money at the point of a pistol. Boyd v. Com., 194 Ky. 73, 238 SW 182.

38. **As affecting degree or other classification of offense** see supra passim §§ 55–71.

For court or jury in prosecutions for homicide see Homicide § 575.

For jury where affecting degree see infra § 185.

39. Peo. v. Dwyer, 324 Ill. 363, 155 NE 316, 317.

40. Peo. v. Dwyer, supra.

"Where the weapon in question and the manner of its use are of such character as to admit of but one conclusion, the question whether or not it is deadly is one of law for the court to determine, but when the character of the weapon is doubtful or the question depends upon the manner of its use, it is a question for the jury to determine from a description of the weapon, from the manner of its use, and the circumstances of the case." Peo. v. Dwyer, supra.

41. Peo. v. Funk, 325 Ill. 57, 155 NE 838.

42. **Generally** see supra §§ 56–64.

43. See supra § 57.

44. Peo. v. Seaman, 101 Cal. A. 302, 281 P 660, 661.

"If a person is about to commit a robbery, there are several courses open to him. If he goes empty-handed he may succeed or he may fail, and in addition thereto, he may be killed. If he succeeds in committing the offense and is thereafter tried, he will have the benefit of claiming robbery in the second degree. On the other hand, if he uses a gun or other weapon mentioned in the statute and succeeds in committing the robbery and is put on trial, then it will be a question for the jury to decide whether the crime was first degree or second degree. The mere fact that on the trial the defendant testified that his gun was not loaded does not require the jury to believe such testimony." Peo. v.

[§ 186] **f. Connection of Accused with Offense.** Identification being a question of fact, it is for the jury, on conflicting evidence, to determine whether accused was connected with or participated in the robbery,[45] as against his claim of alibi,[46] as where the question is whether defendant acted in concert with another in committing the crime,[47] or did acts rendering him guilty as an accessary[48] or principal[49] under general rules.[50]

[§ 187] **2. Instructions—a. In General.** General rules[51] govern as to instructions in a trial for robbery,[52] and in accordance therewith particular instructions given or requested have been held proper[53]

Seaman, supra.

Matters respecting dangerous weapons as for court or jury generally see supra § 184.

[45] Ala.—Lynn v. State, 21 Ala. A. 2, 106 S 344 [certiorari den 214 Ala. 77, 106 S 347].

Cal.—Peo. v. Anderson, (A.) 288 P 1095; Peo. v. Smith, 74 Cal. A. 510, 241 P 267; Peo. v. Seawright, 72 Cal. A. 414, 237 P 796; Peo. v. Anderson, 59 Cal. A. 408, 211 P 254.

Colo.—Mulligan v. Peo., 68 Colo. 17, 189 P 5; Smith v. Peo., 39 Colo. 202, 88 P 1072.

Fla.—Whiting v. State, 97 Fla. 693, 122 S 2.

Ill.—Peo. v. O'Donnell, 315 Ill. 568, 146 NE 490; Peo. v. Allegretti, 291 Ill. 364, 126 NE 158.

Iowa.—State v. Ayles, 205 Iowa 1024, 219 NW 41.

Ky.—Asher v. Com., 221 Ky. 599, 299 SW 203; Lanford v. Com., 209 Ky. 693, 273 SW 492.

La.—State v. Skeahan, 167 La. 1003, 120 S 626.

Mich.—Peo. v. Czarnecki, 241 Mich. 696, 217 NW 781; Peo. v. Quigley, 217 Mich. 213, 185 NW 787.

Mo.—State v. Riddle, 23 SW (2d) 179; State v. Kowertz, 317 Mo. 426, 297 SW 358.

Mont.—State v. Sullivan, 9 Mont. 174, 22 P 1088.

N. J.—State v. Mantis, 151 A 376.

N. Y.—Peo. v. Cania, 217 App. Div. 34, 216 NYS 478.

Okl.—Williams v. State, 35 Okl. Cr. 171, 249 P 433.

Pa.—Com. v. Fink, 93 Pa. Super. 57.

R. I.—State v. Miller, 142 A 662.

Wash.—State v. Druxman, 88 Wash. 424, 153 P 381; State v. Hodoff, 88 Wash. 413, 153 P 377.

[a] **Basis of identification.**—In a prosecution for robbing a bank, where there was testimony conflicting with that of witnesses that defendant was one of the robbers, whether the identifying witnesses formed their opinion from the fact that defendant had been arrested as such, and not from their own knowledge, was a question for the jury. State v. Hodoff, 88 Wash. 413, 153 P 377.

[b] **Method of identification.**—"All the evidence in this case was offered by the prosecution. The defendant did not, at the time of the trial or at any time subsequent to his arrest, make any effort to explain the suspicious circumstances in which he was involved. Though he was not positively identified as one of the parties to the crime his general description tallied with that given by the witnesses, and it was for the jury to determine whether this method of identification was sufficient." Peo. v. Smith, 74 Cal. A. 510, 241 P 267, 268.

[c] **By voice.**—State v. Riddle, (Mo.) 23 SW (2d) 179; State v. Bell, (Mo.) 300 SW 504.

[d] **Evidence held sufficient to take case to jury.**—(1) Generally. Peo. v. Bigelow, 64 Cal. A. 731, 222 P 622; Mulligan v. Peo., 68 Colo. 17, 189 P 5; Asher v. Com., 221 Ky. 599, 299 SW 203; Meredith v. Com., 218 Ky. 571, 291 SW 745; Peo. v. Covelesky, 217 Mich. 90, 185 NW 770; State v. Riddle, (Mo.) 23 SW (2d) 179; State v. Maness, (Mo.) 19 SW (2d) 628; State v. Faudi, (Mo.) 11 SW (2d) 1014; State v. Deviney, (Mo.) 278 SW 726; State v. Eddy, (Mo.) 199 SW 186; State v. Mantis, (N. J.) 151 A 376; Williams v. State, 35 Okl. Cr. 171, 249 P 433; Com. v. Fink, 93 Pa. Super. 57. (2) Testimony of prosecuting witness to effect that she recognized defendant as the man that wrenched a bag of money from her hands. State v. Thompson, (Mo.) 238 SW 115. (3) "Several witnesses gave testimony which tended to show that this defendant and another white man, one Chapin, held pistols upon Burchfield and took the money away from him, representing at the time that they were officers of the law. There was also evidence of inculpatory statements by defendant, voluntarily made; and the defendant was shown without dispute to be a man of general bad character. On the other hand, the defendant denied that he was the man who robbed Burchfield, and also denied that he made the statements attributed to him. He also offered the testimony of one Monicue Morris, colored, to the same effect. This conflict in the testimony presented a question for the determination of the jury." Lynn v. State, 21 Ala. A. 2, 106 S 344, 345 [certiorari den 214 Ala. 77, 106 S 347].

[46] Cal.—Peo. v. Fallai, 99 Cal. A. 297, 278 P 449; Peo. v. Murphy, 92 Cal. A. 729, 268 P 927.

Ill.—Peo. v. Papke, 325 Ill. 410, 156 NE 375; Peo. v. Garbaciak, 306 Ill. 254, 137 NE 832; Peo. v. Martin, 304 Ill. 494, 136 NE 711, 303 Ill. 233, 135 NE 404.

Ky.—Davis v. Com., 230 Ky. 589, 20 SW (2d) 455.

Mich.—Peo. v. Covelesky, 217 Mich. 90, 185 NW 770.

Mo.—State v. Taylor, 18 SW (2d) 474; State v. Klegman, 1 SW (2d) 833; State v. Drew, 300 SW 473; State v. Kowertz, 317 Mo. 426, 297 SW 358; State v. Harmon, 296 SW 391; State v. Adair, 160 Mo. 391, 61 SW 187.

N. Y.—Peo. v. O'Regan, 221 App. Div. 331, 223 NYS 339.

Okl.—Barnhart v. State, (Cr.) 287 P 803.

[a] **Preponderance of evidence favoring alibi.**—"We have considered the record in this case with more than usual care from the fact that the apparent preponderance of the evidence seems sufficient to have raised a reasonable doubt as to the defendant's presence at the time of the robbery. But this was a question for the jury." State v. Harmon, (Mo.) 296 SW 391, 397.

[b] **"While the evidence of appellant's guilt was purely circumstantial, . . . [it] was the exclusive** province of the jury to pass upon the credibility of the appellant and the other witnesses whose testimony tended to establish his alibi." State v. Drew, (Mo.) 300 SW 473, 474.

[47] State v. Kowertz, 317 Mo. 426, 297 SW 358.

[a] **Where companion took money from cash register.**—State v. Kowertz, 317 Mo. 426, 297 SW 358.

[48] Mulligan v. Peo., 68 Colo. 17, 189 P 5; Whiting v. State, 97 Fla. 693, 122 S 2.

[a] **Before the fact.**—Mulligan v. Peo., 68 Colo. 17, 189 P 5; Whiting v. State, 97 Fla. 693, 122 S 2 ("armed robbery").

[49] Peo. v. McKeighan, 205 Mich. 367, 171 NW 500.

[a] **Aiding and abetting.**—Whether defendant, charged as a principal with the crime of assault and robbery without a dangerous weapon, denounced by Comp. L. (1915) § 15208, aided and abetted the commission of the alleged offense, is a question for the jury. Peo. v. McKeighan, 205 Mich. 367, 171 NW 500.

[50] See Criminal Law §§ 107–147.

[51] See Criminal Law §§ 2353–2496.

[52] See cases infra this note.

[a] **Assuming truth of matters in issue.**—A charge is erroneous which assumes the truth of matters of fact in controversy. State v. Bailey, 54 Iowa 414, 6 NW 589; Bradshaw v. State, 44 Tex. Cr. 222, 70 SW 215; Houston v. Com., 87 Va. 257, 12 SE 385.

[b] **Construction as a whole.**—In determining whether the court erred in charging the jury, all the instructions are to be taken together and read as a whole. Peo. v. Etting, 99 Cal. 577, 34 P 237; Moeller v. Peo., 70 Colo. 223, 199 P 414; State v. Bateman, 196 Mo. 35, 95 SW 413; State v. Rodgers, 21 Mont. 143, 53 P 97.

[c] **Request to charge** should be refused, although correct in the abstract, if there is no evidence in the case on which to base it. Haley v. State, 49 Ark. 147, 4 SW 746; Peo. v. Modina, 146 Cal. 142, 79 P 842; Ferguson v. State, 32 Ga. 658; State v. McLain, 159 Mo. 340, 60 SW 736; State v. Graham, 133 N. C. 645, 45 SE 514; Harris v. Com., 129 Va. 751, 105 SE 541, 542 ("we need not stop to consider whether the instruction in the abstract was true. It relates to a question not affecting the guilt or innocence of the accused, and the court was entirely right in refusing to give it").

[d] **Inferences from facts.**—It is not the judge's duty to point out what inferences (1) may (Haley v. State, 49 Ark. 147, 4 SW 746) (2) or should (Haley v. State, supra) be drawn from particular facts in evidence.

[53] See cases infra this note. See Autrey v. State, 15 Ala. A. 574, 74 S

or improper.[54]

[§ 188] **b. Nature and Elements of Offense[55]—(1) In General.** Following the general rule,[56] the court should define the offense,[57] and instruct the jury clearly as to every essential element thereof.[58]

[§ 189] **(2) Particular Elements—(a) Taking.**[59] An instruction to find an accused present at the robbery guilty if he made an assault and "took" the property is correct even though the physical "taking" thereof was by his co-defendant acting in concert.[60] It has been held unnecessary to charge the jury as to the necessity of a carrying away of the property taken.[61]

[§ 190] **(b) Property Taken[62]—aa. Value.** It is sufficient to charge the jury that the property must have some value.[63]

Under statute defining robbery as felonious taking of "money, goods or other valuable thing,"[64]

397; Bolden v. Com., 11 Ky. Op. 183; State v. Silvey, (Mo.) 296 SW 128; State v. Baldwin, (Mo.) 281 SW 940; State v. Deviney, (Mo.) 278 SW 726; State v. Daugherty, 302 Mo. 638, 259 SW 787; Compton v. State, 67 Tex. Cr. 15, 148 SW 580.

[a] **Associates.**—Sutton v. State, 162 Ark. 438, 258 SW 632 (where testimony showed that complaining witness was first put in fear of his life by accused and then his property was taken from the side of his car by the companions of accused who acted under his direction, it did not make any difference that accused's companions were not jointly indicted for the offense, and an instruction, authorizing a conviction if the jury believed from the evidence that accused and his associates took the property by force, was not erroneous on the theory that defendant had no associates because he alone was indicted).

[b] **Circumstantial evidence.**—Peo. v. Giardiano, 332 Ill. 476, 163 NE 798; Peo. v. Guido, 321 Ill. 397, 415, 152 NE 149 ("when there are circumstances forming important links in connection with the direct evidence in a case, an instruction upon the law concerning the competency of circumstantial evidence is proper").

[c] **Completely presenting case under evidence.**—State v. Hahn, 316 Mo. 229, 289 SW 845.

[d] **Not misleading.**—Sutton v. State, 162 Ark. 438, 258 SW 632 (using the words "feloniously and violently" following immediately after the words "steal, take and carry away," was not misleading as calculated to lead the jury into believing that they were directed to find defendant guilty of robbery under circumstances which would only make him guilty of larceny).

[e] **Not prejudicial.**—Nelms v. State, 18 Ga. A. 92, 88 SE 917 ("in his statement denying a robbery, [accused] claimed that he and his associate won the prosecutor's watch and money, by what was called a 'belt trick,' and detailed the colloquy between his associate and himself as the prosecutor approached them, in which his associate referred to the prosecutor, and pulling out his belt, said 'Maybe we can catch him on it.' The defendant's counsel, in directing the defendant during his statement at the trial, told the defendant to 'go out there and show the jury how that belt trick is worked.' Throughout the testimony, as it appears from the record, the device by which the defendants, as they claimed, won the watch and money, a belt game or belt trick, and the nature of the trick, was demonstrated to the jury by the defendant. Under these circumstances it was not error for the trial judge, in stating to the jury the contentions of the defendant, to use the expression 'they say . . . they flimflammed him out of it.' The defendant claimed that he won the money on a belt game or trick, and the language used was not for any reason assigned objectionable, though it may not have been classical)".

[f] **Sufficiently favorable to defendant.**—State v. Simpson, 119 Wash. 653, 657, 206 P 561 ("It is sufficient to give correct instructions upon any issue involved in a case in the language of the court").

[g] **Within issues.**—Green v. State, 66 Tex. Cr. 446, 147 SW 593 (in a prosecution for robbery with firearms, where the prosecuting witness claimed to have been made to hand over money won in a game of cards at the command of defendant who then had a pistol in his hand, a charge setting out the manner in which the witness came into possession of the money and alluding to the game was properly within the issues).

[54] See cases infra this note.

[a] **Effect of victim's death before taking.**—Fox v. State, 102 Ark. 393, 144 SW 516, 518 ("It is next urged that the court erred in refusing to instruct the jury to acquit the defendant if it found that Mrs. Winkleman died from the effects of the assault made on her before the money was taken from her person. The court by proper instruction had told the jury what robbery was under our statutes, and in plain and unambiguous language had covered every phase of the question. All the evidence in the case tended to show that the murder and robbery were a part of the same transaction, and that the robbery was the purpose for which the murder was committed. Therefore we do not think that the court erred in refusing to give the instruction").

[b] **Misleading.**—Hardeman v. State, 14 Ala. A. 35, 70 S 979 (defendant's requested charge that if he had chickens stolen from his premises a few nights before the robbery, and thought some one was attempting to steal them when he went out about the time of the robbery, he had a right to act on the reasonable appearance of things, was properly refused, as vague and misleading).

[c] **Principal in second degree.**—Bryant v. State, 15 Ga. A. 535, 83 SE 795 ("On the trial of two persons for robbery by force, when the evidence authorized but did not demand the conviction of one of them as principal in the first degree, and the conviction of the other as principal in the second degree, it is prejudicial error, in the case of the latter, for the court to charge as follows: 'If you should find that one of these defendants suddenly snatched money from the person of the prosecuting witness, it would make no difference whether it was the total amount named in the bill of indictment, or a portion of it, without the consent of the person in possession and control thereof, but with his knowledge that something was being taken from his person, and it was taken from him so quickly that he could not stop it, and it was done with intent to steal—if you find that one of these two did it and the other one did not know about it, then only that one who did it would be guilty of robbery by force.' This part of the charge is clearly erroneous. For one to be guilty as a principal in the second degree, he must not only know that a crime is being committed, but he must be present aiding, and abetting in the commission of it. Penal Code (1910) § 42").

[55] **Enumerated and discussed** see supra § 12-54.

[56] See Criminal Law §§ 2362-2368.

[57] See cases infra this note.

[a] **Definition held sufficient generally.**—State v. Thompson, (Mo.) 238 SW 115.

[b] **Statutory definition.**—On a trial for robbery, it is sufficient for the court, in defining robbery, to give the statutory definition of the crime. Peo. v. White, 5 Cal. A. 329, 90 P 471.

[c] **"The omission of the word 'unlawful'** in defining the crime of robbery is unimportant, if the acts charged, if committed at all, could not be other than unlawful." State v. Bruno, 141 Minn. 56, 169 NW 249.

Defining degrees see infra §§ 198, 199.

[58] Ga.—Grant v. State, 125 Ga. 259, 54 SE 191; Clay v. State, 122 Ga. 136, 50 SE 56.

Iowa.—State v. Atkins, 122 Iowa 161, 97 NW 996.

Mo.—State v. Alexander, 184 Mo. 266, 83 SW 753.

Okl.—Axhelm v. U. S., 9 Okl. 321, 60 P 98.

Tenn.—Miller v. State, 12 Lea 223.

W. Va.—State v. McCoy, 63 W. Va. 69, 59 SE 758.

[59] **As element of offense** see supra § 13.

[60] State v. Friedman, 313 Mo. 88, 280 SW 1023, 1025.

[61] State v. Friedman, supra.

[a] **Reason for rule.**— ". . . No case is cited in which it has been held that, in an instruction for highway robbery, the court should require the jury to find that the property was carried away. No such case can be found; but in several cases it has been held that the allegation contended for by defendant need not be in an indictment for highway robbery. If it need not be alleged, it need not be proved, and, if it need not be proved that the property was carried away, then it is not necessary for the court to tell the jury that they must find that it was carried away." State v. Friedman, 313 Mo. 88, 280 SW 1023, 1025.

[62] **Subjects of robbery** see supra §§ 14, 15.

[63] State v. Dickens, (Mo.) 285 SW 445.

Value as element of offense see supra § 16.

[64] See supra §§ 2, 14.

where the indictment and evidence show a taking of "money," the charge need not point out that a "thing" taken must be "valuable."[65]

[§ 191] **bb. Ownership, Possession, or Control.**[66] Where the point is in issue, the court should instruct the jury as to the necessity that the property taken belong to some one other than accused.[67] If a claim of right by accused is not in issue, an instruction explaining that the property must have been taken from the immediate possession or control of the victim is sufficient as to ownership.[68]

[§ 192] **(c) From Person or Presence.**[69] The court should charge the jury as to the necessity of a taking from the person, presence, or immediate possession of the victim.[70]

[§ 193] **(d) Force or Intimidation**[71]**—aa. Necessity of Instruction.** The jury should be instructed as to the necessity of a taking by means of force or intimidation.[72]

[§ 194] **bb. Sufficiency.** Since either force or intimidation is sufficient to support a charge of robbery,[73] it is proper to charge the jury to such effect.[74] When instructing on the issue of one phase of the element of force or intimidation, the court need not include in such instruction matter as to the other phase of the element.[75]

Since the degree of force used is immaterial,[76] it is proper to so instruct the jury.[77]

Particular instructions. Under general rules[78] particular instructions given or requested as to the method of taking have been held proper[79] or improper.[80]

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[65] Peo. v. Papke, 325 Ill. 410, 156 NE 375.

[a] **Illustration.**—"It is complained the instruction was erroneous in that it omitted the word 'valuable,' which qualifies the word 'thing.' The statute defines robbery as the felonious and violent taking of 'money, goods or other valuable thing' from the person of another by force or intimidation. Defendant was charged in the indictment with the felonious and violent taking of money from Loseff, and the proof of the people was that defendant took money violently from Loseff." Peo. v. Papke, 325 Ill. 410, 156 NE 375, 377.

[66] **As element of offense** see supra §§ 17–19.

[67] State v. Steele, 150 Wash. 466, 273 P 742.

[a] **Defendant's claim of ownership.**—Instruction held erroneous because of omission to state that before defendants could be found guilty the jury must find that the property taken was the property of some person other than defendants, particularly in view of fact that defendants claimed that money and property they were accused of stealing was won in a dice game and that they used their revolvers to protect winnings when interfered with by others. State v. Steele, 150 Wash. 466, 273 P 742.

[b] **Instruction held sufficient.**—In a prosecution for robbery committed by forcibly retaking money won from accused in gaming, court's charge that it was not unlawful to forcibly take from another one's own property, adequately presented defendant's theory, and a charge that where two persons engaged in gaming and the party losing voluntarily delivered the money lost to the winner, that the winner is the owner of the property, was not error as inferring that accused did not have the right to retake the property under the theory of the defense that the winnings were to be divided to cheat a third person. Punchard v. State, 91 Tex. Cr. 603, 240 SW 939.

[68] State v. Asher, (Mo.) 246 SW 911; State v. Affronti, 292 Mo. 53, 238 SW 106; State v. Jacob, 131 Wash. 490, 230 P 647.

[a] **Instructions held sufficient.**—(1) An instruction that if the assault was made on N, servant of P, and the money and personal property of said P was taken "from the person or in his presence and against the will of said N., etc.," was not open to objection that the words "in his presence," referred only to the owner of the property, and not to the agent or servant, since the information would have been good if it had charged that N was the owner of the property, and a conviction would have been sustained upon proof that P owned it, in which event the instruction would have been good. State v. Asher, (Mo.) 246 SW 911. (2) "One who has the lawful possession and control of the personal property of another, in his or her possession, with the consent and permission of the owner, may be regarded for the purposes of this trial as the owner of said property," announces a correct principle of law. State v. Affronti, 292 Mo. 53, 71, 238 SW 106.

[b] **Issue not raised.**—"Appellant contends the testimony raised an issue as to whether Little was in actual control, care, and management of the money, and that the trial judge committed an error in failing to submit such issue to the jury. If the issue was fairly raised, it ought to have been submitted. We cannot agree with the contention that it was raised. When the whole evidence is considered, it clearly reflects Little's relation to the money, leaves no disputed ground, and, fairly construed, raises no such issue; and we believe the court would have been wholly unwarranted in submitting it. What we have said above applies with equal cogency to the contention that the court ought to have submitted the question as to whether Little was a mere servant of the bank." Guyon v. State, 89 Tex. Cr. 287, 230 SW 408, 410.

[69] **As element of offense** see supra §§ 20–23.

[70] Peo. v. Stevens, 141 Cal. 488, 75 P 62; Hamilton v. Com., 12 Ky. Op. 613; State v. Davidson, 38 Mo. 374.

[71] **As element of offense** see supra §§ 24–44.

[72] Cal.—Peo. v. Ferrara, 31 Cal. A. 1, 159 P 621.

Ga.—Harrison v. State, 12 Ga. A. 552, 77 SE 830.

Iowa.—State v. Miller, 83 Iowa 291, 49 NW 90.

Ky.—Hamilton v. Com., 12 Ky. Op. 613.

Mo.—State v. Hall, 7 SW (2d) 1001.

Mont.—State v. Johnson, 26 Mont. 9, 66 P 290.

Okl.—Roddy v. State, (Cr.) 287 P 765.

Tex.—Palmer v. State, 71 Tex. Cr. 335, 160 SW 349.

Wash.—State v. Parsons, 44 Wash. 299, 87 P 349, 120 AmSR 1003, 7 LRA NS 566, 12 AnnCas 61.

[73] See supra § 24.

[74] Sutton v. State, 162 Ark. 438, 258 SW 632; Peo. v. Ferrara, 31 Cal. A. 1, 159 P 621; State v. Hall, (Mo.) 7 SW (2d) 1001.

[a] **Information alleging force "and" fear.**—Under Pen. Code § 211, defining robbery as felonious taking of personalty from person against his will by "force or fear," instruction permitting conviction if the offense was accomplished by "force or fear" is proper, although the information alleged "force and fear." Peo. v. Ferrara, 31 Cal. A. 1, 159 P 621.

[b] **Manucaption.**—"We are unable to fathom with precision the objection to the instruction reading, 'or an assault permitted the manucaption.' If it means that defendant did not take money from Umbeck by force and violence and putting him in fear, then we refer to that portion of the instruction which requires the finding that defendant made an assault on Umbeck, and with force and violence wrongfully and unlawfully did rob, steal, take, and carry away his money. If the objection means that the record fails to disclose that defendant laid his hands on Umbeck in taking the money, such literal fact is not necessarily a requisite to the crime of robbery, for the putting in fear and the compelling by assault the delivery of money is tantamount to the taking of it by manucaption." State v. Hall, (Mo.) 7 SW (2d) 1001, 1005.

[75] Palmer v. State, 71 Tex. Cr. 335, 160 SW 349.

[a] **When charging on robbery by violence,** the court need not also include a charge on putting in fear, and therefore failing in such connection to specify fear "of life or bodily injury" does not render the instruction erroneous. Palmer v. State, 71 Tex. Cr. 335, 160 SW 349.

[76] See supra § 31.

[77] State v. Parsons, 44 Wash. 299, 87 P 349, 7 LRANS 566.

[a] **It was proper to charge** that the degree of force used was immaterial so long as it was sufficient to compel prosecutor to part with his property. State v. Parsons, 44 Wash. 299, 87 P 349, 7 LRANS 566.

[78] See supra § 187 et seq.

[79] See cases infra this note.

[§ 195] **(e) Consent.**[81] Instructions as to the necessity of a taking by assault,[82] force,[83] and intimidation,[84] or "against the will" of the victim,[85] are ordinarily sufficient to advise the jury that the taking must be without the victim's consent. A request for a charge on consent is properly refused where so framed as to be an incorrect statement of the law.[86]

[§ 196] **(f) Intent**[87]**—aa. Necessity of Instruction.** Ordinarily[88] the court should charge the jury in some form[89] that the taking must have been with intent to steal.[90]

Acting under compulsion. Where the issue is raised by the evidence,[91] there should be an instruction relative to participation under duress or compulsion of another.[92]

Claim of right. An instruction relative to taking under claim of right should be given where this issue is raised by the evidence,[93] but need not be given

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[a] **Assault.**—(1) Generally. Coulson v. State, 102 Tex. Cr. 8, 12, 277 SW 135 ("The charge complained of follows the statutory definition of an assault and is in accordance with the forms approved by this court"). (2) Held in conformity with evidence. Coulson v. State, 102 Tex. Cr. 8, 277 SW 135.

[b] **Intimidation.**—(1) Not misleading. Harrison v. State, 12 Ga. A. 552, 77 SE 830; Roddy v. State, (Okl. Cr.) 287 P 765, 768 (instruction that "the essential elements may be the fear of any unlawful injury, immediate or future, of the person or property of the person from whom said property is taken"). (2) Not prejudicial. Roddy v. State, (Okl. Cr.) 287 P 765.

[80] See cases infra this note.

[a] **Intimidation.**—(1) Generally. Brown v. State, 61 Tex. Cr. 334, 136 SW 265 (where accused was charged with putting another in fear of his life by using a gun and fraudulently taking his coat from him, and the evidence showed that some one made the victim remove his coat and leave it on the ground, it was not error to refuse to instruct that if accused held the victim up with a gun, and caused him to remove and leave his coat, intending to steal money believed to be in the coat, he should be acquitted); Burnsides v. State, 51 Tex. Cr. 399, 102 SW 118 (in a prosecution for robbery by inducing a person to deliver property by threatening to do an illegal act injurious to his character, person, or property, where the indictment alleged that accused falsely impersonated an officer, and that he falsely charged a person with unlawfully boarding a train, a charge that if the jury believe that accused arrested the person charging him with unlawfully boarding a train, and that while he was in the custody of accused, accused threatened to place him in jail, etc., and if they believe such placing in jail would have been injurious to his character, or person, and accused thereby fraudulently induced him to pay accused $4.90, etc., is not sufficient to present the state's case to the jury, since it based the guilt of accused upon a threat to do a legal act, and ignored certain allegations in the indictment). (2) Issue not raised by evidence. Horn v. State, 89 Tex. Cr. 220, 230 SW 693 (an instruction that the jury must find that defendant, who admitted taking property from prosecuting witness, put him in fear of life or bodily injury, and if they had a reasonable doubt they should acquit, the refusal of requested charge that, if defendant took the property, but did not put the witness in fear of life or bodily injury, they should acquit, was proper; the issue not being raised by the evidence); Powell v. State, 60 Tex. Cr. 201, 131 SW 590, 591 (where a witness testified that he was knocked down by a blow on the nose or face, and that accused turned him over and took his money out of his pockets and ran away, but did not testify that he was in fear of his life, it was error to instruct the jury to convict if they believed that accused made an assault on the witness, and used violence on him, and put him in fear of life and bodily injury; "The court should have confined the consideration of the jury to the question of assault and violence, inasmuch as there was no testimony showing the old man was put in fear of his life").

[b] **Snatching.** — (1) Incorrect statement of law. Peo. v. Pedel, 81 Cal. A. 558, 254 P 298 (instruction embodying properly refused). (2) Issue not raised by evidence. Peo. v. Pedel, supra; Roquemore v. State, 111 Tex. Cr. 77, 11 SW (2d) 316.

[81] **Nonconsent as element of offense** see supra § 45.

[82] Burkhalter v. State, 93 Tex. Cr. 504, 247 SW 539.

[83] Watkins v. State, 36 Ga. A. 297, 136 SE 815.

[84] Burkhalter v. State, 93 Tex. Cr. 504, 247 SW 539.

[85] Burkhalter v. State, supra.

[a] **Where evidence of consent was weak.**—Burkhalter v. State, 93 Tex. Cr. 504, 247 SW 539, 545.

[86] Sydell v. State, 17 Oh. A. 418.

[a] **Time of consent.**—"We request that the court charge the jury to the effect that if the prosecuting witness, Clara Bowman, consented to the robbery by the defendants, that the defendants could not be convicted of the crime of robbery." The court was correct in refusing this charge. The charge would imply that if at any time the victim had consented to the robbery by defendants, at any time prior to the commission thereof, they would not be guilty of the crime of robbery, notwithstanding she may have changed her mind and set aside all plans previously entered into, if any. Sydell v. State, 17 Oh. A. 418, 421.

[87] **As element of robbery** see supra §§ 49–53.

Instructions relative to intent generally see Criminal Law § 2368.

[88] See State v. Bruno, 141 Minn. 56, 169 NW 249, 250 (criminal intent is not necessarily an element of a crime defined by statute. . . . . The statute does not in terms make intent a necessary element in the crime of robbery. Whether intent is ever an issue on a trial for robbery we need not determine. If the acts charged by the state were committed, there could be no issue of intent in this case. Such acts necessarily constitute robbery").

[89] **Sufficiency of instructions** see infra § 197.

[90] Cal.—Peo. v. White, 5 Cal. A. 329, 90 P 471.

Ga.—Sledge v. State, 99 Ga. 684, 26 SE 756.

Ill.—Turley v. Peo., 188 Ill. 628, 59 NE 506.

La.—State v. Covington, 169 La. 939, 126 S 431.

Miss.—Jones v. State, 152 Miss. 900, 120 S 199; Jones v. State, 95 Miss. 121, 48 S 407, 21 AnnCas 1137; Woods v. State, 6 S 207.

Mo.—State v. Graves, 185 Mo. 713, 84 SW 904; State v. Brown, 104 Mo. 365, 16 SW 406.

Mont.—State v. Oliver, 20 Mont. 318, 50 P 1018.

N. D.—State v. Fordham, 13 N. D. 494, 101 NW 888.

Tex.—Barnes v. State, 100 Tex. Cr. 135, 272 SW 188; Carreon v. State, 90 Tex. Cr. 572, 236 SW 985; Bollen v. State, 48 Tex. Cr. 70, 86 SW 1025; Smith v. State, (Cr.) 81 SW 712.

W. Va.—State v. McCoy, 63 W. Va. 69, 59 SE 758.

[a] **Omission reversible error.**—State v. McCoy, 63 W. Va. 69, 59 SE 758.

[91] See Owens v. State, 215 Ala. 42, 109 S 109 (requested charge to acquit if satisfied that defendant did what he did from compulsion and fear of being shot or killed was properly refused, as abstract).

[92] Carreon v. State, 90 Tex. Cr. 572, 236 SW 985.

[a] **Application of rule.**—"If appellant had no knowledge of the purpose of said codefendants to perpetrate a robbery, and was not cognizant that one was being committed at the time, he would not be guilty of any offense. After the robbery was committed, even though he may have then learned thereof, if he was compelled by his codefendants to drive the car away in their effort to escape, he would not be guilty of any offense. The charge requested pertinently submitted to the jury in an affirmative way appellant's defense. We fail to find in the charge given by the court any presentation of appellant's defensive theory whatever. . . . The court may have thought little reliance should be placed on appellant's testimony, and the jury may have given as little credence to it, but the issue was fairly raised, and under the well-settled law in this state appellant was entitled to his affirmative presentation of it." Carreon v. State, 90 Tex. Cr. 572, 236 SW 985, 986.

[93] Temple v. State, 86 Tex. Cr. 219, 215 SW 965; Carr v. State, 55 Tex. Cr. 352, 116 SW 591.

[a] **Illustrations.**—(1) Failure to instruct that, if defendant was induced to part with his money and place it under the control of his adversary in a gambling game through deceit and fraud, he would not be guilty of robbery in regaining possession, was error. Temple v. State, 86 Tex. Cr. 219, 215 SW 965. (2) Where it appeared that the alleged robbery grew out of a game of cards between accused and prosecuting witness, and it was contested as to which was entitled to the money taken which had

where there is no evidence to support the point.[94]

Participating to aid arrest. Where the point is in issue, there should be an instruction relative to the effect of defendant's participation in the robbery to aid in the apprehension of the robbers.[95]

[§ 197] **bb. Sufficiency.** It is sufficient to charge intent in the language of a statute defining the crime of robbery.[96] An instruction requiring an intent to "rob" has been held equivalent to requiring an intent to "steal."[97] A charge otherwise sufficient is not objectionable because advising the jury that one may be guilty of robbery even though his attack was originally made for a different purpose.[98]

Use of "felonious," "feloniously," etc. If the element of intent is otherwise adequately expressed, the court need not use[99] or if it does use, need not define,[1] the words "felonious" or "feloniously." But if there is no instruction on intent otherwise sufficient, use of the words "wilfully, feloniously and violently" in describing the taking will not cure the error.[2]

Facts establishing intent. It is not the province of the court to instruct the jury what facts would have established an intent on the part of accused to commit a robbery.[3]

Particular instructions. In accordance with general rules,[4] particular instructions given or requested relative to intent have been held sufficient[5] or in-

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been bet on the game, accused was entitled to a charge on fraudulent intent, though a claim of ownership is not always or necessarily a defense to a charge of robbery, and it was error to refuse to charge that if the jury believed that accused took the money under an honest claim of right, believing that it was his property, or if they had a reasonable doubt whether such was the case, they should acquit. Carr v. State, 55 Tex. Cr. 352, 116 SW 591.

94. Peo. v. Williams, 72 Cal. A. 52, 236 P 355; Com. v. Homer, 235 Mass. 526, 127 NE 517; State v. Hall, (Mo.) 7 SW (2d) 1001.

[a] **Illustration.**—In a prosecution for robbery by subjecting complaining witness to force and fear so that she delivered jewelry, and under a defense developed by the evidence that the jewels were voluntarily delivered as security for a loan, requests that if defendant honestly believed he had a legal right to take the jewelry he must be acquitted, likewise if he procured possession to obtain money with which to satisfy a debt which he believed legally due him from the complaining witness, he should be acquitted, were properly refused as inapplicable to evidence. Com. v. Homer, 235 Mass. 526, 127 NE 517.

95. Barnes v. State, 100 Tex. Cr. 135, 272 SW 188.

[a] **As detective.**—(1) Where the defense was that accused was acting as detective and had no intention to keep proceeds of robbery, refusal to charge that, if he had no such intention, jury should acquit, was error. Barnes v. State, 100 Tex. Cr. 135, 272 SW 188. (2) Where the defense was that accused was acting as detective to secure conviction of real robbers, and had no intention of appropriating money, charge that made right to acquittal forfeit, if he aided or encouraged by gestures, was error, as acquittal should have been made to depend upon matter of intention. Barnes v. State, supra.

96. Peo. v. Scarbak, 245 Ill. 435, 92 NE 286, 288.

"Plaintiffs in error insist that the giving of the first instruction was erroneous for the reason that it is not a complete definition of the crime of robbery, in that it omits the felonious intent as to a constituent element of the offense. This instruction is in the exact language of the statute. The definition as contained in the statute does not omit any essential element of the crime of robbery as it existed at common law, and the definition of the crime by the statute being complete, it was not error to give this instruction in the language of the statute." Peo. v. Scarbak, supra.

97. Baygents v. State, 154 Miss. 36, 122 S 187.

[a] **Failure to otherwise state intent necessary to constitute crime was not error.**—Baygents v. State, 154 Miss. 36, 122 S 187.

98. Peo. v. White, 5 Cal. A. 329, 90 P 471; State v. Covington, 169 La. 939, 126 S 431.

[a] **Illustrations.**—(1) An instruction, that if accused by the use of force and violence on the person of the prosecutrix, or by putting her in fear, compelled her against her will to deliver to him her personal property, and that accused took and received the same by such means, he was guilty of robbery, although he may have attacked the prosecutrix for some other purpose, is not open to the objection that it advised the jury that the intent to take the property was not necessary to constitute the crime. Peo. v. White, 5 Cal. A. 329, 90 P 471. (2) Where a judge charged the jury that to constitute the crime of robbery felonious intent to take property must exist at the time, and force or threatened force be used, the trial judge did not err in modifying it by giving a further charge that if one, after committing any other crime which is done or may not be done with the intention of robbing him or her, then robs a person, that is robbery, even though the criminal intent of robbing might not have been present at the time of beating and wounding or whatever the crime might have been, since the judge had the right to modify the special charge so as to make it applicable to evidence submitted to the jury. State v. Covington, 169 La. 939, 126 S 431.

99. State v. Hall, (Mo.) 7 SW (2d) 1001; State v. Carolla, 316 Mo. 213, 292 SW 721; State v. Massey, 274 Mo. 578, 204 SW 541; State v. Spray, 174 Mo. 569, 74 SW 846; State v. Rowland, 174 Mo. 373, 74 SW 622.

[a] **"Feloniously," is a word of classification,** not of definition nor a part of the crime. Such words are merely descriptive of the grade of the offense, and would not enlighten or aid the jury in determining if the violent acts of the defendant were robbery in the first degree. State v. Carolla, 316 Mo. 213, 292 SW 721, 727.

[b] **Instruction held sufficient.**—"It is further contended that the court failed to require the jury, in and by instruction 1 given sua sponte, to find that the assault was felonious, and that the taking of the property was feloniously done. This instruction does require the jury to find that the property was taken by defendant 'with the intent at the time to wrongfully take and carry away and to convert the same fraudulently to his own use and deprive the owner thereof permanently without his consent.'" State v. Massey, 274 Mo. 578, 204 SW 541, 544.

1. State v. Carolla, 316 Mo. 213, 292 SW 721, 727; State v. Massey, 274 Mo. 578, 204 SW 541; State v. Rader, 262 Mo. 117, 132, 171 SW 46.

"The general rule is in robbery as in ordinary cases, that feloniously need not be used in the instruction, or if used that it need not be defined." State v. Rader, supra [quot State v. Carolla, supra].

[a] **"Even in prosecutions for robbery in the first degree,** on all-fours by analogy both in the respect that a larceny is committed ordinarily and that the statutes defining it likewise use the word 'feloniously,' we find no such invariable rule. On the contrary the general rule is in robbery as in ordinary cases, that feloniously need not be used in the instruction, or if used that it need not be defined." State v. Rader, 262 Mo. 117, 133, 171 SW 46 [quot State v. Massey, 274 Mo. 578, 204 SW 541, 544].

[b] **Definition given held sufficient.**—"The word 'feloniously,' as used in these instructions, means wickedly, and against the admonition of the law; that is, wickedly and unlawfully." State v. Newland, (Mo.) 285 SW 400, 402.

2. State v. McLain, 159 Mo. 340, 60 SW 736.

3. State v. West, 157 Mo. 309, 57 SW 1071.

4. See Criminal Law §§ 2353–2496.

5. See Walling v. State, 55 Tex. Cr. 254, 116 SW 813. See also Hood v. State, 18 Ala. A. 287, 289, 92 S 30 (where the question was, did the defendant by force or by putting prosecutor in fear take, or aid in taking, the money from his person, the court did not err in refusing to instruct: "Did H. (defendant) know the money was to be taken before it was taken? If the jury cannot answer this question, each one of them, in the affirmative, after they have considered all the evidence, they cannot convict the defendant of robbery, or an assault with intent to rob." "Defendant might not have known that prosecutor had any money before he actually took it"); Green v. State, 66 Tex. Cr. 446, 147 SW 593 (in a prosecution for robbery with firearms, where the state showed that, after a game of cards, defendant compelled the state's principal witness to hand back money he had won in the game, a charge that if defendant presented a pistol at or to-sufficient.[6]

[§ 198] **c. Grade, Degree, or Classification of Crime**[7]**—(1) Robbery.** Where such issues are involved in the case, the court, following the general rule,[8] should define degrees[9] or other distinct classifications[10] of the offense.[11]

Under statutes grading the offense according to whether force or intimidation is used,[12] it is proper to charge that on an indictment charging robbery by force and intimidation, a verdict may be found for either[13] or both[14] classifications of the offense as the evidence may disclose. Under such an indictment there should be no instruction as to the distinct statutory classification[15] of robbery by snatching.[16]

Particular instructions. Under general rules,[17] particular instructions given or requested have been held proper or improper with respect to degrees,[18] or other distinct classifications[19] of the offense, such as robbery with a dangerous or deadly weapon,[20] by snatching,[21] or by use of actual force or intimida-

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ward the state's witness, and took from his possession the money described in the indictment without his consent, but did not intend to permanently appropriate it, or, if there was a reasonable doubt as to such intention, defendant should be acquitted, was not objectionable as authorizing a conviction although defendant afterwards intended to repay the state's witness).

[a] **Charge requiring jury to find robbery as alleged in indictment** held sufficient where the indictment alleged a taking with intent to steal. Watkins v. State, 36 Ga. A. 297, 136 SE 815.

[b] **Not objectionable as assuming facts in issue** nor as expressing opinion on what had been proved. State v. Covington, 169 La. 939, 126 S 431.

[6] See Peo. v. McKeighan, 205 Mich. 367, 171 NW 500, 502 ("One of the essential elements of this crime that it is necessary to prove beyond a reasonable doubt is that the respondent had a felonious intent at the time of counseling, aiding, and abetting the commission of the said offense of robbery. It was therefore necessary that the learned trial judge should give clear and explicit instructions as to this important feature of the alleged offense. The learned trial judge charged with reference to this as follows: 'Now if you find by the evidence in this case beyond a reasonable doubt that the respondent counseled, advised, and knew and had a criminal intent at the time that he advised with the other men, and you find the other men did proceed to hold up, rob, and take the money away from the man Spencer, then, under our law, the respondent is equally guilty with the other parties who absolutely took the money away from him.' This, in our opinion, was not a sufficient statement of the necessary intent. It should have been clearly stated that it was necessary that the respondent had a criminal intent to rob, steal, or take from the person of Fred Spencer property that could have been the subject of larceny. An intent to commit a simple assault would not justify a conviction upon the charge alleged in the information").

[a] **Confusing.**—Milam v. State, 24 Okl Cr. 247, 218 P 168 (not sufficiently clear and explicit as to motive and intent and record showed jury confused as to law and issues on this point).

[b] **Special charge on motive.**—Collins v. State, 77 Tex. Cr. 156, 178 SW 345, 356 ("There was no necessity for the court to give the charge on want of motive as requested by appellant. He offered no evidence that he had no motive further than he had borrowed considerable money from Mrs. Greer [wife of the victim], and that he could probably continue to borrow money from her. But the fact that he made arrangement to borrow $350 from Mrs. Greer and the prosecuting witness, her husband, had stopped payment of this check, and any others that might be drawn in his favor, or in the name of his mother, was a motive for appellant to make the assault that was made. There is ample evidence for the jury to find a motive for the crime as committed, and the court correctly refused the special charge requested on the issue of motive").

[7] **Grade, degree or classification of robbery** see supra §§ 55-71.

[8] See Criminal Law §§ 2451-2455.

[9] Peo. v. Kiernan, 202 App. Div. 542, 195 NYS 207.

[a] **Definition of robbery generally is insufficient.**—Peo. v. Kiernan, 202 App. Div. 542, 195 NYS 207.

[b] **Where court failed to define** any one of the three degrees of robbery, and the jury found defendant guilty of robbery in the third degree without knowing what it was, the judgment of conviction was reversed. Peo. v. Kiernan, 202 App. Div. 542, 195 NYS 207.

[c] **Amplifying statutory definition.**—An instruction defining a degree of robbery is not objectionable because the court amplifies and clarifies the statutory definition. Peo. v. Scott, 84 Cal. A. 642, 258 P 638.

[d] **Third degree robbery definition superfluous.**—Where defendant who was convicted of robbery in the second degree does not request any charge relating to robbery in the third degree, and there is nothing in the evidence to charge defendant with robbery in the third degree, he is not prejudiced by an instruction defining robbery in the third degree correctly, but not as comprehensively as might be. Peo. v. Thompson, 198 N. Y. 396, 91 NE 838.

[10] See case infra this note.

[a] **Words of statute.**—It was not error to instruct, in the words of the statute, that, if one by assault, violence, or putting in fear of life or bodily injury fraudulently takes from another any property with intent to appropriate it to his own use, he is guilty of robbery, and that, when a firearm is exhibited in committing the offense, the punishment must be death or imprisonment for not less than five years. "This is the language of the statute." Brown v. State, 61 Tex. Cr. 334, 136 SW 265, 266.

[11] **Included offenses** see infra § 199.

[12] See supra § 68.

[13] Carter v. State, 3 Ga. A. 477, 60 SE 216.

[14] Carter v. State, supra.

[15] See supra § 69.

[16] Pride v. State, 124 Ga. 791, 53 SE 192.

"While all three of the grades of that offense now provided for may be charged in the same indictment, manifestly it is not proper, where only one grade is charged, to instruct the jury as to the law applicable to the other two grades; and, of course, it is equally improper, where two of the grades only are charged in the indictment, to instruct the jury as to the other grade. No citation of authority is required to support this plain legal proposition. It is also manifest that if in a case where the indictment charges only two of the grades the court gives in charge to the jury the law applicable to the other, which is not covered by the indictment, and the evidence introduced upon the trial is such that the accused was likely injured by such erroneous instruction, it is cause for a new trial." Pride v. State, supra.

[17] See Criminal Law §§ 2451-2455.

[18] [a] **Instruction held proper.**—State v. Newland, (Mo.) 285 SW 400 (first degree).

[19] See infra text and notes 20-23.

[20] [a] **Instructions held improper.**—(1) A requested instruction as to the effect of using a deadly weapon after commission of the robbery is properly refused where the evidence fails to raise the issue, and on the contrary clearly shows that such weapon was used before the victim was deprived of her property. Jarman v. State, 112 Tex. Cr. 239, 16 SW (2d) 130. (2) Under Pen. Code (1911) art 1327, providing that if any person, by threat or violence or by putting in fear of life, etc., shall fraudulently take from another's possession any property with intent to appropriate it, he shall be punished by confinement for life or for not less than five years, "and" when a firearm is used or exhibited in the commission of the offense, etc., shall be punished by death or imprisonment for not less than five years, an instruction charging the statute was improper for using the word "or" instead of the word "and." Coker v. State, 71 Tex. Cr. 504, 160 SW 366 (error held harmless in view of other instructions).

[21] [a] **Instruction held improper.**—"On the trial of one indicted under section 148 of the Pen. Code of 1910, for robbery by force and intimidation, it was error to give in charge to the jury the part of that section which relates to robbery by sudden snatching." Blackshear v. State, 20 Ga. A. 87, 92 SE 547 (holding, however, that "where the judge specifically confined the investigation of the jury to the determination of the guilt of the accused of robbery by force or intimidation, there was no reversible error in so charging, for the jury could not have been misled thereby").

tion;[22] and highway robbery.[23]

[§ 199] **(2) Other Offenses.** Where the evidence raises the issue, the court may[24] and ordinarily should[25] instruct the jury as to any offense of a lower grade necessarily included within a charge of robbery. But such a charge is not required where under the evidence accused is either guilty of robbery or innocent of any offense charged.[26] Where the evidence raises the issue of guilt of another offense, but fails to sustain the charge of robbery, instructions should not be given on the latter crime.[27]

[§ 200] **d. Connection of Accused with Crime.** An instruction that the jury must believe beyond a reasonable doubt that accused committed the robbery has been held sufficient on the issue of identification.[28]

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[22] [a] **Instructions held proper.**—(1) Accused "complains of the following excerpt from the charge: 'You will bear in mind that I have instructed you to eliminate the question of robbery by intimidation and by suddenly snatching and carrying away. I read you section 149 of the Penal Code: "Robbery by open force or violence shall be punished by imprisonment and labor in the penitentiary for not less than four years nor longer than twenty years."' The evidence authorized this charge. Furthermore, under it the jury were required to find that there was a robbery by force, before they would be authorized to convict, and were not authorized to convict for robbery by intimidation or snatching." Watkins v. State, 36 Ga. A. 297, 136 SE 815, 816. (2) A charge that defendant, if guilty, would be guilty of robbery by open force or violence, was held authorized by evidence. McIntyre v. State, 41 Ga. A. 352, 152 SE 914.

[23] [a] **Instruction held proper.**—Under a statute making it an offense to rob "any person in or near any public highway," an indictment charging commission "in" the highway is good as against the contention that it should have been "in or near"; and an instruction that if the robbery was committed "at or near" the public highway was unobjectionable where the evidence had been confined to occurrences "in" the highway. "Had there been any evidence given of a robbery near the highway, upon an indictment for robbery in the highway, the charge of the Judge would have been erroneous and the prisoner entitled to a new trial." State v. Burke, 73 N. C. 83, 89.

[24] Davis v. Com., 230 Ky. 589, 20 SW (2d) 455, 456; State v. Parr, 54 Or. 316, 103 P 434.

"The complaint of the instructions is that they permitted a conviction of grand larceny on an indictment for robbery. Robbery includes the offense of grand larceny (Criminal Code, §§ 262, 263), and the punishment for the latter is less severe. It was proper to give instructions covering the whole law of the case, and, since the defendant was given the lighter penalty, he was plainly not prejudiced." Davis v. Com., supra.

[a] **Illustration.**—In a prosecution for robbery and assault with intent to kill if resisted, an instruction that if the jury find from the evidence beyond reasonable doubt that defendants, or either of them, are guilty of stealing from the person of the prosecuting witness the sum described in the indictment or some part thereof, but do not find that they or either of them assaulted said witness with intent, if resisted, to kill or wound said witness, then they should find defendants or either of them guilty of the crime of larceny from the person, is not erroneous, as robbery is larceny aggravated by the circumstance that the property taken is taken from the person of another by violence or by putting him in fear, and the greater crime necessarily embraces the lesser offense of the same class. State v. Parr, 54 Or. 316, 103 P 434.

[25] Cal.—Peo. v. Robinson, 65 Cal. 136, 3 P 607.

Ind.—Duffy v. State, 154 Ind. 250, 56 NE 209.

Iowa.—State v. Becker, 159 Iowa 72, 140 NW 201; State v. Duffy, 124 Iowa 705, 100 NW 796.

Ky.—Richards v. Com., 67 SW 818, 24 KyL 14; Com. v. Prewitt, 82 Ky. 240.

Mo.—State v. Lasson, 292 Mo. 155, 238 SW 101; State v. Cantrell, 290 Mo. 232, 234 SW 800; State v. Weinhardt, 253 Mo. 629, 161 SW 1151.

N. C.—State v. Holt, 192 N. C. 490, 135 SE 324.

[a] **Assault and battery.**—State v. Becker, 159 Iowa 72, 140 NW 201.

[b] **Assault with deadly weapon.**—State v. Holt, 192 N. C. 490, 135 SE 324.

[c] **Attempt or assault with intent to commit robbery.**—State v. Becker, 159 Iowa 72, 140 NW 201; State v. Thompson, (Mo.) 238 SW 115.

[d] **Grand larceny.**—State v. Lasson, 292 Mo. 155, 238 SW 101; State v. Cantrell, 290 Mo. 232; 234 SW 800.

[e] **Petit larceny.**—Com. v. Prewitt, 82 Ky. 240; State v. Weinhardt, 253 Mo. 629, 161 SW 1151. Contra Farrell v. Com., 11 Ky. Op. 386.

[f] **Simple assault.**—State v. Becker, 159 Iowa 72, 140 NW 201.

[g] **Charge held sufficient.**—"The main contention of the plaintiffs in error is that the court did not sufficiently charge on the question of embezzlement. The charge of the court as a whole shows a careful consideration and presentation of all the issues involved. While in the main charge the court does not use the term 'embezzlement,' he does charge fully as to what proof is necessary before conviction could be had. Sydell was not present at the robbery, but planned it. It, therefore, became necessary to charge fully on conspiracy. The court charged on the necessary elements of robbery, assault and battery, assault and pocket-picking, and the necessary elements to be proved by the state to establish conspiracy, and the degree of proof required to convict." Sydell v. State, 17 Oh. A. 418, 420.

[26] Cal.—Peo. v. O'Brien, 88 Cal. 483, 26 P 362; Peo. v. Bryan, 91 Cal. A. 189, 266 P 972; Peo. v. Pedel, 81 Cal. A. 558, 254 P 298; Peo. v. North, 81 Cal. A. 113, 252 P 1063.

Iowa.—State v. Stanley, 109 Iowa 142, 80 NW 228.

Kan.—State v. Clough, 70 Kan. 510, 79 P 117.

Ky.—Armstrong v. Com., 190 Ky. 217, 227 SW 162.

Mo.—State v. Friedman, 313 Mo. 88, 280 SW 1023; State v. Daugherty, 259 SW 787; State v. Thompson, 238 SW 115; State v. Coffee, 158 Mo. 568, 59 SW 964; State v. Brown, 104 Mo. 365, 16 SW 406.

Nebr.—Bunge v. State, 87 Nebr. 557, 127 NW 899.

N. C.—State v. Nicholson, 124 N. C. 820, 32 SE 813.

Tex.—Long v. State, 47 Tex. Civ. A. 296, 83 SW 384; Guyon v. State, 89 Tex. Cr. 287, 230 SW 408; Raleigh v. State, 74 Tex. Cr. 484, 168 SW 1050.

[a] **Generally.**—Where defendant, who was armed with a pistol, by threats forced the custodian of bank funds to open the vault, the fact of the custodian's consent does not change the offense from robbery, and a charge on lower grades of offenses is unnecessary. Guyon v. State, 89 Tex. Cr. 287, 230 SW 408.

[b] **Grand larceny.**—Armstrong v. Com., 190 Ky. 217, 227 SW 162; State v. Thompson, (Mo.) 238 SW 115.

[c] **Petit larceny.**—State v. Whalen, 148 Mo. 286, 49 SW 989; Bunge v. State, 87 Nebr. 557, 127 NW 899.

[d] **Simple assault.**—Bunge v. State, 87 Nebr. 557, 127 NW 899; Raleigh v. State, 74 Tex. Cr. 484, 168 SW 1050.

[e] **Sudden snatching constituting larceny.**—Peo. v. Pedel, 81 Cal. A. 558, 254 P 298.

[27] Bunge v. State, 87 Nebr. 557, 127 NW 899.

"Where the trial court permits the jury to find defendant guilty of larceny from the person after instructing them that the charge of robbery is not sustained by the evidence, instructions on the law of robbery should not be given." Bunge v. State, supra.

[28] Asher v. Com., 221 Ky. 599, 299 SW 203.

[a] **Illustration.**—"Appellant next insists that he was entitled to an instruction on the question of identity as this was the sole issue in this case. Under instruction No. 1, which was given, the jury was told that it must believe to the exclusion of a reasonable doubt that the appellant did the act for which he was being tried. This it could not do unless it believed the evidence of the commonwealth on the question of his identification. The instruction amply took care of appellant's rights in this matter." Asher v. Com., 221 Ky. 599, 299 SW 203, 204.

[b] **Evidence held sufficient to justify instructions.**—(1) In a prosecution charging defendant as accessory before the fact to robbery, facts and circumstances are sufficient to warrant an instruction submitting the issue whether defendant, not being present, advised and encouraged the commission of the crime. Miller v. State, 155 Ark. 68, 243 SW 1063. (2) An instruction that the jury must find that assault and taking of property were actually done by defendant himself, others having been implicated, was proper, where the evidence showed that defendant assaulted prosecuting witness and took property from him. State v. Massey, 274 Mo. 578, 204 SW 541.

Particular instructions. Under general rules,[29] as applied to the circumstances involved, particular instructions given or requested as to the connection of accused with or his participation in the robbery have been held proper[30] or improper.[31]

Possession of stolen property. The court may properly instruct the jury as to the evidential effect of accused's unexplained possession of the stolen property,[32] but should leave the weight of such evidence to the jury.[33]

[§ 201] **3. Verdict—a. In General.** General rules[34] apply as to the form[35] certainty,[36] and responsiveness[37] of verdicts in prosecutions for robbery.[38]

In a special verdict, in compliance with the general rule,[39] a finding as to intent may be necessary.[40]

Assessing punishment.[41] Under a statute providing that where the jury fail to agree on the punishment to be inflicted, or do not declare such punishment by their verdict, the court shall assess the punishment,[42] a verdict finding accused guilty of robbery as charged and expressly leaving the punishment to the court, is good as against the contention that it should have stated that the jury were unable to agree upon the punishment.[43]

[§ 202] **b. Specification of Offense[44]—(1) In General.** A general verdict is sufficient to convict of the highest offense charged in the indictment.[45]

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[c] **Evidence held insufficient** to raise an issue of alibi requiring instructions. Robinson v. State, 62 Tex. Cr. 645, 138 SW 704.

[29] See Criminal Law §§ 2375–2379; and passim §§ 2353–2496.

[30] Nichols v. Com., 3 Ky. Op. 258, 261.

[a] **Alibi.**—"Charge which instructed the jury to find appellant not guilty if they had a reasonable doubt as to his presence at the place where the offense was committed, was not open to any objection. The defense was an alibi, and if the evidence raised in the minds of the jury a reasonable doubt of the presence of the accused at the time and place of the alleged commission of the offense, he was entitled to an acquittal." Fields v. State, 95 Tex. Cr. 20, 252 SW 759, 761.

[b] **Responsibility for acts of accomplice.**—(1) Instruction that, "when two or more persons knowingly act together in the commission of an unlawful act or purpose, then whatever either does in furtherance of such unlawful act or purpose is in law the act and deed of each of such persons," was proper. State v. Deviney, (Mo.) 278 SW 726, 729. (2) "Where two or more defendants are charged jointly with the commission of a crime, it is not necessary that it be shown that each of the defendants, or either one of them, when tried alone, actually committed the crime charged. It is insufficient if it be shown that the defendants were acting together jointly for the common purpose and that the essential elements of the crime exist as to any of them, in which event all would be equally guilty of the crime, and any one of them may be prosecuted alone," was proper under the evidence. Gardiner v. State, 110 Nebr. 11, 192 NW 946, 947.

[31] See cases infra this note.

[a] **Argument as to mistake in identification.**—"You have a right to take into consideration all the circumstances surrounding this alleged holdup, and it is for you to decide whether or not a person put in such imminent peril, and taken by surprise, if any, as the complaining witness in this case has testified to, is or is not liable to be mistaken in his identification, and whether or not he has made a mistake in identifying the defendants, or either of them, in this case," stated no proposition of law and was properly refused as merely an argument on the evidence. Peo. v. Garbaciak, 306 Ill. 254, 137 NE 832.

[b] **Forced identification.**—"That if the jury finds that the identification of the defendants or any of them by the complainant was forced in any by the police officer then they may acquit on that alone," was improper for the reason that, if the jury had any reasonable doubt as to the fact of identification, it was their duty to acquit under the general instructions of the court. Peo. v. Radcliffe, 232 N. Y. 249, 133 NE 577.

[32] Peo. v. Wilson, 135 Cal. 331, 67 P 322; Peo. v. Hallam, 6 Cal. A. 331, 92 P 190; State v. Harris, 97 Iowa 407, 66 NW 728; Ford v. State, 41 Tex. Cr. 1, 51 SW 935, 53 SW 869.

[33] State v. Sullivan, 9 Mont. 174, 22 P 1088.

[a] **Instructions held proper.**—(1) An instruction that the unexplained possession of stolen property soon after the theft was committed was sufficient of itself to authorize a conviction unless it was overcome by other evidence sufficient to create a reasonable doubt was a correct statement of the law and applicable to the evidence. Peo. v. Powloski, 311 Ill. 284, 142 NE 551. (2) General charge on circumstantial evidence sufficiently covering point. Tabor v. State, 52 Tex. Cr. 387, 107 SW 1116.

[b] **Instruction held improper.**—A requested charge that the fact that the person charged to have been robbed did not have any money just prior to the robbery was a circumstance that might raise a reasonable doubt as to defendant's guilt, and another that the fact that defendant did not have in his possession the money charged to have been taken just after the alleged robbery and at or near the scene was a like circumstance, were properly refused as argumentative. Boyd v. State, 153 Ala. 41, 45 S 591.

[34] See Criminal Law §§ 2571–2613.

[35] See cases infra this note.

[a] **Forms held sufficient.**—(1) Generally. State v. Faudi, (Mo.) 11 SW (2d) 1014; State v. Butler, 316 Mo. 264, 289 SW 636. (2) Finding defendant guilty as charged and assessing punishment. Grayham v. State, 22 Ala. A. 170, 113 S 646; State v. Flynn, (Mo.) 292 SW 413; State v. Wood, (Mo.) 285 SW 737; State v. Dickens, (Mo.) 285 SW 445; State v. Newland, (Mo.) 285 SW 400; State v. Deviney, (Mo.) 278 SW 726; State v. Reich, 293 Mo. 415, 239 SW 835.

Failure to assess punishment see infra text and notes 41–43.

[36] See cases infra this note.

[a] **Held sufficiently certain.**—Peo. v. Tognola, 83 Cal. A. 34, 256 P 455, 456 ("A verdict reciting that, 'We, the jury, find the defendant guilty of robbery in the first degree, as charged in the information,' is not void for uncertainty. The language 'as charged in the information' is surplusage and may be disregarded").

[b] **Held uncertain.**—Rex v. Edmonstone, 13 CanCrCas 125.

Certainty generally see Criminal Law § 2585.

[37] See cases infra this note.

[a] **Held responsive.**—(1) Verdict finding defendant "guilty of robbery and assess his punishment at confinement in the penitentiary for life," the indictment charging simple robbery and robbery with a deadly weapon. Tabor v. State, 52 Tex. Cr. 387, 107 SW 1116. (2) "We, the jury, find the defendant guilty as charged in the indictment, and fix his punishment at imprisonment in the penitentiary for ten years," where the indictment for robbery was in the Code form. Grayham v. State, 22 Ala. A. 170, 113 S 646, 647. (3) "We, the jury, in the above-entitled cause, find the defendant guilty of robbery in the first degree, as charged in the information, and assess the punishment at imprisonment in the penitentiary for 20 years." State v. Reich, 293 Mo. 415, 239 SW 835, 837.

Generally see Criminal Law § 2587.

[38] **Specification of offense** see infra § 202.

[39] See Criminal Law § 2586.

[40] State v. Curtis, 71 N. C. 56.

[a] **Reversible error.**—Upon an indictment for robbery, a special verdict which finds acts of violence, but does not find with what intent they were committed, is imperfect, and there must be a new trial. State v. Curtis, 71 N. C. 56.

[41] **Generally** see Criminal Law §§ 2602–2605.

[42] See Criminal Law § 2602.

[43] Jenkins v. State, (Okl. Cr.) 280 P 477, 478.

"Under this provision of the law, it is not essential that the jury shall expressly state in their verdict that it is unable to agree upon a verdict." Jenkins v. State, supra.

[44] **Generally** see Criminal Law §§ 2599, 2600.

[45] Harris v. State, 1 Ga. A. 136, 57 SE 937.

[a] **Illustration.**—"Where the evidence showed that a certain named person was robbed of his money by the joint acts of two men—one of the men, at the point of a pistol, requiring the person so robbed to stand and hold up his hands, while the other held him, searched his pockets, and took the money therefrom—these facts made both men guilty of both grades of the crime of robbery, and a verdict of guilty on said indictment generally is not contrary to the evidence or to the law, because such verdict was a finding of guilty of the highest grade of the offense, to

If the jury find that accused is guilty only of the included offense of larceny, they should so state.[46] On a charge of a higher classification of robbery, a verdict sufficient to find guilt of a lower classification will be sustained as such.[47]

Guilty as charged. Where the indictment or information charges only one classification of robbery, a verdict of guilty as charged is a verdict of guilt of such classification.[48]

[§ 203] **(2) Specification of Degree.** Under statutes providing that where the jury may find accused guilty of one of different degrees of a crime, a verdict of guilty must specifically state the degree for which accused is convicted,[49] a verdict of guilty of robbery should, where different degrees are involved, specify the degree of robbery of which he is found guilty;[50] but it has been held that a verdict of guilty as charged may be a sufficient specification of degree.[51] In jurisdictions where there are no degrees of robbery,[52] or in jurisdictions having both degrees and other distinct classifications and under a charge of a classification not constituting a degree,[53] the verdict need not specify a degree of robbery.

[§ 204] **E. Sentence and Punishment—1. In General.** At common law robbery was regarded as a felony of the gravest character,[54] punishable by death,[55] with or without benefit of clergy according to prevailing provisions of early statutes.[56] The offense is now generally punished by imprisonment although in some jurisdictions the death penalty is retained for certain degrees or other classifications of robbery.[57]

General rules governing sentence[58] and punishment[59] apply in prosecutions for robbery.[60]

[§ 205] **2. By Whom Prescribed.** Whether the

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wit, robbery by force; the facts, as it was claimed, making only the lower grade, or robbery by intimidation." Harris v. State, 1 Ga. A. 136, 57 SE 937.

[46] Peo. v. Gilbert, 60 Cal. 108; State v. Clough, 70 Kan. 510, 79 P 117; State v. Steptoe, 65 Mo. 640 [aff 1 Mo. A. 19].

[47] Van Diest v. Peo., 71 Colo. 121, 204 P 606.

[a] **Illustration.**—Where an information charged defendant with robbery while armed with a dangerous or deadly weapon with intent to kill or maim if resisted, and the verdict found him guilty of "robbery with a deadly weapon, to wit, a gun," but failed to say "as charged in the information" or otherwise to find his intent to kill or maim, such verdict was nevertheless a good conviction of robbery and defendant had no ground for objection so long as the sentence was within the punishment prescribed for robbery without such intent. Van Diest v. Peo., 71 Colo. 121, 204 P 606.

[48] Peo. v. Powloski, 311 Ill. 284, 142 NE 551; Peo. v. Pleitt, 308 Ill. 323, 139 NE 597.

[a] **Armed with dangerous weapon.**—(1) Under Cr. Code § 246, authorizing a longer sentence, if the robber is armed with a dangerous weapon and where the only count in an indictment, charging defendants with robbery, charged that defendants, at the time of the robbery, were armed with a pistol, a verdict of "guilty of robbery in manner and form as charged in the indictment" was a verdict of guilty of robbery while armed with a dangerous weapon. Peo. v. Pleitt, 308 Ill. 323, 139 NE 597. (2) "The court gave an instruction containing forms of verdicts, in one of which the jury were permitted to find the defendants guilty of robbery when armed with a deadly weapon, and in the other a form with a finding that the defendants were guilty but were not armed with a deadly weapon at the time the offense was committed. The verdict was guilty of robbery in manner and form as charged in the indictment, and both counts of the indictment charged the defendants with robbery while armed with a deadly weapon, and the verdict was a finding that they were guilty as charged." Peo. v. Powloski, 311 Ill. 284, 142 NE 551, 554.

[49] See Criminal Law § 2600.

[50] Peo. v. Tognola, 83 Cal. A. 34, 256 P 455, 456.

"Since the amendment by section 211a, of the Penal Code, dividing robbery into the first and second degrees, a verdict of guilty must specify the degree of the crime." Peo. v. Tognola, supra.

[51] Jenkins v. State, (Okl. Cr.) 280 P 477.

[a] **Information charging first degree.**—"Counsel urge that this verdict is insufficient, in failing to state the degree. . . . At the time the verdict was returned, objection to the form of the verdict was made, and the court inquired in what particular it was insufficient, and counsel declined to make more specific his objection. The defendant is charged with robbery in the first degree. The verdict finds him guilty as charged. In the absence of a more specific objection, the verdict is sufficient." Jenkins v. State, (Okl. Cr.) 280 P 477, 478.

[52] Dosh v. State, 72 Tex. Cr. 239, 161 SW 979.

"The verdict of the jury was: 'We, the jury, find the defendant guilty as charged in the indictment and assess his punishment at five (5) years' confinement in the penitentiary.' Appellant contends that this verdict is invalid, and the judgment must be set aside because it does not find of what degree of robbery appellant was guilty. There are no degrees of robbery. Robbery, however committed, is only one offense. If the statute seeks to inflict capital punishment, it is necessary to allege that the robbery was committed by exhibiting a firearm or deadly weapon; and, unless this is alleged, the jury cannot inflict the death penalty. The verdict in this case was clearly sufficient." Dosh v. State, supra.

[53] Rasberry v. State, 4 Okl. Cr. 613, 103 P 865 [reh den 4 Okl. Cr. 634, 112 P 759].

[a] **Conjoint robbery.**—It is not necessary for a verdict of guilty of conjoint robbery to state the degree of which defendant is convicted, there being no degrees and but one punishment prescribed. Rasberry v. State, 4 Okl. Cr. 613, 103 P 865 [reh den 4 Okl. Cr. 634, 112 P 759].

[54] See supra § 12.

[55] Franklin v. Brown, 73 W. Va. 727, 81 SE 405, LRA1915C 557.

[56] Franklin v. Brown, supra; 4 Blackstone Comm. p 243; 3 Chitty Cr. L. p 806.

[57] See statutory provisions. And see infra § 209.

[58] See Criminal Law §§ 3000-3149.

[59] See Criminal Law §§ 3186-3257.

[60] See cases infra this note.

[a] **Conformity to statute.**—Defendant convicted of robbery cannot be sentenced to a term of imprisonment longer than the maximum provided by statute for such offense. State v. Edwards, 127 S. C. 116, 120 SE 490 (where defendant contended "that the sentence of 15 years was more than the law provides for conviction of one guilty of robbery," and the court held that under Cr. Code § 124, authorizing a sentence of from three months to ten years for a felony for which no special punishment is provided, and § 127 authorizing a punishment according to common usage and practice in cases for which no punishment is provided by statute, a sentence of fifteen years for highway robbery was erroneous).

[b] **Indeterminate sentence.**—Pen. Code § 213, making robbery punishable by penitentiary imprisonment for not less than one year, is within the indeterminate sentence law (Pen. Code § 671), and thereunder robbery may be punished by maximum penalty of imprisonment for life. Peo. v. Gonzales, 36 Cal. A. 782, 173 P 407 ("We can see no merit in the claim that the law does not prescribe the maximum penalty for the crime of robbery. The maximum penalty 'prescribed by the law' is the extreme penalty that the law authorizes to be imposed; that is, life imprisonment in the present case, as we have seen. The two sections of the Penal Code may be read together, and they amount to this: 'Robbery is punishable by imprisonment in the state prison not less than one year and it may be for life.' As before suggested, the fact that a maximum and a minimum penalty is prescribed necessarily implied a discretion to

court or the jury may or should assess the punishment for one convicted of robbery depends on the statutory provisions of the particular jurisdiction.[61]

[§ 206] 3. **Circumstances Affecting Punishment**[62] —a. **In General.** Within the limitations and provisions of applicable statutes,[63] the punishment for robbery should be measured by the circumstances involved.[64] Where the statute authorizes or requires an increased penalty under specified conditions, no such penalty can be imposed in the absence of evidence as to such specified conditions.[65]

First degree; life imprisonment.[66] Under a statute providing that the court may impose a life sentence where the crime is punishable by imprisonment for not less than a specified number of years, and no maximum is fixed,[67] a convicted defendant not entitled to an indeterminate sentence,[68] may, where such minimum without maximum penalty is provided, be sentenced to life imprisonment for first degree robbery.[69]

[§ 207] b. **Committed by Two or More.**[70] Under a statute making robbery when committed by two or more persons conjointly punishable by life imprisonment,[71] it is the conjoint commission of the offense, rather than a conjoint conviction or sentence, that attaches such penalty.[72]

Punishment for robo en cuadrilla,[73] constituting a particular classification of robbery in the Philippines,[74] is governed by the general rules controlling punishment of crimes in that jurisdiction[75] as applied to the circumstances and the offense.[76]

[§ 208] c. **Dangerous or Deadly Weapon**[77]—(1) **In General.** Under statutes prescribing increased punishment for robbery with a dangerous or deadly weapon,[78] the use of such a weapon is an aggravating circumstance increasing the penalty.[79]

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be exercised by the judge pronouncing the sentence, and the circumstance that such discretion is specifically mentioned in said section 671 does not affect the legal aspect of the case. It is clear that the judgment is informal, and it is therefore reversed, with discretion to the lower court to pronounce judgment in accordance with said indeterminate sentence law of 1917").

[c] **Place of imprisonment.**—Under a statute providing that males between sixteen and twenty-one years of age convicted of a felony for the first time shall be sentenced to the reformatory, unless the felony is one involving the penalty of life imprisonment, in which case a penitentiary sentence is requisite, a male of such age convicted of robbery punishable by imprisonment for life or a term of years, may be sentenced to imprisonment in the penitentiary. This is true because life imprisonment is "involved" within the meaning of the statute if the offense is such that the court may—even though it neither does nor must—punish by sentence for life. Croswell v. Peo., 74 Colo. 547, 223 P 51.

[d] **Responsiveness of sentence to verdict.**—Under a verdict finding defendant guilty of "plain robbery," he may be sentenced for robbery. Peo. v. Blumberg, 314 Ill. 567, 145 NE 627 (where judgment of conviction was for "plain robbery," and accused was charged with robbery while armed with a dangerous weapon, but the matter of aggravation was waived, "plain," had no technical meaning, and the conviction was for robbery, punishable by imprisonment in penitentiary as against defendant's contention that there was no such crime as "plain robbery" and therefore at most he was guilty of larceny—for which he could not be sentenced to the penitentiary).

61. See statutory provisions.

[a] **In Missouri,** under a statute setting a minimum term of imprisonment for robbery, it is the province of the jury to determine the measure of the punishment. State v. Williams, (Mo.) 292 SW 19.

Assessment in verdict see supra § 201.

62. Grade, degree or classification of offense see supra §§ 55-71.

63. See statutory provisions.

64. Buckley v. State, 79 Nebr. 86, 112 NW 283.

[a] **Discretion.**—"The statute defining the crime of robbery gives the court a large discretion in fixing the punishment. This discretion is to be exercised according to the aggravation of the crime committed. It was not contemplated by the Legislature that the extreme penalty allowed by the statute should be imposed for the first offense when any mitigating circumstances are shown in the evidence." Buckley v. State, 79 Nebr. 86, 112 NW 283.

65. U. S. v. Callotes, 2 Philippine 16.

[a] **Illustration.**—Under a statute providing an increased punishment for robbing an inhabited dwelling by securing entrance thereto in any one of certain specified ways, defendant cannot be sentenced to the increased penalty where the evidence fails to disclose how he secured entrance. U. S. v. Callotes, 2 Philippine 16.

66. Excessive character of such punishment see infra § 215.

67. See statutory provisions.

68. See Criminal Law § 3223.

69. Peo. v. Jennings, 132 Misc. 196, 229 NYS 281.

[a] **Even though not fourth offender.**—"The Penal Law provides that, where a crime is punishable by imprisonment 'for not less than a specified number of years, and no limit of the duration of the imprisonment is declared, the court . . . may, in its discretion, sentence the offender to imprisonment during his natural life.' Penal Law, § 2191. Therefore a criminal convicted of . . . robbery in the first degree, may be sentenced to life imprisonment. It is probable that this would not be so in the case of a person 'never before convicted of a crime punishable by imprisonment in a state prison' and that such culprit would be entitled to an indeterminate sentence. Penal Law, § 2189. But it is not necessary to decide that point in this case, as the relator had previously, on February 26, 1924, been convicted of receiving stolen property, first degree. This crime was punishable by imprisonment for not more than 5 years. Penal Law, § 1308, as amended by chapter 429 of the Laws of 1921. Because of this prior conviction, the relator was not entitled to an indeterminate term, and the sentence imposed upon him is in accordance with the law." Peo. v. Jennings, 132 Misc. 196, 229 NYS 281, 282.

70. As distinct classification of robbery see supra § 67.

71. See statutory provisions.

72. Slover v. Terr., 5 Okl. 506, 49 P 1009.

[a] **Single conviction for conjoint commission.**—"It is error for the court, upon the conviction of one defendant of a conjoint robbery, to impose a sentence of punishment by imprisonment for a less period than life." Slover v. Terr., 5 Okl. 506, 49 P 1009.

73. Defined see supra § 9.

74. See supra § 67.

75. See Criminal Law § 3066.

76. See cases infra this note.

[a] **Aggravating circumstances.**—U. S. v. Sevilla, 30 Philippine 288 (nocturnity and morada); U. S. v. Tabanda, 20 Philippine 195 (nocturnity and morada); U. S. v. Granadoso, 16 Philippine 419 (in uninhabited place, and disguised); U. S. v. Mallari, 5 Philippine 563 (nocturnity, morada and taking advantage of official position as municipal policemen); U. S. v. Tiquio, 2 Philippine 21 (inhabited house).

[b] **Chief of band.**—"The evidence shows that the defendant, Salvador, acted as chief of the band. The penalty, therefore, which should be imposed upon him should be in the grade immediately above the penalty imposed upon the members of the band, in accordance with the provisions of paragraph 2 of article 504 of the Penal Code." U. S. v. Tabanda, 20 Philippine 195, 196.

[c] **Maximum degree** of punishment will be imposed where there are two or more aggravating and no extenuating circumstances. U. S. v. Sevilla, 30 Philippine 288; U. S. v. Tabanda, 20 Philippine 195.

77. As degree or other distinct classification of robbery see supra §§ 56, 61, 65.

78. See statutory provisions.

79. Martin v. State, (Fla.) 129 S 112; Green v. State, 66 Tex. Cr. 446, 147 SW 593. See Peo. v. Luncay, 49 Philippine 464 (use of iron knucks an aggravating circumstance).

"Robbery is the substantive offense charged, and instruments or acts used to produce fear are aggravating circumstances which may in-

Under a statute providing an increased penalty for robbery if the perpetrator "is armed with a dangerous weapon, or being so armed, he wounds or strikes," etc.,[80] the increased penalty may be imposed if one is convicted of robbery while armed with a dangerous weapon even though he did not use the same.[81]

Intent. Under a statute providing increased punishment for robbery with a dangerous weapon and silent as to intent as respects use of such weapon,[82] one convicted under an indictment charging robbery with a dangerous weapon, may be sentenced to such increased punishment even though there is no finding as to this intent.[83] But where the statute requires a specific intent as to use of the weapon, punishment for this classification of robbery cannot be imposed in the absence of a finding of the requisite intent.[84]

Unarmed companions. Under statutes providing an increased punishment for one committing a robbery while armed with a dangerous or deadly weapon, and silent as to the punishment of any unarmed companions,[85] unarmed companions participating in a robbery by an armed man are not subject to increased penalty for robbery while armed.[86]

[§ 209] **(2) Capital Punishment.**[87] Under statutes making robbery with a dangerous or deadly weapon a capital offense,[88] to justify imposition of the death penalty it is essential to show commission of the crime with a weapon of the specified character.[89] Under a statute providing that the death penalty shall be imposed for an assault and robbery where the robber is armed with a dangerous weapon and has an "intent to kill or maim the person so robbed,"[90] the intent to kill or maim only if resisted

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crease the penalty if it be a dangerous weapon." Martin v. State, (Fla.) 129 S 112, 114.

[a] **Use or exhibition.**—Green v. State, 66 Tex. Cr. 446, 147 SW 593.

Intent to use see infra text and notes 82-84.

80. See statutory provisions.

81. Peo. v. Cassin, 322 Ill. 276, 153 NE 381, 382.

"Section 246 of the Criminal Code describes the crime of robbery, and in fixing the punishment provides: 'Or if he is armed with a dangerous weapon, or being so armed, he wounds or strikes him,' etc., the greater penalty shall be inflicted. Counsel argue that the word 'or' should be construed to mean 'and,' and that before the infliction of the heavier penalty the indictment must charge, and the proof show, that the defendant was armed with a dangerous weapon, and wounded or struck the victim. While in proper cases the word 'or' may be construed to mean 'and,' there is nothing in this act that in any way indicates such an intention on the part of the Legislature. . . . We are of the opinion that this section of the Criminal Code means just what it says, and that conviction of robbery, where the jury finds that the accused was armed with a dangerous weapon, requires the imposition of the heavier penalty, whether such weapon was or was not used. . . . It was not error to impose the heavier penalty." Peo. v. Cassin, supra.

Mere possession without use as sufficient to constitute such classification of robbery see supra § 65 text and note 76.

82. See statutory provisions.

83. Peo. v. Hildebrand, 307 Ill. 544, 139 NE 107, 111.

[a] **Cases distinguished.**—"It is argued that, inasmuch as the jury did not specifically find the plaintiffs in error were armed with dangerous weapons, the verdict merely finds them guilty of robbery, and they cite in support of this contention McKevitt v. Peo., 208 Ill. 460, 70 NE 693 [infra text and note 84]. It was held in that case that the verdict, 'Guilty in manner and form as charged in the indictment,' did not include a finding of the specific intent with which it was charged the defendant was animated while armed with the revolver. The statute under which the defendant in that case was convicted of robbery provided that, if the person convicted was armed with a dangerous weapon, with intent, if resisted, to kill or maim the victim, he should be subject to the greater penalty. In 1919 this statute was amended, so as to provide that, if the defendant is armed with a dangerous weapon, he shall be imprisoned in the penitentiary for any term of years not less than 10 or for life. Laws 1919, p. 427. No question of intent is involved. It is not required to be charged or proved. The mere fact of committing a robbery while armed with a dangerous weapon incurs the liability to the higher punishment. The judgment will be affirmed." Peo. v. Hildebrand, 307 Ill. 544, 139 NE 107, 111.

84. Peo. v. Boer, 262 Ill. 152, 105 NE 162; McKevitt v. Peo., 208 Ill. 460, 70 NE 693 (explained in Peo. v. Hildebrand supra text and note 83 [a]).

[a] **Illustration.**—Under Cr. Code (Hurd Rev. St. [1912] c 38) § 246, defining robbery, and providing that every person guilty of robbery shall be imprisoned for not less than one year nor more than fourteen years, or, if he was armed with a dangerous weapon, with intent, if resisted, to kill or maim the person so robbed, he may be imprisoned for any term of years or for life, where an indictment for robbery did not sufficiently allege an intent, if resisted, to kill or maim the person robbed, a judgment stating that accused was guilty of robbery, and that he was armed with a revolver, with such intent, and sentencing him to imprisonment for a term of years not to exceed the maximum fixed by statute for the crime of which he was convicted, was erroneous in form, since it sentenced him to a term of imprisonment not exceeding the maximum term fixed by the statute for the aggravated offense, while under the indictment he could be legally sentenced only for a term not exceeding fourteen years. Peo. v. Boer, 262 Ill. 152, 105 NE 162.

85. See statutory provisions.

86. Peo. v. Paradiso, 248 N. Y. 123, 161 NE 443; Peo. v. Arthur, 221 App. Div. 227, 222 NYS 314 [app dism 247 N. Y. 518, 161 NE 165]; Peo. v. Kevlon, 221 App. Div. 224, 222 NYS 311, 313.

"Section 1944 deals simply with the subject of increased punishment for one who commits a crime in a certain manner. It does not purport to define a crime. Section 2, supra, on the other hand, defines who is a principal in the commission of a crime. As an additional deterrent to crimes of violence and the use of dangerous weapons in their commission, it was entirely reasonable for the Legislature to provide that any person participating therein while armed should receive punishment in addition to that which follows the commission of the felony itself. The purpose being to prevent or deter criminals from using dangerous weapons in the commission of crime, it was but logical that the extra punishment provided should be visited only upon those in possession of such dangerous weapons. If the intention had been that every participant should be subject to such additional punishment, it would have been a simple matter for the Legislature to have so provided by the use of appropriate language. It follows that the sentence imposed was improper, and the defendant should be resentenced in accordance with the provisions of law." Peo. v. Kevlon, supra.

[a] **Degree may be raised but not punishment.**—"Where one of two or more criminals has a dangerous weapon, the degree of the crime which all commit may be raised by reason of the weapon—all acting together are guilty of the same crime, but when it comes to the punishment, the one having the weapon is to get an additional sentence as provided in section 1944. The intention of the Legislature was to discourage the carrying of weapons and to make an added risk in committing crime to the one having the pistol or the gun. Heretofore the one with the gun ran no more chances than the others without weapons—now he will get five to ten years more for his cowardice." Peo. v. Paradiso, 248 N. Y. 123, 161 NE 443, 444.

87. **As excessive** see infra § 215.

Sufficiency of evidence to convict see supra § 176 text and note 80.

88. See statutory provisions.

[a] **In Texas.**—"The crime of robbery by assault is a felony, but not capital; however, when deadly weapons are used it becomes capital. Pen. Code, art. 1327." Gonzales v. State, 88 Tex. Cr. 248, 226 SW 405, 406.

89. Dosh v. State, 72 Tex. Cr. 239, 161 SW 979; Green v. State, 66 Tex. Cr. 446, 147 SW 593.

90. See statutory provisions.

is sufficient to require the death penalty.[91]

[§ 210] **d. Highway Robbery.**[92] Under statutes providing a minimum and maximum period of imprisonment as punishment for highway robbery,[93] the sentence imposed should vary in proportion to the aggravation involved in commission of the crime.[94]

[§ 211] **e. Snatching.**[95] Under a statute amending an existing statutory definition of robbery as a taking by force or intimidation, by further providing that the offense may consist in a sudden snatching of property from the person, and silent as to punishment for such snatching,[96] robbery by snatching is punishable as robbery by force.[97]

[§ 212] **f. Value of Property Taken.** In the absence of contrary statute,[98] the value of the property taken in a robbery does not affect the punishment therefor.[99]

[§ 213] **g. Other Particular Circumstances—(1) Of Aggravation.** Other[1] particular circumstances affecting punishment and justifying an increased penalty under statutory provisions[2] as applied to the facts involved, include use of force or violence in excess of that requisite to accomplishment of the crime,[3] wounding or injuring the victim in a specified way,[4] abuse of confidence,[5] nocturnity,[6] and committing the offense in an inhabited house,[7] as in the dwelling of the victim.[8]

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[91] Com. v. Martin, 17 Mass. 359.

[a] **Intent merely to frighten the victim** by display of firearms is insufficient. Com. v. Martin, 17 Mass. 359 (where, however, the evidence showed intent to kill or maim if resisted).

[92] **Defined** see supra § 5.

[93] See statutory provisions.

[94] State v. Lee, 166 N. C. 250, 80 SE 977.

[a] **Thus,** under the statute fixing the punishment for highway robbery at imprisonment for not less than four months nor more than ten years, where there is no aggravation, the punishment should approximate the lower limit, and when there is aggravation the highest degree should be inflicted. State v. Lee, 166 N. C. 250, 80 SE 977.

[b] **Statute applicable.**—"The last exception of the prisoner is, that the Court sentenced him under the provisions of chap. 32, sec. 13, Bat. Rev. instead of the 29th section of the same chapter. The 13th section provides for the punishment of persons convicted of crimes which were punishable with death, by the laws existing at the time the present Constitution went into effect. The 29th section provides for the punishment of offenses which were punishable with public whipping or other corporal punishment, at the time the present Constitution went into effect. Robbery in the public highway, was a capital felony, at that time, and is the subject of punishment under the 13th section of the statute." State v. Burke, 73 N. C. 83, 89.

[c] **Statute held not void for uncertainty.**—"The error assigned is, that the court could not by law make solitary imprisonment any part of the punishment, and that the residue of the sentence to hard labor for life was erroneous, because it was necessarily dependent on the other erroneous sentence, and therefore fixed no certain time for its commencement. This exception is founded upon the ground that the St. of 1804, c. 143, § 7, on which the conviction was had, was void for uncertainty. This argument rests on a very slight verbal inaccuracy in the terms of the statute providing for the punishment of highway robbery. The provision is, that any person, duly convicted, 'shall be punished by solitary imprisonment for such term, not exceeding two years, and by confinement afterwards to hard labor for life.' It is true there is nothing to which the term 'such' can strictly apply. But it is impossible to mistake its meaning. It is equivalent to a term, or the term of. With a slight variation of expression, it would be free from grammatical inaccuracy; though perhaps not the best chosen expression which could have been used: For instance, 'for such term as shall not exceed,' is equivalent in meaning, and not very different in expression from the term used in the statute. We think a statute of such immense importance to the peace of society, and the safety of persons and property, is not to be adjudged void for uncertainty, on account of any slight inaccuracy of expression, when it is impossible to mistake its meaning. This judgment is affirmed." Evans v. Com., 3 Metc. (Mass.) 453, 455.

[95] **As:**
Distinct classification of robbery see supra § 69.
Force constituting an element of robbery see supra §§ 40, 41.

[96] See statutory provisions.

[97] Pride v. State, 125 Ga. 748, 54 SE 686; Jones v. State, 18 Ga. A. 8, 89 SE 342, 343.

"There is no merit in the contention of the plaintiff in error that his motion in arrest of judgment should have been granted by the trial judge on the ground that no penalty is prescribed for the offense of which he was convicted. . . . Robbery by sudden snatching is punishable as prescribed in section 149 of the Penal Code of 1910." Jones v. State, supra.

[98] See statutory provisions.

[99] U. S. v. Granadoso, 16 Philippine 419; U. S. v. De los Santos, 6 Philippine 411.

[1] **Already considered:**
Commission by two or more see supra § 207.
Dangerous or deadly weapon see supra § 208.
Snatching see supra § 211.
Value see supra § 212.

[2] See statutory provisions.

[3] U. S. v. Melchor, 41 Philippine 453; U. S. v. Lazaro, 34 Philippine 871. See U. S. Barroga, 21 Philippine 161, 163 ("Neither may the crime be held to be comprised within paragraph 4 of the said article 503, for the injury inflicted upon Benita Manuel can only be classified as menos grave; the physician who attended her from the beginning so classified the wounds and testified that after he had set the fractured bone and had treated her two or three times, she returned home and he did not see her again, though he believed that she could not have engaged in her habitual labors during a period of thirty days. Therefore these wounds must be classified simply as lesiones menos graves").

[a] **Robbery with lesiones,** or as defined by statute (Pen. Code art 503 No. 4) robbery committed with violence greater than requisite to commission of the crime, should be punished with the maximum sentence. U. S. v. Melchor, 41 Philippine 453.

[4] Peo. v. Luncay, 49 Philippine 464; Peo. v. Uto Alli, 49 Philippine 73.

[a] **Even if necessary to accomplishment of robbery.**—"Paragraph 4 of article 503 of the Penal Code . . . reads as follows: 'A penalty ranging from presidio mayor in its medium degree to cadena temporal in its minimum degree, whenever the violence or intimidation employed in committing the robbery shall have been carried to a degree clearly unnecessary to the commission of the crime, or when in the course of the perpetration of the crime the offenders shall have inflicted upon any persons not connected with its commission any of the physical injuries falling within the terms of paragraphs three and four of article four hundred and sixteen.' The appellant contends that the information does not allege that violence or intimidation employed in committing the crime was 'carried to a degree unnecessary to the commission of the crime.' That is true, but it is alleged in the information that the wound on the neck of the offended party caused a deformity and the lower court found that the deformity existed. This being the case, the defendant was properly convicted under the paragraph quoted in connection with paragraph 3 of article 416. The penalty imposed by the court is in accordance with law and the findings of the court below are fully sustained by the evidence." Peo. v. Uto Alli, 49 Philippine 73, 75.

[b] **The organ of hearing** is a principal member, within the meaning of No. 2 of article 416 of the Penal Code; and the loss of the use of an ear, as a result of the infliction of physical injuries, makes a case under the provision cited. If such offense is committed upon occasion of robbery, the appropriate penalty is that prescribed in No. 3 of article 503 of the same Code. Peo. v. Luncay, 49 Philippine 464.

[5] U. S. v. Cas, 14 Philippine 21.

[a] **By guest** breaking into wooden box. U. S. v. Cas, supra.

[6] Peo. v. Urbano, 50 Philippine 90; Peo. v. Luncay, 49 Philippine 464; U. S. v. Celestino, 14 Philippine 34; U. S. v. Cas, 14 Philippine 21; U. S. v. Gamboa, 11 Philippine 39; U. S. v. Arceo, 4 Philippine 733; U. S. v. Mack, 4 Philippine 185; U. S. v. Castro, 4 Philippine 87; U. S. v. Oangoang, 3 Philippine 312.

"Penalty must be imposed in its maximum degree, in view of the aggravating circumstance of nocturnity." Peo. v. Urbano, 50 Philippine 90, 94.

[§ 214] **(2) Of Mitigation.** Particular circumstances going in mitigation of the punishment under statutory provisions[9] as applied to the facts involved, include the age,[10] and intoxication[11] of the person convicted.

Race. Under a statute providing that "the circumstance of the offender being a native, mestizo, or Chinaman shall be taken into consideration by the judges and courts in their discretion for the purpose of mitigating or aggravating the penalties, according to the degree of intent, the nature of the act, and the circumstances of the offended person,"[12] it has been held that race is not an extenuating circumstance in robbery cases.[13]

[§ 215] **4. Excessive Punishment.**[14] Under statutes making the term of imprisonment for robbery discretionary with the court within specified limits,[15] a sentence imposed within such limits will not be disturbed on review in the absence of a clear abuse of discretion.[16] But where the penalty imposed is clearly excessive, it will be modified.[17]

Imprisonment. In accordance with general rules,[18] and the circumstances involved sentences prescribing particular periods of imprisonment for robbery have been held excessive[19] or not excessive.[20]

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[7] Peo. v. Jagon, 49 Philippine 555; U. S. v. Celestino, 14 Philippine 34.

[a] **Use of specific word "inhabited."**—"From the facts alleged in the present case it may be deduced with certainty that Martin Dasig and Ismaela Ramos' house where the robbery was committed, was occupied by them inasmuch as it is not logical or reasonable to suppose that they would have a house exclusively for their trunks, valises, wearing apparel and jewelry, and another house exclusively for the residence. The words 'Martin Dasig's house' in connection with the words 'trunk, valise, money, jewelry and wearing apparel' are sufficient to show that the house was the home of the spouses Martin Dasig and Ismaela Ramos, without the necessity of using the specific word 'inhabited.' The acts alleged in the complaint in the present case are, therefore, sufficient to constitute the crime of robbery committed in an inhabited house by armed robbers, who broke open a locked valise, defined and penalized in article 508 of the Penal Code." Peo. v. Jagon, 49 Philippine 555, 560.

[b] **Store.**—(1) Although a store may be used as a dwelling, yet, where robbery is committed in a store, to sustain a conviction for that crime "in an inhabited house" under article 508 of the Penal Code, the information must further allege that the store was used and occupied as a dwelling. Peo. v. Tubog, 49 Philippine 620. (2) "Article 508 of the Penal Code applied by the court, refers to robbery committed in an inhabited house, public building or edifice devoted to religious worship. The information does not allege that the crime was committed in any of the places mentioned. The allegation that it was committed in a store is not equivalent to the allegation that it was committed in an inhabited house. A store may be inhabited, but not necessarily. Ordinarily it is not inhabited. This element being essential to it, must be expressly alleged in the information. Needless to say, a store is neither a public building nor an edifice devoted to worship. This being so, the crime must be considered to be included in article 512 which refers to robbery committed in an uninhabited place." Peo. v. Baguyo, 50 Philippine 582, 585.

[8] U. S. v. Turla, 38 Philippine 346; U. S. v. Recio, 21 Philippine 511; U. S. v. Gamboa, 11 Philippine 39; U. S. v. Arceo, 4 Philippine 733.

"The fact that the crime was committed in the dwelling of the offended party, Estanislao Cuevas, should be considered as a generic aggravating circumstance, the same as nocturnity, there being no extenuating circumstance, to counteract the effects of the said aggravating ones." U. S. v. Turla, 38 Philippine 346, 348.

[9] See statutory provisions.

[10] U. S. v. Fuentes, 4 Philippine 404.

[a] **Under eighteen.**—U. S. v. Fuentes, 4 Philippine 404 (required imposition of penalty immediately inferior to the medium grade of presidio correccional, under other facts involved).

As affecting punishment for crime generally see Criminal Law §§ 3218, 3065.

[11] U. S. v. Oangoang, 3 Philippine 312.

[a] **Rule applied.**—"The aggravating circumstance of nocturnity must be considered against the defendants, but this circumstance is offset by the mitigating circumstance of drunkenness with respect to Julian Jimenez, for we consider it to have been proven that the latter was intoxicated at the time the crime was committed, and that intoxication was not habitual with him. For these reasons the penalty prescribed by the law should be imposed upon the said Jimenez in its medium degree, and upon the other defendant, Maximo Oangoang, in its maximum degree; as with respect to the latter there are no mitigating circumstances to be considered." U. S. v. Oangoang, 3 Philippine 312.

[12] Philippine Pen. Code c 5 art 11.

[13] U. S. v. Loria, 11 Philippine 232.

"The trial court was of opinion that the aggravating circumstance of nocturnity should be taken into consideration in imposing the penalty, but compensated this aggravating circumstance with the extenuating circumstance of race set out in article 11 of the Penal Code. Neither the aggravating nor the extenuating circumstance thus found by the trial judge should have been taken into consideration. We do not think that the evidence of record conclusively establishes the alleged fact that the offense was committed at night; so far as can be gathered from the testimony, the robbery may have taken place either during the daylight on the Sunday preceding the night on which it is alleged to have been committed, or upon the morning of the day following; and this court has uniformly declined to consider the extenuating circumstance of race in cases of conviction of the crime of robbery." U. S. v. Loria, supra.

[14] **Power to impose:**
Death penalty see supra § 209; see also supra § 204.
Life imprisonment see supra § 206 text and notes 66–69. And see § 204 text and note 60 [b].

[15] See statutory provisions.

[16] State v. Johnson, 141 Wash. 324, 251 P 589; State v. Newman, 108 W. Va. 642, 152 SE 195.

[17] State v. Newman, supra.

[18] See Criminal Law § 3212.

[19] See cases infra this note.

[a] **Fifteen years.**—Buckley v. State, 79 Nebr. 86, 112 NW 283, 284 ("The crime was not of the most aggravated form of robbery possible. The amount stolen was small. The crime was committed in a business place and not in a dwelling house, and no actual injury was done either to the person or property of the complaining witness except the taking of the small amount of money. To a man of nearly 50 years of age imprisonment in the penitentiary for 15 years is a terrible punishment indeed. It is virtually imprisonment for life. Such severe sentences more than anything else tend in after years to arouse public sympathy for the criminal, which sometimes leads to the unreasonable exercise of the pardoning power. Notwithstanding the confidence we have in the discretion of the trial judge who heard the evidence in this case, we believe that this sentence ought to be reduced. . . . The sentence is reduced to imprisonment in the penitentiary for 10 years"); Bridges v. State, (Okl. Cr.) 264 P 640 (reduced to ten years).

[b] **Twenty-five years.**—Strong v. State, (Okl. Cr.) 287 P 1091 (robbery with firearms. Sentence reduced to fifteen years without discussion of circumstances rendering punishment of twenty-five years excessive).

[c] **Fifty years.**—Pierson v. State, (Okl. Cr.) 281 P 315 (defendant took a nickel and a watch from victim while co-defendant held gun. Co-defendant had pleaded guilty and got only five years. Defendant stood trial and got fifty years. Sentence reduced to twenty-five years).

[d] **Life imprisonment.**—Sanders v. State, (Okl. Cr.) 289 P 798 (where defendant helped plan the robbery, drove the car, and sat in the car while his accomplice entered a store and committed the actual robbery, and where it further appeared that the accomplice got only fifteen years because he turned state's evidence and that defendant was convicted largely on the testimony of his accomplice, a life sentence was reduced to twenty years on the suggestion of the attorney-general); Vandergriff v. State, (Okl. Cr.) 282 P 897 (robbery with firearms by defendant of sufficient maturity to realize the consequences

Death penalty.[21] Under statutes permitting but not requiring imposition of the death penalty for robbery,[22] a death sentence may be modified to one for imprisonment if under the circumstances death seems an excessive punishment,[23] or if such sentence was the result of passion and prejudice.[24] But a sentence to death otherwise proper,[25] will be upheld where neither excessive nor the result of passion nor prejudice.[26]

[§ 216] **F. Review.** Under general rules,[27] an appellate court will not reverse a conviction of robbery for harmless error,[28] nor for insufficiency of evidence if there is substantial evidence supporting the verdict.[29]

Record on appeal. A reviewing court will not grant a new trial for alleged error where the basis for the claim of error does not appear in the record.[30]

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of his own acts. Court considered life imprisonment excessive and reduced sentence to fifty years without discussion of reasons).

[20] See cases infra this note.

[a] **Nine months.**—Heyen v. State, 114 Nebr. 783, 210 NW 165 (plus fine of $300 for harboring and protecting robbers).

[b] **Six to fifteen years.**—Hukill v. State, 109 Nebr. 279, 190 NW 867 (wanton and unnecessary violence, premeditation, and no extenuating circumstances).

[c] **Twelve years.**—State v. Lucas, 57 Iowa 501, 10 NW 868 (maximum possibly twenty); Bennett v. State, (Tex. Cr.) 27 SW 135 (where defendant placed a knife at his victim's throat and robbed him).

[d] **Fifteen years.**—Peo. v. Crowley, 13 Cal. A. 322, 109 P 493 (for less culpable of two robbers severely injuring intoxicated old man and taking all he had); Peterson v. State, 115 Nebr. 302, 212 NW 610 (robber in car crowded victim's car against a telegraph pole and menaced him with gun); Rex v. Minguy, 31 Que. K. B. 105 (robbery with violence).

[e] **Seventeen years.**—State v. Brafford, 121 Iowa 115, 96 NW 710 (where defendant used a revolver and threatened to kill prosecuting witness).

[f] **Twenty years.**—Peo. v. Crowley, 13 Cal. A. 322, 109 P 493 (for more culpable of two robbers severely injuring intoxicated old man and taking all he had); State v. Williams, (Mo.) 292 SW 19 (fixed by jury—robber used force and violence on person of victim).

[g] **Twenty to thirty years.**—State v. Johnson, 141 Wash. 324, 251 P 589 (robbery of bank under circumstances which might have resulted in murder; statute imposed a minimum but no maximum).

[h] **Twenty-five years.**—State v. Levy, 126 Mo. 554, 29 SW 703 (where defendants robbed one of three thousand five hundred dollars and there was reason to believe that they were habitual criminals); State v. Newman, 108 W. Va. 642, 152 SE 195 (robbery of filling station, not especially vicious aside from controverted fact that victim was confined in a cell where he might have suffocated to death. Court had discretion to sentence ten years to life. Reviewing court considered eligibility to parol as a factor in upholding sentence).

[i] **Life imprisonment.**—Peo. v. Dumas, 161 Mich. 45, 125 NW 766 (stealing twenty-five cent jack-knife where, however, it further appeared that defendant entered a closed store at night, struck the proprietor's wife with a gun to quiet her, and evidenced intent to kill or maim if resisted). See Franklin v. Brown, 73 W. Va. 727, 81 SE 405, LRA1915C 557 (on application for habeas corpus that life imprisonment is not a punishment disproportionate to the character and degree of robbery within the meaning of a constitutional provision forbidding infliction of disproportionate penalties).

[21] **Power to impose generally** see supra § 209.

[22] See statutory provisions.

[23] Brown v. State, (Okl. Cr.) 266 P 491.

[a] **Reduced to fifteen years imprisonment.**—The death penalty for robbery with firearms was held excessive under circumstances, and modified to fifteen years' imprisonment in the penitentiary (Comp. St. [1921] § 2820). Brown v. State, (Okl. Cr.) 266 P 491, 493.

[24] Brown v. State, supra.

"The attorneys for the defendant in their argument urged that the sentence imposed upon the defendant was imposed by the court through passion and prejudice, and that the punishment was excessive, and suggested that, if the court found the defendant had due process of law, the sentence should be modified. The county attorney of Alfalfa county and the Attorney General in open court consented to a modification of the sentence. The court, after carefully examining the facts and circumstances as disclosed by the record, accepts the agreement of the attorneys for the state and the defendant to a modification of the sentence, and modifies the judgment from death by electrocution to imprisonment for a period and term of 15 years. The judgment and sentence is accordingly modified to 15 years, and, as so modified, is affirmed." Brown v. State, supra.

[a] **Imposed for refusal to squeal on accomplices.**—Brown v. State, (Okl. Cr.) 266 P 491.

[25] **Power to impose** see supra § 209.

[26] Thompson v. State, 91 Tex. Cr. 234, 237 SW 926; Brookman v. Com., 151 Va. 522, 145 SE 358.

[a] **Hit sleeping victim with axe.**—"The amount of property secured is insignificant, it is true, but the motive which prompted the crime was evidently the hope of securing property of greater value. The assault shown by the evidence to have been made upon both Isenberg and Silverstein was of a deadly character, and made with an instrument which, in the manner used, was calculated and likely to produce death, and the fact that death did not result therefrom is more of an accident than lack of design on the part of appellant. We are not aware of a case presenting a more cold-blooded, inhuman, and unprovoked attack made upon sleeping inmates of a house for the sole and only purpose of securing to the perpetrator an opportunity to secure for himself money or property belonging to those upon whom the attack was made. We do not feel inclined, under the facts of this case, to say that the jury was without warrant in assessing the penalty of death. The judgment of the trial court is therefore affirmed." Thompson v. State, 91 Tex. Cr. 234, 237 SW 926, 927.

[b] **Shooting and blinding woman victim.**—Where defendant entered a store for the ostensible purpose of making purchases, and while these were being wrapped shot the proprietess intentionally and in cold blood to facilitate robbery of the cash register, and it further appeared that while the victim survived she was permanently deafened, and blinded in one eye, and her sense of smell was destroyed, imposition of the death penalty was not excessive punishment. Brookman v. Com., 151 Va. 522, 145 SE 358.

[27] See Criminal Law §§ 2615–2999, 3258–3778.

[28] Ala.—Stanley v. State, 18 Ala. A. 60, 88 S 183 [certiorari den 205 Ala. 431, 88 S 449].

Cal.—Peo. v. Clary, 72 Cal. 59, 13 P 77.

Fla.—Stephens v. State, 92 Fla. 43, 109 S 303.

La.—State v. Durbin, 22 La. Ann. 154.

Mo.—State v. Davis, 186 Mo. 533, 85 SW 354.

Tex.—Coker v. State, 71 Tex. Cr. 504, 160 SW 366; Ford v. State, 41 Tex. Cr. 1, 51 SW 935, 53 SW 869; Green v. State, 32 Tex. Cr. 298, 22 SW 1094.

[a] **Admission of evidence.**—Stanley v. State, 18 Ala. A. 60, 88 S 183 [certiorari den 205 Ala. 431, 88 S 449].

[b] **Inaccurate instruction** furnishes no ground for reversal, where it could not have been prejudicial. State v. Davis, 186 Mo. 533, 85 SW 354. To same effect Coker v. State, 71 Tex. Cr. 504, 160 SW 366.

[29] Newman v. State, (Okl. Cr.) 279 P 980, 982.

"Where the evidence is such that, if believed by the jury, they could reasonably find the guilt of the accused, this court will not disturb the judgment on the ground of insufficiency of the evidence." Newman v. State, supra.

[30] White v. State, (Tex. Cr.) 53 SW 631.

[a] **Charge as not based on evidence.**—A reviewing court will not grant a new trial because of alleged error in the charge, where the evidence given, which is not before the reviewing court, may have justified the charge. White v. State, (Tex. Cr.) 53 SW 631.

VII. ATTEMPTS AND ASSAULTS WITH INTENT TO ROB

[§ 217] **A. Definitions and Distinctions.** An attempt to commit robbery has been defined as the doing of acts toward the commission of robbery, and with such intent, but falling short of actual perpetration of the completed offense.[31] An assault with intent to commit robbery has been defined as an assault with intent to take money, goods, or other valuable thing from the person of another by force or intimidation.[32]

Distinction between attempt and assault with intent. In jurisdictions where the statutes provide a punishment for assault with intent to commit robbery, and also for an attempt to commit a crime generally,[33] there exists the crime of attempted robbery as distinct from the crime of assault with intent to commit robbery.[34] In this connection it has been said that every assault necessarily includes an attempt,[35] and that the difference between an assault and an attempt is that in the former there is an element of present ability not essential to the latter.[36]

Compelling another to execute an obligation[37] is not an attempt to rob.[38]

[§ 218] **B. Nature and Elements of Offense—1. In General.** To constitute an attempt or assault with intent to rob, it must appear that the circumstances were such that the crime would have been robbery had the attempt been successful.[39] In accordance with the general rule that one may be guilty of an attempt to commit a crime although unknown to the criminal, there are extrinsic facts making its commission impossible,[40] defendant may be convicted for an assault with intent to rob even though the victim was in fact without money or valuable property.[41]

[§ 219] **2. Overt Act.** In accordance with general rules,[42] there can be no attempt to commit robbery in the absence of an overt act in part execution of the intent to commit the crime.[43] An actual demand for money or property is not essential if the circumstances otherwise show an overt act.[44] Abandonment of the purpose or intent to rob before commission of an overt act precludes guilt of the crime of attempt to rob.[45] But repentance after commission of an overt act will not rid the attempt of its criminal character.[46]

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[31] State v. McGinnis, 158 Mo. 105, 59 SW 83 (homicide in course of robbery attempt).

[32] Peo. v. Kuhn, 291 Ill. 154, 125 NE 882.

[33] See statutory provisions.

[34] Peo. v. Burns, 138 Cal. 159, 69 P 16, 70 P 1087, 60 LRA 270.

[35] Peo. v. Burns, supra.

[36] Peo. v. Burns, supra.

As to present ability to commit assault generally see Assault and Battery §§ 185-188.

[37] **Not robbery** see supra § 13 text and note 84.

[38] Rex v. Edwards, 6 C. & P. 521, 25 ECL 555, 172 Reprint 1346.

[a] **Illustration.**—A was decoyed into a house and chained down to a seat, and compelled to write an order for the payment of money and an order for the delivery of deeds. The paper on which he wrote remained in his hand half an hour, but he was chained all the time. It was held that this was not an assault with intent to rob within the St. 7 & 8 Geo. IV c 29 § 6. Rex v. Edwards, 6 C. & P. 521, 25 ECL 555, 172 Reprint 1346.

[39] **Elements of robbery** see supra §§ 13-54.

[40] See Criminal Law § 96.

[41] Hamilton v. State, 36 Ind. 280, 285, 10 AmR 22.

"The position contended for by counsel for the appellant in the case under consideration would lead to consequences which forbid our adoption of it. A robber supposes that an individual has a well filled pocketbook or a valuable watch on his person, and resolving to possess himself thereof, he meets the individual; with a slung-shot, or a bludgeon, he knocks him down, searches his pockets, and fails to find that which he expected to find. Shall it be held that he is guilty of a misdemeanor only? He has taken the first step; has taken it with the intent to commit the crime of robbery, and is clearly, in our opinion, within the statute on which the information is founded." Hamilton v. State, supra.

[a] **Penniless victim.**—Where the charge is an assault with intent to rob of a certain sum of money, it is no defense that the party assaulted had no money on his person at that time. Hamilton v. State, 36 Ind. 280, 10 AmR 22.

[42] See Criminal Law § 93.

[43] Peo. v. Rizzo, 246 N. Y. 334, 158 NE 888, 55 ALR 711. See Dunning v. Com., 5 Ky. Op. 173, 175 (where the court said: "A mere 'attempt to rob,' unaccompanied with an assault with a deadly weapon, or a demand of something of value from the person of another with force and violence with the felonious intent to commit robbery, is not an offense at common law, nor by statute. Neither is it a public offense to carry an ordinary pocket knife concealed, which may be a deadly weapon. The record therefore fails to show that the examining court had any authority to commit Thomas P. Dunning on these two charges, or to require bail of him, nor that the county judge was authorized to take the bond").

[a] **Merely looking for pay roll messenger.**—Where defendant and others armed themselves and drove around in a car looking for a certain pay roll messenger with intent to rob him wherever he might be found, but were arrested before they had located their victim, and in fact no pay roll had been drawn from the bank at the time, defendant was not guilty of an attempt to commit robbery under a statute punishing any act "tending" to commission of a crime as an attempt, because the acts in question had not come near enough to consummation of the robbery to "tend" toward its commission within the meaning of the statute. Peo. v. Rizzo, 246 N. Y. 334, 158 NE 888, 55 ALR 711.

[b] **Overt act shown.**—(1) "The facts in evidence were ample to justify the conclusion that the person who pushed open the saloon door did so for the purpose and with the intent to enter the saloon, and with force and violence feloniously take from the possession of the inmates such money as they might have upon them. The pushing open the door and the partial entry through the same were such overt acts as amounted to an attempt to commit the intended crime. . . . The large number of persons in the saloon prevented the consummation of the robbery." Peo. v. Moran, 18 Cal. A. 209, 122 P 969, 970. (2) Where defendant proposed to one Nelson that the latter knock a certain person unconscious at a specified time and place and divide the money with defendant, and such Nelson advised the police, and thereafter, acting under police instructions, Nelson and a detective introduced to defendant as a fellow crook went to the business office of the proposed victim, took a lead pipe supplied by defendant and at his suggestion went upstairs ostensibly to knock out the victim, who was unaware of the whole matter, and defendant waited outside to get the money, defendant was guilty of an attempt to commit robbery through aiding, abetting, and counseling its commission. Peo. v. Du Veau, 105 App. Div. 381, 94 NYS 225.

[44] Rex v. Trusty, East P. C. 418.

[a] **Stopping coach.**—Where defendants rushed from behind a hedge, pointed a pistol at the driver of a coach, and bade him stop, which he did, at the same time calling for help, and thereby preventing consummation of the robbery, defendants were guilty of an attempt to rob even though they had made no demand for money. Rex v. Trusty, East P. C. 418.

[45] State v. Feltovic, 110 Conn. 303, 147 A 801, 804 (homicide in course of attempted robbery).

[46] State v. Feltovic, supra (homicide in course of attempted robbery).

"The principle invoked in behalf of the accused is dependent upon the facts claimed to have been proved by his showing a voluntary and free abandonment of his purpose to perpetrate a robbery or to attempt to perpetrate one before his purpose has

[§ 220] **3. Intent.** It must appear that defendant had the intent to steal[47] or rob,[48] and defendant cannot be convicted where his intent was to take under a bona fide claim of right.[49] But a specific intent to rob a particular person is not essential to commission of attempted robbery,[50] a general attempt to rob any persons found in a certain place being sufficient.[51]

Where malice aforethought is by statute made an element of the crime,[52] it is not necessary to show actual ill will toward the victim.[53]

[§ 221] **4. Assault.** It must appear that the assault was made upon the person intended to be robbed.[54]

[§ 222] **5. Force or Intimidation—a. In General.** It is essential that defendant should have used, or intended to use, force or intimidation.[55] But the crime may be committed by intimidation as well as by actual force,[56] and proof of actual ability to inflict the injury threatened is not necessarily essential.[57] Resistance by the victim does not preclude existence of the element of force or intimidation.[58]

Subsequent force. Violence forming an element of the offense must not be subsequent to the attempt to take the property.[59]

Degree of force. There must be an appreciable degree of personal violence used or intended to constitute the force essential to the crime of attempted robbery or assault with intent to rob.[60] But subject to this requirement, the amount or degree of

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been put into action by overt act or acts in carrying out the intended crime. An intent or purpose to commit the crime of robbery may be abandoned at any time before the intent or purpose has by some act become an attempt to commit that crime; at that point the crime of an attempt to commit the robbery has been committed. The accused cannot thereafter escape the penalty of his attempt to commit the crime by repentance after that crime has been committed." State v. Feltovic, supra.

[47] Iowa.—State v. Lewis, 173 Iowa 643, 154 NW 432, AnnCas1918A 403.

Ky.—Taylor v. Com., 3 Bush 508.

Mont.—State v. Hanson, 49 Mont. 361, 141 P 609.

Nebr.—Latimer v. State, 55 Nebr. 609, 76 NW 207, 70 AmSR 403.

Nev.—State v. Glovery, 10 Nev. 24, 27.

Tex.—Barton v. State, 88 Tex. Cr. 368, 227 SW 317, 13 ALR 147.

Va.—Butts v. Com., 145 Va. 800, 133 SE 764.

"The intent is of the essence of the offense, and it is to be ascertained from the circumstances of each case." State v. Lewis, 173 Iowa 643, 154 NW 432, 433, AnnCas1918A 403.

"The intent is the gist of the offense and must be clearly established; . . . it is not necessarily to be inferred from the act or acts done, whatever they may be; but must be made out from an impartial consideration of the entire surroundings; which is sometimes extended beyond the immediate res gestæ." State v. Glovery, supra.

[48] Smiley v. State, 87 Tex. Cr. 528, 222 SW 1108.

[a] **Specific intent to rob.**—To sustain the conviction of assault with intent to rob, it was essential that the evidence show a specific intent to rob. Smiley v. State, 87 Tex. Cr. 528, 222 SW 1108.

[49] Barton v. State, 88 Tex. Cr. 368, 227 SW 317, 13 ALR 147; Butts v. Com., 145 Va. 800, 133 SE 764; Reg. v. Boden, 1 C. & K. 394, 47 ECL 394, 174 Reprint 863.

[a] **Collecting wages at point of gun.**—Where, on the day of his discharge, an employee held up the superintendent to demand the payment of his wages up to the time of his discharge, he lacked a criminal intent and was not guilty of attempted robbery even though as a matter of law the wages were not due on discharge but some days later. Butts v. Com., 145 Va. 800, 133 SE 764.

[b] **Good faith.**—If defendant made assault on prosecuting witness solely for the purpose of obtaining money which defendant in good faith believed prosecuting witness owed him, he was not guilty of assault with intent to rob, although he used force or threats, which, in the absence of the claim of right in good faith made, would have amounted to an assault with intent to rob. Barton v. State, 88 Tex. Cr. 368, 227 SW 317, 13 ALR 147.

[c] **Semblance of claim.**—A, at C fair, came up to B, the prosecutor's father (being a stranger to him), and gave him eleven sovereigns to buy him a horse, and B put them into his pocket. B refused to give the eleven sovereigns back, and A and the prisoner, who was in his company, assaulted him, but could not get the money from him. On the next day the prisoner asked B for the eleven sovereigns, and at L fair, on a subsequent day, the prisoner having seen the prosecutor receive seven sovereigns, demanded the eleven sovereigns of him, and then knocked him down, and tried to get the seven sovereigns out of his pocket. Held, that there was such a semblance of a claim of right, that this was not an assault with intent to rob. Reg. v. Boden, 1 C. & K. 394, 47 ECL 394, 174 Reprint 863.

[50] State v. Waite, 141 Wash. 429, 251 P 855.

[51] State v. Waite, 141 Wash. 429, 251 P 855, 858.

"The charge is to the effect that, to find the defendants guilty, it was not necessary to find that they had a specific intent to rob the person named in the information as the prosecuting witness; that it was enough if they found that the defendants had the intent to rob the persons they found in the room, and that one of such persons was the prosecuting witness. Manifestly, this must be the correct rule, else there could be no conviction in any case for a crime of this sort, which fails of consummation because of the intervention of the law officers. While the state could show, as they did in this instance, that the intent was to rob all of the persons present, which number included the prosecuting witness, they could not show that the specific intent was to rob any particular person. It must be remembered that the statute denounces the act of attempted robbery. The person against whom the act is directed is not the gravamen of the offense. This is a matter which the state must show in order to identify the act, and it is sufficiently identified when it is shown that the act is directed against a number, and the particular person named is one of that number." State v. Waite, supra.

[52] See statutory provisions.

[53] Gordon v. State, 125 Ark. 111, 187 SW 913, AnnCas1918A 419.

[a] **Meaning of "malice aforethought."**—Under the statute regarding assault with intent to rob, making malice aforethought an element of the crime, the words "malice aforethought" mean the voluntary and intentional doing of an unlawful act with the purpose, means, and ability to accomplish the reasonable and probable consequence of it, done in a manner showing a heart regardless of social duty and fatally bent on mischief, and it is not necessary to show any actual anger or ill feeling toward the victim. Gordon v. State. 125 Ark. 111, 187 SW 913, AnnCas1918A 419.

[54] Rex v. Thomas, Leach C. C. 330, 168 Reprint 268.

[55] Peo. v. Ryan, 239 Ill. 410, 88 NE 170; State v. Lewis, 173 Iowa 643, 154 NW 432, AnnCas1918A 403; Walters v. State, 56 Tex. Cr. 10, 118 SW 543.

[a] **Mere jostling** coupled with an unsuccessful attempt to take a stud from the victim's tie is not an attempt to rob. Walters v. State, 56 Tex. Cr. 10, 118 SW 543.

[b] **Pushing and crowding** in accordance with the usual methods of pickpockets, in an effort to steal a stud from the tie of a man on a crowded street car, is not such conduct as will constitute the force or intimidation essential to make the crime assault with intent to rob. Peo. v. Ryan, 239 Ill. 410, 88 NE 170.

[c] **Trying to take money from under pillow of sleeper** by stealth is not an attempt to commit robbery. State v. Lewis, 173 Iowa 643, 154 NW 432, AnnCas1918A 403.

[56] McNamara v. Peo., 24 Colo. 61, 48 P 541.

[57] MeNamara v. Peo., supra.

[58] Peo. v. Kuhn, 291 Ill. 154, 125 NE 882.

[59] State v. Lewis, 173 Iowa 643, 154 NW 432, AnnCas1918A 403; Hanson v. State, 43 Oh. St. 376, 1 NE 136.

[a] **Striking victim in effort to escape** after abandonment of an unsuccessful attempt to take money is not such use of force as will make the offense an assault with attempt to rob. State v. Lewis, 173 Iowa 643, 154 NW 432, AnnCas1918A 403.

[60] Peo. v. Ryan, 239 Ill. 410, 88 NE 170.

force exerted is immaterial.[61]

[§ 223] **b. Accusation of Crime.** Under a statute defining third degree robbery as an extortion or gaining of the money or property of another by accusing or threatening to accuse him of a felony, and other statutes punishing an attempt to commit such crime, an accusation or threat to accuse one of doing something not a felony does not constitute an attempt to commit third degree robbery.[62]

[§ 224] **c. Attempt To Snatch.**[63] Under a statute providing punishment for "whoever shall be found guilty of attempting to rob, from the person of another, money or other property by cutting, or tearing the clothes, thrusting the hands into the pockets, or otherwise,"[64] an attempt to snatch property is punishable under the "otherwise" provision of the statute.[65]

[§ 225] **6. Ownership.** To constitute the crime of assault with intent to rob, it is essential that the property intended to be taken should have been that of some one other than defendant.[66] But it is not necessary that the property should have belonged to the victim of such assault.[67]

[§ 226] **C. Persons Liable.** All persons actually participating or aiding and abetting in the commission of an attempt or assault with intent to rob are subject to prosecution and punishment therefor.[68]

[§ 227] **D. Prosecution and Punishment—1. Indictment or Information—a. In General.** An indictment or information for attempt or assault with intent to rob must allege every fact and circumstance that is necessary to constitute the offense,[69] including the assault[70] and intent.[71] Under general rules[72] particular indictments or informations have been held sufficient[73] or insufficient.[74] It has been said that the same particularity is not required in charging attempted acts as is required in charging the completed crime.[75]

[§ 228] **b. Intent.** An indictment or information for an attempt or assault with intent to rob should charge the essential intent.[76] Intent has been held sufficiently charged by an allegation that defendant "attempted" fraudulently to take the property,[77] or that he acted "feloniously,"[78] or "in pursuance of" an assault and attempt to rob,[79] or by any other terms clearly implying such intent.[80]

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[61] Gordon v. State, 125 Ark. 111, 187 SW 913.

[a] **"The law does not require that one be beaten up** before he submits to the robbery to constitute the offense. It is sufficient if he yields because of this fear. Nor is one required to resist to the uttermost. The crime is committed if one exerts sufficient force to overcome the resistance encountered where the property is not taken surreptitiously. When there is manifested a present purpose to take from the person of another his property, not clandestinely, but openly, and by means of the exercise of such force as may be necessary to overcome any resistance offered, the crime of assault to rob is committed." Gordon v. State, 125 Ark. 111, 115, 187 SW 913.

[62] State v. Snow, 320 Mo. 267, 6 SW (2d) 934.

[a] **Violation of liquor laws.**—Evidence showing an attempt to obtain money by accusing another of possessing and transporting alcohol will not sustain conviction for attempt to commit third degree robbery because such liquor law violation is not a felony. State v. Snow, 320 Mo. 267, 6 SW (2d) 934.

[63] **Snatching as constituting completed offense** see supra §§ 40, 41.

[64] See statutory provisions.

[65] State v. West, 106 La. 274, 30 S 848.

[a] **Purse.**—State v. West, 106 La. 274, 30 S 848.

[66] Douglass v. State, 21 Ala. A. 289, 107 S 791.

[67] Douglass v. State, supra; State v. Carroll, 214 Mo. 392, 135 SW 1051, 21 LRANS 311.

[a] **Cashier of bank.**—Douglass v. State, 21 Ala. A. 289, 107 S 791.

[68] Stone v. State, 162 Ark. 154, 258 SW 116; State v. Johnson, 198 Iowa 588, 199 NW 316; State v. Milo, 126 Or. 238, 269 P 225, 227.

[a] **Aiding and abetting.**—(1) If one was present at the place of attempted robbery by prearrangement with one making the attempt, and was there with the purpose of actually aiding in its commission, to the knowledge of the one who attempted the robbery, he was guilty as a principal, although he did not actually participate in the assault in view of Code § 5299. State v. Johnson, 198 Iowa 588, 199 NW 316. (2) A person present, ready, and consenting to aid and abet in assault with intent to rob is guilty of the crime under Crawford & M. Dig. § 2412. Stone v. State, 162 Ark. 154, 258 SW 116.

[b] **Use of weapon.**—If defendants entered a store with the common intent to rob, the act of one in pointing a revolver at the proprietor was in law an act of an associate (L. § 1919). State v. Milo, 126 Or. 238, 269 P 225 (where the court said: "If they were acting together, with a common intent to assault and rob, the act of Kelly in pointing a revolver at the body of Blackburn, and in commanding him to 'stick 'em up' and to 'get into the back room,' is, in law, also the act of Milo, his associate in crime; likewise, the blows that were inflicted upon Emery's chin and head by Milo were, in law, the blows of Kelly").

[69] Ill.—Conolly v. Peo., 4 Ill. 474.

Iowa.—State v. Callahan, 96 Iowa 304, 65 NW 150.

Md.—Hollohan v. State, 32 Md. 399.

Mass.—Com. v. Cody, 165 Mass. 133, 42 NE 575; Com. v. Mowry, 11 Allen 20.

S. D.—State v. Shields, 13 S. D. 464, 83 NW 559.

Tex.—Adams v. State, (Cr. A.) 62 SW 1059; Clark v. State, 41 Tex. Cr. 641, 56 SW 621.

Wash.—State v. Fenton, 30 Wash. 325, 70 P 741; State v. Costello, 29 Wash. 366, 69 P 1099.

Eng.—Reg. v. Huxley, C. & M. 596, 41 ECL 324, 174 Reprint 650.

[70] State v. Norman, 190 Iowa 472, 180 NW 151.

[a] **Allegations held sufficient.**—State v. Norman, 190 Iowa 472, 180 NW 151.

[71] See infra § 228.

[72] See supra text and notes 69, 70; and see Indictments and Informations § 292.

[73] See cases infra this note.

[a] **Generally.**—Douglass v. State, 21 Ala. A. 289, 107 S 791; Peo. v. Holden, 13 Cal. A. 354, 109 P 495; State v. Broyles, 317 Mo. 276, 295 SW 554; State v. Heady, 316 Mo. 111, 289 SW 564; State v. McFadden, 309 Mo. 112, 274 SW 354; State v. Williams, (Mo.) 263 SW 195.

[b] **Attempted robbery in first degree.**—State v. Newman, (Mo.) 289 SW 831.

[c] **Dangerous or deadly weapon.**—McNamara v. Peo., 24 Colo. 61, 48 P 541; Lipscomb v. State, 130 Wis. 238, 109 NW 986.

[74] See case infra this note.

[a] **Held insufficient.**—Chappell v. Com., 200 Ky. 429, 255 SW 90 (omission of word "maliciously" where statute made malice element of offense).

[75] Traver v. State, 72 Ark. 524, 81 SW 615.

Indictments and informations for completed crime see supra §§ 82–119.

[76] State v. Norman, 190 Iowa 472, 180 NW 151.

[a] **Allegations held sufficient.**—State v. Norman, 190 Iowa 472, 180 NW 151.

[77] Runnells v. State, 34 Tex. Cr. 431, 30 SW 1065; Atkinson v. State, 34 Tex. Cr. 424, 30 SW 1064.

[78] State v. Hughes, 31 Nev. 270, 102 P 562.

[79] State v. Hughes, supra.

[80] Peo. v. Johnson, 57 Cal. A. 271, 207 P 257; Com. v. Tanner, 3 Ky. Op. 264, 265.

"The facts alleged in the indictment are sufficient to show the intent to take and carry away the property, and therefore it was unnecessary to aver an intention on the part of appellee 'to steal, take and carry it in so many words away.' And of necessity must have been against the will of the owner of the property. The acts alleged as constituting the of-

[§ 229] **c. Description of Property.** It is not necessary particularly to describe the property defendant intended to take.[81]

Value. It is not necessary to allege the value of the property.[82]

Ownership. An indictment or information for an attempt or assault with intent to commit robbery need not allege the ownership of the property,[83] nor negative defendant's ownership thereof.[84] Where an indictment or information undertakes to set forth ownership, it is sufficient to allege that the property was in the immediate custody or possession of the victim of the attempted robbery.[85]

[§ 230] **d. Consent.** Nonconsent of the victim is sufficiently averred by allegations of force or intimidation.[86]

[§ 231] **e. Completed Offense.** The indictment or information need not define the offense of robbery.[87] It need not,[88] and should not,[89] allege the elements of the completed offense of robbery.

[§ 232] **2. Issues, Proof, and Variance.** Under general rules,[90] material allegations of the indictment or information must be proved, and a variance in a material matter is fatal.[91]

[§ 233] **3. Conviction of Offenses Included in Charge.** Under an indictment for assault with intent to rob, defendant cannot be convicted of robbery.[92]

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fense, are the same as those named in the statute, and are described in its precise language." Com. v. Tanner, supra.

[81] Ind.—Dickinson v. State, 70 Ind. 247.

Kan.—State v. Roberts, 67 Kan. 631, 73 P 905.

Ky.—Taylor v. Com., 3 Bush 508; Com. v. Tanner, 3 Ky. Op. 264, 265.

Miss.—Grogan v. State, 63 Miss. 147.

Tex.—Crumes v. State, 28 Tex. A. 516, 13 SW 868, 19 AmSR 853.

[82] Buntin v. State, 68 Ind. 38; Com. v. Tanner, 3 Ky. Op. 264.

[83] State v. Gulliver, 163 Iowa 123, 142 NW 948.

[a] **Robbery distinguished.**—"The offenses [of robbery and assault with intent to rob] are quite distinct. One is an invasion of a property right and the other an invasion of a right of person. The gist of robbery is the wrongful taking of the property of another under certain circumstances of aggravation, and an allegation of the ownership of the property is necessary to make the charge complete and intelligible. In the other case the overt criminal act is the injury or attempted injury of the person of another, and, for reasons already stated, an allegation of the name of the person assaulted is essential to a complete charge; but, the intent having reference only to the mental attitude or purpose of the assailant, it is sufficiently expressed in alleging it in general terms." State v. Gulliver, 163 Iowa 123, 142 NW 948, 956.

[84] State v. Dilley, 15 Or. 70, 13 P 648.

[a] **Rule applied.**—An indictment under Cr. Code § 533, "for assault and robbery, being armed with a dangerous weapon," need not allege that the money taken from the person assaulted was his property and not the property of accused. State v. Dilley, 15 Or. 70, 13 P 648.

[85] Sims v. State, 23 Ala. A. 387, 126 S 498; Douglass v. State, 21 Ala. A. 289, 107 S 791; State v. Carroll, 214 Mo. 392, 113 SW 1051, 21 LRANS 311; Tyson v. U. S., 7 Okl. Cr. 433, 122 P 733.

"An indictment for assault with intent to rob need not state what the defendant intended to take, nor that he intended to deprive the owner thereof, nor is it necessary to allege ownership in the party assaulted; mere possession in him being sufficient. Tyson v. U. S., supra.

[a] **Assaulting cashier to rob bank.**—(1) A count charging assault on a cashier with intent to rob the bank was not bad, it being unnecessary that the money belong to the person from whom taken. This is not like charging an assault with attempt to rob B, as the bank's money is in the custody of the cashier. Douglass v. State, 21 Ala. A. 289, 107 S 791. (2) An indictment charging an assault on the president and cashier of a bank with intent to rob the bank is sufficient as against an objection that it failed to charge that an attempted robbery was commited upon and against the person of individuals named. Sims v. State, 23 Ala. A. 387, 126 S 498.

[86] Peo. v. Johnson, 57 Cal. A. 271, 207 P 257.

[87] State v. Norman, 190 Iowa 472, 180 NW 151.

[88] Dickerson v. Com., 2 Bush (Ky.) 1; Hollohan v. State, 32 Md. 399; Morris v. State, 13 Tex. A. 65.

[89] State v. Norman, 190 Iowa 472, 180 NW 151. See Lipscomb v. State, 130 Wis. 238, 241, 109 NW 986 (where, after stating that the information was insufficient to charge the completed offense, the court added: "It does, however, charge the crime defined by sec. 4376, Stats. 1898, and of which the defendant was convicted. This section is as follows: 'Any person being armed with a dangerous weapon who shall assault another with intent to rob or murder shall be punished by imprisonment in the state prison not more than fifteen years nor less than one year.' It is true that the present information charged actual robbery instead of intent, but, as actual robbery always includes intent, there is no prejudicial variance between the statute, the information, and the verdict. The information charged more than the statute required, but in legal effect it charged also all that the statute or the verdict covered").

[a] **Neither necessary nor proper.**—"The intent with which the assault is made is the gravamen of the offense. In charging the crime of assault with intent to commit a felony, such as robbery, it is not necessary or proper to charge intent and facts which would make out the ultimate offense of robbery. Indeed, that would be a fictitious charge. If such facts existed, the charge would be of robbery itself, and not assault with intent to rob. The indictment is not vulnerable to the assignment against it. The indictment is sufficient." State v. Norman, 190 Iowa 472, 180 NW 151, 152.

[90] See Indictments and Informations §§ 438–481.

[91] Erwin v. State, 117 Ga. 296, 43 SE 719; State v. Fallon, 2 N. D. 510, 52 NW 318; Barton v. State, 88 Tex. Cr. 368, 227 SW 317, 13 ALR 147.

[a] **Intimidation.**—"Where an indictment charged the accused with assault with intent to rob, in that he 'did unlawfully and maliciously make an assault upon the person of H., and by menaces in a forcible and violent manner demand money of the said H., with intent to commit a robbery upon the person of said H., a verdict of guilty was unwarranted, when there was no evidence that the accused by menaces made a demand of H. for his money, though the evidence may have shown that he committed the offense in some other manner." Erwin v. State, 117 Ga. 296, 43 SE 719.

[b] **Persons assaulted.**—Under a count charging an assault to rob two persons jointly, defendant cannot be convicted if the assault was made on only one of such persons. Barton v. State, 88 Tex. Cr. 368, 227 SW 317, 13 ALR 147.

[c] **Use of weapon.**—(1) "Where an information charges the defendant with the crime of an assault with a dangerous weapon, to wit, a pistol, with intent to commit a felony, and describes the assault as committed by then and there shooting a loaded pistol at and against the party assaulted, with intent to rob him, and the evidence shows that the assault was committed by thrusting the pistol in the face of the party assaulted, and demanding his money, and that the pistol was not discharged until after the assailant had started to make his escape, there is a fatal variance between the allegations and the proof." State v. Fallon, 2 N. D. 510, 52 NW 318. (2) Where an indictment charges that an assault with attempt to rob was made by pointing a loaded gun at the victim, it may, in the absence of affirmative proof that the gun was unloaded, be sustained by proof that a gun was pointed at the victim. State v. Milo, 126 Or. 238, 269 P 225.

[d] **Variance not material.**—Charge of an attempt to rob the cashier of the "Bank of Barnhart," and proof of an attempt to rob the cashier of the "Farm and Dairy Bank" at Barnhart, where, so far as the record shows, there was but one bank at Barnhart, and all of the other witnesses, including those for defendant, referred to it as the Bank of Barnhart. State v. Broyles, 317 Mo. 276, 295 SW 554, 556.

[92] Peo. v. Scofield, 142 Mich. 221, 105 NW 610.

Conviction of:

Attempt to rob on charge of completed offense see Indictments and Informations § 504.

Different degree or classification of completed robbery than that charged see Indictments and Informations § 497.

[§ 234] **4. Evidence—a. Burden of Proof and Presumptions.** In a prosecution for assault with intent to rob, while armed with a dangerous weapon, proof that a gun was pointed at the victim raises a presumption that it was loaded,[93] casting on defendant the burden of proving the contrary.[94]

[§ 235] **b. Admissibility.** Under general rules,[95] as applied to the circumstances involved, particular evidence has been held admissible[96] or inadmissible,[97] as in the case of evidence offered on the issue of intent.[98]

Victim's possession of money. Evidence is inadmissible to show that the person assaulted had no money, unless it be shown that defendant knew that fact.[99]

[§ 236] **c. Weight and Sufficiency.**[1] The essential intent may be established by any circumstances from which the jury may reasonably infer it,[2] and such an inference may be proper despite defendant's failure to say a word about wanting valuables.[3] The victim's successful prevention of the robbery has no tendency to disprove defendant's intent to rob.[4] Evidence of defendant's identification may be sufficient despite refusal of the identifying witnesses to swear positively that defendant was the man,[5] or their admission that a mistake is always possible.[6]

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[93] McNamara v. Peo., 24 Colo. 61, 48 P 541; State v. Milo, 126 Or. 238, 269 P 225; State v. Parr, 54 Or. 316, 103 P 434; Lipscomb v. State, 130 Wis. 238, 109 NW 986.

[a] **"When a highwayman pokes a gun into the face of his victim** and commands him to 'stick 'em up,' his actions and his words speak a language that is well understood by the victim. It is plain to the victim and to the robber that the command to 'stick 'em up,' accompanied by gun play, is a representation by the assailant that he is prepared to execute his command. It is unnecessary for the victim of a holdup to visualize the powder and the leaden ball within the highwayman's gun, or to subject his body to gunfire, in order to vindicate the law. The outlaw who attempts to rob another by putting such other in fear of death or great bodily harm through his conduct in deliberately pointing a gun at such other at close range impliedly represents that the gun is loaded, and the proof of such conduct establishes prima facie that the gun so used was loaded and capable of being discharged." State v. Milo, 126 Or. 238, 269 P 225, 227.

[94] Lipscomb v. State, 130 Wis. 238, 109 NW 986.

[95] See Criminal Law §§ 1034–1558.

[96] See cases infra this note.

[a] **Generally.**—Chafino v. State, 69 Tex. Cr. 393, 154 SW 546 (where the court said: "Appellant has a very brief and incomplete bill of exceptions, showing that he objected to the prosecuting witness testifying that he had his money in his shoe on the night of the alleged assault, and that it was his custom to carry his money in such manner. The bill shows no error in the admission of this testimony. This witness testified that the assault was committed by two persons—one having a pistol, who stopped him, and made him hold up his hands, while the other went through all his pockets, and ran his hands up and down his body and legs, in search of money, and his explanation of why they did not get his money was that he had it in his shoe, and was accustomed to carry it there").

[b] **Competent.**—Wingate v. State, 69 Tex. Cr. 234, 152 SW 1078 (holding that, evidence by a police officer that he found a pistol in the street where the assault occurred the morning after the assault was competent and admissible).

[c] **Material.**—Abner v. Com., 210 Ky. 536, 276 SW 513 (holding that evidence for defendants that the prosecuting witness had a pistol in his car at the time of arrest was material, and should have been admitted, in view of their contention that the prosecuting witness had a pistol and proposed to swap with them when the car stopped).

[d] **Rebuttal.**—Perdue v. State, 17 Ala. A. 500, 86 S 158 (holding that, where a witness at whose house defendant was arrested had testified that the sheriff and another came to her house that night, it was error to exclude evidence offered in rebuttal as to what, if anything, they did in such house).

[97] See cases infra this note.

[a] **Generally.**—Douglass v. State, 21 Ala. A. 289, 107 S 791 (holding that question to cashier whether bank lost money on afternoon accused entered it was too broad and general in trial for assault on cashier to rob bank, as it might have related to transactions with persons other than defendant).

[b] **Immaterial.**—State v. Gulliver, 163 Iowa 123, 142 NW 948, 953 (holding that evidence for defendant that shortly before the offense defendant had made a profit of two hundred dollars from a certain venture was immaterial, because "The fact whether defendant did or did not reap a profit from the entertainment had no such bearing upon or connection with his alleged guilt as to make it admissible on any theory of the case").

[c] **Hearsay.**—State v. Gulliver, 163 Iowa 123, 142 NW 948 (holding that, in a prosecution for assault with intent to rob a bank cashier, evidence that a detective representing a banker's association had investigated the case in its interest, and had approached certain witnesses and made statements adverse to defendant, was inadmissible because mere hearsay and without relevance or materiality).

[98] See cases infra this note.

[a] **Evidence held admissible.**—(1) In view of Code Cr. Proc. (1911) art 261, which provides that municipal authorities may establish rules authorizing arrests, without warrant, of persons found in suspicious places or under circumstances showing they have been guilty of felony or breach of the peace, in a prosecution with intent to rob where defendant claimed that he arrested state's witness when he found him and a female companion in a compromising position in a parked automobile in a public park, and arrest without warrant was authorized by a municipal ordinance, refusal to admit the ordinance, whether valid or not, was error, as it bears on the issue of intent, defendant having claimed that he was on his way to report the matter and surrender the property to the authorities when arrested. Smith v. State, 94 Tex. Cr. 478, 251 SW 1077. (2) Exclusion of cashier's testimony as to whether defendant got, or attempted to get, money from bank or cashier and whether latter knew of overt act to get money from within cage was reversible error, testimony being admissible as of res gestæ and relevant on issues of intent and insanity. Douglass v. State, 21 Ala. A. 289, 107 S 791.

[b] **Evidence held inadmissible.**—Testimony of a witness that accused, charged with an attempt to rob, had solicited the witness some six days before to join in committing robbery but not referring to prosecutor, is too remote to show the specific intent necessary under Rev. Codes § 8894, providing that an act done with intent to commit a crime but failing to effect its commission is an attempt to commit the crime. State v. Hanson, 49 Mont. 361, 141 P 669.

[99] Angley v. State, 35 Tex. Cr. 427, 34 SW 116.

[1] **In criminal cases generally** see Criminal Law §§ 1559–1999.

[2] Burk v. State, 22 Ala. A. 107, 114 S 71; Peo. v. Franklin, 46 Cal. A. 1, 188 P 607, 608; State v. Broyles, 317 Mo. 276, 295 SW 554.

[a] **Illustration.**—"The question of serious consideration is the action of the court in refusing to grant to the defendant his motion for a new trial. And that presents the question as to whether there is evidence of an intent to rob. Intent can only be shown by facts and circumstances from which the jury is authorized to draw the inference. . . . In the instant case the assault on Hale was at night, at the isolated house of the assaulted party, where defendant and his two associates had no right and no lawful business. They called Hale from his house to his doorstep and made an unprovoked assault upon him. As a part of the res gestæ defendant told the others to 'go in and search the house.' The confession of the defendant was that they 'went after money.' The inference that the assault was made with the intent to rob was justified by the evidence for the state. The denials by the defendant and his witness that they went to Hale's house to rob was for the jury. The court had all the parties before him, heard the evidence, and saw them testify. We will not disturb his judgment." Burk v. State, 22 Ala. A. 107, 114 S 71, 72.

[3] Peo. v. Leahy, 295 Ill. 588, 129 NE 517; State v. Simon, 317 Mo. 336, 295 SW 1076.

[a] **Illustration.**—Where the facts were that defendant jumped from a car, shoved a pistol against the victim, and ordered him to get into the car, but said nothing about wanting money or property, and defendant contended in a prosecution for assault to rob that the evidence was just as compatible with intent to kill or kidnap as it was with intent to rob, the court nevertheless held that the evidence was sufficient to authorize the jury to draw the inference of an attempt to rob. State v. Simon, 317 Mo. 336, 295 SW 1076.

[4] Peo. v. Kuhn, 291 Ill. 154, 125 NE 882.

Evidence sufficient. In the notes below are given references to cases in which the evidence was held sufficient to sustain conviction of an attempt or assault with intent to rob,[7] as where it was sufficient to prove the elements of the offense,[8] such as assault,[9] intent to steal,[10] and the use of, or intent to use, force or intimidation;[11] or was sufficient to prove defendant's connection with, or participation in, the offense,[12] as where defendant denied his presence,[13] or, while admitting his presence, denied participation in the offense.[14]

Evidence insufficient. In the notes below are given references to cases in which the evidence was held insufficient to sustain a conviction for an attempt or assault with intent to rob,[15] as where it was insufficient to prove the elements of the offense,[16] such as intent to steal,[17] and the use of, or intent to use, force or intimidation;[18] or was insufficient to prove defendant's connection with, or participation in, the offense,[19] as against his claim of alibi.[20]

[§ 237] **5. Trial[21]—a. Questions for Court and Jury.** The credibility of the evidence is for the jury.[22] On conflicting evidence questions of fact are for the jury,[23] such as the issue of whether there was an assault,[24] and whether it was committed with intent to rob.[25] But where only one conclusion may reasonably be drawn from the facts, the question of intent is one of law for the court.[26]

[§ 238] **b. Instructions—(1) In General.** On a trial for an attempt or assault with intent to rob, the court should instruct the jury as to the elements of the offense,[27] such as the intent to steal or rob,[28] and the use of, or intent to use, force or intimidation.[29]

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5. Peo. v. Franklin, 46 Cal. A. 1, 188 P 607.

[a] **Resemblance enough.**—"While none of them would positively swear that the appellant was the man they had seen on the morning of the assault, each of them picked him from among other prisoners, and on the trial each was positive in the statement that the appellant resembled the man they had seen at the time of the crime, each expressing the belief that he was the same. Standing alone, this evidence would have been sufficient on the subject of identification. It is not necessary that identification be made positively by any one witness. It is a matter for the jury to determine from all the circumstances in evidence on the subject." Peo. v. Franklin, 46 Cal. A. 1, 188 P 607.

6. Weldon v. State, 179 Ark. 10, 14 SW (2d) 245.

7. Ark.—Hight v. State, 172 Ark. 240, 288 SW 384.

Cal.—Peo. v. Gonzales, 69 Cal. A. 609, 231 P 1014; Peo. v. Murphy, 62 Cal. A. 709, 217 P 810; Peo. v. McNabb, 17 Cal. A. 154, 118 P 915.

Ill.—Peo. v. Kusinski, 295 Ill. 575, 129 NE 503.

Kan.—State v. Roberts, 67 Kan. 631, 73 P 905.

Tex.—Seymour v. State, 93 Tex. Cr. 186, 245 SW 913; Drysdale v. State, 70 Tex. Cr. 273, 156 SW 685; Burns v. State, (Cr.) 70 SW 24.

Wis.—Lipscomb v. State, 130 Wis. 238, 109 NW 986.

Ont.—Rex v. Arsino, 19 OntWN 136.

[a] **Armed with dangerous or deadly weapon.**—Lipscomb v. State, 130 Wis. 238, 109 NW 986.

[b] **Circumstantial evidence.**—Peo. v. Gordon, 61 Cal. A. 98, 214 P 276.

[c] **Pay roll.**—Peo. v. Kusinski, 295 Ill. 575, 129 NE 503.

8. Peo. v. Allen, 32 Cal. A. 110, 162 P 401; State v. Cox, 250 Mo. 375, 157 SW 308.

9. Cole v. State, 90 Tex. Cr. 660, 237 SW 256; White v. State, 90 Tex. Cr. 617, 236 SW 983.

10. Ala.—Burk v. State, 22 Ala. A. 107, 114 S 71 [certiorari den 216 Ala. 655, 114 S 72].

Cal.—Peo. v. Johnson, 57 Cal. A. 271, 207 P 257.

Ill.—Peo. v. Leahy, 295 Ill. 588, 129 NE 517; Peo. v. Kuhn, 291 Ill. 154, 125 NE 882.

Okl.—Tyson v. U. S., 7 Okl. Cr. 433, 122 P 733.

Tex.—Cole v. State, 90 Tex. Cr. 660, 237 SW 256; White v. State, 90 Tex. Cr. 617, 236 SW 983; Hernandez v. State, 60 Tex. Cr. 382, 131 SW 1091.

[a] **As against defendant's claim that he thought he was participating in arrest instead of robbery.**—Drysdale v. State, 70 Tex. Cr. 273, 156 SW 685.

[b] **Despite defendant's contention that he was merely avenging insult.**—Peo. v. Franklin, 46 Cal. A. 1, 188 P 607.

11. See Gordon v. State, 125 Ark. 111, 187 SW 913, AnnCas1918A 419 (evidence sufficient to show force used).

12. Ark.—Gordon v. State, supra.

Ga.—Holbrook v. State, 37 Ga. A. 106, 138 SE 919.

Iowa.—State v. Johnson, 198 Iowa 588, 199 NW 316.

Mo.—State v. Newman, 289 SW 831.

Tex.—Barnes v. State, 106 Tex. Cr. 394, 292 SW 548.

[a] **As against claim that victim too drunk to identify defendant.**—Gordon v. State, 125 Ark. 111, 187 SW 913, AnnCas1918A 419.

[b] **Drug store,** attempted robbery of. State v. Newman, (Mo.) 289 SW 831.

[c] **Identification by voice and appearance.**—Barnes v. State, 106 Tex. Cr. 394, 292 SW 548.

13. Ark.—Weldon v. State, 179 Ark. 10, 14 SW (2d) 245.

Ill.—Peo. v. Kuhn, 291 Ill. 154, 125 NE 882.

Iowa.—State v. Gulliver, 163 Iowa 123, 142 NW 948.

Mo.—State v. Woodard, 309 Mo. 19, 273 SW 1047.

Okl.—Bates v. State, 22 Okl. Cr. 369, 211 P 438.

Tex.—Wingate v. State, 69 Tex. Cr. 234, 152 SW 1078.

14. Stone v. State, 162 Ark. 154, 258 SW 116; Peo. v. Leahy, 295 Ill. 588, 129 NE 517; Peo. v. Holdich, 224 Mich. 72, 194 NW 484.

15. Ala.—Perdue v. State, 17 Ala. A. 500, 86 S 158.

Ga.—Killabrew v. State, 33 Ga. A. 55, 125 SE 725.

Ill.—Garrity v. Peo., 70 Ill. 83.

Mo.—State v. Tate, 145 Mo. 667, 47 SW 792.

Tex.—Sanders v. State, 53 Tex. Cr. 613, 111 SW 157.

Eng.—Reg. v. Birch, 2 C. & K. 193, 61 ECL 193, 175 Reprint 81, 1 Den. C. C. 185, 169 Reprint 204.

[a] **Circumstantial evidence.**—Perdue v. State, 17 Ala. A. 500, 86 S 158.

16. Moffett v. State, 83 Tex. Cr. 284, 202 SW 960.

17. State v. Hanson, 49 Mont. 361, 141 P 669.

[a] **Assault without intent to rob or steal.**—State v. Hanson, 49 Mont. 361, 141 P 669, 671.

18. Walters v. State, 56 Tex. Cr. 10, 118 SW 543.

19. Carter v. State, 104 Tex. Cr. 163, 283 SW 174.

20. Perdue v. State, 17 Ala. A. 500, 86 S 158.

21. **General rules** see Criminal Law §§ 2000-2614.

22. Peo. v. Leahy, 295 Ill. 588, 129 NE 517, 519.

23. State v. Broyles, 317 Mo. 276, 295 SW 554.

24. State v. Lewis, 173 Iowa 643, 154 NW 432, AnnCas1918A 403.

25. State v. Simon, 317 Mo. 336, 295 SW 1076; Barton v. State, 88 Tex. Cr. 368, 227 SW 317, 13 ALR 147; Butts v. Com., 145 Va. 800, 133 SE 764.

26. Butts v. Com., supra.

27. See infra text and notes 28-34.

Elements stated see supra §§ 218-225.

28. Axhelm v. U. S., 9 Okl. 321, 60 P 98; Mortimer v. State, 97 Tex. Cr. 485, 262 SW 501, 502.

"The court instructed the jury on the law of assault with intent to rob and upon the law of self-defense. A request was made that the court instruct the jury that there could be no conviction, unless they found from the evidence beyond a reasonable doubt that in making the assault appellant had the specific intent to commit robbery. If the prosecution for an assault with intent to rob is maintainable under the facts, a charge instructing the jury that to justify a conviction there must be proof of his specific intent to rob should have been given." Mortimer v. State, supra.

[a] **Instruction is erroneous** which omits the element of felonious intent. Axhelm v. U. S., 9 Okl. 321, 60 P 98.

29. State v. Lewis, 173 Iowa 643, 154 NW 432, AnnCas1918A 403.

Particular instructions. Under general rules,[30] particular instructions given or requested have been held proper or improper,[31] as instructions respecting the elements of the offense,[32] or defendant's connection therewith or participation therein,[33] or the use of a dangerous or deadly weapon.[34]

[§ 239] **(2) Included Offenses.** Where the evidence is sufficient to raise the issue as to whether defendant was guilty of another offense included in an attempt or assault with intent to rob, the court should instruct the jury as to such other offense.[35] But where the evidence raises no such issue, no instruction as to an included offense need be given.[36]

[§ 240] **c. Verdict.** General rules[37] apply with respect to the form and sufficiency of the verdict in a prosecution for an attempt or an assault with intent to commit robbery.[38]

[§ 241] **6. Punishment.** General rules[39] apply with respect to the punishment inflicted for an attempt or assault with intent to commit robbery.[40]

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[30] See supra text and notes 27-29; and Criminal Law §§ 2353, 2354 et seq.

[31] See case infra this note.

[a] **Instructions requested** but failing clearly to state the law are properly refused. State v. Glovery, 10 Nev. 24.

[32] See case infra this note.

[a] **Instruction proper.**—In a prosecution for assault with intent to rob, where defendant was convicted of assault with intent to commit larceny from the person, an instruction that if defendant assaulted the prosecuting witness to take from him a pistol with which the witness had threatened defendant he could not be convicted was sufficient, and it was unnecessary to give a further charge as to the law of self-defense. State v. Schell, 172 Iowa 127, 153 NW 62.

[33] See cases infra this note.

[a] **Instruction held proper.**—An instruction that, if accused was present when the victim was assaulted and robbery attempted, aiding, abetting, "or ready and consenting to aid and abet," the perpetrators or either of them, the jury should find him guilty was proper. Stone v. State, 162 Ark. 154, 258 SW 116 (where the court added: "Indeed, from the nature of the crime it is difficult to see how any one can be present, ready to aid and abet the person actually committing the assault, and yet not be aiding and abetting him. His very presence at the scene of the crime, standing ready to aid and abet the person actually making the assault, would show a participation in it. His presence for that purpose would have a tendency to awe the person assaulted, and, by the mere suggestion of numbers, prevent him from making resistance").

[b] **Instruction held improper.**—Where the evidence showed that the assault occurred in accused's saloon, and that accused, who had never seen the assaulted party before, was seen to strike some one, and, when the scuffle was over, the assaulted party's pocketbook was gone, and there was no evidence as to who took it or of any prior common purpose of the persons committing the assault, a charge that if accused was aiding and abetting in committing the assault, and that the assault was committed with intent to rob, accused would be guilty of assault with intent to rob, was erroneous, as permitting a conviction for assault with intent to rob, although the aiding and abetting by accused may have been simply in the assault. Peo. v. Belton, 160 Mich. 416, 125 NW 386.

[34] See cases infra this note.

[a] **View that prosecution must prove gun loaded.**—An instruction on a trial for an assault with intent to rob being armed with a dangerous weapon, that if the revolver, as used by accused, was the means by which prosecutor was compelled to submit to the robbery, the revolver was shown to be a dangerous weapon, was erroneous in the absence of direct proof that the revolver was loaded, and the jury should have been told what facts will justify them in finding that the revolver was a dangerous weapon. Lipscomb v. State, 130 Wis. 238, 109 NW 986.

[b] **View that defense must prove gun unloaded.**—Where, in a prosecution for assault with intent to rob, under L. § 1919, evidence showed that defendant and codefendant entered the store together with a common intent, and that codefendant pointed a revolver against the body of the proprietor and commanded him to "stick 'em up" and "get into the back room," an instruction that the gun pointed at the proprietor with intent to rob was presumed to have been loaded, and that the presumption, although not conclusive, was for the jury's consideration, was not erroneous, under § 794, since the jury could infer that the gun was loaded, and in any event no prejudice resulted where direct evidence showed that the gun was in fact loaded. State v. Milo, 126 Or. 238, 269 P 225.

[35] Abner v. Com., 210 Ky. 536, 276 SW 513 (recognizing rule); Peo. v. Brockett, 195 Mich. 169, 161 NW 991; Smiley v. State, 87 Tex. Cr. 528, 222 SW 1108.

[a] **Aggravated assault.**—Smiley v. State, 87 Tex. Cr. 528, 222 SW 1108, 1109.

[b] **Simple assault.**—Peo. v. Brockett, 195 Mich. 169, 161 NW 991 (instruction insufficient).

[36] Peo. v. Fitts, 4 Cal. A. 432, 91 P 536; Abner v. Com., 210 Ky. 536, 276 SW 513.

[a] **Assault and battery.**—Abner v. Com., 210 Ky. 536, 276 SW 513.

[b] **Simple assault.**—Peo. v. Fitts, 4 Cal. A. 432, 91 P 536.

[37] See Criminal Law §§ 2580-2605.

[38] See cases infra this note.

[a] **Form held correct.**—State v. Heady, 316 Mo. 111, 289 SW 564, 565.

[b] **Omission of specific finding as to intent** is not necessarily fatal. Peo. v. Kuhn, 291 Ill. 154, 125 NE 882 (finding of guilty in manner and form charged is sufficient where, under the pleadings and evidence, it should be construed as a finding of intent).

[39] See supra §§ 204-215; and see Criminal Law §§ 3186-3257.

[40] See cases infra this note.

[a] **Conformity to information.**—Where information was sufficient to charge assault with intent to rob under Rev. St. (1919) § 3263, but insufficient under § 3262 relating to assault with intent to kill, fixing punishment at thirty years was error, maximum punishment under § 3263 being five years. State v. McFadden, 309 Mo. 112, 274 SW 354.

[b] **Double punishment.**—"The assault or violence in the robbery case being an essential element or ingredient of the offense, and constituting an important and material part of that offense, as it does in the offense of assault with intent to commit murder, and having been once punished in the robbery case as a material part thereof, it cannot be again punished, as it would be if the judgment below [for an assault during the robbery with intent to commit murder] were allowed to stand." Wilcox v. State, 6 Lea (Tenn.) 571, 574, 40 AmR 53.

[c] **Statute held in force.**—St. § 1159, providing punishment for robbery, held still in force as against contention that there was no statute in force for punishing robbery, and hence could be no offense of assault with intent to rob. Abner v. Com., 210 Ky. 536, 276 SW 513 (further stating that the opinion in Gibson v. Com., 204 Ky. 748, 265 SW 339, in so far as contra, had been withdrawn).

[d] **Use of mortality tables in computing sentence.**—"After the return of the verdict the court announced its conclusion that the only punishment that could be inflicted upon appellant was imprisonment in the state prison for one-half of his natural life; and thereupon, under objection and exception of appellant, it was shown that under the American Tables of Mortality the expectation of life of appellant was 38 years, and judgment was rendered for the exact half of that time, to wit, 19 years. We are satisfied that, for obvious reasons, a court, for the purpose of a judgment of imprisonment in a criminal case, cannot take as a basis for such judgment the expectation of life upon which insurance companies calculate their policies, and which is founded on what vital statistics show to be the average expectation. What the actual life of a particular person would be, and what would be the half of it, cannot be known; and, if one-half of the life of the appellant were the only punishment prescribed for the crime of which he was convicted, such punishment would be too vague and indefinite to be possible of enforcement, and no judgment would be rendered against him." Peo. v. Burns, 138 Cal. 159, 69 P 16, 70 P 1087, 1088, 60 LRA 270.

VIII. BANK ROBBERY[41]

[§ 242] **A. Nature and Elements of Crime.** In some jurisdictions there are statutes creating and punishing the offense of entering a bank or other depositary with intent to rob such institution, and doing violence therein.[42] Such statutes do not denounce the crime of robbery,[43] but create a new and distinct offense.[44] Under statutes making it an offense to enter a bank and intimidate its employees with intent to rob,[45] the felony created lies in the violence in or against the bank or other institution,[46] coupled with the intent to steal its money or property,[47] and it is not essential to the commission of the offense that there should be an actual robbery.[48]

Word "bank" as used in such a statute has been held broad enough to include an unincorporated institution.[49]

Validity of statutes. Statutes of this character have been held valid.[50]

[§ 243] **B. Prosecution—1. Indictment or Information.** Under statutes of this character,[51] the pleader is not remitted to the common-law definition of "robbery,"[52] and the indictment or information need not contain allegations that property was taken from the person or presence of the individual assaulted,[53] nor that it was taken by force.[54] An allegation of the intent necessary under the statute may be inferred from allegations of facts equivalent thereto.[55]

Presence of money or property. In a prosecution under a statute making it a felony to enter a bank and use violence with intent to take or carry away its money or property,[56] it need not be averred in the information that there was any money or property in the bank.[57]

Corporate capacity of bank need not be alleged[58] nor proved.[59]

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[41] **Under common law and statutes relating to robbery generally** see supra §§ 12-54.

[42] See statutory provisions.

[43] Peo. v. Quigley, 217 Mich. 213, 185 NW 787.

[44] Peo. v. Quigley, supra.

[a] **Illustration.**—A statute providing that whoever, with the intent to commit the crime of larceny, or any felony, shall injure or wound, or shall put in fear any person for the purpose of stealing from any building, bank, safe, or other depositary of money, bonds, or other valuables, shall, whether he succeeds or fails in the perpetration of such larceny or felony, be punished, etc., does not undertake to denounce the common-law crime of robbery, but on the contrary creates a new offense. Peo. v. Quigley, 217 Mich. 213, 185 NW 787.

[45] See statutory provisions.

[46] Smith v. State, 109 Nebr. 579, 584, 191 NW 687.

[47] Smith v. State, supra.

[48] Smith v. State, supra.

"The actual securing of any money or property is not of the essence of the charge. The felony created by the statute lies in the violence of or against the bank and in the intent to steal, take or carry away." Smith v. State, supra.

[49] State v. Wagner, 202 Iowa 739, 210 NW 901.

[a] **Legal existence of incorporated banking institution is not essential element** of the crime of entering a bank with intent to rob, defined in Code (1924) § 13002, since "bank" or "banking association" as used in such statute includes any institution doing a general banking business within the meaning of "bank," which is an institution which receives money of others on general deposit, makes loans and discounts, deals in notes and bills of exchange, and otherwise transacts the general business of banking, in view of § 9151. State v. Wagner, 202 Iowa 739, 210 NW 901.

[50] State v. Eaton, 171 Minn. 158, 213 NW 735; State v. Colcord, 170 Minn. 504, 212 NW 894; Smith v. State, 109 Nebr. 579, 191 NW 687.

[a] **Illustration.**—A statute making it a felony to enter a bank in a building and do violence therein with intent to steal, take, or carry away any of its property is valid. Smith v. State, 109 Nebr. 579, 191 NW 687, 688 ("Error is assigned because . . . the law under which the prosecution proceeded is what counsel for the defense terms 'confusion's masterpiece,' and of no effect. The act is certainly a bunglesome place of English. It is as follows: 'That whoever enters any building occupied as a bank, depository or trust company and by violence or by putting in fear any person or persons in charge of or connected with said bank, depository or trust company with intent to take, steal or carry away any of the money, goods, chattels or other property belonging to or in the care, custody or control of said bank, depository or trust company shall be deemed guilty of a felony and on conviction thereof shall be confined in the state penitentiary not less than ten nor more than twenty-five years.' Comp. St. 1922, § 9622. Ill drawn as the statute is, its meaning may thus far be deduced with certainty, i. e., he who enters a bank and does violence, with intent to steal, take or carry away any money or property belonging to it or under its care or control, shall be deemed guilty of a felony. Plainly also it includes as guilty of a felony the person who enters a bank and puts in fear any person in charge thereof or therewith connected, with such intent").

[51] See supra § 242.

[52] Peo. v. Quigley, 217 Mich. 213, 185 NW 787.

[a] **While retaining some elements of common-law robbery,** such a statute does not remit the pleader to the common-law definition of what constitutes robbery. Peo. v. Quigley, 217 Mich. 213, 185 NW 787.

[b] **Form of information held sufficient.**—Peo. v. Quigley, 217 Mich. 213, 185 NW 787.

[53] Peo. v. Quigley, supra.

"This statute does not make it necessary to charge that the property was taken from the person of the party assaulted, but only from any building, bank, safe, or other depository of money, bonds, or other valuables, and accomplished by confining, maiming, injuring, or wounding, or attempting to do so, or putting in fear any person who might interfere with the plan. Such person so put in fear or assaulted might be a patrolman on the street or a customer in the bank or one just entering or leaving the bank, provided the assault was made in the perpetration of the offense." Peo. v. Quigley, supra.

Necessity of such allegation in indictment for robbery see supra § 100.

[54] Peo. v. Quigley, 217 Mich. 213, 185 NW 787.

Necessity of such allegation in indictment for robbery see supra § 105.

[55] Peo. v. Quigley, 217 Mich. 213, 185 NW 787, 788.

"It would seem that an intent to commit a larceny or the purpose of stealing from a bank sufficiently appears charged when it is charged that there was a felonious assault and as a part thereof a felonious stealing and robbery from the bank depository, and such is the law." Peo. v. Quigley, supra.

"It is said that the intent of the assault is not averred nor the purpose thereof, as required by the statute. The statute requires an intent to commit the crime of larceny, or any felony, or an assault or putting in fear for the purpose of stealing from any building, bank, safe, or other depository of money, bonds, or other valuables. An intent is therefore involved. Is such intent sufficiently charged in the information? To hold that an information charging two men with entering a bank and there feloniously assaulting the cashier and putting him in bodily fear and danger of his life, and then and there that they did, by force and violence and against the will of the cashier, feloniously rob and carry away $60,000 in money, bonds, and securities from the bank, safe, and depository, does not charge that the assault was made with intent to commit a larceny or felony, or for the purpose of stealing from the bank, would offend common sense." Peo. v. Quigley, supra.

[56] See statutory provisions.

[57] Smith v. State, 109 Nebr. 579, 191 NW 687.

[a] **Reason for rule.**—Since the felony created by Comp. St. (1922) § 9622 lies in the violence of or against a bank, coupled with the intent to steal, take, or carry away its property, it is not necessary to allege in the indictment that there was any money or property in the bank to be taken away. Smith v. State, 109 Nebr. 579, 191 NW 687.

[58] State v. Wagner, 202 Iowa 739, 210 NW 901.

[§ 244] **2. Evidence.** General rules[60] govern as to the admissibility[61] and sufficiency[62] of evidence in prosecutions for the statutory offense of bank robbery.[63]

IX. ROBBERY WITH HOMICIDE[64]

[§ 245] **A. Nature and Elements of Crime.** In the Philippines, the complex and distinct crime of "robbery with homicide" consists in a robbery accompanied by a contemporaneous,[65] but not a subsequent,[66] homicide.[67]

[§ 246] **B. Persons Liable.** All persons present and participating in any way with guilty intent are liable for the crime of robbery with homicide.[68]

[§ 247] **C. Prosecution and Punishment—1. Complaint.** A complaint for robbery with homicide must charge each of the component offenses with the precision essential to a charge of them separately.[69] In accordance with general rules as to the allegation of the name of a person necessary to a description of the offense,[70] a complaint for robbery with homicide should either allege the name of the victim of the offense,[71] or, if such be the fact, contain an allegation that his name is unknown.[72]

[§ 248] **2. Issues, Proof, and Variance.**[73] To convict defendant of robbery with homicide there must be proof of both of the component offenses.[74] Where defendant is charged with robbery of one person, he cannot be convicted of robbery with homicide if the evidence shows that he robbed a different person.[75]

[§ 249] **3. Conviction of Included Offense.**[76] Under a complaint charging robbery with homicide, defendant may be convicted of either of the constituent simple crimes.[77]

[§ 250] **4. Evidence.** General rules[78] apply with respect to weight and sufficiency of evidence.[79]

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[59] State v. Wagner, supra.

[a] **Allegation surplusage.**—An allegation of the corporate capacity of a bank in an indictment for entering a bank with intent to rob, under Code (1924) § 13002, need not be proved, but may be rejected as surplusage, in view of § 13749, since such capacity is not an essential element of the crime, and the allegation was unnecessary, and the rule that the state must prove matters alleged with needless particularity of description is inapplicable. State v. Wagner, 202 Iowa 739, 210 NW 901.

[60] **Admissibility** see Criminal Law §§ 1034-1558.

Weight and sufficiency see Criminal Law §§ 1559-1999.

[61] See cases infra this note.

[a] **Evidence held admissible.**—(1) "The Anoka National Bank was robbed on December 8, 1925. There is evidence that four persons acting in concert participated. Some of the witnesses were permitted to say what was said and done by others than defendant at the time, and to identify one Salmey who was convicted in the Colcord case, though they did not identify the defendant. There was evidence that immediately before the robbery, on a street near the bank, Salmey and the defendant were together, and that they came out of the bank together. This evidence justified proof that Salmey was in the bank whether or not the witness identified the defendant. And what was said by any of those engaged in the joint enterprise was on familiar principles competent." State v. Eaton, 171 Minn. 158, 159, 213 NW 735. (2) "Defendants, accused of bank robbery in Minnesota, were apprehended about two months later in Louisiana. When arrested they had three guns, ammunition, nitroglycerin, dynamite caps, fuse, and other articles. Evidence of the stuff so in their possession was properly admitted." State v. Colcord, 170 Minn. 504, 212 NW 894.

[62] See cases infra this note.

[a] **Evidence held sufficient to support conviction.**—(1) Generally. State v. Fadler, 126 Kan. 664, 271 P 283; Smith v. State, 109 Nebr. 579, 191 NW 687. (2) To show defendant's connection with, or participation in, the crime. State v. Harding, 204 Iowa 1135, 216 NW 642 (unexplained possession of money stolen from bank); State v. Eaton, 171 Minn. 158, 213 NW 735 (as against claim of alibi); Regan v. State, 116 Nebr. 723, 218 NW 737 (as against claim of alibi). (3) To show guilty knowledge of accessory after the fact. Heyen v. State, 114 Nebr. 783, 210 NW 165.

[b] **Evidence held insufficient to support conviction.**—State v. Wallis, (N. M.) 283 P 906 (circumstantial evidence held insufficient to show defendant's participation).

Evidence sufficient to convict of robbery of bank punished as ordinary robbery see supra § 166 text and note 95.

[63] **Nature and elements of crime** see supra § 242.

[64] **Homicide committed in course of robbery** see Homicide § 70 text and note 68.

[65] U. S. v. Palmadres, 7 Philippine 120.

[66] U. S. v. Palmadres, supra.

[67] **Rule in robbery with rape** see infra § 252.

[68] U. S. v. Santos, 4 Philippine 189.

[a] **No material part in actual murder.**—"When, as in the present case, the purpose of the crime is robbery, and when in order to consummate the same defendants prepared themselves and arranged for the commission of the crime, beginning with the killing of the victim and ending with the stealing of his effects, thus accomplishing their purpose, all are to be considered principals who, by common consent, resolve upon the commission of the robbery and take part therein intentionally and by overt acts, accompanying the one who does the actual act to the place of the crime and coöperate in the consummation of same, and, finally, taking part in the distribution of the stolen property. They are therefore liable as principals for all the consequences of the punishable acts committed, whether they took any material part in the murder or not." U. S. v. Santos, 4 Philippine 189, 193.

[69] U. S. v. Lahoylahoy, 38 Philippine 330, 334.

[a] **Complaint held sufficient.**—U. S. v. Alabot, 38 Philippine 698.

[70] See Indictments and Informations § 272.

[71] U. S. v. Lahoylahoy, 38 Philippine 330, 334.

[72] U. S. v. Lahoylahoy, supra.

"From the fact that the name of the injured person may, in case of necessity, be alleged as unknown it should not be inferred that the naming of such person, when known, is of no importance. Where the name of the injured party is necessary as matter of essential description of the crime charged, the complaint must invest such person with individuality by either naming him or alleging that his name is unknown." U. S. v. Lahoylahoy, supra.

[73] **Generally** see Indictments and Informations §§ 438-481.

[74] U. S. v. Paddit, 1 Philippine 426.

[a] **Rule applied.**—Where the information charges the complex crime of robbery with homicide, the proof must show beyond a reasonable doubt that a robbery was committed, proof of a homicide alone not being sufficient to support a conviction for this offense. U. S. v. Paddit, 1 Philippine 426.

[75] U. S. v. Lahoylahoy, 38 Philippine 330.

[76] **Generally** see Indictments and Informations §§ 482-530.

[77] U. S. v. Lahoylahoy, 38 Philippine 330, 334; U. S. v. Paddit, 1 Philippine 426.

"Where a complex crime is charged and the evidence fails to support the charge as to one of the component offenses the defendant can be convicted of the other." U. S. v. Lahoylahoy, supra.

[78] See Criminal Law §§ 1559-1999.

[§ 251] 5. **Punishment.** Imposition of the death penalty[80] is justified where the crime is committed at night in the dwelling of the victim.[81] But the death sentence may be reduced to life imprisonment where it appears that the country was in an unsettled condition when the crime was committed and that defendant was a native,[82] or where it appears that there was a homicide but no robbery.[83]

X. ROBBERY WITH RAPE

[§ 252] **A. Nature and Elements of Crime.** In the Philippines, the complex crime of robbery with rape consists in robbery accompanied by rape committed on the occasion of the robbery.[84] It is not necessary to show that the rape was committed prior to,[85] or simultaneously with,[86] the robbery.[87]

En cuadrilla.[88] Commission of robbery in a band does not constitute the crime of robo en cuadrilla if on the occasion of the robbery there is also a rape, as this latter fact changes the offense to the complex crime of robbery with rape.[89]

[§ 253] **B. Persons Liable.** All persons taking part in the commission of the complex crime of robbery with rape are identically liable therefor.[90] Defendants participating in the component robbery but not in the component rape are nevertheless liable for the complex crime of robbery with rape,[91] especially where such defendants, although aware of the circumstances, make neither remonstrance nor material opposition to the rape.[92]

[§ 254] **C. Prosecution and Punishment.** General rules[93] govern as to weight and sufficiency of evidence.[94] Aggravating circumstances include nocturnity,[95] and commission of the offense in the dwelling of the offended parties,[96] and in an isolated part of the country.[97]

***ROCHDALE SYSTEM.** A general term appropriate to any kind of business, store, or other, where the coöperative method[1] is pursued.[2]

ROCHESTER TONIC.[3]

ROCK. [§ 1] **A. In General.** A somewhat indefinite word or term.[4]

[§ 2] **B. As Noun.**[5] A large concrete mass of stony material;[6] a large mass of stony matter.[7] In

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79. See cases infra this note.

[a] **Evidence sufficient** (1) to require conviction of "robbery, with homicide" instead of simple "homicide." U. S. v. Santa Maria, 4 Philippine 635. (2) To support conviction of robbery with homicide committed en cuadrilla and as direct participant. U. S. v. Matinong, 22 Philippine 439.

80. See statutory provisions.

81. U. S. v. Fernandez, 11 Philippine 133.

82. U. S. v. Santa Maria, 4 Philippine 635, 637.

83. U. S. v. Paddit, 1 Philippine 426, 427.

"If the charge had been murder (asesinato) the evidence would have been entirely sufficient to sustain the charge as qualified by alevosia, with the aggravating circumstances of nocturnity, and the sentence of the court to the death penalty might have been sustained, but the charge is for robbery resulting in homicide. After a careful consideration of the testimony we are inclined to believe that the offense of robbery has not been proven beyond a reasonable doubt. No witness saw the taking of the package by the defendants and none of the property has been found in their possession. The property was hidden two weeks before the occurrence; there was no evidence as to the manner in which it was hidden nor whether it remained at the place or was seen there at any time from the time it was placed there two weeks previous to the time of its disappearance." U. S. v. Paddit, supra.

84. U. S. v. Tiongco, 37 Philippine 951.

[a] **Robbery in house followed by subsequent rape** of two residents of the house taken outdoors and raped on the occasion of the robbery constitutes the complex crime of robbery with rape. U. S. v. Tiongco, 37 Philippine 951.

85. U. S. v. Tiongco, supra.

86. U. S. v. Tiongco, supra.

87. **Rule in robbery with homicide** see supra § 245.

88. **"Robo en cuadrilla" defined** see supra § 9.

89. Peo. v. Bretana, 49 Philippine 444, 449.

90. U. S. v. Tiongco, 37 Philippine 951.

91. U. S. v. Tiongco, supra.

92. Peo. v. Bretana, 49 Philippine 444; U. S. v. Tiongco, 37 Philippine 951.

93. See Criminal Law §§ 1559-1999.

94. See case infra this note.

[a] **Evidence sufficient** to support conviction as against claim of alibi. Peo. v. Bretana, 49 Philippine 444.

95. Peo. v. Bretana, supra; U. S. v. Tiongco, 37 Philippine 951.

96. Peo. v. Tiongco, supra.

97. Peo. v. Bretana, 49 Philippine 444, 450; U. S. v. Tiongco, 37 Philippine 951.

"In the application of the penalty there should be taken into consideration the aggravating circumstances of nocturnity and the fact that it was committed in an uninhabited place, and in band, the last not being a qualifying circumstance of robbery with rape, on account of said complex crime not being included in the provision of article 504 of the same Code, the same not being offset by any mitigating circumstance; wherefore the penalty provided by law must be imposed in its maximum decree, or cadena perpetua." Peo. v. Bretana, supra.

1. See Coöperative 13 C. J. p 932.

2. Warren Co. Co-op. Assoc. v. Boyd, 171 N. C. 184, 88 SE 153, 155.

[a] **"The name was taken** from the city of Rochdale, Lancaster, England, said to be the birthplace of the co-operative movement as a system of conducting business." Warren Co. Co-Op. Ass'n v. Boyd, 171 N. C. 184, 88 SE 153, 155 [cit Encyclopædia Brit.].

3. See Beer 7 C. J. p 1924 note 49 [f].

4. Chapman v. Lepotsky, 23 Oh. Cir. Ct. N. S. 90, 92.

5. **Rock:**

As deadly weapon see Homicide § 74 text and note 98.

As instrument see Instrument 32 C. J. p 945 note 63 [b].

Crushing and grinding see Manufactures § 55 note 90 [a].

Flint see Solid [36 Cyc 511].

Solid [36 Cyc 511].

6. Webster D. [quot Okey v. Moyers, 117 Iowa 514, 515, 91 NW 771].

7. Webster D. [quot Chapman v. Lepotsky, 23 Oh. Cir. Ct. N. S. 90, 92].

[a] **"Stone weighing two pounds** cannot properly be styled a 'rock.'" State v. Seamons, 1 Greene (Iowa) 418, 420.

*By CHARLES REZNIKOFF (Rochdale System— Rotary inclusive).

geology, a comprehensive word,[8] any natural deposit or portion of the earth's crust, whatever be its hardness or softness;[9] every layer which forms a portion of the solid crust of the earth.[10] In its popular acceptation, only the solid portions of the earth;[11] the stony matter of the earth's crust;[12] the stratum or formation of stone or other fixed hard material underlying and supporting the loose material of which the surface of the earth is ordinarily composed.[13] In ordinary language, the stony matter which constitutes the earth's crust as distinguished from clay, gravel, sand, peat, etc.[14] Technically, "rock" is a mixture of mineral substances, except when it is one species, in a bed or mass;[15] a mass of material matter composed of one or more, usually of several, kinds of minerals, having as a rule no definite external form, and liable to vary considerably in chemical composition.[16] The word includes both stratified and loose rock.[17]

[§ 3] **C. As Adjective,** the term may be employed.[18]

Rock excavation.[19] The excavation of all the diverse qualities of what is properly called "rock," encountered in the progress of the work.[20]

Rock work.[21] In engineering parlance, a flexible term,[22] applied to loose or solid rock.[23] However, the term is not usually applied to stones of smaller dimension than a cubic yard.[24]

Other phrases: "Rock crystal,"[25] "rock formation,"[26] "rock in place,"[27] and "rock oil."[28]

ROD.[29]

RODEO BOUNDARIES.[30]

ROGATIONES, QUÆSTIONES, ET POSITIONES DEBENT ESSE SIMPLICES.[31]

ROGATIO TESTIUM. In the case of a nuncupative will, a formal calling of witnesses to bear witness.[32]

ROGATORY.[33]

ROGUE.[34] A French word which in that language signifies proud, arrogant.[35] In English criminal law, an idle and disorderly person; a trickster; a wandering beggar; a vagrant or vagabond.[36] In some of the ancient English statutes "rogue" means an idle, sturdy beggar.[37]

Phrase: "Rogue and vagabond."[38]

ROGUES' GALLERY.[39] A collection of portraits of persons arrested as rogues or criminals, for the use of the police.[40]

ROISTERER. Various definitions of the word are

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8. U. S. v. Cooke, 207 Fed. 682, 686.

9. Webster D. [quot Chapman v. Lepotsky, 23 Oh. Cir. Ct. N. S. 90, 92].

10. Okey v. Moyers, 117 Iowa 514, 515, 91 NW 771.

11. Okey v. Moyers, supra.

12. Webster D. [quot Chapman v. Lepotsky, 23 Oh. Cir. Ct. N. S. 90, 92].

13. Okey v. Moyers, 117 Iowa 514, 515, 91 NW 771.

[a] **Soapstone included.**—Okey v. Moyers, 117 Iowa 514, 515, 91 NW 771 ("it would seem such formation was within definition of the court"). "Soapstone" [36 Cyc 499].

14. Encyclopedic D. [quot Chicago v. Duffy, 117 Ill. A. 261, 277].

[a] **Shale included** in term as used in the phrase "as 'rock' is generally used." Schlitz v. Akers, (Cal.) 292 P 463, 464.

[b] **"Oil field parlance."**—"A petroleum engineer . . . testified that technically the term 'rock' includes 'shale or stone,' but in 'oil field parlance' the term refers to hard formations, usually in large bodies, as, for instance, 'granite;' and further, that 'shale is not considered rock by oil people.'" Schlitz v. Akers, (Cal.) 292 P 463, 464.

15. Standard D. [quot Okey v. Moyers, 117 Iowa 514, 515, 91 NW 771].

16. Encyclopædia Brit. [quot Okey v. Moyers, supra].

[a] **Constituents** of rock are mineral, although they may be organic in origin. Standard D. [quot Okey v. Moyers, 117 Iowa 514, 515, 91 NW 771].

17. Mills v. Continental Bag, etc., Co., 15 OntWN 131, 132 ("according to the dictionaries").

[a] **Boulders included,** as distinguished "from stones or small boulders such as were buried." Mills v. Continental Bag, etc., Co., 15 OntWN 131, 132.

"Boulder" see 9 C. J. p 143.

18. See cases infra notes 19–24.

19. See Rock Work infra text and notes 22–24.

20. Drhew v. Altoona City, 121 Pa. 401, 421, 15 A 636, 639 [quot Mills v. Continental Bag, etc., Co., 15 OntWN 131, 132].

[a] **Applies** to all rock tunnel and tunnel in mixed earth and rock. Chicago v. McKechney, 205 Ill. 372, 452, 68 NE 954, 982. See Rock Work infra text and notes 22–24.

21. See Rock Excavation supra text and note 19.

22. Urbana Constr. Co. v. Webster County, etc., Joint Drain. Dist., 169 Iowa 351, 151 NW 385.

23. Urbana Constr. Co. v. Webster County, etc., Joint Drain. Dist., supra.

24. Urbana Constr. Co. v. Webster County, etc., Joint Drain Dist., supra.

25. See Precious Stone 49 C. J. p 1320 note 51 [g].

26. Schlitz v. Akers, (Cal.) 292 P 463, 464 (includes shale).

"Formation" 26 C. J. p 983.

27. U. S. v. Cooke, 207 Fed. 682, 686 (in construction contract, "a far more restricted meaning" than "rock," and includes neither hardpan nor cement gravel).

"In place" see Mines and Minerals § 39.

28. See Petroleum 48 C. J. p 1053; Mines and Minerals § 12.

[a] **Kerosene** is a rock oil. Buchanan v. Exchange F. Ins. Co., 61 N. Y. 26, 29. "Kerosene" 35 C. J. p 900.

29. **As deadly weapon** see Homicide § 74 text and note 97.

"Brake rod" 9 C. J. p 318.

"Bridle rods" 9 C. J. p 499.

30. See Boundaries § 199 note 18 [a].

31. A maxim meaning "Demands, questions, and answers ought to be simple." Morgan Leg. Max. [cit Hob. p 143].

32. Godfrey v. Smith, 73 Nebr. 756, 766, 103 NW 450. See Wills [40 Cyc 1137].

33. **Letters rogatory** see Depositions § 1 text and note 16; § 137.

34. See Rogues' Gallery post; Vagrancy [39 Cyc 1108].

As epithet see Libel and Slander § 138.

35. Bouvier L. D.

36. Black L. D. [cit 4 Blackstone Comm. p 169].

"Beggar" 7 C. J. p 1030.

"Disorderly person" 18 C. J. p 1277.

"Vagabond" [39 Cyc 1107].

"Vagrant" see Vagrancy [39 Cyc 1108].

37. Bouvier L. D.

[a] **Tinkers or peddlers** who traveled up and down the country and were rogues. Cockaine v. Hopkins, 2 Lev. 214, 83 Reprint 525.

38. Hawke v. Hulton, [1909] 2 K. B. 93 (construing the Lotteries Act of 1823 "wholly inappropriate," as applied to a limited company).

39. **"Rogue"** ante.

40. Webster New Int. D. See Mabry v. Kettering, 92 Ark. 81, 84, 122 SW 115; Schulman v. Whitaker, 115 La. 628, 630, 39 S 737 (causing physical measurements and photographs to be taken and placed in the rogues' gallery is one of the well recognized methods adopted by all police authorities in large cities for pre-given in the dictionaries, all unfavorable.[41]

ROLL. [§ 1] **A. As Noun.**[42] Strictly and technically, a schedule of parchment, which may be turned up with the hand in the form of a pipe or tube, sheet to sheet, tacked together in such manner that the whole length might be wound up together in the form of spiral rolls.[43]

Rolls. The record or memorials of the judges of the courts of record.[44]

Rolls of citizenship. In a statute relating to Indians, "the last authenticated rolls of each tribe which have been approved by the council of the nations, and the descendants of those appearing on such rolls" and certain others specified who have been lawfully added to the rolls.[45]

[§ 2] **B. As Verb.**[46] To revolve by turning over;[47] to press or level.[48]

In police circles commonly understood as meaning to rob.[49]

Rolled-up plea. In the English authorities the name applied to a defense to an action of libel.[50]

Rolling. Moving or acting like one who, or that which rolls; having a turnover.[51] Phrases in which "rolling" has been employed are: "Due rolling,"[52] "parallel rolling,"[53] "rolling credit,"[54] "rolling [sale] while in transit,"[55] "rolling stock,"[56] and "rolling store."[57]

[§ 3] **C. As Adjective,** the word may be employed.[58]

Roll machine. A machine used in woolen manufacturing.[59]

ROLLER.[60]

ROLLER MILL.[61]

ROLLING STOCK.[62] A definite and precise term, as to the scope of which there can be no misunder-

venting and suppressing crime). See also Arrest § 73; Criminal Law § 1104.

41. State v. Smith, 125 N. C. 615, 626, 34 SE 235.

"There are no harmless roisterers. That species of roisterer, if it ever existed, became extinct before the dawn of history." State v. Smith, supra (per Douglass, J., concurring).

[a] **From the old French** "rusterer," meaning "ruffian." State v. Smith, 125 N. C. 615, 626, 34 SE 235 [cit Century D.].

42. **Roll:**
Assessment see 5 C. J. p 821; Municipal Corporations §§ 3140–3143; Schools and School Districts [35 Cyc 1022]; Taxation [37 Cyc 1046].
Judgment see Judgments §§ 223–239.
Of tribal membership see Indians §§ 30, 31.
"Phony roll" 48 C. J. p 1055.

43. Bouvier L. D. [quot Colman v. Shattuck, 2 Hun (N. Y.) 497, 502].

44. McCahill v. Equitable L. Assur. Soc., 26 N. J. Eq. 531, 536 [quot 1 Coke Inst. p 260].

45. Act June 7, 1897 (U. S. St. at L. c 3). See U. S. v. Wildcat, 244 U. S. 111, 37 SCt 561, 563, 61 L. ed. 1024; Rowe v. Sartain, (Okl.) 230 P 919, 921; Halsell v. Beartail, (Okl.) 227 P 392, 394.

46. **"To play" synonymous** see Indictments and Informations § 181 note 30 [a] (2).

47. Webster New Int. D.

48. Webster New Int. D.

"Cold-rolled" 11 C. J. p 958.

49. Lasecki v. State, 190 Wis. 274, 208 NW 868, 869.

50. **Comment and criticism** see Libel and Slander §§ 276–294, 376.

[a] **Speaking of pleas of justification and fair comment** (1) Scrutton, L. J., said: "Unfortunately some years ago the two pleas were apparently rolled into one, and since then there has been much difference of opinion in the Court of Appeal whether that rolled up plea was a plea of justification coupled with a plea of fair comment, or was a plea of fair comment only." Agar Khan v. Times Pub. Co., [1924] 1 K. B. 675, 682 [quot Foley v. Press Pub. Co., 226 App. Div. 535, 235 NYS 340, 350]. (2) Since decided, however, to be a plea of fair comment only. The term, "rolled-up" plea is a misnomer based on a misconception of the plea; "it has been sometimes treated as containing two separate defenses rolled into one, but it in fact raises only one defense, that being the defense of fair comment or matter of public trust. The averment that the facts were truly stated is merely to lay the necessary basis for the defense on the ground of fair comment. This averment is quite different from a plea of justification of a libel on the ground of truth, under which the defendant has to prove not only that the facts are truly stated but also that any comments upon them are correct." Sutherland v. Stopes, [1925] A. C. 47, 62, 63 (per Viscount Finlay) [quot Foley v. Press Pub. Co., supra, and foll Barnes v. Sykes, (Man.) [1926] 3 WestWkly 476, 1926 Can. Ann. Dig. 242]. See Riddell, J. A., in Boys v. Star Printing, etc., Co., 60 Ont. L. 592, 600, [1927] 3 DomLR 847 ("there is a well settled form of plea of fair comment which in my generation at the Bar was in this province called the 'double plea' and more recently from its use in the leading cases of Sutherland v. Stopes, [1925] A. C. 47, the 'rolled up plea.' ").

[b] **Form.**—"That all the facts stated in the alleged libel are true, that there remains in the libel over and above all statements of fact certain expressions of opinion, which standing alone would be libellous but that those expressions of opinion when related to the facts were fair comment, and that, therefore, the expression of opinion was as fully justified as the statement of fact. That this plea is difficult of interpretation and even more difficult of application to specific situations is apparent upon a rendition of the English authorities." Foley v. Press Pub. Co., 226 App. Div. 535, 235 NYS 340, 350.

51. Webster New Int. D.

52. Witherow Steel Corp. v. Donner Steel Co., 31 F. (2d) 157, 160 (in the manufacture of automobile axles or shafts, "any rolling in which there is a variation in the contour of at least one of the two grooves of the rolls. In die rolling a round bar, uniform grooves are graved or cut into the periphery of the roll or rolls, one ordinarily disposed above the other in their operations").

53. Witherow Steel Corp. v. Donner Steel Co., supra (in the manufacture of automobile axles or shafts, "a known method of rolling a hot metal bar of uniform cross-sectional size and form between a pair of smooth or grooved rolls for reducing its thickness and altering its shape").

54. Tobler v. Willis, 59 Tex. 80, 85, 86 ("the meaning of the term 'rolling credit for three years,' within a given amount, according to the mercantile usages of trade in Galveston, is that where purchases are made on sixty days' time, from time to time, under 'a credit for' three years for $3000, that the purchaser would not have the right to continue to purchase up to the given amount, unless upon paying the overdue accounts; but that the vendor would have the right to refuse further sales upon default of purchaser to pay overdue accounts promptly, notwithstanding the stipulation for 'rolling credit for three years up to a given amount' ").

55. Vaccaro v. Farris, 92 W. Va. 655, 115 SE 830, 832 (sale of a carload of bananas).

56. See Rolling Stock post.

57. See Rolling Store post.

58. See Elliott v. Secor, 60 Mo. 163, 164.

59. Elliott v. Secor, supra ("according to . . . men of experience in woolen manufacturing, a 'set of carding machines,' includes three pieces, one 'first breaker,' one finisher and a condensor. A 'roll machine' consists of one first breaker and a finisher. The latter is chiefly used for making custom rolls, and is generally called a first breaker and finisher, and sometimes called a roll machine").

60. See Dead Roller 17 C. J. p 1153.

61. See Mills § 12.

62. **Rolling stock:**
As equipment see Railroads §§ 481, 979–1005; Street Railroads [36 Cyc 1457].
As personal property see Property § 36 text and note 53.
Included in:
  "Equipment" 20 C. J. p 1301.
  "Railroad" see Railroads § 1.
Not included in:
  "Appendage" 4 C. J. p 1374 note 13 [d].
  "Appurtenances" see Railroads § 673 text and note 9.
  "Local property" see Local 38 C. J. p 129.
Liability for condition of see Carriers §§ 89–99, 1377, 1378; Master and Servant §§ 495–504.
Mortgage of see Railroads §§ 668, 681.

standing,[63] embracing the movable property belonging to a railroad.[64] The term implies the reverse of annexation and a permanent fixture.[65]

Phrases: "Railroad or street railway stock,"[66] and "rolling stock, plant and appliances."[67]

ROLLING STORE. By statute, a store on a truck or motor vehicle carrying stocks of groceries or other goods and selling the same to the public.[68]

ROLL-SET. A term employed in the manufacture of automobile axles or shafts, which "implies spacing and adjustment of the rolls to enable the exuding metal fin, overfill, or flash to spread sidewise of the groove."[69]

ROMAN ADOPTION.[70]

ROMAN CATHOLIC.[71] A Christian who admits the authority of the pope.[72]

ROMAN CENSUS. A numbering of the people with a valuation of their fortunes.[73]

ROMAN LAW.[74] In a general sense, comprehends all the laws which prevailed among the Romans, without regard to the time of their origin, including the collections of Justinian, now generally denominated the civil law.[75]

RONDO.[76]

ROOF.[77] The cover of a building.[78]

Adjectively, as in "roof garden."[79]

ROOFING. The material for a roof.[80]

ROOM.[81] A familiar word,[82] not without some considerable varieties of meaning.[83] It has been

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Synonymous with "rolling plant" see Plant 48 C. J. p 1220 note 31.
Taxation of see Commerce § 133; Taxation [37 Cyc 845].

[63] San Francisco, etc., R. Co. v. Stockton, 149 Cal. 83, 84 P 771, 774.

[64] Ohio, etc., R. Co. v. Weber, 96 Ill. 443, 448; Great Northern R. Co. v. Flathead County, 61 Mont. 263, 202 P 198, 200.

[a] **It comprises** "such property as in its ordinary use is taken from one part of the line to another, such as cars, locomotives, and their attachments and usual accompaniments." Ohio, etc., R. Co. v. Weber, 96 Ill. 443, 448 [quot Great Northern R. Co. v. Flathead County, 61 Mont. 263, 202 P 198, 200].

[b] **Includes:** (1) A narrow gauge locomotive used in moving operations. Black Diamond Coal Mining Co. v. Glover Mach. Works, 212 Ala. 654, 103 S 853. (2) Locomotives, flat cars, box cars, logging trucks, hand cars, push cars, coaches, cabooses, and coal cars may be denominated "rolling stock" of a railroad. Flanagan Bank v. Graham, 42 Or. 403, 71 P 137, 141.

[c] **Of street railroads,** their rolling stock embraces "cars fully equipped for the transportation of passengers or of freight, so far as they are permitted to transport merchandise." Lorain Steel Co. v. Norfolk, etc., R. Co., 187 Mass. 500, 73 NE 646, 648. In general see Street Railroads [36 Cyc 1338].

[65] Beardsley v. Ontario Bank, 31 Barb. (N. Y.) 619, 635.

[66] Lorain Steel Co. v. Norfolk, etc., R. Co., 187 Mass. 500, 73 NE 646, 648.

[67] Per Osler, J. A., in Toronto R. Co. v. Toronto, 6 Ont. L. 187, 193 (construing the statute, "the general words plant and appliances, which follow the particular specific term 'rolling stock' ought in my opinion to be read as restricted to the same genus as the latter, the whole having the meaning of rolling stock, rolling plant and appliances, such as tools in connection with or belonging to such stock").

[68] Acts (1923) c 75 § 4 [Hill Co. v. Whitice, 149 Tenn. 168, 258 SW 407].

[a] **Description of "rolling store."**—"It is a miniature store, stocked with all kinds of merchandise usually carried in a grocery store, placed on an automobile truck, so that the store can be moved from house to house, and the merchandise sold therefrom the same as it would be sold from a store at a fixed location. The vehicle in question is about 16 feet long by 6 feet wide, and has an aisle down the center for the use of the customers. The scheme of the business is to give purchasers cash and carry prices at their doors." Erwin v. Omaha, 118 Nebr. 331, 224 NW 692, 693.

[b] **In category of "peddling."**—Erwin v. Omaha, 118 Nebr. 331, 224 NW 692, 694. "Peddle" 48 C. J. p 778.

[c] **"Traveling store" synonymous.**—See Acts (1923) c 75 § 4 [quot Hill Co. v. Whitice, 149 Tenn. 168, 258 SW 407].

[69] Witherow Steel Corp. v. Donner Steel Co., 31 F. (2d) 157, 161.

[70] See Adoption § 2.

[71] **Roman catholic:**
Charities § 27.
Distinguished from:
  "Catholic" 11 C. J. p 33.
  "Protestant" 50 C. J. p 825.
Education see Parent and Child § 7; Schools and School Districts [35 Cyc 820, 1126].
Exemption of property see Municipal Corporations § 2907; Taxation [37 Cyc 940].
Religious Societies 54 C. J. p 1 et seq.

[72] Hale v. Everett, 53 N. H. 9, 55, 16 AmR 82.

[73] Williams' Case, 3 Bland (Md.) 186, 246.

[a] **Nature of census.**—"Although said to have been made every five years, was not always taken at certain intervals; and was sometimes omitted altogether. It does not, however, appear to have been, in fact, an enumeration of all the inhabitants, but was merely a numbering and classing of the citizens of Rome, and of the colonial cities, and, being commensurate with property, power, and taxation, seems to have been, in many respects, more like what, in Maryland, is called an assessment law for the valuation of real and personal property for the purpose of taxing it, than such a census as is directed to be taken by the Constitution of the United States." Williams' Case, 3 Bland (Md.) 186, 246 [cit Adams Rom. Ant. pp 89, 134; Gibbons Decline and Fall of Rome cc 2, 6, 17; Niebuhr Hist. Rome pp 340, 347].

[74] **Cross references:**
Civil Law 11 C. J. p 795.
Law 36 C. J. p 957.
Modern Civil Law 40 C. J. p 1235.
Roman codes see Code §§ 2–7.

[75] Burrill L. D.

[76] See Gaming § 31.

[77] **Roof:**
As used in federal Safety Appliance Act see Master and Servant § 503 note 57.
"Board" 8 C. J. p 1130 note 90 [a].
Demise of see Landlord and Tenant § 631.
Landlord's liability for condition of see Landlord and Tenant §§ 898, 927.

[78] Webster New Int. D. See Candia v. Rubin, 209 App. Div. 357, 204 NYS 590 (construing in a lease, by "roof" only the upper covering of the building intended and not machinery upon it, such as the water tank and pumping system).

[79] U. S. v. Broadmoor Hotel Co., 30 F. (2d) 440, 441 ("any public performance for profit at any roof garden, cabaret, or other similar entertainment" in a revenue act "imports something more than the furnishing by the hotel of attractive and agreeable surroundings and music by an orchestra").

[80] Sylvania v. Hilton, 123 Ga. 754, 760, 51 SE 744, 746, 107 AmSR 162, 2 LRANS 483.

[81] **Room:**
Distinguished from:
  "Apartment" (of room in rooming house) see Rooming House post.
  "Floor" 26 C. J. p 742 note 98 [a].
  "House" 30 C. J. p 472 note 51 [a].
Gaming § 85.
Included in "Building" 9 C. J. p 683 note 70 [j].
Lease of see Landlord and Tenant §§ 631 note 43 [c], 636 note 27 [a].
Mining term see Mines and Minerals § 93.
Place § 1 text and note 72.
Pool see Disorderly Houses § 26; Gaming § 89.
Private residence see Private § 2 note 98 [a].
Public place see Gaming § 92.
Store [36 Cyc 1330].
Synonymous with:
  "Apartment" 3 C. J. p 250.
  "Chamber" 11 C. J. p 227.
  "House" 30 C. J. p 472 text and note 51.
  "Loft" 38 C. J. p 137.
Waiting [40 Cyc 251].
Whole [40 Cyc 929 note 71].

[82] Daniels v. Hudson River F. Ins. Co., 12 Cush. (Mass.) 416, 427, 429, 59 AmD 192.

[83] Daniels v. Hudson River F. Ins. Co., supra.

"Suppose one, in offering a house to be sold or let, should represent that there is a fireplace in every room. Suppose there is a cellar, or an attic, with or without windows, are they rooms? Or suppose a large apart-defined as a single inclosure, separated by partitions or other means from the other parts of a building;[84] a subdivision of a building,[85] or the building itself where the structure contains but one room;[86] space in a building marked off or set apart by a partition;[87] space which has been set apart or appropriated to any purpose.[88] In its broad sense, any space or apartment separated from others by partitions;[89] and in this sense it would include a mere closet,[90] or any small apartment thus separated.[91] "Room" may include a rear porch,[92] but it has been held not to include sleeping quarters in a store, screened from the gaze of customers.[93] The word may apply as truly to a place of great privacy as to a place of public resort.[94]

Phrases: "Room in the dwelling house,"[95] and "room or rooms;"[96] also "building of five rooms,"[97] and "rooms of a dwelling house."[98]

ROOM-AND-PILLAR SYSTEM. In mining parlance, a term synonymous with "pillar-and-stall system."[99]

ROOMER. A lodger.[1]

ROOMING HOUSE.[2] Formulating a definition of "rooming house" has been said to be a dangerous, if not impossible task.[3] However, it has been defined as merely a house or building where there are one or more bedrooms which the proprietor can spare for the purpose of giving lodgings to such persons as he chooses to receive;[4] usually a house where bed-

ment into which the front door opens, used for the double purpose of an entry, and for a sitting room in warm weather, and furnished for that purpose, is it a room within the representation that there is a fireplace in it? Or suppose above stairs, one or more small apartments, capable of being used as a closet or clothes-press, or for a bedroom; would the representation be falsified by showing that either of these divisions of the house had no fireplace in it?" Daniels v. Hudson River F. Ins. Co., supra.

84. State v. Barge, 82 Minn. 256, 260, 84 NW 911, 53 LRA 428.

85. Peo. v. Keller, 96 Misc. 92, 161 NYS 132, 135.

86. Peo. v. Keller, supra.

87. Webster D. [quot Bentley v. Taylor, 81 Iowa 306, 308, 47 NW 58].

88. Webster D. [quot Bentley v. Taylor, supra].

89. Crosby v. Montgomery, 108 Ala. 498, 503, 18 S 723, 726.

90. Crosby v. Montgomery, supra. But see infra text and note 97.

91. Crosby v. Montgomery, supra.

92. Jetsinger v. London Guarantee, etc., Co., 210 Ill. A. 308, 310.

93. Strell v. Zisman, (N. J. Ch.) 136 A 801.

94. Grom v. Peo., 135 Ill. A. 453, 456.

95. White v. White, 16 N. J. L. 202, 31 AmD 232 (a devise of real property so as to bar the wife's right of dower should she neglect to decline the devise within six months after probate, as provided by the New Jersey statute). Election by widow see Wills [40 Cyc 1963].

96. Peo. v. Lupton, 52 Misc. 336, 103 NYS 172, 173 (construing a statute forbidding an open or unlocked door to the "room or rooms" where any liquors are sold or kept for sale during the hours when the sale of liquors is forbidden, the phrase refers to the room or rooms in which liquors are sold or kept for sale, and not to any adjoining room).

97. Crosby v. Montgomery, 108 Ala. 498, 18 S 723, 726 (construing an ordinance fixing water rates the phrase does not include any small apartments prepared and adapted for use as mere pantries, water-closets or bathrooms, but a kitchen would be included. "The use to which it [an apartment] may be applied, alone, will not determine its character. A room comfortable for sleeping purposes might be applied solely to use as a bathroom or pantry. Such use would not destroy its character as a room of the dwelling house, within the meaning of the ordinance. Nor is it any the less a room of the dwelling, if it is permitted to remain vacant and unused for any purpose"). Water-rents and charges see Waters [40 Cyc 796].

98. Crosby v. Montgomery, 108 Ala. 498, 503, 18 S 723 (includes those apartments which are adapted, with more or less convenience, to personal occupation).

99. Marquette Cement Min. Co. v. Oglesby Coal Co., 253 Fed. 107, 109 ("the room-and-pillar or pillar-and-stall system, by the advancing and not the retreating plan").

"Pillar-and-Stall System" 48 C. J. p 1181.

[a] **In mining limestone cement,** the system is described as one that consists in beginning at the mine opening, cutting tunnels or entries in the limestone ledge, and taking off rooms from them, leaving a limestone roof of varying thickness, theoretically sufficient to sustain the overburden when pillars of sufficient size are allowed to remain. Marquette Cement Min. Co. v. Oglesby Coal Co., 253 Fed. 107, 109.

Subjacent support see Mines and Minerals §§ 923–942.

1. Webster New Int. D. See also Lodger 38 C. J. p 136; Rooming House post.

[a] **One renting and living in apartment,** although in a hotel, is not a roomer, within the meaning of a statute providing that for the purpose of an innkeeper's lien, "hotel" shall include inn, rooming house, and eating house. Cedar Rapids Inv. Co. v. Commodore Hotel Co., 205 Iowa 736, 218 NW 510, 511, 56 ALR 1098.

"Guest" see Innkeepers § 9.

"Tenant" see Landlord and Tenant § 1 note 2 [a].

2. **"Common Lodging House"** 12 C. J. p 204.

"Lodging House" 38 C. J. p 137.

3. Cedar Rapids Inv. Co. v. Commodore Hotel Co., 205 Iowa 736, 218 NW 510, 512, 56 ALR 1098.

[a] **New term** "because the existence of such places is recent." Independence v. Richardson, 117 Kan. 656, 232 P 1044, 1046.

4. Independence v. Richardson, supra.

[a] **Not public place** "to which any well-behaved person of means can go and demand lodgings as a matter of right, as he can do at a hotel." Independence v. Richardson, 117 Kan. 656, 232 P 1044, 1046.

[b] **Building operated for several purposes.**—"The same building may undoubtedly be operated as an inn and rooming house, eating house, and apartment house as a single institution and under the same management." Cedar Rapids Inv. Co. v. Commodore Hotel Co., 205 Iowa 736, 218 NW 510, 511, 56 ALR 1098.

[c] **"Apartment house" distinguished.**—Cedar Rapids Inv. Co. v. Commodore Hotel Co., 205 Iowa 736, 218 NW 510, 512, 56 ALR 1098 ("a well understood difference recognized by the statutes"). "Apartment house" see Apartment 3 C. J. p 250.

[d] **"Apartment" distinguished from room in rooming house.**—There is a well understood difference, recognized by the statutes. "It is not ordinarily expected that housekeeping, light or heavy, or the preparation or enjoyment of meals, will take place . . . [in a rooming house], or that the room will be used to any considerable extent as a sitting room. An apartment . . . is usually looked upon as a home. It may consist of a single main room, but its own term implies that housekeeping, including necessary accumulation and preparation of food and cooking will be conducted there. It is frequently provided with separate or common laundry facilities and usually with separate accommodations for toilet and bathing. The room in a rooming house is usually in the immediate possession (when the occupant is not there), and dependent on the care of the proprietor. The apartment may be furnished with maid service, but it is understood to be in exclusive occupancy and use of the tenant as a sitting room and a home and for household purposes as well as for sleeping purposes." Cedar Rapids Inv. Co. v. Commodore Hotel Co., 205 Iowa 736, 218 NW 510, 512, 56 ALR 1098. See also infra this note [f]. "Apartment" 3 C. J. p 250.

[e] **"Boarding house" distinguished.**—"The only material difference between a boarding house and a rooming house is that a boarding house furnishes meals." Independence v. Richardson, 117 Kan. 656, 232 P 1044. "Boarding house" 8 C. J. p 1132.

[f] **Keeping of rooming house and proprietor of apartment house distinguished.**—Although technically distinguishing between them is "a dangerous, if not impossible, task," "generally speaking . . . the rooming house proprietor furnishes bedrooms or sleeping accommodations used principally as a place to rest, sleep, for toilet and dressing." Cedar Rapids Inv. Co. v. Commodore Hotel Co., 205 Iowa 736, 218 NW 510, 511,

rooms as such are furnished.[5] By statute, the word may be included in "hotel."[6]

ROOSTER. In logging parlance, the connecting appliance between the tender of the engine and the first car of a logging train.[7]

ROOT.[8] Popularly, any subterranean part of a plant.[9]

Phrase: "From the grass roots down."[10]

Adjectively used, as in "root beer."[11]

ROOT BEER. A drink containing the extracted (not expressed) juices of various roots, as of dock, dandelion, sarsaparilla, and sassafras.[12]

ROPE.[13] A construction of wire or of twisted fibers, as of hemp, cotton, flax, or jute, so intertwined as to form a thick cord capable of sustaining a severe strain.[14]

Adjectively used as in "rope maker,"[15] and "rope making."[16]

ROSARY. An article used by Roman catholics in counting their prayers,[17] carried in a pocket when not so used, and never used for ornament,[18] composed of beads, a metal chain, and a cross, the beads fastened on the chain at regular intervals.[19] It is not complete without a cross.[20]

Phrase: "Rosaries, chaplets, and similar articles of religious devotion."[21]

ROSE. A well-known flavoring extract;[22] and in everyday speech, when used with food or other products, the word implies that such products are so flavored.[23]

ROSIN. The residuum left from the process of distilling turpentine.[24]

ROSS. As a noun, the rough exterior of bark.[25] As a verb, to divest of the ross.[26]

Rossed pulp wood. A kind of wood, chiefly poplar and spruce, used for making pulp in the manufacture of paper.[27]

ROSTER. A word used instead of "register,"[28] and comprehends a list of all military officers connected with a regiment, brigade or division, and is kept as are records of orders and official communications.[29]

ROT.[30]

ROTARY. Turning, as a wheel on its axis;[31] turning round and round, as a wheel on its axis.[32] There is nothing in the primary definition of the word

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512, 56 ALR 1098. See also supra this note [d].

[5] Cedar Rapids Inv. Co. v. Commodore Hotel Co., supra.

[6] See Code (1927) § 10348 [quot Cedar Rapids Inv. Co. v. Commodore Hotel Co., supra (relating to innkeeper's lien)].

"Hotel" see Innkeepers § 1.

[7] Gauthier v. Wood, 49 Wash. 8, 94 P 654, 655.

[a] **"Composed of** a metal pipe about seven feet long and three inches in diameter, the ends of which had been plugged with an iron or steel eye, into which a bolt was dropped. A wooden beam was sometimes used in place of the pipe for the coupling." Gauthier v. Wood, 49 Wash. 8, 94 P 654, 655.

[8] **"Pinkroot"** 48 C. J. p 1204.

"Pinkroot" included see Marine Insurance § 390 text and note 2.

"Sarsaparilla" not included see Marine Insurance § 392 text and note 3.

[9] Webster New Int. D.

[10] Martin v. Eagle Dev. Co., 41 Or. 448, 456, 69 P 216.

[11] "Root beer" post.

[12] Monroe Cider Vinegar, etc., Co. v. Riordan, 280 Fed. 624, 627.

"Beer" 7 C. J. p 1024.

[13] See Appliance 4 C. J. p 1378 note 80.

[14] New Standard D. [quot Whitlock Cordage Co. v. U. S., 13 Cust. A. (U. S.) 656, 658].

[a] **Commonly, rope consists** of rope yarns twisted into three strands that in turn are twisted together. New Standard D. [quot Whitlock Cordage Co. v. U. S., 13 Cust. A. (U. S.) 656, 658].

[b] **"Cord" distinguished.**—Technically, the distinction between a cord and a rope, other than of wire, is made at one-inch circumference; in popular usage smaller sizes are often termed ropes. New Standard D. [quot Whitlock Cordage Co. v. U. S., 13 Cust. A. 656, 658]. "Cord" 13 C. J. p 1235 text and note 17.

[15] Wall v. Howard Ins. Co., 14 Barb. (N. Y.) 383, 387 (defined as "one who twists yarn into rope").

[16] Wall v. Howard Ins. Co., supra.

[a] **"Hackling the hemp" distinguished.**—Wall v. Howard Ins. Co., 14 Barb. (N. Y.) 383, 387.

[b] **"Spinning the yard" distinguished.**—Wall v. Howard Ins. Co., 14 Barb. (N. Y.) 383, 387.

[17] Benziger v. Robertson, 122 U. S. 211, 212, 7 SCt 1169, 30 L. ed. 1149.

[a] **"The primary purpose** of rosaries . . . is not to excite religious devotion by appeals to the memory. Rosaries . . . are used by Catholics . . . to keep count of the prayers which religious discipline and religious tracts require believers to repeat." U. S. v. Closson Co., 12 Cust. A. (U. S.) 470.

[b] **"Cross" and "crucifix" compared and distinguished.**—"The cross and crucifix inspire prayer and religious devotion, whereas rosaries . . . are designed to keep a record of prayers said. Crosses, crucifixes, rosaries . . . are all sacred articles in the sense that they are dedicated to a religious use, but the religious use of the one is not the religious use of the other, and they are therefore not similar articles." U. S. v. Closson Co., 12 Cust. A. (U. S.) 470.

[18] Benziger v. Robertson, 122 U. S. 211, 213, 7 SCt 1169, 30 L. ed. 1149. See Jones v. Hotel Latham Co., 62 Misc. 620, 115 NYS 1084, 1085 ("a rosary is an article of use and not worn for ornament").

[19] Benziger v. Robertson, 122 U. S. 211, 213, 7 SCt 1169, 30 L. ed. 1149.

"Beads" 7 C. J. p 1017.

"Chain" 11 C. J. p 225.

[20] Benziger v. Robertson, 122 U. S. 211, 213, 7 SCt 1169, 30 L. ed. 1149.

[21] U. S. v. Closson Co., 12 Cust. A. (U. S.) 470; Kennedy v. U. S., 12 Cust. A. (U. S.) 347 (Tariff Act of 1922).

[22] Clotworthy v. Schepp, 42 Fed. 62.

[23] Clotworthy v. Schepp, supra.

"Rose water" see Customs Duties § 30 note 50 [a].

[24] London Assur. Corp. v. Thompson, 170 N. Y. 94, 100, 62 NE 1066.

[a] **Description.**—It is poured into barrels while in a liquid or semiliquid state; when it cools it hardens like plaster of paris and will stand alone as if it were of solid stone, even if taken out of the barrels. London Assur. Corp. v. Thompson, 170 N. Y. 94, 100, 62 NE 1066.

[25] Webster New Int. D.

[26] Webster New Int. D. See U. S. v. Pierce County, 147 Fed. 199, 200, 77 CCA 425.

[27] U. S. v. Pierce County, supra (wood that has had its bark skin and rough places removed by hand shaving or by a rossing machine, the prime object of which was to cheapen transportation by reducing the bulk and weight of the wood).

Not "manufacture of wood" see Customs Duties § 33.

[28] **"Register"** 53 C. J. p 1067.

[29] Mathews v. Bowman, 25 Me. 157, 167.

[30] **"Black Rot"** 8 C. J. p 1115.

"Decay" 18 C. J. p 25.

"Rotten" post.

[31] Webster D. [quot Kip-Armstrong Co. v. King Philip Mills, 130 Fed. 28, 29].

[32] Century D. [quot Kip-Armstrong Co. v. King Philip Mills, supra].

to indicate that continuous rotation is necessarily involved.[33]

Rotary tubular steam boiler is a tubular boiler[34] with a cylindrical shell supported by trunnions to permit revolution.[35]

***ROTTEN.** Decayed;[36] also not firm or trusty; unsound; defective; etc.[37]

ROUGH. Characterized by violent or disorderly action;[38] rude;[39] also, careless;[40] crudely done;[41] hasty.[42]

Rough handling.[43] A term which as applied to a shipment of cattle has been held to mean such unreasonable and negligent handling of the cattle as was beyond the natural and usual way of handling such shipments.[44] Rough handling is not necessarily negligent handling,[45] but unnecessary rough handling of a train which causes injury to cattle in it is negligent handling.[46]

Rough leather.[47] Such leather as has been tanned and unhaired, and not given any further finishing treatment.[48]

Other phrases: "In the rough,"[49] "rough minutes,"[50] and "rough shadowing."[51]

ROUGHHEW. To form rudely;[52] to give the first form or shape to;[53] to hew coarsely, without smoothing;[54] to hew or shape roughly or irregularly;[55] to roughcast;[56] to shape approximately and rudely;[57] often used figuratively.[58]

ROUGHING. After the printing of a picture,[59] a separate process which gives to it somewhat the effect of an oil painting, increases its durability, and improves its appearance.[60]

ROUGHLY.[61] Rudely.[62]

ROULETTE.[63] A game played at a table divided into numbered and colored spaces, and having in the center a rotating disc on which a ball is rolled until it drops into one of the thirty-seven spaces, the player winning if he has staked his money on that space, or its color, or on a combination including it.[64]

ROUND. [§ 1] **A. As Verb.** To give curved form to;[65] to go about a corner or point;[66] to go around wholly or in part.[67]

[§ 2] **B. As Adjective.** Not angular.[68] The term has been held the equivalent of large, great, or considerable.[69]

Applied to raw logs, circular or cylindrical,[70] or inclining to a circle; that is, round to all ordinary intents and purposes.[71]

Round dance. Dancing performed in couples, usually by a male and a female, their arms clasped around or about the shoulders of each other and the couple thus together or synchronously moving over and around the dancing floor.[72]

Round lot, in a contract for the sale of grain, was construed as meaning a lot of five thousand bushels.[73]

Round sum, in an instruction as to damages, described a lump sum in contradistinction from one that is the result of calculation or exact computation.[74]

Round trip, with relation to a sea voyage, is a term said to mean a trip from the port of departure to the same port on return;[75] and with relation to transportation, the performance of services both ways over a route.[76]

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[33] Kip-Armstrong Co. v. King Philip Mills, supra.

[34] **"Boiler"** 8 C. J. p 1138.

[35] Kip-Armstrong Co. v. King Philip Mills, 130 Fed. 28, 29.

[36] Steinmetz v. U. S. Ins. Co., 2 Serg. & R. (Pa.) 293, 296. See Decay 18 C. J. p 25 note 39 [a].

[37] Webster D. [quot Haworth v. Seevers Mfg. Co., 87 Iowa 765, 775, 51 NW 68, 62 NW 325].

"Defective" 18 C. J. p 459.

[38] Century D. [quot Shier v. American R. Express Co., 234 Mich. 505, 208 NW 746, 751].

[39] Webster New Int. D. [quot Berkowitz v. Farrell, 19 Ala. A. 196, 95 S 916].

"Rude" post.

[40] Century D. [quot Shier v. American R. Express Co., 234 Mich. 505, 208 NW 746, 751].

"Careless" 12 C. J. p 1291.

[41] Century D. [quot Shier v. American R. Express Co., 234 Mich. 505, 208 NW 746, 751].

[42] Century D. [quot Shier v. American R. Express Co., supra].

[43] **"Handle"** 29 C. J. p 211.

[44] Southern Kansas R. Co. v. Yarborough, 49 Tex. Civ. A. 407, 109 SW 390, 392.

[45] Davis v. Sullivan, (Tex. Civ. A.) 242 SW 764, 766.

[46] Davis v. Sullivan, supra. See also Shier v. American R. Express Co., 234 Mich. 505, 208 NW 746, 751.

[47] **"Leather"** 36 C. J. p 973.

[48] U. S. v. Robertson, 1 Cust. A. (U. S.) 379, 380.

[49] See In 31 C. J. p 368 text and note 79.

[50] State v. Scott, 35 Wyo. 108, 247 P 699, 705.

[51] See Detectives § 4.

[52] Webster D. [quot U. S. v. Rochester Last Works, 11 Cust. A. (U. S.) 457, 458].

[53] Webster D. [quot U. S. v. Rochester Last Works, supra].

[54] Century D.; Webster D. [both quot U. S. v. Rochester Last Works, supra].

[55] Standard D. [quot U. S. v. Rochester Last Works, supra].

[56] Webster D. [quot U. S. v. Rochester Last Works, supra].

[57] Webster D. [quot U. S. v. Rochester Last Works, supra].

[58] Standard D. [quot U. S. v. Rochester Last Works, supra].

[59] **"Picture"** 48 C. J. p 1179.

[60] Turner v. Osgood Art Colortype Co., 223 Ill. 629, 632, 79 NE 306.

[61] **"Rough"** ante.

[62] Century D. [quot Shier v. American R. Express Co., 234 Mich. 505, 208 NW 746, 751].

[63] **As banking game** see Gaming 27 C. J. p 970 note 30 [k].

[64] Century D. [quot Zaft v. Milton, 97 N. J. Eq. 576, 581, 126 A 29].

[65] Webster New Int. D. [quot Butterworth v. State Highway Commn., (Iowa) 232 NW 760, 762; Hoover v. Iowa State Highway Commn., (Iowa) 230 NW 561, 564].

[66] Webster New Int. D. [quot Butterworth v. State Highway Commn., (Iowa) 232 NW 760, 762; Hoover v. Iowa State Highway Commn., (Iowa) 230 NW 561, 564].

[67] Webster New Int. D. [quot Butterworth v. State Highway Commn., (Iowa) 232 NW 760, 762; Hoover v. Iowa State Highway Commn., (Iowa) 230 NW 561, 564].

[68] Webster New Int. D. [quot Butterworth v. State Highway Commn., (Iowa) 232 NW 760, 762; Hoover v. Iowa State Highway Commn., (Iowa) 230 NW 561, 564].

[69] Golden v. Clinton, 54 Mo. A. 100, 118.

"Considerable" 12 C. J. p 524.

"Great" 28 C. J. p 825.

"Large" 36 C. J. p 953.

[70] Bucki v. McKinnon, 37 Fla. 391, 395, 20 S 540.

[71] Bucki v. McKinnon, supra.

[72] Hardwick v. Fruitridge Bd. of School Trustees, 54 Cal. A. 696, 712, 205 P 49.

[73] Hammond v. Olmstead, 10 Fed. 223, 226.

[74] Times Pub. Co. v. Carlisle, 94 Fed. 762, 771, 36 CCA 475.

*By Wm. Howard Buchanan (Rotten—Ruunt Magna In Se inclusive).

Other phrases: "Rounding a corner,"[77] "round trip ticket,"[78] and "with the woodland adjoining to said plains, extending four English miles round the said plains."[79]

ROUNDHOUSE.[80]

ROUNDSMAN. A police officer who makes rounds of inspection.[81]

ROUND TRIP TICKET.[82]

ROUND-UP. In the custom of cattle men, a gathering together of the cattle every spring, at which the brands are examined, and the cattle of the several ranches and owners are separated or "cut out."[83]

ROUSTABOUT. A name by which negro deck hands on the steamers plying the Mississippi river and its tributaries are known;[84] a negro deck hand engaged on steamboats to do the work of loading, unloading, etc.[85]

ROUT.[86]

ROUTE.[87] A way used for going from one place to another,[88] in common acceptation excluding terminal points, and making it dependent on them.[89] The term implies passage to and from.[90] The word may be used in a different and more general sense than "highway,"[91] and is sometimes used to designate a course, a line of travel or transit.[92]

Route of travel.[93] The way[94] or road[95] traveled.[96]

Other phrases: "Local route,"[97] "most direct route of travel,"[98] "new route,"[99] "on the route lately surveyed,"[1] "the land route usually traveled,"[2] and "the route usually traveled;"[3] also "routes and bounds."[4]

ROYAL.[5] Of or pertaining to the crown or the king or sovereign.[6]

Royal fishery. A term applied at common law to the right of fishery, by virtue of the king's prerogative, in a royal or navigable river so far as the sea ebbed and flowed in it.[7]

Royal grants.[8] Conveyances of record, in England, which are of two kinds: First, letters patent; and second, letters close, or writs close.[9]

Royal river. A term used at common law to designate a navigable river so far as the sea ebbed and flowed.[10]

Royal titles. Titles of this description were designed to convey the fee simple to the grantee; they were usually made by the acting governor of the province in the name of the king.[11]

ROYALTY or **ROYALTIES.**[12] [§ 1] **A. As Noun.** In its primary and natural sense, merely the English translation or equivalent of "regalitates," "jura regalia," "jura regia."[13] Formerly the word referred to the prerogative of the king to take gold and silver discovered in land privately owned.[14]

In case of copyrights[15] **and patents**[16] the term is commonly used to designate the share of the proceeds of property paid to a person having some proprietary or creative interest therein by another who has obtained from the payee an absolute or qualified ownership of such property.[17] It has been defined as a tax or duty paid to the owner of a patent for the privilege of manufacturing or using the patented article;[18] rental;[19] something proportionate to the use of a patented device; in other words, a kind of excise;[20] specific sums paid annually, or at other stated periods, for the right to use a patented device, whether it is used much or little or not at all.[21] The word has been held an appropriate term as applied to improvements which are nonpatentable.[22]

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[75] Pacific Mail SS. Co. v. U. S., 18 Ct. Cl. 30, 38.

[76] Century D. [quot Kelly v. New York City R. Co., 104 NYS 561, 565].

[77] Butterworth v. State Highway Commn., (Iowa) 232 NW 760, 762; Hoover v. Iowa State Highway Commn., (Iowa) 230 NW 561, 564.

[78] See Carriers § 1079 text and note 49; "Excursion Ticket" 23 C. J. p 276.

[79] Jackson v. Reeves, 3 Cai. (N. Y.) 293, 298.

[80] See Engine House or Roundhouse 20 C. J. p 1261.

[81] Webster New Int. D. See generally Municipal Corporations § 1315 et seq.

[82] See Round ante.

[83] Hebberd v. Southwestern Land, etc., Co., 55 N. J. Eq. 18, 27, 36 A 122.

Brands and marks generally see Animals §§ 85–124.

[84] Riley v. Allen, 23 Fed. 46, 47.

[85] U. S. v. Trice, 30 Fed. 490.

[86] See Riot § 2.

[87] **Route:**
Change of see Railroads §§ 153–155.
Designation of see Private Roads § 20.
Liability for loss or injury by deviation from see Carriers §§ 156–160; Shipping [36 Cyc 256].
On which mileage based see Sheriffs and Constables [35 Cyc 1594].
Selection of, for shipment see Sales [35 Cyc 196].
Post route see Post Office § 2.

[88] Fleming & T. Standard French D. [quot Atty.-Gen. v. West Wisconsin R. Co., 36 Wis. 466, 494].

[89] Atty.-Gen. v. West Wisconsin R. Co., supra.

[90] Atty.-Gen. v. West Wisconsin R. Co., supra.

"Passage" 47 C. J. p 1373.

[91] Louisiana Highway Commn. v. Cormier, 13 La. A. 459, 128 S 56, 61.

"Highway" see Highways § 1.

[92] Louisiana Highway Commn. v. Cormier, 13 La. A. 459, 128 S 56, 61.

"Course" 15 C. J. p 678.

[93] **"Travel"** [38 Cyc 948].

[94] **"Way"** [40 Cyc 846].

[95] **"Road"** see Highways § 1.

[96] Maynard v. Cedar County, 51 Iowa 430, 431, 1 NW 701, 702.

[97] See Local 38 C. J. p 130 text and note 83.

[98] See Most 42 C. J. p 455 text and note 31.

[99] See New 46 C. J. p 15 text and note 85.

[1] Wood v. Michigan Air Line R. Co., 90 Mich. 334, 336, 51 NW 263.

[2] Greene v. McGhee, 37 Ala. 164, 165.

[3] Com. v. Heiges, 4 Pa. Dist. 184.

[4] Peo. v. Milton Highway Comrs., 37 N. Y. 360, 364.

"Bounds" 9 C. J. p 298.

[5] **"Royal mine"** see Mines and Minerals § 114.

"Royal prerogative" see Prerogative, 49 C. J. p 1332.

[6] Webster New Int. D.

[7] Arnold v. Mundy, 6 N. J. L. 1, 86, 10 AmD 356. See generally Fish § 21.

"Royal fish" see Fish 26 C. J. p 597 note 60 [c].

[8] **"Grant"** 28 C. J. p 818.

[9] Black L. D. [cit Stephen Comm.].

[10] Arnold v. Mundy, 6 N. J. L. 1, 86, 10 AmD 356. See generally Navigable Waters 45 C. J. p 398.

[11] Florida Town Impr. Co. v. Bigalsky, 44 Fla. 771, 781, 33 S 450.

[12] **Royalty or royalties:**
As incorporeal hereditament see Property 50 C. J. p 758 note 83 [b].
Right to by curtesy see Curtesy § 43.
Subject to creditors' bill see Creditors' Suits § 84.

[13] Atty.-Gen. v. Mercer, 8 App. Cas. 767, 778 [quot Rex v. Atty.-Gen., [1924] A. C. 213; Atty.-Gen. v. Rex, 63 Can. S. C. 622, 68 DomLR 106, 111, [1922] 3 WestWkly 269].

[14] State v. Armson, 166 Minn. 230, 207 NW 727, 731.

[15] See Copyright and Literary Property 13 C. J. p 1106 note 53 [b].

[16] See Patents §§ 447–467.

[17] Matter of Elsner, 210 App. Div. 575, 206 NYS 765, 768.

In oil and gas leases,[23] a share of the product or profit reserved by the owner for permitting another to use the property;[24] the amount reserved or the rental to be paid the original owner of the whole estate;[25] the compensation for the privilege or rights created by the lease;[26] the compensation provided for the privilege of drilling for oil and gas, and consists of a share in the oil and gas produced under existing leases;[27] the share of the product or profit paid to the owner of the property.[28] As applied to an existing lease, a share in the oil and gas produced, but the term does not include a perpetual interest in the oil and gas in the ground.[29]

Phrases: "Advanced royalty,"[30] "lands, mines, minerals, and royalties,"[31] "rentals and royalties,"[32] and "royalties on iron ore subsequently mined."[33]

[§ 2] **B. As Adjective,** the term may be employed,[34] as in the phrases "royalty interest,"[35] and "royalty tax."[36]

R. R. A well-understood abbreviation of "railroad."[37]

RUBBER.[38] [§ 1] **A. As Noun.** Caoutchouc, or India rubber, especially in any of its commercial forms.[39]

[§ 2] **B. As Adjective,** the term has been employed.[40]

Rubber bubbles. Small hollow tubes of licorice candy to which are attached small uninflated balloons (so-called) composed of rubber so flimsy as to be easily broken.[41]

Rubber hose. A tubing of indefinite length, open at both ends.[42]

Other phrases: "Rubber-like consistency,"[43] and "rubber thread."[44]

RUBBEROID. A trade name for an imitation of hard rubber;[45] a descriptive word meaning like rubber.[46]

RUBBISH. [§ 1] **A. As Noun.**[47] Anything worthless or valueless;[48] debris;[49] trash;[50] waste or rejected matter.[51]

Phrase: "Driftwood and rubbish."[52]

[§ 2] **B. As Adjective** the word may be employed.[53]

Rubbish hand. A general utility man.[54]

RUBBLE STONES. Rough, irregular stones, such as are found in quarries that furnish small and inferior stone only, or are the remains in ledges from which dimension or other large stones have been taken; and when used for constructing walls they are not dressed, hewn, or cut, and so lose none of their measurement in laying.[55]

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18. Volk v. Volk Mfg. Co., 101 Conn. 594, 599, 126 A 847; Hubenthal v. Kennedy, 76 Iowa 707, 711, 39 NW 694.

19. Western Union Tel. Co. v. American Bell Tel. Co., 105 Fed. 685.

[a] **"Bonus" compared.**—Payne v. U. S., 50 App. (D. C.) 219, 269 Fed. 871, 873. "Bonus" 9 C. J. p 135.

[b] **"Profit" synonymous.**—See Profit or Profits 50 C. J. p 646 note 17 [p].

[c] **"Rents and profits" synonymous.**—Nisbet v. Dozier, 204 Ky. 204, 263 SW 736.

20. Western Union Tel. Co. v. American Bell Tel. Co., 125 Fed. 342, 348, 349, 60 CCA 220 [cit Bouvier L. D.].

21. Western Union Tel. Co. v. American Bell Tel. Co., supra.

22. Volk v. Volk Mfg. Co., 101 Conn. 594, 126 A 847, 849.

23. **Royalty under:**
Mining lease see Mines and Minerals §§ 632–650.
Oil, gas, and sale leases see Mines and Minerals §§ 728–736.

24. Webster D. [quot Indiana Natural Gas, etc., Co. v. Stewart, 45 Ind. A. 554, 90 NE 384, 385]; Volk v. Volk Mfg. Co., 101 Conn. 594, 601, 126 A 847; Hill v. Roberts, (Tex. Civ. A.) 284 SW 246, 249. And see Curlee v. Anderson, (Tex. Civ. A.) 235 SW 622, 624.

25. Wagner Supply Co. v. Bateman, (Tex.) 18 SW (2d) 1052, 1055.

"Rent" distinguished see Rent ante.

26. McIntire v. Bond, 227 Ky. 607, 13 SW (2d) 772, 773, 64 ALR 630.

27. Bellport v. Harrison, 123 Kan. 310, 255 P 52, 53.

28. Homestake Exploration Corp. v. Schoregge, 81 Mont. 604, 264 P 388, 392; Hinerman v. Baldwin, 67 Mont. 417, 215 P 1103, 1108.

29. Leydig v. Internal Revenue Comr., 43 F. (2d) 494, 496.

30. Kissick v. Bolton, 134 Iowa 650, 651, 112 NW 95.

31. Rex v. Atty.-Gen., [1924] A. C. 213; Atty.-Gen. v. Mercer, 8 App. Cas. 767, 778.

32. Western Union Tel. Co. v. American Bell Tel. Co., 105 Fed. 684, 685.

33. Basic Iron Ore Co. v. Dahlke, (N. J.) 152 A 73, 74.

34. See cases infra notes 35, 36.

35. Robinson v. Jones, 119 Kan. 609, 613, 240 P 957; Byrne v. Fulton Oil Co., 85 Mont. 329, 278 P 514, 517.

36. State v. Armson, (Minn.) 232 NW 35, 36.

37. West Chicago St. R. Co. v. Peo., 155 Ill. 299, 304, 40 NE 599.

38. **Rubber plant or factory** see Nuisances § 264.

39. Webster New Int. D.

40. See cases infra notes 41–44.

41. U. S. v. Andrews, 12 Cust. A. 258.

42. Dodge v. Porter, 98 Fed. 624, 627.

[a] **"Pneumatic tire" distinguished.**—Dodge v. Porter, 98 Fed. 624, 627.

43. Byerley v. Barber Asphalt Pav. Co., 230 Fed. 995, 999.

44. Haskell Golf Ball Co. v. Perfect Golf Ball Co., 143 Fed. 128, 130.

45. Standard Paint Co. v. Trinidad Asphalt Mfg. Co., 220 U. S. 446, 31 SCt 456, 457, 55 L. ed. 536.

46. Standard Paint Co. v. Trinidad Asphalt Mfg. Co., supra.

47. **Duty of lessee to remove** see Mines and Minerals 40 C. J. p 1019 text and note 17.

48. Webster D. [quot Gorman v. Cleveland, 26 Oh. A. 109, 113, 159 NE 136].

49. Webster D. [quot Gorman v. Cleveland, supra].

[a] **Snow and leaves** are included within the meaning of the term. Wehr v. Roland Park Co., 143 Md. 384, 122 A 363, 367.

"Debris" 17 C. J. p 1371.

50. Webster D. [quot Gorman v. Cleveland, 26 Oh. A. 109, 113, 159 NE 136].

51. Webster D. [quot Gorman v. Cleveland, supra].

[a] **As used in Metropolitan Paving Act** (57 Geo. III c 29 §§ 59, 60), entitling scavengers to dust, ashes, rubbish, etc., within certain districts, the term applies to such things as are in the contemplation of the owner rubbish, and which he desires to dispose of in that character. Filbey v. Combe, 2 M. & W. 677, 683, 150 Reprint 928.

52. Springfield v. North Fork Outlet Drain. Dist., 249 Ill. A. 133, 144.

53. See case infra note 54.

54. Fillipon v. Albion Vein Slate Co., 242 Fed. 258, 155 CCA 98.

55. Hawkins v. U. S., 12 Ct. Cl. 181, 188.

RUBLE. A term given to the money of account in Russia.[56]

RUBRICS. In England the titles of acts were styled rubrics because written in red ink.[57]

RUDE.[58] Rough, insulting.[59]

Phrase: "Rude or indecent behavior."[60]

RUDELY.[61] In a rude manner, coarsely, uncivilly, violently.[62]

Phrase: "Rudely displaying a pistol."[63]

RUFFED GROUSE.[64]

RUFFIAN. As a noun, a boisterous, cruel, brutal fellow;[65] a desperate fellow ready for murderous or cruel deeds;[66] a cutthroat.[67]

As adjective, brutal, cruel, murderous, boisterous, violent, stormy.[68]

RUG. A coarse, nappy, woolen fabric, used for various purposes as: First, for cover of a bed;[69] second, for protecting the carpet before a fire;[70] and third, for protecting the legs against the cold in riding.[71]

Phrases: "Carpets and rugs,"[72] and "traveling rug."[73]

RUIN.[74]

RULE or RULES.[75]

[§ 1] **As a Noun—1. In General.** A term of wide and varied significance, depending upon the context,[76] described generally as a course[77] of practice uniformly followed,[78] or a uniform course of things.[79] By its very name a rule is supposed to be a means of guidance.[80] A rule must necessarily be of general application.[81] It is not unfrequent, to consider and speak of a regular course of practice under a rule, as itself forming a rule.[82]

[§ 2] **2. Regulation, Promulgation, or Command.** The term may be employed appropriately to include commands, instructions and directions, and has been defined as[83] that which is prescribed or laid down as a guide to conduct;[84] that which is settled by authority or custom;[85] a by-law;[86] a minor law;[87] an

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[a] **Ranged rubble or broken ashlar** are ordinarily a larger stone, which, when cut, trimmed, and laid, make a wall of coursed masonry as if constructed of squared stone of different sizes, somewhat like that produced by dimension stone; and in cutting they are reduced in size, and measure much less in the wall than when first quarried. Hawkins v. U. S., 12 Ct. Cl. 181, 188.

"Dimension stone" distinguished see Dimension 18 C. J. p 1041 note 86 [a] (2).

"Footing stone" synonymous see Footing Stone 26 C. J. p 790 note 20 [a].

56. Pleasants v. Maryland Ins. Co., 8 Cranch (U. S.) 55, 58, 3 L. ed. 486.

"Money" 40 C. J. p 1489.

57. State v. Woolard, 119 N. C. 779, 780, 25 SE 719.

58. **Touching in rude manner** see Assault and Battery §§ 8, 193.

59. Webster D. [quot Holmes v. Carolina Cent. R. Co., 94 N. C. 318, 323].

"Insulting" see Insult 32 C. J. p 949.

"Rough" ante.

60. See Indecent 31 C. J. p 415 text and note 20.

61. See Rude ante.

62. State v. Lawrence, 19 Nebr. 307, 314, 27 NW 126.

[a] **"Willfully" not synonymous.**—Fuller v. State, 48 Tex. Cr. 300, 87 SW 832.

63. Gozy v. State, 34 Tex. Cr. 146, 29 SW 783.

64. See Grouse 28 C. J. p 880.

65. Taylor v. Hungerford, 205 Iowa 1146, 217 NW 83, 84.

66. Taylor v. Hungerford, supra.

67. Taylor v. Hungerford, supra.

68. Taylor v. Hungerford, supra.

"Boisterous" 8 C. J. p 1142.

"Cruel" 17 C. J. p 388.

69. Webster D. [quot Ingersoll v. Magone, 53 Fed. 1008, 1010, 4 CCA 150].

70. Webster D. [quot Ingersoll v. Magone, supra].

71. Webster D. [quot Ingersoll v. Magone, supra].

72. See Customs Duties 17 C. J. p 573 text and note 52.

73. See Customs Duties 17 C. J. p 573 note 52 [a] (3).

74. **In mining lease** see Mines and Minerals 40 C. J. p 1022 note 64 [b].

Of a building see Negligence 45 C. J. p 863 note 18 [b] (1).

75. **Rule or rules:**
Admiralty § 129 et seq.
Admitting to practice see Attorney and Client § 16 et seq.
Against perpetuities see Perpetuities §§ 2–8.
Carriers §§ 53, 1070–1077.
Civil service see Officers §§ 71–80.
Collision § 24 et seq.
Conflict of Laws § 2.
Corporations §§ 426–488.
Courts § 275 et seq.
Exchanges §§ 3–11.
Gas §§ 26–28.
Health §§ 31–36.
Innkeepers § 47.
Insurance § 70.
Judicial notice of see Evidence §§ 1897, 1898.
Land office see Public Lands §§ 460–463.
Master and Servant §§ 586–595, 745, 1133, 1203, 1261, 1346, 1431.
Mines and Minerals §§ 120, 121.
Municipal Corporations § 796 text and notes 66, 67, § 1280.
Of adjudication or decision see Arbitration and Award § 341 et seq; Courts § 297 et seq; Federal Courts §§ 163, 411.
Of evidence see Evidence § 4.
Railroads § 886 et seq.

Rule in nature of order:
Generally see Motions and Orders § 42 C. J. p 457.
To show cause see Motions and Orders § 69 et seq.

76. Los Angeles v. Gager, 10 Cal. A. 378, 380, 102 P 17 [quot Atlantic Coast Line R. Co. v. State, 73 Fla. 609, 74 S 595, 602].

77. **"Course"** 15 C. J. p 678.

78. State v. Field, 31 N. M. 120, 241 P 1027, 1043 [cit Cyc].

"Practice" 49 C. J. p 1311.

79. Webster D. [quot South Florida R. Co. v. Rhodes, 25 Fla. 40, 46, 5 S 633, 23 AmSR 506, 3 LRA 733]; Bates v. Nome, 1 Alaska 208, 216.

80. Salter v. Calgary, 9 Alta. L. 334, 336.

81. State Racing Commn. v. Latonia Agricultural Assoc., 136 Ky. 173, 187, 123 SW 681, 25 LRANS 905.

82. Talbot v. Seeman, 1 Cranch (U. S.) 1, 36, 2 L. ed. 15.

83. Finnegan v. Missouri Pac. R. Co., 261 Mo. 481, 507, 169 SW 969.

"Command" 11 C. J. p 1237.

"Direction" 18 C. J. p 1044.

"Instruction" 32 C. J. p 944.

"Promulgation" 50 C. J. p 720.

84. Webster D. [quot South Florida R. Co. v. Rhodes, 25 Fla. 40, 46, 5 S 633, 23 AmSR 506, 3 LRA 733]; Bates v. Nome, 1 Alaska 208, 216.

85. Webster D. [quot South Florida R. Co. v. Rhodes, supra]; Bates v. Nome, supra.

[a] "**A technical rule** is one which is established by authority and precedent, which does not depend upon reasoning or argument, but is a fixed established rule to be acted upon and only discussed as regards its application—in truth is 'the law.'" Chesterfield, etc., Colliery Co. v. Hawkins, 3 H. & C. 677, 691, 159 Reprint 698.

[b] "**The enforced subversion by a private body of a time-honored legal principle** does not . . . fall within any definition of a 'rule.'" Rosensweig v. Whitney, 221 App. Div. 8, 222 NYS 87, 91.

[c] **The mere raising of a fee or rental** is not the making of a rule. George F. Heinrichs, Inc. v. New York, 121 Misc. 592, 201 NYS 377, 379.

"Authority" 6 C. J. p 864.

"Custom" see Customs and Usages § 1.

86. State v. Hoctor, 83 Nebr. 690, 693, 120 NW 199, 200.

"By-Law" 9 C. J. p 1112.

87. Webster D. [quot South Florida R. Co. v. Rhodes, 25 Fla. 40, 46, 5 S 633, 23 AmSR 506, 3 LRA 733];

order;[88] an ordinance;[89] a prescription;[90] a regulation.[91] Other terms have been compared and distinguished, such as "agreement,"[92] "caprice,"[93] "compact,"[94] "mere discretion,"[95] "ordinance,"[96] and "whim."[97]

Term may import partial restriction which does not wholly prohibit.[98]

Applied to conduct of employees,[99] the word may mean either the definite promulgation or command of the employer, or it may refer to the practice generally or universally pursued by the employees themselves.[1]

In parliamentary language,[2] devices in words and phrases for the control and direction of those who have something else given them to do;[3] the regulation adopted by a deliberative body for the conduct of its proceedings.[4]

[§ 3] **3. As a Typographic Element,** a thin plate or strip of metal, of the same height as the type, used for printing lines as in a tabular work or between columns of the same page.[5]

[§ 4] **4. Phrases—a. Rule Absolute.** That which commands the subject matter of the rule to be forthwith enforced.[6]

[§ 5] **b. Rule of Construction or Interpretation.**[7] A rule of construction is one which either governs the effect of an ascertained intention or points out what a court should do in the absence of express or implied intention;[8] also a regular course of decisions on the text of the law, constitutes a rule of construction, by which that text is to be applied to all similar cases.[9]

Subordinate rule of construction is a mere judicial exposition of the natural meaning of a certain form of expression.[10]

Rule of interpretation is one which governs the ascertainment of the meaning of the maker of a written document.[11]

[§ 6] **c. Rule of Court.**[12] A term said to mean uniformity, regulation in practice alike to all suitors, established and fixed, as much as a statute itself, and known to all litigants and attorneys;[13] also an order generally made by a court having competent jurisdiction;[14] an order made by a court between the parties to a cause before it, or touching the discharge of duty by those engaged in the conduct of its proceedings, either as permanent officers of the court or as serving therein in some temporary capacity;[15] the term may include commands to lower courts or court officials, to do ministerial acts.[16] As sometimes used the term has been held to be intended for the word "judgment."[17]

In the federal judicial code the term has reference to a standing rule having the force of law.[18]

[§ 7] **d. Rules of Procedure.**[19] Rules made by

Bates v. Nome, 1 Alaska 208, 216.

[a] **"Local laws" interchangeable.**—Obelisk Waterproof Co. v. Cloher, 111 Misc. 1, 182 NYS 303, 307.

[b] **"Laws" synonymous** see Law 36 C. J. p 957 text and note 84 [b].

88. See Order 46 C. J. p 1131 text and note 2 [d], [e].

89. State v. Hoctor, 83 Nebr. 690, 693, 120 NW 199.

[a] **Ordinance distinguished.**—Armatage v. Fisher, 74 Hun 167, 172, 26 NYS 364, 367.

"Ordinance" see Municipal Corporations § 796.

90. Webster D. [quot South Florida R. Co. v. Rhodes, 25 Fla. 40, 46, 5 S 633, 23 AmSR 506, 3 LRA 733]; Bates v. Nome, 1 Alaska 208, 216.

91. Webster D. [quot South Florida R. Co. v. Rhodes, 25 Fla. 40, 46, 5 S 633, 23 AmSR 506, 3 LRA 733]; Bates v. Nome, 1 Alaska 208, 216; State v. Hoctor, 83 Nebr. 690, 693, 120 NW 199.

[a] **Terms compared.**—(1) "Regulation" and "rule" are words of a like import and import a partial restriction which does not wholly prohibit, and imply uniformity in operation, not discrimination. Belmar v. Prior, 81 N. J. L. 254, 79 A 1032, 1034. (2) "'Rules, regulations, and by-laws' . . . are words of no less import and are intended to carry with them the same obligation or duty as the word 'ordinance.'" Taylor v. Lambertville, 43 N. J. Eq. 107, 112, 10 A 809.

"Regulation" ante.

92. Merchants' Exch. v. Knott, 212 Mo. 616, 640, 111 SW 565, 571.

"Agreement" 2 C. J. p 979.

93. Merchants' Exch. v. Knott, 212 Mo. 616, 640, 111 SW 565, 571.

94. Merchants' Exch. v. Knott, supra.

"Compact" 12 C. J. p 217.

95. Merchants' Exch. v. Knott, 212 Mo. 616, 640, 111 SW 565, 571.

"Discretion" 18 C. J. p 1134.

96. See supra note 89 [a].

97. Merchants' Exch. v. Knott, 212 Mo. 616, 640, 111 SW 565, 671.

98. Belmar v. Prior, 81 N. J. L. 254, 258, 79 A 1032.

99. See Master and Servant §§ 586–595.

1. Schaufele v. Central of Georgia R. Co., 6 Ga. A. 660, 665, 65 SE 708.

2. See Parliamentary Law § 1 et seq.

3. Belmar v. Prior, 81 N. J. L. 254, 257, 79 A 1032; Taylor v. Lambertville, 43 N. J. Eq. 107, 112, 10 A 809. See Hunt v. Lambertville, 45 N. J. L. 279, 282.

4. Armatage v. Fisher, 74 Hun 167, 172, 26 NYS 364, 367.

5. Lanston Monotype Mach. Co. v. Pittsburgh Type Founders Co., 276 Fed. 921.

[a] **"The pointwise dimension** of a . . . rule . . . is its thickness, as to which uniformity and exactness is essential." Lanston Monotype Mach. Co. v. Pittsburgh Type Founders Co., 276 Fed. 921.

6. Black L. D.

[a] **Rule absolute for new trial,** in Pennsylvania practice, implies all that is meant by the words "judgment vacated, judgment set aside, and new trial granted." Evans v. Freeman, 140 Fed. 419, 423. See Fisher v. Hestonville, etc., Pass. R. Co., 185 Pa. 602, 605, 40 A 97. See also New Trial.

7. See also Construction 12 C. J. p 1297; Contracts § 481 et seq; Fidelity Insurance § 3; Fire Insurance § 69 et seq; Life Insurance §§ 87–91; Marine Insurance §§ 59, 60; Mortgages §§ 334–340; Municipal Corporations §§ 904–919; Mutual Benefit Insurance § 20 et seq.

8. Matter of Union Trust Co., 89 Misc. 69, 151 NYS 246, 249.

[a] **"Rule of interpretation" distinguished.**—Matter of Union Trust Co., 89 Misc. 69, 151 NYS 246, 249.

9. Talbot v. Seeman, 1 Cranch 1, 36, 2 L. ed. 15.

10. Dutton v. Pugh, 45 N. J. Eq. 426, 431, 18 A 207 [quot Post v. Herbert, 27 N. J. Eq. 540, 543].

11. Matter of Union Trust Co., 89 Misc. 69, 151 NYS 246, 250.

12. See generally Courts § 275 et seq.

13. Spangler v. Atchison, etc., R. Co., 42 Fed. 305, 306; Bates v. Nome, 1 Alaska 208, 216; Wilson v. Big Joe Block Coal Co., 135 Iowa 531, 537, 113 NW 348.

14. Bouvier L. D. [quot Barney v. State, 49 Nebr. 515, 522, 68 NW 636].

15. Goodlett v. Charles, 48 S. C. L. 46, 49.

"Order" synonymous see Motions and Orders 42 C. J. p 465 text and note 13.

16. Carter v. Louisiana Purchase Exposition Co., 124 Mo. A. 530, 538, 102 SW 6.

17. Jacobs v. Moffatt, 3 Blackf. (Ind.) 395, 398.

18. Dills v. Champion Fiber Co., 175 N. C. 49, 94 SE 694, 695.

19. See also Courts § 275 et seq; Federal Courts §§ 108 et seq, 199, 336, 346, 387 et seq; Municipal Corporations §§ 770, 771; Parliamentary any legislative body, as to the mode and manner of conducting the business of the body.[20]

[§ 8] **e. Rule of Property.**[21] A settled legal principle governing the ownership and devolution of property;[22] the decisions of the highest court of a state when they relate to and settle some principle of local law directly applicable to title.[23] In the plural, those rules governing the descent, transfer, or sale of property, and the rules which affect the title and possession thereto.[24]

[§ 9] **f. Other Phrases:** "Rule in Shelley's Case,"[25] "rule nisi,"[26] "rule of credits,"[27] "rule of evidence,"[28] "rule of haste,"[29] "rule of presumption,"[30] "rule of stare decisis,"[31] "rule of taxation,"[32] "rule of the road,"[33] "rule or regulation,"[34] "rule to plead,"[35] "rule to show cause,"[36] and "the rule of the state court;"[37] also "laws, rules, and regulations now governing the" society,[38] "local laws or rules,"[39] "ordinances, rules, regulations and by-laws,"[40] "rules and regulations,"[41] "rules established as aforesaid,"[42] "rules of limitation,"[43] "rules of the Code of Civil Procedure."[44]

[§ 10] **B. As an Adjective,** the word may be employed.[45]

Rule day. In practice, the day on which a rule is returnable, or on which the act or duty enjoined by a rule is to be performed.[46]

RULE IN SHELLEY'S CASE.[47]

RULE NISI.[48]

RULE OF THE ROAD.[49]

RULE TO SHOW CAUSE.[50]

RULING.[51] A settlement or decision of a point of law arising from the trial of the case, without necessarily the force and solemnity of a judgment or order.[52]

In the plural, expositions of the law or the legal reasons upon which the courts rested their judgment on the questions presented or the issues joined.[53]

Law 46 C. J. p 1376; Pleading 49 C. J. p 1 et seq.

"Court procedure" 15 C. J. p 691.

"Practice" § 3.

"Procedure" 50 C. J. p 425.

[20] Heyker v. McLaughlin, 106 Ky. 509, 514, 50 SW 859, 51 SW 820, 20 KyL 1983 ("they are intended for the orderly and proper disposition of the matters before it"); Heiskell v. Baltimore, 65 Md. 125, 148, 4 A 116, 57 AmR 308.

[21] See Courts § 342; Federal Courts § 173.

[22] Yazoo, etc., R. Co. v. Adams, 81 Miss. 90, 115, 32 S 937; Brekke v. Crew, 43 S. D. 106, 178 NW 146, 154.

[23] Edwards v. Davenport, 20 Fed. 756, 763, 4 McCrary 34.

[24] Bucher v. Cheshire R. Co., 125 U. S. 555, 8 SCt 974, 978, 31 L. ed. 795; Kuhn v. Fairmont Coal Co., 152 Fed. 1013, 1015.

[25] See Deeds § 311; Trusts [39 Cyc 230]; Wills [40 Cyc 1605].

[26] See Motions and Orders § 69 text and note 58 [a]. See also Equity § 826; Mortgages §§ 1515, 1516, 1600; New Trial § 296.

[27] U. S. v. Byers, 127 Fed. 993, 995.

[28] See Evidence § 4.

[29] See Master and Servant § 793 text and note 23 [a].

[30] Wigmore Ev. [quot State v. Lane, 126 Minn. 78, 84, 147 NW 951, 52 LRANS 932 ("simply a rule changing the burden of proof, i. e., declaring that the main fact will be inferred or assumed from some other fact until evidence to the contrary is introduced")].

[31] See Courts § 304 et seq.

[32] State v. Chicago, etc., R. Co., 128 Wis. 449, 108 NW 594, 623 ("the law of taxation"). See also Taxation [37 Cyc 672].

[33] Ærial Navigation § 11; Highways § 413; Motor Vehicles § 604.

[34] Atlantic Coast Line R. Co. v. State, 73 Fla. 609, 74 S 595, 601. See also Collision § 24 et seq.

[35] See Appeal and Error § 1721; Judgments § 373; Pleading § 239.

[36] See Motions and Orders § 69 et seq.

[37] Waverly Stone, etc., Co. v. Waterloo, 239 Fed. 561, 564.

[38] See Law 36 C. J. p 966 text and note 81.

[39] Obelisk Waterproof Co. v. Cloher, 111 Misc. 1, 182 NYS 303, 307.

[40] Taylor v. Lambertville, 43 N. J. Eq. 107, 111, 10 A 809; Hunt v. Lambertville, 45 N. J. L. 279, 282.

[41] Higbee v. Higbee, 4 Utah 19, 26, 5 P 693 ("in a legal sense mean laws").

[a] **Includes** rates and tariffs fixed by the board of railroad commissioners. Atlantic Log, etc., Co. v. Central of Georgia R. Co., (Ga.) 155 SE 525, 527.

[b] **Applied to use of railroad property** "rules and regulations" implies uniformity in operation, not discrimination for the pecuniary advantage of the promulgator. Indianapolis Union R. Co. v. Dohn, 153 Ind. 10, 12, 53 NE 937, 938, 74 AmSR 274, 45 LRA 427.

[c] **Divorce is not a rule or regulation.**—Higbee v. Higbee, 4 Utah 19, 27, 5 P 693.

[d] **"Minute" of board of directors** is not necessarily a rule or regulation. Belmar v. Prior, 81 N. J. L. 254, 258, 79 A 1032. "Minute" 40 C. J. p 1212.

[e] **Used in a statute relating to licenses** the phrase implies uniformity, publicity, and the establishment of standards by which applicants or licensees may know in advance upon what conditions the license may be granted, or will be withheld or revoked. State Racing Commn. v. Latonia Agricultural Assoc., 136 Ky. 173, 187, 123 SW 681, 25 LRANS 905.

[42] Peo. v. Prendergast, 148 App. Div. 129, 132, 122 NYS 115.

[43] Hopkins v. Lincoln Trust Co., 115 Misc. 257, 187 NYS 883, 886.

[44] Los Angeles v. Gager, 10 Cal. A. 378, 102 P 17, 18.

[45] See Cook v. Cook, 18 Fla. 634, 637.

[46] Black L. D.

[a] **In Florida** Cir. Ct. Rules, rule 13, providing that all declarations shall be filed on or before the rule day to which the process is made returnable, "rule day" means the return-day on which a defendant is required to appear by summons duly served and returned. Cook v. Cook, 18 Fla. 634, 637.

[47] See Deeds § 311; Trusts [39 Cyc 230]; Wills [40 Cyc 1602–1605].

[48] See Motions and Orders § 69 text and note 58 [a]. See also Equity § 826; Mortgages §§ 1515, 1516, 1600 note 9 [c]; New Trial § 296; Nisi 46 C. J. p 480.

Rule to show cause see Motions and Orders § 69.

[49] See Aerial Navigation § 11 et seq; Highways § 413 et seq; Motor Vehicles § 604.

[50] See Motions and Orders § 69 et seq.

[51] See also Appeal and Error §§ 792–799, 1651–1673; Courts § 323.

[52] Black L. D.; Century D. [both quot State v. O'Brien, 18 Mont. 1, 5, 43 P 1091, 44 P 399].

[a] **Has been held to be applicable only** to decisions upon questions of law and not to findings upon matters of fact. Paine v. Newton St. R. Co., 192 Mass. 90, 93, 77 NE 1026; Anderson v. O'Donnell, 29 S. C. 355, 365, 7 SE 523, 13 AmSR 728, 1 LRA 632.

[b] **Refusal of a judge to do a ministerial act** is not a "ruling" or "decision." Cruse v. McQueen, (Tex. Civ. A.) 25 SW 711, 712.

[c] **Statement of a purpose to make a ruling** in a certain way before the time for it comes is not a ruling. Small v. Saunders, 81 N. H. 520, 129 A 270.

[d] **"Determination" distinguished.**—Peo. v. Second Dist. Public Serv. Commn., 181 App. Div. 147, 168 NYS 59. "Determination" 18 C. J. p 983.

[53] Keller v. Summers, 262 Mo. 324, 330, 171 SW 336.

Phrases: "Ruling, decision, or finding upon an issue of fact or matter of law,"[54] and "ruling made during the course of the trial;"[55] also "rulings of any state board or commission,"[56] "rulings of the court,"[57] and "rulings of the court in the progress of the trial."[58]

RULING CASTE.[59]

RUM. [§ 1] **A. As Noun.**[60] A species of spirituous liquor;[61] in its ordinary sense, spirits;[62] specifically, spirit distilled from the juice of the sugarcane in any form, commonly from the refuse juice left from sugar making, but often from molasses, as especially in countries where the sugar cane is not produced.[63]

[§ 2] **B. As Adjective,** as in "rum disease."[64]

RUMOR.[65] Common talk;[66] current story passing from one person to another without any known authority for the truth of it;[67] flying or popular report;[68] general public report of certain things, without any certainty as to their truth.[69]

Any rumor. Any current report and not the remarks of a single person.[70]

RUN.[71] To carry on;[72] to conduct,[73] control,[74] or manage;[75] to operate.[76] Also to move, go, pass, or proceed; to continue.[77]

In relation to fire, the term means to pass, spread, or communicate in ordinary modes.[78]

To run property may mean to remove it.[79]

Phrases: "Conduct and run,"[80] "may run,"[81] "run ahead of third class trains,"[82] "run into money,"[83] "run, maintain, and operate,"[84] "run out,"[85] "to run at large;"[86] and "run out a line;"[87] also "runs upon either side."[88]

RUNNER. As defined by ordinance one who solicited [solicits] patronage or custom for certain business enterprises (including hotels) on any railroad train or other place in the city.[89]

RUNNING.[90] Moving or advancing; continuing.[91]

Running connections.[92] A railroad term said to include only such arrangements as to the time of arrival and departure of trains, and as to stations, platforms, and other facilities, as will enable companies desiring to connect to do so without detriment or serious inconvenience.[93]

Running foot. In paving parlance, foot front of property.[94]

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[54] Hebert v. Handy, 28 R. I. 317, 318, 67 A 325.

[55] Reade v. Halpin, 180 App. Div. 157, 167 NYS 624, 626.

[56] Paine v. Newton St. R. Co., 192 Mass. 90, 93, 77 NE 1026.

[a] **"Rulings of any state department or commission."**—Salem v. Eastern Massachusetts St. R. Co., 254 Mass. 42, 45, 149 NE 671.

[57] Gilmer v. Sidenstricker, 42 W. Va. 52, 53, 24 SE 566.

[58] Cooper v. Omohundro, 19 Wall. (U. S.) 65, 69, 22 L. ed. 47; Keeley v. Ophir Hill Cons. Min. Co., 169 Fed. 598, 600, 95 CCA 96.

[a] **"Rulings of the court in the cause in the progress of the trial."**—Key West v. Baer, 66 Fed. 440, 441; 13 CCA 572.

[59] See Caste 11 C. J. p 27 text and note 91 [a].

[60] **Generally** see Intoxicating Liquors 33 C. J. p 480.

"Bay Rum" 7 C. J. p 1014.

[61] Grant v. State, 73 Ala. 13, 14.

[62] Rex v. McKenzie, 58 N. S. 313, 45 CanCrCas 144.

[63] Century D.

[64] Streitwolf v. Streitwolf, (N. J. Ch.) 47 A 14, 18 ("that appetite for spirits which cannot be overcome except by actual restraint").

[65] **Rumor:**
Admissibility in evidence:
  Generally see Evidence § 172.
  In justification or mitigation of libel or slander see Libel and Slander §§ 503, 579.
As constructive notice see Notice § 39.
Defense of libel or slander see Libel and Slander § 196.
Disqualification of juror by opinions derived from see Juries §§ 374–376.
Duty of insured to communicate see Marine Insurance § 157.
Probative quality of see Evidence § 172.
Repetition of see Libel and Slander § 187 et seq.

[66] Smith v. Moore, 74 Vt. 81, 86, 52 A 320.

[67] Webster D. [quot State v. Culler, 82 Mo. 623, 627; State v. Vettere, 76 Mont. 574, 248 P 179, 183].

[a] **"Hearsay" synonymous.**—Gaffney v. Royal Neighbors of America, 31 Ida. 549, 174 P 1014, 1017; State v. Culler, 82 Mo. 623, 627; State v. Vettere, 76 Mont. 574, 248 P 179, 183. "Hearsay" see Evidence § 166; Hearsay 29 C. J. p 286.

[b] **"Story" synonymous.**—State v. Culler, 82 Mo. 623, 627; State v. Vettere, 77 Mont. 66, 248 P 179, 183.

[68] Webster D. [quot State v. Culler, 82 Mo. 623, 627; State v. Vettere, 77 Mont. 66, 248 P 179, 183]; Smith v. Moore, 74 Vt. 81, 86, 52 A 320.

"Report" synonymous see Report ante.

[69] Gaffney v. Royal Neighbors of America, 31 Ida. 549, 174 P 1014, 1017.

Newspaper report see Newspaper Report 46 C. J. p 16.

[70] Smith v. Moore, 74 Vt. 81, 86, 52 A 320.

[71] See also Running post.

[72] Webster New Int. D. [quot Peo. v. Bogess, 194 Cal. 212, 228 P 448, 455; State v. Kamuda, 98 Vt. 466, 129 A 306, 309].

"Carry on" see Carry 10 C. J. p 1240, 1241 text and notes 26–30.

[73] Webster New Int. D. [quot Peo. v. Bogess, 194 Cal. 212, 228 P 448, 455; State v. Kamuda, 98 Vt. 466, 129 A 306, 309].

"Conduct" 12 C. J. p 411.

[74] Diel v. Henry Zeltner Brewing Co., 30 App. Div. 291, 293, 51 NYS 930.

"Control" 13 C. J. p 837.

[75] Webster New Int. D. [quot Peo. v. Bogess, 194 Cal. 212, 228 P 448, 455; State v. Kamuda, 98 Vt. 466, 129 A 306, 309]; Diel v. Henry Zeltner Brewing Co., 30 App. Div. 291, 293, 51 NYS 930.

"Manage" 38 C. J. p 521.

[76] Diel v. Henry Zeltner Brewing Co., 30 App. Div. 291, 293, 51 NYS 930.

"Operate" 46 C. J. p 1110.

[77] Webster New Int. D.

[78] Ayer v. Starkey, 30 Conn. 304, 307.

"Communicate" 12 C. J. p 211.

"Pass" 47 C. J. p 1372.

[79] Williams v. State, 27 Tex. A. 258, 260, 11 SW 114 (running property out of state).

"Remove" ante.

[80] Highland Ave., etc., R. Co. v. Thornton, 105 Ala. 225, 228, 16 S 699. See also Conduct 12 C. J. p 412 text and note 70 [a] (3).

[81] Harris v. Macomb, 213 Ill. 47, 50, 72 NE 762, 763.

[82] Cogbill v. Louisville, etc., R. Co., 152 Ala. 154, 158, 44 S 683.

[83] Perry v. Smith, 22 Vt. 301, 306.

[84] Turner v. State, 153 Ark. 40, 239 SW 373, 375.

[85] Hinsdale County v. Mineral County, 9 Colo. A. 368, 376, 48 P 675, 678.

[86] Gedge v. Lindsay, 7 Terr. L. 141, 143 (as applied to prairie fires).

[87] Mineral County v. Hinsdale County, 25 Colo. 95, 99, 53 P 383 (when used in connection with surveying, means that a person qualified to do such work shall go upon the ground, and with proper instruments, chainmen and necessary assistants, establish and mark a line upon the surface of the earth).

[88] Cornell v. Franklin County Comrs., 67 Oh. St. 335, 338, 65 NE 998.

[89] Engel v. Frank Parmalee Co., 169 Ill. A. 410.

[90] See also Run ante.

[91] Webster New Int. D.

[92] **Furnishing facilities to connecting lines** see Carriers § 938 et seq.

[93] Oregon Short Line, etc., R. Co. v. Northern Pac. R. Co., 51 Fed. 465, 476, 478 [aff 61 Fed. 158, 163, 9 CCA 409].

Running front foot.[95] As used in statute relating to assessments for improvements, the aggregate frontage on both sides of the street.[96]

Running head. The line at the top of the page, which contains the folio or number of the page with the title of the book.[97]

Running lease. A term applied to a lease allowing the tenant the use of all the land he could clear in his lifetime.[98]

Running light. An expression used with regard to a railroad engine when it is not drawing cars.[99]

Other phrases: "Prohibited from running at large,"[1] "running account,"[2] "running along . . . line,"[3] "running and operating a railroad,"[4] "running at large,"[5] "running board,"[6] "running condition,"[7] "running days,"[8] "running down,"[9] "running fall,"[10] "running . . . loose,"[11] "running of the cars,"[12] "running of the locomotive or cars, or other machinery,"[13] "running of the train,"[14] "running order,"[15] "running policy,"[16] "running properly,"[17] "running repairs,"[18] "running season,"[19] "running switch,"[20] "running the shore,"[21] "running up the creek;"[22] also "running with,"[23] "running with the land,"[24] "the right to running water,"[25] "while running,"[26] and "whilst running, conducting or managing any locomotive, car or train of cars."[27]

RUNNING ACCOUNT.[28]

RUNNING AT LARGE.[29]

RUNNING DAYS.[30]

RUNNING POLICY.[31]

RUNNING SWITCH.[32]

RUNNING WITH THE LAND.[33]

RUN-OUT. A term applied in molding[34] when the heated metal escapes through any imperfection in the mold.[35]

RUNWAY. The path or tracks over which anything runs; a passageway.[36]

RUPTURE.[37] [§ 1] **A. As Noun.** A breaking or bursting asunder;[38] the forcible tearing or breaking of a part.[39] As used in a boiler insurance policy, a tearing asunder of the boiler or any portion thereof.[40]

Hernia[41] may constitute a "rupture."[42]

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[94] Barber Asphalt Pav. Co. v. Howcott, 109 La. 692, 33 S 734.

"Foot" see 26 C. J. p 790.

"Per foot" see Per 48 C. J. p 808 text and note 62.

[95] **"Running foot"** supra text and note 94.

[96] Klein v. Nugent Gravel Co., (Ind.) 66 NE 486, 489. See also Municipal Corporations § 3112.

Front-foot rule see Front-Foot Rule 27 C. J. p 911; Municipal Corporations § 3112.

[97] Century D. [quot Miller v. State, 81 Ark. 359, 362, 99 SW 533].

"Page" 46 C. J. p 1168.

[98] Cowan v. Hatcher, (Tenn. Ch. A.) 59 SW 689, 691.

Leases generally see Landlord and Tenant § 379 et seq.

[99] Galveston, etc., R. Co. v. Nicholson, (Tex. Civ. A.) 57 SW 693, 694.

[1] See Prohibit 50 C. J. p 650 text and note 99.

[2] See Accounts and Accounting § 8.

[3] Ramsay v. Butler, 148 Md. 438, 129 A 650, 651.

[4] Neely v. Buchanan, (Tenn. Ch. A.) 54 SW 995, 997.

[5] See Animals §§ 610–612; Larceny § 17; Municipal Corporations §§ 334, 335; Railroads § 1460.

[6] Central of Georgia R. Co. v. Bell, 133 Ga. 92, 65 SE 155. See also Footboard 26 C. J. p 790.

[7] Lane v. McLay, 91 Conn. 185, 99 A 498, 499.

"Condition" 12 C. J. p 398.

[8] See Shipping [36 Cyc 366].

[9] See Marine Insurance § 276 (in policy).

[10] Mt. Carmel v. Guthridge, 52 Ill. A. 632, 635.

[11] Testerman v. Hines, 88 W. Va. 547, 107 SE 201. See also Running light supra text and note 99.

[12] Georgia R., etc., Co. v. Reeves, 123 Ga. 697, 705, 51 SE 610; Gulfport, etc., Tract. Co. v. Hicks, 116 Miss. 164, 76 S 873.

[13] Tampa Electric Co. v. Soule, 84 Fla. 557, 94 S 692, 697; McGrady v. Charlotte Harbor, etc., R. Co., 66 Fla. 486, 63 S 921, 922; Seaboard Air Line Ry. Co. v. Bishop, 132 Ga. 71, 81, 63 SE 1103; Smith v. Atlantic Coast Line R. Co., 5 Ga. A. 219, 221, 62 SE 1020.

[14] Southern Ry. Co. v. Holbrook, 124 Ga. 679, 681, 53 SE 203.

[15] Lane v. McLay, 91 Conn. 185, 99 A 498, 499; Rhodes v. Cox, 9 KyL 895.

[16] See Insurance § 179; Marine Insurance § 48.

[17] See Properly 50 C. J. p 724 text and note 98.

[18] St. Louis, etc., R. Co. v. State, 86 Ark. 518, 520, 112 SW 150; Fidelity, etc., Co. v. Sanford, etc., Co., 158 Md. 525, 149 A 275, 281.

[19] See Sales [35 Cyc 180 text and note 18].

[20] See Flying Switch 26 C. J. p 745.

[21] Whitmore v. Brown, 100 Me. 410, 61 A 985, 988.

[22] Webb v. Bedford, 2 Bibb (Ky.) 354, 357.

[23] Merchants' Underwriters v. Parkhurst-Davis Mercantile Co., 140 Ill. A. 504, 508. See also "Concurrent" 12 C. J. p 393 text and note 2.

[24] See Covenants §§ 53–90; Deeds §§ 386–388.

[25] See Water Right [40 Cyc 541 text and note 29a].

[26] See Marine Insurance 38 C. J. p 1035 text and note 93.

[27] Gray v. Wabash R. Co., 157 Mo. A. 92, 97, 137 SW 324; Peters v. St. Louis, etc., R. Co., 150 Mo. A. 721, 733, 131 SW 917; Pratt v. Missouri Pac. R. Co., 139 Mo. A. 502, 507, 122 SW 1125.

[28] See Accounts and Accounting § 8.

[29] See Animals §§ 610–612. See also Larceny § 17; Municipal Corporations §§ 334, 335; Railroads § 1460.

[30] See Shipping [36 Cyc 366 text and note 13].

[31] See Insurance § 179 text and note 84 [a]; Marine Insurance § 48.

[32] See Flying Switch 26 C. J. p 745.

[33] **Conditions** see Deeds §§ 386–388.

Covenants §§ 53–90.

[34] **"Mold"** 40 C. J. p 1488.

[35] Kehoe v. Allen, 92 Mich. 464, 466, 52 NW 740, 31 AmSR 608.

[36] Century D.

Duty of master see Master and Servant §§ 476, 477, 728.

[37] **Cross references:**
Accident Insurance § 128.
Boiler Insurance 8 C. J. p 1140 text and note 7.
Damages § 420.
Workmen's Compensation Acts § 57 text and note 42.

[38] Cleveland Drop Forge Co. v. Travelers' Indemn. Co., 114 Oh. St. 549, 151 NE 671, 672.

[39] Dorland Med. D. [quot Webber v. Massachusetts Bonding, etc., Co., 81 Mont. 351, 357, 263 P 101].

[40] Louisville College of Dentistry v. Hartford Steam Boiler Inspection, etc., Co., 185 Ky. 778, 215 SW 941, 942.

[a] **"Bursting" distinguished.**—Funk & W. D. [quot Cleveland Drop Forge Co. v. Travelers' Indemn. Co., 114 Oh. St. 549, 151 NE 671, 672]. "Bursting" 9 C. J. p 1101.

"Explosion" distinguished see Explosion 25 C. J. p 68 [b].

[41] **"Hernia"** 29 C. J. p 349.

[42] Webber v. Massachusetts Bonding, etc., Co., 81 Mont. 351, 357, 263 P 101; Texas Indemn. Ins. Co. v. Holloway, (Tex. Civ. A.) 30 SW (2d) 921, 926; Southern Casualty Co. v. Fulkerson, (Tex. Civ. A.) 30 SW (2d) 911, 916.

[§ 2] **B. As Verb.** To break apart or separate the parts;[43] to open or part, as a steam boiler, without extreme violence.[44]

RURAL. Of or pertaining to the country, as distinguished from a city or town.[45]

Rural population. A phrase understood to signify a people scattered over the country and engaged in agricultural pursuits or some similar avocation requiring a considerable area of territory for its support.[46]

Rural real estate. That located in the country, in an agricultural district.[47]

Phrases: "Rural homestead,"[48] "rural letter carrier,"[49] "rural post road;"[50] and "rural [telephone] line."[51]

RURAL HOMESTEAD.[52]

RURAL LETTER CARRIER.[53]

RUSH. It has been said that the term undoubtedly requires something more than ordinary diligence.[54]

RUSH GAME or **HORSE GAME.**[55] The practice of the game is to find some one in advance, when the others form in a line, each one in the rear pushing the one in advance of him, and so on through the line until the one to be "rushed," who knows nothing of what is coming, is rushed upon by the one in his rear, and pushed or rushed.[56]

RUSK. As commonly understood, a light, sweetened bread, biscuit, or cake that has been crisped and browned in an oven.[57]

RUSSETTS. A term employed to designate an inferior quality of grape fruit.[58]

RUST. A term, although most commonly applied to the red or yellowish rust of iron, includes, as a part of its definition, the oxidation of any other metals, as well as iron.[59] As used in a bill of lading, includes not only rust occasioned by dampness of the atmosphere, but rust occasioned by water as well.[60]

RUSTIC. Unadorned, awkward, and pertaining to the country, rural.[61]

RUSTICUM FORUM. A phrase sometimes used in reference to proceedings of arbitrators.[62]

RUSTICUM JUS. In maritime law, the application of an equal division of damages.[63]

RUSTLER. A term used to designate a cattle thief.[64]

RUT. A synonym for furrow.[65]

RYE WHISKY.[66]

RUUNT MAGNA IN SE.[67]

***S.** An abbreviation for "section,"[68] "south,"[69] "statute,"[70] and various other words of which it is the initial.[71]

"S," long. Old fashioned form of the letter sometimes used to double the "s."[72]

SABBATH.[73]

SABBATH-BREAKING.[74]

SABOTAGE.[75]

SACCHARINE. An acid anhydrid;[76] anhydro-

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[43] Dallas v. Moore, 32 Tex. Civ. A. 230, 237, 74 SW 95.

[44] Funk & W. D. [quot Cleveland Drop Forge Co. v. Travelers' Indemn. Co., 114 Oh. St. 549, 151 NE 671, 672].

[45] Webster New Int. D.

[46] State v. Eidson, 76 Tex. 302, 305, 13 SW 263, 7 LRA 733.

[a] **"Town population" distinguished.**—State v. Eidson, 76 Tex. 302, 305, 13 SW 263, 7 LRA 733.

[47] Stees v. Bergmeier, 91 Minn. 513, 516, 98 NW 648. See also Municipal Corporations § 3121.

[48] See Homesteads § 91.

[49] See Post Office § 73.

[50] Cunningham v. Potts, 9 F. (2d) 469, 471.

[51] See Telegraphs and Telephones.

[52] See Homesteads § 91.

[53] See Post Office § 73.

[54] Boston Lumber Co. v. Pendleton Bros., 102 Conn. 626, 632, 129 A 782.

"Ordinary diligence" see Ordinary 18 C. J. p 1040 text and notes 50–57.

[55] Assault and Battery § 8 note 50 [a] (7).

[56] Markley v. Whitman, 95 Mich. 236, 54 NW 763, 35 AmSR 558, 20 LRA 55.

[57] U. S. v. Hermanos, 9 Cust. A. 66, 67 [cit Standard D.].

[58] Abel v. Murphy, 43 Misc. 648, 649, 88 NYS 256.

"Grapefruit" 28 C. J. p 823.

[59] Wolff v. The Vaderland, 18 Fed. 733, 739.

[60] The J. L. Luckenbach, 209 Fed. 142, 143; Broderick, etc., Rope Co. v. Luckenbach SS. Co., 139 Wash. 444, 247 P 937, 938. See also Carriers § 577 note 10 [b]; Shipping [36 Cyc 288 text and note 92].

[61] Raley v. State, 47 Tex. Civ. A. 426, 105 SW 342, 344.

"Rural" ante.

[62] Dickinson v. Chesapeake, etc., R. Co., 7 W. Va. 390, 429 [quot Underhill v. Van Cortlandt, 2 Johns. Ch. 339, 361]. See generally Arbitration and Award 5 C. J. p 1.

[63] The Victory, 68 Fed. 395, 400, 15 CCA 490. See also 3 Kent Comm. p 231 (where it is called "rusticum judicium").

[64] Galeppi v. Swanston, (Cal. A.) 290 P 116, 119. See also Animals § 249 et seq; Larceny § 17.

[65] Maxim Mfg. Co. v. Imperial Mach. Co., 286 Fed. 79, 83.

"Object" as including see Motor Vehicles § 363 text and notes 85, 87.

[66] See Pure 51 C. J. p 100 text and note 73. See also Intoxicating Liquors 33 C. J. p 480.

[67] A maxim meaning "Great interests are apt to clash." Morgan Leg. Max.

[68] Black L. D.

[69] Webster Unabr. D. [quot Sibley v. Smith, 2 Mich. 486, 503]; Bradley v. New York Cent. R. Co., 296 Ill. 383, 389, 129 NE 744. See Law v. Peo., 80 Ill. 268, 269; Etchison Ditching Assoc. v. Jarrell, 33 Ind. 131, 132.

[a] **Abbreviation "plain and valid in law."**—Sibley v. Smith, 2 Mich. 486, 503.

[b] **Held sufficient in descriptions.**—Law v. Peo., 80 Ill. 268, 269; Etchison Ditching Assoc. v. Jarrell, 33 Ind. 131, 132; Sibley v. Smith, 2 Mich. 486, 503.

[c] **Supreme court "may take judicial notice** of the fact that 'N' and 'S' when applied to directions are properly read north and south." Bradley v. New York Cent. R. Co., 296 Ill. 383, 389, 129 NE 744.

[70] Black L. D.

[71] Black L. D.

[72] Albright v. Lehigh Coal, etc., Co., 203 Pa. 65, 69, 52 A 33.

[a] **In discussing old spelling of name.**—"Generally his name is spelled by the officers as 'Moser,' occasionally as 'Mosser.' . . . His signature to the waiver is written with the old-fashioned long 's,' now sometimes used in English to double the 's,' but at the date of the writing it signified but one s, and therefore the name spelled by the defendant is 'Moser,' as it appears in all the other papers in the suit now to be found in the office." Albright v. Lehigh Coal, etc., Co., 203 Pa. 65, 69, 52 A 33.

[73] See Sunday [37 Cyc 539].

[74] See Sunday [37 Cyc 577 et seq].

[75] See Insurrection and Sedition §§ 12, 23.

[76] Lutz v. Magone, 153 U. S. 105, 108, 14 SCt 777, 38 L. ed. 651.

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*By Carlos M. Sandoval (S. to Sale or Return inclusive).

ortho-sulphamin-benzoic acid;[77] a trade name for benzoic sulphinide.[78] It is derived from coal tar;[79] and is used in many ways as a sugar substitute.[80]

SACK. [§ 1] **A. As Noun,** the term has a variety of meanings.[81] In a general sense, a measure of quantity;[82] an encasement not usually of permanent value and ordinarily used for the convenient transportation of the contents;[83] a receptacle of some pliable material, as cloth, leather, or the like, for holding and carrying goods of any kind;[84] its most natural meaning being a receptacle for holding the more coarse and bulky articles.[85] In a special sense, a fund in hand to be used for purposes of corruption.[86]

[§ 2] **B. As Adjective,** the term may be employed.[87]

Sack raft. A raft described as being round, or nearly so, in shape, the outside or boom logs fastened together at their ends with chains or ropes in a loose manner, with considerable slack, and inclosed in these boom logs are loose logs, put in without regard to position or order, with no binders of any sort, so that when the towline is made fast, and the towboat begins to pull on it, the raft becomes more or less elongated, and takes somewhat the shape of a sack or bag.[88]

SACRAMENTA PAUPERUM SUNT SERVANDA.[89]

SACRAMENTA PUBERUM SUNT SERVANDA.[90]

SACRAMENTUM HABET IN SE TRES COMITES, VERITATEM, JUSTITIAM ET JUDICIUM; VERITAS HABENDA EST IN JURATO; JUSTITIA ET JUSTICIUM IN JUDICE.[91]

SACRAMENTUM SI FATUUM FUERIT, LICET FALSUM, TAMEN NON COMMITTIT PERJURIUM.[92]

SACRED. In its ordinary sense, set apart by solemn religious ceremony or to religious use.[93] As used in a state constitution, with reference to the right to trial by an impartial jury, the term means no more than the word "inviolate,"[94] found in the fundamental law of some of the states;[95] hence it only means that the right itself shall be free from destruction or material impairment.[96]

Sacred things. In the classification of the Spanish civil law, those established for the service of God, and, as the consequence of such establishment, the dominion of them was not in man and they could not be counted property.[97]

SACRIFICE. As known to the maritime law, a term which is used in the sense of giving up or suffering to be lost for the sake of something else, not in the sense of an immolation.[98]

SACRILEGII INSTAR EST RESCRIPTUM PRINCIPIS OBVIARE.[99]

SACRILEGIUS OMNIUM PRÆDONUM CUPIDITATEM ET SCELERA SUPERAT.[1]

SADDLERY. As commonly understood,[2] the term means all leather articles and fittings used about horse furniture or for the equipment of horses;[3] the articles usually offered for sale in a saddler's shop;[4] the materials for making saddles and harness;[5] saddles and whatever belongs to them collectively.[6] The term ought to be applied to the trappings of a well horse, a "going" horse, and not a sick one.[7]

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[77] U. S. v. Lehn, 113 Fed. 1005.

[78] Lutz v. Magone, 153 U. S. 105, 108, 14 SCt 777, 38 L. ed. 651.

[79] Lutz v. Magone, 153 U. S. 105, 108, 14 SCt 777, 38 L. ed. 651 [aff 41 Fed. 128]; U. S. v. Lehn, 113 Fed. 1005.

[a] **Distinguished from "dulcin,"** which is also derived from coal tar. U. S. v. Lehn, 113 Fed. 1005.

[80] Webster New Int. D.

[81] State v. Nunn, 122 Wash. 437, 438, 210 P 771.

[82] State v. Nunn, supra.

[a] **"Five sacks of whiskey."**—This phrase used in an information for possessing and carrying about with intent to sell "five sacks of whiskey" held not to render such information void, since the phrase was probably used in the sense of measure of quantity. State v. Nunn, 122 Wash. 437, 438, 210 P 771.

[83] U. S. v. Nicholls, 186 U. S. 298, 300, 22 SCt 918, 46 L. ed. 1173 (construing phrase "cartons, cases, crates, boxes, sacks and coverings of any kind").

[84] State v. Nunn, 122 Wash. 437, 438, 210 P 771.

[85] State v. Nunn, supra.

[86] Edwards v. San Jose Printing, etc., Soc., 99 Cal. 431, 436, 34 P 128, 37 AmSR 70 (where the term was so construed when used in a newspaper publication stating that a corporation would put a large sum of money into the fight to corrupt voters, and that a certain person would have charge of the "sack").

[87] See cases infra note 88.

[88] The Mary, 123 Fed. 609, 611. See The Athabasca, 45 Fed. 651, 653, 654. See also Logs and Logging § 116 et seq.

"Raft" 51 C. J. p 367.

[89] A maxim meaning "The oaths of the poor are to be kept." Morgan Leg. Max. [cit Halkerstone Leg. Max.].

[90] A maxim meaning "The oaths of minors are to kept inviolate." Morgan Leg. Max: [cit Trayner Leg. Max.].

[91] A maxim meaning "An oath has in it three component parts, truth, justice, and judgment; truth in the party swearing; justice and judgment in the judge administering the oath." Peloubet Leg. Max. [cit 3 Inst. 160].

[92] A maxim meaning "A foolish oath, though false, makes not perjury." Bouvier L. D. [cit 2 Inst. 167].

[93] Webster New Int. D. See also Sacred things infra note 97.

[94] State v. Mercier, 98 Vt. 368, 370, 127 A 715 (Const. c 1 arts 10, 12). See Peo. v. Peete, 54 Cal. A. 333, 363, 202 P 51.

"Inviolate" 33 C. J. p 809.

[95] See constitutional provisions.

[96] State v. Mercier, 98 Vt. 368, 370, 127 A 715. See State v. De Lorenzo, 81 N. J. L. 613, 616, 79 A 839, AnnCas 1912D 329; Humphrey v. Eakeley, 72 N. J. L. 424, 426, 60 A 1097, 5 Ann Cas 929. See also Juries §§ 13–15, 22, 31, 94.

[a] **It does not mean:** (1) "That the mode of listing and selecting the jurors shall forever remain unchanged." State v. Mercier, 98 Vt. 368, 370, 127 A 715. (2) "That it shall be unalterable." Clayton v. Clark, 55 N. J. L. 539, 540, 26 A 795 [quot State v. De Lorenzo, 81 N. J. L. 613, 616, 79 A 839, AnnCas1912D 329; Humphrey v. Eakeley, 72 N. J. L. 424, 425, 60 A 1097, 5 AnnCas 929].

[97] Sullivan v. Richardson, 33 Fla. 1, 114, 14 S 692.

[98] The Roanoke, 46 Fed. 297, 298. See Heye v. North German Lloyd, 33 Fed. 60, 63; Shepherd v. Kottgen, 2 C. P. D. 585, 589, 590. See also Shipping [36 Cyc 373–390].

[99] A maxim meaning "It is like sacrilege to oppose the order of the ruler of one's country." Morgan Leg. Max. [cit Tayler L. Gloss.].

[1] A maxim meaning "A sacrilegious person transcends the cupidity and wickedness of all other despoilers." Morgan Leg. Max. [cit Adams' Case, 4 Coke 104b, 106, 76 Reprint 1091].

[2] Wyman v. U. S., 13 Cust. A. 241, 243.

[3] Wyman v. U. S., supra [cit Century D.; New Standard D.].

[a] **Not "limited to articles of leather,** because it appears that there is a saddle cloth and I suppose the court may take judicial notice that the surcingle is made of canvas." Veil v. U. S., 113 Fed. 856.

[b] **Tariff Act (1922)** par 1436 imposes duty on "saddlery and parts thereof . . . that is to say all horse furniture and equipment and parts thereof other than harness and saddles," [these latter being covered elsewhere in the act]. Wyman v. U. S., 13 Cust. A. 241, 243.

For **later cases, developments** and **changes** in the law see **Annotations,** same title and section number.

SADISM.[8]

SÆPE CONSTITUTUM EST, RES INTER ALIOS JUDICATAS ALIIS NON PRÆJUDICARE.[9]

SÆPENUMERO UBI PROPRIETAS VERBORUM ATTENDITUR, SENSUS VERITATIS AMITTITUR.[10]

SÆPE VIATOREM NOVA, NON VETUS ORBITA FALLIT.[11]

SÆVITIA. A term of the civil law,[12] of the ecclesiastical courts of England,[13] and of English law,[14] corresponding to "cruel treatment,"[15] or "cruelty;"[16] and which may be defined to be personal violence actually inflicted or menaced, and affecting life or health.[17]

SAFE. [§ 1] **A. As Adjective.**[18] Free from danger of any kind;[19] frequently construed to mean "reasonably safe;"[20] secure;[21] so free from danger to life or health as the nature or place of employment reasonably permits;[22] sound.[23] The term has been defined in statutes[24] as meaning such freedom from danger to the life, health, safety,[25] or welfare[26] of employees[27] or frequenters,[28] as the nature of the employment,[29] place of employment,[30] or public

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4. Webster New Int. D. [quot Wyman v. U. S., 13 Cust. A. 241, 243].

[a] **Whips are not saddlery.**—In construing tariff provisions, [Act July 24, 1897, par 208, 447] the court said: "There is, therefore, nothing to support the findings of the board that these whips are saddlery, except in so far as it is a matter of common knowledge that carriage whips are kept in saddler's shops." Davies v. U. S., 107 Fed. 266, 267.

5. Webster New Int. D. [quot Wyman v. U. S., 13 Cust. A. 241, 243].

6. Wyman v. U. S., supra [cit Century D.; New Standard D.].

7. Veil v. U. S., 113 Fed. 856.

[a] **Held not to include** woolen bands intended for use of veterinary surgeons, to be applied to lame legs. Veil v. U. S., 113 Fed. 856.

8. See Insane Persons § 128.

9. A maxim meaning "It has often been settled that matters adjudged between others ought not to prejudice those who were not parties." Black L. D. [cit Dig. 42, 1, 63].

10. A maxim meaning "Frequently where the propriety of words is attended to, the meaning of truth is lost." Bouvier L. D.

11. A maxim meaning "Often it is the new track, not the old one, which deceives the traveler." Peloubet Leg. Max. [cit 4 Inst. 34].

12. Hair v. Hair, 31 S. C. Eq. 163, 173 [quot Briggs v. Briggs, 24 S. C. 377, 380].

13. Beebe v. Beebe, 10 Iowa 133, 135.

14. Ring v. Ring, 118 Ga. 183, 184, 44 SE 861, 62 LRA 878.

15. Ring v. Ring, supra.

"Cruel treatment" as ground for divorce see Divorce §§ 80–107.

"Cruel treatment" 17 C. J. p 388.

16. Beebe v. Beebe, 10 Iowa 133, 135.

"Cruelty" 17 C. J. p 388.

17. Hair v. Hair, 31 S. C. Eq. 163, 173 [quot Briggs v. Briggs, 24 S. C. 377, 380].

[a] **"To this may be added** as constituting 'sævitia' of another kind: When the husband has not actually inflicted any bodily injury, yet practices such obscene and revolting indecencies in the family circle that a modest and pure-minded woman would find these grievances more intolerable to be borne than the most cruel afflictions upon her person." Briggs v. Briggs, 24 S. C. 377, 380.

18. See also Safely post; Safety post.

Iron safe clause see Fire Insurance § 320.

Safe place to work see Master and Servant § 441 et seq.

19. Webster D. [quot Louisville, etc., R. Co. v. Brownlee, 14 Bush (Ky.) 590, 595]. See Martin v. Des Moines Edison Light Co., 131 Iowa 724, 731, 106 NW 359.

[a] **"In common parlance,** [safe place to work] does not mean a place so made or guarded as to exclude all possibility of danger." Martin v. Des Moines Edison Light Co., 131 Iowa 724, 731, 106 NW 359.

20. Waterbury v. Chicago, etc., R. Co., 207 Ill. A. 375, 379; Lively v. American Zinc Co., 137 Tenn. 261, 273, 191 SW 975. See also Reasonably 52 C. J. p 1188 note 17.

[a] **As used in reference to the duties of masters** to servants, or railroads to passengers, the term does not have an absolute and unqualified meaning. St. Louis, etc., R. Co. v. Barnett, 65 Ark. 255, 258, 45 SW 550.

[b] **"Does not purport absolute safety,** but only reasonable safety." Lively v. American Zinc Co., 137 Tenn. 261, 273, 191 SW 975.

[c] **"The words 'safe' and 'care' and 'safe place'** are frequently used interchangeably with 'reasonably safe' and 'reasonable care.' 'Safe' and 'unsafe' are words frequently used in comparison by courts in discussing the question of a reasonably safe place, and evidently without any intention of changing the well-established rule of reasonable care or a reasonably safe place." Gray v. Washington Water Power Co., 30 Wash. 665, 671, 71 P 206 [quot Lively v. American Zinc Co., 137 Tenn. 261, 274, 191 SW 975].

21. Wenzel, etc., Constr. Co. v. Industrial Commn., (Wis.) 233 NW 777, 779.

[a] **"Secure" synonymous.**—Wenzel, etc., Constr. Co. v. Industrial Commn., (Wis.) 233 NW 777, 779.

22. Dugenske v. Wyse, 194 Wis. 159, 215 NW 829, 830.

[a] **Similar definition.**—"As free from danger to the life, safety, and welfare of the employee as the nature of the employment would reasonably permit." Kuhn v. Cincinnati Tract. Co., 109 Oh. St. 263, 142 NE 370, 373.

23. Kuhn v. Cincinnati Tract. Co., supra.

[a] **"Sound" synonymous.**—"By recognized lexicographers the word 'safe' is given the meaning of sound, and the word 'sound' the meaning of safe." Kuhn v. Cincinnati Tract. Co., 109 Oh. St. 263, 142 NE 370, 374.

"Sound" [36 Cyc 514].

24. See statutory provisions. See also Oh. Gen. Code § 871–13; Wis. St. (1929) § 101.01 subsec 11; Wis. St. (1911) § 2394–41 subd 11 (all defining "safe" and "safety" in same words).

25. Kuhn v. Cincinnati Tract. Co., 109 Oh. St. 263, 142 NE 370, 373; Ohio Automatic Sprinkler Co. v. Fender, 108 Oh. St. 149, 170, 171, 141 NE 269; Wenzel, etc., Constr. Co. v. Industrial Commn., (Wis.) 233 NW 777, 779; Holcomb v. Szymczyk, 186 Wis. 99, 102, 202 NW 188; Gobar v. Val Blatz Brewing Co., 179 Wis. 256, 257, 191 NW 509; Olson v. Whitney Bros. Co., 160 Wis. 606, 610, 150 NW 959; Tallman v. Chippewa Sugar Co., 155 Wis. 36, 39, 143 NW 1054.

26. Kuhn v. Cincinnati Tract. Co., 109 Oh. St. 263, 142 NE 370, 373; Ohio Automatic Sprinkler Co. v. Fender, 108 Oh. St. 149, 170, 171, 141 NE 269; Wenzel, etc., Constr. Co. v. Industrial Commn., (Wis.) 233 NW 777, 779; Holcomb v. Szymczyk, 186 Wis. 99, 102, 202 NW 188; Gobar v. Val Blatz Brewing Co., 179 Wis. 256, 257, 191 NW 509.

27. Kuhn v. Cincinnati Tract. Co., 109 St. 263, 142 NE 370, 373; Ohio Automatic Sprinkler Co. v. Fender, 108 Oh. St. 149, 170, 171, 141 NE 269; Wenzel, etc., Constr. Co. v. Industrial Commn., (Wis.) 233 NW 777, 779; Holcomb v. Szymczyk, 186 Wis. 99, 102, 202 NW 188; Gobar v. Val Blatz Brewing Co., 179 Wis. 256, 257, 191 NW 509; Olson v. Whitney Bros. Co., 160 Wis. 606, 610, 150 NW 959; Tallman v. Chippewa Sugar Co., 155 Wis. 36, 39, 143 NW 1054.

28. Ohio Automatic Sprinkler Co. v. Fender, 108 Oh. St. 149, 170, 171, 141 NE 269; Holcomb v. Szymczyk, 186 Wis. 99, 102, 202 NW 188; Gobar v. Val Blatz Brewing Co., 179 Wis. 256, 258, 191 NW 509; Olson v. Whitney Bros. Co., 160 Wis. 606, 610, 150 NW 959; Tallman v. Chippewa Sugar Co., 155 Wis. 36, 39, 143 NW 1054.

29. Kuhn v. Cincinnati Tract. Co., 109 Oh. St. 263, 142 NE 370, 373; Ohio Automatic Sprinkler Co. v. Fender, 108 Oh. St. 149, 170, 171, 141 NE 269; Wenzel, etc., Constr. Co. v. Industrial Commn., (Wis.) 233 NW 777, 779; Holcomb v. Szymczyk, 186 Wis. 99, 102, 202 NW 188; Olson v. Whitney Bros. Co., 160 Wis. 606, 610, 150 NW 959; Tallman v. Chippewa Sugar Co., 155 Wis. 36, 39, 143 NW 1054.

30. Wenzel, etc., Constr. Co. v. Industrial Commn., (Wis.) 233 NW 777, 779; Holcomb v. Szymczyk, 186 Wis. 99, 102, 202 NW 188.

building,[31] will reasonably permit.[32]

Safe deposit company.[33] A company which maintains vaults for the deposit and safekeeping of valuables in which compartments or boxes are rented to customers who have exclusive access thereto, subject to the oversight and under the rules and regulations of the company;[34] one whose purposes are to keep and maintain safe deposit vaults and safes and strong boxes for the safe-keeping of valuable articles and property of all kinds.[35]

Other phrases: "Safe and available,"[36] "safe and close custody,"[37] "safe and convenient,"[38] "safe and decent access,"[39] "safe and harmless,"[40] "safe and sufficient,"[41] "safe and suitable,"[42] "safe and suitable appliance,"[43] "safe and unobstructed exit,"[44] "safe and workmanlike manner,"[45] "safe berth,"[46] "safe custody,"[47] "safe depository,"[48] "safe distance,"[49] "safe employment,"[50] "safe-guards,"[51] "safe harbor,"[52] "safe highway,"[53] "safe-keeping,"[54] "safe limit,"[55] "safe limit of speed,"[56] "safe machinery,"[57] "safe means,"[58] "safe port,"[59] "safe rate of speed,"[60] "suitable and safe."[61]

[§ 2] **B. As Noun.** A place or structure for the storage of money, papers, or valuables, in safety from risk of theft or fire;[62] the actual receptacle in which valuables are placed to complete their safety.[63]

Other phrases: "Safe or vault,"[64] also "vault or safe."[65]

SAFE APPLIANCE.[66]

SAFE–CONDUCT.[67]

SAFE CRACKER. One who uses explosives in an attempt to break open a safe used for keeping valuables, with intent to commit a larceny;[68] but the term has a broader meaning than one who cracks or attempts to crack a safe by the use of an explosive and may cover persons who break or attempt to break into safes through other instrumentalities.[69]

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[31] Holcomb v. Szymczyk, supra; Gobar v. Val Blatz Brewing Co., 179 Wis. 256, 257, 191 NW 509.

[a] "**'Safe' as applied to a public building** is defined [in a statute], 'shall mean such freedom from danger to the life, health, safety or welfare of employees or frequenters, or the public, or tenants, or firemen, and such reasonable means of notification, egress and escape in case of fire, and such freedom from danger to adjacent buildings, or other property, as the nature of the employment, place of employment, or public building, will reasonably permit.'" Holcomb v. Szymczyk, 186 Wis. 99, 102, 202 NW 188. See Gobar v. Val Blatz Brewing Co., 179 Wis. 256, 257, 191 NW 509 (partially quoting same statutory definition).

[b] **A building is "safe,"** within meaning of the statute, which is composed of proper materials and is structurally safe, and statute does not apply to temporary conditions, having no relation to structure of building or materials of which composed. Holcomb v. Szymczyk, 186 Wis. 99, 104, 202 NW 188.

[32] Kuhn v. Cincinnati Tract. Co., 109 Oh. St. 263, 142 NE 370, 373; Ohio Automatic Sprinkler Co. v. Fender, 108 Oh. St. 149, 170, 171, 141 NE 269; Wenzel, etc., Constr. Co. v. Industrial Commn., (Wis.) 233 NW 777, 779; Holcomb v. Szymczyk, 186 Wis. 99, 102, 202 NW 188; Gobar v. Val Blatz Brewing Co., 179 Wis. 256, 258, 191 NW 509; Olson v. Whitney Bros. Co., 160 Wis. 606, 610, 150 NW 959; Tallman v. Chippewa Sugar Co., 155 Wis. 36, 39, 143 NW 1054.

[33] **Safe deposit company:**
In general see Warehousemen [40 Cyc 396].
Garnishment of property in custody of see Garnishment § 105.
Liability of bank for negligence in caring for special deposit see Banks and Banking §§ 331, 332.

[34] Bouvier L. D.

[35] See State v. Kelsey, 53 N. J. L. 590, 591, 22 A 342.

[36] Lively v. American Zinc Co., 137 Tenn. 261, 274, 191 SW 975.

[37] Steere v. Field, 22 F. Cas. No. 13,350, 2 Mason 486, 495.

[38] Morgan v. Lewiston, 91 Me. 566, 570, 40 A 545; Church v. Cherryfield, 33 Me. 460; McClosky v. Moies, 19 R. I. 297, 299, 33 A 225.

[39] Dunn v. Western Union Tel. Co., 2 Ga. A. 845, 59 SE 189, 191.

[40] Schneck v. Lewis, 121 Misc. 370, 201 NYS 282, 287.

[41] Lake Erie, etc., R. Co. v. McFall, 165 Ind. 574, 76 NE 400, 402.

[42] Wall v. Marshutz, 138 Cal. 522, 526, 71 P 692; Lively v. American Zinc Co., 137 Tenn. 261, 274, 191 SW 975.

[43] Davis v. Northwestern R. Co., 75 S. C. 303, 55 SE 526, 528. See also Master and Servant §§ 441–451.

[44] Hoffman v. Fraad, 130 Misc. 667, 224 NYS 694, 703.

[45] Consolidated Coal Co. v. Schaefer, 135 Ill. 210, 216, 25 NE 788.

[46] The Juniata, 124 Fed. 861, 863.

[47] Reg. v. Newman, 8 Q. B. D. 706, 710.

[a] **Intrusting "for investment"** distinguished from intrusting "for safe custody." Reg. v. Newman, 8 Q. B. D. 706, 710.

"Custody" 17 C. J. p 440.

[48] Louisville, etc., R. Co. v. Brownlee, 14 Bush (Ky.) 590, 595.

[49] Wadsworth v. Marshall, 88 Me. 263, 271, 34 A 30, 32 LRA 588.

[50] Miller v. Paine Lumber Co. (Wis.) 230 NW 702, 703.

[a] "**Broader in scope** than a safe 'place of employment.'" Miller v. Paine Lumber Co., (Wis.) 230 NW 702, 703.

[51] Kuhn v. Cincinnati Tract. Co., 109 Oh. St. 263, 142 NE 370, 373.

[52] The Donna Lane, 299 Fed. 977, 980.

[53] See Chicago, etc., R. Co. v. Leachman, 161 Ind. 512, 518, 69 NE 253. See also Highways §§ 444–467.

[54] Wright v. Paine, 62 Ala. 340, 344, 34 AmR 24; In re Huston, 27 Ida. 231, 238, 147 P 1064. See also Depositories §§ 1–11.

[55] Horton v. New York Cent. R. Co., 205 App. Div. 763, 200 NYS 365, 366.

[56] Grimshaw v. Rutland R. Co., 205 App. Div. 155, 199 NYS 590, 592.

[57] Gulf, etc., R. Co. v. Wells, 81 Tex. 685, 687, 17 SW 511; Texas Cent. R. Co. v. Lyons, (Tex. Civ. A.) 34 SW 362, 364. See also Master and Servant § 441 et seq.

[58] Texas, etc., R. Co. v. Beezley, 46 Tex. Civ. A. 108, 101 SW 1051, 1052. See also Carriers § 1354.

"Means" 40 C. J. p 18.

[59] Atkins v. Fibre Disintegrating Co., 2 F. Cas. No. 601, 2 Ben. 381, 383; Palace Shipping Co., Ltd. v. Gans SS. Line, [1916] 1 K. B. 138, 141; Reynolds v. Tomlinson, [1896] 1 Q. B. 586, 589; Ogden v. Graham, 1 B. & S. 773, 780, 101 ECL 773, 121 Reprint 901; Hall Bros. SS. Co. v. Paul, Ltd., 30 T. L. R. 598, 599.

[a] **Implies** port must be both physically and politically safe. Palace Shipping Co., Ltd. v. Gans SS. Line, [1916] 1 K. B. 138, 141; Ogden v. Graham, 1 B. & S. 773, 780, 101 ECL 773, 121 Reprint 901 (port which, on account of political disturbance, vessel could not enter without risk of confiscation is not a safe port).

[60] Cleveland, etc., R. Co. v. Newell, 75 Ind. 542, 544.

[61] Kansas City Southern R. Co. v. Greer, 90 Ark. 531, 119 SW 1121, 1123.

[a] **"Good" and "sufficient"** held substantially the same as "suitable and safe" in an instruction. Kansas City Southern R. Co. v. Greer, 90 Ark. 531, 119 SW 1121, 1123.

[62] Century D.

[63] Columbia Casualty Co. v. L. W. Rogers Co., 157 Ga. 158, 160, 121 SE 224.

[64] Columbia Casualty Co. v. L. W. Rogers Co., supra.

[65] Smith v. Mine, etc., Supply Co., 32 Utah 21, 26, 32, 88 P 683.

Within meaning of ordinance regulating storage of explosives see Explosives § 6 note 46.

[66] See Master and Servant § 441 et seq.

[67] See War [40 Cyc 325]. See also Passport 47 C. J. p 1375.

[68] State v. O'Day, 74 S. C. 448, 450, 54 SE 607.

[a] **Success not necessary.**—"It is not essential to constitute a safe cracker that he shall be successful in his attempt to break open the safe." State v. O'Day, 74 S. C. 448, 450, 54 SE 607.

"Larceny" see Larceny §§ 1–3.

SAFE DEPOSIT COMPANY.[70]

SAFEGUARD.[71]

SAFELY.[72] In a safe manner.[73]

Phrases: "Safely anchored,"[74] "safely and securely,"[75] "safely arrived,"[76] "safely carried,"[77] "safely delivered,"[78] "safely in port,"[79] "safely keep,"[80] "safely moored,"[81] and "safely promise."[82]

SAFE PLACE TO WORK.[83]

SAFETY.[84] [§ 1] **A. As Noun.** Applied to funds, the term means their safekeeping and faithful and punctual accounting for them.[85] Applied to places of employment,[86] and public buildings,[87] it is not an absolute, fixed term, but a relative one;[88] and it has been defined in statutes[89] as meaning such freedom from danger to the life, health, safety or welfare of employees,[90] or frequenters,[91] or the public or tenants,[92] as the nature of the employment,[93] or the public building,[94] will reasonably permit.[95]

In safety. A phrase equivalent to "without injury."[96]

[§ 2] **B. As Adjective.** Dependable;[97] reliable;[98] security.[99]

Safety gates. Physical hindrances in the way of those seeking to cross railroad tracks.[1]

Safety ground wire. One making direct connection between the framework on which the motor sets and the ground, whereby any leakage of electricity from the motor or wires to the framework is carried into the ground, thus preventing shock to a person coming in contact with the machine.[2]

Other phrases: "Safety appliance,"[3] "safety devices,"[4] "safety first campaign,"[5] and "safety

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69. State v. O'Day, 74 S. C. 448, 450, 54 SE 607.

70. See Safe ante § 1.

71. See Master and Servant §§ 523–529.

72. See also Safe ante; Safety post.

73. Century D.

74. The Thornley, 98 Fed. 735, 742, 39 CCA 248.

75. Jaminet v. American Storage, etc., Co., 109 Mo. A. 257, 268, 84 SW 128; Ross v. Hill, 2 C. B. 877, 890, 52 ECL 877, 135 Reprint 1190.

[a] **In a declaration** stating that defendant agreed to carry plaintiff and his baggage "safely and securely," the words meant "safely and securely, regard being had to the relative rights and duties of the parties;" the words importing only an undertaking to use due care. Ross v. Hill, 2 C. B. 877, 52 ECL 877, 135 Reprint 1190.

76. The Thornley, 98 Fed. 735, 742, 39 CCA 248.

77. Heitman v. Chicago, etc., R. Co., 45 Mont. 406, 412, 123 P 401. See also Carriers § 79 et seq.

78. The Thornley, 98 Fed. 735, 742, 39 CCA 248.

[a] **In construing salvage contract** providing no payments for services were due unless the vessel was delivered safely in port, the court said: "'Safely delivered' meant delivered in a safe place, with no impending dangers. . . . 'Safely,' in such connection, does not mean that the ship is intact, without injury or damage resulting from her voyage." The Thornley, 98 Fed. 735, 742, 39 CCA 248.

79. The Thornley, supra.

80. Cormack v. Wolcott, 37 Kan. 391, 394, 15 P 245.

81. The Thornley, 98 Fed. 735, 742, 39 CCA 248.

82. Syracuse Knitting Co. v. Blanchard, 69 N. H. 447, 448, 43 A 637.

83. See Master and Servant § 441 et seq.

84. See also Safe ante; Safely ante.

85. State v. Louisiana Agriculture, etc., Bd., 122 La. 677, 680, 48 S 148.

86. Maryland Casualty Co. v. Thomas Furnace Co., 185 Wis. 98, 102, 201 NW 263; Kelly v. Kneeland-McLurg Lumber Co., 161 Wis. 158, 160, 152 NW 858; Sparrow v. Menasha Paper Co., 154 Wis. 459, 463, 143 NW 317. See also Master and Servant § 441 et seq.

87. Gobar v. Val Blatz Brewing Co., 179 Wis. 256, 257, 191 NW 509.

88. Olson v. Whitney Bros. Co., 160 Wis. 606, 612, 150 NW 959 [quot Maryland Casualty Co. v. Thomas Furnace Co., 185 Wis. 98, 103, 201 NW 263].

89. See statutory provisions. See also Oh. Gen. Code § 871—13; Wis. St. (1929) § 101.01 subsec 11; Wis. St. (1911) § 2394–41 subd 11 (all giving same definition for "safe" and "safety").

90. Kuhn v. Cincinnati Tract. Co., 109 Oh. St. 263, 142 NE 370, 373; Ohio Automatic Sprinkler Co. v. Fender, 108 Oh. St. 149, 171, 141 NE 269; Maryland Casualty Co. v. Thomas Furnace Co., 185 Wis. 98, 102, 201 NW 263; Gobar v. Val Blatz Brewing Co., 179 Wis. 256, 257, 191 NW 509. See Kelly v. Kneeland-McLurg Lumber Co., 161 Wis. 158, 160, 152 NW 858; Sparrow v. Menasha Paper Co., 154 Wis. 459, 463, 143 NW 317 (last two cases omitting "welfare" from quoted statutory definition).

91. Ohio Automatic Sprinkler Co. v. Fender, 108 Oh. St. 149, 171, 141 NE 269; Maryland Casualty Co. v. Thomas Furnace Co., 185 Wis. 98, 102, 201 NW 263; Gobar v. Val Blatz Brewing Co., 179 Wis. 256, 257, 191 NW 509; Sparrow v. Menasha Paper Co., 154 Wis. 459, 463, 143 NW 317.

92. Gobar v. Val Blatz Brewing Co., 179 Wis. 256, 257, 191 NW 509.

93. Kuhn v. Cincinnati Tract. Co., 109 Oh. St. 263, 142 NE 370, 373; Ohio Automatic Sprinkler Co. v. Fender, 108 Oh. St. 149, 171, 141 NE 269; Maryland Casualty Co. v. Thomas Furnace Co., 185 Wis. 98, 102, 201 NW 263; Gobar v. Val Blatz Brewing Co., 179 Wis. 256, 257, 191 NW 509; Sparrow v. Menasha Paper Co., 154 Wis. 459, 463, 143 NW 317; Kelly v. Kneeland-McLurg Lumber Co., 161 Wis. 158, 160, 152 NW 858.

94. Holcomb v. Szymczyk, 186 Wis. 99, 102, 202 NW 188; Gobar v. Val Blatz Brewing Co., 179 Wis. 256, 257, 191 NW 509.

95. Kuhn v. Cincinnati Tract. Co., 109 Oh. St. 263, 142 NE 370, 373; Ohio Automatic Sprinkler Co. v. Fender, 108 Oh. St. 149, 171, 141 NE 269; Maryland Casualty Co. v. Thomas Furnace Co., 185 Wis. 98, 102, 201 NW 263; Gobar v. Val Blatz Brewing Co., 179 Wis. 256, 257, 191 NW 509, 510; Kelly v. Kneeland-McLurg Lumber Co., 161 Wis. 158, 160, 152 NW 858; Sparrow v. Menasha Paper Co., 154 Wis. 459, 463, 143 NW 317.

[a] **"Absolute safety** is unattainable, and employers are not insurers." Titus v. Bradford, etc., R. Co., 136 Pa. 618, 626, 20 A 517, 20 AmSR 944 [quot Lively v. American Zinc Co., 137 Tenn. 261, 274, 191 SW 975].

96. Missouri, etc., R. Co. v. Miller, 15 Tex. Civ. A. 428, 431, 39 SW 583.

[a] **Used in instruction,** "the language was not improper in a charge, and did not hold defendant to too great a responsibility, and was, in effect, the same as if it had used the words 'without injury.'" Missouri, etc., R. Co. v. Miller, 15 Tex. Civ. A. 428, 431, 39 SW 583.

97. Safety Storage Co. v. Lupenski, 100 N. J. Eq. 385, 386, 136 A 203.

98. Safety Storage Co. v. Lupenski, supra.

99. Safety Storage Co. v. Lupenski, supra.

[a] **Used in name** "Safety Storage Company," "safety" means no more than "reliable," "dependable," "security," or the like, and when used in community so as to become generally known by public, any interference or appropriation of dominant part of such name by competitor in manner deceiving public into believing that competitor is original user, to detriment of original user, has been held to be unfair business competition and should be restrained. Safety Storage Co. v. Lupenski, 100 N. J. Eq. 385, 386, 136 A 203.

1. West Jersey, etc., R. Co. v. Bridgeton, 64 N. J. L. 189, 190, 44 A 848. See also Railroads § 1042.

[a] **"Warning signals" distinguished.**—West Jersey, etc., R. Co. v. Bridgeton, 64 N. J. L. 189, 190, 44 A 848. See also Railroads §§ 1006–1017.

2. Lamberti v. Neal, 253 Mass. 99, 105, 148 NE 463.

3. See Appliance 4 C. J. p 1395 note 67.

"Appliance" 4 C. J. pp 1378–1398.

4. Kuhn v. Cincinnati Tract. Co., 109 Oh. St. 263, 142 NE 370, 373. See State v. St. Paul, etc., R. Co., 98 Minn. 380, 108 NW 261, 266, 120 AmSR 581, 28 LRANS 298, 8 AnnCas 1047.

"Device" 18 C. J. p 1032.

5. Cluff v. Cameron, 22 OntWN 245, 246 [aff 23 OntWN 89].

island."[6]

SAGO FLOUR. A term which is said to indicate the first and only form in which the product of the sago palm is known in this country.[7]

SAID. In legal terminology,[8] above mentioned;[9] aforementioned;[10] aforesaid;[11] already spoken of;[12] before mentioned;[13] previously mentioned,[14] or named.[15] It is a relative word,[16] or a word of reference[17] to what has been already spoken of or specified;[18] and if there is a question as to which of the antecedent things or propositions specified is referred to, it is generally held to refer to the last of such antecedent propositions or things;[19] or to the next antecedent;[20] but such rule will not be strictly applied where it would result in destroying or materially altering the intention expressed in the whole context of the language under consideration;[21] and the word will be referred to the proper antecedent.[22]

Phrases: "Said acts and conduct,"[23] "said children,"[24] "said county,"[25] "said defendants,"[26] "said estate,"[27] "said lands,"[28] "said manufacturer,"[29] "said oil,"[30] "said property,"[31] "said railroad,"[32]

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[6] Jeffares v. Wolfenden, 31 West LR 428. 429.

[7] Littlejohn v. U. S., 119 Fed. 483, 484.

[8] Murry v. State, 150 Ark. 461, 234 SW 485, 486.

[9] In re Phelan, 82 N. J. Eq. 316, 319, 87 A 625. See Greeley Nat. Bank v. Wolf, 4 F. (2d) 67, 69; Com. v. Schweiters, 122 Ky. 874, 880, 93 SW 592, 29 KyL 417.

[a] "**When used in a document** it refers to something that has been mentioned above in the document." Greeley Nat. Bank v. Wolf, 4 F. (2d) 67, 69; Com. v. Schweiters, 122 Ky. 874, 880, 93 SW 592, 29 KyL 417.

[10] Murry v. State, 150 Ark. 461, 234 SW 485, 486; International, etc., R. Co. v. Anderson County, 59 Tex. 654, 663.

[11] State v. Skeggs, 154 Ala. 249, 260, 46 S 268; Moore v. Texarkana Pav. Impr. Dist. No. 20, 122 Ark. 326, 183 SW 766, 769, AnnCas1917D 599 [quot Le Flore v. Handlin, 153 Ark. 421, 240 SW 712, 715 (both quot Cyc)].

"**Aforesaid**" 2 C. J. p 393.

[12] Murry v. State, 150 Ark. 461, 234 SW 485, 486.

[13] Bouvier L. D. [quot Brown v. State, 28 Tex. A. 379, 380, 13 SW 150]; State v. Skeggs, 154 Ala. 249, 260, 46 S 268; Moore v. Texarkana Pav. Impr. Dist. No. 20, 122 Ark. 326, 183 SW 766, 769, AnnCas1917D 599 [quot Le Flore v. Handlin, 153 Ark. 421, 240 SW 712, 715 (both quot Cyc)].

[a] "**In contracts and pleadings** it is usual and proper, when it is desired to speak of a person or thing before mentioned, to designate them by the term 'said' or 'aforesaid' or some similar term." Bouvier L. D. [quot Brown v. State, 28 Tex. A. 379, 380, 13 SW 150].

[14] Kephart v. Buddecke, 20 Colo. A. 546, 551, 80 P 501.

[15] Wheeler, etc., Mfg. Co. v. Filer, 52 N. J. Eq. 164, 168, 28 A 13, 14.

[16] Ward v. Torian, 216 Ala. 288, 289, 112 S 815; Le Flore v. Handlin, 153 Ark. 421, 240 SW 712, 715; Ellis v. Horine, 1 A. K. Marsh. (Ky.) 417, 418.

[17] State v. Skeggs, 154 Ala. 249, 260, 46 S 268, 272; Moore v. Texarkana Pav. Impr. Dist. No. 20, 122 Ark. 326, 183 SW 766, 769, AnnCas1917D 599 [quot Le Flore v. Handlin, 153 Ark. 421, 240 SW 712, 715 (both quot Cyc)]; Hinrichsen v. Hinrichsen, 172 Ill. 462, 465, 50 NE 135; Temple v. State, 185 Ind. 139, 146, 113 NE 233; Antipoeda Baptist Church v. Mulford, 8 N. J. L. 182, 190. See Lammers v. Meyer, 59 Ill. 214, 217; Com. v. Schweiters, 122 Ky. 874, 880, 93 SW 592, 29 KyL 417.

[18] Moore v. Texarkana Pav. Impr. Dist. No. 20, 122 Ark. 326, 183 SW 766, 769, AnnCas1917D 599 [quot Le Flore v. Handlin, 153 Ark. 421, 240 SW 712, 715 (both quot Cyc)]; Hinrichsen v. Hinrichsen, 172 Ill. 462, 465, 50 NE 135; Temple v. State, 185 Ind. 139, 146, 113 NE 233. See Com. v. Schweiters, 122 Ky. 874, 880, 93 SW 592, 29 KyL 417; Antipoeda Baptist Church v. Mulford, 8 N. J. L. 182, 190 (to an antecedent name).

[a] "**Refers to something previously pointed out** or designated." In re Daniels, 192 Iowa 326, 331, 184 NW 647. See Trunkey v. Van Sant, 176 N. Y. 535, 543, 68 NE 946; Moss v. State, 47 Tex. Cr. 459, 83 SW 829, 830, 11 AnnCas 710.

[19] Moore v. Texarkana Pav. Impr. Dist. No. 20, 122 Ark. 326, 183 SW 766, 769, AnnCas1917D 599 [quot Le Flore v. Handlin, 153 Ark. 421, 240 SW 712, 715 (both quot Cyc)]; Hinrichsen v. Hinrichsen, 172 Ill. 462, 465, 50 NE 135; Curran v. Wells Bros. Co., 205 Ill. A. 307, 308; Temple v. State, 185 Ind. 139, 146, 113 NE 233. See Carver v. Carver, 97 Ind. 497, 503; Esdaile v. Maclean, 15 M. & W. 277, 283, 153 Reprint 854; In re McIntosh, (Man.) [1923] 2 WestWkly 605, 609.

[a] **In construing will.**—"The ordinary rule of construction to be placed upon the word 'said' in this case is that it refers to the persons last mentioned." In re McIntosh, (Man.) [1923] 2 WestWkly 605, 609.

[b] **Rule adopted by statute.**—"The words 'said' and 'such,' when used by way of reference to any person or thing, shall apply to the person or thing last mentioned. P. S., c. 2, s. 14." Piper v. Boston, etc., R. Co., 75 N. H. 435, 442, 75 A 1041.

[20] Le Flore v. Handlin, 153 Ark. 421, 240 SW 712, 715; Ellis v. Horine, 1 A. K. Marsh. (Ky.) 417, 418. See Ward v. Torian, 216 Ala. 288, 289, 112 S 815 ("next appropriate antecedent"); Garrett v. South Penn. Oil Co., 66 W. Va. 587, 591, 66 SE 741 ("next preceding antecedent").

[a] "**In strict grammatical propriety** [the word] must be understood to relate to the next antecedent." Ellis v. Horine, 1 A. K. Marsh. (Ky.) 417, 418. See Southern Mut. Ins. Co. v. Pike, 34 La. Ann. 825, 829.

[b] "**Nothing to the contrary appearing,** it ordinarily refers to its next appropriate antecedent, and not to one more remote." Ward v. Torian, 216 Ala. 288, 289, 112 S 815, 816.

[c] "**Same" distinguished.**—"The relative 'same' refers to the next antecedent, though the word 'said' does only when the plain meaning requires it." 2 Kent Comm. p 555 [quot Wilkinson v. State, 10 Ind. 372, 373; Brown v. State, 28 Tex. A. 379, 380, 13 SW 150].

[d] "**Same" more explicit.**—Brown v. State, 28 Tex. A. 379, 380, 13 SW 150.

[21] Curran v. Wells Bros. Co., 205 Ill. A. 307, 308. See Southern Mut. Ins. Co. v. Pike, 34 La. Ann. 825, 829.

[a] **Reference determined by sense.**—"The reference of the word 'said' is to be determined in any given case by the sense." 2 Kent Comm. p 555 [quot Brown v. State, 28 Tex. A. 379, 380, 13 SW 150]. See Wilkinson v. State, 10 Ind. 372, 373.

[b] "**Even in an indictment** [words of reference as 'there' and 'said'] will not be referred to the last antecedent, if the sense requires that they should be referred to some prior antecedent." 1 Chitty Pl. p 239 [quot Lammers v. Meyer, 59 Ill. 214, 217].

[22] Sloss-Sheffield Steel, etc., Co. v. Dunn, 9 Ala. A. 524, 63 S 812. See Lammers v. Meyer, 59 Ill. 214, 217.

[a] **Proper and recognized construction** is given to the word "said" immediately preceding "duties" in a complaint, by "referring the allegation to the only antecedent to which it may sensibly and correctly be referred." Sloss-Sheffield Steel, etc., Co. v. Dunn, 9 Ala. A. 524, 528, 63 S 812.

[23] Nelson v. Nelson, 18 Cal. A. 602, 605, 123 P 1099.

[a] "**Comprehends the complete picture** of plaintiff's dereliction that appears in the cross-complaint." Nelson v. Nelson, 18 Cal. A. 602, 605, 123 P 1099.

[24] In re De Rycke, 99 App. Div. 596, 597, 91 NYS 159, 161.

[25] Moss v. State, 47 Tex. Cr. 459, 83 SW 829, 830, 11 AnnCas 710.

[26] Wheeler, etc., Mfg. Co. v. Filer, 52 N. J. Eq. 164, 168, 28 A 13, 14.

[a] **In a prayer for relief,** the phrase refers to defendants previously named in the bill. Wheeler, etc., Mfg. Co. v. Filer, 52 N. J. Eq. 164, 168, 28 A 13.

[27] Hinrichsen v. Hinrichsen, 172 Ill. 462, 464, 50 NE 135.

[28] Bethany, etc., School Dist. No. 1 v. Bethany, etc., Joint Tp. Bds., 233 Mich. 327, 334, 207 NW 5.

[29] Robert Portner Brewing Co. v. Southern Express Co., 109 Va. 22, 25, 63 SE 6, 8.

[30] Garrett v. South Penn. Oil Co., 66 W. Va. 587, 591, 66 SE 741.

[31] Kline v. German Union F. Ins. Co., 147 App. Div. 790, 132 NYS 181, 184.

[32] International, etc., R. Co. v. Anderson County, 59 Tex. 654, 663.

"said road,"[33] "said sum,"[34] "said trustees,"[35] "said wall,"[36] and "said work."[37]

SAIL.[38] In marine insurance law,[39] the meaning of the term is well settled by judicial construction;[40] it is almost a technical word,[41] and means to begin a voyage;[42] to get under way in complete readiness for voyage, with the purpose of proceeding thereon without further delay;[43] to put to sea;[44] to start on the voyage.[45]

Phrases: "Sail her himself,"[46] "sail on or before a given day,"[47] "sail with convoy,"[48] and "sails . . . the vessel on shares,"[49] also "sailing vessel."[50]

SAILING.[51] That period of time when the vessel breaks ground, being at that time fully fit for sea, having the cargo on board which she intends to carry, with a competent crew, and having permission to leave by having the custom house clearances on board.[52]

SAILOR.[53]

SAISIE. In French law, a judicial seizure or sequestration of property, of which there are several varieties.[54]

Saisie-arrêt. An attachment of property in the possession of a third person.[55]

Saisie-exécution. A writ resembling that of fieri facias;[56] defined as that species of execution by which a creditor places under the hand of justice (custody of the law) his debtor's movable property liable to seizure, in order to have it sold, so that he may obtain payment of his debt out of the proceeds.[57]

Saisie-foraine. A species of foreign attachment;[58] that which a creditor, by the permission of the president of a tribunal of first instance or a juge de paix, may exercise, without preliminary process, upon the effects, found within the commune where he lives, belonging to his foreign debtor.[59]

Saisie-gagerie. A conservatory act of execution, by which the owner or principal lessor of a house or farm causes the furniture of the house or farm seized;[60] similar to the distress of the common law.[61]

Saisie-immobilière. The proceeding by which a creditor places under the hand of justice (custody of the law) the immovable property of his debtor, in order that the same may be sold, and that he may obtain payment of his debt out of the proceeds.[62]

SAKE. A Japanese beverage manufactured from rice by a peculiar process of fermentation,[63] some-

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33. Byars v. Bennington, etc., R. Co., 99 App. Div. 34, 37, 90 NYS 736, 738.

34. Chadwick v. McClurg, (N. J. Ch.) 142 A 173, 175.

35. Trunkey v. Van Sant, 176 N. Y. 535, 543, 68 NE 946.

36. Palmer v. Evangelical Baptist Benev., etc., Soc., 166 Mass. 143, 144, 43 NE 1028.

37. Bone v. Hackett, 20 Ariz. 587, 185 P 131, 132.

[a] **In statute** governing county highway construction, the phrase has been held to refer to the whole program of construction. Bone v. Hackett, 20 Ariz. 587, 185 P 131, 132.

38. **"Depart" distinguished** see Depart 18 C. J. p 489 note 32 [a]. See also Maritime Law § 196.

39. See Marine Insurance §§ 94, 195.

40. Northland Nav. Co. v. American Merchant Mar. Ins. Co., 214 App. Div. 571, 212 NYS 541, 544.

41. Barker v. McAndrew, 18 C. B. N. S. 759, 774, 114 ECL 758, 773, 144 Reprint 643.

42. Black L. D.

43. Northland Nav. Co. v. American Merchant Mar. Ins. Co., 214 App. Div. 571, 212 NYS 541, 544. See Archibald McNeil, etc., Co. v. Western Maryland R. Co., 42 F. (2d) 669, 677; Sea Ins. Co. v. Blogg, [1898] 1 Q. B. 27, 31, 3 Com. Cas. 1 [aff [1898] 2 Q. B. 398, 401].

[a] **"If a ship quits her moorings and removes,** although only to a short distance, being perfectly ready to proceed upon her voyage, and is by some subsequent occurrence detained, that is nevertheless a sailing; but it is otherwise if at the time when she quits her moorings and hoists her sails, she is not in a condition for completing her sea voyage." Pittigrew v. Pringle, 3 B. & Ad. 514, 520, 23 ECL 229, 110 Reprint 186 [quot Northland Nav. Co. v. American Merchant Mar. Ins. Co., 214 App. Div. 571, 212 NYS 541, 544]. See Union Ins. Co. v. Tysen, 3 Hill (N. Y.) 118, 126; Graham v. Barras, 5 B. & Ad. 1011, 1020, 27 ECL 424, 110 Reprint 1065; Lang v. Anderdon, 3 B. & C. 495, 499, 10 ECL 228, 107 Reprint 817, 1 C. & P. 171, 12 ECL 108, 171 Reprint 1149. To same effect Sea Ins. Co. v. Blogg, [1898] 2 Q. B. 398, 401 [aff [1898] 1 Q. B. 27].

[b] **"A vessel has sailed** the moment she is unmoored and got under way, in complete preparation for the voyage, with the purpose of proceeding to sea, without further delay at the port of departure." 1 Phillips Ins. (5th ed.) § 772 [quot Sea Ins. Co. v. Blogg, [1898] 1 Q. B. 27, 31 [aff [1898] 2 Q. B. 398].

[c] **"The rule is** that a vessel 'sails' from the port when she has her cargo on board which she intends to carry, is in complete readiness for the voyage with stores and crew aboard." Archibald McNeil, etc., Co. v. Western Maryland R. Co., 42 F. (2d) 669, 677.

44. Black L. D.

45. Barker v. McAndrew, 18 C. B. N. S. 759, 774, 114 ECL 758, 773, 144 Reprint 643.

[a] **A provision in a charter party** requiring freight to be paid when a vessel has "sailed," means when the vessel has actually started upon its voyage, and not merely leaving the harbor to prepare for the voyage. Hudson v. Bilton, 6 E. & B. 565, 570, 86 ECL 565, 119 Reprint 975; Thompson v. Gillespy, 5 E. & B. 209, 226, 85 ECL 209, 119 Reprint 459.

46. Sheriffs v. Pugh, 22 Wis. 273, 278, 94 AmD 600.

[a] **In an agreement for the charter of a vessel,** that the captain was 'to sail her himself,' means not only that he was to command her but to employ the crew necessary for her navigation. Sheriffs v. Pugh, 22 Wis. 273, 278, 94 AmD 600.

47. Glaholm v. Hays, 2 M. & G. 257, 40 ECL 589, 133 Reprint 743. See also Marine Insurance § 195.

48. Simond v. Boydell, Dougl. 268, 271, 99 Reprint 175. See also Marine Insurance § 197.

49. Marshall v. Boardman, 89 Me. 87, 90, 35 A 1024, 56 AmSR 392.

50. Dallaire v. Quebec Salvage Co., 49 Que. Super. 501, 502.

[a] **Not a sailing vessel.**—One equipped with sails but moved from one place to another by a tug (tow) is not a sailing vessel. Dallaire v. Quebec Salvage Co., 49 Que. Super. 501, 502.

51. See also Sail ante.

52. Roelandts v. Harrison, 23 L. J. Exch. 169, 173 [quot Northland Nav. Co. v. American Merchant Mar. Ins. Co., 214 App. Div. 571, 212 NYS 541, 544].

53. **Sailor:**
In general see Seamen [35 Cyc 1176].
Domicile of see Domicile §§ 39, 40.
Pension of see Pensions 48 C. J. p 784.
Preference in appointment to office see Officers §§ 81–83.

54. Black L. D.

55. Black L. D. See also Garnishment 28 C. J. p 1.

56. **"Fieri facias"** 25 C. J. p 1121.

57. Black L. D. [cit Dalloz D.].

58. **"Foreign attachment"** see Foreign 26 C. J. p 888 text and notes 40–42.

59. Black L. D. [cit Dalloz D.].

60. Black L. D. [cit Dalloz D.].

61. **"Distress"** 18 C. J. p 1289.

62. Black L. D. [cit Dalloz D.]. See also Sequestration [35 Cyc 1388–1390].

63. Stratton v. Komada, 148 Fed. 125, 126; U. S. v. Nishimiya, 137 Fed. 396, 398, 69 CCA 588.

[a] **Compared with wine.**—It resembles still wines in the large percentage of alcohol, and it has many

what similar to that employed in making beer.[64] It is amber colored, has a sweet taste, has no bead, and is always heated before being drunk.[65] The name is apparently arbitrary and not descriptive and conveys little or no intelligence to the mind.[66]

In old English law, a lord's right of amercing his tenants in his court;[67] acquittance of suit at county courts and hundred courts.[68]

SAL. A descriptive word,[69] whose dictionary definition is "salt,"[70] principally used in connection with scientific subjects, as chemistry.[71] It is the common prefix for names of various preparations, in which connection it is always understood to mean that some form of salt is a substantial element of the preparation.[72]

Sal ammoniac. The electrolyte commonly known by this name is a solution of chloride of ammonium.[73]

SALABLE. As applied to commercial transactions, means fit for sale in the usual course of trade at the usual selling prices;[74] free from any remarkable defects;[75] good and sufficient of its kind;[76] good lawful merchandise of suitable quality;[77] merchantable;[78] of ordinary,[79] marketable[80] quality;[81] at least of medium quality or good class.[82]

Salable value. Actual value;[83] cash value;[84] market value;[85] but not necessarily synonymous with "fair valuation."[86]

SALAD OIL.[87] Oil for salad;[88] as a notorious fact,[89] and prima facie,[90] olive oil.[91]

SALAMANDER. In furnace parlance,[92] a mixture of iron, graphite, silica, and other elements;[93] the unfused material which accumulates in the bottom of a furnace while it is in operation, and which must be removed periodically.[94]

SALARIED OFFICER.[95]

SALARY.[96] [§ 1] **A. In General.** A term said

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points of similarity to both wine and beer. U. S. v. Nishimiya, 137 Fed. 396, 398, 69 CCA 588.

[b] **Contrasted with wine.**—Stratton v. Komada, 148 Fed. 125, 126.

64. U. S. v. Nishimiya, 137 Fed. 396, 398, 69 CCA 588.

Compared with "beer" see Beer 7 C. J. p 1025 note 49 [g].

65. U. S. v. Nishimiya, 137 Fed. 396, 398, 69 CCA 588.

66. U. S. v. Nishimiya, supra.

67. Black L. D. [cit Kellw. p 145].

68. Black L. D. [cit Fleta book 1 c 47 § 7].

69. S. R. Feil Co. v. John E. Robbins Co., 220 Fed. 650, 651, 136 CCA 258.

70. S. R. Feil Co. v. John E. Robbins Co., supra.

71. S. R. Feil Co. v. John E. Robbins Co., supra.

72. S. R. Feil Co. v. John E. Robbins Co., supra.

73. In re Charles Town Light etc., Co., 183 Fed. 160, 165. See S. R. Feil Co. v. John E. Robbins Co., 220 Fed. 650, 651, 136 CCA 258.

74. Foote v. Wilson, 104 Kan. 191, 178 P 430, 431. See Stevens Tank, etc., Co. v. Berlin Mills Co., 112 Me. 336, 92 A 180, 182.

[a] **"Does not only mean** that it may or should be sold in the market, but it also means . . . that it shall be of ordinary marketable quality, bringing the average price." Stevens Tank, etc., Co. v. Berlin Mills Co., 112 Me. 336, 92 A 180, 181.

75. Stevens Tank, etc., Co. v. Berlin Mills Co., supra.

76. Stevens Tank, etc., Co. v. Berlin Mills Co., supra.

77. Stevens Tank, etc., Co. v. Berlin Mills Co., supra.

78. Foote v. Wilson, 104 Kan. 191, 178 P 430, 431; Stevens Tank, etc., Co. v. Berlin Mills Co., 112 Me. 336, 92 A 180, 182.

[a] **Equivalent to merchantable.**—Foote v. Wilson, 104 Kan. 191, 178 P 430, 431.

"Merchantable" 40 C. J. p 647.

79. Stevens Tank, etc., Co. v. Berlin Mills Co., 112 Me. 336, 92 A 180, 182.

"Ordinary" 46 C. J. p 1132.

80. **"Marketable"** 38 C. J. p 1267.

81. Stevens Tank, etc., Co. v. Berlin Mills Co., 112 Me. 336, 92 A 180, 182.

"Quality" 51 C. J. p 113.

82. Stevens Tank, etc., Co. v. Berlin Mills Co., 112 Me. 336, 92 A 180, 182.

83. Bouvier L. D. (sub verbo "value") [quot Wood v. Syracuse School Dist. No. 1, 108 Kan. 1, 4, 193 P 1049].

[a] **"Actual value" equivalent.**—Wood v. Syracuse School Dist. No. 1, 108 Kan. 1, 4, 193 P 1049; Jonas v. Noel, 98 Tenn. 440, 443, 39 SW 724, 39 LRA 862 [quot Hetland v. Bilstad, 140 Iowa 411, 118 NW 422, 423].

"Actual value" 1 C. J. p 1186 note 84.

84. Bouvier L. D. (sub verbo "value") [quot Wood v. Syracuse School Dist. No. 1, 108 Kan. 1, 4, 193 P 1049].

[a] **" 'Salable value,' 'actual value' and 'cash value'** all mean the same thing and are designed to effect the same purpose." Bouvier L. D. (sub verbo "value") [quot Wood v. Syracuse School Dist. No. 1, 108 Kan. 1, 4, 193 P 1049].

"Cash value" 11 C. J. p 25.

85. Jonas v. Noel, 98 Tenn. 440, 443, 39 SW 724, 39 LRA 862 [quot Hetland v. Bilstad, 140 Iowa 411, 118 NW 422, 423].

[a] **"Market value" equivalent.**—Jonas v. Noel, 98 Tenn. 440, 443, 39 SW 724, 39 LRA 862 [quot Hetland v. Bilstad, 140 Iowa 411, 118 NW 422, 423].

"Market value" 38 C. J. pp 1261–1266.

86. In re Crystal Ice, etc., Co., 283 Fed. 1007, 1009.

[a] **Under Bankruptcy Act** § 1 par 15 (11 USCA § 1), defining insolvency as the condition wherein "the aggregate of his property . . . shall not, at a fair valuation, be sufficient in amount to pay his debts," the fact that the "salable value" of a corporation's property is exceeded by its debts has been held not enough to bring it within the provision, for although its property be not presently salable for enough to pay its debts, its fair valuation may be more than enough. In re Crystal Ice, etc., Co., 283 Fed. 1007, 1009.

87. **As subject of misbranding** see Food § 11 text and note 43 [d].

88. Brina v. U. S., 179 Fed. 373, 105 CCA 558.

[a] **"Olio per insalata."**—Brina v. U. S., 179 Fed. 373, 105 CCA 558.

89. Brina v. U. S., 179 Fed. 373, 105 CCA 558.

[a] **"That [olive oil] is what the world** has been accustomed to regard as salad oil." Brina v. U. S., 179 Fed. 373, 374, 105 CCA 588.

90. Brina v. U. S., supra.

91. Brina v. U. S., supra [quot Century D.; Imperial D.; Stormont D.; Worcester D.].

92. Sloss-Sheffield Steel, etc., Co. v. Ralston, 177 Ala. 272, 58 S 260, 261.

93. Illinois Steel Co. v. Saylor, 129 Ill. A. 73, 76.

[a] **How formed.**—"During the operation of the blast furnace, the heavier portions of the iron, such as carbon, graphites, and silicates, collect in the bottom of the furnace, and by some chemical action the fire brick gradually disappear or fuse with the iron and become a very hard substance, called 'salamander.'" Illinois Steel Co. v. Saylor, 226 Ill. 283, 285, 80 NE 783.

[b] **Better lining than fire brick.**—"This salamander is considered a better lining than fire brick, because it can withstand a higher degree of heat." Illinois Steel Co. v. Saylor, 226 Ill. 283, 285, 80 NE 783.

"Fire brick" see Brick 9 C. J. p 416. See also Chamotte 11 C. J. p 228.

94. Sloss-Sheffield Steel, etc., Co. v. Ralston, 177 Ala. 272, 58 S 260, 261.

95. See Officers §§ 11, 243–251. See also Salary post.

96. **Salary:**
Assignment of future see Assignments § 42.
Conflicting claims against city for see Interpleader § 25 note 95 [a] (2).
Constitutionality of statutes regulating see Constitutional Law § 132.
Exemptions § 102 et seq.
Garnishment § 216 et seq.
Interest on see Interest § 70 note 99 [a] (2).

to be derived from "salarium," which is from the word "sal," salt, being an article in which the Roman soldiers were paid,[97] and which may be and has been variously applied and defined.[98] "Salary" has been defined as an agreed compensation for services, payable at regular intervals;[99] annual compensation for services rendered;[1] annual or periodical wages or pay;[2] compensation for services rendered[3] by one to another;[4] compensation paid for a particular service,[5] or stipulated to be paid for services;[6] fixed and periodical remuneration for services;[7] fixed,[8] annual, or periodical payment for services,[9] depending upon the time and not upon the amount of services rendered;[10] fixed regular wages, as by the year, quarter, or month;[11] fixed sum[12] paid to a person for his services, yearly, half-yearly, or quarterly;[13] hire;[14] payment or recompense for services;[15] periodical allowance made as compensation to a person for his official or professional services or for his regular work;[16] periodi-

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Mandamus to compel officer to draw warrant for see Mandamus § 219 text and note 57, §§ 307–312, 345.
Sharing profits in addition to as constituting partnership see Partnership § 101.
Taxation of see Internal Revenue §§ 233, 239; Judges § 70 text and note 87.

Salary of:
Agent see Agency § 446.
Ambassadors and Consuls §§ 17–19.
Army or navy officer see Army and Navy §§ 74–107.
Attorney-General § 9.
Clerks of Courts §§ 46–49.
Coroners § 35 et seq.
Corporate officer see Corporations § 1906 et seq.
County board see Counties § 100.
County officer see Counties § 161 et seq.
Court attendant or assistant see Courts § 211.
Customs officer see Customs Duties § 83.
District and Prosecuting Attorneys § 48 et seq.
Fireman see Municipal Corporations § 1483 et seq.
Health officer see Health §§ 27, 28.
Inspection officer see Inspection § 10.
Insurance agent see Insurance § 155 et seq.
Judges § 64 et seq.
Justices of the Peace §§ 28–30.
Municipal agent or employee generally see Municipal Corporations § 1652 et seq.
Municipal officer see Municipal Corporations § 1138 et seq.
Policeman see Municipal Corporations § 1385 et seq.
Prison officer see Prisons §§ 22–26.
Public officer:
  In general see Officers § 233 et seq.
  Liability created by statute within meaning of limitation acts see Limitations of Actions § 124.
Railroad commissioner see Public Utilities § 77.
Sheriffs and Constables [35 Cyc 1547 et seq].
Teacher in general see Schools and School Districts [35 Cyc 1097 et seq].
Town officer see Towns [38 Cyc 625].
United States marshal see United States Marshals [39 Cyc 806 et seq].
Wife living apart from her husband see Husband and Wife § 36 note 38 [a].

97. Martin v. Santa Barbara County, 105 Cal. 208, 212, 38 P 687; Indianapolis School Comrs. v. Wasson, 74 Ind. 133, 141; Cowdin v. Huff, 10 Ind. 83, 85 [quot Cochise County v. Wilcox, 14 Ariz. 234, 239, 127 P 758; Teller County v. Trowbridge, 42 Colo. 449, 456, 95 P 554].

[a] **"Whether it be derived** from 'salarium,' or more fancifully from 'sal,' the pay of the Roman soldier, it carries with it the fundamental idea of compensation for services rendered. Hopkins v. Cromwell, 89 App. Div. 481, 485, 85 NYS 839.

98. Marioneaux v. Cutler, 32 Utah 475, 487, 91 P 355 [quot Higgins v. Glenn, 65 Utah 406, 237 P 513, 515]. See cases infra this section.

99. San Juan County v. Oliver, 7 Colo. A. 515, 518, 44 P 362, 363 (where it was said that while this is the strict meaning of the term, a more liberal meaning is frequently given to the word).

[a] **Similar definition.**—"A compensation agreed upon between employer and employee for a fixed term of service for one year or some aliquot part thereof, as a half year or quarter year and for services that are not menial in their nature." State v. Duncan, 1 Tenn. Ch. A. 334, 344.

1. Burrill L. D. [quot State v. Speed, 183 Mo. 186, 198, 81 SW 1260; People v. Myers, 11 NYS 217, 218, 25 AbbNCas 368; State v. Duncan, 1 Tenn. Ch. A. 334, 341]. See In re Reber, 235 Pa. 622, 631, 84 A 587.

2. Webster D. [quot Indianapolis School Comrs. v. Wasson, 74 Ind. 133, 142]; Rowland v. New York, 83 N. Y. 372, 375; Landis v. Lincoln County, 31 Or. 424, 427, 50 P 530 [quot Cochise County v. Wilcox, 14 Ariz. 234, 239, 127 P 758; Teller County v. Trowbridge, 42 Colo. 449, 455, 95 P 554].

[a] **Similar definition.**—"Annual or periodical recompense or pay." Webster D. [quot Cane v. New York, 34 NYS 675].

3. Chancellor's Case, 1 Bland (Md.) 595, 630; United Boxboard, etc., Co. v. McEwan Bros. Co., (N. J. Ch.) 76 A 550, 554; Hopkinson v. Cromwell, 89 App. Div. 481, 485, 85 NYS 839.

[a] **"Not extra compensation** for extra and unusual services made after such services had been rendered." Atty.-Gen. v. Wilmington, 10 Del. Ch. 384, 390, 93 A 364.

4. United Boxboard, etc., Co. v. McEwan Bros. Co., (N. J. Ch.) 76 A 550, 554.

5. Cox v. Holmes, 14 Wash. 255, 256, 44 P 262 [quot State v. Maynard, 35 Wash. 168, 176, 76 P 937].

6. Rowland v. New York, 83 N. Y. 372, 375.

7. Com. v. Bailey, 3 KyL 110, 114.

8. Benedict v. U. S., 176 U. S. 357, 360, 20 SCt 458, 44 L. ed. 503 [quot Beach v. Kent, 142 Mich. 347, 356, 105 NW 867]; Brandon v. Askew, 172 Ala. 160, 167, 54 S 605; Blaine County v. Pyrah, 32 Ida. 111, 178 P 702, 703; Spalding v. Thornbury, 128 Ky. 533, 541, 108 SW 906; King v. Western Union Tel. Co., 84 S. C. 73, 80, 65 SE 944; State v. Grant, 12 Wyo. 1, 20, 73 P 470, 2 AnnCas 382.

9. Webster D. [quot Com. v. Bailey, 3 KyL 110, 114]; Worcester D. [quot Indianapolis School Comrs. v. Wasson, 74 Ind. 133, 142; Com. v. Bailey, 3 KyL 110, 114]; Benedict v. U. S., 176 U. S. 357, 360, 20 SCt 458, 44 L. ed. 503 [quot Beach v. Kent, 142 Mich. 347, 356, 105 NW 867]; Spalding v. Thornbury, 128 Ky. 533, 541, 108 SW 906; Thompson v. Phillips, 12 Oh. St. 617, 618; King v. Western Union Tel. Co., 84 S. C. 73, 80, 65 SE 944; State v. Grant, 12 Wyo. 1, 20, 73 P 470, 2 AnnCas 382.

10. Benedict v. U. S., 176 U. S. 357, 360, 20 SCt 458, 44 L. ed. 503 [quot Beach v. Kent, 142 Mich. 347, 356, 105 NW 867]; Brandon v. Askew, 172 Ala. 160, 167, 54 S 605; Blaine County v. Pyrah, 32 Ida. 111, 178 P 702, 703; Spalding v. Thornbury, 128 Ky. 533, 541, 103 SW 291, 108 SW 906, 31 KyL 738; Thompson v. Phillips, 12 Oh. St. 617, 618 [quot Cox v. Holmes, 14 Wash. 255, 256, 44 P 262 (quot State v. Maynard, 35 Wash. 168, 176, 76 P 937)]; King v. Western Union Tel. Co., 84 S. C. 73, 80, 65 SE 944. See Tucker v. Shoemaker, 149 Ga. 250, 253, 99 SE 865; State v. Bland, 91 Kan. 160, 168, 136 P 947. But see State v. Grant, 12 Wyo. 1, 20, 73 P 470, 2 AnnCas 382 (amount not time).

[a] **Similar definition.**—"A periodical payment dependent upon time." State v. Bland, 91 Kan. 160, 168, 136 P 947.

[b] **Earmark of salary.**—"Compensation fixed by time . . . constitutes the earmark of salary." State v. Barnes, 24 Fla. 29, 33, 3 S 433; Tucker v. Shoemaker, 149 Ga. 250, 253, 99 SE 865.

11. Webster D. [quot Houser v. Orangeburg County, 59 S. C. 265, 266, 37 SE 831].

12. Retirement of State Employees, 28 Pa. Dist. 393, 394.

13. Stormouth D. [quot Com. v. Bailey, 3 KyL 110, 114].

[a] **Similar definition.**—"A fixed sum to be paid by the year for services." Burrill L. D. [quot State v. Speed, 183 Mo. 186, 198, 81 SW 1260; Peo. v. Myers, 11 NYS 217, 218, 25 AbbNCas 368; State v. Duncan, 1 Tenn. Ch. A. 334, 341].

14. Webster D.; Worcester D. [both quot Indianapolis School Comrs. v. Wasson, 74 Ind. 133, 142].

[a] **"Hire" distinguished** see infra § 3.

[b] **"Hire" synonymous** see infra § 4 note.

"Hire" 29 C. J. p 756.

15. State v. Billheimer, 178 Ind. 83, 92, 96 NE 801 [cit Cyc].

16. Standard D. [quot Cochise County v. Wilcox, 14 Ariz. 234, 239, 127 P 758; Teller County v. Trowbridge, 42 Colo. 449, 454, 95 P 554; Springfield Coal Min. Co. v. Industrial Commn., 291 Ill. 408, 411, 126 NE 133, 22 ALR 859; Peo. v. Lay, 193 Mich. 476, 488, 160 NW 467; Henderson v. Koenig, 168 Mo. 356, 367, 68 SW 72, 57 LRA 659]. See Autauga Banking, etc., Co. v. Allen, 220 Ala. 478, 125 S 805, 806 [cit Cyc].

[a] **Similar definition.**—"A periodical allowance as compensation for official or professional services." Autauga Banking, etc., Co. v. Allen, 220 Ala. 478, 125 S 805, 806 [cit Cyc].

cal compensation due to men in official and other situations;[17] periodical payment made for regular employment;[18] periodical payment of a certain value, in money, for work and labor done;[19] recompense or consideration, made to a person for his pains and industry in another man's business,[20] or stipulated to be paid to a person[21] periodically[22] for services,[23] recompense,[24] reward,[25] or compensation[26] for services performed[27] or rendered;[28] remuneration for services rendered in the course of employment;[29] reward or recompense paid for personal services;[30] stipend;[31] stipulated periodical recompense;[32] sum of money periodically paid for services rendered;[33] wages.[34] Perhaps "salary" is more frequently applied to annual employment than to any other.[35]

In a more technical sense, the term may be employed as having reference to the compensation of officers;[36] and in this sense has been defined as meaning a certain annual stipend, payable to an officer for performing his whole duty;[37] compensation, fixed for official services to be rendered;[38] compensation for the personal discharge of official duty;[39] fixed compensation decreed by authority,[40] for regular work,[41] or made by law to be paid periodically for services, whether there be any services actually rendered or not,[42] or to be established by law,[43] and paid at stated times;[44] per annum compensation[45]

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17. Martin v. Santa Barbara County, 105 Cal. 208, 212, 38 P 687.

18. Merriam v. U. S., 282 Fed. 851, 856.

19. Chancellor's Case, 1 Bland (Md.) 595, 630.

20. Abbott L. D. [quot Hopkins v. Cromwell, 89 App. Div. 481, 485, 85 NYS 839]; Tomlinson L. D. [quot Buxton v. Rutherford County, 82 N. C. 91, 95].

21. Century D. [quot Retirement of State Employees, 28 Pa. Dist. 393, 394; State v. Duncan, 1 Tenn. Ch. A. 334, 339]; Webster D. [quot Indianapolis School Comrs. v. Wasson, 74 Ind. 133, 142; Peo. v. Wemple, 52 Hun 414, 419, 5 NYS 495]; Hutchinson v. Gormley, 48 Pa. 270, 272.

22. Century D. [quot Retirement of State Employees, supra; State v. Duncan, supra].

23. Century D. [quot Retirement of State Employees, supra; State v. Duncan, supra]; Webster D. [quot Indianapolis School Comrs. v. Wasson, 74 Ind. 133, 142; Peo. v. Wemple, 52 Hun 414, 419, 5 NYS 495]; Hutchinson v. Gormley, 48 Pa. 270, 272.

[a] **Similar definition.**—"The consideration paid or agreed to be paid to a person at regular, fixed periods, in consideration for his services." Roberts v. Carrithers, 180 Ky. 315, 202 SW 659, 661.

24. Bouvier L. D. [quot Fidelity Ins., etc., Co. v. Shenandoah Iron Co., 42 Fed. 372, 376; State v. Barnes, 24 Fla. 29, 32, 3 S 433; Peo. v. Adams, 65 Ill. A. 283, 286; Hartman v. Mitzel, 8 Pa. Super. 22, 24; Fidelity Ins., etc., Co. v. Shenandoah Valley R. Co., 86 Va. 1, 8, 9 SE 759, 19 AmSR 858]; McNulta v. Corn Belt Bank, 164 Ill. 427, 441, 45 NE 954, 56 AmSR 203; Marioneaux v. Cutler, 32 Utah 475, 487, 91 P 355 [quot Higgins v. Glenn, 65 Utah 406, 237 P 513, 515].

25. Abbott L. D. [quot Peo. v. Myers, 11 NYS 217, 218, 25 AbbNCas 368]; State v. Duncan, 1 Tenn. Ch. A. 334, 341]; Bouvier L. D. [quot Fidelity Ins., etc., Co. v. Shenandoah Iron Co., supra; State v. Barnes, supra; Peo. v. Adams, supra; Hartman v. Mitzel, supra; Fidelity Ins., etc., Co. v. Shenandoah Valley R. Co., supra]; McNulta v. Corn Belt Bank, supra; Marioneaux v. Cutler, supra [quot Higgins v. Glenn, supra].

26. Abbott L. D. [quot Peo. v. Myers, 11 NYS 217, 218, 25 AbbNCas 368; State v. Duncan, 1 Tenn. Ch. A. 334, 341]; Marioneaux v. Cutler, 32 Utah 475, 487, 91 P 355 [quot Higgins v. Glenn, 65 Utah 406, 237 P 513, 515].

27. Abbott L. D. [quot Peo. v. Myers, supra; State v. Duncan, supra]; Bouvier L. D. [quot Fidelity Ins., etc., Co. v. Shenandoah Iron Co., 42 Fed. 372, 376; State v. Barnes, 24 Fla. 29, 32, 3 S 433; Peo. v. Adams, 65 Ill. A. 283, 286; Hartman v. Mitzel, 8 Pa. Super. 22, 24; Fidelity Ins., etc., Co. v. Shenandoah Valley R. Co., 86 Va. 1, 8, 9 SE 759, 19 AmSR 858]; McNulta v. Corn Belt Bank, 164 Ill. 427, 441, 45 NE 954, 56 AmSR 203.

28. Marioneaux v. Cutler, 32 Utah 475, 487, 91 P 355 [quot Higgins v. Glenn, 65 Utah 406, 237 P 513, 515].

29. Druce v. Railway Clearing House, 133 L. T. Rep. N. S. 514.

30. Windmiller v. Peo., 78 Ill. A. 273, 276.

31. Stormouth D. [quot Com. v. Bailey, 3 KyL 110, 114]; Worcester D. [quot Indianapolis School Comrs. v. Wasson, 74 Ind. 133, 142]. See State v. Duncan, 1 Tenn. Ch. A. 334, 339.

"Stipend" synonymous see infra § 2.

"Stipend" [36 Cyc 1278].

32. Worcester D. [quot Indianapolis School Comrs. v. Wasson, 74 Ind. 133, 142; Com. v. Bailey, 3 KyL 110, 114 (substituting "stipulation" for "stipulated")].

33. Morse v. Robertson, 9 Hawaii 195, 197; Com. v. Butler, 99 Pa. 535, 542 [quot Koppen v. Union Iron, etc., Co., 181 Mo. A. 72, 80, 163 SW 560; Hopkins v. Cromwell, 89 App. Div. 481, 485, 85 NYS 839]. See In re Shine, [1892] 1 Q. B. 522, 531.

[a] **Similar definition.**—"Salary is a stated sum for a stated period." Com. v. Greer, 9 Pa. Co. 444, 446.

34. Stormouth D. [quot Com. v. Bailey, 3 KyL 110, 114]; Worcester D. [quot Indianapolis School Comrs. v. Wasson, 74 Ind. 133, 142]; Teller County v. Trowbridge, 42 Colo. 449, 455, 95 A 554.

"Wages" distinguished see infra § 3.

"Wages" synonymous see infra § 2 note.

35. Maynard v. Royal Worcester Corset Co., 200 Mass. 1, 4, 85 NE 877. See In re Reber, 235 Pa. 622, 631, 84 A 587.

[a] **"Appropriately refers to annual compensation** paid to the members of the board of viewers" [under terms of a statute]. In re Reber, 235 Pa. 622, 631, 84 A 587, 590.

36. See cases infra notes 37–53.

37. Fulgham v. Lightfoot, 1 Call (5 Va.) 250, 255.

38. Atty.-Gen. v. Wilmington, 10 Del. Ch. 384, 390, 93 A. 364.

[a] **Similar definitions.**—(1) "A form of compensation prescribed for paying public officers and others for their services." State v. Imel, 242 Mo. 293, 303, 146 SW 783. (2) "Any compensation fixed for an officer." Thompson v. Phillips, 12 Oh. St. 617, 618 (where this is described as the general sense). (3) "The word 'salary' is understood to relate to compensation for official or other services." Walsh v. Bridgeport, 88 Conn. 528, 536, 91 A 969, AnnCas1917B 318.

39. Briscoe v. Clark County, 95 Ill. 309, 312 [quot McCoy v. Handlin, 35 S. D. 487, 522, 153 NW 361, LRA1915E 858, AnnCas1917A 1046].

[a] **Similar definitions.**—(1) "As applied to a public officer, it means the compensation paid him for his personal service in the discharge of the duties of his office." Windmiller v. Peo., 78 Ill. A. 273, 276. (2) "Compensation for personal services, and not the repayment of moneys expended in the discharge of the duties of an office." Sniffen v. New York, 6 N. Y. Super. 193, 196; Peay v. Nolan, 157 Tenn. 222, 7 SW (2d) 815, 817, 60 ALR 408. (3) "The compensation prescribed to be paid to a public officer for the personal discharge of the duty enjoined upon him by law." Houser v. Umatilla County, 30 Or. 486, 489, 49 P 867.

40. Brandon v. Askew, 172 Ala. 160, 167, 54 S 605; Dane v. Smith, 54 Ala. 47, 49 [quot State v. Barnes, 24 Fla. 29, 32, 3 S 433]; Blaine County v. Pyrah, 32 Ida. 111, 178 P 702, 703. See Houser v. Orangeburg County, 59 S. C. 265, 266, 37 SE 831 ("When this word is used in connection with a public officer, it must be taken to embrace the fixed regular wages . . . as established by public authority").

41. Cochise County v. Wilcox, 14 Ariz. 234, 238, 127 P 758.

42. Scharrenbroich v. Lewis, etc., County, 33 Mont. 250, 257, 83 P 482.

43. Dane v. Smith, 54 Ala. 47, 49 [quot State v. Barnes, 24 Fla. 29, 32, 3 S 433].

44. Dane v. Smith, supra [quot State v. Barnes, supra, and cit Blick v. Mercantile Trust, etc., Co., 113 Md. 487, 494, 77 A 844].

[a] **"For permanence,** [it] is paid at intervals." Brandon v. Askew, 172 Ala. 160, 167, 54 S 605; Blaine County v. Pyrah, 32 Ida. 111, 178 P 702, 703. See Dane v. Smith, 54 Ala. 47, 49 ("paid at stated times") [quot State v. Barnes, 24 Fla. 29, 32, 3 S 433].

45. Henderson v. Koenig, 168 Mo. 356, 367, 68 SW 72, 57 LRA 659; Montpelier v. Senter, 72 Vt. 112, 114, of men in official and in some other positions,[46] or situations,[47] or stations;[48] personal compensation provided to be paid to an officer for his own services;[49] or to be paid to a public officer for continuous, as contradistinguished from particular services,[50] usually a fixed sum to be paid by the year,[51] half-year or quarter;[52] stated compensation paid for the performance of official duties,[53] or the rendering of services of a particular kind;[54] to the reward paid to a public officer for the performance of his official duties.[55]

[§ 2] **B. Equivalents and Synonyms.** “Salary” may be employed as being synonymous with or equivalent to “allowance,”[56] “compensation,”[57] “earnings,”[58] “hire,”[59] “pay,”[60] “per diem,”[61] “stipend,”[62] and “wages.”[63]

[§ 3] **C. Distinctions.** “Salary” has been distinguished from “allowance,”[64] “bonus,”[65] “commission,”[66] “compensation,”[67] “damages,”[68] “divi-

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47 A 392.

46. Anderson L. D. [quot State v. Speed, 183 Mo. 186, 198, 81 SW 1260].

47. Winfield L. D. [quot Peo. v. Myers, 11 NYS 217, 219, 25 AbbNCas 368; State v. Duncan, 1 Tenn. Ch. A. 334, 341]; Seiler v. State, 160 Ind. 605, 619, 65 NE 922, 66 NE 946, 67 NE 448; Indianapolis School Comrs. v. Wasson, 74 Ind. 133, 141; Cowdin v. Huff, 10 Ind. 83, 85 [quot Cochise County v. Wilcox, 14 Ariz. 234, 239, 127 P 758; Teller County v. Trowbridge, 42 Colo. 449, 455, 95 P 554].

48. Blick v. Mercantile Trust, etc., Co., 113 Md. 487, 494, 77 A 844 [quot E. H. Koester Bakery v. Ihrie, 147 Md. 219, 224, 127 A 492].

49. Marion County v. Lear, 108 Ill. 343, 350, 351 [quot Peo. v. Adams, 65 Ill. A. 283, 286; Houser v. Umatilla County, 30 Or. 486, 489, 49 P 867]; State v. Dunbar, 53 Or. 45, 52, 98 P 878, 20 LRANS 1015.

[a] **“Does not prevent an allowance for clerk hire.”**—State v. Dunbar, 53 Or. 45, 52, 98 P 878, 20 LRANS 1015.

50. Cochise County v. Wilcox, 14 Ariz. 234, 239, 127 P 758; Landis v. Lincoln County, 31 Or. 424, 427, 50 P 530 [quot Teller County v. Trowbridge, 42 Colo. 449, 455, 95 P 554].

51. Century D. [quot Retirement of State Employees, 28 Pa. Dist. 393, 394; State v. Duncan, 1 Tenn. Ch. A. 334, 339]; Webster D. [quot Peo. v. Myers, 11 NYS 217, 218, 25 AbbNCas 368]; Hutchinson v. Gormley, 48 Pa. 270, 272.

52. Century D. [quot Retirement of State Employees, supra; State v. Duncan, supra].

53. Millers’ Indemn. Underwriters v. Cook, (Tex. Civ. A.) 229 SW 598, 602.

54. Millers’ Indemn. Underwriters v. Cook, supra.

55. Abbott L. D. [quot Peo. v. Myers, 11 NYS 217, 218, 25 AbbNCas 368; State v. Duncan, 1 Tenn. Ch. A. 334, 341]; Bouvier L. D. [quot Fidelity Ins., etc., Co. v. Shenandoah Iron Co., 42 Fed. 372, 376; State v. Barnes, 24 Fla. 29, 32, 3 S 433; McNulta v. Corn Belt Bank, 164 Ill. 427, 441, 45 NE 954, 56 AmSR 203; Peo. v. Adams, 65 Ill. A. 283, 286; Fidelity Ins., etc., Co. v. Shenandoah Valley R. Co., 86 Va. 1, 8, 9 SE 759, 19 AmSR 858].

[a] **“The salary of a public officer** is a provision made by law for his maintenance and support, during his term, to the end that without anxiety concerning his means of subsistence he may be able to devote himself entirely to the duties of his office.” Ruperich v. Baehr, 142 Cal. 190, 194, 75 P 782 [quot Lewis v. Denver, 9 Colo. A. 328, 329, 48 P 317]. See also Officers § 233 et seq.

56. San Juan County v. Oliver, 7 Colo. A. 515, 518, 44 P 362, 363; Indianapolis School Comrs. v. Wasson, 74 Ind. 133, 142.

“Allowance” 2 C. J. p 1157.

57. Martin v. Santa Barbara County, 105 Cal. 208, 212, 38 P 687; Kirkwood v. Soto, 87 Cal. 394, 396, 25 P 488; Atty.-Gen. v. Wilmington, 10 Del. Ch. 384, 390, 93 A 364; Crawford County v. Lindsay, 11 Ill. A. 261, 263; United Boxboard, etc., Co. v. McEwan Bros. Co., (N. J. Ch.) 76 A 550, 554; Peo. v. Lynch, 254 N. Y. 427, 431, 173 NE 571; Rowland v. New York, 83 N. Y. 372, 375; McCoy v. Handlin, 35 S. D. 487, 522, 153 NW 361, LRA1915E 858, AnnCas1917A 1046; Higgins v. Glenn, 65 Utah 406, 237 P 513, 515; Marioneaux v. Cutler, 32 Utah 475, 91 P 355. See Briscoe v. Clark County, 95 Ill. 309, 312; Maynard v. Royal Worcester Corset Co., 200 Mass. 1, 4, 85 NE 877. See also Compensation 12 C. J. p 231 text and note 46.

[a] **While the term in its original and strict sense** signifies a fixed compensation it is frequently used as the equivalent of “compensation.” Martin v. Santa Barbara County, 105 Cal. 208, 212, 38 P 687.

“Compensation” distinguished see infra § 3.

58. West v. Jefferson Woolen Mills, 147 Tenn. 100, 115, 245 SW 542.

“Earnings” distinguished see infra § 3.

“Earnings” 19 C. J. p 853.

59. San Juan County v. Oliver, 7 Colo A. 515, 44 P 362, 363; Indianapolis School Comrs. v. Wasson, 74 Ind. 133, 142.

60. San Juan County v. Oliver, supra; Indianapolis School Comrs. v. Wasson, supra.

“Pay” 48 C. J. p 572.

61. Peay v. Nolan, 157 Tenn. 222, 7 SW (2d) 815, 817, 60 ALR 408.

62. San Juan County v. Oliver, 7 Colo. A. 515, 44 P 362, 363; Indianapolis School Comrs. v. Wasson, 74 Ind. 133, 142.

63. Cochise County v. Wilcox, 14 Ariz. 234, 239, 137 P 758; White v. Hayden, 126 Cal. 621, 627, 59 P 118; Teller County v. Trowbridge, 42 Colo. 449, 455, 95 P 554; San Juan County v. Oliver, 7 Colo. A. 515, 44 P 362, 363; Walsh v. Bridgeport, 88 Conn. 528, 535, 91 A 969, AnnCas1917B 318; Indianapolis School Comrs. v. Wasson, 74 Ind. 133, 142; Morse v. Robertson, 9 Hawaii 195, 197; Morris v. Hosmer, 182 Iowa 883, 886, 166 NW 295; Roberts v. Carrithers, 180 Ky. 315, 202 SW 659, 661; Koppen v. Union Iron, etc., Co., 181 Mo. A. 72, 80, 163 SW 560; Dayton v. Ewart, 28 Mont. 153, 156, 72 P 420, 98 AmSR 549; Hopkins v. Cromwell, 89 App. Div. 481, 485, 85 NYS 839; Landis v. Lincoln County, 31 Or. 424, 427, 50 P 530; Com. v. Butler, 99 Pa. 535, 542; West v. Jefferson Woolen Mills, 147 Tenn. 100, 115, 245 SW 542.

[a] **“According to the most approved lexicographers,** the words ‘wages’ and ‘salary’ are synonymous.” Com. v. Butler, 99 Pa. 535, 542 [quot Koppen v. Union Iron, etc., Co., 181 Mo. A. 72, 80, 163 SW 560; Hopkins v. Cromwell, 89 App. Div. 481, 85 NYS 839, 841].

[b] **“According to some lexicographers** the words ‘wages’ and ‘salary’ are synonymous.” Walsh v. Bridgeport, 88 Conn. 528, 535, 91 A 969, AnnCas1917B 318.

[c] **“Lexicographers and some authorities** class ‘salary’ and ‘wages’ as synonymous.” Landis v. Lincoln County, 31 Or. 424, 427, 50 P 530 [cit Ralapje & L. L. D.; Webster D.; and quot Cochise County v. Wilcox, 14 Ariz. 234, 239, 127 P 758; Teller County v Trowbridge, 42 Colo. 449, 455, 95 P 554].

[d] **“Wages has a similar meaning.”**—Roberts v. Carrithers, 180 Ky. 315, 202 SW 659, 661.

[e] **“ ‘Salary’ is the equivalent of ‘wages.’ ”**—Morris v. Hosmer, 182 Iowa 883, 886, 166 NW 295.

“Wages” distinguished see infra § 3.

64. See Allowance 2 C. J. p 1157 note 45 [g].

65. McNulta v. Corn Belt Bank, 164 Ill. 427, 442, 45 NE 954, 56 AmSR 203.

[a] **Additional sum voted** by bank directors to be paid their president over and above his salary as consideration for accepting presidency and performing acts not embraced among his duties as president, held “bonus” and not “salary.” McNulta v. Corn Belt Bank, 164 Ill. 427, 442, 45 NE 954, 56 AmSR 203.

“Bonus” 9 C. J. p 135.

66. Osborn v. Henry, 200 Ala. 353, 355, 76 S 119; Castle v. Lawlor, 47 Conn. 340, 345; Greer v. Hunt County, (Tex. Commn. A.) 249 SW 831, 832. But see White v. Ballard County Bank, (Ky.) 117 SW 294, 296.

[a] **“Salary” used as synonym of “commission”** held not misleading in instruction in suit where issue was agency, it being immaterial whether agent’s compensation be termed “salary” or “commission.” White v. Ballard County Bank, (Ky.) 117 SW 294, 296.

[b] **Where the compensation** of an officer is a fixed sum for a definite period, and not a rate of commission, this makes it a salary. Castle v. Lawlor, 47 Conn. 340, 345.

“Commission” 12 C. J. p 143.

67. State v. Billheimer, 178 Ind. 83, 92, 96 NE 801. See Com. v. Butler, 99 Pa. 535, 542.

[a] **“All salaries are compensations,** but all compensations are not salaries.” State v. Billheimer, 178 Ind. 83, 92, 96 NE 801.

“Compensation” synonymous see supra § 2.

68. State v. Billheimer, 178 Ind. 83, 92, 96 NE 801.

“Damages” §§ 1–51.

dends,"[69] "drawing account,"[70] "earnings,"[71] "emoluments,"[72] "fees,"[73] "gain or profit,"[74] "hire,"[75] "percentages,"[76] "reimbursement,"[77] "repayment,"[78] and "wages."[79]

[§ 4] **D. What Term Implies, Imports, or Includes.** The term "salary" implies a contract of employment.[80] It imports a specific contract for a specific sum for a certain period of time;[81] and hence its use may import a factor of permanency,[82] or permanency of employment.[83] It is said to contain three elements, all required to round out and complete the thought, namely, the dignity in popular estimation of the duty involved, a fixed term, and compensation by contract.[84] Further, it is said to have four characteristics—first, that it is paid for services rendered; secondly, that it is paid under

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69. Peo. v. Lynch, 254 N. Y. 427, 431, 173 NE 571.

"Dividend" 18 C. J. p 1406.

70. Hoeland v. Lange, 113 Misc. 469, 471, 184 NYS 885.

"Drawing account" 19 C. J. p 762.

71. Springfield Coal Min. Co. v. Industrial Commn., 291 Ill. 408, 412, 126 NE 133, 22 ALR 859. But see West v. Jefferson Woolen Mills, 147 Tenn. 100, 115, 245 SW 542, 546; El Paso Electric R. Co. v. Murphy, 49 Tex. Civ. A. 586, 590, 109 SW 489, 491 ("a salary is earnings").

"Earnings" interchangeable see supra § 2.

"Earnings" 19 C. J. p 853.

72. Scharrenbroich v. Lewis, etc., County, 33 Mont. 250, 257, 83 P 482; Retirement of State Employees, 28 Pa. Dist. 393, 394.

[a] **"'Emolument' is more comprehensive."**—Scharrenbroich v. Lewis, etc., County, 33 Mont. 250, 257, 83 P 482.

"Emolument" see Officers § 259 note 59 [a].

73. Autauga Banking, etc., Co. v. Allen, 220 Ala. 478, 125 S 805, 806 [cit C. J.]; Osborn v. Henry, 200 Ala. 353, 355, 76 S 119; Dane v. Smith, 54 Ala. 47, 49; Cochise County v. Wilcox, 14 Ariz. 234, 238, 127 P 758; Teller County v. Trowbridge, 42 Colo. 449, 455, 95 P 554; State v. Barnes, 24 Fla. 29, 32, 3 S 433; Tucker v. Shoemaker, 149 Ga. 250, 253, 99 SE 865; Cowdin v. Huff, 10 Ind. 83, 85; State v. Bland, 91 Kan. 160, 168, 136 P 947; Com. v. Bailey, 3 KyL 110, 114; Lobrano v. Plaquemines Parish Police Jury, 150 La. 14, 20, 90 S 423, 425 [cit Cyc]; E. H. Koester Bakery v. Ihrie, 147 Md. 219, 224, 127 A 492; Blick v. Mercantile Trust, etc., Co., 113 Md. 487, 494, 77 A 844; Henderson v. Koenig, 168 Mo. 356, 367, 68 SW 72, 57 LRA 659; State v. Patterson, 152 Mo. A. 264, 269, 132 SW 1183; Landis v. Lincoln County, 31 Or. 424, 427, 50 P 530; Hutchinson v. Gormley, 48 Pa. 270, 272; In re Actuarial Fees, 32 Pa. Co. 225, 234; Com. v. Grier, 9 Pa. Co. 444, 447; Cox v. Holmes, 14 Wash. 255, 256. 44 P 262.

[a] **Officer paid by fees** is not the recipient of a salary. Henderson v. Koenig, 168 Mo. 356, 367, 68 SW 72, 57 LRA 659.

[b] **"'Salary' and 'fees'** are not directly germane to each other." Teller County v. Trowbridge, 42 Colo. 449, 456, 95 P 554.

[c] **"While the two terms may be more or less synonymous** in many connections, they are not so as ordinarily used in connection with the compensation of an office." Lobrano v. Plaquemines Parish Police Jury, 150 La. 14, 20, 90 S 423 [cit Cyc].

"Fee" 25 C. J. p 1009.

74. Roberts v. Carrithers, 180 Ky. 315, 202 SW 659, 661; Hoeland v. Lange, 113 Misc. 469, 471, 184 NYS 885.

[a] **"Never applied in describing the gain,** profit, or recompense which accrues to one who is conducting a business of his own." Roberts v. Carrithers, 180 Ky. 315, 202 SW 659, 661.

[b] **"'Profits' and 'salary'** are quite different terms." Hoeland v. Lange, 113 Misc. 469, 471, 184 NYS 885.

75. State v. Duncan, 1 Tenn. Ch. A. 334, 339.

[a] **"Hire" and "salary."**—Hire is "for the more menial, manual or mechanical form of work and commonly implies employment for short periods," while salary is "for the more mental forms, and implies greater permanence of employment and payment at longer intervals." State v. Duncan, 1 Tenn. Ch. A. 334, 339.

76. Osborn v. Henry, 200 Ala. 353, 355, 76 S 119; Thompson v. Phillips, 12 Oh. St. 617, 618 (percentage).

[a] **"Where the compensation . . . is to be ascertained by a percentage** on the amount of money received and disbursed . . . it is not a salary." Thompson v. Phillips, 12 Oh. St. 617, 618.

77. State v. Billheimer, 178 Ind. 83, 92, 96 NE 801.

78. Sniffen v. New York, 6 N. Y. Super. 193, 196; Peay v. Nolan, 157 Tenn. 222, 7 SW (2d) 815, 817, 60 ALR 408.

79. Merriam v. U. S., 282 Fed. 851, 855; Wilkes-Barre First Nat. Bank v. Barnum, 160 Fed. 245, 247; Speilberger Bros. v. Brandes, 3 Ala. A. 590, 598, 58 S 75; Cochise County v. Wilcox, 14 Ariz. 234, 239, 127 P 758; Teller County v. Trowbridge, 42 Colo. 449, 456, 95 P 554; Walsh v. Bridgeport, 88 Conn. 528, 535, 91 A 969, AnnCas1917B 318; McLellan v. Young, 54 Ga. 399, 400, 21 AmR 276; Springfield Coal Min. Co. v. Industrial Commn., 291 Ill. 408, 411, 126 NE 133, 22 ALR 859; Massie v. Cessna, 239 Ill. 352, 359, 88 NE 152, 130 AmSR 234, 28 LRANS 1108; Cowdin v. Huff, 10 Ind. 83, 85; Roberts v. Carrithers, 180 Ky. 315, 202 SW 659, 661; E. H. Koester Bakery v. Ihrie, 147 Md. 219, 224, 127 A 492; Blick v. Mercantile, Trust, etc., Co., 113 Md. 487, 494, 77 A 844; Koppen v. Union Iron, etc., Co., 181 Mo. A. 72, 80, 163 SW 560; Hopkinson v. Cromwell, 89 App. Div. 481, 485, 85 NYS 839; Meyers v. New York, 69 Hun 291, 295, 23 NYS 484; Cochran v. A. S. Baker Co., 30 Misc. 48, 50, 61 NYS 724; Peo. v. Brookfield, 13 Misc. 566, 34 NYS 674; Cane v. New York, 34 NYS 675; Peo. v. Myers, 11 NYS 217, 219, 25 AbbNCas 368; West v. Jefferson Woolen Mills, 147 Tenn. 100, 108, 245 SW 542; State v. Duncan, 1 Tenn. Ch. A. 334, 340, 344; Millers' Indemn. Underwriters v. Cook, (Tex. Civ. A.) 229 SW 598, 602; Bell v. Indian Live-Stock Co., (Tex.) 11 SW 344, 346, 3 LRA 642; Gordon v. Jennings, 9 Q. B. D. 45, 46. See Bigley v. Bellevue, 158 Pa. 495, 497, 28 A 23; Moriarty v. Regent's Garage, etc., Co., Ltd., [1921] 2 K. B. 766 (to distinguish between "salary" and "wages" described as impossible task). See also Master and Servant § 192 et seq.

[a] **"Use and acceptation** under certain circumstances may have given the word 'salary' a significance somewhat different from the word 'wages.'" Walsh v. Bridgeport, 88 Conn. 528, 535, 91 A 969, AnnCas1917B 318.

[b] **Terms compared.**—(1) "Salary" and "wages" in their legal application are "recognized as independent and distinct terms." Cane v. New York, 34 NYS 675. (2) "Wages," in its ordinary acceptation, has a less extensive meaning than "salary," and is usually restricted to sums paid as hire to those employed in various manual occupations. Massie v. Cessna, 239 Ill. 352, 359, 88 NE 152, 130 AmSR 234, 28 LRANS 1108. (3) "Wages" is used "for the more menial, manual or mechanical form of work" (State v. Duncan, 1 Tenn. Ch. A. 334, 339) (4) and generally applies to manual labor (Merriam v. U. S., 282 Fed. 851, 855; Cane v. New York, supra). (5) "Wages" signifies compensation for mechanical or menial labor. Millers' Indemn. Underwriters v. Cook, (Tex. Civ. A.) 229 SW 598, 602. (6) "Salary" has reference to employment above the grade of such labor. Millers' Indemn. Underwriters v. Cook, supra. (7) "Salary" refers to "a superior grade of services and implies a position or office," and "is suggestive of something higher, larger, and more permanent." Wilkes-Barre First Nat. Bank v. Barnum, 160 Fed. 245, 247. (8) "Salary" is ordinarily used when speaking of employments of a more dignified character (Roberts v. Carrithers, 180 Ky. 315, 202 SW 659, 661) (9) or for the more mental forms of work (State v. Duncan, supra). (10) "Salary" applies to those "holding official station" (Cane v. New York, supra) (11) and is said to indicate periodical payment for regular employment (Merriam v. U. S., supra).

80. Davis v. Fall River, 155 Mass. 96, 29 NE 202. See Railway Clearing House v. Druce, 42 T. L. R. 663, 664 ("connotes contractually secured payment").

81. Blick v. Mercantile Trust, etc., Co., 113 Md. 487, 494, 77 A 844 [quot E. H. Koester Bakery v. Ihrie, 147 Md. 219, 224, 127 A 492 (substituting "imparts" for "imports")].

82. Maynard v. Royal Worcester Corset Co., 200 Mass. 1, 4, 85 NE 877.

83. White v. Koehler, 70 N. J. L. 526, 527, 57 A 124. But see Palmer v. Marquette, etc., Rolling Mill Co., 32 Mich. 274, 276; Chestnut v. Kansas City, 171 Mo. A. 327, 330, 157 SW 656.

[a] **The length of time of service** cannot be implied by the use of the term in an offer of employment. Palmer v. Marquette, etc., Rolling Mill Co., 32 Mich. 274, 276.

[b] **Merely provides rate of payment** of compensation of employee and does not make for him a definite term. Chestnut v. Kansas City, 171 Mo. A. 327, 330, 157 SW 656.

84. State v. Duncan, 1 Tenn. Ch. A. 334, 344.

some contract or appointment; thirdly, that it is computed by time; and fourthly, that it is payable at a fixed time.[85] Examples are given in the subjoined notes of what the term has been held to include[86] and not to include.[87]

[§ 5] **E. Phrases.** "Additional salary,"[88] "fixed salary,"[89] "salary, fees or compensation,"[90] "salary or compensation,"[91] "salary or income,"[92] "salary or standard rate of pay,"[93] "salary or wages,"[94] "salary or wages and emoluments,"[95] "salary paid to him,"[96] "salary per year,"[97] "salary, wages or income,"[98] and "stated salary;"[99] also "fixed salaries."[1]

SALE.[2]

SALE AND EXCHANGE. A term which, in reference to real estate, implies that the proceeds of the sale are to be vested in another estate of the same character, and to be settled to the same uses.[3]

SALE AND RETURN.[4]

SALE, BILL OF.[5]

SALE OR RETURN.[6]

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85. In re Shine, [1892] 1 Q. B. 522, 531.

86. See cases infra this note.

[a] **Additional compensation.**—"The compensation . . . given to the judges of the superior courts for their services in holding the special courts, to be paid by the commissioners of the county in which the courts are held, is a part of their salary." Buxton v. Rutherford County Comrs., 82 N. C. 91, 95.

[b] **Allowance for clerk hire.**—Under some statutes the term has been held to include clerk hire. Beaumont v. Ramsey County, 32 Minn. 108, 111, 19 NW 727; Armstrong v. Ramsey County, 25 Minn. 344; Bruce v. Dodge County Comrs., 20 Minn. 388, 389.

[c] **Fees.**—(1) The term salary may mean an income arising from fees paid to an officer. Fulgham v. Lightfoot, 1 Call (5 Va.) 250, 255. (2) Fees and commissions may be included when "salary" is used in the sense of legal compensation for services. San Juan County v. Oliver, 7 Colo. A. 515, 518, 44 P 362.

[d] **Mileage may be included.**—"If the mileage allowance is limited to the amount actually expended in traveling, then it cannot, of course, add anything to the income of the recipient of the salary. But if the mileage is not so limited, as where a certain amount is allowed for each mile traveled, and this amount exceeds the actual mileage charged, then the balance above such charge becomes a part of the official income or compensation the same as though it were a part of the 'salary.'" Marioneaux v. Cutler, 32 Utah 475, 487, 91 P 355 [quot Higgins v. Glenn, 65 Utah 406, 237 P 513, 515].

[e] **"Per diem compensation" held salary.**—State v. Barnes, 24 Fla. 29, 32, 3 S 433; Com. v. Butler, 99 Pa. 535, 542; State v. Duncan, 1 Tenn. Ch. A. 334, 344. But see Bigley v. Bellevue, 158 Pa. 495, 497, 28 A 23.

[f] **Rarely held to include** "recompense, reward or compensation" in addition to a fixed sum. Retirement of State Employees, 28 Pa. Dist. 393, 394.

87. See cases infra this note.

[a] **Bonus.**—Railway Clearing House v. Druce, 42 T. L. R. 663, 664.

[b] **Commissions of agent, broker or factor.**—Hamberger v. Marcus, 157 Pa. 133, 139, 27 A 681, 37 AmSR 719.

[c] **Daily compensation of constable** for acting as borough lamp lighter and policeman. Bigley v. Bellevue, 158 Pa. 495, 497, 28 A 23.

[d] **Emoluments.**—Retirement of State Employees, 28 Pa. Dist. 393, 394.

[e] **Estimated amount of maintenance.**—Retirement of State Employees, 28 Pa. Dist. 393, 394.

[f] **Expenses.**—(1) An allowance made by a court of probate for services of an auditor of the accounts of a succession held not salary. Vance v. Lafferanderie, 4 Rob. (La.) 340, 342. (2) For deputy hire. Crawford County v. Lindsay, 11 Ill. A. 261, 263. (3) "It does not include money necessarily paid to others as expenses in performing the duties of the office." Windmiller v. Peo., 78 Ill. A. 273, 276. See Marion County v. Lear, 108 Ill. 343, 350; Peo. v. Adams, 65 Ill. A. 283, 286; Sniffen v. New York, 6 N. Y. Super. 193, 196; Houser v. Umatilla County, 30 Or. 486, 489, 49 P 867. (4) Per diem expenses allowed a judge while absent from home holding a general or special term of court. Peo. v. Wemple, 52 Hun 414, 419, 5 NYS 495. See Gobrecht v. Cincinnati, 51 Oh. St. 68, 72, 36 NE 782, 23 LRA 609. (5) A sum out of which salesman's traveling expenses should be paid. Krey Packing Co. v. U. S. Fidelity, etc., Co., 189 Mo. A. 591, 600, 175 SW 322. (6) Travelling expenses of public officer. Houser v. Orangeburg County, 59 S. C. 265, 266, 37 SE 831.

[g] **Extra compensation** received by a district judge for holding court outside of his own district held no part of his official salary. Benedict v. U. S., 176 U. S. 357, 360, 20 SCt 458, 44 L. ed. 503.

[h] **Fees.**—Cochise County v. Wilcox, 14 Ariz. 234, 239, 127 P 758.

[i] **Profits** which a person contracted to receive for goods sold for another (Brierre v. His Creditors, 43 La. Ann. 423, 425, 9 S 640.

88. Beach v. Kent, 142 Mich. 347, 356, 105 NW 867.

89. Re Parkin El. Co., Ltd., 37 Ont. L. 277, 31 DomLR 123, 126, 10 OntWN 66.

90. Brandon v. Askew, 172 Ala. 160, 167, 54 S 605.

91. Peo. v. York, 29 Misc. 158, 159, 60 NYS 795.

[a] **Held not synonymous** with phrase "prospective scale of salaries" in the Greater New York Charter. Peo. v. York, 29 Misc. 158, 159, 60 NYS 795.

92. Hollinshead v. Hazleton, [1916] 1 A. C. 428, 449, 462; In re Shine, [1892] 1 Q. B. 522, 531; Ex p. Benwell, 14 Q. B. D. 301, 307; Ex p. Wicks, 17 Ch. D. 70, 73; Ex p. Brindle, 56 L. T. Rep. N. S. 498.

[a] **Voluntary allowance** held not to be "salary or income," within English bankruptcy act. Ex p. Wicks, 17 Ch. D. 70, 73.

93. Railway Clearing House v. Druce, 42 T. L. R. 663; Druce v. Railway Clearing House, 133 L. T. Rep. N. S. 514, 517.

94. Re Parkin El. Co., Ltd., 37 Ont. L. 277, 31 DomLR 123, 130, 10 OntWN 66.

95. Rex v. Lyon, 37 T. L. R. 26, 28.

96. Douglas v. Sacramento Pension Bd., 75 Cal. A. 335, 342, 242 P 756.

[a] **Used in pension provision** of Sacramento City Charter, §§ 167–169, 171, the words "mean what the compensation which has been provided for the position or office or employment, whose duties he is required to perform, would amount to, computed upon the same basis as is a fixed or determinate yearly salary, limited, however, to the number of working days in the year." Douglas v. Sacramento Pension Bd., 75 Cal. A. 335, 242 P 756, 758.

97. Chestnut v. Kansas City, 171 Mo. A. 327, 330, 157 SW 656.

98. Roberts v. Carrithers, 180 Ky. 315, 202 SW 659, 661.

99. State v. Barnes, 24 Fla. 29, 32, 3 S 433.

1. Com. v. Butler, 99 Pa. 535, 543.

2. **Of personal property generally** see Sales 55 C. J. p 1.

Of real property generally see Vendor and Purchaser [39 Cyc 1129].

3. Rail v. Dotson, 22 Miss. 176, 184. See also Powers § 65 et seq.

4. See Sales 55 C. J.

5. See Sales 55 C. J.

6. See Sales 55 C. J.